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Preaching to the High School Choir: Rachel Bauchman, The Establishment Clause, and the Search for the Elusive Bright Line

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PREACHING TO THE HIGH SCHOOL CHOIR:
RACHEL BAUCHMAN, THE ESTABLISHMENT CLAUSE,
AND THE SEARCH FOR THE ELUSIVE BRIGHT LINE

Julian R. Kossow

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PREACHING TO THE PUBLIC SCHOOL CHOIR:
THE ESTABLISHMENT CLAUSE, RACHEL
BAUCHMAN, AND THE SEARCH FOR THE
ELUSIVE BRIGHT LINE

JULIAN R. KOSSOW*

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I. INTRODUCTION

The U.S. Supreme Court has a long tradition of protecting religious freedom in this country.¹ Yet for those who are most anxious about the separation of church and state, a dark specter has begun to haunt America. Religious freedom and the First Amendment principles² that helped make this country great are

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1. See, e.g., Reynolds v. United States, 98 U.S. 145, 163 (1878) (“[T]o suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty.”); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“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 . . . religion or other matters or force citizens to confess by word or act their faith therein.”) (emphasis added). See generally Sherbert v. Verner, 374 U.S. 398 (1963) (holding that state could not deny employment benefits to plaintiff because she refused to work on Sabbath day of her faith); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Free Exercise Clause entitled Amish to exemption from general school attendance law).

2. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

The [First] Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and perma-

being threatened.³ A hue and cry has arisen. The religious right has repeatedly expressed its desire to make America a "Christian nation."⁴ A majority of American citizens now want to return prayer to public schools.⁵

After the Republicans' sweeping victory in the 1994 congressional elections, "Religious Equality"⁶ and "Religious Liberties"⁷ amendments to the Constitution were introduced in the House of

ment separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 217 (1963) (citation omitted).

Mr. Jefferson, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

Reynolds, 98 U.S. at 164 (emphasis added) (citation omitted) (quoting Letter from Thomas Jefferson to Danbury Baptist Ass'n (Jan. 1, 1820)). See also Stephanie E. Russell, *Sorting Through the Establishment Tests, Looking Past the Lemon*, 60 MO. L. REV. 653, 658 n.43 (1995); 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281-82 (Andrew A. Lipscomb ed., 1903).

3. See *infra* notes 6-7.

4. See Nat Hentoff, *A Christian Nation?*, WASH. POST, Feb. 17, 1996, at A25 (quoting Focus on the Family founder Dr. James Dobson's remark that "[t]he Constitution was designed to perpetuate a Christian order"); Jann Rennert, *Christian Soldiers March Onward, over Passive Electorate*, ARIZ. REPUBLIC, Oct. 15, 1995, at F1 (reporting that Christian Coalition conference attendees "were told they are 'persecuted' right here in their 'Christian nation'"). Such sentiments are not limited to extremist elements. The Oklahoma Republican Party adopted a platform at its 1996 convention declaring that the United States was founded as a Christian nation and that all law should be based upon Christian values. Tom Teeppen, *If Republicans Get Their Way, Pray for the Children*, ATLANTA J. & CONST., July 21, 1996, at 2F.

5. See Bill Broadway, *Schism Over School Prayer: Two GOP-Proposed Constitutional Amendments Reflect Split in Conservative Thinking*, WASH. POST., Dec. 2, 1995, at B7.

6. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995). Rep. Henry J. Hyde (R. Ill.) introduced the amendment on November 15, 1995. It provides: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination." *Id.* Rep. Hyde consulted with famed accommodationist Professor Michael McConnell to help draft this new amendment, which would allow for government funding of religious organizations. Broadway, *supra* note 5, at B7.

7. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995). Rep. Ernest J. Istook, Jr. (R. Okla.) introduced the amendment less than two weeks after the introduction of the Religious Equality Amendment. The Religious Liberties Amendment provides:

To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

Id.

Representatives. A number of commentators have viewed the proposed amendments as a direct attack on the Establishment Clause.⁸ Moreover, even though the traditional test of Establishment Clause boundaries set out by the U.S. Supreme Court in *Lemon v. Kurtzman*⁹ has proven more than adequate to maintain the separation of church and state, several Supreme Court justices have advocated abolishing the test.¹⁰ Commentators such as Professor Michael McConnell have written of the deserved death of “secular liberalism.”¹¹ Separation of church and state is under siege. “Accommodation” is the new “correct” path.¹²

Not all of the roiling is unhealthy or improper by any means. Buttressed by First Amendment rights of free exercise and free speech, religion is still a powerful force in our cultural, political, and social endeavors.¹³ This is appropriate for a country founded upon the principle of religious liberty. History, however, remains an omnipresent warning of potentially horrifying abuse.¹⁴ Free-

8. Constitutional scholars, including Douglas Laycock, have warned that the Religious Equality Amendment is only a “‘school prayer’ amendment in disguise.” Janan Hanna, Proposal Seeks ‘Religious Equality’; 1st Amendment Would Be Redefined, *CHI. TRIB.*, Dec. 10, 1995, at C1. The Religious Liberties Amendment, on the other hand, shuns any such disguise; its explicit goal is to restore prayer in schools. Katharine Q. Seelye, Proposed Prayer Amendment Splits the Right, *N.Y. TIMES*, Nov. 22, 1995, at D18. A spokesman for Americans United for Separation of Church and State has described the Religious Liberties Amendment as “essentially repeal[ing] the First Amendment’s Establishment Clause.” *Id.*

9. 403 U.S. 602 (1971). *Lemon* laid out a three-part test: “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612-13 (citations omitted). See generally *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970).

10. Justices O’Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist have all expressed dissatisfaction with the *Lemon* test. See, e.g., *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (Scalia, J., dissenting) (remarking that “in many applications [the *Lemon* test] has been utterly meaningless”); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that *Lemon* test should not be Court’s “primary guide” in its Establishment Clause jurisprudence); *id.* at 623 (O’Connor, J., concurring) (preferring “endorsement test” over *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (stating that *Lemon* “has no basis in the history of the amendment it seeks to interpret”). See also discussion *infra* part IV.

11. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 *U. CHI. L. REV.* 115, 134 (1992) (“The ideology of secular liberalism, while still strong among the American elite, has lost its position of unquestioned dominance.”).

12. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. CHI. L. REV.* 195, 203 (1992) (observing that while recent U.S. Supreme Court decisions have tolerated some official sponsorship of religion, “even this much accommodation of religion in public life is not enough, however, for some members of the Court”).

13. *Id.* at 195-96; McConnell, *supra* note 11, at 134-35.

14. The Supreme Court has voiced the very same concern:

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal ex-

dom of religion means freedom of conscience for all religions or for none, not just freedom of conscience for the majority's creed.¹⁵ The founders of this country were keenly aware of that.¹⁶ Thus, the First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁷ Equilibrium is the key: as the right to freely exercise one's religion expands, the right to be free of an established religion diminishes, and vice versa. Therein lies the genius of the system; it allows religion to flourish while maintaining a vibrant church-state separation that permits breathing room for all. Historically, the Establishment Clause has been a success.¹⁸

Many of the Establishment Clause cases decided by the Supreme Court during the past thirty years have been nibbles at the margin of constitutional protection, not thrusts at the heart.¹⁹ The Rehnquist Court, by accentuating accommodation, has shifted the fulcrum that balances the Free Exercise Clause with the Establishment Clause.²⁰ The seesaw now tilts decidedly in favor of the Free Exercise Clause, leaving the Establishment Clause up in the air.²¹ The direction taken by the Court raises the distant early warning of history's tragic lessons.

perience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular . . . form of religious services.

Engel v. Vitale, 370 U.S. 421, 429 (1962). In addition to obvious abuses, such as those which took place in Nazi Germany from 1933 to 1945 and during the Spanish Inquisition in the late fifteenth century, the events in Bosnia-Herzegovina are a more recent example of such horrors. See John F. Burns, 500 Muslims Driven by Serbs Through a Gauntlet of Terror, N.Y. TIMES, Oct. 2, 1992, at A1.

15. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

16. "Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs." Engel, 370 U.S. at 429.

17. U.S. CONST. amend. I.

18. The Establishment Clause has been used to prevent many types of entanglements between church and state. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (finding allocation of state funds to religion-affiliated schools for secular subjects unconstitutional due to excessive entanglement); *Schempp*, 374 U.S. at 223 (deciding that daily Bible reading and reciting of the Lord's Prayer in public schools is unconstitutional); Engel, 370 U.S. at 424 (holding official school prayer unconstitutional as a government-sponsored religious activity).

19. Russell, *supra* note 2, at 659 n.45.

20. *Id.* at 660 n.53.

21. See *Rosenberger v. Rector of the Univ. of Virginia*, 115 S. Ct. 2510, 2525 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Lamb's Chapel v. Center*

One of the central Establishment Clause issues has been the need to ascertain the allowable proportion of religion in public schools.²² Because children are susceptible to authority and may not have the defenses necessary to screen out improper suggestions, the Court has heard numerous cases that deal with this issue.²³ Part II of this Article examines the Rachel Bauchman case.²⁴ Currently on appeal in the Tenth Circuit, this case involves the question of whether a fifteen-year-old Jewish girl's Establishment Clause rights were violated by the use of overtly Christian religious music and by the actions of the director of the public school choir of which she was a member.²⁵ Part III of this Article analyzes significant Establishment Clause decisions in the Warren and Burger Courts, exploring in particular the parentage and progeny of the Lemon test.²⁶ Part IV analyzes notable Establishment Clause opinions in the Rehnquist Court and illustrates how these decisions are systematically dismantling the protection of the Establishment Clause. Part V articulates both a response to the accommodationist trend of the Rehnquist Court and a suggested answer to the Rachel Bauchman case. Finally, part VI proposes a return to a rigorous application of the Lemon

Moriches Union Free Sch. Dist., 508 U.S. 384, 391 (1993); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623 (1989).

22. The cases have ranged from activities that have entailed heavy involvement, such as direct readings from the Bible, see *Schempp*, 374 U.S. at 223, and use of a state-created school prayer, see *Engel*, 370 U.S. at 424, to activities with a lesser degree of involvement. For example, in *Lamb's Chapel*, the Court held that the use of public school facilities to show a religious film was constitutional. 508 U.S. at 395. The Court also has found unconstitutional the use of public funds to help build colleges and universities with religious affiliations because such use did not primarily advance religion and had a secular purpose. *Roemer v. Board of Public Works*, 426 U.S. 736, 762-66 (1976).

23. See *Lee v. Weisman*, 505 U.S. 577, 595-97 (1992). The potential influence in a school environment is much greater because of the amount of control faculty members and administrators exert upon the students, as well as the ability to limit the movement of students during religious exercises. *Id.* at 597. The *Lee* Court compared this to an invocation offered at the opening of a state legislative session, where the participants were adults who were free to come and go with little comment. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

24. See *Bauchman ex rel. Bauchman v. West High Sch.*, 906 F. Supp. 1483 (D. Utah 1995) (*Bauchman III*); *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995) (*Bauchman II*); *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 248 (D. Utah 1995) (*Bauchman I*).

25. *Bauchman II*, 900 F. Supp. at 261.

26. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Everson v. Board of Educ.*, 330 U.S. 10 (1947); see also *Sease v. School District*, 811 F. Supp. 183 (E.D. Pa. 1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311 (8th Cir. 1980);

test²⁷ as the most suitable bright line for separating church and state in public school cases.

II. THE CASE OF RACHEL BAUCHMAN

In 1994, Rachel Bauchman, a fifteen-year-old Jewish girl, transferred to West High School, a public school in Salt Lake City, Utah.²⁸ During the 1994-95 academic year, Rachel, a tenth-grade honor student, auditioned for and became a member of the school's A'Cappella Choir, an elective course that the school offered for credit.²⁹ Rachel had been singing soprano in choruses since the first grade and was thus familiar with a variety of choral music.³⁰ This choir's repertoire, however, which consisted mainly of contemporary Christian devotionals, was quite different from the repertoire of any of the choirs in which she had previously sung.³¹ Because of her religious convictions, Rachel did not feel she could, in good conscience, sing these particular songs, every one of which praised Jesus Christ.³² Nevertheless, the choir class curriculum mandated that the choir practice and perform these songs.³³ As part of the curriculum, the choir director, Richard Torgerson, required Rachel and the other choir members to sing at public sites.³⁴ Many of these performances, especially the ones that were part of a series of "Christmas concerts," took place in Christian churches.³⁵ In addition, Torgerson's former students described him as a deeply religious man who pressed his religious

27. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

28. *Bauchman I*, 900 F. Supp. at 249-50 (D. Utah 1995).

29. *Id.* at 249; Andrea Stone, *Jewish Teen Stands Against Utah Choir's Christian Tone*, USA TODAY, Nov. 2, 1995, at A4.

30. Stone, *supra* note 29, at A4.

31. The A'Cappella choir repertoire consisted of such Christian devotionals as "Friends," "The Lord Bless You and Keep You," and "Advent Gift." *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254, 259-61 (D. Utah 1995); Stone, *supra* note 29, at A4.

32. For example, the lyrics of "Advent Gift" are:

Lord, come to the manger, I wait for your birth;
 Now come Savior Jesus and bless all the earth;
 The heavens rejoice for your coming is nigh;
 All glory and honor to You, Lord most high.

Stone, *supra* note 29, at A4. Another lyric proclaims, "We glorify thee, God of Hosts. We love thee and exalt thee." *Bauchman II*, 900 F. Supp. at 260.

33. *Bauchman II*, 900 F. Supp. at 260.

34. *Id.*

35. *Id.* For example, performances were held in The Church of the Madeleine (Roman Catholic), the First Presbyterian Church, and Temple Square (The Church of Jesus Christ of Latter-Day Saints).

beliefs upon his students and even encouraged them to visualize "Jesus dying for our sins."³⁶

Rachel asked her father to write a letter to Torgerson requesting that he balance the choir's repertoire by adding nonsectarian songs and music of other faiths.³⁷ She also asked that some of the performances be held at nonreligious sites.³⁸ Torgerson refused both requests.³⁹ Subsequently, he offered Rachel the choice of continuing with the choir's scheduled practices and performances or sitting in the library for the duration of the Christmas concerts, for which she would earn an "A" for the course.⁴⁰ Rachel's religious convictions prevented her from accepting the first of Torgerson's offers; her sense of honor required her to decline the second.⁴¹

The situation worsened during the spring semester. Traditionally, the choir conducted a "spring tour" during which it performed religious and devotional music.⁴² The choir frequently participated as a group in Christian church services.⁴³ During class, Torgerson explicitly criticized Rachel's opposition to the content and locations of the spring tour.⁴⁴ Subsequently, Torgerson canceled the tour and indicated to the class that Rachel was the cause.⁴⁵ He chastised her in class for asserting her First Amendment rights, repeatedly mentioning Judaism in such a way as to differentiate her from her classmates.⁴⁶ Rachel alleged that "following the lectures she was exposed to public ridicule and humiliation, and was the subject of racial and religious epithets spoken by her fellow students."⁴⁷ For the remainder of the school year, Rachel was subjected to hostility, anti-Semitic remarks, a locker defaced by swastikas, and other hostile actions by West High School students.⁴⁸

36. William Raspberry, *Avoidable Ugliness*, WASH. POST, Nov. 8, 1995, at A17; see also Samuel A. Autman, *Bauchman Refiles West High Civil Rights Suit; It Includes Statements from Ex-Students on Actions of Choirmaster*, SALT LAKE CITY TRIB., Sept. 27, 1995, at D2.

37. Stone, *supra* note 29, at A4.

38. *Bauchman II*, 900 F. Supp. at 260.

39. *Id.*

40. *Id.*

41. See *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 248, 249 (D. Utah 1995).

42. *Bauchman II*, 900 F. Supp. at 260.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 260-61.

47. *Id.* at 261.

48. Stone, *supra* at 29, at A4. "She was called 'Dirty Jew' by other students. She was told to 'go back to Israel.' Swastikas and 'Jew Bitch' were scrawled on her student govern-

Rachel's father wrote a private letter to Torgerson regarding his daughter's situation.⁴⁹ Torgerson released the letter to Preston Naylor, the father of another student in the choir.⁵⁰ Naylor then circulated the letter to all of the parents of the students in the choir.⁵¹ Rachel alleged that the release and circulation of her father's letter increased her public humiliation and the hostility directed against her.⁵² Torgerson stated in class that he would not stop his activities "no matter what"—even if Rachel believed they were unconstitutional.⁵³

The situation culminated at the high school graduation on June 7, 1995. Attendance was compulsory for all students.⁵⁴ The A'Cappella Choir was slated to perform two songs: "Friends" and "The Lord Bless You and Keep You."⁵⁵ The lyrics in both songs explicitly referred to "the Lord" and to other words with clear religious connotations.⁵⁶ Rachel sued, seeking a temporary restraining order, which was denied by U.S. District Court Judge J. Thomas Greene.⁵⁷ That denial was immediately overruled by the U.S. Court of Appeals for the Tenth Circuit.⁵⁸ The Tenth Circuit enjoined the choir from singing, and also enjoined public school officials from allowing the singing of those two particular songs at the graduation.⁵⁹ Notwithstanding the injunction, a large majority of the students and parents in attendance sang "Friends."⁶⁰

ment campaign posters. Now she is afraid to walk the hallways alone."Id.; see also Kristen Moulton, Choir's Christian Tunes Sound a Note of Discord in Salt Lake City Rights: Despite Injunction, Class Sang Religious Song at Graduation, L.A. TIMES, Aug. 20, 1995, at 4.

49. Bauchman II, 900 F. Supp. at 261.

50. Id.

51. Id.

52. Id.

53. Id.

54. Laurie Goodstein, School Prayer Directive May Not Settle All Cases: Many Religious Disputes Fall in Gray Zone, WASH. POST., July 15, 1995, at A1.

55. Raspberry, *supra* note 36, at A17.

56. Bauchman II, 900 F. Supp. at 261; see also Cal Thomas, Graduates Get Lesson in Absurdity, DAYTON DAILY NEWS, June 14, 1995, at 11A:

The lyrics of "Friends" are, "Friends are friends forever if the Lord's the Lord of them." "May the Lord Bless You and Keep You," although deriving from the Jewish Old Testament, carries with it a Christian connotation in its arrangement and its frequent usage in Christian services. The lyrics are, "The Lord lift up the light of the his countenance upon you and give you peace. . . . Amen."

57. Bauchman *ex rel.* Bauchman v. West High Sch., 900 F. Supp. 248, 254 (D. Utah 1995).

58. Bauchman v. West High Sch., No. 95-4084 (10th Cir. Aug. 18, 1995).

59. Id.

60. Bauchman II, 900 F. Supp. at 261-62. It should be noted that Judge Greene ruled against Rachel in her civil contempt action that claimed Torgerson and other public school officials violated the injunction. Bauchman *ex rel.* Bauchman v. West High Sch., 900 F. Supp. 1483, 1494 (D. Utah 1995). That decision currently is on appeal in the Tenth Cir-

Following this episode, Rachel brought suit in federal district court against West High School, Torgerson, various public school officials, and the Salt Lake City School District, alleging, among other things, violations of her First Amendment rights.⁶¹ The district court dismissed the suit, first in an oral opinion by Judge Greene, and later, following supplemental pleadings, in a written opinion.⁶² Remarkably, Greene ruled that Rachel had failed to state a claim for which relief could be granted, even though the Tenth Circuit had earlier decided, based upon essentially the same pleadings, that an injunction was appropriate.⁶³

The point of this Article is not to debate the wisdom of Judge Greene's dismissal of Rachel's suit. It does seem clear, however, that Judge Greene will be reversed again on appeal. The Tenth Circuit has stated that a dismissal for failure to state a claim is proper "only when it appears 'clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" ⁶⁴ Rachel will undoubtedly get her day in court.

III. THE ESTABLISHMENT CLAUSE IN THE WARREN AND BURGER COURT ERAS

Had Rachel's claim arisen in the Warren Court era, or even in the Burger Court era, contemporaneous constitutional jurisprudence would have revealed a clear violation of her First Amendment rights. *Engel v. Vitale*⁶⁵ and *Abington School District v. Schempp*⁶⁶ were the constitutional soil in which the Warren Court rooted its perception of the separation of church and state. Both *Engel* and *Schempp* focused on the issue of state-sponsored religious prayer in public schools.

cuit. See Jennifer Skordas, Ruling: Teachers Are Not to Blame Judge; West High Teachers Not to Blame for Singing, School Officials Tried to Stop Religious Song, Ruled Not in Contempt, *SALT LAKE TRIB.*, Nov. 28, 1995, at B1.

61. *Bauchman II*, 900 F. Supp. at 262. In addition to alleging violations of her rights under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, Rachel also brought a claim under 42 U.S.C. § 1983 for violation of the same First Amendment rights, as well as claims under the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb (1994), and the Utah Constitution. 900 F. Supp. at 262.

62. *Id.*

63. See *id.* at 271-72.

64. *Barett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

65. 370 U.S. 421 (1962).

66. 374 U.S. 203 (1963).

A. Engel v. Vitale

Decided in 1962, Engel involved a New Hyde Park, New York, school district directive that required every class in the district to recite a state-created prayer in the presence of a teacher at the beginning of each school day.⁶⁷ The New York State Board of Regents had recommended the nondenominational prayer as part of its "Statement on Moral and Spiritual Training in the Schools."⁶⁸ School district policy allowed those students who wished not to participate the option of being excused upon the written request of a parent or guardian.⁶⁹ Furthermore, teachers could not mandate any specific dress code, language, or posture during the prayer session.⁷⁰ Parents of ten students brought suit against the school district, alleging that the prayer was contrary to their beliefs and violated the Establishment Clause.⁷¹ Finding that no student was compelled to participate in the prayer, the New York Court of Appeals upheld the constitutionality of the policy.⁷²

In a decision written by Justice Black, the Supreme Court held that the nondenominational prayer was unequivocally a religious activity.⁷³ Recognizing that state policy is unconstitutional when it creates a government program furthering religion, the Court found that the Establishment Clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."⁷⁴ The Court went on to explain that although a prayer may be denominationally neutral and participation in its utterance voluntary, it is still an inappropriate advancement of religious goals by the state and thus violates the Establishment Clause.⁷⁵

The Establishment Clause is premised upon the "belief that a union of government and religion tends to destroy government and to degrade religion."⁷⁶ The Board of Regents' policy was therefore in direct conflict with the both the language and purpose of the Establishment Clause. The government violates the

67. Engel, 370 U.S. at 422. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.*

68. *Id.* at 423.

69. *Id.* at 438 (Douglas, J., concurring).

70. *Id.*

71. *Id.* at 423.

72. *Id.*

73. *Id.* at 424-25.

74. *Id.* at 425.

75. *Id.* at 430.

76. *Id.* at 431.

First Amendment not just when it promotes one religion over another, but also when it infringes upon religious freedom, even to a small degree.⁷⁷

B. Abington School District v. Schempp

The following year, in *Abington School District v. Schempp*,⁷⁸ the Supreme Court addressed the emotional and vexatious issue of Judeo-Christian prayer in public schools. *Schempp* involved a Pennsylvania statute that required the reading of ten verses from the Bible at the beginning of each school day.⁷⁹ As originally enacted, the statute did not have a provision for excusing students.⁸⁰ The statute was amended, allowing students with parental permission to be excused from the recitation and prayer sessions.⁸¹

The school day at Abington High School began with a reading over the intercom system of a student-selected passage from the Bible.⁸² A recitation of the Lord's Prayer followed the reading.⁸³ The Schempps, who were Unitarians, sued the school district because they believed that other children would view the family's religious difference as "atheism," which the Schempps felt would stigmatize their children.⁸⁴ The federal district court held that the statute violated the Establishment Clause.⁸⁵ In affirming, the Supreme Court noted that the Bible reading inherently possessed a "devotional and religious character and constitute[d] in effect a

77. *Id.* at 436. James Madison, the author of the First Amendment, stated:

[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *WRITINGS OF MADISON* 183, 185-186 (Gaillard Hunt ed., 1900)).

78. 374 U.S. 203 (1963).

79. *Id.* at 205.

80. *Id.* at 206 n.1.

81. *Id.*

82. Readings came from many versions of the Bible, and the Jewish Holy Scriptures. The school only offered the King James version of the Bible, which it gave to every teacher in the district. *Id.* at 207.

83. *Id.* The Lord's Prayer is:

Our Father which art in heaven, Hallowed be thy name.

Thy kingdom come, Thy will be done in earth, as it is in heaven.

Give us this day our daily bread.

And forgive us our debts, as we forgive our debtors.

And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.

Matthew 6:9-13 (King James).

84. *Schempp*, 374 U.S. at 208 n.3.

85. *Id.* at 206.

religious observance.”⁸⁶ Furthermore, the fact that prayers were said daily in a public school building under the supervision of school personnel constituted an impermissible advancement of religion by the state.⁸⁷

The purpose of the Establishment Clause, declared the Court, quoting Justice Rutledge’s seminal dissent in *Everson v. Board of Education*,⁸⁸ “ ‘was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.’ ”⁸⁹ Emphasizing the need for neutrality, the Schempp Court stated that “while [the government] protects all, it prefers none, and it disparages none.”⁹⁰ This is the intent of the Establishment Clause. If the purpose and primary effect of a statute advances or inhibits religion, then it is constitutionally infirm.

While the Abington Township School District contended that the program had secular purposes and was voluntary, the Schempp Court found that the pervasive religious character of the exercises outweighed the school district’s arguments.⁹¹ The Court understood that the seesaw effect of competing interests within the First Amendment prohibits the use of government power to deny the free exercise of religion to anyone. By the same token, the First Amendment “has never meant that a majority could use the machinery of the State to practice its beliefs.”⁹²

C. *Lemon v. Kurtzman*

The Warren Court sowed the seeds of contemporary Establishment Clause jurisprudence in *Engel* and *Schempp*. The Burger Court reaped the harvest of church-state separation in 1971 when it created the bright line test that is synonymous with the holding of *Lemon v. Kurtzman*.⁹³ To pass muster under the *Lemon* test, a government practice must (1) reflect a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entan-

86. *Id.* at 210.

87. *Id.*

88. 330 U.S. 1 (1946).

89. *Schempp*, 374 U.S. at 217 (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting)).

90. 374 U.S. at 215 (citation omitted).

91. *Id.* at 224.

92. *Id.* at 226.

93. 403 U.S. 602 (1971).

gument with religion.⁹⁴ The Lemon test is the direct offspring of *Board of Education v. Allen*⁹⁵ and *Walz v. Tax Commission*.⁹⁶ The Court obtained the first two prongs of the Lemon test from *Allen*, in which the Court emphasized secular purpose and primary effect.⁹⁷ The third prong, excessive government entanglement with religion, derived from *Walz*.⁹⁸

Lemon involved statutes enacted in Rhode Island⁹⁹ and Pennsylvania.¹⁰⁰ Each statute provided for public funding of secular education in parochial schools. In Rhode Island, public funds went to supplement the salaries of school teachers who taught secular subjects in religious schools.¹⁰¹ In Pennsylvania, the statute authorized the state to purchase secular education classes from religious schools through payment of public funds to those schools for salaries and textbooks.¹⁰² Writing for the Court, Chief Justice Burger analyzed the First Amendment's use of the word "respecting" and determined that the proper interpretation of this word required the Court to strike down laws that are merely the first step toward establishment of a state religion.¹⁰³ Lemon turned out to be the high water mark of separation of church and state jurisprudence. Until recent years, the Lemon test was Establishment Clause gospel.¹⁰⁴

94. *Id.* at 612.

95. 392 U.S. 236 (1968). In *Allen*, the Supreme Court upheld a New York statute that required school districts to purchase and loan school textbooks, free of charge, to all students in grades seven through twelve, including parochial, public, and private school attendees. *Id.* at 238. Writing for the majority, Justice White concluded that the statute was constitutional because it was not a "law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 238.

96. 397 U.S. 664 (1970). In *Walz*, a property owner sought to enjoin the New York Tax Commission from giving tax exemptions on real property wholly owned and used by religious organizations. *Id.* at 666. The Supreme Court, in an opinion by Justice Burger, found that the statute did not attempt to establish, sponsor, or support religion. *Id.* at 673-74.

97. *Lemon*, 403 U.S. at 612 (citing *Allen*, 392 U.S. at 243).

98. *Id.* at 613.

99. *Id.* at 615 (citing R.I. GEN. LAWS § 16-51-1 (1970)).

100. *Lemon*, 403 U.S. at 620 (citing PA. STAT. ANN., tit. 24, §§ 5601-5609 (1971)).

101. *Id.* at 607-08.

102. *Id.* at 609.

103. *Id.* at 612. Lemon actually turned upon the excessive entanglement prong derived from *Walz*. See *id.* at 615.

104. See *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 392 (1990); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 490 (1986); *Larson v. Valente*, 456 U.S. 228, 235 (1982).

D. Lower Court Application of the Lemon Test

*Florey v. Sioux Falls School District 49-5*¹⁰⁵ is one of *Lemon's* most significant progeny. The facts of *Florey* required the Eighth Circuit to apply the *Lemon* test in its entirety to the question of public school observance of religious holidays.¹⁰⁶ In 1977, a kindergarten class in Sioux Falls, South Dakota, held a Christmas program.¹⁰⁷ The program contained many Christian religious references, including the now well-known "Beginners' Christmas Quiz."¹⁰⁸ Complaints from parents prompted the school board to set up a citizens' committee with members from a cross-section of the community.¹⁰⁹ The committee's purpose was to study the relationship between church and state and determine what was appropriate for school functions.¹¹⁰

Several months of deliberations resulted in the creation of a set of rules and a policy statement explaining the rules.¹¹¹ Generally, the rules limited observances to those holidays that had both a religious and secular basis. Holidays with only a religious basis would not be observed.¹¹² Rule 3 allowed music, art, literature, and drama with a religious theme or basis to be included in the curriculum if presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."¹¹³ Rule 4 permitted the use of religious symbols in teaching only if they were used as an "example of the cultural and religious heritage of the holiday and [were] temporary in nature."¹¹⁴

The district court held that the rules, "if properly administered and narrowly construed," would not violate the First Amend-

105. 619 F.2d 1311 (8th Cir. 1980).

106. *Id.* at 1314.

107. *Id.*

108. *Id.* at 1317. The "Christmas Quiz" contained many direct references to Christian religious beliefs:

Teacher: Of whom did heavenly angels sing [a]nd news about His birthday bring?

Class: Jesus.

....

Teacher: What is the day we celebrate [a]s birthday of this One so great?

Class: Christmas.

Id. at 1318.

109. *Id.* at 1313. The committee consisted of parents, teachers, clergy of various religions, the school district's music director, and an attorney. *Id.* at 1313 n.1.

110. *Id.* at 1313.

111. *Id.*

112. *Id.* at 1314.

113. *Id.*

114. *Id.*

ment.¹¹⁵ The Eighth Circuit applied the Lemon test to determine whether the rules promulgated by the school board violated the Establishment Clause.¹¹⁶ Using a step-by-step approach, the Florey court analyzed each Lemon prong in detail. The court considered the first imperative—that “the [activity] must have a secular purpose”¹¹⁷—in light of the school prayer cases.¹¹⁸ These cases involved a state-created system that advanced religion.¹¹⁹ By contrast, the rules in Florey tried “to delineate the scope of permissible activity.”¹²⁰

The Florey court emphasized that the “purpose and effect” of the rules was clearly secular.¹²¹ The school board policy attempted to minimize the impact of religious holidays while trying to preserve their cultural heritage.¹²² Even though a particular holiday may have had a religious connotation, the rules promoted a secular version of the holiday.¹²³

Next, the Florey court applied the second Lemon prong to the rules, asking whether they had a “‘principal or primary effect . . . that neither advances nor inhibits religion.’”¹²⁴ Again, the court found no invalidity.¹²⁵ The rules mandated that religious materials, including art, music, and literature, be presented in the context of the teaching of cultural history.¹²⁶

The final prong was never really an issue because the facts in Florey did not even approach “excessive government entanglement with religion.”¹²⁷ The court found that there was no meaningful relationship between the school district’s policies and any religious authority.¹²⁸ Thus, Florey stands for the proposition that the First Amendment does not insulate public schools from all religious teaching.

115. *Id.* at 1313.

116. *Id.*

117. *Id.* at 1314 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

118. See *supra* discussion part III.A-B.

119. “[W]hen a state intentionally sets up a system that by its essential nature serves a religious function, one can only conclude that the advancement of religion is the desired goal.” Florey, 619 F.2d at 1315.

120. *Id.*

121. *Id.*

122. *Id.* at 1317.

123. *Id.*

124. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

125. *Id.*

126. *Id.*

127. *Id.* at 1318.

128. *Id.*

E. The Burger Court's Move Toward Accommodation

Toward the end of the Burger era, the Supreme Court began to retreat from strict adherence to separation of church and state. In terms of values, accommodation moved to the forefront.¹²⁹ The Court's 1984 decision in *Lynch v. Donnelly*¹³⁰ exemplified this shift. *Lynch* involved an annual Christmas display in a park in Pawtucket, Rhode Island.¹³¹ Included in the display for the previous forty years were a Nativity scene, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures such as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a banner reading "Seasons Greetings," among other things.¹³² In an opinion written by Chief Justice Burger, the Court held that the use of the Nativity scene in the context of a Christmas display did not violate the Establishment Clause because the government did not intend to aid any particular religion or faith.¹³³ The Court emphasized the importance of viewing the government's action in relation to the circumstances.¹³⁴ In this case, the city had a secular purpose for including the Nativity scene in its Christmas display.¹³⁵ In the context of the Christmas holiday, the Nativity scene neither advanced a religious cause nor created an excessive entanglement between religion and government.¹³⁶ The Court further stated that any benefit received by a particular religion or faith was "indirect, remote, and incidental."¹³⁷ The Court found that rather than requiring complete separation of church and state, the Constitution allowed for accommodation of all religions and prevented hostility towards any. The Court went out of its way to point out that "[a]nything less would require the 'callous indifference' . . . that was never intended by the Establishment Clause."¹³⁸

129. This fundamental change in policy is a direct reflection of Republican appointments to the Court. See Linda Greenhouse, *The Year the Court Turned to the Right*, N.Y. TIMES, July 7, 1989, at A1.

130. 465 U.S. 668 (1984).

131. *Id.* at 671.

132. *Id.* at 671.

133. *Id.* at 685.

134. *Id.* at 680.

135. *Id.* at 681.

136. *Id.* at 681-82.

137. *Id.* at 683.

138. *Id.* at 673 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The Court also reasoned that "[t]o forbid the use of this one passive symbol at the very time hymns and carols are sung and played in public places including schools, and while Congress and state legislatures open public sessions with prayers, would be an overreaction contrary to our history and to our holdings." *Id.* at 686.

IV. THE ESTABLISHMENT CLAUSE IN THE REHNQUIST COURT

A. Dismantling the Wall

If the trend away from the separation of church and state was a drizzle at the end of the Burger Court, it became a torrent in the Rehnquist reign. Even in the most clear-cut cases, Chief Justice Rehnquist and Justice Scalia revealed that their personal agenda was to emphasize the Free Exercise Clause at the expense of the Establishment Clause. For example, in the 1987 case *Edwards v. Aguillard*,¹³⁹ Justices Rehnquist and Scalia were the dissenters in the seven-to-two decision.¹⁴⁰ *Edwards* involved a Louisiana law which forbade the teaching of evolution in public schools unless accompanied by instruction in the theory of "creation science."¹⁴¹ In an opinion written by Justice Brennan, the Court held that the law served no identifiable secular purpose and that its primary effect was the promotion of a particular religious belief, both of which violated the Establishment Clause.¹⁴² The Court reasoned that references to religion may be valid as long as they do not have the purpose or effect of advancing religious goals.¹⁴³ The Court also noted that younger students require even more protection because the danger of influencing the beliefs of public grade school and high school children is so great.¹⁴⁴ Fortunately, Justices Rehnquist and Scalia stood alone. Had they carried the day in *Edwards*, there would have been little, if any, protection left under the Establishment Clause.

The Rehnquist Court's desire to dismantle the Establishment Clause's wall of separation between church and state became clear in *Bowen v. Kendrick*.¹⁴⁵ *Bowen* involved the constitutionality of the Adolescent Family Life Act (AFLA), which authorized federal grants to secular and sectarian organizations for counseling and research in the areas of premarital adolescent relations and teen pregnancy.¹⁴⁶ Chief Justice Rehnquist, writing for the Court in a five-to-four decision, ostensibly applied the Lemon test

139. 482 U.S. 578 (1987).

140. *Id.* at 610 (Rehnquist, C.J., dissenting)

141. *Id.* at 581.

142. *Id.* at 594.

143. *Id.* at 584. A few examples of valid references would be the teaching of religion to provide historical perspective, to illustrate comparative religious beliefs, or to highlight religion in literature. *Id.* at 594.

144. *Id.* at 584 n.5.

145. 487 U.S. 589 (1988).

146. *Id.* at 593.

in holding that, on its face, AFLA did not have the “primary effect of advancing religion.”¹⁴⁷

Justice Blackmun, in a compelling dissent, asserted that

AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make a total separation between secular teaching and religious doctrine.¹⁴⁸

Continuing his assault on the majority’s form-over-substance approach, Justice Blackmun declared:

Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record develops thus far in this litigation makes all too clear, federal tax dollars appropriated for AFLA purposes have been used, with government approval, to support religious teaching.¹⁴⁹

B. Allegheny County: Accommodation Moves to the Forefront

The conservative ideology of accommodation, implicit in earlier decisions,¹⁵⁰ became explicit in *County of Allegheny v. American*

147. Bowen, 487 U.S. at 602 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

148. *Id.* at 638 (Blackmun, J., dissenting). *Accord* *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 388 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 749 (1976) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 481 (1973).

149. Bowen, 487 U.S. at 626 (Blackmun, J., dissenting). For example, public funds were used to pay for the following counseling:

You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church.

. . . .

The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life.

Id. at 625 (Blackmun, J., dissenting) (quoting Appendix to Petitioner’s Brief at 226, 372).

150. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985); (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Civil Liberties Union.¹⁵¹ This case involved the constitutionality of two holiday displays in downtown Pittsburgh. The first display was a Nativity scene placed inside the county courthouse.¹⁵² The second was an eighteen-foot menorah placed outside the City-County Building next to a forty-five-foot Christmas tree.¹⁵³

This case was unusual in that four justices found that neither display violated the Establishment Clause,¹⁵⁴ three justices found that both displays violated the Establishment Clause,¹⁵⁵ and two justices found that the Nativity scene was unconstitutional while the menorah, in its context, was constitutional.¹⁵⁶ The majority distinguished the two displays by indicating that the Nativity scene conveyed a religious message.¹⁵⁷ The Court held that while “[t]he government may acknowledge Christmas as a cultural phenomenon . . . it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.”¹⁵⁸ Although the menorah is the traditional symbol of Chanukah, the Court reasoned that its placement next to a Christmas tree created an “overall holiday setting” that mitigated the menorah’s original nature, making it a symbol of the winter holiday season and not a religious message of the Jewish faith.¹⁵⁹

Justice Kennedy articulated the conservative view of accommodation in Allegheny County.¹⁶⁰ With respect to the Nativity scene, Justice Kennedy objected to the majority’s application of the Lemon test; however, he purported to follow it himself.¹⁶¹

151. 492 U.S. 573 (1989).

152. *Id.* at 578.

153. *Id.* at 587.

154. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices White and Scalia joined in Justice Kennedy’s opinion. See *id.*

155. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part). Justices Marshall and Stevens joined in Justice Brennan’s opinion. See *id.* Justice Stevens also wrote an opinion concurring in part and dissenting in part, in which Justices Brennan and Marshall joined. See *id.* at 646.

156. *Id.* at 621. Only Justice O’Connor joined part VII of Justice Blackmun’s opinion. See *id.* at 578.

157. *Id.* at 600.

158. *Id.* at 601.

159. *Id.* at 614.

160. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part). “The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.” *Id.* at 664.

161. *Id.* at 655-56:

I am content for present purposes to remain within the Lemon framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. . . . [But] even the Lemon test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.

Ironically, his application of the Lemon test would have severely weakened the separation of church and state with the very standard that has most effectively maintained its preservation during the past twenty years.

The real thrust of Justice Kennedy's opinion, however, lay in his use of the coercive effect test,¹⁶² which Justice O'Connor criticized in her concurrence:

An 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. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.¹⁶³

Drawing upon her concurrence in *Lynch v. Donnelly*,¹⁶⁴ Justice O'Connor's proposed solution was the endorsement test.¹⁶⁵ In *Lynch*, Justice O'Connor had described the Establishment Clause's protections as prohibiting the government from "making adherence to a religion relevant in any way to a person's standing in the political community."¹⁶⁶ The government violated this prohibition when it endorsed a particular religion: "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."¹⁶⁷ Justice O'Connor's thesis in *Lynch* was that the relevant inquiry was not "whether secular objectives for the legislation existed, but rather, whether the government intend[ed] to convey a message of endorsement or disapproval of religion or whether the message had such effect."¹⁶⁸ In *Allegheny County*, Justice O'Connor explained that the test was the most appropriate to apply in Establishment Clause cases because, "[a]s a theoretical matter, [it] captures the essential command of the Establishment Clause, namely, that government must not make

162. "[G]overnment may not coerce anyone to support or participate in any religion or its exercise." *Id.* at 659.

163. *Id.* at 627-28 (O'Connor, J., concurring) (citations omitted).

164. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

165. *Allegheny County*, 492 U.S. at 623 (O'Connor, J., concurring).

166. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

167. *Id.* at 688.

168. *Id.* at 670-72.

a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'¹⁶⁹

Thus, when the Allegheny County dust had settled, three separate Establishment Clause tests remained: the Lemon test, the coercive effect test, and the endorsement test.¹⁷⁰ In the context of our country's diversity and pluralism, in which constitutional protections are so vital, the existence of three tests was a harbinger of trouble.

C. Establishment Clause Jurisprudence Fractured

*Lee v. Weisman*¹⁷¹ involved a Providence, Rhode Island, school district that invited a rabbi to give the invocation and benediction at a graduation ceremony.¹⁷² It had been the long-standing policy of the school district to invite members of the clergy to give such addresses, as long as they followed the school district's guidelines and gave assurances that the prayers would be nonsectarian.¹⁷³ Justice Kennedy, writing for the majority, used the coercive effect test in holding that state-sponsored and directed religious exercise amounted to an impermissible involvement of government with religion.¹⁷⁴ The Court reasoned that because the school district provided the rabbi with a pamphlet on school policy and instructed him to deliver a nonsectarian message, they were in effect controlling the prayer's content.¹⁷⁵ The Court declared that not only are actions or practices that coerce people to support or participate in religious activities invalid, but those that even pose the danger of doing so are likewise impermissible in light of the Establishment Clause.¹⁷⁶ Again, Justices Scalia, White, and Thomas, and Chief Justice Rehnquist dissented because of their belief that the facts of *Lee* fit comfortably within the concept of ac-

169. *Allegheny County*, 492 U.S. at 627 (O'Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

170. Arguably, there was a fourth test: nonpreferential treatment. In his dissenting opinion in *Wallace*, then-Justice Rehnquist found that the establishment of a national religion or the preference of a religious sect was forbidden by the Establishment Clause. 472 U.S. at 106 (Rehnquist, J., dissenting). However, he also found that programs that benefit or prefer one religion without hindering another were constitutional. *Id.* (Rehnquist, J., dissenting).

171. 505 U.S. 577 (1992).

172. *Id.* at 581.

173. *Id.*

174. *Id.* at 587.

175. *Id.* at 588.

176. See *id.* at 592.

commodation of religion by government.¹⁷⁷ In retrospect, it is not surprising that because of their accommodationist agenda these four justices refused to concur in even the weakest of church-state separation standards, the coercive effect test.¹⁷⁸

The Rehnquist Court continued its expansion of the Free Exercise Clause in *Zobrest v. Catalina Foothills School District*.¹⁷⁹ *Zobrest* concerned a hearing-impaired student who was attending a private Roman Catholic school.¹⁸⁰ *Zobrest* asked the school district to furnish him with a sign language interpreter, but the school district refused.¹⁸¹ In a five-to-four opinion, Chief Justice Rehnquist wrote that “[g]overnment 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 re-

177. “[T]he Establishment Clause must be construed in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’” *Id.* at 631 (Scalia, J., dissenting) (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part)).

178. Even Professor Michael McConnell, an ardent supporter of accommodation and free exercise, takes a very dim view of the Court’s current trend:

Until recently, the Free Exercise Clause was interpreted in a manner favorable to accommodation, while the Establishment Clause was interpreted to create obstacles to accommodation. . . . The current trend in the Court is the reverse: The Free Exercise Clause no longer is interpreted to require accommodation in most instances, but the Establishment Clause no longer is interpreted to interfere with them, in most instances. This leads to a jurisprudence in which legislative discretion is maximized and the Clauses, since they are rarely applied, rarely conflict.

Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *GEO. WASH. L. REV.* 685, 695-96 (1992).

179. 509 U.S. 1 (1993). The Rehnquist camp pressed strenuously to expand the Free Exercise Clause in two later cases, *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994).

In *Lamb’s Chapel*, a school board denied a religious congregation the opportunity to use school property for the viewing of a film because of the film’s religious nature. 508 U.S. at 386-87. The Court held that granting equal access to government property would not have violated the Establishment Clause test under *Lemon* because the activity would not have occurred during school hours, would not have been sponsored by the school, and would have been open to the public. *Id.* at 395.

At issue in *Kiryas Joel* was a state law creating a separate school district for a community of Orthodox Jews. 114 S. Ct. at 2484. The Court held that it was not the fact that the school district was comprised of solely one religious sect that violated the First Amendment, but rather that the legislature had intentionally set the school district lines in such a way as to accommodate one religious group. *Id.* at 2487. Notwithstanding the blatant Establishment Clause violation, Chief Justice Rehnquist and Justices Scalia and Thomas dissented, finding no constitutional infirmity. *Id.* at 2505 (Scalia, J., dissenting).

180. *Zobrest*, 509 U.S. at 3.

181. *Id.* at 4.

ceive an attenuated financial benefit.”¹⁸² The Court reasoned that any aid the secular school received was indirect because the aid attached to the individual child, and the parents had the choice to send him to any school they wished.¹⁸³

Again, Justice Blackmun wrote a dissenting opinion. “‘Although Establishment Clause jurisprudence is characterized by few absolutes,’ at a minimum ‘the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.’”¹⁸⁴ Thus, in its rush to restrict the protections of the Establishment Clause, the Rehnquist majority in *Zobrest* embarked upon the dangerous path of political decisionmaking.¹⁸⁵ There was no need for the Court to decide *Zobrest* on constitutional grounds. There were two other, nonconstitutional grounds on which the Court properly could have decided the case.¹⁸⁶

The Court’s compulsion to expand the Free Exercise Clause found its most recent expression in a five-to-four decision, *Rosenberger v. Rector of the University of Virginia*.¹⁸⁷ In *Rosenberger*, the Court upheld the payment of public funds to an evangelical student organization devoted to religious proselytization.¹⁸⁸ Writing for the majority, Justice Kennedy stated that

[t]hough our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.¹⁸⁹

In a cogent dissent, Justice Souter asserted “[t]he Court today, for the first time, approves direct funding of core religious activities by an arm of the State.”¹⁹⁰ Justices Souter, Stevens, Ginsburg, and Breyer viewed this as a clear violation of the Establishment Clause. Concluding his dissent with a reference to his

182. *Id.* at 8.

183. *Id.* at 12.

184. *Id.* at 21 (Blackmun, J., dissenting) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

185. See generally Julian R. Kossow, *Dolan v. City of Tigard Takings Law and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 *STAN. ENV. L. J.* 215 (1995).

186. *Zobrest*, 508 U.S. at 15 (Blackmun, J., dissenting) (“This Court could easily refrain from deciding the constitutional claim by vacating and remanding the case for consideration of the statutory and regulatory issues.”).

187. 115 S. Ct 2510 (1995).

188. *Id.* at 2525.

189. *Id.* at 2532.

190. *Id.* at 2533.

own apprehension about the future,¹⁹¹ Justice Souter recalled Chief Justice Burger's prophetic warning in *Lemon*: "[I]n constitutional adjudication some steps, which when taken were thought to approach "the verge" have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop."¹⁹²

V. THE NEED TO RETURN TO THE LEMON BRIGHT LINE

To advocate a return to strict *Lemon* test adherence in the context of a case involving lyrics in public high school choir songs may appear to many readers to be "distant" and "early" rather than a "warning."¹⁹³ However, the most delicate sensitivities are involved in issues of separation of church and state.¹⁹⁴ Perhaps Rachel Bauchman will establish at trial that Torgerson's activities amounted to outright proselytizing. If so, I trust that all members of the present Court would find such conduct offensive to the Constitution. Indeed, past cases have so held.¹⁹⁵

The more difficult question arises when a plaintiff cannot show proselytizing by public school teachers and the legal focus narrows solely to the lyrics of choir songs and their places of performance. A strong argument can be made that cultural, historic, and artistic aspects inherent in music outweigh, in a constitutional sense, the music's explicit religious content. However, this argument would only be persuasive if the music itself were part of a nonsectarian curriculum of public education presented in the same way that algebra or any other course were taught.¹⁹⁶ Thus, Rachel's case brings us to the precise intersection of the *Lemon* test and the Establishment Clause. Taking into account the totality of Torgerson's actions, three questions need to be asked: first, did the government's practice reflect a clearly secular purpose?¹⁹⁷ Second, did the government's practice have a primary effect that neither advanced nor inhibited religion?¹⁹⁸ Finally, did the gov-

191. *Id.* at 2550.

192. *Id.* at 2551 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971)).

193. See *supra* note 14 and accompanying text.

194. See *supra* note 23 and accompanying text.

195. See *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Lemon*, 403 U.S. at 625; *Abington School Dist. v. Schempp*, 374 U.S. 203, 303 (1963); *Engel v. Vitale*, 370 U.S. 421, 444 (1962).

196. See *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 407 (1995).

197. *Lemon*, 403 U.S. at 612.

198. *Id.*

ernment's practice avoid excessive entanglement with religion?¹⁹⁹ My answers are no, no, and no.

A recent Fifth Circuit decision, *Doe v. Duncanville Independent School District*,²⁰⁰ not only sheds light on the answers but also bears a striking similarity to the *Rachel Bauchman* case.²⁰¹ *Duncanville* involved a twelve-year-old girl who had qualified to play on the school's basketball team.²⁰² She was part of a physical education class specifically designed for members of the basketball team.²⁰³ In addition to the basketball team, Doe also joined the choir. She received academic credit for both activities.²⁰⁴

The basketball team activities that were of questionable religious character included the coach's recitation of the Lord's Prayer at practices, games, and on the bus traveling to away games.²⁰⁵ While Doe was a member of the choral program, she was required to sing the choir's theme songs, "The Lord Bless You and Keep You" and "Go Ye Now in Peace."²⁰⁶ Not wanting to single herself out, Doe took part in these programs.²⁰⁷ However, after discussing it with her father, she realized that she was not required to participate and opted out of the prayers.²⁰⁸ Unfortunately, her non-participation drew attention from spectators and her fellow students, who singled her out and questioned her beliefs.²⁰⁹

The Fifth Circuit held that the school district's practice of allowing its employees to participate in and/or supervise student prayers during basketball practices and games violated the Establishment Clause.²¹⁰ However, the court found that the school district's practice of allowing the choir to use Christian religious songs as its theme songs did not violate the Establishment Clause.²¹¹ The court acknowledged that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."²¹² In holding that the prayers at basketball practices and games violated the Establishment Clause, the court stated:

199. *Id.*

200. 70 F.3d 402 (1995).

201. See discussion *supra* part II.

202. *Duncanville*, 70 F.3d at 404.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 406-07.

211. *Id.* at 408.

212. *Id.* at 406.

This is particularly true in the instant context of basketball practices and games. The challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend. During these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies.²¹³

As for the choir's theme songs, the court held that "[r]eligious songs may be sung, however, for their artistic and historic qualities if presented objectively as part of a secular program of education."²¹⁴ Thus, Duncanville turns on the objective presentation of the choir's songs.²¹⁵

The facts of Rachel's case appear to demand a different result. Torgerson's actions violated the first prong of the Lemon test because they did not clearly reflect a secular purpose. The choir's repertoire consisted solely of Christian songs, and Torgerson refused any attempt to balance the choir's program.²¹⁶ Furthermore, this was not an isolated incident. Many of Torgerson's former students voiced concerns similar to those expressed by Rachel.²¹⁷ In addition, the choir performed concerts at various community churches, where it participated in Christian religious services.²¹⁸

As to the second part of the Lemon test, the primary effect of Torgerson's directing of the choir was a blend of music for music's sake and an advancement of the teacher's own religion, as well as an inhibition of Rachel's religion. During his choir class, Torgerson repeatedly pressed his religious beliefs on his students, preaching that "Jesus d[ied] for our sins."²¹⁹ He also publicly emphasized Rachel's religious beliefs, stimulating anti-Semitic responses from her peers.²²⁰ The totality of these circumstances fails to satisfy the second requirement of the Lemon test.

With respect to the third prong of the Lemon test, the whole process reflected an excessive entanglement with religion. The choir's extensive religious repertoire, its participation in religious services, and the choir director's steadfast stance against any secularization of the curriculum so entangled this public school

213. *Id.*

214. *Id.*

215. *Id.*

216. *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254, 260 (D. Utah 1995).

217. *Raspberry*, *supra* note 36, at A17.

218. *Bauchman II*, 900 F. Supp. at 260.

219. *Raspberry*, *supra* note 36, at A17; see also *Autman*, *supra* note 36, at D2.

220. *Bauchman II*, 900 F. Supp. at 260-61.

with religion as to pressure Rachel's minority beliefs. Such actions threaten suffocation of the concept of religious freedom.

VI. CONCLUSION

A rigorous application of the Lemon test would show that Rachel's First Amendment rights have been violated. From a policy perspective, this finding would be an appropriate result. Separation of church and state must once again become a judicial priority. The Rehnquist Court's thrust toward accommodation of religion is simply too threatening to the millions of Americans who do not follow the majority's creed.²²¹ The wall of separation envisioned by our founders and made explicit in the Establishment Clause²²² may crumble under the weight of too many decisions like *Bowen*,²²³ *Zobrest*,²²⁴ and *Rosenberger*.²²⁵ The majority of Americans, including the orthodox and the fundamentalist, are free—truly free—to practice their beliefs, but those beliefs should not be foisted upon Americans of a different faith or of no faith. Only the Supreme Court's interpretation of the First Amendment stands in the way.

221. Professor Nadine Strossen, president of the American Civil Liberties Union, stated in a recent symposium on the topic of religion in schools:

By the same token, for those who are non-religious, or who follow different religious traditions from those assertedly embraced in school-sponsored prayer, the exercise is equally problematic, because, as Justice O'Connor stated . . . it signals to them that they are only second-class citizens. . . . The adverse impact of government-endorsed religious exercises upon those who do not share the beliefs advanced is not just a matter of abstract constitutional theory. Its tangible damage is demonstrated by Deborah Weisman's experience. The most common question she got about her case . . . is: "Why make such a big deal out of a small prayer?" Here is Deborah's answer to that question, speaking from her own experience as a public school student: "I don't think a little prayer is a small thing. It excludes. They forced me to pray to someone else's God. That is a big deal . . . When I am forced to participate in a ritual . . . it's an attempt to make me different from what I am—to change my identity, to make me conform."

Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 623 (1995) (quoting telephone interview with Deborah Weisman (Sept. 6, 1995)).

222. See *supra* note 2.

223. 487 U.S. 589 (1988).

224. 505 U.S. 577 (1992).

225. 115 S. Ct. 2510 (1995).