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TAKING A DAY OFF TO PRAY:  
CLOSING SCHOOLS FOR RELIGIOUS OBSERVANCE IN  
INCREASINGLY DIVERSE SCHOOLS

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I. INTRODUCTION

States and public schools across the Nation consistently debate the number of days students must be in attendance, the length of the day, and the configuration of those days to maximize learning opportunities. Establishing the school calendar within each state's statutory minimum can be challenging as many states still maintain somewhat traditional (albeit antiquated) calendars, which commence the school year around Labor Day and conclude shortly after June begins.<sup>1</sup> Public schools are generally in session for 180 school days.

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<sup>1</sup> The summer break that students (and teachers) have come to expect was originally tied to the agrarian harvest, allowing students time off to help their families with planting and crop harvest. Daphne Sashin, *Back to School: Why August is the New September*, CNN (Aug. 5, 2015, 5:02 PM), <http://www.cnn.com/2015/08/04/living/school-start-dates-august-parents-feat/index.html> (explaining that when public education started in the 19<sup>th</sup> century, public education calendars differed depending upon the community. Some urban schools were in session up to 240 days, while their rural counterparts were open about five months a year, over two sessions, allowing for children to help with the planting in the spring and harvesting in the fall. A concern for the professionalization of teachers, periodic financial shortfalls, and the perceived ill effect of too much schooling on teachers and students led public schools to eliminate the summer session. In the early 20<sup>th</sup> century rural and urban schools came into alignment, which provided everyone with the 180-day calendar).

Some states have been more creative in their scheduling by reducing the number of days required of student attendance in favor of expanded school days, citing reduced costs. Attempting to schedule 180 school days in the period of late August through early June does not provide schools with much flexibility should they be required to close for exigent circumstances such as inclement weather. Providing students with additional days off for holidays and religious observances only increases the complexity of meeting the required number of school days in a respective state given these calendar constraints.

Public school administrators have to consider numerous factors when deciding when class ought to be in session. Public schools schedule days off for several reasons—in many cases to coordinate with national civic holidays, such as Labor Day and Memorial Day. Less uniformly, public schools may also be off for recognition of federal holidays like Veterans' Day, Columbus Day, or Martin Luther King Day. When religion is added into the mix of considerations, then rational planning for school calendars becomes more challenging.<sup>2</sup> The most common religious holiday for which students in public schools are released from attendance is Christmas. Public schools often provide a two-week break between the Christmas and New Year's holidays and generally schedule a two to five-day break at Thanksgiving. Due to the public recognition of Christmas as both a secular and non-secular holiday, there is less consternation among individuals who perceive the release of students during this period as sectarian.<sup>3</sup> Justice Richard Posner of the 7th Circuit Court of Appeals noted that holidays like

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<sup>2</sup> John R. Rodwan, Jr., *Should Public Schools Close For Christian, Jewish, and Muslim Holidays?*, HUMANIST (Mar. 23, 2015), <https://thehumanist.com/news/religion/should-public-schools-close-for-christian-jewish-and-muslim-holidays>.

<sup>3</sup> See *Metz v. Leninger*, 57 F.3d 618, 620 (7<sup>th</sup> Cir. 1995) (noting that “[s]ome holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public . . .”).

Christmas, Thanksgiving, and Easter have lost (at least to some extent) their religious connotations and have taken on the trappings of secular holidays.<sup>4</sup> The Christian holidays of Christmas and Good Friday are the religious holidays most commonly recognized in the United States by the closure of government offices and agencies.<sup>5</sup> Many schools provide students with the week before or after Easter off for spring break. In fact, school closure on Sundays can be tied back to the Protestant origins of the Nation's public-school system.<sup>6</sup> However, for students of all faith groups, particularly non-Christian students, observance of religious holidays requires them to choose between going to class and honoring their faith.<sup>7</sup>

Some schools determine which religious holidays to close based on the percentage of students who adhere to a particular faith or tradition.<sup>8</sup> Conversely, other schools have elected to abandon school calendars that provide days off for religious holidays all together; it is becoming nearly impossible for schools, especially larger, urban schools, to recognize all religions in a respective community by providing days off.<sup>9</sup> Instead, some districts are opting to accommodate students' religious observance needs as they arise.<sup>10</sup> However, there are

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<sup>4</sup> *Id.* at 618.

<sup>5</sup> *Id.* at 620.

<sup>6</sup> *Id.* (noting that "Protestants baked Christian holy days into the school calendar when they founded public schools in the 19<sup>th</sup> century").

<sup>7</sup> Casey Tolan, *As Public School Students Get Christmas Break, Other Religions Ask Why Not Us?*, FUSION (June 25, 2015, 6:11 PM), <https://splinternews.com/as-public-school-students-get-christmas-break-other-re-1793848675>.

<sup>8</sup> *Id.* (noting that in Dearborn Schools (Michigan), where half the students are Muslim, schools close on Muslim holy days. However, note that adherence to a particular faith tradition generally can vary. Some students (and their families) may adhere more strictly to the tenets of a faith tradition while others may be more casual in their religious observance. This may result in a discrepancy between the number of students who generally identify with a particular faith and the number of students who would be absent from school on a religious holiday).

<sup>9</sup> Letitia Stein, *Secular Calendar Could Stay in County Schools*, ST. PETERSBURG TIMES, Oct. 2, 2007, at 4B; cf. Hillsborough Cnty. Schs. Policy 5225 (providing excused absences for the religious holidays of: Rosh Hashanah, Sukkot, Yom Kippur, Passover, Shavuot, Edi al-Fitr, Eid al-Adha, Ramadan, Good Friday, and Orthodox Good Friday).

<sup>10</sup> *Id.*

still district (and perhaps states) that close for religious holidays in a manner that is either intended to promote religious practice or could be reasonably viewed as such (see Table 1). Because Good Friday is the most commonly recognized (through government and/or school closures) non-secularized religious holiday, we will focus on how courts have addressed it as an exemplar for how courts might approach constitutional challenges to other non-secularized religious holidays. Table 1 below provides an overview of school holidays (with closure) for the 20 largest school districts in the United States for the 2017-18 school year.

Table 1. Holidays for the Largest Twenty School Districts in the United States

SCHOOL DISTRICT	HOLIDAYS									
	Rosh Hashanah	Yom Kippur	Eid Al-Adha	Diwali	Columbus Day	Veterans Day	Martin Luther King, Jr. Day	Lunar New Year	President's Day	Good Friday
New York City, NY	X	X	X		X	X	X	X	X	X
L.A. Unified Schools, CA						X	X		X	
Chicago Public Schools, IL					X		X		X	
Miami-Dade Cnty Schools, FL						X	X		X	
Broward Cnty Schools, FL						X	X		X	
Clark County Schools, NV						X	X		X	
Houston ISD, TX							X		X	X*
School District of Philadelphia, PA	X					X	X		X	X
Hawaii's Dept. of Ed., HI						X	X		X	X
Hillsborough County Schools, FL						X	X		X	
Detroit City Sch. Dist., MI							X			
Dallas ISD, TX							X			X**
Fairfax Cnty Schools, VA					X		X		X	X***
Palm Beach County, FL	X						X		X	X****
Orange Cnty of Public Ed., CA							X		X	
San Diego Unified Schools, CA						X	X		X	X*****
Cnty of Montgomery Schools, AL							X		X	X*****
Prince George's Cnty Public, MD	X*****	X*****	X*****	X*****			X		X	X
Duval Cnty Schools, FL							X		X	
Gwinnett Cnty Public Schools, GA							X		X	

\* Spring Holiday is on Good Friday

\*\* Incentive Weather Make-Up Day is on Good Friday

\*\*\*Spring Holiday is on Good Friday

\*\*\*\*Weather Day is on Good Friday

\*\*\*\*\*School is in session but no major activities can be scheduled

In March 2015, Mayor Bill de Blasio announced that, starting in the 2016-17 school year, students would get days off to observe two Islamic holidays. Mayor de Blasio stated, “The Muslim faith is one of the fastest growing in the city and in this nation. Many, many city students celebrate Eid-al Fitr at the end of Ramadan and Eid al-Adha at the end of the annual pilgrimage to Mecca.”<sup>11</sup> In explaining his decision, de Blasio explained:

We made a pledge to families that we would change our school calendar to reflect the strength and diversity of our city. Hundreds of thousands of Muslim families will no longer have to choose between honoring the most sacred days on their calendar or attending school. This is a common sense change, and one that recognizes our growing Muslim community and honors its contributions to our City.<sup>12</sup>

While Mayor de Blasio made the speech at PS/IS 30 in Brooklyn, where 36% of students were absent the last time Eid al-Adha fell on an instructional day, implying a secular purpose, his intent in adding the Muslim holidays to the list of school holidays seemed more focused on political acknowledgement than school district efficiency.<sup>13</sup>

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<sup>11</sup> Rodwan, *supra* note 2.

<sup>12</sup> *Mayor de Blasio and Chancellor Fariña Designate Eid Al-Fitr and Eid Al-Adha Official School Holidays*, N.Y.C. DEP'T EDUC. (Mar. 3, 2015), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/Mayor+De+Blasio+and+Chancellor+Fariña+Designate+Eid+Al-Fitr+and+Eid+Al-Adha+Official+School+Holidays.htm>.

<sup>13</sup> *Id.*

New York schools also close for the Lunar New year, a major holiday in Chinese and Korean cultures, and the Jewish holidays of Yom Kippur and Rosh Hashanah.<sup>14</sup> Incongruously, the holiday Diwali, the festival of lights celebrated by Hindus, Sikhs, and Jains in India, has not yet been included on the list of holidays celebrated by New York Schools despite prominent populations of Hindus, Sikhs, and Jains.<sup>15</sup> Charles Haynes noted, “Deciding who’s in and who’s out on school calendars is a complicated political and legal conundrum in a city (like many other American cities) exploding with religious and cultural diversity.”<sup>16</sup>

In comparison to New York City, in Cranston, Rhode Island, the school committee decided to eliminate the school breaks for Jewish holidays and Good Friday for the 2014-15 school year in an effort to be more equitable to all of its teachers and students.<sup>17</sup> However, in its zealously to achieve equity, the school district violated teachers’ individual rights when it failed to approve release time for teachers wanting to observe Good Friday, while teacher requests to take time off for Rosh Hashanah and Yom Kippur were granted.<sup>18</sup> Teachers complained that “respect for one religion amounted to

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<sup>14</sup> Rodwan, *supra* note 2.

<sup>15</sup> Charles C. Haynes, *Politics and Perils of Closing School for Religious Holidays*, FIRST AMENDMENT CENTER (May 1, 2014), <http://www.firstamendmentcenter.org/politics-and-perils-of-closing-school-for-religious-holidays/>.

<sup>16</sup> *Id.*

<sup>17</sup> Richard Salit, *Cranston Teachers Sue After Being Denied Good Friday Day-Off Requests + Poll*, PROV. JOURNAL (Mar. 16, 2015, 12:19 PM), <http://www.providencejournal.com/article/2015316/NEWS/150319403> (the Cranston Teachers’ Alliance sued the School Department, arguing that the School Department prevented members from freely observing Good Friday. The Alliance noted that nearly 200 requests for the contractual religious days were denied for Good Friday, in spite of the fact that teachers who observed the Jewish high holidays were granted their requests for time off. Those that requested to be excused from work on Good Friday were required to submit to human resources some sort of documentation to support their intention to observe the holy day. Those who did respond with items like church bulletins or other notices were denied and told they could practice their faith outside of the school’s day).

<sup>18</sup> *Id.*

disrespect for another.”<sup>19</sup> A group of angry teachers demanded the Good Friday holiday be reinstated the following year.<sup>20</sup> The School Committee and the Cranston Teachers’ Alliance agreed to reinstate the school holidays (with closure) for Good Friday, Rosh Hashanah, and Yom Kippur in the years that followed.<sup>21</sup>

In this article, we examine the legal issues associated with closing schools for religious holidays as school districts become more diverse like New York and attempt to treat teachers more equitably like Cranston. In Section II, we review Establishment Clause jurisprudence over time and how it has been applied to different legal issues. Specifically, we discuss the Supreme Court’s opinions regarding Sunday Blue Laws, religious displays on public property, and school prayer. We also provide an in-depth overview of two federal appellate court cases directly addressing the constitutionality of government closure for Good Friday. In Section III, we distill the legal rules established in the various lines of cases and present a possible three-part framework for analyzing the constitutionality of school closures for religious holidays. We highlight what we consider to be major weaknesses in the implied assumptions supporting previous Establishment Clause tests and provide some suggestions for states and school districts as they consider when and why to close schools for religious holidays. In Section IV, we conclude by providing some questions for future discussion.

## II. THE CONSTITUTIONALITY OF GOVERNMENT AND RELIGION

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<sup>19</sup> John G. Rodwan, *Should Public Schools Close for Christian, Jewish, and Muslim Holidays*, HUMANIST (March, 23, 2015), <https://thehumanist.com/news/religion/should-public-schools-close-for-christian-jewish-and-muslim-holidays>.

<sup>20</sup> *Id.*

<sup>21</sup> Courtney Callgiuri, *Cranston School to Close on Good Friday Next Year*, WPRI (Apr. 17, 2015, 8:36 AM), <http://wpri.com/2015/04/17/cranston-schools-to-close-on-good-friday-next-year/>.

The United States Supreme Court has never decided whether the Constitution prohibits states from recognizing Good Friday as a holiday by closing government offices and/or public schools.<sup>22</sup> In fact, Justin Brookman notes that the Court “has never explicitly decided whether government recognition of any sectarian holiday could impermissibly favor or endorse religion.”<sup>23</sup> However, a review of the Supreme Court’s Establishment Clause jurisprudence and lower federal court rulings on the validity of state recognized religious holidays provides guidance.<sup>24</sup>

### *A. Establishment Clause Jurisprudence Generally*

In his dissent to the denial of *certiorari* in *Utah Highway Patrol Association v. American Atheists, Inc.*,<sup>25</sup> Justice Thomas argues that by denying *cert* the Court was rejecting “an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.”<sup>26</sup> Indeed, the Supreme Court’s treatment of establishment clause claims has left as many questions as answers, because, as Justice Thomas put it, “this Court’s nebulous Establishment Clause analyses, turn on little more than ‘judicial predilections’.”<sup>27</sup> Indeed, Diana McCarthy points out that “the Court has espoused Establishment Clause

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<sup>22</sup> Justin Brookman, *The Constitutionality of the Good Friday Holiday*, 73 N.Y.U. L. REV. 193, 195 (1998); *See Metz v. Leninger*, 57 F.3d 618, 622 (7<sup>th</sup> Cir. 1995) (identifying *Cammack v. Waihee*, 932 F.2d 765, 777 (9<sup>th</sup> Cir. 1991) as only other case directly addressing whether Good Friday holiday violates Establishment Clause).

<sup>23</sup> *Id.* at 195 (citing *County of Allegheny v American Civil Liberties Union*, 492 U.S. 573, 601 (1989), holding that “[the] government may acknowledge Christmas as a cultural phenomenon”; *see also*, *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) identifying Christmas as a “long recognized as a National Holiday”).

<sup>24</sup> *Id.*

<sup>25</sup> 132 S. Ct. 12 (2011).

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Id.* Justice Thomas goes on to say “Because our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone’s guess, I would grant certiorari.”

principles of neutrality and protection of minority rights, yet has often reached results that conflicted with those principles.”<sup>28</sup>

Some of the Court’s struggle seems to arise from a general disagreement, both between the justices and, in some cases, justices’ internal struggles, about the essential meaning and purpose of the Establishment Clause.<sup>29</sup> Generally, there appears to be a tension between its desire to honor what some justices perceive as a national religious tradition<sup>30</sup> and an aversion to the perceived or actual entanglement between the government and religion.<sup>31</sup> Based on the existing Supreme Court case law, some general but not hard fast rules can be ascertained. Based on the particular facts of a case, the court may choose to apply one specific rule, a predictable combination of rules or parts of rules, or an ad hoc collection of legal principles.<sup>32</sup> Because the Supreme Court has not yet addressed school closures for non-secularized religious holidays, case law on other related issues provides some guidance on how the Court might rule in the future given the current state of Establishment Clause jurisprudence.

### *B. Blue Laws*

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<sup>28</sup> Diana McCarthy. *The Establishment Clause and Good Friday as a Legal Holiday: Has Accommodation Run Amok?* 65 TEMP. L. REV. 195, 196 (1998).

<sup>29</sup> Steve G. Gey. *Reconciling the Supreme Court’s Four Establishment Clauses*. 8 U. PA. J. CONST. L. 725 (2006).

<sup>30</sup> For example, in her concurring opinion in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004), Justice O’Connor argued that the inclusion of “under God” in the official Pledge of Allegiance is constitutional because “[c]ertain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty.”

<sup>31</sup> Gey, *supra* note 27, p. 769 argues, “The reason that the Court so vigorously discourages the government from endorsing religion has much more to do with what such endorsements communicate about the structure of government and the nature of citizenship than whether such endorsements directly compel individuals to engage in particular religious practices.”

<sup>32</sup> *Id.* at 761–65.

In the United States, Sunday closing laws or “Blue Laws” prohibited many businesses from opening, various products from being sold, and certain activities from occurring. The Blue Laws date back hundreds of years, when in 1656 the British Parliament restricted work on Sundays, provided those restrictions did not “hinder” any “works of piety, necessity or mercy.”<sup>33</sup> In the nineteenth-century, Sunday closing was an issue even at the federal level.<sup>34</sup> For example, in the late 1820s, Congress dealt with a contentious issue of whether there should be mail delivery on Sundays (this came to an end in 1912).<sup>35</sup> Likewise, in 1893, Congress appropriated money for the World’s Fair in Chicago, Illinois but stipulated that the fair was to remain closed each Sunday.<sup>36</sup>

In the twentieth-century, Blue Laws focused more on issues related to entertainment or shopping on Sundays.<sup>37</sup> The traditional deference to church activities on Sunday had largely disappeared.<sup>38</sup> People running businesses for entertainment or shopping requested relief from Blue Laws that prohibited the opening of everything from swimming pools to movie theaters and prevented the sale of items ranging from beer to motor oil.<sup>39</sup> For many people, attending church had become one of several options on Sunday morning.<sup>40</sup> Today, churches compete with other secular pursuits on Sunday mornings.<sup>41</sup> As states have repealed their Blue Laws, raising the opportunity

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<sup>33</sup> PETER WALLENSTEIN, *BLUE LAWS AND BLACK CODES: CONFLICT, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA* 38 (2004).

<sup>34</sup> *Id.*

<sup>35</sup> DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* (1987).

<sup>36</sup> ALEXIS MCCROSSEN, *HOLY DAY, HOLIDAY: THE AMERICAN SUNDAY* (2000) (returning the appropriation, the directors desired to keep the fair open every day).

<sup>37</sup> Wallenstein, *supra* note 31, at 38.

<sup>38</sup> Steve McMullin, *The Secularization of Sunday: Real or Perceived Competition for Churches*, *REV. REL. RES.* 43, 43 (2013).

<sup>39</sup> Wallenstein, *supra* note 31, at 38.

<sup>40</sup> *Id.*

<sup>41</sup> Jorg Stoltz, *A Silent Battle: Theorizing the Effects of Competition Between Churches and Secular Institutions*, *REV. REL. RES.* 253, 272 (2010).

cost of religious opportunity for religious participation, religious attendance has fallen.<sup>42</sup>

In the 1960s, the Supreme Court addressed the constitutionality of Blue Laws in four sequential cases: *Gallagher v. Crown Kasher Super Market, Inc.*,<sup>43</sup> *Braunfeld v. Brown*,<sup>44</sup> *Two Guys from Harrison-Allentown, Inc. v. McGinley*,<sup>45</sup> and the seminal case, *McGowan v. Maryland*.<sup>46</sup> In all four cases, local merchants sought injunctions against the enforcement of, or the overturning of convictions, under statutes that proscribed various business activities on Sunday. The Court was consistent in its rulings in all four cases—it rejected the various constitutional claims and upheld the laws, yet remained concerned that the intent of Blue Laws were intended to favor Christians and to encourage religious observance.<sup>47</sup> This notion was highlighted in *McGowan* as Chief Justice Warren wrote:

We do not hold that Sunday legislation may not be a violation of the “Establishment” Clause if it can be demonstrated that its purpose – evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect – is to use the State’s coercive power to aid religion.<sup>48</sup>

In each of the four cases, the Court confirmed that the challenged statutes had a religious origin, but

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<sup>42</sup> Johnathan Gruber & Daniel M. Hungerman, *The Church Versus the Mall: What Happens When Religion Faces Increased Secular Competition?*, 123 QUART. J. ECON. 831, 831 (2008).

<sup>43</sup> 366 U.S. 617 (1961).

<sup>44</sup> 366 U.S. 599 (1961).

<sup>45</sup> 366 U.S. 582 (1961).

<sup>46</sup> 366 U.S. 420 (1961).

<sup>47</sup> See *McGinley*, 366 U.S. at 592 (summarizing plaintiffs’ argument that Establishment Clause violation stemmed from alleged illegitimate purpose behind Sunday closing laws – to close businesses and create tranquil atmosphere to increase church attendance).

<sup>48</sup> *McGowan*, 366 U.S. at 453.

held that the modern purpose of the statutes was simply to “provide a uniform day of rest for all citizens.”<sup>49</sup> The Court noted that, over time, there had been a gradual acceptance of Sunday as a day of rest, diminishing the religious nature of the statutes.<sup>50</sup> In *McGowan*, the Court noted, “[I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country.”<sup>51</sup>

### *C. Religious Displays on Public Property*

The two well-known Supreme Court cases regarding religious displays on public property are helpful in building on the body of law introduced in the Blue Law opinions. In 1984, the Court considered the constitutionality of the inclusion of a crèche (nativity scene) as part of an annual Christmas display in the main Pawtucket, Rhode Island shopping district on government property.<sup>52</sup> The crèche was included as one of many symbols associated with the holiday season, including a Santa Claus house, a Christmas tree, candy-striped poles, carolers, reindeer pulling a sleigh, and a banner that read “SEASONS GREETINGS”.<sup>53</sup> The *Lynch* Court relied on the three-prong *Lemon* test<sup>54</sup> to determine whether the state action was constitutional under the Establishment Clause. The

<sup>49</sup> *Id.* at 445; see also *Gallagher*, 366 U.S. at 626–28; *McGinley*, 366 U.S. at 595–96.

<sup>50</sup> *Brookman*, *supra* note 20, at 197.

<sup>51</sup> *Id.*; *McGowan*, 366 U.S. at 197.

<sup>52</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984). This was the Court’s first case since the Blue Laws cases that the

Court addressed state-sponsored recognition of a religious holiday. *Brookman*, *supra* note 20, at 197.

<sup>53</sup> *Id.* at 671.

<sup>54</sup> While the Court did use the *Lemon* test, it noted “we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.” *Lynch*, 465 U.S. at 679. The three prongs of the *Lemon* test are: “[1] the statute must have a secular . . . purpose, [2] its principal or primary effect must be one that neither advances nor inhibits religion, [and (3), it] must not foster ‘an excessive government entanglement with religion.’ 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

*Lynch* Court concluded that the Pawtucket display did not violate the Establishment Clause.<sup>55</sup> In discussing the first prong of the *Lemon* test, the Court focused its inquiry on how the crèche fit within the context of the entire display and the Christmas season.<sup>56</sup>

The Court concluded that “When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.”<sup>57</sup> While the Court agreed that the display might advance Christian religions in a sense, it argued that governmental actions will occasionally result in the advancement of religion, and that such indirect, remote, or incidental benefit alone is not a violation of the Establishment Clause.<sup>58</sup>

Just five years later, the Court revisited the issue of the display of a crèche on government property. In *County of*

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<sup>55</sup> The *Lynch* Court relied heavily in what its interpretation of the founder’s intent when writing the Establishment Clause. *Lynch*, 465 U.S. at 673–78. The Court noted, “We have refused ‘to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.’” *Id.* at 678 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 671 (1970)).

<sup>56</sup> *Id.* at 679. The Court likened its analysis to its analysis in *Stone v. Graham*, 449 U.S. 39 (1980), in which it “invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls...[because] the Commandments were posted purely as a religious admonition, not ‘integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.’” *Lynch*, 465 U.S. at 679, quoting *Graham*, 449 U.S. at 42. The Court went on to note that it had “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.

<sup>57</sup> *Id.* at 680. The Court summarized, “The narrow question is whether there is a secular purpose for Pawtucket’s display of the crèche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.” *Id.* at 681.

<sup>58</sup> *Id.* at 683 (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). The Court goes on to note, “Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is not more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ’s Mass,’ or the exhibition of literally hundreds of religious paintings in governmentally supported museums.” *Id.*

*Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter et al.*,<sup>59</sup> the Court considered the constitutionality of a crèche placed on the Grand Staircase of the Allegheny County Courthouse, noted to be the “most public” part of the courthouse.<sup>60</sup> While the county officials sometimes decorated around the crèche with greenery and poinsettias, no other symbols of the holiday season were included in the display (like Santa Claus or reindeer) as they had been in *Lynch*.<sup>61</sup> Also using the *Lemon* test, the *Allegheny* Court focused most specifically on government practices that have either the purpose or effect of endorsing religion, noting that governments are “precluded . . . from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”<sup>62</sup> The Court noted, “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”<sup>63</sup> Justice Blackmun, writing for the majority, discussed two weaknesses in the *Lynch* opinion that Justice O’Connor outlined in her concurring opinion which, he argues, render *Lynch* unhelpful in guiding subsequent Establishment

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<sup>59</sup> 492 U.S. 573 (1989). In the same case, the Court was also asked to consider the constitutionality of a holiday display at the Allegheny City-County Building, a block away from the courthouse that included a 45-foot decorated Christmas tree with a sign reading “Salute to Liberty”. An 18-foot menorah was later added to this display. The menorah was owned by Chabad, a Jewish group but was stored, erected, and removed each year by the city. *Id.* at 587.

<sup>60</sup> *Id.* at 579. The County had permitted the Holy Name Society, a Roman Catholic group to display the crèche at the courthouse since the 1981 Christmas season. This particular crèche included the holy family, farm animals, shepherds, wise men, an angel, and a banner proclaiming “Gloria in Excelsis Deo!” *Id.* at 580. While the crèche did have a place indicating that it was donated by the religious organization, it remained displayed on the government property for nearly six weeks during the holiday season.

<sup>61</sup> *Id.* at 580. Furthermore, the county used the crèche as the setting for an annual Christmas carol program.

<sup>62</sup> *Id.* at 593 (quoting *Wallace*, 472 U.S. at 70). The Court also notes, “Whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same.” *Id.* at 593.

<sup>63</sup> *Id.* at 593–94 (quoting *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring)).

Clause cases. Blackmun notes that while Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurring opinion in which she provided an alternative, "sound analytical framework for evaluating governmental use of religious symbols."<sup>64</sup> First, by comparing the holiday display to other "endorsements" approved by the Court in the past, the *Lynch* court implied that one could distinguish between permissible or impermissible endorsements of religion.<sup>65</sup> However, Blackmun noted:

Justice O'Connor's] concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion. Rather the concurrence recognizes any endorsement of religion as "invalid" because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>66</sup>

Next, Justice O'Connor described a method for determining when the government's use of an object that has religious meaning or symbolism has the effect of endorsing religion.<sup>67</sup> She noted that the main consideration should be "what viewers may fairly understand to be the purpose of the display"<sup>68</sup> based on the "context in which the contested object appears."<sup>69</sup> Based on the context and location of the county's

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<sup>64</sup> *Id.* at 595.

<sup>65</sup> *Id.* at 594.

<sup>66</sup> *Id.* at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *Lynch*, 465 U.S. 465 at 692 (O'Connor, J., concurring)).

<sup>69</sup> *Id.* Justice O'Connor applied this framework for analyzing the Pawtucket crèche in *Lynch*, concluding that the crèche was a party of the city's holiday celebration as a whole.

crèche display, the Court concluded that it was a violation of the Establishment Clause because it sent an “unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.”<sup>70</sup> The court went on to note that Allegheny County chose “to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause.”<sup>71</sup>

It is important to note that there was certainly not a consensus in the analysis of this case. Justice Blackmun delivered the opinion of the Court for the part of the opinion that specifically discussed the legality of the crèche display (Parts III-A, IV, and V). He was joined (for these parts only) by Justices Brennan, Marshall, Stevens, and O’Connor. However, Justices Stevens, O’Connor, Brennan, and Kennedy all wrote separate opinions to clarify their positions. Many of the Justices concurred in part and dissented in part to either Blackmun’s majority opinion or to one of the other opinions. While this opinion does little to clarify the positions of individual judges with respect to their positions regarding the Establishment Clause, the Justices seem to agree that the context in which the government uses a religious symbol is relevant for determining whether it can reasonably be considered to have a secular purpose.<sup>72</sup> This approach could be helpful in analyzing school

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<sup>70</sup> *Id.* at 600. In coming to this conclusion, the Court considered the context of the display (particularly the banner over the crèche proclaiming “Gloria in Excelsis Deo!” (“Glory to God in the Highest!”)), its display as a singular attraction, and its prime location in one of the most public and beautiful parts of the courthouse).

<sup>71</sup> *Id.* at 601–02. Using the same framework for analysis, the majority of the Court concluded that the menorah display did not have the “prohibited effect of endorsing religion, given its ‘particular physical setting.’” *Id.* at 575. Its display with a Christmas tree and a patriotic sign made it more like the seasonal display upheld in *Lynch*.

<sup>72</sup> *See id.* at 597. Blackmun noted that following *Lynch*, the Court clarified its position, making clear that “when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the

closures for religious holidays if the Court were willing to make the jump between the endorsement effect of religious symbols and the endorsement effect of state and/or district policy that benefits those of a particular faith over others.

In looking at the Establishment Clause jurisprudence as a whole, we are not confident that the Court would be willing to make that leap. However, we argue that Justice O'Connor's framework, focusing on the endorsement effects on both adherents and nonadherents of a particular faith, could be a powerful and useful framework for considering school closures on religious holidays.

#### *D. Good Friday and the Courts*

The essence of Christianity is found in the festival known as Easter in which Jesus was raised from the dead.<sup>73</sup> For Christendom, the Friday before Easter Sunday commemorates the day that Jesus died for humanity's sins. Brookman posits, "Perhaps because the crucifixion does not translate as easily into a day of celebration as birth (Christmas) or rebirth (Easter), Good Friday has remained an exclusively Christian holiday with no secular trappings."<sup>74</sup> Due to this, government recognition of Good Friday has received a higher level of judicial scrutiny in comparison to holidays that have both

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nonadherents as a disapproval, or their individual religious choices." *Id.* at 597 (quoting *Grand Rapids Sch. Dist. V. Ball*, 473 U.S. 373, 390 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997)).

<sup>73</sup> BIBLE DICTIONARY 255 (Paul J. Achtemeier ed., rev. ed., 1996) ("The name 'Easter' derives from the

Anglo-Saxon goddess of Spring (Eostre or Ostara), but the Christian festival developed from the Jewish

Passover...because according to the Gospels the events of Jesus' last days took place at the time of Passover).

<sup>74</sup> Brookman, *supra* note 20, at 203. While we seek to examine the question of how the Court might handle all non-secularized religious holidays as school holidays, we focus specifically on how courts have ruled with regards to Good Friday because it has been the most widely recognized non-secularized religious holiday in state and local governments and school districts.

secular and non-secular traditions. Countless states and localities provide Good Friday legal holiday status by closing government offices and schools.<sup>75</sup> Critics argue that by giving legal recognition to a purely sectarian holiday such “as Good Friday, the state or locality in effect ‘establishes’ Christianity as the government’s religion.”<sup>76</sup> The Supreme Court has never heard a case on the constitutionality of state and localities closing government offices and schools to recognize Good Friday, yet two claims in the lower courts provide some guidance.

*1. Cammack v. Waihee*

In 1941, the Territory of Hawaii enacted a bill that declared Good Friday, the Friday preceding Easter Sunday, be “set apart and established as [a] territorial holiday.”<sup>77</sup> When Hawaii attained statehood, the legislation was ratified and became a part of the Hawaii Revised Statutes.<sup>78</sup> Thus, Good Friday has been a public holiday for over seventy-six years.<sup>79</sup> While, Hawaii section 8-1 does not appropriate funds to carry out its purpose,<sup>80</sup> by providing for state holidays, the statute has a fiscal impact in that many state and local government offices are closed and those employees receive paid time off.<sup>81</sup>

In 1970, the Hawaii Legislature enacted a public collective bargaining law which mandated the terms and conditions of public employment be determined through a collective bargaining process. The number of dates of paid leave days are among the mandatory subjects of collective bargaining, either expressly or through incorporation of section

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<sup>75</sup> *Id.* at 193.

<sup>76</sup> *Id.*

<sup>77</sup> Holidays Designated, HAW. REV STAT. § 8-1 (1941).

<sup>78</sup> *Id.*

<sup>79</sup> The other states recognizing Good Friday as a public holiday are: Connecticut, Delaware, Florida, Kentucky, Hawaii, Indiana, Louisiana, New Jersey, North Carolina, North Dakota, Tennessee, and Texas.

<sup>80</sup> *Cammack v. Waihee*, 932 F.2d 765, 767 (9<sup>th</sup> Cir. 1991).

<sup>81</sup> *Id.*

8-1. Good Friday is included as one such paid leave day. These collective bargaining agreements cover approximately sixty-five percent of Hawaii's public employees.

The Hawaii statute at the heart of the *Cammack* case is Hawaii Revised Statute §8-1, which denoted that Good Friday, the Friday preceding Easter, was to be set apart and established as a state holiday.<sup>82</sup> Neil Cammack and other taxpayers filed suit challenging the specific provision that established Good Friday as a holiday.<sup>83</sup> The plaintiffs contended that the statute violated the Hawaii state constitution<sup>84</sup> and the Establishment Clause of the United States Constitution.<sup>85</sup> Principally, the plaintiffs argued that the state and local government's

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<sup>82</sup> Holidays Designated, HAW. REV STAT. § 8-1 (1941).

<sup>83</sup> *Cammack*, 932 F.2d at 769-72.

<sup>84</sup> HAW. CONST. art. I, § 4.

<sup>85</sup> *Cammack*, 932 F.2d at 769-72. The Establishment Clause reads in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." U.S. CONST., amend. I. Those who encourage religious practices in public schools advocate for a stricter interpretation of the Establishment Clause, contending that it should only apply to the federal government and its agents and that states and public schools (as agents of the state) are not bound by this clause. The notion that states were not obligated to comply with the Bill of Rights had some plausibility early in American jurisprudential history. Chief Justice John Marshall wrote:

These amendments contain no expression indicating an intention to apply them to the state governments...[T]he fifth amendment...is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. *Barron v. Baltimore*, 32 U.S. 243 (1833).

In *Permoli v. First Municipality of New Orleans*, 44 U.S. 589, 609 (1845), the Court held that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." Of course, since the adoption of the Fourteenth Amendment, state agents have also been bound by the regulations set forth in the Bill of Rights.

Additionally, all the states assumed the dual obligation of supporting the free exercise of religion and maintain religious neutrality in their respective constitutions. LEO PFEFFER, CHURCH, STATE, AND FREEDOM 140 (1953). Every state that entered the union after the Constitution was ratified included a basic law or prohibition in its constitution regarding religion. *Id.* at 142. No state attempted to establish any denomination or religion; on the contrary, all states expressly forbade such an attempt. *Id.* "The decision was in all cases voluntary; and it was made because the unitary principle of separation and freedom was as integral a part of American democracy as republicanism, representative government, and freedom of expression." *Id.*

expenditure of \$4.25 million to pay for the holiday was unconstitutional.<sup>86</sup> By the federal and state governments paying for workers to observe a purely Christian holiday, the plaintiffs argued that the state was endorsing one religion over another and potentially sending a message of disapproval to the state's non-Christian citizens.<sup>87</sup>

The government argued that the *Cammack* case was controlled by *Marsh v. Chambers*.<sup>88</sup> The *Marsh* Court upheld a practice by the Nebraska state legislature opening its daily sessions with a prayer from an official chaplain, who was compensated from the state treasury.<sup>89</sup> The Supreme Court held that legislative prayer was, “deeply embedded in the history and tradition of this country[,] [f]rom colonial times through the founding of the Republic and ever since.”<sup>90</sup> While the recognition of Good Friday as an important day in Hawaii goes back to before it was a state,<sup>91</sup> the *Cammack* court refused to equate the Hawaii statute with the ruling in *Marsh* and rejected the government's contention.<sup>92</sup>

The *Cammack* court continued its analysis using the *Lemon* test, first focusing on the secular purpose prong.<sup>93</sup> The court began by reviewing the legislative history of the 1941 bill that established Good Friday as a state holiday to determine the original purpose or intent of the law. In earlier proposed

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<sup>86</sup> Brookman, *supra* note 20, at 205 n. 77.

<sup>87</sup> *Id.* *Cammack*, 932 F.2d at 769–72.

<sup>88</sup> 463 U.S. 783 (1983).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 786.

<sup>91</sup> *Cammack*, 932 F.2d at 772.

<sup>92</sup> *Id.* (noting that the court would not extend a ruling based upon the unique history surrounding legislative prayer. The impact of the activities challenged in *Marsh* were largely confined to the internal workings of the legislature. A public holiday can affect the entire populace, therefore the court rejected the government's contention that *Marsh* controlled the disposition of *Cammack*).

<sup>93</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing a three-prong test for determining whether a state statute is constitutional under the Establishment Clause. The three prongs are: 1) the statute must have a secular purpose, 2) its principal or primary effect must be one that neither advances nor inhibits religion, and 3) it must not foster excessive government entanglement with religion).

iterations of the law, the Hawaii legislature failed to establish Good Friday as an official state holiday, largely because of timing and the number of other spring holidays.<sup>94</sup>

The court determined that nothing in the legislative history concerning making Good Friday a state holiday suggested a sectarian motive.<sup>95</sup> The court also considered the support of the labor unions to be an indication of secular purpose. The labor unions embedded statutory holidays into their collective bargaining agreements with state and local governments.<sup>96</sup> The *Cammack* court noted that the labor unions endorsement of this statute was “a strong indicant that the purpose animating the challenged act [was] not so much state sponsorship of religion as state sensitivity to the concerns of organized labor.”<sup>97</sup> The *Cammack* court’s argument that organized labor’s acceptance of the tenets of this statute demonstrated the law’s secular intention is misguided. It is hard to fathom that any labor union would disapprove of a non-work, yet paid holiday. The *Cammack* court concluded that the statute did not violate the “primary purpose” prong of the *Lemon* test by citing *McGowan v. Maryland*.<sup>98</sup> Similar to the Sunday closing laws, the court found that the purpose of the Good Friday holiday was to provide a uniform day of rest for all, regardless of the religious belief.<sup>99</sup>

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<sup>94</sup> *Cammack*, 932 F.2d at 775 (noting the opposition for making Good Friday a state holiday in 1941 was the timing as the state was seeking to make Lincoln’s and Washington’s birthday state holidays. The governor’s primary objection was that “the holidays were getting a bit thick about that time of year”; see also Governor’s Veto Message, H. Bill No. 39 (May 3, 1939) (“I have had many objections from business men throughout the Territory to creating additional holidays and I see no reason for adding to those which we now have”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 776.

<sup>97</sup> *Id.*

<sup>98</sup> 366 U.S. 420, 445 (1961) (“even to the extent that an improper purpose could be gleaned from the statute’s legislative history, that would not compel a finding of improper purpose”).

<sup>99</sup> *Cammack*, 939 F.2d at 776.

While the court did not that a Good Friday designation seemed potentially favorable to Christians, it was not concerned with this possibility:

It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an ‘unavoidable consequence of democratic government’ the majority’s political accommodation of its own religious practices and corresponding ‘relative disadvantage [to] those religious practices that are not widely engaged in.’ ‘[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.’<sup>100</sup>

To support this position, the court relied on *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*<sup>101</sup> in which the Supreme Court held that when applying the first prong of the *Lemon* test, the secular purpose need not be unrelated to religion. The *Lemon* test’s “purpose requirement aims at preventing the relevant governmental decision maker . . . from abandoning neutrality and acting with the intent of promoting neutrality and acting with the intent of promoting a particular point of view in religious matters.”<sup>102</sup>

*Zorach v. Clausen*<sup>103</sup> amplified this position when the Court rejected an Establishment Clause contest to a public

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<sup>100</sup> *Id.* (quoting *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990), superseded by statute as noted in *Holt v. Hobbs*, 135 S. Ct. 853); see also *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987).

<sup>101</sup> 483 U.S. 327, 335 (1987).

<sup>102</sup> *Id.*

<sup>103</sup> 343 U.S. 306 (1952).

school program that allowed students a limited time off campus for religious instruction. Writing for the majority, Justice Douglas explained that a legislative act motivated by a legitimate secular purpose is not unconstitutional simply because it accommodates the religious practices of some citizens:

When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual. . . . The government must be neutral when it comes to competition

between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship instruction.<sup>104</sup>

The *Zorach* Court continued its examination by rejecting the conviction that “separation of Church and State means that public institution can make no adjustments of their schedules to accommodate the religious needs of the people.”<sup>105</sup> The Court described this philosophy as hostile to religion and could not be read the Bill of Rights.<sup>106</sup> In comparison, the Governor of

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<sup>104</sup> *Id.* at 313–14 (Douglas, J., concurring).

<sup>105</sup> *Zorach*, 343 U.S. at 315.

<sup>106</sup> *Id.*; see also *Gallagher v. Crown Kasher Super Mkt. of Massachusetts, Inc.*, 366 U.S. 617, 627 (“But because the State wishes to protect those who do worship on Sunday does

California was challenged after she ordered the closing of state offices from noon to 3:00 p.m. on Good Friday.<sup>107</sup> Employees were paid for the three hours of closure.<sup>108</sup> The personnel manual for California identified that state offices would be closed during that time for worship.<sup>109</sup> Therefore, the California Court of Appeal held that the order “cannot plausibly be characterized as serving any ‘secular purpose.’”<sup>110</sup> In contrast, the *Cammack* court concluded that the Hawaiian public employees were not encouraged in any way to use for the holiday for worship—there was nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. Thus, the court concluded that it did not violate the first prong of the *Lemon* test.<sup>111</sup>

The *Cammack* court then moved on to the second prong of the *Lemon* test, which requires an examination of whether the primary effect of the Hawaii Good Friday statute advances religion. In *School Dist. of Grand Rapids v. Ball*, the Court set forth that advancement of religion may be found when a “symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices.”<sup>112</sup> The *Cammack* court returned to an analysis of the Sunday closing laws and whether they violated the Establishment Clause because Sunday is the Sabbath day for Christians.<sup>113</sup> As noted earlier, the Supreme Court

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not mean that the State means to impose religious worship on all”) (citing *Everson v. Board of Educ. of Ewing Twp.*, 330 U.S. 1 (1947)).

<sup>107</sup> *Mandel v. Hodges*, 54 Cal. App. 3d 596 (1976).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Cammack v. Waihee*, 932 F.2d 765, 777 (9th Cir. 1991).

<sup>112</sup> 473 U.S. 373 (1985).

<sup>113</sup> *McGowan v. Maryland*, 366 U.S. 420, 431 (1961).

identified that the proponents of the Sunday closing laws had grown to include secular (particularly labor) organizations.<sup>114</sup> The *McGowan* Court held:

Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes, and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.<sup>115</sup>

These laws had an overriding “purpose and effect” of establishing “a uniform day of rest for” the community rather than that of promoting a Christian religion.<sup>116</sup>

The *Cammack* court contended that Hawaii’s sanction of Good Friday as a legal holiday was analogous to the Sunday closing laws.<sup>117</sup> Using the *McGowan* philosophy, the *Cammack* court concluded that due to so many Hawaiians observing Good Friday and absenting themselves from work, “the legislature cannot be faulted for not selecting a different spring day for a ‘common day of rest.’”<sup>118</sup> Presumably, most Christians would take part, or the whole, day off of work on Good Friday to attend religious services, and Christians encompass the majority of the public workforce.<sup>119</sup> Furthermore, the court embraced the State’s argument that Good Friday had become a popular holiday weekend that many Hawaiians used for travel, shopping, and outdoor recreational activities.<sup>120</sup>

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<sup>114</sup> *Id.* at 431–35.

<sup>115</sup> *Id.* at 452.

<sup>116</sup> *Id.* at 444–45.

<sup>117</sup> *Cammack v. Waihee*, 932 F.2d 765, 778 (9th Cir. 1991).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 778–79.

The *Cammack* court next tackled the argument that giving state employees paid leave on Good Friday constituted an endorsement of Christianity. The court looked to section 8-1's inclusion into collective bargaining agreements and determined that it was simply a paid leave day for state employees and not an endorsement of religion—Christian employees were not singled out.<sup>121</sup> Unlike the facts in the *Mandel* case, which emphasized a limited closing period and encouragement to worship,<sup>122</sup> in *Cammack*, all employees, not just Christian employees, were covered by the collective bargaining agreements involved irrespective of their individual beliefs.<sup>123</sup>

Finally, the *Cammack* court considered the context of the Good Friday holiday in determining its endorsement effect.<sup>124</sup> Analyzing the context of a governmental action's endorsement of religion can be seen in *County of Allegheny v. American Civil Liberties Union*<sup>125</sup> and *Lynch v. Donnelly*.<sup>126</sup> Both cases dealt with the issue of religious displays on government property during the winter holiday season. In each case, the Supreme Court approved the display of religious icons when they were suitably balanced by secular displays.<sup>127</sup> Justice Brennan opined:

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<sup>121</sup> *Id.* at 779.

<sup>122</sup> *Mandel v. Hodges*, 54 Cal. App. 3d 596, 612 (1976).

<sup>123</sup> *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down a program mostly benefitting parents of parochial school children); *cf.* *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (permitting textbook loans to parochial school children under a program which benefits all); *Cammack v. Waihee*, 932 F.2d 765, 779 (9th Cir. 1991) (noting that the paid leave is for the entire day and not only for the three hours associated with the traditional Christian observance. Employers did not encourage, nor mandate attendance at any form of religious activity).

<sup>124</sup> *Cammack v. Waihee*, 932 F.2d 765, 779 (9th Cir. 1991).

<sup>125</sup> *Cty. of Allegheny v. Amer. Civil Liberties Union*, 492 U.S. 573 (1989), abrogated by *Town of Greece v. Galloway*, 134 S. Ct. 1811.

<sup>126</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>127</sup> *See Cammack*, 932 F.2d at 779; *Lynch*, 465 U.S. at 680 (upholding the display of a crèche surrounded by other secular symbols of the Christmas season); *Allegheny*, 492 U.S. at 575 (upholding the display of a menorah that was a part of a seasonal display that also included a large Christmas tree and a patriotic sign). Note that, as discussed above, the *Allegheny* court

It is worth noting that Christmas shares the list of federal holidays with such patently secular patriotic holidays as the Fourth of July, Memorial Day, Washington's Birthday, Labor Day, and Veteran's Day. We may reasonably infer from the distinctly secular character of the company that Christmas keeps on this list that it too is included for essentially secular reasons.<sup>128</sup>

Because "Good Friday is surrounded by patriotic and historic dates, which are selected for the importance to the citizens of Hawaii," the *Cammack* court determined that "[t]he government's action might best be termed a mere 'acknowledgment' of religion."<sup>129</sup> The court concluded that in this context, an observer would not regard the inclusion of Good Friday in the list of state holidays as an endorsement of religion—it is simply "a holiday observed widely enough (and long enough) that . . . establishing a uniform day of rest is appropriate . . . ."<sup>130</sup>

The *Cammack* court ultimately concluded that the Good Friday holiday's main effect was secular and that the holiday passed constitutional muster because the justices determined it would be inappropriate to hold otherwise, "merely because the holiday may make it easier to worship on that day for those employees who may wish to do so."<sup>131</sup> Citing *McGowan*, the *Cammack* court held, "[t]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or

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did rule that a stand-alone crèche displayed in a prominent location with religious messaging did constitute an endorsement of religion in violation of the Establishment Clause. *Id.* at 602.

<sup>128</sup> *Lynch*, 465 U.S. at 710 n. 16 (Brennan, J., dissenting).

<sup>129</sup> *Cammack*, 932 F.2d at 780 (citing *Lynch*, 465 U.S. at 692–93).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

harmonize with the tenets of some or all religions.”<sup>132</sup> Further, “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid.”<sup>133</sup> The *Cammack* court therefore held that the state’s recognition of Good Friday by making it a paid holiday did not violate the effect prong of the *Lemon* test.

The *Cammack* court turned to the third and final prong in the *Lemon* test, considering whether the Good Friday holiday “foster[ed] an excessive government entanglement with religion.”<sup>134</sup> The entanglement prong seeks to minimize the involvement of religious officials with secular authorities and secular authority in religious affairs. Government entanglement is prominent when religious and public employees must work together.<sup>135</sup> The plaintiffs argued that the recognition of Good Friday as a paid holiday violated the entanglement prong because the timing of the holiday depended upon the church’s calculation of when Easter occurs.<sup>136</sup> The necessary interaction between the state and religious bodies, in the plaintiff’s view, constituted excessive administrative entanglement.<sup>137</sup> The court looked for examples in which the Supreme Court found excessive entanglement. Specifically, it looked at the Court’s opinion in *Aguilar v. Felton*, involving excessive administrative entanglement,<sup>138</sup> and *Lynch v. Donnelly*, involving religious

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<sup>132</sup> *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

<sup>133</sup> *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

<sup>134</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

<sup>135</sup> *See Aguilar v. Felton*, 473 U.S. 402, 412–14 (1985) (requiring on-site monitoring of sectarian schools by public authorities and coordinated planning by public and sectarian figures).

<sup>136</sup> *Cammack*, 932 F.2d at 781.

<sup>137</sup> *Id.*

<sup>138</sup> *See, e.g., Aguilar*, 473 U.S. at 402, 414 (holding that a New York City program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an “excessive entanglement of church and state” and violated the Establishment Clause); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (concluding that funds given to private, religiously-affiliated schools would not become wrapped up in religious uses simply because they were presented to a religious school); *Levitt v. Comm. for Pub. Educ.*

displays on government property.<sup>139</sup> Reflecting upon these opinions, the *Cammack* court determined that: “Hawaii’s Good Friday holiday, to the extent that the actual date of the holiday would be determined by resort to church calendars, any such entanglement would surely not be the kind of ‘comprehensive’ and ‘enduring’ entanglement the first amendment prohibits.”<sup>140</sup>

The plaintiffs also argued that the state violated the third prong of the *Lemon* test based on the political divisiveness caused by the law’s enactment. The schism arguably was created because non-Christian groups, like Buddhists and Baha’is, tried “to have significant days in their religious calendars declared legal holidays by the state legislature.”<sup>141</sup> Political divisiveness has been considered in Establishment Clause cases but was never relied upon “as an independent ground for holding a government practice unconstitutional.”<sup>142</sup> The *Cammack* court was unconvinced that political divisiveness resulting from the enactment of Good Friday as a state holiday directly “led to the non-Christian sects’ attempts to have certain days declared state

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& Religious Liberty, 413 U.S. 472 (1973) (holding that various New York and Pennsylvania statutes which provided direct cash payments to private religious schools and tax benefits to parents of students at such schools violated the Establishment Clause of the First Amendment).

<sup>139</sup> *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (stating “[t]here is nothing here . . . like the ‘comprehensive, discriminating, and continuing state surveillance’ or the ‘enduring entanglement’ present in *Lemon*”); *but see* *Griswold Inn, Inc. v. Connecticut*, 183 Conn. 552, 564, 441 A.2d 16, 22 (1981) *aff’d*, 389 U.S. 479 (1965) (holding that even though the court found that excessive entanglement existed because Good Friday’s actual date is determined by ecclesiastical calendars, the court also was faced with a significant challenge. In the statute, Connecticut had banned the sale of liquor on Good Friday only. Thus, the state was forced to monitor alcohol sales on Good Friday and, in effect, “enforce observance of a religious holiday” by liquor licenses).

<sup>140</sup> *Cammack*, 932 F.2d at 781.

<sup>141</sup> *Id.*

<sup>142</sup> *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1383 (9th Cir. 1994) (noting that the court has never relied on political divisiveness as “an independent ground for holding a government practice unconstitutional”). *See, e.g.* *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 (1973); *see also* *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 n. 17 (1987) (quoting and following *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984)).

holidays . . . .”<sup>143</sup> These controversies appear to have occurred some two or three decades after Good Friday’s declaration as a legal holiday.<sup>144</sup> Therefore, the *Cammack* court concluded that the Hawaii state statute satisfied the entanglement prong of the *Lemon* test.<sup>145</sup>

The *Cammack* court held on this case in such a manner that it would be difficult for an average Hawaiian citizen to view Hawaii’s inclusion of Good Friday on a list of state holidays as any more a law establishing a religion than is the current including of Christmas on the same list.<sup>146</sup> The primary question is whether a reasonable observer would view such longstanding practices, including recognition of Thanksgiving as a public holiday, as a disapproval of their particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.<sup>147</sup> The *Allegheny* court noted, “The Religious Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.”<sup>148</sup> The *Cammack* court concluded its analysis by stating:

The Hawaii law does not require or endorse any religious activity, and the only public expenditure associated with the holiday is the continued pay accrued by public employees. We are persuaded that nothing more is ‘established’ by the Hawaii statute than an extra day of rest for a weary public labor-force.<sup>149</sup>

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<sup>143</sup> *Cammack*, 932 F.2d 765, 781.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 777.

<sup>148</sup> *Cty. of Allegheny v. Amer. Civil Liberties Union*, 492 U.S. 573, 664 (1989).

<sup>149</sup> *Cammack*, 932 F.2d at 782.

## 2. *Metzel v. Leinger*

In 1941, the Illinois legislature established Good Friday as a state holiday, requiring the closure of state offices and K-12 public schools.<sup>150</sup> While there is no record of legislative intent, in 1942, the Governor of Illinois issued a proclamation, stating that Good Friday “is a day charged with special meaning to multitudes throughout the Christian world” and that the state holiday was intended to recognize its religious significance.<sup>151</sup> He further “commend[ed] the sacred rites and ceremonies of the occasion to thoughtful consideration of churchgoers and believers throughout [the] state.”<sup>152</sup>

In 1989, the Illinois state legislature rescinded Good Friday as a state holiday, but the day remained a paid public school holiday.<sup>153</sup> Apart from Christmas and Thanksgiving, Good Friday was “the only holiday of religious origin or character on which all the public schools of the state [were] closed.”<sup>154</sup> Based on these facts, a public school teacher filed suit against the state under 42 U.S.C. §1983, objecting to the use of her tax funds to pay teachers for Good Friday holidays.<sup>155</sup> The district court granted summary judgment in favor of the teacher, concluding that the school holiday violated the Establishment Clause as a matter of law.<sup>156</sup>

Judge Posner, writing for the majority, made no reference to the *Lemon* test in his analysis. Rather, the Seventh Circuit Court of appeals began first by considering the essential nature of the Establishment Clause.<sup>157</sup> While it acknowledged

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<sup>150</sup> *Metzel v. Leinger*, 57 F.3d 618 (7th Cir. 1995).

<sup>151</sup> *Id.* at 619.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (citing 105 ILL. COMP STAT. § 5/24-2).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The court ruled the teacher had standing to file suit as a taxpayer the state for the paid school holiday, which her taxes supported.

<sup>156</sup> *Id.* The district court also granted a permanent injunction against enforcing the Good Friday holiday statute.

<sup>157</sup> *Id.* at 620.

that the Good Friday holiday did not bear resemblance to the government-established religion in place when the Bill of Rights was originally conceived, it did note that “in modern times the courts have interpreted the establishment clause to forbid the government—state and local as well as federal—to promote one religion at the expense of others (or even religion in general at the expense of non-belief).”<sup>158</sup> The court stipulated that a law that promotes religion may be upheld in some circumstances because the law has a secular purpose or “the effect in promoting religion is too attenuated to worry about.”<sup>159</sup> A statute may also be defensible if it serves as an accommodation of persons’ free exercise of their religion.<sup>160</sup> The court focused its attention primarily on the nature of Good Friday itself—whether it could be considered a secular holiday. The court noted,

Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public that government measures to promote them, as by making them holidays or even by having the government itself celebrate them, have only a trivial effect in promoting religion.<sup>161</sup>

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<sup>158</sup> *Id.* at 620 (citing *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Cty. of Allegheny v. Amer. Civil Liberties Union*, 492 U.S. 573, 605 (1989); *Amer. Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* However, the court noted that this was not an issue in this case because Illinois had a statute excusing students from attending school if their religion required absence. See 105 ILL. COMP. STAT. §§ 5/26-1, 5/26-2b.

<sup>161</sup> *Id.*

The court concluded that Good Friday was not a secular holiday anywhere in the United States.<sup>162</sup> While Christmas and Thanksgiving, and even Easter, have secular rituals<sup>163</sup> in which many Americans participate, regardless of religion, the court noted:

Good Friday has accreted no such secular rituals. . . . It is a day of solemn religious observance, and nothing else, for believing Christians, and no one else. Unitarians, Jews, Muslims, Buddhists, atheists—there is nothing in Good Friday for them, as there is in the other holidays we have mentioned despite the Christian origin of those holidays.<sup>164</sup>

By closing all public schools on Good Friday, Illinois accorded Christianity special recognition, making it easier for its adherents to practice their faith than those of other religions.<sup>165</sup>

Using an unprecedented approach, Judge Posner argued that whether there is a secular purpose supporting a school holiday for religious observance (i.e., how many teachers and students would be absent on that particular day because of religious observance) is a question of fact.<sup>166</sup> No such evidence

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<sup>162</sup> *Id.* The court includes a parenthetical: “(with the possible exception of Hawaii, as we shall see.)” The court noted that its conclusion was also the “unanimous view of the theologians of diverse faiths who submitted affidavits in the district court.” *Id.*

<sup>163</sup> *Id.* The court lists rituals such as shopping, eating specific foods, and participation in secular activities (like Easter egg hunts).

<sup>164</sup> *Id.* at 620–21. The court goes on to note, “That should come as no surprise. Good Friday commemorates the execution of the Christian Messiah.”

<sup>165</sup> *Id.* at 621. The court concluded, “The state law closing all public schools on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions. The Christian does not have to absent himself from school on a school day, and so perhaps have to incur the inconvenience of a make-up exam on a later day, as the observant Jew might have to do if his school district decided not to close for any Jewish holidays.”

<sup>166</sup> *Id.* The court indicated that to support a claim of secular purpose, it would need evidence of how many Christians lived in each district and observed Good Friday. *Id.* at 622. The court specifically noted that many self-identified Christians do not belong to a church

was presented in *Metzl*, but Posner indicated that the burden of presenting such evidence should rest with the state since the state is making the claim that there is a secular justification for the Good Friday school holiday.<sup>167</sup> Using this approach, the court concluded that the Illinois law as applied did violate the Establishment Clause because the state failed to show that its law closing schools throughout the state for Good Friday was necessary to avoid the excessive waste of educational resources.<sup>168</sup> However, Posner did make it clear that public schools could still close for Good Friday by more explicitly defining a secular purpose or by allowing school districts to close based on more community-specific attendance projections.<sup>169</sup>

### *E. School Prayer Cases*

While the Blue Law, religious display, and Good Friday cases listed above provide guidance regarding blanket state-mandated closures (both public and private) for religious observance, they apply generally to all citizens. For an analysis of how a court might handle school closures on religious

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and/or do not go to Good Friday services. Furthermore, those Christians who did want to attend Good Friday services could do so either before or after school hours. *Id.* at 622–23. *See also*, Martha Minnow, *Religion and the Burdens of Proof: Posner's Economics and Pragmatism in Metz v. Leininger*, 120 HARV. L. REV. 1175, 1181–1182 (2007).

<sup>167</sup> *Id.* at 622. Posner distinguished this case from *Cammack*, stating, “though it upheld the law it did so in part on the basis of a factual determination (whether or not correct—for there was a vigorous dissent both to the panel opinion and to the denial of rehearing en banc) that in Hawaii Good Friday has been secularized, becoming the first day of a three-day spring weekend devoted to shopping and recreational activities that have about them, as Hamlet would have said, no relish of salvation. Illinois is not Hawaii.” (citing *Cammack v. Waihee*, 932 F.2d 765, 775–76, 78–79 (9<sup>th</sup> Cir. 1991)).

<sup>168</sup> *Id.* at 623. The court is specific in discussing this as a state issue. It indicates that in the future it could be an issue addressed at the district level: “Maybe someone someday will bring a suit charging that a school district which closes its school on a religious holiday is thereby promoting religion in violation of the establishment clause. Presumably the defense would be that in the particular school district the holding open of the schools on the particular religious holiday would be a waste of educational resources because so few students or teachers would show up for work. The defense might succeed, if factually supported.”

<sup>169</sup> *Id.* *See* Minnow, *supra* note 164, at 1182.

holidays, it is also necessary to consider how the Court has handled other religious observances in public schools. By their very nature, public schools require special legal consideration because school attendance is mandatory for children in a particular age range, a large majority of those children attend public schools, children of school age may be more susceptible to manipulation and/or coercion, and public schools are government-run institutions (and must adhere to the requirements and limitations imposed on state actors).

Public schools must be careful to balance the student protections guaranteed by the Free Exercise Clause with the state actor limitations imposed by the Establishment Clause. As individuals, students have “. . . the right to freely articulate [their] religious beliefs in a public setting [which] is fundamental to American constitutional entitlements”<sup>170</sup> so long as they do not interfere with the rights of others. However, from an institutional perspective, the Constitution requires teachers, administrators, and other school staff to take a religiously neutral position, separating religion from the work of the state. Thomas Jefferson discussed this theoretical barrier between church and state as a “wall,” seeking to protect individuals from government intrusion into private religious matters.<sup>171</sup> The Court has considered the appropriate height of

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<sup>170</sup> Brett A. Geier, *Texas Cheerleaders and the First Amendment: Can You Cheer for God at a Football Game?*, 33 MISS. C. L. REV. 65, 66 (2014). However, “there exists a tension between the doctrines, when applied: the government action to facilitate free exercise might be challenged as impermissible establishment, and government efforts to refrain from establishing religion might be objected to as denying the free-exercise of religion.” *S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1091 (M.D. Fla. 2009).

<sup>171</sup> Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), available at <https://www.loc.gov/loc/lcib/9806/danpre.html> (last visited Feb. 8, 2017). Writing to President Thomas Jefferson, the Danbury Baptist Association wanted to congratulate him on his election to the presidency and to seek his approval of religious freedom. With the Bill of Rights not pertaining to the states during this time, many states still had officially established religions, and Connecticut was one of those states. The Danbury Baptists knew of Jefferson’s leading role in the struggle to end state-established religion in Virginia and felt Jefferson would lend a sympathetic ear. However, in his response, Jefferson stated, “I contemplate with sovereign reverence that act of the whole American people

the “wall” between church and state numerous times since its seminal decision in *Engel v. Vitale* in 1962 when it struck down New York’s required recitation of daily prayer in public schools.<sup>172</sup> The Court’s subsequent opinions, particularly those in *Lemon v. Kurtzman*,<sup>173</sup> *Lee v. Weisman*,<sup>174</sup> and *Santa Fe Independent School District v. Doe*<sup>175</sup> are particularly relevant in determining Establishment Clause jurisprudence as it may pertain specifically to public schools.

In *Lemon v. Kurtzman*, the Court considered two cases involving the allocation of public funds to private schools for educational resources. While the Court struck down the two state statutes at issue in the case, the case is most famous (or infamous) for the three-part legal test the Court used to determine whether the state statutes violated the Establishment Clause:

- (1) The statute (or other state action) has a secular legislative purpose;
- (2) The principal primary effect of the statute or state action either advances or inhibits religion;
- (3) Did the statute or state action foster excessive entanglement with religion?<sup>176</sup>

While the *Lemon* test has been periodically used as an Establishment Clause test, it has not been used with the regular

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which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church [and] State.” See also, Brett A. Geier & Ann E. Blankenship-Knox, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIRST AMEND. L. REV. 381 (2017).

<sup>172</sup> *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that the First Amendment protects religious liberty by keeping government from determining when and how people should pray or worship, so school officials could not require devotional religious exercises during the school day, as this practice unconstitutionally entangled the state in religious activities and established religion). See also, Geier & Blankenship-Knox, *supra* note 169.

<sup>173</sup> 403 U.S. 602 (1971).

<sup>174</sup> 505 U.S. 577 (1992).

<sup>175</sup> 530 U.S. 290 (2000).

<sup>176</sup> *Lemon*, 403 U.S. at 612-613. These three prongs are not used as factors in a balancing test, but rather, they are used as requirements that must all be met for a statute or state action to survive constitutional review.

consistency that would be necessary to establish it as *the* test for Establishment Clause cases. In fact, while many lower courts and other legal authorities still rely on *Lemon*, the Supreme Court rarely cites *Lemon* or uses it to form Establishment Clause analyses.<sup>177</sup> It does continue to use individual prongs of the test, particularly the secular purpose prong, either as stand-alone frames for analyses or in conjunction with other tests of the establishment of religion, such as coercion or endorsement.<sup>178</sup>

In *Lee v. Weisman*, the Court discussed the establishment of religion through coercion.<sup>179</sup> The Court considered the constitutionality of a non-sectarian prayer delivered by a rabbi at a public middle school graduation ceremony.<sup>180</sup> The Court found the district policy allowing this kind of religious demonstration at a public school graduation to be so blatantly in violation of the Establishment Clause that it did not find it necessary to go through the multi-pronged *Lemon* Test.<sup>181</sup> Justice Kennedy, writing for the majority, noted:

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for

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<sup>177</sup> Minnow, *supra* note 164, at 1180.

<sup>178</sup> *Id.*

<sup>179</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 586–87; *see also* *S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1092 (M.D. Fla 2009)

(noting that “the analysis is not effected [sic] by whether the student was or was not offended by the school district’s conduct”).

students, and that suffices to determine the question before us.<sup>182</sup>

He went on to note that attempts to accommodate the free exercise of religion, even the religion of majority, cannot supersede the limitations imposed by the Establishment Clause.<sup>183</sup> He concluded: “It is beyond dispute that, at a minimum, the Constitution guarantee that government may not coerce anyone to support or participate in religion or its exercise . . .”<sup>184</sup> Furthermore, the Court noted that coercion does not have to be direct to violate the Establishment Clause, but rather can take the form of “subtle coercive pressure” that interferes with an individual’s “real choice” about whether to participate in the activity at issue.<sup>185</sup> Thus was born the “coercion test.”

Also relevant to the discussion of school closures on religious holidays is *Santa Fe Independent School District v. Doe*, in which the Court considered the establishment of religion through endorsement.<sup>186</sup> Students filed suit against the Santa Fe Independent School District for permitting prayers at high school football games given by a student elected (in a school-run election) as the student council chaplain.<sup>187</sup> The Court dismissed the school district’s argument that the prayers constituted private speech or free exercise of religion.<sup>188</sup> While the prayers were given by a student, the fact that the student was elected to give those prayers in a school-endorsed election and the prayers took place on governmental property at school-

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<sup>182</sup> *Lee*, 505 U.S. at 587.

<sup>183</sup> *Id.* at 587–99.

<sup>184</sup> *Id.* at 587.

<sup>185</sup> *Id.* at 592, 595. While the Court did note that participation in graduation ceremonies was technically voluntary, it found that students were subject to peer pressure to attend the graduation and to participate in the religious exercises, even if just by standing in silence. *Id.* at 595.

<sup>186</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 302.

sponsored events equated to the school's endorsement of the speech itself, triggering the Establishment Clause.<sup>189</sup> In concluding that the district policy constituted a clear endorsement of religion, the Court noted that the policy was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."<sup>190</sup>

The aforementioned cases<sup>191</sup> built on the Establishment Clause jurisprudence discussed above. When dealing with a minority-age population, a court might consider more carefully the coercive effect state actions may have on a population of students who are more susceptible to manipulation and peer pressure. Additionally, courts may focus on the extent to which canceling school on religious holidays may constitute a state or even school district endorsement of religion without evidence of secular purpose.

### III. COURT TEST FOR RELIGIOUS HOLIDAYS

The Court has not set forth clear guidance on when, if ever, and how a state government (and by extension, public schools) can recognize religious holidays. However, a review of the Establishment Clause jurisprudence set forth above, including the Blue Law cases, religious display cases, lower court opinions

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<sup>189</sup> *Id.* at 302–03, 307–08. While the Court acknowledged that not all speech given in government forums constitutes government-sponsored speech (especially when it has created an open or limited-open forum), the Santa Fe school in question had not created a forum open for other individual expressions of free speech or religion. *Id.* at 302–03. The Court noted further that the school actually controlled the speech by limiting the student prayer to messages that were non-sectarian and non-proselytizing. *Id.* at 303.

<sup>190</sup> *Id.* at 317.

<sup>191</sup> Note that this is just a small selection of cases in education law that use these tests to determine the constitutional validity of state actions. Many other cases could be included and provide perhaps more nuanced additions to this discussion. This section is meant only to introduce the different tests that may be applied when considering how religious observance may be evaluated differently with a minority age population.

on Good Friday closures, and school prayer cases, indicate that such an analysis should focus, at a minimum, on the secular nature of the holiday. First, in considering whether a government may constitutionally recognize a religious holiday by closing government offices and/or schools, a court will look to see if there is another, secular purpose for selecting that day for closure.<sup>192</sup> If there is no clear secular purpose, a court may then look at the nature of the holiday itself. Courts have ruled in past cases that certain holidays have become secularized over time, with their celebration associated with non-religious purposes and symbols as much as religious ones.<sup>193</sup> For example, as noted in *Metzl*, courts have ruled that Christmas, Thanksgiving, and Easter fall into this category of secularized holidays.<sup>194</sup> Finally, a court may consider if, over time, continued state recognition of a religious holiday may lessen its perceived endorsement of a particular religion, such as Christianity.<sup>195</sup> A court may consider these facts through the application of some part or all of the *Lemon* test, the endorsement test, the coercion test, or some combination of ideas.

### *A. Secular Purpose*

The Court has used the secular purpose prong of the *Lemon* test several times to invalidate state statutes,<sup>196</sup> perhaps most notably in *Wallace v. Jaffree*<sup>197</sup> and *Edwards v. Aguillard*.<sup>198</sup> In its *Wallace* opinion, the Court declared an

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<sup>192</sup> *Cammack v. Waihee*, 932 F.2d 765, 773–74 (9<sup>th</sup> Cir. 1991); *Metzl v. Leininger*, 57 F.3d 618, 620, 622 (7<sup>th</sup> Cir. 1995).

<sup>193</sup> *Metzl*, 57 F.3d at 620.

<sup>194</sup> *Id.* at 620–21; *Cammack*, 932 F.2d at 775–76, 778–79.

<sup>195</sup> *Metzl*, 57 F.3d at 621.

<sup>196</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations and internal quotes omitted).

<sup>197</sup> 472 U.S. 38 (1985).

<sup>198</sup> 482 U.S. 578 (1987); *see also* *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980).

Alabama statute which mandated a period of silence for “meditation or voluntary prayer”<sup>199</sup> in public schools to be unconstitutional. The Court concluded the law “was not motivated by any clear secular purpose—indeed, the statute had *no* secular purpose.”<sup>200</sup> To determine the statute’s purpose, the Court considered the statute’s intent as stated by its legislative sponsor and other relevant Alabama statutes.<sup>201</sup>

Similarly, in *Edwards v. Aguillard*<sup>202</sup> the Court invalidated a Louisiana law requiring equal treatment of evolution and “creation science” in public schools. In its analysis, the Court focused on three issues: first, the state failed to identify a “clear secular purpose”<sup>203</sup> for the statute; second, the Court noted “a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution”;<sup>204</sup> and finally, the legislative history revealed legislators’ intent to “change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.”<sup>205</sup> Thus, the court looked at both the stated legislative intent and how that intent was reinforced by previous state actions and/or legislation.

However, the Court has demonstrated in many other cases that it is just as likely to overlook a religious purpose, allowing a statute to survive the secular purpose analysis if the facts can be interpreted differently using a different test.<sup>206</sup> For example, in *McGowan v. Maryland*,<sup>207</sup> the Court noted that while Sunday closing laws originally had a religious purpose and that Sunday

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<sup>199</sup> *Wallace*, 472 U.S. at 38 (internal quotes omitted) (quoting ALA. CODE §16-1-20.1 (Supp. 1984)).

<sup>200</sup> *Id.* at 56 (emphasis in original).

<sup>201</sup> *Id.* at 43.

<sup>202</sup> *Edwards*, 482 U.S. 578.

<sup>203</sup> *Id.* at 585.

<sup>204</sup> *Id.* at 590.

<sup>205</sup> *Id.* at 592.

<sup>206</sup> Andrew Koppelman. *Secular Purpose*, 88 VA. L. REV. 87 (2002).

<sup>207</sup> 366 U.S. 420 (1961).

is a day of religious significance, primarily for Christians, “[t]he present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.”<sup>208</sup> Frankly, the jurisprudence does not provide sufficient guidance to determine when the Court might be persuaded by an application of the secular purpose test.

Both the *Cammack*<sup>209</sup> and *Metzl*<sup>210</sup> courts considered the secular nature of government closure for Good Friday but came to different conclusions based on their interpretations of the evidence presented. They both noted that avoiding potentially high absenteeism would provide a sufficiently secular justification (or purpose) for government closure on a religious holiday such as Good Friday.<sup>211</sup> Judge Posner indicated that whether absenteeism of teachers and students might be sufficient to warrant an official state, district, or school closure is a question of fact on which evidence must be considered.<sup>212</sup> However, it is unclear “how much secular justification must be shown, and who has the burden of providing the legislature’s purposes.”<sup>213</sup> Judge Posner would argue that this burden lies with the state, but it is unclear what evidence would suffice.<sup>214</sup>

While courts have been reluctant to pass judgment on legislative intent, the Court may use some version of the “reasonable person” test to determine if a legislature’s intent is obviously to advance a religion or benefit a particular religious

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<sup>208</sup> *Id.* at 445; see also *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (holding that “the evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols”).

<sup>209</sup> *Cammack v. Waihee*, 932 F.2d 765 (9<sup>th</sup> Cir. 1991).

<sup>210</sup> *Metzl v. Leninger*, 57 F.3d 618 (7<sup>th</sup> Cir. 1995).

<sup>211</sup> *Brookman*, *supra* note 20, at 218.

<sup>212</sup> *Metzl*, 57 F.3d at 621.

<sup>213</sup> *Brookman*, *supra* note 20, at 219.

<sup>214</sup> *Id.* at 219.

group.<sup>215</sup> A higher court or court in another jurisdiction may find little guidance when reading these cases together. Therefore, it is one of many things that should be considered in making decisions about school closures for religious holidays.

### *B. Secularized Holiday*

If there is no reasonable secular justification for a government closure on a religious holiday, a court may consider whether the nature of the holiday itself has become secularized over time such that it could not reasonably be seen as an endorsement of religion. The most common example of this is the secular celebration of Christmas, associated with Santa Claus, Christmas trees, snowmen, and gift-giving. While many secularized Christmas traditions can be traced back to religious roots, courts have determined that these traditions, as celebrated today, do not offend the Establishment Clause.<sup>216</sup> However, courts have recognized that Christmas is still celebrated as a regular holiday and have been careful to treat religious symbols and practices associated with Christmas differently.<sup>217</sup>

The *Cammack* and *Metzl* courts both considered the secularized nature of Good Friday and came to different conclusions. In *Metzl*, Judge Posner concluded that the Good Friday holiday failed a constitutional challenge, noting, “Good Friday . . . is not a secular holiday anywhere in the United

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<sup>215</sup> *Id.*

<sup>216</sup> Jeffrey Horner, *Let's Take the "Bah Humbug" Out of Christmas: A Guide to Permissible Activities at Public Schools*, 207 ED. LAW REP. 831, 833–34 (2006). Similar secular traditions associated with religious holidays include the Easter bunny and turkeys for Thanksgiving. The 7<sup>th</sup> Circuit Court of Appeals in *Metzl* noted, “Even Easter is becoming gradually secularized; in the week before Easter Sunday, a radio station in Chicago was advertising an opportunity to have your pet photographed with the Easter Bunny on Easter Sunday for \$5.” *Metzl*, 57 F.3d at 620.

<sup>217</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Cty. of Allegheny v. Amer. Civil Liberties Union*, 492 U.S. 573 (1989).

States.”<sup>218</sup> However, the *Cammack* court came to a different conclusion. It focused on many of the factors discussed in *McGowan*,<sup>219</sup> including how people chose to spend their time during the holiday. Specifically, the *Cammack* court noted that in Hawaii, “the Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefited from the three-day weekend created as a result of the holiday. Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii.”<sup>220</sup> The *Cammack* court, by noting all of the non-religious activities the citizens of Hawaii enjoyed on Good Friday, seemed to undercut any argument that there was a secular purpose (absenteeism) to have a spring holiday on that specific day of the year. Based on the court’s own argument, the state could have accomplished the same purpose by selecting any other day during the spring season.<sup>221</sup>

### *C. Passage of Time Lessened Endorsement*

In *Cammack*, the court further contended that the religious nature of Good Friday has diminished over time such that a state-recognized holiday no longer violates the Establishment Clause.<sup>222</sup> It noted, “Hawaii’s Good Friday holiday, at least at this late date, fifty years after enactment, cannot be regarded as an endorsement of religion any more than Sunday Closing Law may.”<sup>223</sup> Implicit in this statement is the command that one

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<sup>218</sup> *Metzl*, 57 F.3d at 620. At least one court has found that this factor alone makes any statutory recognition or observance unconstitutional. See *Florey v. Sioux Falls Sch. Dist.*, 464 F. Supp. 911, 915 (D.S.D. 1979), *aff’d*, *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311 (1980) (identifying Good Friday, Ash Wednesday, and Pentecost as examples of purely religious holidays); see also *Brookman*, *supra* note 20, at 219.

<sup>219</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>220</sup> *Cammack v. Waihee*, 932 F.2d 765, 778 (9<sup>th</sup> Cir. 1991) (citations omitted).

<sup>221</sup> One could further argue that setting a specific day, like the first Friday of April, rather than having a moving holiday reliant on a religious calendar, might allow the citizen of Hawaii to better take advantage of Hawaii’s recreational opportunities.

<sup>222</sup> *Cammack*, 932 F.2d at 778, 789.

<sup>223</sup> *Id.* at 778–79.

must look at both the intent of the legislature at the time of adoption and how a reasonable observer today would interpret that act. In his article on the constitutionality of Good Friday holidays, Brookman argues “the more evident is that a legislature was motivated by secular reasons for the choice of a Good Friday holiday, the less time it should take for a reasonable observer to conclude that the holiday does not carry a message of endorsement.”<sup>224</sup>

Brookman cites to two district court opinions to support his position. He notes that in *Granzeier v. Middleton*,<sup>225</sup> the district court in the Eastern District of Kentucky upheld the closure of the courthouse and public library because “no reasonable objective observer would perceive the practice as an endorsement of Christianity.”<sup>226</sup> While many businesses in the community closed on Good Friday and the majority of the public schools used Good Friday as the beginning of their spring holiday break, the court noted that because the government did not emphasize the religious nature of Good Friday or encourage employees to attend church, it did not constitute an endorsement of Christianity.<sup>227</sup> However, the District Court in the Western District of Wisconsin came to a different conclusion about a Wisconsin statute making Good Friday a legal holiday.<sup>228</sup> The court noted that the legislative history and the language of the 1945 statute itself, which “unequivocally demonstrate[d] religious endorsement” could not be cleansed and made religiously neutral by the passage of time.<sup>229</sup> Based on these opinions, Brookman concludes:

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<sup>224</sup> Brookman, *supra* note 20, at 220.

<sup>225</sup> 955 F. Supp. 741 (E.D. Ky. 1997).

<sup>226</sup> Brookman, *supra* note 20, at 221.

<sup>227</sup> 955 F. Supp. at 747.

<sup>228</sup> *Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996).

<sup>229</sup> *Id.* at 974. *See also* Brookman, *supra* note 20, at 222.

[A]lthough time can often cleanse a statute of its message-conveying qualities, here the purpose and wording of the statute were so geared toward a policy of encouraging Christian practice that even fifty years later, a reasonable observer would see the statute as aligning the state on the side of Christians.<sup>230</sup>

While using this three-part approach does allow the reconciliation of the *Cammack* and *Metzl* opinions, we would argue that it relies on several assumptions with which we do not agree:

1. That legislators are clear and forthright with their intent. While legislative intent may be evident to those involved in the policy drafting process, intent is not always documented in the actual legislation or the official record of the legislative history. In situations where legislation is meant to circumvent constitutional limitations imposed by the Establishment Clause, shrewd legislators may be more careful about what goes into the official legislative history.
2. That the effect of accommodating one religion repeatedly over time serves to diminish the endorsement of that religion rather than strengthen it. This may be the most surprising, and we argue, the most ridiculous, of the assumptions. The idea that those who are marginalized by a particular practice will forget that they are being marginalized if it happens for long enough may make sense to someone who has little experience actually being marginalized. We argue that the passage of time actually enhances the state endorsement of religion rather than diminishes it. It blurs the line between religious practice and political practice and

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<sup>230</sup> Brookman, *supra* note 20, at 221.

repeatedly sends a message to those marginalized by the law that their interests are not important to lawmakers and/or the government.

3. That a reasonable observer would be familiar with the legislative intent of legislation passed decades ago such that it would inform his or her perception of the statute's enforcement. This is an unrealistic portrayal of the average citizen. Courts spend significant amounts of time discussing and debating legislative intent after having been presented with detailed evidence from both sides of what legislators meant to do and say. A reasonable observer is not presented with this kind of evidence (or even an outlet where they can get access to it if they sought it out) or the legal training to help them interpret legislation and hearing records. This reasonable observer assumption is anything but reasonable.
4. That secular purpose arguments based on decades-old absentee data may not accurately support the same logistical arguments today. Many states and districts that rely on absenteeism as the secular reasoning behind school closures on religious holidays may never have actually considered data in their decision-making process. For those that did have data regarding absenteeism rates, those numbers are likely decades out of date. Furthermore, religious practice looks different now than it did three or four decades ago. Schools are increasingly filled with students from diverse faith backgrounds.<sup>231</sup> Even within the Christian faith, which

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<sup>231</sup> The Public Religion Research Institute (PRRI), report that "Today, only 43% of Americans identify as white and Christian, and only 30% as white and Protestant. In 1976, roughly eight in ten (81%) Americans identified as white and identified with a Christian denomination, and a majority (55%) were white Protestants." Robert P. Jones & Daniel Cox, *America's Changing Religious Identity: Findings from the 2016 American Values Atlas*, PUB. RELIGION RESEARCH INST. 7 (Sept. 6, 2017), <https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf>. The report goes on to note that non-

still makes up a majority in many communities, there is growing diversity in what students believe and how they practice.<sup>232</sup> States and districts must do some updated data collection on the religious practices of their students and use those data as a basis for any secular purpose arguments. However, we would not that, like labor unions, we suspect that students enjoy having the Good Friday holiday off from school and their parents may have gotten used to having that time off every year. Therefore, states and districts should consider carefully how those data should be collected. Furthermore, large districts, like New York City and Los Angeles, may have concentrations of students of a particular faith in certain neighborhoods. Consequently, schools may experience very different absenteeism rates. Logistically, it may not make sense for the district to prescribe which religious holidays should result in school closures district-wide. Therefore, it may be more efficient to make decisions about school closures based on anticipated absenteeism rates on a school-by-school basis in districts that are very large and very diverse.

In sum, we argue that the three-prong test in *Cammack* and *Metzl* that focuses primarily on the secularized nature of religious holidays is insufficient and does not provide appropriate guidance for school districts in identifying appropriate days for school closure. At this time, it seems improbable that other religious holidays will become secularized like Christmas and Thanksgiving, at least on a grand scale.<sup>233</sup> Additionally, waiting for a religiously favorable statute

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Christian groups are growing (albeit still a small segment of the general U.S. population) and that younger Americans (under age 30) are more likely to be non-Christian than their older counterparts. *Id.* See also *U.S. Public Becoming Less Religious*, PEW RESEARCH CTR. (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>.

<sup>232</sup> *Id.* at 7–9.

<sup>233</sup> We do note that this may happen in specific communities. In that case, evidence of such would have to be presented in court if challenged. We agree with Judge Posner, *Metzl*

to lose its endorsement value over a long period of time is not a reasonable legislative strategy. Therefore, states and districts should most logically focus on making scheduling decisions based solely on secular facts, including recent estimates of absenteeism based on reliable data.

#### IV. CONCLUSIONS

Unless the Supreme Court weighs in on the issue of state-mandated closures of government offices and public schools for Good Friday, we will be left to contend with competing lower court adjudications. *Cammack* and *Metzl* provide competing conclusions as to whether establishing Good Friday as a state holiday violates the Establishment Clause of the First Amendment. The issue leaves courts, legislators, and scholars divided.

Opponents of these laws contend that by giving legal recognition to a purely sectarian holiday, like Good Friday, states are establishing Christianity as the government's religion. Good Friday, in the Christian doctrine, is the day in which Jesus was crucified and "has remained an exclusively Christian holiday with no secular trappings."<sup>234</sup> Since Good Friday has meaning only for Christians, government recognition can be interpreted as exclusive and divisive in modern society. The argument proffered by supporters of these laws are two-fold: First, absences would be so great at schools and government offices that it would be unreasonable and inefficient to have them remain open. Second, legislatures are not attempting to establish a sectarian holiday, but they are seeking to provide all citizens with a uniform day of rest. Proponents contend that this philosophy is congruent with the Sunday closing laws in

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v. Leininger, 57 F.3d 618, 622 (7<sup>th</sup> Cir. 1995), that it makes most sense for the state to bear the burden of proving this as a defense.

<sup>234</sup> Brookman, *supra* note 20, at 203.

that once legislatures decided to provide a uniform day of rest for the community, Sunday was the appropriate choice because so many already recognized it as a day of rest.

The uncertainty in Establishment Clause jurisprudence puts states and school districts in a challenging position. Schools must navigate a narrow passage between making practical, secular decisions based on absenteeism and making accommodations for the religious majority at the cost of all other students. In his effort to honor many religions and despite his best intentions, Mayor de Blasio may be as guilty of violating the Establishment Clause as districts that seek to honor only Christian traditions. Other localities are taking a different approach of holding school on all religious holidays and providing students with religious accommodations as necessary. Given an increasingly diverse student population, states and school districts alike need to rethink how they are making these decisions and the evidence they have to support them.