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The Constitutionality of Ceremonial Invocations Given at Public High School Football Games Under an Equal Access Plan: *Jager v. Douglas County School District*

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I. INTRODUCTION

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] In an effort to define the proper relationship between religion and government, courts have struggled to create a balance between the establishment and the free exercise clauses of the first amendment.[2] An illustration of this conflict arose in *Jager v. Douglas County School District*,[3] which challenged the constitutional validity of ceremonial invocations given at public high school football games under an "equal access plan."[4]

In 1985, Doug Jager, a member of the Douglas County High School marching band, complained to his high school principal about

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1. U.S. CONST. amend. I. Both the establishment clause prohibition and the free exercise clause are applied to the states through the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1, 8, 14-15 (1947) (establishment clause); Wallace v. Jaffree, 472 U.S. 38, 42 (1985) (reaffirming the same); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise clause). Most of the Bill of Rights have been made applicable to the states via the fourteenth amendment through selective incorporation by the Supreme Court. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2 (2d ed. 1988).

2. The Supreme Court has recognized that "[t]here are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the [Free Exercise Clause]. Provisions for churches and chaplains at military establishments for those in the armed forces may afford one such example." Abington School Dist. v. Schempp, 374 U.S. 203, 296 (1963). But the Court

> has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.' Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). At the same time, however, the Court has recognized that 'total separation is not possible in an absolute sense. Some relationship between government and religious organization is inevitable.' Ibid.

(citing Lynch v. Donnelly, 465 U.S. 668, 672 (1984)). Thereby, "[t]he court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970). To reference other law review articles concerning the relationship between the establishment and free exercise clauses and debating which one should predominate, see Recent Developments, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1178 n.16 (1984).

3. 862 F.2d 824 (11th Cir.), *cert. denied*, 102 S. Ct. 2431 (1989).

4. *See infra* text accompanying notes 41-43.

the use of invocations given before home football games. Jager's objection to the prayers focused on the reference to Jesus Christ, which conflicted with his religious beliefs.[5] The following year, Jager and his parents met with several school officials to discuss some alternative solutions. After several months of debate, the school officials decided to proceed with invocations under an equal access plan.

The district court held that the equal access plan was constitutional on its face but declined to determine whether it was constitutional as applied. On appeal, the Court of Appeals for the Eleventh Circuit reversed and held that the equal access plan violated the first amendment under the three-part test of *Lemon v. Kurtzman*.[6] The dissent disagreed, however, claiming that the principles espoused in *Marsh v. Chambers*[7] rendered the equal access plan constitutional.

This casenote examines the constitutionality of ceremonial invocations at public high school football games under an equal access plan. Part II briefly summarizes both *Lemon* and *Marsh*, which provide two distinct methods of analysis for reviewing challenges under the establishment clause. Part III introduces the facts of *Jager* and reviews the reasoning of the district court and the Eleventh Circuit. Part IV then explores the constitutionality of equal access prayers at public high school football games. First, a brief argument is addressed concerning the historical foundation of the establishment clause, focusing specifically on whether neutrality or preferentialism is required in establishment clause analysis. Second, the facts of *Jager* are analyzed under each of the three parts of the *Lemon* test. Third, the facts of *Jager* are examined under the analysis of *Marsh*, which the dissent asserts is proper in the context of this case. This note thus concludes that the *Lemon* test is the proper analysis to apply. Nonetheless, this note expresses dissatisfaction with the *Lemon* test and concludes that equal access invocations given at public high school football games are constitutionally based upon the historical foundation of the establishment clause.[8]

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5. *See infra* note 39.

6. 403 U.S. 602 (1971). The three parts of the *Lemon* test are: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citations omitted).

7. 463 U.S. 783 (1983).

8. In particular, this note resolves that the Supreme Court's neutrality posture in determining establishment clause issues is historically unfounded and should be abandoned in favor of another approach, which would thus lead to more unified and principled results. One commentator, Evans, has sided with Justice Rehnquist's dissent in Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985), in which Justice Rehnquist maintains that the establishment clause does not require neutrality between government and religion; rather the establishment clause only forbids "establish-

II. BACKGROUND

Excluding those cases involving polygamy,[9] the United States Supreme Court's first modern encounter with the religion clauses was just over forty years ago.[10] However, the Court has yet to provide a consistent and universally-embraced approach to issues involving the religion clauses of the first amendment. The principal analysis that has been applied in establishment clause jurisprudence to evaluate government activities regarding religion is the three-part test[11] of *Lemon*.[12] Although several justices have disavowed that the three-part *Lemon* test is the authoritative standard,[13] the *Lemon* test has prevailed, with only one noted exception, in every establishment clause case since its inception.[14] The important departure to the widespread use of the *Lemon* test arose in *Marsh*,[15] which employed an unprecedented historical as-

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ment of a national religion" and forbids "preference among religious sects or denominations." *Id.* at 106. Thus, this commentator has suggested a "preferential" approach to an establishment clause challenge. *See infra* note 64 and accompanying text. Because this preferential approach is outside the scope of this note, it will be addressed only briefly, thus providing food for thought for abandoning the three-part *Lemon* test.

9. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

10. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); *see generally* Wallace v. Jaffree, 472 U.S. at 91 (Rehnquist, J., dissenting).

11. The *Lemon* test is a composite of the criteria employed by the Court in previous establishment clause decisions. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) ("[T]he now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases."); *see also* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (origin of both the "secular purpose" and "primary effect" prongs of the three-part *Lemon* test); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (origin of the "excessive entanglement" prong of the three-part *Lemon* test).

12. 403 U.S. 602 (1971).

13. In Meek v. Pittenger, 421 U.S. 349, 358-59 (1975), Justice Stewart stated that *Lemon* sets no "precise limits to the necessary constitutional inquiry." The *Lemon* standard has also been described by Justice Powell as "no more than [a] helpful signpost[]" in dealing with establishment clause challenges. Hunt v. McNair, 413 U.S. 734, 741 (1973). In Tilton v. Richardson, 403 U.S. 672 (1971), Chief Justice Burger referred to the *Lemon* test as mere "guidelines," *id.* at 678, and as an inquiry which the Court "ha[s] often found . . . useful . . . ." Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

14. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989); Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989); Bowen v. Kendrick, 487 U.S. 589 (1988); Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Edwards v. Aguillard, 482 U.S. 578 (1987); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Mueller v. Allen, 463 U.S. 388 (1983); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Stone v. Graham, 449 U.S. 39 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

15. 463 U.S. 783 (1983). However, besides *Marsh*, the Court did not apply the *Lemon* test

sessment to an establishment clause challenge. Familiarization with both *Lemon* and *Marsh* provides the necessary foundation for analyzing the constitutionality of equal access invocations at public high school football games.

A. Lemon v. Kurtzman

In *Lemon*,[16] the Supreme Court determined the constitutionality under the establishment clause of two state statutes that provided state aid to church-related elementary and secondary schools. One statute "provide[d] financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects,"[17] and the other statute "authorize[d] state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools."[18] In analyzing these statutes, the Court began its inquiry with a three-part test, which is a "cumulative criteria developed by the Court over many years."[19] It has become familiarly recognized as the *Lemon* test.

Under the *Lemon* test, every statute or government activity that has a bearing on religion or religious institutions must:

(1) have a secular purpose;
(2) neither advance nor inhibit religion; and
(3) not foster an excessive government entanglement with religion.[20]

Respectively, each step is known as the purpose, effect, and entanglement prong of the *Lemon* test. If any prong of this three-part test is breached, the statute or state activity must be declared unconstitutional. Thus, the inquiry ends once a single prong has been violated.[21] In *Lemon*, both statutes were struck down as violating the excessive government entanglement prong.

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to Larson v. Valente, 456 U.S. 228 (1982) (*Lemon* was not applied because of "substantial evidence of overt discrimination against a particular church"). *See also* Lynch v. Donnelly, 465 U.S. 668 (1984), in which the Court cites *Marsh* and *Larson* as two occasions where the *Lemon* test was not applied to establishment clause challenges. One might possibly include *Lynch* with *Marsh* and *Larson* due to the loose application of the *Lemon* test by the Court.

16. 403 U.S. 602 (1971).

17. *Id.* at 606-07.

18. *Id.* at 607.

19. *Lemon*, 403 U.S. at 612. *See supra* note 11.

20. *Lemon*, 403 U.S. at 612-13.

21. *See* Wallace v. Jaffree, 472 U.S. 38, 44 n.22 (1985) (after it has been determined that the "purpose" prong has been violated, there is no need to consider the remaining two prongs of the three-part *Lemon* test); Stone v. Graham, 449 U.S. 39, 40-41 (1980) (statute violating any of the *Lemon* principles is invalid under the establishment clause).

B. Marsh v. Chambers

Marsh[22] involved a Nebraska legislator's establishment clause challenge to the legislature's practice of beginning its sessions with prayer by a state-approved chaplain. In its inquiry, the Supreme Court completely ignored the *Lemon* test. Chief Justice Burger, writing for the majority, affirmed the practice of legislative prayers in the United States by noting: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[23] Resting its decision on "[t]his unique history,"[24] the Court concluded:

> [T]here can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[25]

Justice Brennan, dissenting in an opinion joined by Justice Marshall, criticized the majority for its historical approach to the practice of legislative prayers and for its failure to apply the *Lemon* test. This practice was regarded by him as having a "pre-eminently religious" purpose,[26] a primarily "religious" effect,[27] and as "lead[ing] to excessive 'entanglement' between the State and religion."[28] Pointing out that the majority had "written a narrow and, on the whole, careful opinion,"[29] Justice Brennan presumably took comfort in regarding the Court's historical inquiry as "carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[30]

However, the Supreme Court's establishment clause jurisprudence after the *Marsh* decision reveals that several Justices are departing from the rigorous application of the *Lemon* test.[31] This suggests that

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22. 463 U.S. 783 (1983).
23. *Id.* at 786.
24. *Id.* at 791.
25. *Id.* at 792.
26. *Id.* at 797.
27. *Id.* at 798.
28. *Id.*
29. *Id.* at 795.
30. *Id.* at 796. *See also* Lynch v. Donnelly, 465 U.S. 668, 695-96 (1984) (Brennan, J., dissenting), where Justice Brennan reiterated his "hope that the Court's decision in *Marsh v. Chambers* would prove to be only a single, aberrant departure from our settled method of analyzing Establishment Clause cases" (citation omitted).
31. *See infra* note 65.

the Court is becoming dissatisfied with the secular purpose, primary effect, and excessive government entanglement prongs. This new trend in establishment clause jurisprudence has thus left unclear the precise effects of historical analysis in future establishment clause decisions. Thus, several of the lower federal courts have recently had to decide whether to apply the three-part *Lemon* test or the historical analysis of *Marsh* in an establishment clause challenge.[32] One such example is illustrated in *Jager v. Douglas County School District*,[33] in which the school district argued that the historical approach of *Marsh* rather than the three-part *Lemon* test was the proper inquiry in determining the constitutionality of ceremonial invocations given at public high school football games under an equal access plan. Nevertheless, the Eleventh Circuit was not persuaded by the school district's arguments and concluded that the proper inquiry was the more traditionally-applied three-part test of *Lemon*.[34]

III. *Jager v. Douglas County School District*

A. *The Facts*[35]

Doug Jager, a resident of Douglas County, Georgia, was a student at Douglas County High School and a member of its high school marching band. In the fall of 1985, he informed his high school principal of his objections concerning the practice of pregame invocations delivered at home football games.[36] These invocations often began "with the words 'let us bow our heads' or 'let us pray.' "[37] They also frequently "made reference to Jesus Christ" or concluded "with the words 'in Jesus' name we pray.' "[38] These pre-game invocations conflicted

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32. *See, e.g.*, Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988); Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987).

33. 862 F.2d 824 (11th Cir.), *cert. denied*, 102 S. Ct. 2431 (1989).

34. *See supra* text accompanying notes 13-15.

35. The following summation of facts can be found in *Jager*, 862 F.2d at 826-27. These facts are also listed in the district court's findings of fact. *See* Jager v. Douglas County School Dist., No. C86-2037A (N.D. Ga. 1987).

36. Since 1947 pre-game invocations had been given at Douglas County High School football games. As part of the pregame ceremony, the invocation speaker would be announced and identified with his church affiliation. When the practice first commenced, the student government invited the invocation speakers. Beginning in 1950, the invocations were given by local ministers. But, in the early 1970s, the assistant football coach delegated the task of providing invocation speakers to a Presbyterian clergyman, Leon Jeffords. From the early 1970s through 1986, this task was discharged by Jeffords to the Douglas County Ministerial Association, which consisted exclusively of ordained Protestant Christian ministers. From 1974 to 1986, every invocation given at Douglas County football games, with perhaps five exceptions, was given by a Protestant Christian clergyman. *Jager*, 862 F.2d at 826 n.2.

37. *Id.* at 826.

38. *Id.*

with the sincere religious values and beliefs of the Jagers.[39] The high school principal responded to the objections of the pre-game invocations by asking the band director to discuss the matter with Doug Jager. "The band director proceeded [by] lectur[ing] Doug on Christianity."[40]

On June 2, 1986, a conference was held between the various parties to seek a solution to the instant dispute. It resulted in two alternative proposals: "an inspirational wholly secular speech and an 'equal access' plan that would retain some religious content."[41] However, in July 1986, the Jagers rejected the equal access plan. They notified the school system attorney that the only feasible alternative was the wholly secular inspirational speech. Consequently, a compromise proposal was drafted by Reverends Jenkins and Mountains to " 'perpetuate and regulate the traditional invocation as part of the opening ceremonies of school athletic events.' "[42] In August 1986, the Jagers agreed to reconsider the equal access plan in return for the voluntary and interim cessation of invocations at the football games.

In September 1986, the Douglas County School Superintendent met with the Douglas County high school principals to discuss the pre-game invocations. The group considered the "equal access" compromise drafted by Reverends Jenkins and Mountains and decided to proceed in accordance with their plan. The terms of the proposed equal access plan provided that any member of a school organization or club could be designated to give the invocation. In addition, parents, students, and school staff members were allowed to submit their names to give the invocation. The student government then randomly selected the invocation speaker from the names submitted without any regard to their religion or their religious beliefs. No minister was allowed to deliver an invocation or to be involved in the selection of such a speaker. Furthermore, no school was allowed to control or monitor the content of the invocation.

On September 15, 1986, each of the high schools in Douglas County were informed by their principals that all invocations delivered at football games would thereafter proceed in accordance with the

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39. The Jagers "are descended from Native Americans." *Jager*, No. C86-2037A (findings of fact). Their religious convictions are based on: "(a) the reverence of Native Americans for nature; (b) a fundamental belief in the intellectual capacity of human beings to identify and address the salient issues of human existence; and (c) a skepticism toward organized religious dogma that inhibits intellectual curiosity and scientific inquiry into questions and problems of human existence." *Id.*

40. *Jager*, 862 F.2d at 826.

41. *Id.* at 827.

42. *Id.* (citation omitted).

equal access plan.[43] But, "[o]n September 19, 1986, the Jagers filed a complaint in the United States District Court for the Northern District of Georgia."[44]

B. The District Court's Decision

The United States District Court for the Northern District of Georgia "issued a temporary restraining order enjoining the Douglas County School District from conducting or permitting religious invocations prior to any athletic event at the school stadium."[45] In November 1986, the district court tried the case on its merits.[46] On February 3, 1987, the district court held that the pregame invocations were unconstitutional.[47]

On February 27, 1987, the Douglas County School District filed a motion for clarification. The district court then entered an additional order, ruling "that the equal access plan was constitutional on its face and did not violate the establishment clause" of the first amendment.[48] However, the court declined to express an opinion as to the constitutionality of the application of the equal access plan.[49]

C. The Eleventh Circuit's Decision

On appeal, the Jagers challenged the facial validity of the equal access plan, which allowed the student government to randomly choose invocation speakers. They argued that the equal access plan was unconstitutional under the three-part test of *Lemon*.[50] The school district disagreed, however, and urged instead that *Marsh*[51] was the proper inquiry for determining whether the equal access plan violated the establishment clause.

The Eleventh Circuit reversed the district court's ruling that the equal access plan was constitutional on its face. The Eleventh Circuit

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43. The equal access invocation proposal written by Reverends Jenkins and Mountain was never formally adopted by the School Board as an official policy. *Jager*, 862 F.2d at 827 n.3.

44. *Id.* at 827.

45. *Id.*

46. *Id.*

47. The district court made several rulings at the trial. It not only held that the pre-game invocations were unconstitutional but also denied the request of the Jagers for a permanent injunction. The court also held that the pre-game invocations did not violate the Jagers' first amendment rights under the free exercise clause and did not violate the Georgia Constitution. *Jager*, 862 F.2d at 827. However, these issues will be disregarded, thus, allowing a more narrow focus on the constitutionality of the equal access invocations.

48. *Id.*

49. *Id.*

50. 403 U.S. 602 (1971).

51. 463 U.S. 783 (1983).

held that the facts of *Jager* do not lend themselves to the historical inquiry of *Marsh* "because invocations at school-sponsored football games were nonexistent when the Constitution was adopted."[52] Instead, it found the three-part test of *Lemon* to be the proper inquiry. In applying the *Lemon* test, the Eleventh Circuit concluded that the equal access plan was unconstitutional under both the secular purpose and primary effect prong but determined that the equal access plan involved no excessive government entanglement on its face.

But Chief Judge Roney, dissenting, asserted that the *Jager* facts were more akin to *Marsh* and should be analyzed under its principles rather than by the *Lemon* test. Under *Marsh*, he found the equal access plan to be constitutionally valid. Chief Judge Roney also concluded that even if *Marsh* was inapplicable, the application of the *Lemon* test would not render the equal access plan a violation of the establishment clause. Thus, in Chief Judge Roney's judgment, both tests led to the same result. Therefore, he would have affirmed the district court's ruling concerning the facial validity of the equal access plan.[53]

IV. ANALYSIS

The scope of the establishment clause has been determined largely "on a case-by-case basis." This accounts for "[t]he considerable internal inconsistency in the opinions of the [Supreme] Court [which] derives from what, in retrospect, may have been too sweeping utterances on aspects of [the establishment and free exercise clauses] that seemed clear in relation to the particular cases but have limited meaning as general principles."[54] Thus, a consistent or universally-embraced approach is clearly lacking in cases dealing with the religion clauses of the first amendment.[55] "[T]he confusion, inconsistency, and incorrect deci-

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52. *Jager*, 862 F.2d at 829. The Eleventh Circuit was relying on the Supreme Court's rationale in *Marsh*, in which the practice of commencing Nebraska's legislative sessions with prayer was upheld. Because legislative prayers existed at the time the first amendment was drafted (its "unique history"), the Court concluded that therefore "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from [the] practice of [legislative] prayer." *Marsh*, 463 U.S. at 791. In *Edwards v. Aguillard*, the Supreme Court stated that "[s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." 482 U.S. 578, 583 n.4 (1987) (citations omitted).

53. *Jager*, 862 F.2d at 835-41 (Roney, C.J., dissenting).

54. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). Many of the Supreme Court's decisions interpreting the religion clauses have been criticized by the justices themselves. *See* Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 10 (1984).

55. "Constitutional law scholars and other observers are virtually unanimous in labeling the Supreme Court's decision in establishment cases as inconsistent and unprincipled judgments based on the Court's perceived notions of public policy and the exigencies of the moment." Cornelius,

sions in establishment clause cases have not resulted from the difficulty of the problem; they have resulted from the [Supreme] Court's failure to recognize the proper theory of church-state relations mandated by the Constitution, and the incorrect interpretation of the establishment clause which that failure has produced."[56] More specifically, the confusion and inconsistency stems from the Supreme Court's misinterpretation of the establishment clause's historical foundation.[57] In deciding establishment clause issues, the Supreme Court, although not adopting a strict theory of government neutrality toward religion,[58] has nonethe-

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supra note 54, at 8-9 (footnote omitted). For example:

> —the government may not supplement parochial school teachers' salaries, but it may employ and pay with public tax money chaplains in legislative bodies, the armed services, and in public prisons and hospitals, and it may pay for veterans' sectarian training for the ministry;
>
> —the states may not allow noncompulsory prayer, Bible reading, or meditation in the public schools, but it is permissible to have opening prayers in Congress and the Supreme Court, as well as "In God We Trust" on our currency, and "Under God" in the Pledge of Allegiance and the National Anthem;
>
> —high schools may not *allow* religious groups to use school property even after school hours, but colleges may not *refuse* to do so;
>
> —states may furnish bus transportation to parochial school children, but may not pay the expenses of their field trips for instructional purposes;
>
> —the state may loan textbooks to parochial schools, but not other teaching and testing materials;
>
> —a state may exempt church property and schools from taxation, but may not reimburse church schools for expenses of tests and examinations;
>
> —a state may not give financial aid to repair a church supported secondary school, but may build academic buildings for sectarian colleges and lease state land to a church school for the purposes of working a tax exemption;
>
> —a state may compel a business to close on Sunday and may pay for and display a nativity scene on public property, but may not allow schools to display the Ten Commandments in their hallways;
>
> —public schools may not allow released time for religious services on school property, but may for services held off the premises;
>
> —states may not give tax relief only for tuition paid to parochial schools, but may allow tax deductions for such tuition if the program also allows a similar deduction for public school expenses;
>
> —and the state may provide therapeutic and diagnostic health services to a church school in a mobile unit parked next to the school, but not in the school itself.

Id. at 6-8 (footnotes omitted). *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980).

56. Cornelius, *supra* note 54, at 10.

57. A detailed historical examination of the establishment clause is outside the scope of this note. However, for an interesting examination into the background and foundation of the establishment clause, see Evans, *Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis*, 64 ST. JOHNS L. REV. 41 (1989) [hereinafter 'Evans'].

58. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation . . . ."); *see also* Lemon v. Kurtzman, 403 U.S. 602 (1971):

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government

less tried to maintain a placid coexistence or neutrality approach between government and religion,[59] as is evidenced in cases applying the *Lemon* test.[60] However, "neutralism"[61] has been sharply criticized by Chief Justice Rehnquist, then an associate justice, as being constitutionally unsound and historically unfounded.[62] Instead, Justice Rehn-

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and religious organizations is inevitable. . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

Id. at 614 (citations omitted).

59. The "neutrality" posture that members of the Supreme Court have taken can be traced to the comments made by Thomas Jefferson in a letter he wrote to the Danbury Baptist Association on January 1, 1802. In the letter, he referred to the establishment clause as "building a wall of separation between Church and State," *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1861). In Everson v. Board of Educ., 330 U.S. 1, 16 (1947), the Supreme Court adopted the "wall of separation" metaphor in its theory of establishment clause analysis stating, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18. In support of neutrality, the Court further stated that the first "[a]mendment requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id. See also* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice."); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) ("[T]he government must pursue a course of complete neutrality toward religion.").

60. *See* cases cited *supra* note 14.

61. The language of the establishment clause alone suggests that "neutralism" is not mandated. For example:

> [T]he phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the *framers* prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interest of one or another particular sect.

M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14 (1978) (emphasis in original).

62. After a careful review into its historical background, Justice Rehnquist concluded:

> [T]he establishment clause was intended to do no more than prohibit preferentialism.
>
> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.
>
> . . . .
>
> [Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled

quist maintained that the establishment clause only "forbade establishment of a national religion, and forbade preference among religious sects or denominations."[63] Accordingly, one commentator has suggested

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> results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."
>
> Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication. . . .]

Rehnquist further stated:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

Justice Rehnquist also noted that the *Lemon* test, which is but an effort to apply the "wall of separation" metaphor, is equally devoid of a historical foundation:

> [T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.

In the concluding remarks of his *Wallace v. Justice* dissent, Justice, Rehnquist provided food for the thought of abandoning the *Lemon* test in favor of an analysis rooted in the intended meaning of the establishment clause:

> The Court strikes down the Alabama statute [in *Wallace v. Jafree*] because the State wished to "characterize prayer as a favored practice." It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." *History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.*

See Evans, *supra* note 57, at 75-76 & n.172 (citing Wallace v. Jaffree, 472 U.S. 38, 106-07, 110, 112-13 (1984) (Rehnquist, J., dissenting) (citations omitted) (footnotes omitted).

63. *Wallace*, 472 U.S. at 106. However, in Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 490-93 (1986), Justice Rehnquist joined Justice Powell's concurring opinion in which he agreed that the "principal or primary effect" of advancing religion was the central question of the Washington provision. And, in Bowen v. Kendrick, 487 U.S. 589 (1988), Rehnquist, in his first opinion concerning the establishment clause as Chief Justice, applied the *Lemon*

that the Supreme Court should adopt "preferentialism" and thereby abandon its historically unfounded "neutralism," which now exists between religion and government.[64]

But despite any debate of "neutralism" versus "preferentialism," the facts of *Jager* provide an interesting example and timely opportunity to discuss several of the propositions asserted within the establishment clause framework. First, invocations given under the equal access plan will be examined under the application of the *Lemon* test. In particular, the secular purpose, the primary effect, and the entanglement prongs will each be addressed. Finally, invocations under the equal access plan will be considered under the historical inquiry of *Marsh.*

A. *The Validity of the Equal Access Plan Under the* Lemon *Test*

Under an establishment clause challenge, the *Lemon* test[65] requires that every statute or government activity meet three criteria.

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test, thus upholding the validity of a federal statute. However, these cases do not seem to determine Rehnquist's position on establishment clause issues. For example, in Edwards v. Aguillard, 482 U.S. 578, 610-40 (1987) (Scalia, J., dissenting), Chief Justice Rehnquist joined in Justice Scalia's dissent in which Scalia noted "the pessimistic evaluation that The Chief Justice made of the totality of *Lemon*" and in which Scalia endorsed the abandonment of the purpose prong. *Id.* at 636. In addition, Chief Justice Rehnquist joined in Justice Kennedy's opinion in County of Allegheny v. ACLU, 109 S. Ct. 3086, 3134-46 (1989) (Kennedy, J., with whom Chief Justice [Rehnquist], Justice White, and Justice Scalia join, concurring in the judgment in part and dissenting in part). In his concurring opinion, Justice Kennedy hints very strongly that he is willing to abandon the three-part *Lemon* test as a guide in resolving establishment clause challenges.

64. Several constitutional law experts have proposed new theories of analysis to resolve the confusion and inconsistencies, which exists in establishment clause jurisprudence. *See, e.g.*, Cornelius, *supra* note 54, at 9 n.54. However, one commentator has suggested a preferential inquiry, referred to as "preferentialism." This approach

> necessarily involve[s] two steps. The first consideration would be whether the challenged action is nonpreferential on its face. . . . The second consideration is whether all religions necessarily can be treated similarly. This part of the test would require the party challenging the activity to present a factual showing that similar treatment is not possible. Absent such a showing, the challenged governmental action would be deemed constitutional. . . .
>
> Under [this] suggested analysis, incongruous results stemming from applying *Lemon* would be avoided . . . .

See Evans, *supra* note 57, at 99-101.

However, any further discussion of "preferentialism" or any other alternative theory of analysis in establishment clause jurisprudence is outside the scope of this note.

65. Although the *Lemon* test has been traditionally applied in establishment clause challenges, recent Supreme Court decisions now reveal that there are four justices of the Court who have expressed their willingness to abandon the three-part test of *Lemon*. These justices include Chief Justice Rehnquist, Justice White, Justice Kennedy, and Justice Scalia. *See* Wallace v. Jaffree, 472 U.S. at 91-114 (Rehnquist, J., dissenting); Edwards v. Aguillard, 482 U.S. at 608-10 (White, J., concurring) and Wallace v. Jaffree, 472 U.S. at 90-91 (White, J., dissenting); County of Allegheny v. ACLU, 109 S. Ct. at 3134-46 (Kennedy, J., with whom Chief Justice [Rehnquist], Justice White, and Justice Scalia join, concurring in the judgment in part and dissenting in part); Edwards v. Aguillard, 482 U.S. at 610-40 (Scalia, J., dissenting).

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[66] In each case, application of this three-part test "calls for line drawing; no fixed, per se rule can be framed."[67]

In the past, the Supreme Court has recognized that "government must pursue a course of complete neutrality toward religion."[68] However, the Court has recognized the error of "focus[ing] exclusively on the religious component of [an] activity."[69] The Court stated that this exclusive focus "would inevitably lead to [the activity's] invalidation under the Establishment Clause."[70] Rather, the proper focus of any inquiry should be on the conduct of the activity considered in its overall context.[71] Thus, in determining whether or not the *Lemon* test renders the equal access plan unconstitutional, the plan must be considered in its overall context.

1. The secular purpose

In determining whether a government activity survives an establishment clause challenge, one must first ask whether it has a secular purpose. Justice O'Connor modified this prong of the *Lemon* test in her concurring opinion in *Lynch*. "The proper inquiry under the purpose

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66. *Lemon*, 403 U.S. at 612-13 (citations omitted).

67. Lynch v. Donnelly, 465 U.S. 668, 678 (1984). "[T]he Court consistently has declined to take a rigid, absolutist view of the Establishment Clause . . . . [W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 678-79. "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). And, in *Lemon*, the Court admitted that "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612.

68. *Wallace*, 472 U.S. at 60. The Court adopts this proposition from its prior decisions. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); Epperson v. Arkansas, 393 U.S. 97, 103-04, 109 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 215-22 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause."); McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

69. *Lynch*, 465 U.S. at 680.

70. *Id.*

71. *See id.* at 679; *accord* Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

prong . . . is whether the government intends to convey a message of endorsement or disapproval of religion."[72]

The Eleventh Circuit concluded that the equal access plan "was adopted with the actual purpose of endorsing and perpetuating religion."[73] Its conclusion was based on the four purposes of the plan as found by the district court. Those purposes were as follows:

> (1) to continue a longstanding custom and tradition, (2) to add a solemn and dignified tone to the proceedings, (3) to remind the spectators and players of the importance of sportsmanship and fair play,[74] and (4) "to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity."[75]

The Eleventh Circuit alleged that all of these purposes could be served by giving wholly secular inspirational speeches rather than through the use of pregame invocations.[76] Senior Circuit Judge John W. Peck, in a concurring opinion, suggested that the equal access plan would not provide for a variety of beliefs and views due to the preeminence of Protestant Christianity in Douglas County.[77] Therefore, the Eleventh Circuit was convinced that because the wholly secular inspirational speech alternative was rejected, the school district actually had a religious purpose for the use of pregame invocations. To support its position, the Eleventh Circuit remarked that "[t]he unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests."[78] Thus, the Elev-

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72. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Actually, Justice O'Connor proposed a refinement of both the purpose and the effect prongs of *Lemon*. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Id.* at 690. *See also Wallace*, 472 U.S. at 68-70 (O'Connor J., concurring). In more recent cases, Justices Blackmun, Brennan, Marshall, and Stevens have utilized Justice O'Connor's endorsement test for both the purpose and effect prongs to analyze government activity. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989); Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989).

73. *Jager*, 862 F.2d at 829.

74. During the 1986 football season, the district court issued a temporary restraining order against pre-game invocations. During that period, the court found that "the School System experienced no measurable increase in fan violence, rowdiness or unsportsmanlike behavior." *Id.* at 829 n.10 (citation omitted).

75. *Id.* at 829 (citation omitted).

76. The district court found in its findings of facts that the secular purposes of the invocations were never established by the School Board until the Jagers filed suit. *Id.* at 829 n.11.

77. *Id.* at 835 (Peck, J., concurring).

78. *Id.* at 830 (citing Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981)), *aff'd mem.*, 455 U.S. 913 (1982). In *Karen B.*, the court invalidated a Louisiana statute that permitted prayers in public schools. Although it discussed the inherently religious character of prayers, it found the secular purpose of the statute to be a sham.

enth Circuit concluded that the equal access plan conveys an endorsement of religion and violates the purpose prong.

However, the Eleventh Circuit appears to have "focus[ed] exclusively on the religious component"[79] of the equal access plan. The purposes of the plan need not be exclusively secular.[80] The district court has made it plain that the equal access plan serves legitimate secular purposes. The plan continues a long-standing tradition, adds solemnity to the occasion, and reminds the spectators and participants of the high ideals of sportsmanship and fair play. In *Lynch*, Justice O'Connor has acknowledged that invocations can serve secular purposes.[81] And, in *Marsh*, the Court remarked that the delegates to the First Congress "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.' Rather, the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.' "[82]

Other courts, as well, have found invocations to have secular purposes. These purposes include solemnizing high school graduations ceremonies;[83] creating "an atmosphere conducive to open exchanges, cooperative participation, and toleration and conscientious deliberations of

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79. Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

80. *Lemon* only requires a secular purpose. "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation [which the Supreme] Court has approved in the past would have been invalidated." *Id.* at 681 n.6. Also note that "[t]he [Supreme] Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Id.* at 680. *See* Stone v. Graham, 449 U.S. 39, 41 (1980); Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421, 424-25 (1962). Even where religion was substantially benefitted, the Court has found a secular purpose and no violation of the establishment clause. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 392 U.S. 236 (1968); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 672 (1971); *cf.* Larkin v. Grendel's Den, Inc. 459 U.S. 116 (1982).

81. *See Lynch*, 465 U.S. at 692-93 (O'Connor J., concurring) ("[S]uch government 'acknowledgements' of religion as legislative prayers of the type approved in *Marsh* . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." (citation omitted)); Wallace v. Jaffree, 472 U.S. 38, 56-58 (1985).

82. 463 U.S. at 792 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

83. *See* Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987). However, it should be noted that in *Stein* the Sixth Circuit "did not address the limitations placed on *Marsh* by the Supreme Court in *Edwards*. In fact, *Stein* did not even mention *Edwards*. The sixth circuit overlooked that *Marsh* was grounded in historical practice which dates from the time of the drafting of the Constitution. As *Edwards* indicates, *Marsh* created an exception to the *Lemon* test only for such historical practice." Jager v. Douglas County School Dist., 862 F.2d 824, 829 n.9 (11th Cir. 1989).

all those present" at city council meetings;[84] establishing "a solemn atmosphere and serious tone" at County Commission board meetings;[85] and preserving "the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform."[86]

In *Wallace v. Jaffree*,[87] the Supreme Court struck down an Alabama statute that authorized a brief period of silence for meditation or voluntary prayer in all public school classrooms. The Court did so because it could find no evidence of a secular purpose.[88] This was not the case in *Jager*. The equal access plan had legitimate, albeit nonexclusive, secular purposes, to which courts must normally defer.[89] Rightfully considered in its context, the plan's purposes were neither a "sham" nor a "thinly-veiled attempt" to convey an endorsement of religion. Neither was the equal access plan motivated wholly or entirely by religious considerations. Thus, the equal access plan does satisfy the first prong of the *Lemon* test.

2. *The primary effect*

In addressing the second prong of the three-part *Lemon* test, it is necessary to determine whether the principal or primary effect of a government's activity is one that neither advances nor inhibits religion. That is, the government's activity must not convey "a message of endorsement or disapproval."[90]

The Eleventh Circuit reasoned that because the equal access plan allowed a religious invocation to be "given via a sound system controlled by school principals and [because] the religious invocation occurs at a school-sponsored event at a school-owned facility,"[91] that the plan has the effect of endorsing religion. The Eleventh Circuit based its premise on the context of several facts: (1) in the past, Protestant ministers have given most of the pre-game invocations, and (2) "Protestant Christianity is the majority religious preference in Douglas County."[92]

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84. Marsa v. Wernik, 86 N.J. 232, 248, 430 A.2d 888, 896-97, *cert. denied*, 454 U.S. 958 (1981).

85. Bogen v. Doty, 598 F.2d 1110, 1113 (8th Cir. 1979).

86. Colo v. Treasurer & Receiver Gen., 378 Mass. 550, 559, 392 N.E.2d 1195, 1200 (1979).

87. 472 U.S. 38 (1985).

88. *Id.* at 56-57.

89. *See* Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987).

90. *See supra* note 72.

91. Jager v. Douglas County School Dist., 862 F.2d 824, 831 (11th Cir.), *cert. denied*, 102 S. Ct. 2431 (1989).

92. *Id.*

Therefore, the Eleventh Circuit asserted that pre-game invocations will most likely continue to be from the Protestant denomination. The Eleventh Circuit also mentioned that pre-game invocations would also involve those attending in group prayer. Thus, the Eleventh Circuit concluded that invocations delivered under the equal access plan have the primary effect of conveying a message of endorsing religion.

However, in *Lynch*, the Supreme Court remarked that "on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' "[93] Invocations delivered under the equal access plan do not endorse religion any more than a nativity scene displayed on government property,[94] "legislative prayers upheld in *Marsh*," "expenditure[s] of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools [approved in] *Board of Education*," "tax exemptions for church properties sanctioned in *Walz*," or "Sunday Closing Laws upheld in *McGowan*."[95] In each of the prior examples, the Court found no violation of the establishment clause.

Rightfully considered in context, the invocations under the equal access plan were given only five times a year,[96] were sixty to ninety seconds in length at a public event lasting two to three hours,[97] and were delivered by randomly selected speakers "without regard to their religious beliefs" or values.[98] Therefore, such invocations seemingly do not have the primary effect of advancing religion nor of conveying a message of endorsing or disapproving religion. The second prong of *Lemon* thereby appears satisfied.

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93. 465 U.S. at 683 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

Examples of practices cited as acceptable because of their insubstantial effect on religion include the printing of "In God We Trust" on coins, the reference to God in the Pledge of Allegiance, the exhibition of religious paintings in governmentally supported museums, tax exemptions for religious organizations and the use of the phrase "God save the United States and this honorable court" to open court sessions. *But cf.* Hall v. Bradshaw, 630 F.2d 1018, 1021 (4th Cir. 1980) ("A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause. . . . No *de minimis* exception is tolerable.").

Jager, 862 F.2d at 839.

94. *Lynch*, 465 U.S. 668 (1984).

95. *Id.* at 681-82 (citations omitted).

96. *Jager*, 862 F.2d at 837. Chief Judge Roney, in his dissent, mentions that because these invocations are given only five times a year, "there is no danger of daily indoctrination as there is when structured prayer is a part of a classroom setting." *Id.*

97. *Id.* at 839.

98. *Id.*

3. The entanglement

The third prong of the three-part *Lemon* test requires that there be no excessive government entanglement. In *Jager*, there is general agreement that this prong is satisfied. Under the equal access plan, the clergymen were no longer allowed to deliver the invocations. Nor were they allowed to participate in the selection of the invocation speaker. Also, the school district had no contact with any church, nor did it monitor or control the content of any invocation. In addition, the district court found that it cost only $1.08 to broadcast invocations during the football season.[99] The mere fact that some administrative entanglement existed does not render the plan unconstitutional.[100] Thus, the school district was not excessively entangled with religion.

B. The Validity of the Equal Access Plan Under Marsh

Acknowledging that both prior-*Marsh* and post-*Marsh* decisions[101] involving establishment challenges have employed the *Lemon* test reveals that the historical inquiry of *Marsh* has limited application, particularly in the public school setting.[102] Nonetheless, the school district sought to distinguish this case from those invalidating prayer in the public schools.[103] In effect, it argued that the Supreme Court's statement that the analysis of *Marsh* "is not useful in determining the proper roles of church and state in public schools"[104] was limited to the classroom[105] and has no import outside of that setting.[106] The three remaining arguments advanced by the school district to not only distinguish the school prayer cases but also to support the equal access invocations under the *Marsh* analysis were: (1) the student-teacher rela-

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99. *Id.*

100. *See* Lynch v. Donnelly, 465 U.S. 668, 671, 684 (1984). The Court found that the erection and dismantling of a nativity scene cost the city $20 a year. This administrative entanglement was found to be *de minimis* and not the " 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*, 403 U.S., at 619-622." *Id.*

101. *See supra* note 14.

102. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); *accord* Graham v. Central Community School Dist., 608 F. Supp. 531, 535 (S.D. Iowa 1985) ("*Marsh* decision is a singular Establishment Clause decision that rests on the 'unique history' of legislative prayer, and the holding of that case is clearly limited to the legislative setting.").

103. *E.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

104. *Edwards*, 482 U.S. at 583 n.4.

105. Every case in which the Court has sought to determine the proper roles between church and state in the public schools has involved a classroom setting. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (classroom curriculum); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (classes); Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence in the classroom).

106. Jager v. Douglas County School Dist., 862 F.2d 824, 831 (11th Cir.), *cert. denied*, 102 S. Ct. 2431 (1989).

tionship was not invoked by the invocations, (2) attendance at this public event was entirely voluntary, and (3) the invocations were a *de minimis* infraction of the establishment clause.[107] Each of these arguments will be addressed separately.

The school district first argued that the invocations under the equal access plan, given outside the classroom setting or instructional environment, provided a ceremonial opening at a public event. Therefore, the school district contended that the *Marsh* analysis was more applicable than the *Lemon* test. The ceremonial invocations were in no way intended to proselyte, nor were they intended to endorse any particular religious beliefs. But rather, the ceremonial invocations were to continue a longstanding tradition of creating a solemn proceeding in which to remind those present and participating of the importance of "sportsmanship and fair play" in a setting outside the classroom. However, the Eleventh Circuit found little merit in this argument. The court stated that "[e]ven though not occurring in the classroom, the invocations take place at a school-owned stadium during a school-sponsored event."[108] They then brushed aside the school district's outside-the-classroom-setting argument by citing *Doe v. Aldine Independent School District.*[109] In *Doe*, a prayer was sung at an extracurricular activity sponsored by the school. The defendants argued that because the prayer was sung outside the classroom setting, it did not violate the establishment clause. However, this argument was rejected by the *Doe* court. The court stated:

> Pep rallies, football games, and graduation ceremonies are considered to be an integral part of the school's extracurricular program and as such provide a powerful incentive for students to attend . . . . "It is the Texas compulsory education machinery that draws the students to the school event and provides any audience at all for the religious activities . . . ." Since these extracurricular activities were school sponsored and so closely identified with the school program, the fact that the religious activity took place in a nonreligious setting might create in a student's mind the impression that the state's attitude toward religion lacks neutrality.[110]

Convinced by the *Doe* court's reasoning, the Eleventh Circuit then proceeded to address the concerns of the invocations on the teacher-student relationship.

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107. *Id.* at 832.

108. *Id.* at 831.

109. 563 F. Supp. 883 (S.D. Tex. 1982).

110. *Jager*, 862 F.2d at 831 (citing Doe v. Aldine Indep. School Dist, 563 F. Supp. 883, 887 (S.D. Tex. 1982) (citation omitted)).

The school district contended that the teacher-student relationship is not invoked by the giving of invocations at football games and argued that there is little chance of indoctrination considering that most of the audience is comprised of adults and students sixteen-to-eighteen years old. Those students who are younger are often accompanied by their parents. In addition, the school district asserted that these invocations occur away from the instructional classroom setting after school hours, thus preventing any teacher-student implication. On the other hand, the Eleventh Circuit discounted these arguments by emphasizing that under the equal access plan, teachers, as authority figures, can give invocations that are religious in nature. Therefore, their prayers become a strong endorsement of prayer.

Next, the school district alleged that attendance at football games, a community event was entirely voluntary. Therefore, it argued, invocations at such events were constitutional. However, as the Eleventh Circuit correctly pointed out, neither "the Supreme Court [nor the Eleventh Circuit] ha[s] held that public prayer becomes constitutional when student participation is purely voluntary."[111] The Eleventh Circuit dismissed this argument as meritless stating that "[t]he Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual."[112]

The school district also attempted to distinguish the school prayer cases by contending that the ceremonial invocations were a *de minimis* infraction of the establishment clause because they were only sixty to ninety seconds in length.[113] But, the Eleventh Circuit found this argument flawed stating that "[i]t is 'no defense to urge that the religious practice here may be relatively minor encroachments on the First Amendment.' "[114] Allowance of the *de minimis* infraction would be a

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111. *Jager*, 862 F.2d at 832. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause. . . ."); *see also* Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963) (Religious exercises are not "mitigated by the fact that individual students may absent themselves upon parental request. . . ."). In *Schempp*, the Court also stated that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 223. *But cf.* Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987) (The voluntary nature of an activity "warrants a difference in constitutional results.").

112. *Jager*, 862 F.2d at 832.

113. *See* Grossberg v. Deusebio, 380 F. Supp. 285, 290 (E.D. Va. 1974). The court held that "such indirect and incidental beneficial effect to the propagation of religion which might flow from the brief periods allotted to the invocation and benediction contemplated as part of the graduation ceremony" was not a violation of the establishment clause.

114. *Jager*, 862 F.2d at 832 (citing *Schempp*, 374 U.S. at 225). *See* Hall v. Bradshaw, 630 F.2d 1018, 1021 (4th Cir. 1980) ("A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establish-

"breach of neutrality that is today a trickling stream [that] may all too soon become a raging torrent . . . ."[115] The Eleventh Circuit therefore stressed that "[t]he Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious character of the activity."[116]

The school district's attempt to distinguish the school prayer cases in an effort to apply the historical inquiry of *Marsh* was unpersuasive. The Supreme Court has stated that *Marsh* "is not useful in determining the proper roles of church and state in [the] public schools."[117] To allow *Marsh* to be applied in such a situation as is found in *Jager* would create a dangerous precedent in establishment clause jurisprudence of allowing to be recognized many American traditions and practices, which are religious and can be historically documented.

V. CONCLUSION

As *Jager* illustrates, establishment clause jurisprudence is an extremely unsettled and sensitive area of constitutional law. Nonetheless, ample support exists for the proposition that the *Lemon* test, rather than the historical inquiry of *Marsh*, is the proper analysis to be implemented in issues involving the establishment clause. However, this note has taken the position that the ceremonial invocations given under the equal access plan at public high school football games are constitutional under the *Lemon* test, despite the Eleventh Circuit's opposite conclusion. In addition, this note concludes that the facts of *Jager* do not fall within the confines of the historical inquiry of *Marsh*, the sole exception to the *Lemon* test.

In examining establishment clause jurisprudence, it is apparent that courts rendering decisions employing the more traditionally-applied *Lemon* test have been inconsistent in its application. Because of that inconsistency, some lower federal courts have been leaning away from the *Lemon* test by utilizing the "unique histor[ical]" approach of *Marsh* to modern establishment clause issues in an effort to recognize many forms of traditions historically documented in American society.

The Supreme Court's lack of clear guidance and inability to adopt a universally-embraced approach in establishment clause jurisprudence has been criticized by both constitutional law scholars and the justices themselves. Much of the criticism is legitimately based on the "neutrality" interpretation that the Supreme Court has sought to maintain in

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ment Clause.").

115. *Schempp*, 374 U.S. at 225.

116. *Jager*, 862 F.2d at 832.

117. Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

its establishment clause decisions. Chief Justice Rehnquist has criticized this "neutrality" interpretation as being unsound and with no historical foundation. Thus, there is a great need to fashion a workable test or theory of analysis to resolve the considerable confusion and inconsistencies, which presently exist in establishment clause jurisprudence. One commentator has suggested that the Supreme Court should abandon its "neutrality" stance in favor of a "preferential" approach. Applying preferentialism, which Chief Justice Rehnquist has asserted is the true meaning of the establishment clause, is one theory of analysis which could provide both "unified and principled results," thus avoiding the egregious results that have been produced by the existing neutrality interpretation.

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