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The First Amendment prohibits the federal government from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof." The Framers of the Constitution, through the First Amendment, set forth the standard for interpreting this religion clause by espousing the doctrine that an impenetrable wall separates religion and government. The Supreme Court initially purported to hold to this stan-
standard in interpreting the Establishment Clause. However, in the last several decades the Court has moved further away from the impenetrable wall standard. The Court appears to be searching for a way to maintain government neutrality among religions while allowing more interaction between religion and government. Government neutrality is focused on the equal treatment of religious and nonreligious institutions in governed society.

In the recent past, the Supreme Court has formulated various tests in an attempt to achieve this neutrality and to find a suitable replacement for the impenetrable wall standard. In doing so, the Court recognizes

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3. See McCollum v. Board of Educ., 333 U.S. 203, 210 (1948) (stating that neither a state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another" (quoting Everson, 330 U.S. at 15)); Everson, 330 U.S. at 15 (stating that "[n]either a state nor the Federal Government can set up a church").

4. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that a statute that aids religion is not a violation of the Establishment Clause if it has a secular purpose, has as its primary effect one "that neither advances nor inhibits religion," and does not "foster an excessive government entanglement with religion" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)); see infra notes 98-144 and accompanying text (discussing Lemon v. Kurtzman's effect on Establishment Clause analysis).

The Supreme Court's movement away from the bright line rule of the impenetrable wall caused a great deal of confusion and inconsistency in the area of Establishment Clause jurisprudence. See infra notes 111-82 and accompanying text (discussing the several tests the Court formulated to address the problems surrounding the Establishment Clause).

5. The Court has never stated explicitly that accommodation of religion should be greater. But by tearing down the impenetrable wall of separation, this is the inevitable result. See, e.g., Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2471 (1993) (Blackmun, J., dissenting) (stating that while "the Court never has authorized a public employee to participate directly in religious indoctrination," that is a necessary consequence of any move away from an impenetrable wall standard); Everson, 330 U.S. at 18 (allowing state transportation aid to flow to nonpublic schools, thereby accommodating religion while still holding to an impenetrable wall).

6. See supra notes 217-26 (defining the neutrality standard). This represents an eventual recognition of the importance of the interaction between religion and governed society, as evidenced by the Court's opinions in the last 50 years. Compare Everson, 330 U.S. at 15 (indicating that government cannot establish a religion or pass laws assisting religion in any way) with Zobrest, 113 S. Ct. at 2467 (claiming that "[t]he service [upheld] in this case is part of a general government program that distributes benefits neutrally to any child . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends") and School Dist. v. Schempp, 374 U.S. 203, 212 (1963) (stating "that religion has been closely identified with our history and government") and Engel v. Vitale, 370 U.S. 421, 434 (1962) (stating that "[t]he history of man is inseparable from the history of religion") and Zorach v. Clauson, 343 U.S. 306, 313 (1952) (stating that "[w]e are a religious people whose institutions presuppose a Supreme Being").

7. See infra notes 98-182 and accompanying text (examining the various tests used in Establishment Clause cases). Only the three-part test outlined in Lemon v. Kurtzman has gained any acceptance. See, e.g., Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 380 (1985) (applying the "familiar" Lemon test to shared time and community education programs
religion not as a separate entity existing apart from American society, but as an entity that is a part of American society, functioning like other parts of society and entitled to many of the same benefits. A minority of the Court, however, has consistently rejected the recognition of religion as a part of society. This faction continues to guard against any further destruction of the impenetrable wall standard.


8. See infra notes 209-16 (discussing the extensive role of religion in America and the Court's recognition of that role). Religion is entitled to societal benefits and government support on a functional basis when its actions are within the "civil religion." See Maddigan, supra note 7, at 320-26 (defining "civil religion"). A civil religious function is one that, although theologically intertwined with a religion, contributes to the moral character of the country by supporting democracy and democratic values through public practices common to all religions. Id. The Establishment Clause only prohibits government aid to those functions that are traditionally religious in nature or go beyond the role religion plays in the civil religion. Id. at 309.

9. See, e.g., Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., dissenting) (arguing that tax benefits to parents of children attending nonpublic schools violated the Establishment Clause); Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Douglas, J., dissenting) (rejecting the Court's holding that textbooks supplied by the government to religiously affiliated schools were not so ideological as to violate the Establishment Clause); Zorach, 343 U.S. at 315-18 (Black, J., dissenting) (questioning a statute allowing children to leave school early to attend religious instruction); Everson, 330 U.S. at 28 (Rutledge, J., dissenting) (reasoning that government funding of transportation for religious schools is inconsistent with the Framers' intent).

10. Grand Rapids, 473 U.S. at 380-81. Even though only a minority of the Court since Everson viewed religion and government as completely separate, this view still manages to prevail in some cases. See id. at 381 (stating that the First Amendment "is more than a pledge that no single religion will be designated as a state religion").
Everson v. Board of Education\textsuperscript{11} represents the first Establishment Clause case to strike a blow to the impenetrable wall.\textsuperscript{12} Since Everson, the Court has taken the position that the Establishment Clause is not an absolute, as the impenetrable wall standard suggests.\textsuperscript{13} The Court is moving in the direction of accommodating religion to the extent that it is a part of society that can be supported by government,\textsuperscript{14} while reconciling this notion of accommodation with a restrictive constitutional clause that historically provided for a separation of religion and government.\textsuperscript{15} The Supreme Court's search for a standard that accomplishes this reconciliation has lasted several decades and has succeeded only in fragmenting the Court in Establishment Clause cases.\textsuperscript{16} The standards suggested by sev-

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\item \textsuperscript{11} 330 U.S. 1 (1947).
\item \textsuperscript{12} Id. at 17. By upholding transportation reimbursements by government for parochial school children, the Court allowed greater interaction between religion and government, something the impenetrable wall was meant to prohibit. Id.; see infra notes 78-85 and accompanying text (arguing that while some commentators believe Everson maintained the impenetrable wall, it in fact created an exception to the impenetrable wall standard).
\item \textsuperscript{13} See Grand Rapids, 473 U.S. at 385 (stating that "Establishment Clause jurisprudence is characterized by few absolutes," but noting it absolutely prohibits government sponsorship of a specific religion); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (stating that "there is room for play in the joints [of the Establishment Clause] which will permit religious exercise to exist without sponsorship and without interference").
\item \textsuperscript{14} See Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (accommodating religion by holding that a person may use aid from a state program to further his religious studies); Maddigan, supra note 7, at 296 (stating that religion plays an important role in American society and therefore some interaction between religion and government is necessary).
\item \textsuperscript{15} LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 93 (1986) (arguing that the First Amendment "was framed to deny power, not to vest it," thus limiting any accommodation of religion).
\item \textsuperscript{16} Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 315 (1986). As a result, the Court is extremely divided in some Establishment Clause cases. For example, five justices filed separate opinions in Grand Rapids School District v. Ball, 473 U.S. 373, 375 (opinion of the Court); id. at 398 (Burger, C.J., concurring in part and dissenting in part); id. at 398 (O'Connor, J., concurring in part and dissenting in part); id. at 400 (White, J., dissenting); id. at 400 (Rehnquist, J., dissenting).
\item Similarly, six opinions were filed in Wolman v. Walter, 433 U.S. 229, 232 (1977) (opinion of the Court); id. at 255 (Burger, C.J., concurring in part and dissenting in part); id. (Brennan, J., concurring in part and dissenting in part); id. at 256 (Marshall, J., concurring in part and dissenting in part); id. at 262 (Powell, J., concurring in the judgement in part and dissenting in part); id. at 264 (Stevens, J., concurring in part and dissenting in part).
\item This Note uses the terms "fragmented" and "divided," in relation to the Supreme Court, not to refer to a Supreme Court divided sharply along traditional ideological or jurisprudential lines. Instead, these terms refer to a Supreme Court that disagrees as to what test or what form of test should apply in a particular area of the law. In contrast, a "cohesive" Court is one that basically agrees to what test should be used, but may disagree as to the outcome after applying the test to a particular set of facts.
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eral justices\textsuperscript{17} have proven to be unwieldy or doctrinally unsound.\textsuperscript{18}

In \textit{Zobrest v. Catalina Foothills School District},\textsuperscript{19} the Court implicitly introduced yet another Establishment Clause standard that includes an equal protection type analysis.\textsuperscript{20} This approach acknowledged one standard endorsed by commentators in the Establishment Clause field.\textsuperscript{21}

\textit{Zobrest} involved James Zobrest's request to the Catalina Foothills School District for a school district-paid sign language interpreter to accompany him to Salpointe Catholic High School.\textsuperscript{22} The school district denied the request as a violation of the Establishment Clause.\textsuperscript{23} Zobrest brought a suit based on the federal Individuals with Disabilities Education Act (IDEA),\textsuperscript{24} its Arizona counterpart,\textsuperscript{25} and the Religion Clauses

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  \item 17. See infra notes 105-08 and accompanying text (explaining the \textit{Lemon} test); infra notes 162-76 and accompanying text (examining Justice O'Connor's no endorsement test); infra notes 177-82 and accompanying text (describing Justice Kennedy's no coercion test).
  \item 18. See, e.g., \textit{Aguilar v. Felton}, 473 U.S. 402, 419 (1985) (Burger, J., dissenting) (voicing concern over the Court's "obsession" with the \textit{Lemon} criteria); \textit{Lynch v. Donnelly}, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring) (suggesting new criteria that "clarifies" the \textit{Lemon} test); see also Maddigan, supra note 7, at 300-02 (arguing new approaches to Establishment Clause cases); Steven D. Smith, \textit{Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test}, 86 MICH. L. REV. 266,302-13 (1987) (criticizing Justice O'Connor's no endorsement test); Gey, supra note 7, at 1473 (criticizing the no endorsement and no coercion tests).
  \item 19. 113 S. Ct. 2462 (1993). The Court addressed two issues in \textit{Zobrest}. One dealt with the Establishment Clause and the other dealt with whether the Court should decide the Establishment Clause issue at all. \textit{Zobrest}, 113 S. Ct. at 2465-66, 2466-69. On the latter issue, the dissenting justices argued that the case should be remanded to develop a record on a possible statutory solution to avoid reaching the constitutional issue unnecessarily. \textit{Id.} at 2469-71 (Blackmun, J., dissenting); \textit{id.} at 2475 (O'Connor, J., dissenting). The majority rejected this self-restraint rule because the "posture" of the case made the self-restraint rule inapplicable and, therefore, the constitutional issue could be reached. \textit{Id.} at 2466; see infra note 194 (examining in detail the application of the self-restraint rule).
  \item 20. See infra notes 238-46 and accompanying text (discussing \textit{Zobrest}'s application of equal protection standards to Establishment Clause cases).
  \item 21. See David A. Steinberg, \textit{Alternatives to Entanglement}, 80 Ky. L.J. 691, 731-35 (1992) (suggesting a "classification model" alternative to current Establishment Clause tests); Paulsen, supra note 16, at 315 (endorsing an equal protection standard for Establishment Clause cases); cf. Maddigan, supra note 7, at 296 (endorsing a test that will recognize religion's role in American society). The Court does not explicitly reject the often used \textit{Lemon} test, but never applies it to the facts in \textit{Zobrest}. \textit{Zobrest}, 113 S. Ct. at 2466-69. The Court only mentions the test when discussing the lower court's decision. \textit{Id.} at 2464-65.
  \item 22. \textit{Zobrest}, 113 S. Ct. at 2464.
  \item 23. \textit{Id.} Pursuant to the Arizona statute, the request was first sent to the County Attorney, who made the initial determination as to the constitutionality of the request. \textit{Id.} Then the request was sent to the Arizona Attorney General, who agreed with the County Attorney. \textit{Id.}
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of the First Amendment of the United States Constitution.\textsuperscript{26} The United States District Court for the District of Arizona upheld the school district's decision.\textsuperscript{27}

On appeal, the United States Court of Appeals for the Ninth Circuit\textsuperscript{28} relied on the three-part test first enunciated in \textit{Lemon v. Kurtzman}\textsuperscript{29} and found that providing an interpreter would violate the Establishment Clause.\textsuperscript{30} In reversing the Ninth Circuit, the Supreme Court did not apply the \textit{Lemon} test. Instead, the Court focused on the neutral application of the statute,\textsuperscript{31} finding that providing a school district-paid sign language interpreter did not violate the Establishment Clause.\textsuperscript{32} The dissent, adhering more closely to the impenetrable wall standard, found that providing James Zobrest with a district-paid sign language interpreter would violate the Establishment Clause.\textsuperscript{33}

This Note examines \textit{Zobrest v. Catalina Foothills School District} as an indication of the Supreme Court's move toward applying a neutrality standard in Establishment Clause cases. This Note first examines briefly the history of the establishment of religion in the United States. This Note then examines the history and progression of modern Establishment Clause jurisprudence and then outlines the constitutional tests the Court developed in the last twenty years. This Note posits that the \textit{Zobrest} decision represents a movement toward the use of a neutrality standard by attempting to reconcile the Establishment Clause with statutes that permit any aid to religion on a neutral basis with other societal institutions. This Note then argues that this neutrality standard allows religious and

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\bibitem{26} U.S. CONST. amend. I; see \textit{supra} note 1 (discussing the Free Exercise and Establishment Clauses).
\bibitem{27} \textit{Zobrest}, 113 S. Ct. at 2464. James Zobrest, seeking a preliminary injunction and any other relief that the Court deemed proper, argued that the IDEA, its Arizona counterpart, and the Free Exercise Clause of the First Amendment required that the school district provide an interpreter, and that such a requirement was not barred by the Establishment Clause of the First Amendment. \textit{Id.} The district court denied the injunction on the grounds that to grant it would violate the Establishment Clause. \textit{Id.} The court granted summary judgment to the school district. \textit{Id.}
\bibitem{28} \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 963 F.2d 1190, 1193 (9th Cir. 1992), \textit{rev'd}, 113 S. Ct. 2462 (1993).
\bibitem{29} 403 U.S. 602, 612-13 (1971).
\bibitem{30} \textit{Zobrest}, 963 F.2d at 1193-96 (applying the \textit{Lemon} test).
\bibitem{31} \textit{Zobrest}, 113 S. Ct. at 2467; see \textit{infra} notes 194-202 and accompanying text (discussing the majority opinion at length).
\bibitem{32} \textit{Zobrest}, 113 S. Ct. at 2467.
\bibitem{33} \textit{Id.} at 2471-75 (Blackmun, J., dissenting). The dissent posited that any aid, no matter how indirect, violated the Establishment Clause, and argued that the Court had never allowed a public employee to assist in the religious indoctrination of children. \textit{Id.} The dissent acknowledged the fact, however, that "Establishment Clause jurisprudence is characterized by few absolutes." \textit{Id.} at 2473 (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985)).
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nonreligious institutions to be treated alike by government when both perform the same functions. This Note concludes that the use of a neutrality standard, as suggested in Zobrest, will lead to the application of a lower, yet still rigid, standard of review to some Establishment Clause cases, thus benefitting American society by allowing religion to perform its civil religious functions in the same capacity as nonreligious organizations.

I. RELIGION IN UNITED STATES HISTORY: TOWARD THE ESTATEMENT CLAUSE

Much of the debate surrounding the Establishment Clause centers around the intent of the Framers of the Constitution. Some scholars assert that the Framers intended the Clause to be applied strictly, precluding all government aid from reaching any religion and prohibiting religious action from influencing government action. Others focus on government action at the time the Clause was adopted to argue that the clause allows for religious accommodation. In light of these varied viewpoints, it is imperative to understand religion's role in the United States when the First Amendment was written, as well as today.

A. Religion in Colonial America

1. Religious Separation in Colonial America

Religion played a major part in the settling, formation, and development of the United States. As a result, the Founding Fathers recognized the need to preserve religion and prevent government interference

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34. See Levy, supra note 15, at xii (stating that historical analysis indicates that "religion flourishes best when left to private voluntary support in a free society"); see also David Felsen, Comment, Developments in Approaches to Establishment Clause Analysis: Consistency for the Future, 38 Am. U. L. Rev. 395, 426 (1989) (stating that when strict separationism is synthesized with the Lemon test, the strict effect of the Establishment Clause is realized); Gey, supra note 7, at 1473 (arguing for a return to the impenetrable wall standard).

35. Maddigan, supra note 7, at 296 (arguing that government interaction with religion is consistent with the Framers' intent); see also Hal Culbertson, Note, Religion in the Political Process: A Critique of Lemon's Purpose Test, 1990 U. Ill. L. Rev. 915, 916 (arguing that Lemon's purpose prong restricts the right of religious participation in the political process).

36. Winthrop S. Hudson, Religion in America 5-29 (2d ed. 1973). From John Winthrop's "city set on the hill" sermon, to the Puritans on the deck of the Arabella, id., to Pope John Paul II's visit to Denver in July of 1993, religion has helped shape the destiny of this country like no other single force. Moreover, from the time of the Framers a belief in God has profoundly impacted American thought. See School Dist. v. Schempp, 374 U.S. 203, 213 (1963) (stating that the Founding Father's firm belief in God was "clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself").
of any kind. To guarantee religious liberty in a country containing so many different religions, the Founding Fathers believed in the practice of strict government neutrality, meaning that government should neither favor nor disparage one religion over another. Thomas Jefferson first espoused this notion in his Act for Establishing Religious Freedom (Act). Jefferson condemned the establishment of religion because he believed it deprived citizens of their natural rights and tended to destroy and corrupt religious principles.

Jefferson regarded the passing of his Act as one of his greatest achievements, but the passing of the Act is attributed to James Madison. Madison also was responsible for the Establishment Clause in the Federal Constitution. His "Memorial and Remonstrance," in which he argued against a bill pending in the Virginia legislature that provided state revenue to support seminaries, indicated his strong belief in religious freedom.


Id. at note 39.

Jefferson's Act, supra note 39, at 73.

Id.

Madison's Memorial and Remonstrance changed religious freedom from a statement of tolerance to "the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual." Everson, 330 U.S. at 34 (Rutledge, J., dissenting) (footnote omitted).

Anson P. Stokes & Leo Pfeffer, Church and State in the United States 93-94 (1964).

James Madison, Memorial and Remonstrance, in Church and State in American History, supra note 39, at 68, 72. For Madison, "religious freedom was the crux of the struggle for freedom in general." Everson, 330 U.S. at 34 (Rutledge, J., dissenting).
religion in Virginia is frequently enunciated by justices on the Supreme Court who adhere to the impenetrable wall standard.45

The writings of both Jefferson and Madison on the subject of religious establishment indicate that they intended the separation between religion and government to be absolute.46 Notwithstanding the vehemence with which they spoke out against religious establishment, both stressed the importance of complete separation for the sake of religion and government.47 Principally, the separation of religion and government was meant to guard against "three main evils": sponsorship, financial support, and active involvement of the sovereign in religious activities.48

These evils were undoubtedly on Madison's mind while drafting the Bill of Rights, specifically the First Amendment. Even though many argued that the "no religious test" clause in Article VI49 of the Constitution sufficed to guard against any sort of religious oppression,50 the Establishment Clause became the first clause of the Bill of Rights.51

45. See, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2662 (1992) (Blackmun, J., concurring) (citing Jefferson's "wall of separation" language); County of Allegheny v. ACLU, 492 U.S. 573, 647 (1989) (Stevens, J., dissenting) (reciting Madison's introduction of an anti-establishment amendment to the Federal Constitution in 1789); Everson, 330 U.S. at 34 (Rutledge, J., dissenting) (citing the entire Memorial and Remonstrance in appendix). Madison opposed extensive interaction between government and religion because religion does not need state support to survive, establishment is not necessary for the support of civil religion, and "equality... ought to be the basis of every law." Madison, supra note 44, at 69.

46. DEREK DAVIS, ORIGINAL INTENT 56 (1991); James M. Dunn, Neutrality and the Establishment Clause, in EQUAL SEPARATION, supra note 37, at 57-58.

47. See Everson, 330 U.S. at 11-12 (discussing Jefferson's and Madison's fight against religious establishment). Professor Leonard W. Levy argues that some commentators have "developed a plausible but fundamentally defective interpretation of the establishment clause to prove that its framers had no intention of prohibiting government aid to all denominations or to religion on a nonpreferential basis." LEVY, supra note 15, at 91. This presupposes, of course, that Jefferson and Madison were right in their fears of religious establishment or that their fears still hold true today. See Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in the judgement in part and dissenting in part) (stating that "[a]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights").

48. See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (stating that because the Constitution does not explicitly state prohibitions with regard to the Establishment Clause, the lines of reference must be the "three main evils" the Clause was meant to guard against); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (stating that the three main evils are what the Framers meant by "'establishment' ").

49. U.S. CONST. art. VI, cl. 3. The Constitution provides that "no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States." Id.

50. LEVY, supra note 15, at 63-64. Madison himself believed, initially, that no amendments to the original document were needed. See DAVIS, supra note 46, at 53-55; Dunn, supra note 46, at 57.

51. See U.S. CONG. amend I. For a detailed account of the Establishment Clause debates of 1791, see STOKES & PEFFER, supra note 43, at 93-100. Professor Leonard W.
2. Religious Accommodation in Colonial America

Although the United States prides itself on the separation of religion and government, American history shows that religion and government have been, in fact, heavily intertwined. For example, government endorsement of Thanksgiving and Christmas have continued since the time of the First Congress.\textsuperscript{52} Chaplains were appointed for Congress and the Armed Forces, and in 1789, Congress considered funding for an American bible.\textsuperscript{53} Even the public university founded by Thomas Jefferson did not prohibit religious education.\textsuperscript{54} It is interesting, then, that both Jefferson and Madison advocated absolute separation when religious involvement in society and government was commonplace during their era.\textsuperscript{55}

B. Religion in America Today

As it was at the time of Madison and Jefferson, religion is still very much a part of American society today.\textsuperscript{56} Although it may appear that America's religious convictions have waned somewhat in recent decades,\textsuperscript{57} religious fervor is still alive and religion remains very much inter-
twined with our daily lives and our government. For instance, from the time of George Washington, inaugurations invoked God's name in speech or in oath. Prayer still opens most state and the federal government legislative sessions each year. While Thanksgiving and Christmas are national holidays, they are also heavily religious.

The Supreme Court was hesitant to account for the important role that religion plays in American society. Recently, however, the Court has come to recognize that religion and government coexist and are of equal importance in maintaining support for American democracy. It is from this position that the Court is attempting to reconcile the dual notions of religious accommodation and separation.

II. The Search for a Standard: Building and Tearing Down the Wall

Although those justices who supported Jefferson's impenetrable wall standard prevailed initially, the Court soon created many exceptions so that the standard barely resembled the one Jefferson espoused. In-

58. Kenneth L. Woodward, Talking to God, NEWSWEEK, Jan. 6, 1992, at 39. A recent survey found that 78% of all Americans pray at least once a week, while 57% pray at least once a day. Id. Furthermore, 40% of Americans attend services once a week. Id. at 40.

59. See Lynch v. Donnelly, 465 U.S. 668, 675-78 (1983) (reciting the history of government approval and support of Thanksgiving and other religiously based holidays); Zwicker, supra note 53, at 791 (noting the appointment of chaplains to the armed forces and to Congress). Contra Culbertson, supra note 35, at 916 (arguing that court decisions have restricted religious involvement in the political process).

60. Peggy Landers, U.S. Presidents Quick to Invoke God's Help, CALGARY HERALD, Jan. 23, 1993, at C9 (noting that all 42 presidents called upon God during the oath of office to help in their duties).


62. See Lynch, 465 U.S. at 675 (stating that Thanksgiving "has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance" (footnote omitted)).

63. See McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (finding unconstitutional the use of public school buildings for the teaching of religion); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (holding that the wall between religion and government is "high and impregnable" and the Supreme Court "could not approve the slightest breach"). But see School Dist. v. Schempp, 374 U.S. 203, 212-14 (1963) (examining the relationship between religion and American government and society).

64. See Lynch, 465 U.S. at 673 (stating that the Constitution does not require complete separation between religion and government because "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government"); Maddigan, supra note 7, at 296 (stating that for religion to fulfill its proper role within American society, there must necessarily be interaction with government).

tially, the impenetrable wall separating religion and government maintained a sturdy form, with few and narrow exceptions.66 The bright line rule existing since the drafting of the Constitution eventually disappeared, however, and the Court created a muddled area of law.67

A. Everson and the Impenetrable Wall

Everson v. Board of Education68 was the first “modern” Establishment Clause case.69 In a close decision, the United States Supreme Court upheld a New Jersey school board program that reimbursed the parents of nonpublic school children for transportation costs.70 The only nonpublic school in the district, however, was a Catholic school.71

The Everson Court found that earlier First Amendment cases gave the Religion Clauses a broad meaning.72 The Court, in essence, held that providing transportation to students who attend religiously affiliated schools is a general welfare program similar to police and fire protection, sewage disposal, and the building and maintenance of public sidewalks.73

66. Everson, 330 U.S. at 17 (holding that only aid from school districts to assist in the transportation of nonpublic school children was not violative of the Establishment Clause).

67. See infra notes 68-182 and accompanying text (discussing the history of Establishment Clause jurisprudence). Before Everson v. Board of Education, the Court had few occasions to visit the Establishment Clause. See Everson, 330 U.S. at 15 (citing pre-Everson Establishment Clause cases). The number of Establishment Clause challenges began to rise due to the increased role government began to play in American society during and after the New Deal.

68. 330 U.S. 1 (1947).


70. Everson, 330 U.S. at 3.

71. Id. at 30-31 (Rutledge, J., dissenting); see 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 21.4, at 464 (2d ed. 1992).

72. Everson, 330 U.S. at 15. The Court stated that “[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” Id. at 18 (emphasis added). The Everson approach indicated that, at this point in Establishment Clause jurisprudence, the Court still focused on traditional Establishment Clause neutrality between religions and not between religion and non-religious organizations performing the same activity. See id. at 15.

73. Id. at 17.
The dissent vigorously opposed the program. Justice Rutledge, writing for the dissent, claimed that the history of the Religion Clauses made it impossible for the program to survive Establishment Clause scrutiny. Justice Rutledge rejected the notion that even if a statute applied neutrally to all religions it would pass Establishment Clause scrutiny; instead, he argued that any government aid to religion was unconstitutional. Thus, the dissent argued that the statute should be struck down because the Constitution required complete separation of religion and government and not comprehensive identification of government with religion.

Some argue that the impenetrable wall standard is impossible to maintain because of the nature of religion in American society. Others, like the dissenting justices in Everson, argue that the impenetrable wall is required by the text of the Constitution and history and is necessary to the well being of religion and government alike. Yet, several Supreme
Court cases considered *Everson* a definitive statement that courts should apply the impenetrable wall standard to Establishment Clause cases.\(^8\) Furthermore, many consider *Everson* to be a case that reenforces the impenetrable wall.\(^8\)

*Everson* did, however, chip away at the impenetrable wall by allowing government aid to flow indirectly to religion on a neutral basis.\(^8\) By upholding transportation reimbursements by government for parochial school children, the Court allowed greater interaction between religion and government, something the impenetrable wall prohibited.\(^8\) Furthermore, the dissent vehemently opposed the majority by arguing that the wall is absolute, even to the degree allowed by the Court in *Everson*.\(^8\)

**B. The Effect of Everson on the Establishment Clause**

*Everson*’s weakening of the impenetrable wall standard impacted greatly upon later Establishment Clause cases. Despite this significant impact on Establishment Clause jurisprudence, *Everson* provided little guidance for courts construing the Establishment Clause.

In *McCollum v. Board of Education*,\(^8\) the Court found that an Illinois school district program allowing children to attend religious education in the school building during the school day violated the Establishment

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\(^8\) See *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (citing *Everson* as a source of the separation of religion and government); *McCollum v. Board of Educ.*, 333 U.S. 203, 211 (1948) (stating that the Establishment Clause “was intended to erect a ‘wall of separation’” between religion and government (quoting *Everson*, 330 U.S. 1, 16 (1947))).

\(^8\) See *Zorach*, 343 U.S. at 312, *McCollum*, 333 U.S. at 211; see also *Zwicker*, supra note 53, at 794 (criticizing the Court’s conclusion in *Everson* that the Framers intended the Establishment Clause to require a wall of separation between religion and government).

\(^8\) *Everson*, 330 U.S. at 17. Justice Douglas, a member of the *Everson* majority, stated a few years later that the case may have been decided wrongly and that the impenetrable wall should have been maintained, suggesting that *Everson* did in fact strike a blow to the impenetrable wall. See *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (stating that “[t]he *Everson* case seems in retrospect to be out of line with the First Amendment”).

\(^8\) *Everson*, 330 U.S. at 17.

\(^8\) *Id.* at 28-29 (Rutledge, J., dissenting).

\(^8\) 333 U.S. 203 (1948).
Four years later, however, in *Zorach v. Clauson*, the Court upheld a New York City program similar to that of Illinois. These inconsistent decisions characterized Establishment Clause cases in the decades following *Everson*.

The Court also struggled to maintain consistent treatment of governmental imposition of religion on citizens. In *McGowan v. Maryland*, the Court upheld a Sunday closing law on the grounds that the law was no longer exclusively religious in nature *despite* its religious history. Just two years later, however, in *School District v. Schempp*, the Court held that the Establishment Clause prohibited the reading of the Bible.
and the recitation of the Lord's Prayer in public schools because of the pervasive religious history of these acts.\textsuperscript{94}

By espousing the impenetrable wall standard while at the same time not adhering to it in \textit{Everson}, the Supreme Court had to search for a new standard that would recognize the necessary interaction between religion and government, but still limit congressional and state power in respecting the establishment of religion.\textsuperscript{95} The Court struggled to find a bright-line rule after \textit{Everson} eliminated the impenetrable wall standard, but no bright-line rule was readily apparent.\textsuperscript{96} This struggle formed both the basis for the neutrality standard the Supreme Court is currently moving towards\textsuperscript{97} and the basis for many years of division on the Court in Establishment Clause jurisprudence.

\section*{III. The Search for an Establishment Standard}

\textit{A. Development and Criticism of the Lemon v. Kurtzman Test: The Confusion Begins}

Once the impenetrable wall fell, the Supreme Court began to search for a test that would allow some accommodation of religion, while maintaining at least the spirit of separation. Several tests were suggested, yet most did little to reconcile separation and accommodation.

\textit{1. Lemon v. Kurtzman}

The Supreme Court first attempted in \textit{Lemon v. Kurtzman}\textsuperscript{98} to standardize several criteria\textsuperscript{99} that would allow moderate integration of religion and government.\textsuperscript{100} \textit{Lemon} involved statutes from two states: Penn-

\begin{itemize}
    \item \textsuperscript{94} Id. at 223.
    \item \textsuperscript{95} \textit{See infra} notes 98-110, 162-81 and accompanying text (discussing various standards the Supreme Court proposed in Establishment Clause jurisprudence).
    \item \textsuperscript{96} \textit{See Donald E. Lively, The Establishment Clause: Lost Soul of the First Amendment, 50 Ohio St. L.J. 681, 683 (1989) (stating that \textit{Everson} "was a harbinger of future calamity"); Paulsen, \textit{supra} note 16, at 317-18 (finding that the Court "forced a square historical peg into a round doctrinal hole" in \textit{Everson}).}
    \item \textsuperscript{97} \textit{See infra} notes 209-45 and accompanying text (describing the neutrality standard the Court is moving toward, as evidenced by its decision in \textit{Zobrest v. Catalina Foothills School District}, 113 S. Ct. 2462 (1993)).
    \item \textsuperscript{98} 403 U.S. 602 (1971).
    \item \textsuperscript{99} \textit{Id.} at 612-13. Although the Court used each of the three prongs of the \textit{Lemon} test previously, a cohesive test that incorporated them all was never formulated until \textit{Lemon}. \textit{See infra} notes 105-06 and accompanying text (describing the \textit{Lemon} test).
    \item \textsuperscript{100} \textit{Lemon}, 403 U.S. at 614. History and precedent aside, \textit{Lemon} began the Supreme Court's eventual recognition of the role that religion plays in American society and some accommodation of religion's role in the civil religion is necessary. \textit{See id.} (recognizing that "total separation [between religion and government] is not possible in an absolute sense"); \textit{Lynch v. Donnelly}, 465 U.S. 668, 673 (1984) (stating that "no institution within [society]
sylvania and Rhode Island. The Pennsylvania statute allowed the State to reimburse nonpublic school teachers' salaries, as well as the cost of textbooks and teaching materials used in nonpublic schools. The Rhode Island statute called for the State to provide a fifteen percent supplement to nonpublic school teachers' salaries from state funds. Rhode Island supplemented teacher's salaries, while Pennsylvania reimbursed the students; yet both statutes amounted to giving aid directly to nonpublic schools.

Chief Justice Burger, writing for the majority, gleaned three criteria from previous Establishment Clause rulings and formulated a three-part test. The test required that to pass constitutional muster, a statute must have a secular purpose, a primary effect that does not advance religion, and must not require or necessitate excessive entanglement between the State and religious institutions. The court found that the Pennsylvania statute met these criteria because it did not violate the Establishment Clause.

Commentators question the relevance of these percentages in deciding Establishment Clause cases, suggesting that various assumptions the Court could make based on these percentages might be improper and not very useful. Rotunda & Nowak, supra note 71, at 467 n.18; see also Mark Fischer, The Sacred and the Secular: An Examination of the "Wall of Separation" and its Impact on the Religious World View, 54 U. Pitt. L. Rev. 325, 346 (1992) (stating that the affiliation of the Catholic Church with a large percentage of private schools implies that any aid flowing to private schools helps to establish the Catholic faith); Steinberg, supra note 21, at 731 n.289 (stating that because the Catholic Church constitutes a large percentage of private schools, "government aid to private schools might appear as an endorsement of the Catholic Church" (emphasis added)).

101. Lemon, 403 U.S. at 606. Both statutes enabled their respective states to financially aid church-related elementary and secondary schools. Id. at 606-07.

102. Id. The Pennsylvania statute provided reimbursements to both elementary and secondary schools, while the Rhode Island statute only aided elementary schools. Id.

103. Id. at 607.

104. Id. at 607-09. The main beneficiaries of the reimbursements were Catholic schools. Id. at 608, 610. A federal trial court found that 95% of Rhode Island children who attended nonpublic schools attended schools affiliated with the Catholic Church. Id. at 608. Similarly, in Pennsylvania, a trial court found that 96% of private school children attended religiously affiliated schools, most of which were Catholic. Id. at 610.

105. Lemon, 403 U.S. at 612. Two prongs were developed in Board of Education v. Allen, 392 U.S. 236 (1968), where the Court upheld a New York law allowing the State to lend textbooks to parochial schools. Id. at 248. In doing so, the Court found that a statute does not violate the Establishment Clause when the law has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion." Id. at 243 (emphasis added) (quoting School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

In Walz v. Tax Commissioner, 397 U.S. 664 (1970), the Court upheld a property tax exemption for religious organizations that used the property for religious purposes. Id. at 680. In doing so, the Court identified the third prong considered in Establishment Clause cases. Id. at 670. For a statute to pass Establishment Clause scrutiny, it can not involve excessive government entanglement with religion nor can it require "official and continuing surveillance leading to an impermissible degree of entanglement." Id. at 674-75.
tween government and religion. Chief Justice Burger cautioned, however, that the impenetrable wall was a line of separation that changed with the circumstances of each case and the *Lemon* test allowed for this flexibility. Thus, the *Lemon* test began as merely a loose standard, subject to the interpretations of individual judges and individual circumstances.

Ultimately, this flexibility was the *Lemon* test's undoing. Although initially embraced wholly by the Court, justices and commentators alike eventually criticized the test. The most recent Establishment Clause cases that have upheld aid to religiously affiliated institutions only mentioned the *Lemon* test and applied one or none of the *Lemon* prongs to decide the outcome of a case.

2. *The Court's Use of the Lemon Test to Hold State Law Unconstitutional*

Although the Supreme Court and commentators later criticized the *Lemon* test, the Court utilized the test many times as a means to find state laws unconstitutional. The Court reiterated the *Lemon* test in *Committee for Public Education & Religious Liberty v. Nyquist*, finding unconstitutional a New York statute and program providing direct aid to

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106. *Lemon*, 403 U.S. at 612-13. “First, [a] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Allen*, 392 U.S. at 243; finally, the statute must not foster 'an excessive government entanglement with religion.'” *Id.* at 612-13 (quoting *Walz*, 397 U.S. at 674); see also *supra* note 105. Justice Burger also warned against “[t]he potential for political divisiveness” resulting from excessive government entanglement with the church. *Id.* at 623. This fourth prong never took hold and existed primarily in Justice Brennan's opinions. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 256 (1977) (Brennan, J., concurring in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 374 (1975) (Brennan, J., concurring in part and dissenting in part).


109. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring) (citing opinions critical of the *Lemon* test); see also *infra* notes 145-61 and accompanying text (discussing the criticism of the *Lemon* test). Justice Scalia colorfully yet sternly criticized the Court for citing to *Lemon v. Kurtzman*, stating that the *Lemon* test is a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Id.*

110. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2487 (1994) (finding invalid a state statute creating a school district within a wholly religious community on the basis of an unconstitutional delegation of state authority); *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (failing to apply the *Lemon* test to determine if the opening of legislative sessions with prayer violates the Establishment Clause).

111. See *infra* notes 145-61 and accompanying text (discussing the criticism of the *Lemon* test).

nonpublic elementary and secondary schools\textsuperscript{113} and to parents of children who attended those schools.\textsuperscript{114} The Court, determining that the statute advanced religion,\textsuperscript{115} reinforced Everson and held that a nonreligious state action applying to all citizens is a neutral approach to religion.\textsuperscript{116}

\textit{Grand Rapids School District v. Ball}\textsuperscript{117} and Aguilar v. Felton\textsuperscript{118} represent two additional cases in which the Court affirmed the use of the Lemon test as the measure for Establishment Clause cases.\textsuperscript{119} However, the Court did not apply all three parts of the test.\textsuperscript{120} The Court invalidated the statute in \textit{Grand Rapids} and stated that the ultimate question in every Establishment Clause case was whether the aid provided to the religion was "direct and substantial."\textsuperscript{121} In Aguilar, the Court focused on the fact that the statute allowed excessive entanglement between religion and government\textsuperscript{122} and increased political divisiveness.\textsuperscript{123}

\begin{itemize}
\item[113.] \textit{Id.} at 774. The Court again found it important that nearly all of the nonpublic schools receiving the aid were affiliated with the Roman Catholic Church. \textit{Id.} at 768; see supra note 104 (discussing the use of the percentage of religiously affiliated institutions that receive government aid by the Court).
\item[114.] \textit{Committee for Public Education}, 413 U.S. at 780. In holding the programs violative of the Establishment Clause, the Court focused on the primary effect prong of the Lemon test, stating that "[i]n the absence of an effective means of guaranteeing that the state aid derived from funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." \textit{Id.}
\item[115.] \textit{Id.} at 794.
\item[116.] \textit{Id.} at 782. State action is valid under the Establishment Clause where the action is "provided in common to all citizens [and is] 'so separate and so indisputably marked off from the religious function' that [it] may fairly be viewed as reflections of a neutral posture toward religious institutions." \textit{Id.} (quoting Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (emphasis added)) (citation omitted).
\item[117.] 473 U.S. 373 (1985). In \textit{Grand Rapids}, the Court held invalid two school district programs—one allowing for private school teachers to educate generally adults and children in private elementary schools at school district expense and the other paying teachers to teach nonreligious courses in private schools during the school day. \textit{Id.} at 375.
\item[118.] 473 U.S. 402 (1985). The New York City program held invalid in Aguilar was similar to the program in \textit{Grand Rapids} in that the school paid teachers to teach nonreligious courses in private schools throughout the school day. \textit{Id.} at 406; see supra note 117 (discussing \textit{Grand Rapids School District v. Ball}).
\item[119.] \textit{Aguilar}, 473 U.S. at 412; \textit{Grand Rapids}, 473 U.S. at 380.
\item[120.] Rather than applying the full test, the Court limited its focus to only the excessive entanglement prong in Aguilar and the primary effect prong in \textit{Grand Rapids}. \textit{Aguilar}, 473 U.S. at 412; \textit{Grand Rapids}, 473 U.S. at 383.
\item[121.] \textit{Grand Rapids}, 473 U.S. at 394. Although Justice Brennan seemed to adhere to the impenetrable wall standard, he accepted the premise " 'that not every law that confers an indirect, remote, or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid.' " \textit{Id.} at 393 (quoting \textit{Committee for Pub. Educ. & Religious Liberty v. Nyquist}, 413 U.S. 756, 771 (1973)).
\item[122.] \textit{Aguilar}, 473 U.S. at 413.
\item[123.] \textit{Id.} at 414.
\end{itemize}
3. The Court's Use of the Lemon test to Uphold State Law

Dissatisfaction with the Lemon test and the fragmentation that it caused on the Supreme Court was most evident in cases in which the Court upheld the constitutionality of a state statute. Accordingly, the Court searched for a new test and laid the groundwork for the neutrality standard.

The Court applied the Lemon test in Meek v. Pittenger, and upheld one aspect of a Pennsylvania loan program that provided textbooks to nonpublic schools. The Court also invalidated program provisions that allowed for the loan of other types of instructional material and provided remedial and therapeutic services to nonpublic schools. The Court found that the Establishment Clause allowed assistance to programs that financially benefitted nonpublic school students equally and indirectly. Furthermore, the Court determined that as long as the benefit was secular, nonideological, and incidental to the school’s religious affiliation, the program did not offend the Constitution.

In Wolman v. Walter, the Supreme Court recognized the importance of the neutral application of statutes and characterized this application as a “common thread” in Establishment Clause cases. The Court explained that as long as the State provides “services, facilities, or materi-


Although the Court adhered closely to the Lemon test, Justice Stewart cautioned in Meek, as did Chief Justice Burger in Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), and later in Aguilar, 473 U.S. at 419, that the prongs of the Lemon test served “only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.” Meek, 421 U.S. at 359. The fragmented opinions demonstrate that each justice had a different view of how the guidelines were drawn and how they should be applied.

125. Meek, 421 U.S. at 359 (finding that this program was “indistinguishable from the New York textbook loan program upheld in” Board of Education v. Allen, 392 U.S. 236 (1968)).

126. Id. at 366. The Court stated that even though the other materials were “wholly neutral, secular instructional material and equipment,” the program was nonetheless invalid because it “inescapably results in the direct and substantial advancement of religious activity.” Id.

127. Id. at 374.

128. Id. at 364.

129. Id.


131. Id. at 242. In Wolman, the Court upheld an Ohio statute that loaned textbooks to primarily nonpublic Catholic schools and provided funds for standardized testing, diagnostic testing services, and instructional materials. Id. at 236-51. The Court held invalid a provision to assist in field trip transportation. Id. at 252-55. The Court was once again heavily fragmented in applying the Lemon test.
als' that are "secular, neutral, or nonideological," a statute providing such aid does not have the primary effect of advancing religion as prohibited by the Establishment Clause.

In *Mueller v. Allen*, the Court upheld a Minnesota statute that allowed parents to take a tax deduction for expenses incurred for privately educating their children. In approving the deduction, the Court focused on the neutral application of the statute, specifically the availability to all parents, regardless of the type of private school their children attended. This neutrality did not convey an endorsement of religion by the State. Although the *Allen* Court reiterated that the *Lemon* test is the test for Establishment Clause cases, the Court focused on the neutrality of the statute and not on the *Lemon* test.

Consequently, the *Wolman* decision marked the end of the impenetrable wall. The decision provided a balancing test to satisfy the primary effect prong of the *Lemon* test. *Wolman* suggested that "direct" and "substantial" aid to religious institutions must outweigh a "neutral" and "secular" statute for the statute to be declared unconstitutional. The impenetrable wall standard, coupled with the *Wolman* balancing test, became a much less stringent standard to apply. However, the impenetrable wall standard continued to ignore the fact that religion is an integral part of American society, intertwined so heavily that to deny reli-

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132. Id. at 242 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)).
133. Id. (quoting *Lemon*, 403 U.S. at 616). The statute in *Wolman* provided funding and personnel for health services. Id. at 233.
134. Id.
136. Id. at 390. The program especially benefitted parents of children who attended nonpublic schools, most of them religiously affiliated. Id. at 391. Ninety-five percent of students who attended nonpublic schools in Minnesota attended schools that considered themselves religiously affiliated. Id. The Court did not address this in its analysis, however, probably due to the pervasive neutrality of the statute's application.
137. Id. at 397.
138. Id. Justice Marshall, writing in dissent, criticized the majority's concept of neutrality. Id. at 404 (Marshall, J., dissenting). Justice Brennan stated that the concept of neutrality that the First Amendment requires prohibits "subsidizing religious education, whether it does so directly or indirectly. . . . [T]his principle of neutrality forbids . . . any tax benefit." Id.
139. Id. at 394.
140. Whereas the balancing espoused in *Wolman* only allowed some state aid to reach religious institutions directly, the impenetrable wall never allowed any aid, no matter how direct or indirect, to reach religion. *See supra* note 131 (discussing *Wolman*).
142. Id.
143. *See Gey*, *supra* note 7, at 1466 (stating that cases decided after the fall of the impenetrable wall are "evidence of the confused state of establishment clause law").
gious institutions the aid available to nonreligious institutions that perform the same function is unreasonable and unequal.\footnote{Craig L. Olivo, Note, Grumet v. Board of Education of the Kiryas Joel Village School Dist.—When Neutrality Masks Hostility—The Exclusion of Religious Communities From an Entitlement to Public Schools, 68 NOTRE DAME L. REV. 775, 776-77 (1993).}

**B. Attacking Lemon and the Resulting Tests**

Although the Court purported to use the Lemon test in *Grand Rapids*, *Aguilar*, and in most other Establishment Clause cases,\footnote{See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2148 (1993); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985); Aguilar v. Felton, 473 U.S. 402, 412 (1985).} the test was not without its vocal critics.\footnote{See Paulsen, supra note 16, at 331 (recognizing that the shortcomings of Lemon hide a viable analytic core that could be used to form a workable framework); Simson, supra note 7, at 908 (suggesting substantial revision of the Lemon test).} Two justices expressed their dissatisfaction with the Lemon test in *Aguilar*.\footnote{Id. at 419 (Burger, C.J., dissenting). Chief Justice Burger stated that the Court’s “responsibility is not to apply tidy formulas by rote; [the Court’s] duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.” Id. (quoting Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting)).} One, Chief Justice Burger, the author of the Lemon test, criticized the Court for its “obsession” with the test.\footnote{Id. at 429 (O'Connor, J., dissenting); see supra note 105 (discussing the entanglement prong of the Lemon test). Justice O’Connor also criticized any use of a “political divisiveness test,” arguing that “the ‘elusive inquiry’ into political divisiveness should be confined to a narrow category of parochial aid cases.” Id. (quoting Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983)). There is no indication what this category might be.} The other, Justice O’Connor, attacked the entanglement prong of the Lemon test because it invited speculation as an interpretation of the Constitution when only two parties were involved in a lawsuit.\footnote{474 U.S. 481 (1986). Although Witters used the full Lemon test, it commanded a loose majority on the Court. The justices agreed that the Lemon test should be applied, but disagreed about the method of application. See id. at 485-86 (applying the full Lemon test); id. at 490 (Powell, J., concurring) (applying only one prong of the Lemon test and balancing the direct and substantial with the neutral, indirect and incidental); id. at 493

This dissatisfaction with the Lemon test signaled the beginning of the Court’s search for either a new standard for Establishment Clause cases or at least a refinement of the Lemon test. One thing was clear: the Lemon test did not work to the Court’s satisfaction and it had to be changed.

**I. The Court Seeks to Abandon the Lemon Test**

Even when the Court was unanimous in deciding the outcome of Establishment Clause cases, it remained fragmented as to how to reach that outcome. *Witters v. Washington Department of Services for the Blind*\footnote{474 U.S. 481 (1986). Although Witters used the full Lemon test, it commanded a loose majority on the Court. The justices agreed that the Lemon test should be applied, but disagreed about the method of application. See id. at 485-86 (applying the full Lemon test); id. at 490 (Powell, J., concurring) (applying only one prong of the Lemon test and balancing the direct and substantial with the neutral, indirect and incidental); id. at 493
involved a state program that provided funding for handicapped students to obtain special education. The Court unanimously accepted that not every statute that allows money to reach a religious organization does not necessarily violate the Establishment Clause. The Court noted that the funds came from neutrally available state aid, and thus did not send any message of state endorsement of a particular religion.

Bowen v. Kendrick continued the assault on the Lemon test while expanding the idea that a statute neutral on its face toward all secular and sectarian organizations is not violative of the Establishment Clause. Bowen recognized that the Religion Clauses of the First Amendment do not prohibit religious institutions from practicing or participating in social welfare programs. The Court's recognition of this principle opened the door for the support of religious institutions when performing a function that is also performed by nonreligious institutions, so long as both religious and nonreligious activities are similarly supported.

Despite the Lemon test's apparent abandonment, it was the Court's first attempt to formulate a test that allows greater accommodation of religion within the limits of the Establishment Clause. Nevertheless, the Lemon test caused massive fragmentation in many of the Court's opinions and proved to be unworkable as a stable standard. This criticism
indicated a need for a better test and led to the development of two alternative tests. Ultimately, these alternate tests were criticized as much as the Lemon test.161

2. The No Endorsement Test

The harsh criticism endured by the Lemon test resulted in the development of the no endorsement test.162 The test is a clarification of Lemon.163 The Lemon test prevents the government from acting with the intent of approving or disapproving religion.164 Conversely, the no endorsement test focuses on government practices that create a perception to an “objective observer” of endorsing or rejecting religion.165

Applying the no endorsement test in Lynch v. Donnelly,166 Justice O’Connor, concurring with the Court, argued that the Establishment Clause permitted a city to display a Nativity scene.167 Justice O’Connor found that because the city government displaying the scene did not intend to endorse religion168 or to communicate a message of government endorsement or disapproval of religion,169 the Nativity scene did not endorse Christianity and, therefore, was not a violation of the Establishment Clause.170

161. See Maddigan, supra note 7, at 300-02 (criticizing the no endorsement and no coercion tests); Gey, supra note 7, at 1473 (stating that no adequate replacement has been found for the impenetrable wall standard).


163. Lynch, 465 U.S. at 689. Justice O’Connor felt that the need to clarify the Lemon test arose because “[i]t has never been entirely clear . . . how the three parts of the test relate to the principles enshrined in the Establishment Clause.” Id. at 688-89.

164. Smith, supra note 18, at 270.

165. Id. at 272. The “fourth prong” of the Lemon test—potential political divisiveness—that the Court, and primarily Justice Brennan, kept alive was summarily dismissed by Justice O’Connor. Lynch, 465 U.S. at 689 (O’Connor, J., concurring). She stated that although there have been cases that treated political divisiveness as a separate prong or as part of the entanglement prong, ultimately, “[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation . . . itself may affect the political response to the government practice.” Id.

166. 465 U.S. at 687-89 (O’Connor, J., concurring).

167. Id. at 694.

168. Id. at 690-91.

169. Id. at 691-94.

170. Id. at 694.
In *Board of Education v. Mergens*, the Court applied the no endorsement test to validate a statute requiring equal access to public school buildings for any purpose, including religious purposes. Thus, even using the no endorsement test, the Court considered the neutrality of the statute and examined whether the statute applied equally to both religious and nonreligious activities.

Justice O'Connor's view that the no endorsement test is a clarification of the *Lemon* test is shared to some extent by other members of the Court. Commentators criticize the test, however, because it focuses on the objective observer and thus lends itself to significant ambiguity. As a result, a third test was introduced to define more precisely the acceptable level of religious accommodation.

3. *The No Coercion Test*

The third test, the "no coercion test," first set forth by Justice Kennedy, concurring with the Court in *County of Allegheny v. ACLU*, allows government practices that do not coerce a person into following or practicing a particular religion. Of the Court's current tests, the no coercion test is the most receptive to religion's role in society because it allows government action that does not advance religion. Nevertheless, this test is confronted with many problems.

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172. *Id.* at 249 (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). In *Mergens*, Justice O'Connor stated that "[b]ecause the Act on its face grants equal access to both secular and religious speech... it [is] clear that the Act's purpose was not to 'endorse or disapprove of religion.'" *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)) (emphasis added).
173. *Id.*
176. See Maddigan, *supra* note 7, at 231-35. Michael Maddigan questions the use of the objective observer in determining what is government endorsement of religion. *Id.* at 301. He also criticizes the fact that the term "endorsement" lacks definition. *Id.; see also Smith, supra* note 18, at 283 (criticizing the ambiguous meaning of "endorsement").
178. *Id.* at 662.
The no coercion test may invalidate support of activities of religious organizations that are not religious in nature at all, but are part of the "civil religion" that should be exempt from Establishment Clause scrutiny. Furthermore, the no coercion test allows the government to engage in wholly religious activities, such as the displaying of a creche at Christmas. The broad sweep of this test makes it hard to gain majority support, especially as the Court moves toward a neutrality standard.

Each of these tests contains deficiencies, leaving the Court heavily fragmented in its approach to Establishment Clause cases. As a result, the Court continued its search for a standard to add both cohesiveness and stability to Establishment Clause jurisprudence, while struggling to reconcile the dual notions of accommodation and separation.

IV. **ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT: THE MOVE TOWARD NEUTRALITY**

When *Zobrest v. Catalina Foothills School District* reached the Supreme Court, Establishment Clause jurisprudence was characterized by a fragmented Court and inconsistent opinions due to the inability of the Court to reconcile accommodationist and separationist views of government and religion. Although the Court did not reconcile fully these two views, it did move in that direction.

On appeal from the United States Court of Appeals for the Ninth Circuit, the petitioner, James Zobrest, sued the Catalina Foothills School

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181. *Maddigan, supra* note 7, at 335-36; *see also supra* note 8 (discussing the meaning of civil religion).

182. *Maddigan, supra* note 7, at 336; *see County of Allegheny,* 492 U.S. at 655 (applying the no coercion test and finding constitutional a county's creche display).

183. 113 S. Ct. 2462 (1993).

184. *See supra* note 90 (characterizing the inconsistency and fragmentation of Establishment Clause jurisprudence).
District under IDEA and its Arizona counterpart. Zobrest based his claim on the school district's refusal to provide him with a sign language interpreter, as required by the IDEA, after transferring from a public school to Salpointe Catholic High School. In addition, Zobrest argued that by refusing to provide the interpreter, the school district violated the Free Exercise Clause of the First Amendment, and that the Establishment Clause did not bar providing an interpreter. Nevertheless, the school district refused to provide an interpreter, asserting that because Zobrest attended a Catholic school, providing him with such aid would impermissibly endorse religion.

Both the United States District Court for the District of Arizona and the United States Court of Appeals for the Ninth Circuit affirmed the decision of the school district not to provide an interpreter. The Ninth

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187. Zobrest, 113 S. Ct. at 2464.
189. Zobrest, 113 S. Ct. at 2464.
190. Id. The school district followed Arizona statutory procedures in reaching its decision to refuse to provide an interpreter for Zobrest. Id.; see supra note 23 (detailing Arizona's statutory procedures).
191. Zobrest, 113 S. Ct. at 2464. For a detailed account of the lower court decisions, see supra notes 27-30 and accompanying text.
Circuit based its affirmance on the longstanding Lemon test. On appeal, the Supreme Court did not use the Lemon test and reversed. Addressing only the Establishment Clause issue, the Court focused on

192. Zobrest, 963 F.2d at 1193.
194. Id. Although the Court addressed a constitutional issue, Zobrest clearly could have been decided on a nonconstitutional basis. See id. at 2469 (Blackmun, J., dissenting) (arguing that the important constitutional question was reached unnecessarily). Justice O'Connor did not address the merits, stating only that the "fundamental rule" suffices to dispose of the case before [the Court], whatever the proper answer to the decidedly hypothetical issue addressed by the Court." Zobrest, 113 S. Ct. at 2475 (O'Connor, J., dissenting); see also Ashwander v. TVA, 297 U.S. 283, 341-56 (1936) (Brandeis, J., concurring) (discussing this fundamental rule).

The issue as to whether or not the Court will address a constitutional issue involves the rule of self-restraint. An appeal from a lower court brings the entire case to the Supreme Court. See United States v. Locke, 471 U.S. 84, 92 (1985); McLucas v. DeChamplain, 421 U.S. 21, 31 (1975). This includes nonconstitutional questions decided below as well as those that were not pressed in or passed on by the lower court. Locke, 471 U.S. at 92; United States v. Clark, 445 U.S. 23, 27-28 (1980). It is only in exceptional circumstances that questions not pressed or passed on in a lower court will be reviewed. Youakim v. Miller, 425 U.S. 231, 234 (1976). The Court, however, as a matter of judicial restraint, "will not reach constitutional questions in advance of the necessity of deciding them." Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984); see Ashwander, 297 U.S. at 346-48. Thus, when a case arrives before the Court, it "will not pass on the constitutionality of [a statute] if a construction of the [statute] is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided." Locke, 471 U.S. at 92; see Heckler v. Mathews, 465 U.S. 728, 741-44 (1984); see also City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294 (1982) (stating that "[n]o reason for hasty decision of the constitutional question presented by this case has been advanced"). Locke requires the Court to find a nonconstitutional answer to an issue whenever possible. Locke, 471 U.S. at 92. The Court must reconcile Locke's statement that the Court will not pass on the constitutionality of an Act if some other nonconstitutional ground is available, id., with the rule that it will not address issues not pressed or passed upon below. See Youakim, 425 U.S. at 234 (stating that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed") (quoting Duignan v. United States, 274 U.S. 195, 200 (1927) (emphasis added)). One solution is to remand a case for further consideration, as was suggested by the dissenting justices in Zobrest, 113 S. Ct. at 2469-70 (Blackmun, J., dissenting); id. at 2475 (O'Connor, J., dissenting). This is not uncommon. See, e.g., Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (vacating judgment and remanding for consideration of the statutory question); Aladdin's Castle, 455 U.S. at 295 (relying on the lower court for a decision on state law); Youakim, 425 U.S. at 234 (remanding to the lower court for consideration of conflict between state and federal law); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 104 (1944) (stating that "[e]very one of these questions must be answered before we reach the constitutional issues which divided the court below").

The rule of self-restraint, however, requires only that the Court avoid constitutional questions whenever "fairly possible." Locke, 471 U.S. at 92; see Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 157 (1983). Apparently, the majority in Zobrest found that it was not fairly possible to avoid the constitutional question, stating that a statutory question "buried in the record" is not enough to invoke the rule. Zobrest, 113 S. Ct. at 2466. However, there is no indication that the statutory question was buried in the record. As the majority itself indicates, the case was brought under the federal IDEA and its Arizona
several different factors rather than on the Lemon test, a test used by the Court in two decades of Establishment Clause cases.\textsuperscript{195}

The first and most important factor was that any aid required by the IDEA flowed to handicapped children on a neutral basis.\textsuperscript{196} The second factor was that any aid provided by the IDEA ultimately reached the religiously affiliated school as a result of the private choices of individual parents and not by the existence of some financial incentive within the statute.\textsuperscript{197} Furthermore, any aid to the school was on an indirect basis\textsuperscript{198} and did not relieve the school of any cost necessary to carry on their educational function.\textsuperscript{199} The "primary beneficiaries" of the IDEA, according to the majority, are handicapped students, not the sectarian schools they attend.\textsuperscript{200} Lastly, the Court stated that, contrary to the statement of the Ninth Circuit, the Establishment Clause does not absolutely bar placing public employees in sectarian schools.\textsuperscript{201} Any fear that a state-paid sign language interpreter would either add to or subtract from what was taught at the sectarian school is tempered by the fact that sign language interpreters must abide by ethical guidelines requiring them to interpret everything exactly as said and intended.\textsuperscript{202}

\begin{footnotes}
\textsuperscript{195} Zobrest, 113 S. Ct. at 2464-65. The Court mentioned the Lemon test only in its recital of the Ninth Circuit's reasoning. \textit{Id.}
\textsuperscript{196} \textit{Id.} at 2467; \textit{cf.} Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878 (1990) (finding that a neutrally applicable drug law does not violate the Free Exercise Clause).
\textsuperscript{197} Zobrest, 113 S. Ct. at 2467 (citing Mueller v. Allen, 463 U.S. 388, 399 (1983)).
\textsuperscript{198} \textit{Id.} Although the Court emphasized, as it had in the past, the indirect nature of the aid, it is not clear whether this fact was crucial in disposing of Zobrest or future cases. Rather, the question remains whether direct aid that flows to parochial schools from a neutral statute and is a result of the independent choice of parents violates the Establishment Clause. Zobrest and other Court decisions suggest that as long as a statute allows government aid to flow to all schools or other "'publicly sponsored social welfare programs'" equally, the constitutionality of the statute would not turn on how the government aid gets to a religious school or program. \textit{Id.} at 2466 (quoting Bowen v. Kendrick, 487 U.S. 589, 609 (1988)); \textit{see Bowen}, 487 U.S. at 609. However, money flowing directly to a seminary or a religion's collection basket may be excessive government aid to religion and, therefore, violative of the Establishment Clause.
\textsuperscript{199} Zobrest, 113 S. Ct. at 2468-69.
\textsuperscript{200} \textit{Id.} at 2469.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\end{footnotes}
The dissent vehemently opposed the majority's reasoning.\textsuperscript{203} However, the dissent, like the majority, did not strictly apply the \textit{Lemon} test.\textsuperscript{204} Instead, the dissent only alluded to the entanglement prong and argued that a public employee is not allowed to participate directly in religious instruction.\textsuperscript{205} Because religion was integrated so heavily in all aspects of the school's curriculum, a state-paid sign language interpreter could not avoid conveying religious messages.\textsuperscript{206} The interpreter's job, therefore, is infused with religious significance because of this environment.\textsuperscript{207} According to the dissent, promoting religious doctrines and advancing a school's religious mission in this way is strictly prohibited by the Establishment Clause.\textsuperscript{208}

V. Neutrality and Equal Protection in Establishment Clause Jurisprudence

Establishment Clause jurisprudence has evolved from completely separating religion and government to a substantial integration of the two. The \textit{Zobrest} Court's move toward the use of a neutrality standard indicates an attempt to reconcile the supposed separatist notion of the Framers\textsuperscript{209} with the accommodationist reality that religion plays a substantial role in American society.\textsuperscript{210} This reconciliation could not be accompl-
plished under the Court’s separatist view of the Religion Clauses.\footnote{211} The Framers were concerned with all government involvement with religion, especially in the form of financial support.\footnote{212} Even though there was a great deal of religious accommodation when the Religion Clauses were enacted,\footnote{213} the Court used the Framers’ concern to support its impenetrable wall standard.\footnote{214} If the impenetrable wall standard were invoked today, application of the IDEA\footnote{215} would not survive Establishment Clause scrutiny despite its neutrality because the IDEA aids religion through government actions.\footnote{216}

For this reason the Supreme Court is moving toward recognizing a new standard—a neutrality standard. This standard allows governments to enact laws that apply equally to all religious and nonreligious organizations, thus furthering goals common to all organizations and persons. The neutrality standard is consistent with the intent of the Framers and stays true to the principle that government should remain neutral in its dealings with religion.

A. The Neutrality Standard Defined

Religious accommodation and the supposed separationist intent of the Framers can be reconciled by applying a neutrality standard, which utilizes an equal protection type analysis. It is this kind of standard that is suggested by \textit{Zobrest}.\footnote{217}

At the time of Jefferson and Madison, religion and government were substantially entangled,\footnote{218} but the Framers desired to keep the two separate.\footnote{219}
rate. The neutrality standard reconciles these seemingly contradictory notions. Where a statute applies to all citizens regardless of the religious or nonreligious nature of the activity, it falls like a blanket over all of society, including society's publicly sponsored social welfare programs. If a religious organization performs a function common to a nonreligious organization, it should be treated equally regardless of its religious affiliation. If a nonreligiously affiliated organization also performs such activities, the function is likely a publicly sponsored social welfare program or a civil religious function. This indicates that religiously affiliated organizations can receive the benefit of government aid.

However, any statute regulating activities that nonreligiously affiliated organizations cannot perform indicates that the statute is not neutral and is subject to a higher level of scrutiny by the Court. In this context, the Supreme Court applies an equal protection analysis to the question of whether a statute is neutral on its face and is equally applied to all per-

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219. See supra notes 36-51 and accompanying text (examining religious separation in colonial America).
220. Zobrest, 113 S. Ct. at 2467.
221. Id. at 2466.
222. See supra note 8 (discussing accommodation of religion performing civil religious functions). In applying the neutrality standard, the Court would have to classify functions performed by religious organizations as either unique to the organization or part of the organization's civil religious function. Professor Philip Kurland argues that religious classifications can be a legitimate basis for government action, whether to benefit or burden religion. Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. REV. 1, 96 (1961). See generally David K. DeWolf, State Action Under the Religion Clauses: Neutral in Result or Neutral in Treatment?, 24 U. Rich. L. REV. 253 (1990) (arguing in favor of Professor Kurland's position).
223. See supra note 198 (discussing aid flowing to publicly sponsored welfare programs).
224. The neutrality of a statute on its face is not dispositive of the issue of whether it violates the Establishment Clause. The level of neutrality of the statute merely indicates the level of scrutiny that will be applied by the Court. See infra notes 227-37 and accompanying text (examining levels of scrutiny in Equal Protection jurisprudence). Only after the level of scrutiny is determined can other factors, such as whether the aid is direct or indirect and whether the aid is a result of independent choice, be weighed in deciding the outcome. For instance, because the education of children is done by both religious and nonreligious organizations, government aid in this area would be allowed.

One factor that may impact heavily on the constitutionality of a statute is the percentage of religious institutions benefiting from government action in relation to all institutions. See supra note 104 (discussing the Supreme Court's use of the percentage of private schools receiving government aid that are religiously affiliated). Where the constitutionality of statutes is decided on neutrality grounds, some measure of that neutrality must be made; a statute that disproportionately favors religiously affiliated institutions (or a single religion) may not pass the neutrality test. Cf. Larson v. Valente, 456 U.S. 228, 247 (1982) (applying an equal protection standard to an Establishment Clause case).
The Court is thus shifting Establishment Clause jurisprudence toward an equal protection type of analysis.

B. Equal Protection and Establishment Clause Jurisprudence

1. Equal Protection Jurisprudence

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires government to either enact laws that apply to persons equally or, if this cannot be accomplished, give a rational reason for the inequitable application of the law. To determine whether government abides by this limit on its power, the Supreme Court classifies the actions taken by government and applies a different standard of review to each. A classification made by the government passes equal protection review if it is justified by a legitimate governmental purpose.

There are three standards of review, or levels of scrutiny, that the Court uses in Equal Protection Clause cases. The first is the "rational relationship" level of scrutiny. Under this standard, a law will withstand Equal Protection Clause scrutiny if the law bears a rational relationship to a legislative purpose not otherwise prohibited by the

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225. See Larson, 456 U.S. at 247 (applying an equal protection standard to an Establishment Clause case). The Equal Protection Clause states, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

226. See Larson, 456 U.S. at 247. In Larson, the Court applied an equal protection type analysis to a Religion Clause case, stating that the "rule must be invalidated unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest." Id. (citations omitted); see also Grumet v. Board of Educ., 618 N.E.2d 94, 102 (N.Y. 1993) (Kaye, C.J., concurring) (applying an equal protection standard to invalidate a New York law creating a public school system to accommodate children of a particular religious sect), aff'd, 114 S. Ct. 2481 (1994).

227. U.S. CONST. amend. XIV, § 1. Although the Equal Protection Clause is explicitly applicable only to state and local governments, its purpose is applicable to the federal government through the Fifth Amendment's Due Process Clause. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the concepts of the Equal Protection Clause and the Due Process Clause, while not interchangeable, both protect the American ideal of fairness).

228. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341, 344 (1949) (stating that "[t]he essence of [equal protection] can be stated with deceptive simplicity" as "those who are similarly situated be similarly treated").

229. Id. at 349 (stating that the Supreme Court must determine the legislative purpose of a law to examine whether the classification made by the law supports that purpose).

230. See Heller v. Doe, 113 S. Ct. 2637, 2642 (1993) (stating that the rational relationship standard of review is applied where a classification involves neither fundamental rights nor proceeds along " 'suspect lines' " (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976))).
Constitution.\textsuperscript{231} The second standard of review is the intermediate level of scrutiny.\textsuperscript{232} Under this level of scrutiny, a law will fail unless the classification bears a substantial relationship to an important government interest.\textsuperscript{233}

The third standard of review, and most important for Establishment Clause purposes, is the "strict scrutiny" level.\textsuperscript{234} This level of scrutiny requires the government to show that the classification it has created closely serves some compelling or overriding purpose.\textsuperscript{235} While this level of scrutiny is usually applied to classifications based on race,\textsuperscript{236} all "discrete and insular minorities" receive this scrutiny.\textsuperscript{237}

2. Equal Protection and the Establishment Clause

Courts should apply the strict scrutiny standard of review to laws that classify on the basis of religion.\textsuperscript{238} The Establishment Clause explicitly prohibits government from making laws that favor one religion over another religion or nonreligion. A law favoring religion violates an explicit fundamental right and is presumptively unconstitutional, subject to the

\textsuperscript{231} See Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (stating that for a "classification scheme" to be upheld, it must be "rationally related to a legitimate state interest") (quoting \textit{Dukes}, 427 U.S. at 303).


\textsuperscript{233} See Plyler v. Doe, 457 U.S. 202, 217-18 (1982) (stating that, in relation to an alienage classification, a state must show that the classification furthers a "substantial interest of the State" (footnote omitted)).

\textsuperscript{234} See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that the strict scrutiny test requires that the classification chosen by a legislature to accomplish a compelling goal so tightly fits that goal that there is no possibility of an illegitimate motive for the classification).

\textsuperscript{235} \textit{Id.}

\textsuperscript{236} See Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (applying strict scrutiny to a racial classification to find racial segregation in public schools violative of Equal Protection Clause guarantees).

\textsuperscript{237} See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). The "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." \textit{Id.}

\textsuperscript{238} See Larson v. Valente, 456 U.S. 228, 246 (1982) (stating that the Supreme Court must "apply strict scrutiny in adjudging" laws that grant a "denominational preference"). Professor Wilber G. Katz argues that the Court's language in \textit{Everson} requires government neutrality "not only between sects but also between believers and nonbelievers." \textit{Katz}, supra note 51, at 13. This indicates that strict scrutiny should be applied to all religious classifications.
most exacting scrutiny. To survive this scrutiny, a presumptively unconstitutional law must be justified by a compelling state interest and must fit closely to further that interest. Therefore, only a law that applies to religious and nonreligious organizations equally will pass the equal protection analysis of the neutrality standard.

This equal protection analysis of Establishment Clause issues fits well with Establishment Clause jurisprudence. Both approaches limit government action, and both invoke members of society that should be treated equally—individuals and organizations. Equal protection analysis of Establishment Clause cases would be applied on a rational basis to laws that affect civil religious functions of all organizations, or those activities common to both the secular and the sectarian. This approach would recognize and even constitutionality allow the accommodation of

239. See Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (stating that classifications that impinge on a fundamental right must be "precisely tailored to serve a compelling governmental interest").


The law at issue is precisely the sort of legislation that should be strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system. Although I am willing to assume that the law is addressed to a compelling governmental interest—providing special education and related services to disabled children who would otherwise go without such assistance—the law is not closely fitted to that purpose, as more moderate measures were available to satisfy that purpose.

Id. (emphasis added); see supra notes 227-37 and accompanying text (examining Equal Protection Clause jurisprudence).

243. For instance, in the aid to private schools cases, the Court was very concerned with the fact that most of the parents that benefitted from the programs sent their children to parochial schools. See supra notes 111-44 (examining cases involving aid to private schools). The vast majority of those schools were religiously affiliated. Under a neutrality standard, the equal protection analysis would apply to determine whether the aid was justified by the government interest in having all children in the state receive an education and whether the aid program was closely fitted to further that interest. Because the aid was given to all children who attend private schools, there is no religious classification and rational basis analysis should apply.

After determining the standard of review, various factors, such as the direct or indirect nature of the accommodation, whether the accommodation is a result of independent choice, and whether religion overwhelmingly benefits may be taken into consideration. For instance, a statute that benefits Catholic schools over schools run by other religions, while not explicitly intending to create a religious classification, may be unconstitutional.
religion. On the other hand, the Court would apply strict scrutiny to any law, regardless of its classification, that benefitted or burdened activities unique to a particular religion or outside the scope of civil religious activities performed by a particular religion.\textsuperscript{244} At this point, the Court must once again erect the impenetrable wall.\textsuperscript{245} This application of an equal protection standard thus serves to allow accommodation of religion while protecting against an unconstitutional establishment of religion.\textsuperscript{246}

\textbf{C. Problems Confronting the Neutrality Standard}

The neutrality standard may be unable to overcome certain obstacles to give the Establishment Clause the clarity it needs. First, a conflict may be created with religious free exercise because the neutrality standard is based in part on the invalidation of religious classifications.\textsuperscript{247} However, the neutrality standard actually promotes free exercise by protecting religion from governmental intrusion on uniquely religious practices while allowing religion to perform its civil religious functions more fully.

Second, there is the question of whether borrowing a standard that primarily focuses on government equality will work in a standard that partly focuses on separation of religion and government.\textsuperscript{248} For no matter how broadly the Establishment clause is viewed, if the clause is taken together with the Free Exercise Clause, it requires that some barrier exist between religion and government.\textsuperscript{249} While this separation is certainly not abso-
lute,\textsuperscript{250} no such concept of complete separation exists in Equal Protection Clause jurisprudence.

Finally, there is no indication that the Court will realize the neutrality standard fully before abandoning it for another test. Because of past failures of tests in this area, the searching that the Court has gone through in the last few years, and the inevitable changes of personnel, it is uncertain whether the full potential of this standard will ever be realized.\textsuperscript{251}

VI. CONCLUSION

Religion will continue to play a vital role in all aspects of American society. Establishment Clause jurisprudence historically refused to recognize this role and required that religion and government remain separate entities, even on the smallest scale. Eventually, many exceptions were developed that weakened this strict separation, creating a confusing and fragmented area of the law.

\textit{Zobrest v. Catalina Foothills School District} indicates the Supreme Court's continued recognition that complete separation of religion and government is not required by the Establishment Clause by suggesting a neutrality standard. This concept treats religious organizations as any organization that serves a function in society. Furthermore, the neutrality standard that the Court is moving toward promises to end the years of confusion and fragmentation characteristic of Establishment Clause analysis. With the help of government aid available to all organizations that perform the same function, the neutrality standard promises to allow religion to continue to function effectively in and to support society.

\textit{James J. Dietrich}


\textsuperscript{251} However, five justices joined the \textit{Zobrest} majority opinion, indicating that there is some support for the neutrality standard. \textit{Zobrest}, 113 S. Ct. at 2463. On the other hand, Justices White and Blackmun, each on opposite sides of the opinion, retired from the Supreme Court. It is impossible to predict how their successors, Justices Ruth Ginsburg and Stephen Breyer, will vote in this area. As circuit court judges, each followed Supreme Court precedent. Their own jurisprudence in this area, therefore, can not be any more clear than that of the Court.