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I. INTRODUCTION

Those who are even remotely interested in spiritual matters know that organized religions in the United States (and indeed throughout the Western world) are in turmoil and that church attendance is declining rapidly.[1] The turmoil is a consequence, at least in part, of the seeming inability (or unwillingness) of the leaders of organized religions to support the moral foundations and tenets of their own faiths when these come into conflict with the demands and expectations of an increasingly secular world. Additionally, some religious leaders have largely lost their ability to act as role models because their personal moral standards sometimes deviate from those religions. The avalanche of child sex abuse scandals that now engulfs some religions illustrates this particularly poignantly.[2]

There is, however, another factor that contributes to the societal decline with respect to religion. This factor, a legal one, relates to the interpretation of the First Amendment to the U.S. Constitution, which states in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[3] The Establishment Clause and the Free Exercise Clause are, at least potentially, in conflict with each other.[4] This conflict arises from the possibility that a person's constitutional right to the free exercise of religion may be impeded by a

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1. *E.g.*, Frank Bruni, *Faith Fades Where It Once Burned Strong*, N.Y. TIMES, Oct. 13, 2003, at A1; Frank Bruni, *Mainline Christianity Withering in Europe*, N.Y. TIMES, Oct. 13, 2003, at A1.

2. *See, e.g.*, Laurie Goodstein, *Scandals in the Church: The Overview; Abuse Scandal Has Ended, Top Bishop Says*, N.Y. TIMES, Feb. 27, 2004, at A1.

3. U.S. CONST. amend. I.

4. *See, e.g.*, Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 298 (2002).

governmental desire to adhere to the Establishment Clause. The Supreme Court has struggled to strike the right balance between these two clauses. This continuing struggle, which has spawned the Court's development of the "neutrality principle," is vital to an understanding of First Amendment jurisprudence.[5]

The Supreme Court has interpreted the Establishment Clause as requiring or involving the application of the neutrality principle.[6] This principle imposes an obligation on federal and state governments to refrain from favoring or disfavoring either sectarianism or secularism.[7] Accordingly, governmental hostility towards religion violates the neutrality principle because it elevates secularism and demeans religion.[8] The converse also applies because governmental preference for religion adversely affects secularism.

This Article argues that the neutrality principle ineffectively addresses the conflicts between the Establishment Clause and the Free Exercise Clause and has largely removed religion from American public life by trivializing its existence. In particular, I will argue that the application of the neutrality principle trivializes religion because it reduces the significance of religion in the United States by largely removing it from the public arena. In addition, and more importantly, when the neutrality principle is used to protect religion, this protection is only achieved by deconstructing the concepts of religion and by removing the religious nature, characteristics, or significance of a relevant act or symbol. Thus, I will argue that rather than protecting religion, the neutrality principle often serves to demean it in American society. As such, the neutrality principle is a convenient but ultimately specious principle—one that is inherently incapable of facilitating the free exercise of religion as constitutionally protected by the First Amendment. I suggest that a

5. *See, e.g.*, Locke v. Davey, 124 S. Ct. 1307, 1311 (2004) (citing cases discussing this tension between the Free Exercise and Establishment clauses).

6. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 848 (1995).

7. The Free Exercise Clause is applicable to the states, even though its terms make it applicable only to federal action. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 21–25 (2003).

8. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.").

return to the original meaning of the Establishment Clause would help prevent this negative treatment of religion in the United States.

The Supreme Court developed the neutrality principle primarily during the last few decades.[9] However, earlier tests used by the Court to determine the constitutionality of relevant laws and practices may be interpreted as variants of this principle.[10] In Part II of this Article, I recount briefly the separation of church and state doctrine, followed in Part III by a description of the development of the neutrality principle and its manifestations or variants in the relevant jurisprudence. Part IV follows with an assessment of the impact of the application of the neutrality principle on religion in American society. Finally, in Part V, I provide some suggestions on how the menace of neutrality may be overcome.

II. SEPARATION OF CHURCH AND STATE

A. The Original Meaning of the Establishment Clause

In the United States, the concept of religious freedom emerged in the founding period and has continued to exist in various forms ever since.[11] The Framers of the Constitution were familiar with the centuries of persecution in Europe of religious groups not established by the state. Most of the early settlers were escaping religious persecution in Europe when they immigrated to the American colonies to start a new life.[12] At that time, the fear of religious persecution justified the popularity of the doctrine of separation between church and state. Among others, the Puritans preached that government or political influence upon religion would taint the faith of the settlers.[13] Roger Williams, for instance, addressed the issue of the separation of church and state in his eloquent metaphor of the wilderness and the garden.[14] For Williams, the garden was the place of God's people—those of faith; outside the

9. *See, e.g.*, *Rosenberger*, 515 U.S. at 848; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

10. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

11. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 1–2 (2000).

12. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424–26 (1990); *see also* Carter, *supra* note 4, at 297–98.

13. Carter, *supra* note 4, at 295.

14. *Id.* at 296.

garden was the unevangelized world or wilderness. His idea was to construct a hedge to separate the two worlds and protect religion from the state.[15]

At the time the Constitution was drafted, religion represented one of the most important influences in the lives of the American people—it permeated their every thought and action.[16] Any decision made by government was expected to have a religious background or dimension due to the prevailing morals of the decision makers of that time.[17] Although American state legislatures in the 1770s and 1780s drafted constitutions providing for the protection of religious worship, religious tests for public office were common and some states maintained a system of general assessment of religions.[18] The Founders were aware of the power and importance of religion in the lives of people. They knew that religion could not be separated from decision makers' thought processes. In incorporating the Free Exercise and Establishment Clauses into the Constitution, the drafters did not intend to trivialize the role that religion played in the United States; rather, they sought to prevent the establishment of a state-sponsored church.[19] Following the understanding of separation between church and state at that time, the Founders aimed to protect religion from the state,[20] not the state from religion, as the Supreme Court has recently held.[21] Thomas Berg suggests that, although the religion clauses of the First Amendment do not reveal a specific underlying theory about how the state should treat religion,

15. *Id.*

16. Conkle, *supra* note 11, at 4.

17. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 44 (2002) (referring to George Washington's statement that "Religion and Morality are the essential pillars of Civil Society").

18. THOMAS C. BERG, THE STATE AND RELIGION IN A NUTSHELL 44–56 (1998).

19. Carter, *supra* note 4, at 294 (claiming that the "Protestant separatists believed in dividing *church* from state, not *God* from state"); *see, e.g.*, Conkle, *supra* note 11, at 4–5 (discussing the interrelatedness of Christian and American history). *But see, e.g.*, Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 387 (arguing that the Framers were primarily concerned with preventing seemingly "tolerant expression[s] of religious views" from becoming an attempt to "indoctrinate and coerce"); Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1125 (2002) (arguing that Madison interpreted the religion clauses as preventing governmental support of any religion, believing that "liberty and republican government would be furthered through 'the multiplicity of sects'" (quoting THE FEDERALIST NOS. 10, 51 (James Madison))).

20. Carter, *supra* note 4, at 294.

21. Conkle, *supra* note 11, at 5–6.

the view that "religious belief should not be compelled but . . . government may support [religious belief] in ways short of coercion"[22] is perhaps the most credible from a historical perspective.

B. Everson: *The Wall Between Church and State*

In the United States, the doctrine of strict separation of church and state became part of First Amendment jurisprudence in 1947 when the Supreme Court delivered its judgment in *Everson v. Board of Education*.[23] Justice Black's opinion for the Court expressed the doctrine as follows:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[24]

Justice Black also stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[25] In disallowing government aid of all religions, the majority preempted an interpretation of the Establishment Clause that would condone the aid of all religions as long as they are treated equally. Presumably, this interpretation of the Establishment Clause would be unworkable because, in addition to making judgments on "equal treatment," it would also require judicial pronouncements as to what constitutes a religion, which is a daunting task at best and discriminatory at worst. Nevertheless, Justice Black's separation of church and state doctrine is unable to hide the natural tension between the First Amendment's Free Exercise and Establishment clauses. This tension stems from the

22. BERG, *supra* note 18, at 53 (discussing this and other views on the Framers' intent).

23. 330 U.S. 1 (1947).

24. *Id.* at 15–16.

25. *Id.* at 18.

fact that governmental indifference to religion and the absence of government aid may prevent people from exercising their constitutional right to the free exercise of religion. Indeed, some government assistance may be necessary to facilitate the exercise of constitutional rights. The inherent tension between the Free Exercise Clause and the Establishment Clause explains the Supreme Court's development of various tests since 1947, each of which aim to mitigate the effects of the strict separation of church and state doctrine as espoused in *Everson*.[26]

III. THE DEVELOPMENT OF THE NEUTRALITY PRINCIPLE

A. A History of the Neutrality Principle: Variants on a Theme

1. The Lemon *test*

Although the neutrality principle is arguably of recent vintage, a review of the relevant Supreme Court jurisprudence reveals its long pedigree. The principle may be traced to the Court's decision in *Lemon v. Kurtzman*.[27] In *Lemon*, the Court developed one of the most durable tests for analyzing purported violations of the Establishment Clause. *Lemon* involved a Pennsylvania statute that allowed the state to reimburse participating nonpublic schools for expenses incurred in providing certain educational services pursuant to purchase-of-service contracts with the state.[28] According to the terms of the contracts, the schools were to provide teachers, textbooks, and instructional materials for mathematics, modern foreign languages, physical science, physical education courses, and other secular courses of instruction.[29] The question in *Lemon* was whether church-affiliated schools could also take advantage of this program.[30] The Supreme Court answered the question in the negative and, in the process, developed the *Lemon* test for

26. See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), in which the Supreme Court declared that "[i]t has never been thought either possible or desirable to enforce a regime of total separation."

27. 403 U.S. 602 (1971).

28. *Id.* at 609–10. In *Lemon*, the Court also addressed a Rhode Island statute that directly paid private school teachers for teaching secular subjects. *Id.* at 607.

29. *Id.* at 609.

30. *Id.* at 610–11.

determining the constitutionality of such statutes: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[31]

The *Lemon* test, in a real sense, constitutes a version of the neutrality principle, because if the purpose or effect of a law or practice is to favor religion, or if the state would be entangled with religion, the balance would shift to sectarianism at the expense of secularism. In requiring laws to have a secular purpose, the *Lemon* test aims at restoring that balance. However, this test often impedes the free exercise of religion because, when focusing on the effect of the relevant law, any indirect state involvement with religion may be held to violate the Establishment Clause. As such, the *Lemon* test in reality becomes an extreme version of the neutrality principle if its application results in a failure to accommodate the role and significance of religion in American society. As McConnell, Garvey, and Berg have argued, "[T]he point is that accommodations of the free exercise of religion necessarily 'favor' religion over nonreligion, in violation of the Establishment Clause as interpreted in *Lemon*."[32] That the *Lemon* test fails to accommodate religious observance led Justice Scalia, in *Lamb's Chapel v. Center Moriches Union Free School District*,[33] to liken the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried" and "stalks our Establishment Clause jurisprudence once again, frightening the little children."[34] Similarly, but perhaps less expressively, Chief Justice Rehnquist, referring to the *Lemon* test, opined that "it bristles with hostility to all things religious in public life."[35]

31. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

32. MCCONNELL ET AL., *supra* note 17, at 281.

33. 508 U.S. 384 (1993).

34. *Id.* at 398 (Scalia, J., concurring).

35. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (disputing the majority's holding that a school district's policy of allowing invocations at high school football games by a student selected by the student body is unconstitutional).

2. The endorsement test

The Supreme Court has never overruled the *Lemon* test. But the perceived or real difficulties associated with its application explain, at least in part, attempts by members of the Court to reinterpret the test or even to develop other tests which more closely resemble their preferred understanding of the neutrality principle. Justice O'Connor reinterpreted the purpose and effect prongs of the *Lemon* test, in her concurring opinion in *Lynch v. Donnelly*,[36] as prohibiting state "endorsement" of religion. She suggested that the purpose prong of the *Lemon* test be reinterpreted as prohibiting government from intentionally communicating a message of endorsement.[37] Along the same lines, the reinterpretation of the effect prong forbids government action, whether intended or not, that is deemed to objectively convey a message of endorsement or disapproval.[38] Thus, the endorsement test requires an investigation into "whether the government intends to convey a message of endorsement or disapproval of religion"[39] and whether the relevant law or practice "sends a message to nonadherents that they are outsiders, not full members of the political community."[40] If so, the Establishment Clause has been violated.[41]

The endorsement test was later applied by Justice Blackmun in *County of Allegheny v. ACLU*.[42] In this case, the Court declared unconstitutional a freestanding display of a nativity scene on the main staircase of a county courthouse, but upheld the display of a Jewish menorah that stood next to the city's Christmas tree and was accompanied by a statement saluting liberty. Justice Blackmun held that, unlike the Court's holding in *Lynch*, the crèche sent a message of official endorsement to nonbelievers.[43] This was held to constitute a violation of the neutrality principle because the endorsement of a Christian symbol results in favorable treatment of religion at the expense of secularism.[44] The display of a Jewish menorah, on the

36. 465 U.S. 668 (1984).
37. *Id.* at 688 (O'Connor, J., concurring).
38. *Id.* (O'Connor, J., concurring).
39. *Id.* at 691 (O'Connor, J., concurring).
40. *Id.* at 688 (O'Connor, J., concurring).
41. *Id.* at 687–88 (O'Connor, J., concurring).
42. 492 U.S. 573 (1989).
43. *Id.* at 621.
44. *Id.* at 601.

other hand, was upheld because, according to Justice Blackmun, the combined display of a tree, a sign saluting liberty, and a menorah simply recognizes that both Christmas and Chanukah are part of the same winter holiday season, which have attained a secular status in American society.[45] Hence, if the Christmas tree and the sign distract from the display of the menorah, the neutrality principle is not violated.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, regarded both displays as constitutional. Justice Kennedy rejected the endorsement test because it "reflects an unjustified hostility toward religion."[46] For Justice Kennedy, the Court's religion decisions

> disclose[d] two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."[47]

He also stated that "it borders on sophistry to suggest that the '"reasonable"' atheist would feel less than a '"full membe[r] of the political community"' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false."[48] Justice Scalia, in an insightful statement about the endorsement test, commented that it is a "strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment [under the Free Exercise Clause] forbids endorsement of religion in general."[49]

3. The neutrality principle

The Supreme Court first announced the neutrality principle as such in *Rosenberger v. Rector & Visitors of the University of*

45. *Id.* at 620.

46. *Id.* at 655 (Kennedy, J., concurring and dissenting).

47. *Id.* at 659 (Kennedy, J., concurring and dissenting) (second alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

48. *Id.* at 673 (Kennedy, J., concurring and dissenting) (alterations in original) (citations omitted in original).

49. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 400 (1993) (Scalia, J., concurring).

Virginia.[50] In *Rosenberger*, the University of Virginia (University), a state instrumentality, authorized payments from its Student Activities Fund (SAF) to outside contractors to cover the printing costs of a variety of publications issued by student groups.[51] However, the University withheld authorization for payments to a printer for Rosenberger, of Wide Awake Productions (WAP), on the ground that, contrary to SAF guidelines, the journal had religious editorial content.[52] In a 5–4 decision, the Supreme Court held that this action represented viewpoint discrimination because it required University officials to scan and interpret student publications to ascertain their underlying philosophic assumptions respecting religious theory and belief.[53] The University argued that this viewpoint discrimination was justified to avoid a violation of the Establishment Clause.[54] However, the Court reasoned that the viewpoint discrimination, in effect, elevated secularism over sectarianism. This discrimination constituted a denial of the right of free religious speech that risked "fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[55] In developing the neutrality principle, the *Rosenberger* majority fashioned a variant of the *Lemon* test that allows government action, the purpose or effect of which is secular and neither advances nor inhibits religion.

In contrast, the dissent argued that the majority approved direct funding of core religious activities by an arm of the state and therefore condoned a violation of the Establishment Clause.[56] They focused on the publication's religious orientation as the relevant characteristic justifying denial of financial benefits that would otherwise have been available.[57] However, in disallowing payments from SAF, the dissenters condoned a form of discrimination in favor of secularism, which would have breached the majority's neutrality principle. Ultimately, *Rosenberger* stands for the proposition that government aid that indirectly benefits religion is acceptable because it ensures the neutral treatment of secularism and sectarianism.

50. 515 U.S. 819 (1995).
51. *Id*. at 824.
52. *Id*. at 827.
53. *Id*. at 845.
54. *Id*. at 846.
55. *Id*.
56. *Id*. at 864–65 (Souter, J., dissenting).
57. *Id*. at 868 (Souter, J., dissenting).

The Supreme Court's neutrality approach to the First Amendment is reinforced by its public access jurisprudence, which deals with the access of religious groups to public facilities. According to this jurisprudence, the exclusion of a religiously affiliated group from a public facility constitutes a policy favoring secularism, and thus violates neutrality. Thus, in *Board of Education v. Mergens*, the Court overturned a decision by a local board of education to reject a student's request for permission to form a Christian student club, which, like other clubs, would have had access to the school's facilities after school hours.[58] The Court held that "a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion."[59] Indeed, the rejection of the student's request had the effect of violating the neutrality principle by excluding a religious club from using school facilities after school hours, thereby effectively elevating secularism over sectarianism.

The holding in *Mergens* was followed by *Lamb's Chapel*,[60] where the Court similarly applied the neutrality approach. In this case, the Court held that preventing a church from showing a religiously oriented film series on family values and childrearing after hours on school premises violated the First Amendment's Free Speech Clause. The Court pointed out that permitting school district property to be used for the screening of the film would not constitute an establishment of religion under *Lemon*.[61] The Court held that there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed" in view of the fact that the films were not scheduled for screening during school hours, were not sponsored by the school, and were open to the public.[62]

The neutrality principle was also strongly endorsed in *Capitol Square Review & Advisory Board v. Pinette*,[63] where Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, held that "[r]eligious expression cannot violate the

58. 496 U.S. 226 (1990).

59. *Id.* at 252.

60. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

61. *Id.* at 395.

62. *Id.*

63. 515 U.S. 753 (1995).

Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[64] In *Pinette*, the Establishment Clause was not violated by a religiously neutral policy that permitted a private party (the Ku Klux Klan) to display an unattended religious symbol (a cross) in a traditional public forum located next to the local seat of government.[65] Hence, the Court held that the First Amendment protects the government's neutral treatment of private religious expression. In permitting public access that confers incidental benefits upon religion, the Court further demonstrated its adherence to the neutrality principle.[66]

One of the most recent public access jurisprudence cases is *Good News Club v. Milford Central School*,[67] where New York authorized local school boards to adopt regulations governing the use of their school facilities. Milford Central School regulations provided that (1) "district residents may use the school for 'instruction in any branch of education, learning or the arts,'" and (2) "the school is available for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.'"[68] Good News, a private Christian organization for children ages six to twelve, submitted a request to the interim superintendent of the district for permission, in accordance with Milford's policy, to hold the club's weekly after-school meetings in

64. *Id.* at 770.

65. *Id.*

66. This interpretation of the neutrality principle is compatible with the "purpose approach" used by the Supreme Court to ascertain the constitutionality of legislation under the Free Exercise of Religion Clause of the First Amendment. Indeed, in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), Justice Scalia, delivering the opinion of the Court, held that a generally applicable law, the purpose of which is not to discriminate against religion, is constitutional even if it indirectly infringes on a person's freedom of religion. *Id.* at 877–79; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating a city's ban on the ritual slaughter of animals because the background, specific language, and exemptions of the ban indicated that its purpose was to suppress a central element of the Santeria religion). Conversely, the application of the "neutrality principle" by the Supreme Court in an Establishment Clause context indicates that if the purpose of the law or practice is not to establish religion it will be held constitutional even if it indirectly confers a benefit on religion. *See* Gabriël A. Moens, *Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle*, 1996 BYU L. REV. 787, 792–802.

67. 533 U.S. 98 (2001).

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

the school cafeteria. Milford denied the request on the ground that the policy prohibited use of the facilities by any individual or organization for religious purposes.[69]

The Court addressed whether Milford infringed the Good News Club's free speech rights, and if so, whether this infringement was justified by Milford's desire to avoid violating the Establishment Clause.[70] Writing for the Court, Justice Thomas held that "Milford's exclusion of the Good News Club based on its religious nature [was] indistinguishable from the exclusion" in *Lamb's Chapel* and *Rosenberger*, and that it "constitute[d] viewpoint discrimination."[71] The finding of viewpoint discrimination was based on the hostility directed against the content of the message of the Good News Club.[72] The Court indicated that it is necessary to examine the regulated speech or activity in order to conclude that viewpoint discrimination is involved:

> Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature—"the equivalent of religious instruction itself"—it excluded the Club from use of its facilities.[73]

Justice Thomas held that viewpoint discrimination was not justified by a desire to avoid violation of the Establishment Clause because allowing the Good News Club to use the facilities of the school would have ensured the application of a neutral, evenhanded government policy.[74] After finding that neutrality was "'a significant factor in upholding governmental programs in the face of [an]

69. *Id.* at 104.

70. *Id.* at 112.

71. *Id.* at 107.

72. *Id.* at 111.

73. *Id.* at 108 (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 507 (2d Cir. 2000)).

74. *Id.* at 114.

Establishment Clause attack,'"[75] Justice Thomas affirmed that access to the school would strengthen the neutrality principle:

> Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.[76]

4. The "coercion" test

Justice Thomas also considered the "coercion test" in *Good News Club*. According to this test, the government may not coerce a person, either physically or mentally, into attending or participating in religious activities. This test is a variant of the neutrality principle used by the Supreme Court to ensure that laws and government practices do not disfavor secularism and thereby elevate sectarianism.[77] The coercion test is exemplified in *Lee v. Weisman*.[78]

In *Lee*, the Court considered whether a religious exercise (a nonsectarian prayer) could be conducted at a middle school graduation ceremony where the graduates were required to either

75. *Id.* (quoting Rosenberger v. Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995)); *see* Mitchell v. Helms, 530 U.S. 793, 809 (2000) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."); *see also* Edwards v. Aguillard, 482 U.S. 578 (1987) (holding a Louisiana law unconstitutional that proscribed the teaching of evolution as part of the public school curriculum, unless accompanied by a lesson on creationism).

76. *Milford*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839).

77. Justice Thomas considered the coercion test when he asked "whether the community would feel coercive pressure to engage in the Club's activities." *Id.* at 115. He refused to apply the test in the circumstances of this case because the relevant community to consider for the purposes of the test is the community of parents, not elementary school children. He concluded that "[b]ecause the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities." *Id.*

78. 505 U.S. 577 (1992).

tolerate the prayer or not attend their own graduation.[79] The Court held that the school district's supervision and control of the ceremony placed subtle and indirect pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction and, in effect, endorsed a religious observance.[80] The Court relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'"[81] The Court concluded that "primary and secondary school children" may not be placed "in the dilemma of [either] participating [in a religious ceremony], with all that implies, or protesting."[82] *Lee* reveals that the neutrality principle is simply a generalized version of the coercion test. The majority in *Lee* thought that the practice, in effect, preferred religion at the expense of secularism.[83]

B. The Newest Wave of Neutrality Decisions

1. Zelman: *neutrality and free choice*

There is a line of cases that deals with the distribution of government funds to eligible people who are required to spend these funds for certain approved purposes—most notably education. Is the Establishment Clause violated if these funds are used by some

79. *Id*. at 583.

80. *Id*. at 593.

81. *Id*. at 587 (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

82. *Id*. at 593.

83. *Lee* is consistent with other Supreme Court decisions both before and since that time. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (finding that a school district's policy of permitting, but not requiring, prayer initiated and led by a student at high school football games constitutes a violation of the Establishment Clause, because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which . . . 'tends to do so'" (quoting *Lee*, 505 U.S. at 587)); Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating government-sponsored reading of at least ten verses from the Bible); Engel v. Vitale, 370 U.S. 421, 435 (1962) (holding that school prayers are unconstitutional because "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance").

recipients to purchase education in church-affiliated schools? Certainly, a plausible argument could be made that the neutrality principle is violated if the effect (or even purpose) of the distribution of government funds is to advance religion (thereby violating the *Lemon* test) or endorse sectarianism. Also, such a governmental scheme may arguably violate the coercion test in that the distribution of government funds, in a subtle way, coerces parents to seek education in a church-affiliated school for their children. However, the Supreme Court's jurisprudence indicates that if the funds are made available to eligible applicants the neutrality principle is not violated by parents' decision to purchase education, even religious education, of their own choosing. Presumably, the rationale for this jurisprudence stems from the belief that free choice will enhance the neutrality principle, because direction to use the funds only in public schools would deny parents free choice and adversely impact sectarianism while elevating secularism.

The *Lemon*, endorsement, and coercion tests,[84] which are all variants of the neutrality principle, found recent expression in *Zelman v. Simmons-Harris*.[85] *Zelman* dealt with the Cleveland Scholarship and Tutoring Program, which was adopted by the Ohio Legislature in 1996 after thirty years of desegregation litigation and

84. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy, writing for himself and Justices Rehnquist and Scalia, suggested that, in order to establish a violation of the Establishment Clause, religious endorsement is not sufficient but would have to be accompanied by "proselytization" or "coercion." *Id.* at 659–61 (Kennedy, J., concurring and dissenting). Neither the endorsement test nor the coercion test has been completely adopted by a majority of the Supreme Court. In *Allegheny*, Justice Blackmun, writing for the majority, held that

> [a]n Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.

Id. at 627–28 (citations omitted). He added that a requirement to show "coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *Id.* at 628. Therefore, "any Establishment Clause test limited to '*direct coercion*' clearly would fail to account for forms of '[s]ymbolic recognition or accommodation of religious faith'" that may also violate the Establishment Clause. *Id.* (quoting *id.* at 661 (Kennedy, J., dissenting)). For Justice Kennedy, the endorsement test is flawed in its fundamentals and unworkable in practice because, if "applied without artificial exceptions for historical practice," it would invalidate many traditional practices that recognize the role of religion in American society. *Id.* at 670 (Kennedy, J., dissenting).

85. 536 U.S. 639 (2002).

education reform programs had failed to improve the Cleveland City School District. The scholarship payments were available in the form of checks payable to the parents, who designated the school to which the checks would be sent. In order to ensure that the money was spent on education, the parents were required to go to the school and endorse the checks. The respondents, Ohio taxpayers, argued that the program created public perception of state endorsement of religion.[86]

The Supreme Court, in a 5–4 decision, held that "the Ohio program is neutral in all respects toward religion" and that neutral educational assistance programs that offer aid directly to a broad class of individual recipients defined without regard to religion are constitutional.[87] The Court characterized the Establishment Clause as a provision that "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[88] In this case, there was no question that the purpose of the program was secular in nature and that it provided "educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented [to the Court was] whether the Ohio program nonetheless ha[d] the forbidden 'effect' of advancing or inhibiting religion."[89] The Supreme Court applied the holding of *Mueller v.*

86. *Id.* at 643–48. The Ohio Supreme Court rejected these claims, stating that "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." Simmons-Harris v. Goff, 711 N.E.2d 203, 209 (Ohio 1999) (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)). The Ohio Supreme Court concluded "that the School Voucher Program has a secular legislative purpose, does not have the primary effect of advancing religion, and does not excessively entangle government with religion." *Id.* at 211. The plaintiffs then obtained a ruling in the District Court for the Northern District of Ohio that the program violated the Establishment Clause. Disagreeing with the Ohio Supreme Court's conclusion that money only flows to religious institutions as a result of genuinely "independent and private choices of recipients," Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 864 (N.D. Ohio 1999), the district court held that the program unconstitutionally "advance[d] religion" because the overwhelming majority of schools from which a student may choose were sectarian and because no adjacent public school had chosen to participate in the program. *Id.* at 847–49. The Court of Appeals for the Sixth Circuit affirmed, finding that the "program ha[d] the primary effect of advancing religion . . . in violation of the Establishment Clause." Simmons-Harris v. Zelman, 234 F.3d 945, 961 (6th Cir. 2000).

87. *Zelman*, 536 U.S. at 653.

88. *Id.* at 648–49 (citations omitted).

89. *Id.* at 649.

Allen,[90] where it had rejected an Establishment Clause challenge to a Minnesota program that authorized tax deductions for various educational expenses, including private school tuition costs, even though the vast majority of beneficiaries were parents whose children attended sectarian schools.[91] In *Zelman*, Chief Justice Rehnquist, commenting on the Minnesota program in *Mueller*, stated that because "the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools," it "survive[d] scrutiny under the Establishment Clause."[92] Chief Justice Rehnquist further reminded his readers that true private choice programs have been held constitutional in the past:

> While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.[93]

90. 463 U.S. 388 (1983).

91. *Id*. at 403.

92. *Zelman*, 536 U.S. at 650; *see Mueller*, 463 U.S. at 400 ("The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

93. *Zelman*, 536 U.S. at 649 (citations omitted) (quoting Agostini v. Felton, 521 U.S. 203, 236 (1997)). Justice Rehnquist specifically noted *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), where the Court upheld payment of a salary by a school district to a sign-language interpreter for a deaf student attending a Roman Catholic high school, and observed that the challenged program "'distributes benefits neutrally to any child qualifying as "disabled."' Its 'primary beneficiaries' . . . were 'disabled children, not sectarian schools.'" *Zelman*, 536 U.S. at 651 (quoting *Zobrest*, 509 U.S. at 10, 12). In *Zobrest*, Chief Justice Rehnquist held that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest*, 509 U.S. at 8; *see also* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a statute that authorized payments to visually handicapped persons for vocational rehabilitation services, even if the recipient used these payments to pay tuition at a Christian college). The Supreme Court recently decided *Locke v. Davey*, 124 S. Ct. 1307 (2004), another funding case. Unlike *Zelman* and the cases Chief Justice Rehnquist cites therein, in *Locke* the Supreme Court found constitutional a state law that prohibited using state scholarship funds for devotional theology degrees. *See* discussion *infra* Part III.B.2.

The Chief Justice further indicated that the program was constitutional because it "[was] neutral in all respects toward religion. It [was] part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district."[94] The only preferences involved in this program were "preference[s] for low-income families, who receive greater assistance and are given priority for admission at participating schools."[95] "There are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools. Such incentives '[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion . . . .'"[96] Chief Justice Rehnquist responded to the suggestion that "even without a financial incentive for parents to choose a religious school, the program creates a 'public perception'" of state endorsement of religion:[97]

> But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. . . . Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.[98]

The Supreme Court also rejected an attack on the constitutionality of the Ohio program on the ground that it coerced parents into sending their children to religious schools. It emphasized that there was no coercion involved in the program, because it provided a wide range of options for Ohio schoolchildren, including religious schools.[99] Chief Justice Rehnquist summed up the majority opinion as follows:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of

94. *Zelman*, 536 U.S. at 653.

95. *Id.*

96. *Id.* (alterations in original) (citation omitted) (quoting *Agostini*, 521 U.S. at 231).

97. *Id.* at 654.

98. *Id.* at 654–55.

99. *Id.* at 655–56.

> individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.[100]

Justice O'Connor's concurrence emphasized that a program of genuine choice satisfies the endorsement test. In particular, her decision to concur rather than join the majority opinion was based on her belief that the Court's decision did not mark a dramatic break from past Establishment Clause decisions and that the policy was neutral.[101] Justice O'Connor noted that the Court's recent Establishment Clause decisions had clarified "the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, or, as [she] put it, of 'endors[ing] or disapprov[ing] . . . religion.'"[102] For her, the Court's task was to consider whether the program administers aid in a neutral fashion and whether the beneficiaries had a genuine choice between religious and nonreligious organizations. If the answer to either question had been in the affirmative, then she would have held that it satisfied the Establishment Clause.[103] She referred to Justice Black's opinion in *Everson*, where he stated that "the '[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary.'"[104] She then proceeded to deconstruct Justice Souter's dissenting opinion in which he rejected the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents, but rather by its effects.[105] Justice O'Connor argued that, although the criteria

100. *Id.* at 662–63.

101. *Id.* at 663 (O'Connor, J., concurring).

102. *Id.* at 669 (O'Connor, J., concurring) (second and third alterations in original) (citation omitted) (quoting Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring)).

103. *Id.* (O'Connor, J., concurring) (noting that "[i]f the answer to either query is 'no,' the program should be struck down under the Establishment Clause").

104. *Id.* (O'Connor, J., concurring) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

105. *Id.* at 670 (O'Connor, J., concurring).

used to identify the beneficiaries of an aid program might have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination, this effect is not present where "'aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[106] In such a case, the aid does not have the effect of advancing religion.

2. Locke v. Davey, *the Supreme Court's most recent funding decision*

As this Article was going to press, the Supreme Court handed down its decision in *Locke v. Davey*.[107] In *Locke*, the Supreme Court upheld as constitutional a Washington State scholarship program that made funds available to students at accredited schools in the state for any course of study except devotional theology.[108] The respondent, Joshua Davey, argued that the program violated his constitutional right to the free exercise of religion because the scholarship funds could not be used to support his preferred course of study—devotional theology—at his preferred accredited institute.[109]

Locke poses interesting questions regarding the relationship between the Free Exercise and Establishment clauses of the First Amendment because the exclusion of devotional theology degrees from Washington's otherwise inclusive scholarship program might be perceived as impacting an eligible student's free exercise of religion, even if the exclusion aims at avoiding a violation of the Establishment Clause. Washington based the exclusion of devotional theology from its scholarship program on Article I, Section 11 of its state constitution, which states, "No public money or property shall

106. *Id.* at 653–54 (O'Connor, J., concurring) (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)). *Agostini* held that the presence of a public employee on private school property does not create an impermissible link between government and religion and overruled *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating New York's system for delivering financial assistance to educationally deprived children in low-income areas); *see also* Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating a regulation of the University of Missouri at Kansas prohibiting the use of University facilities for purposes of religious worship or religious teaching).

107. 124 S. Ct. 1307 (2004).

108. *Id.* at 1308.

109. *Id.* at 1311.

be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[110]

The Court's decision in *Locke* is surprising for at least two reasons. First, it is incompatible with the free choice line of cases exemplified in *Zelman*, according to which the neutrality principle is violated if a governmental program adversely impacts sectarianism and elevates secularism. Chief Justice Rehnquist recognized *Zelman*'s continuing validity in *Locke* when he stated that "the link between government funds and religious training is broken by the independent and private choice of recipients."[111] Second, the Court's decision in *Locke* conflicts with *Church of the Lukumi Babalu Aye, Inc.*, which stands for the proposition that a program is presumptively unconstitutional if it is not facially neutral with respect to religion.[112] This would be the case if the program's purpose were to discriminate against a religion by imposing a burden on it. However, Chief Justice Rehnquist decided that the facts of *Locke* lend themselves to the application of a "'play in the joints'" principle: "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[113] The Court found that states, consistent with this principle of play in the joints, could, under *Zelman*,[114] and *Witters*,[115] provide scholarship funds for religious education, but that they need not do so.[116] In addition, the Court held that Washington's constitutional prohibition of spending government money on religious education provided a substantial basis for excluding devotional theology.[117]

If the implementation of the neutrality principle requires the neutral, equal treatment of secularism and sectarianism, then the principle is violated if a government program imposes a burden on religion which is not placed on secularism. If one disregards the principle of play in the joints and reinstates the principle of neutrality, the scholarship program would undoubtedly be

110. *Id.* at 1312 n.2 (quoting WASH. CONST. art. I, § 11).
111. *Id.* at 1311.
112. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
113. *Locke*, 124 S. Ct. at 1311.
114. 536 U.S. 639 (2002).
115. 474 U.S. 481 (1986).
116. *Locke*, 124 S. Ct. at 1312.
117. *Id.* at 1315.

unconstitutional under *Zelman* and the free choice line of cases. Also, under the purpose approach of *Lukumi*, the scholarship program, to the extent that it prohibits the use of the funds for the study of theology, would be unconstitutional as violating the guarantees under the Free Exercise Clause. Justice Scalia specifically emphasized this point in his dissenting opinion in *Locke*. Referring to *Lukumi*, he reminded his readers that the majority of the Court had held in that case that "[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny, and that the minimum requirement of neutrality is that a law not discriminate on its face."[118] He continued:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.[119]

He emphasized that "[i]f the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones." He was joined by Justice Thomas, who wrote individually to emphasize the valid point that "the study of theology does not necessarily implicate religious devotion or faith" because such study may be undertaken from a secular perspective as well as from a religious one.[120]

3. Recent application of the neutrality principle at the circuit court level

a. Glassroth*: the Ten Commandments case*. One of the most controversial decisions of 2003, in terms of community reaction and media exposure, is the Eleventh Circuit's decision in *Glassroth v. Moore*.[121] This case is an interesting example of the implementation of the Court's neutrality jurisprudence by lower courts. But more importantly, it illustrates the thesis that the neutrality principle has the potential to demean the role of religion in the public arena. In order to appreciate this theme, a review of the facts of this case is essential.

118. *Id*. at 1316 (Scalia, J., dissenting) (alteration in original) (citations omitted) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

119. *Id*.

120. *Id*. at 1320 (Thomas, J., dissenting).

121. 335 F.3d 1282 (2003), *cert. denied*, 124 S. Ct. 497 (2003).

Chief Justice Moore of the Alabama Supreme Court installed a 5,280-pound monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building "to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church."[122] No person entering the main public entrance of the building could avoid the monument due to its size and placement.[123] The Chief Justice denied requests to add a Martin Luther King Jr. monument and an atheist display, which would presumably have made the display less focused on Judeo-Christian religion.[124] He did, however, allow the installation of two plaques, one quoting Martin Luther King Jr.'s "Letter from Birmingham Jail," describing the "'moral law or law of God,'" and the other quoting Frederick Douglass's statement that slavery hides man '"from the laws of God.'" Chief Justice Moore also added a brass plaque of the Bill of Rights.[125]

The plaintiffs, three attorneys required to enter the State Judicial Building, claimed they were offended by the monument because it caused them to feel like outsiders.[126] They sued Chief Justice Moore in his official capacity as the administrative head of the Alabama judicial system, claiming his actions violated the Establishment Clause of the First Amendment.[127] They sought a declaratory judgment that his actions were unconstitutional and an injunction to remove the monument from public sight.[128] The District Court of Alabama concluded that Moore's actions violated the Establishment Clause, because his purpose in erecting the monument was nonsecular and because the monument's primary effect was to advance religion.[129] The Eleventh Circuit subsequently affirmed. Circuit Judge Carnes stated that the Supreme Court has come to understand the Establishment Clause to mean

> that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not

122. *Id*. at 1284.
123. *Id*. at 1292.
124. *Id*. at 1287.
125. *Id*. at 1287–88.
126. *Id*. at 1284.
127. *Id*.
128. *Id*.
129. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1299–1300 (M.D. A1a. 2002).

> delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."[130]

Chief Justice Moore, in his arguments before the court, stressed that the First Amendment language that "Congress shall make 'no law'" does not require government officials to refrain from taking action respecting an establishment of religion or prohibiting the free exercise thereof.[131] Chief Justice Moore, in emphasizing the "no law" language of the First Amendment, contended that it "proscribes only laws, which should be defined as '. . . rule[s] of civil conduct . . . commanding what is right and prohibiting what is wrong.'"[132] He claimed that the Ten Commandments monument "does neither," and is merely "'a decorative reminder of the moral foundation of American law.'"[133] The court found that, if it took this position offered by Chief Justice Moore, nothing would prevent him or those with similar ideologies from "adorn[ing] the walls of . . . courtroom[s] with sectarian religious murals and hav[ing] decidedly religious quotations painted above the bench."[134] Furthermore, the court referred to *County of Allegheny v. ACLU*,[135] where the Supreme Court "held unconstitutional the placement of a crèche in the lobby of a courthouse."[136] *Allegheny*, the court stated, "stands foursquare against the notion that the Establishment Clause permits government to promote religion so long as it does not command or prohibit conduct."[137]

Chief Justice Moore also argued that the monument only depicted the moral foundation of secular duties.[138] The importance of this argument stems from the fact that there could not be a violation of the Establishment Clause if the monument is "secular" in nature. However, the court, in rejecting this argument, relied on

130. *Glassroth*, 335 F.3d at 1293 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 590–91 (1989)).

131. *Id*.

132. *Id*.

133. *Id*. at 1294.

134. *Id*.

135. 492 U.S. 573.

136. *Glassroth*, 335 F.3d at 1294 (citing *Allegheny*, 492 U.S. at 612).

137. *Id*. (citing *Allegheny*, 491 U.S. at 609).

138. *Id*. at 1286.

Stone v. Graham,[139] where the Supreme Court held that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[140] The court noted that any attempt to show a valid secular purpose would be belied by Chief Justice Moore's own words that the purpose of the monument is to acknowledge the overruling power of God over the affairs of men and "to remind all who enter the [State Judicial] [B]uilding that 'we must invoke the favor and guidance of Almighty God.'"[141] The court also concluded that the monument conveyed a message of endorsement of religion because the appearance, location, and setting of the monument "contributed to 'the ineffable but still overwhelming holy aura of the monument.'"[142] Moreover, as Chief Justice Moore had campaigned under the banner of the Ten Commandments, a reasonable observer certainly could have concluded that the state was advancing, endorsing, or preferring Christianity.[143]

Glassroth confirms that courts will apply the neutrality principle or one of its variants in order to ascertain whether the Establishment Clause has been violated. It also illustrates that the application of the principle results in the trivialization of religion in American society

139. 449 U.S. 39 (1980) (holding unconstitutional a Kentucky statute requiring a copy of the Ten Commandments to be posted on the wall of each public school classroom).

140. *Id.* at 41 (footnote omitted).

141. *Glassroth*, 335 F.3d at 1296 (quoting Glassroth v. Moore, 229 F. Supp. 2d 1290, 1297, 1312 (M.D. Ala. 2002)).

142. *Id.* at 1297 (quoting *Glassroth*, 229 F. Supp. 2d at 1303–04).

143. *Id.* ("[A] reasonable observer would 'find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity.'" (quoting *Glassroth*, 229 F. Supp. 2d at 1304)). On August 27, 2003, the monument was finally removed from the State Judicial Building, one week after the deadline set by the district court. *See* Associated Press, *Ten Commandments Moved from Alabama Courthouse* (Aug. 28, 2003), http://channelonenews.com/news/2003/08/28/at_tencommandments. Chief Justice Moore's response to the removal was the following: "It is a sad day in our country when the moral foundation of our laws and the acknowledgement of God has to be hidden from public view to appease a federal judge." *Id.* The purpose of Chief Justice Moore's acts was to restore religion to the forefront of life from the chasm of neutrality into which it had fallen. *Glassroth*, 335 F.3d at 1296. The removal of the monument stirred the emotions of those affected by its presence, creating an automatic connection between church and state, which cannot easily be removed by order of a judge. Chief Justice Moore has since been relieved by the State Judicial Committee of his position on the court for disobeying the order of a federal court judge. Laura K. Womble, *Move It or Lose It*, AUBURN PLAINSMAN (Nov. 20, 2003), http://www.theplainsman.com/vnews/display.v/ART/2003/11/20/3fbc8e1521b08.

by removing a religious monument from the public arena. In addition, any attempt to secularize the monument by stressing that it merely constituted a decorative reminder of the moral foundation of the American legal system would have diminished the monument's religious message.

b. Newdow: *the Pledge of Allegiance case*. Another recent case has caused an equal amount of controversy in both the religious and political worlds: the Pledge of Allegiance case, *Newdow v. U.S. Congress*.[144] In *Newdow*, an atheist father of a student attending a public elementary school in the California Elk Grove Unified School District (EGUSD) claimed that his daughter was injured when she was "compelled to 'watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is a God, and that our's [sic] is "one nation under God."'"[145] In accordance with state law and a school district rule, EGUSD teachers began each school day by leading their students in a recitation of the Pledge of Allegiance. In particular, the California Education Code required public schools to start "each school day with 'appropriate patriotic exercises'" and specified "that 'the giving of the Pledge of Allegiance to the Flag of the United States of America . . . satisf[ies]' this requirement."[146] In order to implement this statute, the EGUSD adopted a policy requiring that "'[e]ach elementary school class [shall] recite the pledge of allegiance to the flag once each day.'"[147] The pledge, codified in 1942, was amended in 1954 to insert the phrase "under God" after the word "nation" in order to further patriotism and to counter godless communism.[148]

144. 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003) (specifying that the Supreme Court will address whether the plaintiff has standing and whether the district's policy violates the Establishment Clause). Oral arguments are calendared for March 24, 2004. *See* http://a257.g.akamaitech.net/7/257/2422/12jan20041425/www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalmarch2004.pdf (last visited Mar. 26, 2004).

145. *Newdow*, 292 F.3d at 601 (alterations in original).

146. *Id*. at 600 (quoting CAL. EDUC. CODE § 52720 (West 1989)). The Pledge of Allegiance was originally written in 1892. Jill Noelle Cecil, *Third-Graders Discuss God's Role in Pledge*, LEAF-CHRONICLE (Dec. 7, 2003), http://www.theleafchronicle.com/news/stories/20031207/localnews/780583.html.

147. *Newdow*, 292 F.3d at 600 (second alteration in original).

148. *See id*.; Associated Press, *Court Refuses to Reconsider Pledge Decision* (Feb. 28, 2003), http://www.usatoday.com/news/nation/2003-02-28-pledge_x.htm.

Judge Goodwin of the Ninth Circuit relied on the principle that "'[t]he government must pursue a course of complete neutrality toward religion.'"[149] In discussing the Establishment Clause issues, Judge Goodwin first reminded readers of the applicable tests:

> Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman*; the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny v. ACLU;* and the "coercion" test first used by the Court in *Lee*.[150]

Judge Goodwin further stated: "We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them."[151] In analyzing the endorsement test, he held:

> In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. . . . To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.[152]

The Ninth Circuit relied on the Supreme Court's decision in *Wallace v. Jaffree*,[153] and specifically Justice O'Connor's concurrence. In *Wallace*, the Court invalidated an Alabama statute that authorized a one-minute period of silence in public schools for meditation or voluntary prayer.[154] Justice O'Connor stated that, because the "purpose and likely effect [of the statute] is to endorse and sponsor voluntary prayer in the public schools," the statute violated the endorsement test and, hence, the neutrality required by the Establishment Clause.[155] Judge Goodwin took up Justice O'Connor's neutrality theme when he reasoned in *Newdow* that "'[t]he government must pursue a course of complete neutrality

149. *Newdow*, 292 F.3d at 608 (quoting Wallace v. Jaffree, 472 U.S. 38, 60 (1985)).
150. *Id.* at 605 (citations omitted).
151. *Id.* at 607.
152. *Id.*
153. 472 U.S. 38.
154. *Id.* at 40.
155. *Id.* at 67.

toward religion.'"[156] For him, neutrality cannot be achieved in a case where allegiance is to be sworn to any deity or no deity at all. Furthermore, Judge Goodwin stated that the school district conveys "a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge."[157]

Judge Goodwin went on to discuss past Supreme Court rulings, such as *West Virginia State Board of Education v. Barnette*, where the Court found unconstitutional a school district's wartime policy of punishing students who refused to salute the flag and recite the Pledge of Allegiance.[158] In *Barnette* the Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[159] Hence, the Ninth Circuit came to the conclusion that "[t]he Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community.'"[160]

Judge Goodwin also concluded that the school district's policy and the 1954 amendment to the pledge failed the coercion test. Using the language of the Supreme Court in *Lee*, he observed that "'[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.'"[161]

The Ninth Circuit then applied the *Lemon* test, first investigating whether the legislation has a secular purpose. Examining the historical context, the court determined that "the primary purpose of the 1954 [amendment] was to advance religion, in conflict with the first prong of the *Lemon* test."[162] At the time, the inclusion of "under

156. *Newdow*, 292 F.3d at 608 (quoting *Wallace*, 472 U.S. at 60).

157. *Id.*

158. 319 U.S. 624, 626 n.2 (1943).

159. *Id.* at 642.

160. *Newdow*, 292 F.3d at 608 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

161. *Id.* at 608–09 (quoting Lee v. Weisman, 505 U.S. 577, 592 (1992)).

162. *Id.* at 609.

God" was meant by the government to inveigh against the atheistic communist threat.[163] The only secular purpose claimed by the government was to "solemniz[e] public occasions, express[] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society."[164] The court found this argument flawed because it looked at the pledge as a whole rather than just the 1954 addition of "under God."[165] When the *Lemon* test is applied and the legislative history of the amendment examined, the language reveals that its purpose "was to take a position on the question of theism, namely, to support the existence and moral authority of God,"[166] thereby rejecting atheistic and materialistic concepts. Such a purpose violates the Establishment Clause. The Ninth Circuit determined that since the amendment fails the purpose prong of *Lemon*, it did not need to discuss the other prongs.[167]

The court also found that the school district's policy failed the *Lemon* test, even if the EGUSD had a secular purpose in fostering patriotism, because the policy constitutes an endorsement of religion.[168] "Given the age and impressionability of schoolchildren . . . particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God."[169] Accordingly, the court concluded "that (1) the 1954 Act adding the words 'under God' to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause."[170]

Justice Fernandez, concurring and dissenting, stressed the importance of the neutrality principle when he disagreed with the majority's understanding of the Establishment Clause:

> We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such

163. *Id.*
164. *Id.* at 610.
165. *Id.*
166. *Id.*
167. *Id.* at 611.
168. *Id.*
169. *Id.* at 611.
170. *Id.* at 612.

> thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.
>
> We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions.[171]

Judge Fernandez opined that the danger that "under God" in the Pledge of Allegiance will result in the establishment of a theocracy or will suppress somebody's beliefs is de minimis. For Judge Fernandez, phrases such as

> 'under God' and 'In God we Trust' have no tendency to establish a religion in [the United States] or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.[172]

Thus, in *Newdow* both Judge Goodwin and Judge Fernandez agreed that the neutrality principle should govern their analysis, but they clearly disagree on the application of this principle to the facts of the case. Judge Goodwin found that even though the students were not forced to recite the pledge, the amended 1954 version conveyed a message of state endorsement of religion, specifically of monotheism.[173] Likewise, he found that the policy and the amendment fail the coercion test because they place students in the untenable position of choosing between participating against their will or protesting.[174] When he applied the purpose prong of the *Lemon* test, Judge Goodwin found that the addition of the phrase "under God" to the pledge did not have a secular purpose but a religious one.[175] In contrast, Judge Fernandez opined that, in

171. *Id.* at 613 (Fernandez, J., concurring and dissenting).

172. *Id.* at 614 (Fernandez, J., concurring and dissenting).

173. *Id.* at 607.

174. *Id.* at 608.

175. *Id.* at 611–12.

removing the phrase "under God" from the pledge, the majority "do so at the price of removing a vestige of the awe we all must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country."[176] Judge Fernandez's opinion, in effect, is a reminder that *Newdow* serves as yet another example of how the implementation by courts of the neutrality principle in Establishment Clause cases trivializes the role of religion in the United States. In holding that the policy and the law are unconstitutional, the Ninth Circuit decided that the religious climate, which resulted in the amendment of the Pledge of Allegiance in 1954, created an entanglement between church and state.[177] By doing so, the court effectively facilitated the relegation of an important aspect of American life to meaninglessness by removing its significance from public life.[178]

The Supreme Court decisions on the neutrality principle and its implementation by the Ninth Circuit in *Newdow* illustrate the use of the different variants of the principle. The principle, as illustrated in *Newdow*, has the potential to trivialize the role of religion in American society. This potentiality may be referred to as the "menace" of neutrality.

IV. THE MENACE OF NEUTRALITY

The neutrality principle is based on the idea that "[o]nly a state that views itself as a 'homestead for all citizens' without committing

176. *Id*. at 615 (Fernadnez, J., concurring and dissenting).

177. *Id*. at 611.

178. In contrast, the Seventh Circuit held the recital of the Pledge of Allegiance to be constitutional. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). *Sherman* involved an Illinois statute, adopted in 1979, which directed schoolchildren to recite the Pledge: "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds." ILL. REV. STAT. ch. 122, ¶ 27-3 (1992) (current version at 105 ILL. COMP. STAT. 5/27-3 (2003)). According to the Seventh Circuit, the Pledge of Allegiance is merely a patriotic exercise and hence, is constitutional: "Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival." *Sherman*, 980 F.2d at 444 (emphasis omitted). The court reasoned that, in accordance with *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the government retains the right to design the curriculum in its schools and that people have the right to select private education if they disagree with the government's decisions in this regard. *Sherman*, 980 F.2d at 445. As the Seventh and the Ninth Circuits reached different results on the issue of the constitutionality of reciting the Pledge of Allegiance, the Supreme Court granted certiorari. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003).

itself to the . . . contents of [any] one religion or creed can ensure freedom of religion for each individual citizen."[179] "The First Amendment does not elevate one religion above all others, but rather it places all religions on par with one another, and even recognizes the equality of religion and non-religion."[180] The principle's premise is that, at least from a constitutional point of view, secularism and sectarianism must be treated equally (or neutrally). However, the review of cases in Part III of this Article reveals that courts, in endeavoring so intently to equalize sectarianism and secularism, overlook the consequences of the application of the neutrality principle for American society. The application of the neutrality principle inherently trivializes and degrades religion because it largely results in the removal of religious influences from American society. The constitutional separation between church and state has become a convenient means by which to protect the state against religion. Additionally, the application of this principle, and its associated tests, often involves a discretionary assessment by courts of relevant facts, thereby turning Establishment Clause analysis into nothing more than an exercise or judicial conversation in semantics.[181] The *Glassroth* court put it as follows: "Challenges under the Establishment Clause have often turned on subtle but significant differences. A crèche standing alone is constitutionally different from a crèche incorporated into a larger holiday display and legislative prayer is significantly different from prayer at a high-school graduation."[182]

The application of the neutrality principle results in trivializing religion to the point of making it irrelevant. The principle has been interpreted as requiring the State to be free from religion, rather than religion to be free from governmental interference. Although, arguably, the use of the neutrality principle was developed to

179. Deiter Lorenz, Freedom of Religion—The Legal Situation in Germany 3 (1995) (unpublished manuscript, on file with the Brigham Young University Law Review).

180. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1311 (M.D. Ala. 2002); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Zorach v. Clauson, 343 U.S. 306, 314–15 (1952); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948) (holding that the First Amendment requires accommodation, not merely tolerance, of all religions, and forbids hostility towards any).

181. I call this the Supreme Court's "see-saw approach" to the Establishment Clause.

182. 229 F. Supp. 2d at 1307 (citations omitted).

safeguard religious liberty, it has instead resulted in a failure to protect religion. Therefore, the Supreme Court's jurisprudence has the unfortunate consequence of facilitating the emergence of a culture of disbelief, making it difficult, if not impossible, to talk about religion in the legal context, or to talk about religion at all. Use of the neutrality principle has treated religion and religious belief as less important facets of the human personality. The recent focus on neutrality in issues between church and state, and likewise the trivialization of citizens' religious beliefs, moves counter to the philosophies upon which the United States was founded. In attempting to protect religion from government and to protect government from religion, only the latter has remained powerful in any degree.[183]

The neutrality principle not only has a trivializing effect on religion in general, but, more importantly, it also has resulted in deconstructing the relevant religious symbol or idea, even when used to protect religion (as in the access jurisprudence cases). A good example is provided by another Pledge of Allegiance case, decided by the Seventh Circuit. Unlike the Ninth Circuit in *Newdow*, the Seventh Circuit in *Sherman v. Community Consolidated School District 21* decided that the reference to "under God" in the Pledge of Allegiance was constitutional.[184] However, it came to that conclusion only after stripping away all religious meaning from the phrase. Indeed, the court opined that the reference is best understood as a form of "ceremonial deism" protected from Establishment Clause scrutiny chiefly because it has lost through rote repetition any significant religious content.[185] The Seventh Circuit rationalized that the Pledge of Allegiance is merely a patriotic exercise, despite the fact that the objections to its recital concentrates on its alleged religious overtones.[186] The court quoted Justice Brennan in *Marsh v. Chambers*:

> "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like. I might well adhere to the view expressed in

183. *See* Carter, *supra* note 4, at 311–12 (discussing the metaphor of the garden).

184. 980 F.2d 437 (7th Cir. 1992).

185. *Id.* at 447.

186. *Id.* at 444.

> *Schempp* that such mottoes are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance."[187]

Thus, the Seventh Circuit merely mimicked the Supreme Court's relevant jurisprudence, according to which Thanksgiving, Christmas, "In God We Trust," and similar governmental "'acknowledgements of religion serve . . . the legitimate secular purposes of solemnizing public occasions . . . and encouraging the recognition of what is worthy of appreciation in society.'"[188]

The deconstructive role of the neutrality principle when used to protect religious practices is also exemplified by *Marsh v. Chambers*, where the Supreme Court upheld the Nebraska legislature's practice of opening each day's session with a prayer by a state-paid chaplain.[189] The Court found that because the prayer was so deeply embedded in the history and tradition of the country, it did not violate the Establishment Clause.[190] In *Marsh*, the Supreme Court overruled the court of appeals, which had held that the chaplaincy practice violated all three elements of the *Lemon* test: the purpose and primary effect of selecting the same minister for sixteen years and publishing his prayers was to promote a particular religious expression, and the use of state money for compensation and publication led to unconstitutional entanglement of church and state.[191] In contrast, the Supreme Court in *Marsh* relied specifically on the fact that Congress authorized legislative prayer at the same time that it drafted the Bill of Rights. The Court illustrated its point by noting that the practice of opening sessions of Congress with

187. *Id.* at 447 (quoting Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting)).

188. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

189. 463 U.S. 783 (1983).

190. *Id.* at 793–95. The same conclusion was reached in *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003), regarding a state seal containing a pictograph of the Ten Commandments. Furthermore, the Third Circuit determined in *Freethought Society v. Chester County*, 334 F.3d 247, 265–66 (3d Cir. 2003), *quoted in* Glassroth v. Moore, 335 F.3d 1282, 1300 (11th Cir. 2003), that "a new display of the Ten Commandments is much more likely to be perceived as an endorsement of religion" than one in which there is a legitimate "preservationist perspective." This case involved an eighty-year-old plaque of the Ten Commandments on the outside of the county courthouse; the court distinguished this case from the present case due to the lack of attention to the plaque over the past eight decades. *Id.* at 266–67.

191. *Marsh*, 463 U.S. at 786.

prayer has continued without interruption for almost two hundred years, ever since the First Congress drafted the First Amendment. Chief Justice Burger, writing for the Court, stated, "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."[192] If the practice were discontinued because of its perceived incompatibility with the Establishment Clause, the Court would, in effect, impose more stringent First Amendment limits on the states than those contemplated by the draftsmen of the Constitution. Hence, the Court concluded that in light of the unique history of the First Amendment, there could "be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[193]

The same reasoning applies also to the recent Ten Commandments case discussed in Part III of this Article. Indeed, proponents of the display of the Ten Commandments in the rotunda of the State Judicial Building maintained that the Commandments are not an inherently religious document because they belong to most religions, i.e., they are part of the world's collective cultural history, and, therefore, their display cannot violate the Establishment Clause. However, in *Glassroth*, the court of appeals deflected *Marsh* by referring to some of the most recent cases regarding displays of the Ten Commandments and indicated that these have focused on the "factual specifics and context" as determinative "when it comes to applying the Establishment Clause to religious symbols and displays."[194] The court indicated that, as its decision implied nothing to situations with different facts, recognitions of God by government are not *per se* impermissible.[195] Furthermore, the court invoked the well-known statement in Justice O'Connor's concurrence in *Lynch:*

> "Those government acknowledgments of religion [declaration of Thanksgiving as a holiday, the national motto on money, and the opening of court sessions with reference to God] serve, in the only ways reasonably possible in our culture, the legitimate secular

192. *Id*. at 788.

193. *Id*. at 792.

194. *Glassroth*, 335 F.3d at 1300.

195. *Id*. at 1298.

> purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."[196]

The attempt in *Glassroth* to "secularize" the monument is baffling in any case in view of the fact that the Supreme Court itself declared in *Stone* that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[197] Thus, in order to shield religious monuments of this nature against constitutional attack, it would be necessary to deconstruct the religious message they convey. It reinforces what noted philosopher Kierkegaard said of the shift towards religious neutrality: "when we make of our faith a thing to be defended, we also shrink it to a defensible size, and thus remove a part of its power."[198]

An interesting phenomenon has emerged as a consequence of the trivializing effect that the courts' neutrality holdings have upon the role of religion in American life. During the *Glassroth* and *Newdow* controversies, huge numbers of people supported the Ten Commandments monument and the 1954 version of the Pledge of Allegiance, respectively. When the inherently religious essence of ideas and symbols is squeezed out of them through adjudication, a backlash from those who believe in them is likely to soon follow.

Glassroth offers a prime example of the validity of this point. There are two schools of thought on the presence of the Ten Commandments in the Alabama State Judicial Building: those who find it appropriate and those who do not. Those who do not support the presence of the Ten Commandments in the State Judicial Building fear the proximity of so religious a monument to the state and in turn are preventing a piece of American legal history from being placed in a location which would educate the citizens of Alabama. As a consequence, the spirit and importance of a document, which has held such influence over American culture and the founding of the United States, would be lost. In contrast, those

196. *Id.* at 1301 (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

197. 449 U.S. 39, 41 (1980) (footnote omitted).

198. *See* Carter, *supra* note 4, at 310.

who believe it is appropriate may take the perspective that the Ten Commandments are merely the secular expression of the moral foundation of law in the United States. However, this is a double-edged sword because, if the Ten Commandments form just another code of law, like the Louisiana Code of Evidence or the Internal Revenue Code, the meaning behind the Ten Commandments is lost as well. Herein lies the menace of the neutrality principle, for religion loses under either viewpoint.

V. OVERCOMING THE MENACE OF NEUTRALITY

The idea that church and state have different roles in society and that respectful separation between them should be maintained is essentially a good idea. The Founders of the United States knew that accommodation of both religious and nonreligious behavior was incompatible with the establishment of a government-sponsored church or with preferential treatment of religion.[199] However, a review of the relevant jurisprudence in this Article reveals that the application of the neutrality principle may have a chilling effect on religion, either by trivializing the role and significance of religion in American society or by deconstructing the relevant religious activity or symbol. This effect does not mean that the neutrality principle is inherently bad, but that the application of the principle in prior Supreme Court cases, as well as several recent decisions, disadvantages religion to the point of making it irrelevant. Hence, a different version of the neutrality principle needs to be developed in order to deflect this effect. This new version should enable religion to maintain its significant role in American society and should facilitate the exercise by people of their constitutional right to exercise their religion. This new version may therefore be called "equitable neutrality." Equitable neutrality does not require religion and government to rail against each other in order to keep their meaningfulness intact and avoid losing themselves in each other. Equitable neutrality could be achieved by returning the Establishment Clause to its original meaning, which arguably prohibits the government from establishing a state-sponsored church or from allocating government funds to churches, but does not require the strict separation of church and state.[200]

199. *See supra* note 19 and accompanying discussion.

200. See *supra* note 19 for discussion of some of the theories regarding original intent.

The purpose test is the one best suited to analyzing Establishment Clause violations. This test requires a determination of legislative intent. If it is not the purpose of the law to establish a state-sponsored church or to allocate government funds to churches, the law should be constitutional, even if it indirectly (or incidentally) confers a benefit on religion. The neutrality principle discussed in this Article is, to a certain extent, already compatible with this purpose approach. For example, in *Rosenberger*, the Supreme Court condoned the giving of indirect government aid precisely because the purpose of the payments from the Student Activities Fund was not to establish a church or to fund a religious publication.[201] Instead, it merely ensured the neutral treatment of secularism and sectarianism. The application of the neutrality principle becomes problematic, however, when an investigation into the purpose of a relevant law results in a finding of a violation of the Establishment Clause in circumstances where there is no governmental intention to establish a state-sponsored church or to allocate funds to churches.

Under my proposed purpose approach, the Establishment Clause is violated if religion is entrenched "as a feature of and identified with the body politic . . . so as to involve the citizen in a duty to maintain it and the obligation . . . to patronize, protect and promote the established religion."[202] This interpretation of the Establishment Clause facilitates the exercise by people of their constitutional right to freedom of religion because any indirect (or incidental) benefit enjoyed by them would be constitutional. This benefit does not offend the Establishment Clause because no governmental intention to create a state church or to allocate funds to a church can be ascertained. However, as argued in Part III of this Article, under the present neutrality approach, a person's constitutional right to the free exercise of religion is often only protected following a deconstruction of religion, thereby demeaning it in public life. The advantage of the purpose approach is that any government accommodation of religion is constitutional, provided it is not the purpose of the law to benefit religion directly by establishing a state church or by allocating government funds to churches. Thus, the application of this purpose approach would retain and respect the

201. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 864 (1995).

202. Attorney-Gen. *ex rel.* Black v. Commonwealth, (1981) 146 C.L.R. 559, 582 (Austl.).

religious character of the relevant religious activity or symbol. This is equitable neutrality.

VI. CONCLUSION

The neutrality principle as applied by the Supreme Court and in recent circuit court decisions fails to achieve true neutrality and often trivializes religion's role in public life. The notion of equitable neutrality, which involves the application of the purpose test in order to analyze putative violations of the Establishment Clause, has the potential to rectify the courts' incorrect application of the neutrality principle without disadvantaging religion. Were that to happen, the roles of religion and government would be separate, but would respect each other. This, in turn, would balance both religion and the government's powers so neither would slide into the chasm of inconsequence.