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What's in a Name - Nothing Good if It's Friday: The Seventh Circuit Invalidates Good Friday Public School Holiday, 29 J. Marshall L. Rev. 1031 (1996)

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WHAT'S IN A NAME? NOTHING GOOD IF IT'S FRIDAY: THE SEVENTH CIRCUIT INVALIDATES GOOD FRIDAY PUBLIC SCHOOL HOLIDAY

After observing Good Friday as a public school holiday for more than fifty years, Illinois has ended this practice just this past spring.[1] Due to a recent decision in the Court of Appeals for the Seventh Circuit, Illinois public schools may no longer close statewide for the Good Friday holiday.[2] This decision is yet another in a series that displays a tendency of hostility toward religion.[3] Courts have handed down these decisions in the guise of upholding the First Amendment prohibition against the establishment of a religion.[4] However, by invalidating the Good Friday holiday for Illinois' public schools, the court has eliminated a long-standing practice that accommodated religion.[5]

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1. *See* Metzl v. Leininger, 57 F.3d 618, 624 (7th Cir. 1995).

2. *Id.*

3. This trend is identified, and its implications are discussed throughout Professor Carter's recent book. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

4. U.S. CONST. amend. I. The amendment provides that "Congress shall make no law respecting an establishment of religion[.]" *Id.*

5. Accommodation is one of the concepts applied in interpreting the Establishment Clause. The accommodationist stance is a centrist position between absolute separation of church and state, and establishment. Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917, 923 (1993) (utilizing for illustration of Establishment Clause positions a continuum that extends from state sponsorship and promotion of religion on one end, to exclusion of religion on the other, with accommodation in the middle). How far the state may go to accommodate religion is an unsettled question. *Id.* at 961.

Some accommodations are required to satisfy the Free Exercise Clause (U.S. CONST. amend. I.), while others are prohibited by the Establishment Clause. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3, 24-41 (1985) (positing a class of permissible accommodations that fall between those prohibited and those required; also giving examples of, and describing the limits of accommodation); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4, at 1168 (2d ed. 1988) (distinguishing between excessive accommodations, and permissible or mandatory accommodations). *Cf.* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 253-56 (1993) (considering issues raised by permissive accommodations).

Realization of the goals of both Religion Clauses together is best accomplished by adoption of an accommodationist stance. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV.

The U.S. Supreme Court's rulings in Establishment Clause cases show how the Court has moved from a standard of accommodation and neutrality to one bordering on hostility toward religion.[6] Over the years, the Court has used various tests that have often yielded contradictory results.[7] Moreover, lower courts have applied these standards in Good Friday cases and have reached inconsistent holdings. In the Illinois case, the Seventh Circuit reached an incorrect result, while applying standards that should themselves be replaced. The three-part test that was used in *Lemon v. Kurtzman*[8] and its progeny should finally be replaced with the standard proposed by Justice Kennedy in his dissent to *County of Allegheny v. American Civil Liberties Union*.[9] This standard, in the form in which it first appeared in *County of Allegheny*,

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685, 691 (1992) (contending that accommodation is the preferable approach to Establishment Clause interpretation). Even non-mandatory accommodations are consistent with the original intent of the Framers of the Constitution. *Id.* at 693-94 (finding such accommodations historically justified). *See also* Donald A. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, in* CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT 114, 120 (Philip B. Kurland ed. 1975) (describing accommodation as a type of benevolent neutrality, consistent with the guarantee of religious liberty underlying both Religion Clauses of the First Amendment); Leo Pfeffer, *The Establishment Clause: The Never-Ending Conflict, in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 69, 73-77 (Ronald C. White, Jr. et al. eds., 1990) (discussing viewpoints of various scholars who consider the accommodationist approach in keeping with the intent of the Framers of the Constitution). Consistent with this interpretation, allowing continued observance of the Good Friday public school holiday would fall squarely within the category of an acceptable accommodation of religion.

6. *See* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 376-405 (1996) (discussing various theological and political theories that played a role in the development of the Establishment Clause). The strict separationist view has become prevalent only in 20th century jurisprudence. *Id.* at 421-23. *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1986). *But cf.* Lupu, *supra* note 5, at 237 (noting a trend away from the dominant strict separationism of the 1970s).

7. The confused state of Establishment Clause jurisprudence is widely noted. The Establishment Clause can mean whatever the Court wants it to "mean[] . . . at any particular time . . . , neither more nor less." *See* Pfeffer, *supra* note 5, at 69. *See also* Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 75 (1990) (listing some descriptions of Religion Clause jurisprudence). Various scholars have characterized it as: "a maze;" "in significant disarray;" "a conceptual disaster area;" "inconsistent and unprincipled;" and similar to "surreal portions of 'Alice in Wonderland.'" *Id.*

8. 403 U.S. 602, 612-13 (1971). To withstand a constitutional challenge, a statute or state conduct must: 1) have a primarily secular purpose; 2) neither advance nor inhibit religion; and 3) not create excessive entanglement between government and religion. *Id.* For a further discussion of *Lemon*, see *infra* notes 63-71 and accompanying text.

9. 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part, dissenting in part).

would safeguard against future erosion of religious freedom, while upholding the necessary separation between church and state.

Part I of this Note outlines the history of the Good Friday holiday in Illinois, including the changes in the holiday's legal status. Part II examines U.S. Supreme Court decisions in Establishment Clause cases that provide the foundation for this Illinois ruling. Part III discusses the case law as applied by the few circuits that have dealt specifically with Good Friday statutes. This Part then analyzes the Seventh Circuit's opinion that invalidated the Good Friday school holiday in Illinois. Finally, Part IV recommends adoption of the different standard in Establishment Clause cases.

I. HISTORY OF THE GOOD FRIDAY HOLIDAY IN ILLINOIS

Good Friday had been observed as a State holiday in Illinois for almost fifty years. This section first reviews the history of the legislation that created the State holiday. Then this section addresses a change in the law. Finally, this section discusses the decision that invalidated the statewide public school holiday provision.

A. Creation of the Legal Holiday

In 1941, the Illinois legislature enacted a bill making Good Friday a legal State holiday in Illinois.[10] There is no legislative history extant; therefore, the exact motives and rationale for the enactment remain unknown.[11] However, what is certain is the practical effect that the bill had. The legislation granted all state employees a paid day off from work while it also created a holiday for the public school students.[12]

The following year, the Governor of Illinois issued a proclamation on the meaning of Good Friday.[13] While this proclamation made mention of the legislation, it did not supply any reason for the bill's passage the previous summer.[14] It did not address

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10. 1941 Ill. H.B. 905, 62d Gen. Ass.
11. Metzl v. Leininger, 57 F.3d 618, 619 (7th Cir. 1995).
12. *Id.*
13. *Id.*
14. *Id.* at 624 (Manion, J., dissenting). The text reads:

> The hallowed traditions of almost two thousand years cluster around the Friday just preceding Easter Sunday. Good Friday, as it has come to be called, is a day charged with especial meaning to multitudes throughout the Christian world. Good Friday was lately given appropriate statutory recognition in Illinois. By enactment of the last regular session of our General Assembly, the day was made a legal and school holiday throughout the State. The widespread commemoration of Good Friday, always becoming, is eminently fitting in these times of unusual stress. NOW, THEREFORE, I,

the legislative intent of the bill at all. Rather, the Governor's message focused on the nature of the holiday.[15] The State's chief executive addressed a citizenry that had just four months earlier entered World War II. The Governor stressed the "hallowed traditions of almost two thousand years" connected with the holiday, that ought to be observed in "these times of unusual stress."[16] Thus, with its appeal to tradition, the proclamation can be read as having not a purely religious content. Instead, it can be read as having additionally a patriotic agenda, in attempting to bolster the morale of the population by emphasizing its cultural heritage.[17]

B. Revision of the Holiday Status

For forty-eight years, Illinois retained Good Friday as a legal State holiday without amending the enactment.[18] Then, in 1989, the legislature repealed the act which had given Good Friday its legal holiday status.[19] The repeal was effected by a one-sentence provision inserted into a 78-page banking bill.[20] The legislative history of this Banking and Corporate Fiduciary Bill is scant. The

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> DWIGHT H. GREEN, Governor of the State of Illinois, by this official proclamation, do hereby direct attention to this significant day, Good Friday, which falls this year on April 3, and commend the sacred rites and ceremonies of the occasion to the thoughtful consideration of churchgoers and believers throughout the state.

Id. See also Brief for Appellant at 7, Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (No. 94-2563) (giving the text of the proclamation); Brief for Appellee at 3, Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (No. 94-2563) (providing the text in the same form).

15. *Metzl*, 57 F.3d at 624.

16. *Id.*

17. This reading of the enactment gains credence when one considers that it came less than one month after the passage of a similar bill making Lincoln's Birthday a legal state holiday. *See* 1941 Ill. H.B. 332, 62d Gen. Ass. For a discussion of the concept of "civil religion," see NEUHAUS, *supra* note 6, at 20-23. The term is used to describe a public ethic. *Id.* at 22.

A form of Christian-influenced civil religion, and a broader "civic piety" developed in America as a result of the de facto cultural (as opposed to legal) establishment of Christianity. RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY, 28-33 (1996). This development reflected Rousseau's vision of a civil religion that would end sectarian divisions in society. *Id.* at 28-29. However, this brand of civic piety has lost some of its dominance as America has become more culturally and ethnically diverse. *Id.* at 33-34.

While the force of a unified brand of civic piety may have waned, forms present in this civil religion remain present. *See* Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1247, 1247-49 (1986) (discussing sociologist Robert N. Bellah's concept of civil religion). A liturgical calendar is one of the forms still present in American civil religion. *Id.* at 1251.

18. *Metzl*, 57 F.3d at 619.

19. 1989 Ill. S.B. 1013, 86th Gen. Ass.

20. *Id.*

only legislative debate was a very brief discussion of some of the technical points of the bill.[21] The holiday-repeal provision was never mentioned once in debate.[22] Therefore, a determination of legislative intent for the repeal, as for the original enactment, can be only a matter of speculation.[23]

However, Good Friday remained a public school holiday in Illinois. The section of the Illinois School Code that listed Good Friday among other school holidays was unchanged.[24] This provision was not affected by the passage of the Banking and Corporate Fiduciary Bill. While Illinois repealed its legal Good Friday holiday without any discussion by its elected representatives, it did not change the status of the statewide Good Friday public school holiday.

C. Challenge to the School Holiday

Then, in 1993, a Chicago Public School teacher brought a civil rights action against the State Superintendent of Education, the Chicago Board of Education, and others.[25] The teacher contended that the provision in the school code for the observance of the Good Friday holiday in public schools statewide violated her

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21. *See* 1989 Ill. 86 GEN. ASS. REG. SESS. SENATE TRANSCRIPT. Some of the debate from the 55th Legislative Day (June 26, 1989) reads:

> SENATOR KEATS: You think the last bill was innocuous. You ought to try this one. This is a *totally technical bill*, as it left here. In the House, in the House amendment—because it restructures the whole bill—I'll explain it by the House amendments, 'cause it redid the entire bill. The first amendment puts the original bill back into its original form. *A technical bill* that— that using Amendment 2 and 1, adds the Corporate Fiduciaries Act to the Banking Act, which is a *technical problem* that needed to be done, because of the corporate fiduciary functions of receivership, et cetera. It also defines some of the terms already used in the Banking Act to clean up the definition of those terms. Those are the first two amendments. The third amendment—it returns the original definition of merger back to where it was before the bill was introduced, because it was generally accepted as new definition of merger. Probably was not as good as the old one. . . . One of these amendments is a hundred and seven pages; another one is hundred and eight pages. *Boy, it's technical*, but it's all fairly easily defined as I just have here.

Id. (emphasis added).

22. The *Metzl* court implied that the legislature actually considered the holiday, and somehow reached the conclusion that it was no longer important enough to be a State holiday, but still meaningful enough to remain a holiday in the schools. *See Metzl*, 57 F.3d at 619. This is misleading.

23. One wonders if the legislators even realized that, in passing a banking bill, they were simultaneously "rescinding" the Good Friday holiday. *See Metzl*, 57 F.3d at 624 (Manion, J., dissenting). "In 1989 something changed. The State repealed the Good Friday holiday, again without leaving any stated reason for its decision." *Id.* What "changed" was likely that the repeal of the holiday slipped through entirely unnoticed.

24. 105 ILCS 5/24-2 (1993).

25. Metzl v. Leininger, 850 F. Supp. 740, 740 (N.D. Ill. 1994).

constitutional rights.[26] She argued that this provision was unconstitutional under the First Amendment prohibition against an establishment of religion.[27] According to her, a paid day off for a religious holiday for all public school employees constituted an impermissible state establishment of a religion.[28] She concluded that this action showed a preference for one religion over others.[29] The district court heard the case in 1994, and held that the school code provision was unconstitutional.[30] The court entered a permanent injunction against the enforcement of this provision.[31]

The State appealed this decision. In 1995, the Court of Appeals for the Seventh Circuit affirmed the lower court's decision.[32] The appellate court applied the same standard that the lower court had used.[33] To evaluate the constitutionality of a statute challenged under the Establishment Clause, the court considered the legislation's purpose, its effect, and the possibility that it fostered excessive governmental entanglement with religion.[34] The court found that the purpose and effect of the holiday impermissibly favored religion.[35] However, the court did not consider the possible state entanglement with religion, since failure of any one of the three factors was sufficient to find a challenged statute unconstitutional.[36] Thus, the challenge to the school code provision succeeded. Using a test formulated by the Supreme Court almost a quarter-century ago,[37] the Seventh Circuit permanently enjoined the observance of the Good Friday public school holiday throughout the state.[38]

II. SUPREME COURT STANDARDS IN ESTABLISHMENT CLAUSE CASES

Most Establishment Clause cases are of relatively recent origin,[39] and the various standards applied by the Supreme Court

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26. *Id.*
27. *Id.*
28. *Id.* at 741.
29. *Id.* at 748-49.
30. *Metzl*, 850 F. Supp. at 750.
31. *Id.*
32. Metzl v. Leininger, 57 F.3d 618, 624 (7th Cir. 1995).
33. *Id.* at 620-21.
34. *Id.* See *supra* note 8 for a statement of the three parts of the *Lemon* test.
35. *Metzl*, 57 F.3d at 623-24.
36. The district court ruled this a non-issue, relying on *Lemon*. *Metzl*, 850 F. Supp. at 749-50. This finding remained undisturbed by the Court of Appeals for the Seventh Circuit.
37. The Court formulated a three-part test in Lemon v. Kurtzman. 403 U.S. 602, 612-13 (1971).
38. *Metzl*, 57 F.3d at 624.
39. This observation is often made in discussions of Establishment Clause jurisprudence. *See, e.g.*, Donald L. Beschle, *The Conservative as Liberal: The Religion*

over the years continue to be used.[40] An overview of the relevant case law may be divided into three periods. First, this section discusses two cases decided before *Lemon*, and the standards those cases engendered. Next, this section briefly considers *Lemon* and its three-part test. Finally, this section examines several of the significant cases decided after *Lemon*, and their implications.

A. *Before* Lemon: *Standards of Accommodation*

Two cases that were decided years before *Lemon* articulated Establishment Clause standards significant to the Illinois Good Friday holiday decision. The first case is *Zorach v. Clauson*,[41] which dealt with a statute allowing public schools to release students for religious instruction. The second is *McGowan v. Maryland*,[42] which involved Sunday closing laws.

Clauses, Liberal Neutrality, and the Approach of Justice O'Connor, 62 NOTRE DAME L. REV. 151, 152 (1987) (stating that "[a]lmost all of the significant law . . . is a product of the last forty years"); Witte, *supra* note 6, at 410 (noting also that the vast majority of Establishment Clause law has been decided since the 1940s). The Supreme Court decided only 23 cases in this area in the first 150 years of the nation's history. *Id.* at 408. However, since 1940, the Court has heard almost 100 cases on Religion Clause issues. *Id.* at 410. Justice Black's dicta advocating separationism in Everson v. Board of Educ. was an "open invitation to litigation." *Id.* at 422. *See also* Robert T. Handy, *Why It Took 150 Years for Supreme Court Church-State Cases to Escalate*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 52, 63-65 (Ronald C. White, Jr. & Albright G. Zimmerman eds. 1990) (explaining the increase in the number of cases by demographic changes in the American population); THEIMANN, *supra* note 17, at 34-35 (discussing the second disestablishment that occurred as the American population became more diverse).

40. See *supra* note 7 for a discussion of the inconsistent results in Establishment Clause cases.

41. 343 U.S. 306 (1952).

42. 366 U.S. 420 (1961).

1. Zorach v. Clauson*: Non-Hostility to Religion*

In *Zorach*, the Supreme Court for the first time articulated standards of accommodation of religion when it considered whether a school program of "released time" was constitutional under the Establishment Clause.[43] The Court rejected any analysis under the Free Exercise Clause,[44] reasoning that no one was forced to attend classes in religious instruction, and that no religious instruction was introduced into the schools.[45] Therefore, the Court saw the issue as one controlled by the Establishment Clause alone.[46] The question of coercion framed the Court's anal-

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43. *Zorach*, 343 U.S. at 308. The program permitted elementary school students to leave school during the school day to attend classes in religious education. *Id.* Students not participating in this released time program remained in school. *Id.* Parents of the children challenged to this program, contending that it was an unconstitutional establishment of religion. *Id.* at 309-10.

44. U.S. CONST. amend. I. "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.* The inherent tension between the Establishment and Free Exercise Clauses is often discussed by scholars. There is disagreement on which clause, if either, is the dominant one. *See, e.g.*, Dallin H. Oaks, *Introduction* to THE WALL BETWEEN CHURCH AND STATE 1, 2-5 (Dallin H. Oaks ed. 1963) (discussing the dichotomy of the phrases in the First Amendment, and possible policy implications of different viewpoints); THIEMANN, *supra* note 17, at 57-66 (summarizing various concepts underlying judicial reasoning when dealing with the tension between the clauses). *Cf.* NEUHAUS, *supra* note 6, at 116 (expressing the view that the Free Exercise Clause is the dominant clause). The Establishment Clause "is in the service of the 'free exercise' clause." *Id.*

45. *Zorach*, 343 U.S. at 311.

46. *Id.* at 311-12. Many of the Establishment Clause cases have involved school issues. These cases have dealt with issues such as aid to religious schools and school prayer; some of the major cases, in chronological order, are: Everson v. Board of Educ. of Ewing Township, 330 U.S. 1 (1947) (upholding subsidized transportation for students in religious schools; noted as the first modern era Establishment Clause case); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (striking religious instruction of public school students on public school premises); Engel v. Vitale, 370 U.S. 421 (1962) (striking state-written prayer in public school classrooms); Abington Township Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (striking required prayer or Bible readings in public school classrooms); Stone v. Graham, 449 U.S. 39 (1980) (striking privately-funded posting of the Ten Commandments in public school classrooms); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking a moment of silence or voluntary prayer in public schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (striking a program employing public school teachers to teach secular subjects in religious schools); Aguilar v. Felton, 473 U.S. 402 (1985) (striking a program similarly using public school teachers in remedial and enrichment programs in religious schools). For a discussion of Establishment Clause jurisprudence specifically in relation to school issues, *see, e.g.*, KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 196-98 (1988) (commenting on, and arguing against prayer in public schools); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 798-802 (1993) (noting that the volume of cases involving school issues is so great that it "encompass[es] virtually all of the church-state jurisprudence"); Witte, *supra* note

ysis of the establishment issue.[47] The Court examined the program in relation to the general question of separation of church and state. It acknowledged that while the Constitution prohibits the establishment of any religion, there must not be "in every and all respects . . . a separation of Church and State."[48] Thus, the Court recognized that the church and the state must coexist. For if they did not, "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."[49]

The Court further enunciated broad principles applicable to Establishment Clause analysis. It acknowledged that government must remain neutral toward religion, and that the diversity of beliefs and non-belief must be respected.[50] However, the Court

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6, at 422-25 (analyzing Establishment Clause challenges in school issues).

The role of religion in the public schools has continued to be a source of controversy. In an attempt to correct common misunderstandings, a group of 35 civil liberties and religious organizations issued a publication detailing permissible practices under current law. *Religion in the Public Schools: A Joint Statement of Current Law*, (Apr. 1995) [hereinafter *Joint Statement*]. A similar publication has been issued even more recently in conjunction with the PTA. *A Parent's Guide to Religion in the Public Schools*, (Dec. 1995) [hereinafter *Parent's Guide*].

Recently, even the President attempted to correct the mistaken idea that the public schools must be "religion-free zones." *Statement of Principles* from Richard W. Riley, U.S. Secretary of Education, to Public School Superintendents (Aug. 10, 1995) (Issued by the U.S. Department of Education). The President directed an address to the nation's public school superintendents on the issue of religion in the schools. *Id.* The President acknowledged that there is a legitimate, constitutional place for religion in the public schools. *Id.* "Religion is too important in our history and our heritage for us to keep it out of our schools. . . . [I]t mustn't be denied." *Id.* (quoting President Clinton).

47. *Zorach*, 343 U.S. at 311. "If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented." *Id.*

48. *Id.* at 312.

49. *Id.* The Court then gave a number of examples of the relationship between the church and state:

> Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'

Id. at 312-13.

50. *Id.* at 313. The Court articulated an attitude of accommodation:

> We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal

found that history and tradition supported state accommodation of religion.[51] The Court recognized the "wall [of separation] between Church and State,"[52] but rejected the notion that the wall must manifest itself in a constitutional "requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[53] In upholding the constitutionality of the "released time" program, the Court articulated principles of accommodation and non-hostility, as well as separation and non-coercion: "We cannot read into the Bill of Rights such a philosophy of hostility to religion."[54]

2. McGowan v. Maryland: *Religious Original Purpose*

A few years later, in *McGowan*, the Supreme Court upheld the constitutionality of legislation originally enacted to further a religious purpose. Maryland Sunday Closing Laws were challenged as violative of the Establishment Clause because they furthered the religious purpose of encouraging church attendance, and of maintaining an atmosphere of tranquility conducive to Sunday religious services.[55] The Court reviewed the entire histo-

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of its adherents and the appeal of its dogma.

Id.

51. *Id.* at 314-15.

52. *Zorach*, 343 U.S. at 317 (Black, J., dissenting) (paraphrasing his dicta in *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947), quoting Thomas Jefferson). *See also* A.E. Dick Howard, *The Wall of Separation: The Supreme Court as Uncertain Stonemason*, *in* RELIGION AND THE STATE 85, 85 (J. Wood ed. 1985) (discussing Thomas Jefferson's letter cited by Justice Black). For a text of Jefferson's letter to the Committee of the Danbury Baptist Association, and a discussion of Jefferson's views on religious freedom, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 158-66 (1994).

For a discussion of the development of the Religion Clauses, see Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841-60 (1986) (exploring the intent of the Framers of the Constitution, and especially James Madison's role in the drafting of the First Amendment). It is clear that the Framers intended to guarantee individual religious liberty and protect against state compulsion of religious practice. *Id.* at 856. Beyond that, the original intent is not so clear. *Id.* There is no evidence that the Framers intended to guarantee freedom for irreligion, or to extend legal protection to atheists. *Id. See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436-55 (1990) (discussing the Framers' intent in the development of the Establishment Clause); Witte, *supra* note 6, at 376-405 (tracing the various political and theological influences behind the formation of the Religion Clauses). For an overview of the presence in America of various denominations, and of the influences they exerted in colonial and early U.S. society, see MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA (1984).

53. *Zorach*, 343 U.S. at 314.

54. *Id.* at 315.

55. McGowan v. Maryland, 366 U.S. 420, 431 (1961). Store employees brought

ry of Sunday Closing Laws in reaching its conclusion.[56] This review showed that the purely religious original purpose of the law changed over time to include a concurrent secular purpose.[57] Therefore, the Maryland law did not operate as an establishment of a religion, and thus was not unconstitutional.[58]

The Court held that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[59] It illustrated the principle with the example of criminal laws against murder or theft.[60] The fact that a similar prohibition exists in Christianity and in Judaism did not invalidate the state's prohibition against this conduct.[61] The Court also held that laws originating with a religious purpose were valid, even if they continue to benefit religion, so long as there was a contemporary secular purpose as well.[62]

B. Lemon v. Kurtzman: *A Three-Part Test*

Lemon v. Kurtzman[63] marked a major change in the Supreme Court's Establishment Clause analysis. *Lemon* consolidated

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suit after being indicted for violating a county "Blue Law" by selling certain goods on a Sunday. *Id.* at 422. They contended that the Maryland statutes authorizing the county's ban on Sunday sales violated the principle of separation of church and state. *Id.* at 429. Since the purpose of the law was to aid religion, they contended that they were indicted under a law that was unconstitutional. *Id.* at 431.

56. *Id.* at 431-45. In this sense, the Court recognized the importance of historical perspective; it began its inquiry with the origin of the law in medieval England, and continued tracing its development from the colonial American period through the present. *Id.*

57. *Id.* at 433-34. The contemporary secular purpose was to provide a uniform day of rest. *Id.* at 449.

58. *Id.* at 452.

59. *Id.* at 442.

60. *McGowan*, 366 U.S. at 442.

61. *Id.*

> In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. . . . The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

Id.

62. *Id.* at 447.

> If the Christian religion is, incidentally or otherwise, benefited or fostered . . . (as it undoubtedly is,) there is all the more reason for the enforcement of laws that help to preserve it. While courts have generally sustained Sunday laws as 'civil regulation,' their decisions will have no less weight if they are shown to be in accordance with divine law as well as human.

Id. at 447 (quoting Judegind v. State, 78 Md. 510, 515-16 (1894)).

63. 403 U.S. 602 (1971).

challenges to two states' statutes benefitting religious schools.[64] The Court struck both statutes, finding them impermissible violations of the Establishment Clause.[65] In reaching this decision, *Lemon* produced a widely-used three-part test for evaluating the constitutionality of a statute or state action under the Establishment Clause. First, legislation must be secular in purpose.[66] If there is a religious purpose, it can only coexist with the secular; it cannot be the primary purpose.[67] Second, the legislation's effect must neither advance nor inhibit religion.[68] Lastly, the legislation must not foster excessive entanglement of the state with religion.[69] A violation of any one part of the test is sufficient to invalidate the challenged statute or action.

This three-part test is the enduring legacy of *Lemon*. Application of this test has been pervasive, setting the contemporary standard for evaluation under the Establishment Clause.[70] However, *Lemon* also marked a significant shift in the Court's attitude toward religion. The Court implicitly devalued religion with its declaration that, under the Constitution, religion is "a private matter."[71]

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64. *Id.* at 606. One was a Rhode Island law authorizing payment from public funds of salary supplements to teachers in nonpublic schools. *Id.* at 607. The supplements were paid only if certain conditions were met, including the recipients' teaching only secular subjects, and using only State-approved teaching materials. *Id.* at 607-608. The other challenged statute was a Pennsylvania law authorizing direct reimbursement to nonpublic schools for actual expenditures on salaries and materials. *Id.* at 609. It also required that the courses taught be in secular subjects, and that the materials be approved by the State. *Id.* at 610.

65. *Id.* at 625. The decisive factor was the Court's determination that the statutes caused an excessive entanglement between church and state. *Id.* at 614. The Court looked at the type of State benefits provided, the type of institutions receiving the aid, and the resultant relationship caused by the legislation. *Id.* at 615. The Court feared that the secular subjects would be imbued with religious values, despite good faith efforts to keep the religious separate from the secular. *Id.* at 616-17. The Court recognized this potential intermingling as a constant danger, even absent any actual allegations of the mixing of the two. *Id.* at 618.

66. *Id.* at 612.

67. *Id.*

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

69. *Id.* at 613.

70. Although courts regularly apply the *Lemon* test, it is as widely criticized as it is used. *See, e.g.*, Joanne Kuhns, Note, *Board of Education of Kiryas Joel Village School District v. Grumet: The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599, 1600-01 (1995) (commenting on the repeated criticism of *Lemon*, following the Court's most recent Establishment Clause case of relevance).

71. *Lemon*, 403 U.S. at 625. For a discussion of the consequences of "privatizing" religion, see NEUHAUS, *supra* note 6, at 80-81 (citing Professor Bickel's proposal for a "semi-sanitized public square, for a legal process that is religious in function but dare not speak the name of religion").

C. *After* Lemon*: Analysis Further Complicated*

Despite the fact that application of the *Lemon* test has produced widely inconsistent results, the Supreme Court has continued to add elements to Establishment Clause analysis. Unfortunately, these additions have not clarified the standards of evaluation.[72] What has emerged instead has been a trend of devaluing religion.[73] Initially, this section discusses *Lynch v. Donnelly*[74] and its endorsement test. Next, this section shows how the Court used that test to reach contradictory results in *County of Allegheny v. ACLU*.[75] Finally, this section describes the Court's movement to an even more anti-accommodationist stance in *Board of Education of Kiryas Joel Village School District v. Grumet*.[76]

1. Lynch v. Donnelly*: Contextual Evaluation*

In *Lynch*, the Supreme Court upheld the inclusion of a nativity scene, or creche, in a city Christmas display.[77] The Court applied the *Lemon* test and found that the display did not violate any one of its three parts.[78] The Court held that context was a crucial element in this determination.[79] For example, in its purpose analysis, the Court found legitimate secular purposes for including the creche in the display.[80] The inclusion of the creche was not characterized as a promotion of religion, but instead, as merely the depiction of the historical origins of a national holiday.[81] In its effects analysis, the Court found that any benefit to religion derived from the display was too "indirect, remote and incidental" to be an Establishment Clause violation.[82] The Court reasoned that the coincidence of a possible benefit to religion was not unconstitutional.[83] In fact, the Court admitted that "our precedents plainly contemplate that on occasion some advancement of

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72. *See, e.g.*, Howard, *supra* note 52, at 96 (commenting on the confused state of Establishment Clause jurisprudence). "The uninitiated observer who seeks to make sense of the Supreme Court's rulings in Establishment Clause cases is in for a shock." *Id.* at 95.

73. *See* CARTER, *supra* note 3 (tracing this trend in judicial attitude).

74. 465 U.S. 668 (1984).

75. 492 U.S. 573 (1989).

76. 114 S. Ct. 2481 (1994) [hereinafter *Kiryas Joel*].

77. *Lynch*, 465 U.S. at 687. A creche was included in a city Christmas display exhibited in a private park in downtown Pawtucket, Rhode Island. *Id.* at 671.

78. *Id.* at 687.

79. *Id.* at 680.

80. *Id.* at 681.

81. *Id.* at 680.

82. *Id.* at 683.

83. *Id.* at 682.

religion will result from governmental action."[84] Additionally, the Court acknowledged, as it had in the past, that total separation between church and state was not possible. In declaring that the prohibition of the display "would be a stilted over-reaction contrary to our history and to our holdings,"[85] the Court also recognized that there was an affirmative constitutional mandate of accommodation of religion.[86]

While this ruling would seem to affirm the principles applied before *Lemon*, in a concurring opinion, Justice O'Connor proposed yet a different standard for Establishment Clause cases.[87] O'Connor expressed the hope that her proposed endorsement standard would clarify the doctrinal approach in these cases.[88] She defined the standard of endorsement of religion: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[89] Therefore, by adding the element of perceived political standing, O'Connor's standard further complicated Establishment Clause analysis.

2. County of Allegheny v. ACLU: *Jurisprudence of Minutiae*[90]

When the Supreme Court applied the endorsement test articulated in Justice O'Connor's *Lynch* concurrence in the two consolidated cases of *County of Allegheny*, it reached an inconsistent result. The Court upheld a menorah display,[91] yet struck a creche display,[92] while emphasizing in both cases the point that the context of a display must be considered when evaluating the

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84. *Id.* at 683.

85. *Id.* at 686. "Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed." *Id.*

86. *Id.* at 673.

87. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

88. *Id.* at 687 (O'Connor, J., concurring). *See also* The Honorable Sandra Day O'Connor, *Foreword: The Establishment Clause and Endorsement of Religion*, 8 J. L. & RELIGION. 1, 3 (1990) (expressing the belief that an endorsement standard provided a "judicially manageable and analytically sound alternative" to separationist and accommodationist views). *Contra* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 331 (1987) (arguing that the endorsement test "is riddled with analytical flaws"). The endorsement standard would only add to the confusion and inconsistency in Establishment Clause jurisprudence. *Id.*

89. *Lynch*, 465 U.S. at 688.

90. County of Allegheny v. ACLU, 492 U.S. 573, 674 (Kennedy, J., concurring in part, dissenting in part) (characterizing the majority's approach to Establishment Clause analysis).

91. *Id.* at 621.

92. *Id.*

effect created.[93] In the course of its contextual analysis, the Court considered trivial distinctions in reaching its conclusion. It reasoned that aspects of the physical placement of the creche made it an unconstitutional endorsement of religion.[94] But the same kind of inquiry into the menorah display yielded an opposite result.[95] The Court found that the city did not endorse Judaism by including the menorah in the display; thus, the display was constitutional.[96]

In a lengthy dissent,[97] Justice Kennedy proposed an alternative standard for Establishment Clause analysis: non-coercion, and lack of a direct benefit to religion.[98] Kennedy rejected a strict formalism in Establishment Clause analysis, since that "would require a relentless extirpation of all contact between

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93. *Id.* at 597.

94. *Id.* For example, the Court found significance in the fact that the creche was displayed in a prominent location in the County Building. *Id.* at 599-600. It assessed the visual impact of a surrounding floral display, deciding that it was insufficient to neutralize the creche's religious message. *Id.* at 599. In contrast to its finding in *Lynch*, here the Court held that an overall holiday theme was also insufficient. *Id.* at 598-99.

This preoccupation with the trivial has been widely ridiculed. For example, this approach has been called the application of the "two plastic reindeer rule" (Daniel Parish, Comment, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 260 n.52 (1994) (citing a common characterization)), or, of a "Santa Claus" test. Shahin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 533 (1990) (criticizing the Court's holding as inconsistent with precedent).

The Court of Appeals for the Seventh Circuit similarly delved into trivia when considering a creche displayed in Chicago's City Hall. *See* American Jewish Congress v. City of Chicago, 827 F.2d 120, 122 (7th Cir. 1987) (striking the creche display). The unreliability of this mode of analysis was seen little more than a year later when the Seventh Circuit considered similar factors and yet reached the opposite result. In that instance the Seventh Circuit reversed a district court's finding of an Establishment Clause violation where a creche was displayed, along with secular holiday symbols, on the lawn of a village hall. Mather v. Mundelein, 864 F.2d 1291, 1293 (7th Cir. 1989). Physical placement of the display was determinative in both cases. *American Jewish Congress*, 827 F.2d at 129 (Easterbrook, J., dissenting) (characterizing the approach as one "requiring scrutiny more commonly associated with interior decorators than with the judiciary."). "When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt." *Id.*

95. *County of Allegheny*, 492 U.S. at 621. The Court assessed the proximity of the menorah's placement to a Christmas tree. *Id.* at 616. Since a Christmas tree is a type of hybrid religious-secular symbol, the secular aspect of the tree was sufficient to secularize the menorah as well. *Id.* at 617.

96. *Id.* at 621.

97. *Id.* at 655 (Kennedy, J., concurring in part, dissenting in part). Kennedy disagreed with the majority's result in the part of the decision on the creche, and with their reasoning in the part on the menorah. *Id.* Kennedy criticized the *Lemon* test, but contended that, if applied properly, it would have supported the constitutionality of both displays. *Id.* at 655-56.

98. *Id.* at 659 (Kennedy, J., concurring in part, dissenting in part).

government and religion."[99] Instead he would allow flexibility in accommodation and passive acknowledgment of religion.[100] Tradition and historical perspective, rather than a focus on trivial elements, would inform the determination of constitutionality.[101] This approach would keep Establishment Clause jurisprudence free from both "an unguided examination of marginalia"[102] and "an Orwellian rewriting of history."[103] Most important, it would preserve a spirit of neutrality, instead of fostering an attitude of hostility toward religion.[104]

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99. *Id.* at 657 (Kennedy, J., concurring in part, dissenting in part).

100. *Id.* at 657 (Kennedy, J., concurring in part, dissenting in part).

101. *Id.* at 662-63 (Kennedy, J., concurring in part, dissenting in part).

102. *Id.* at 676 (Kennedy, J., concurring in part, dissenting in part).

103. *Id.* at 678 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy recognized that under his approach "the eager proselytizer may seek to use these symbols for his own ends." *Id.* However, he found that potential danger less significant than the duty to uphold "the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism [that] allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins." *Id.* at 679.

104. The standard of coercion is compatible with the accommodationist interpretation of the Establishment Clause. Smith, *supra* note 5, at 924 (advocating adoption of a coercion standard for a coherent approach to Establishment Clause jurisprudence). Coercion is higher at either end of a spectrum, from sponsorship to exclusion, of governmental positions on religion. *Id.* At the government sponsorship end, coercion is highest on nonbelievers. *Id.* However, at the exclusion end, coercion is highest on believers. *Id.* The middle range of accommodation represents the point where government is least coercive regarding either belief or nonbelief. *Id. See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (advocating a noncoercion standard to protect nonbelievers as well as believers); Kristin J. Graham, Comment, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation*, 42 BUFF. L. REV. 147, 172 (1994) (finding a coercion standard consistent with the Framers' intent).

Some commentators have suggested that a version of the coercion test has already been adopted as the current standard after Lee v. Weisman, 112 S. Ct. 2649 (1992). *See, e.g.*, Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993) (contending that the coercion standard has in fact replaced the *Lemon* test). However, even if a form of a "psychological coercion" test was applied, it is a far different standard from that originally proposed by Justice Kennedy in *County of Allegheny*. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 501 (1994) (characterizing the version of coercion in *Weisman* as almost indistinguishable from a separationist stance).

3. Kiryas Joel v. Grumet: *Anti-Accommodationist*[105] *Attitude*

In *Kiryas Joel*, the Supreme Court found that a statute creating a special school district for a religious group was unconstitutional because it had the impermissible effect of advancing religion.[106] The Court considered the state's delegation of authority to the Kiryas Joel School District an impermissible and purposeful delegation on the basis of religion.[107] The Court also expressed concern that there was not an effective way to guarantee that future governmental action, i.e. school districting, would be equally granted to the next group seeking it.[108]

Justice O'Connor, in a concurring opinion, stated her support for the principles of equal treatment and accommodation.[109] However, she proposed another new approach to Establishment Clause analysis, recognizing the need to move away from *Lemon*.[110] She suggested dropping the unified *Lemon* test approach

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105. *Kiryas Joel*, 114 S. Ct. at 2515. (Scalia, J., dissenting) (characterizing the attitude of the majority).

106. *Id.* at 2494.

107. *Id.* at 2489. The Legislature formed the district to accommodate the needs of handicapped children in the village. *Id.* at 2486. The village consisted of an enclave of a Jewish sect that did not attempt to assimilate into modern society. *Id.* at 2485. The children from the village experienced emotional trauma when they were educated at a secular school, because the cultural milieu was so foreign to them. *Id.* In response to this unique problem, the New York legislature created a special school district for the village. *Id.* at 2486. *See* Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 499 (1995) (finding that the Court's holding represented a move away from, "rather than toward[] a regime of genuine religious freedom in the face of expanded secular government"). *See also* Kuhns, *supra* note 70, at 1600 (noting a continued lack of clarity in the Court's Establishment Clause doctrine).

108. *Kiryas Joel*, 114 S. Ct. at 2491.

109. *Id.* at 2497 (O'Connor, J., concurring).

> That the government is acting to accommodate religion should generally not change this analysis. What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect.

Id.

110. *Id.* at 2500 (O'Connor, J., concurring).

> [T]he slide away from *Lemon*'s unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. . . . But it seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

Id.

in favor of situation-specific analyses.[111] O'Connor drew parallels to Free Speech Clause analysis, finding that a situation-specific analysis would avoid the problems inherent in "shoehorning" every examination into a single approach that has become increasingly complicated by the addition of new factors.[112]

Additionally, Justice Scalia wrote a very strongly-worded dissent. He criticized the failure to find a secular basis for the enactment, and took issue with the finding of an impermissible accommodation simply premised on a fear that future neutrality would not be preserved.[113] Scalia also expressed concern over the "hostil[ity] to our national tradition of accommodation"[114] evident in recent decisions. Finally, he characterized the majority opinion as "unprecedented" in the degree to which it "turn[ed] the Establishment Clause into a repealer of our Nation's tradition of religious toleration."[115]

Clearly, the *Lemon* test, or more recent modifications of its criteria have led to disparate and unpredictable results. The inconsistency of these rulings shows that the standards of Establishment Clause evaluation must be changed. This becomes even more evident upon consideration of those few cases which have dealt with Good Friday issues.

III. SUPREME COURT STANDARDS IN GOOD FRIDAY CASES

Case law dealing specifically with Good Friday legislation is sparse.[116] In the few cases that exist, courts have reached in-

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111. *Id.* at 2499 (O'Connor, J., concurring). O'Connor suggested several different categories of analysis, including: government actions targeted at groups, either giving special benefits or imposing special duties; governmental speech on religious topics; and government decisions on matters of doctrine or religious law. *Id.* at 2499-2500.

112. *Id.* at 2499 (O'Connor, J., concurring).

113. *Id.* at 2509-10 (Scalia, J., dissenting).

> But even if the New York Legislature had never before created a school district by special statute (which is not true), and even if it had done nothing but consolidate school districts for over a century (which is not true), how could the departure from those past practices possibly demonstrate that the legislature had religious favoritism in mind? It could not. To be sure, when there is no special treatment there is no possibility of religious favoritism; but it is not logical to suggest that when there is special treatment there is proof of religious favoritism.

Id.

114. *Id.* at 2515 (Scalia, J., dissenting).

115. *Id.* at 2516 (Scalia, J., dissenting).

116. Good Friday is a legal State holiday in only the following states: Delaware, Florida, Hawaii, Indiana, Louisiana, Maryland, New Jersey, North Carolina, North Dakota, Pennsylvania, and Tennessee. DEL. CODE ANN. tit. 1, § 501 (1993); FLA. STAT. ANN. § 683.01 (1)(h) (West 1990); HAW. REV. STAT. § 8-1 (1993); IND. CODE ANN. § 1-1-9-1 (a) (Burns 1996); LA. REV. STAT. ANN. § 1: 55 (A)(1) (West 1987); MD. ANN. CODE art. 1, § 27 (a)(6) (1957); N.J. STAT. ANN. § 36: 1-1 (West 1968 &

consistent results. This section begins with an examination of the rulings on Good Friday statutes in jurisdictions other than Illinois. An analysis of the Illinois ruling follows.

A. Good Friday Cases in Other States

Three prior cases have dealt with Good Friday legislation. In all three instances, courts applied the *Lemon* test, but reached contradictory results.[117] This section first examines the one decision that upheld Good Friday legislation. This section then discusses the two other cases which struck Good Friday statutes.

1. Good Friday as a Secular Holiday

In the challenge brought in *Cammack v. Waihee*[118] to a statute granting Good Friday legal holiday status in Hawaii, the Court of Appeals for the Ninth Circuit applied the three-part *Lemon* test. The court reasoned that the concern expressed by the legislature over the number and timing of legal holidays evidenced a sincere secular purpose in the creation of the Good Friday holiday.[119] Next, the court considered the effect of the holiday. It acknowledged the history behind the legal holiday, which dated from the pre-statehood period.[120] The court found that the legal holiday had been observed long enough in the state to become a generally accepted day off, "a popular shopping day" that benefitted commerce.[121] It saw the creation of this holiday as less coercive, and less an endorsement of religion than the constitutional Sunday closing laws.[122]

Supp. 1996); N.C. GEN. STAT. § 103-4 (a)(8) (1995); N.D. CENT. CODE § 1-03-01 (5) (1995); PA. CONS. STAT. ANN. 44 P.S. § 11 (1991); TENN. CODE ANN. § 15-1-101 (1992). Additionally, Texas counts Good Friday, along with Rosh Hashanah and Yom Kippur, as an "optional holiday." TEX. GOV'T CODE ANN. § 662.003 (c) (West 1994).

A Wisconsin statute (WIS. STAT. ANN. § 895.20 (West Supp. 1995)) that granted a Good Friday afternoon holiday to State employees was recently struck as violative of the Establishment Clause in a decision that cited *Metzl* as precedent. Freedom From Religion Found., Inc. v. Thompson, 920 F. Supp. 969, 972 (W.D. Wisc. 1996). The State of Wisconsin was considering an appeal. Gary Borg, *Offices Open on Good Friday*, CHI. TRIB., Feb. 27, 1996, at 7.

The three prior cases that have dealt with Good Friday statutes are: Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991); Mandel v. Hodges, 127 Cal. Rptr. 244 (Cal. Ct. App. 1976); Griswold Inn v. Connecticut, 441 A.2d 16 (Conn. 1981).

117. *Griswold Inn* and *Mandel* were both decided before the Supreme Court devised its multiplicity of tests in the 1980s. Therefore, only in *Cammack* did the Court have a greater choice of tests from which to choose.

118. 932 F.2d 765 (9th Cir. 1991).

119. *Id.* at 775.

120. *Id.* at 778-79.

121. *Id.* at 778.

122. *Id.* at 779. "Under Hawaii's scheme, recognition of the holiday is simply

Finally, the court readily dismissed the entanglement issue, despite the need to refer to a church calendar to set the date of the Good Friday holiday.[123] The court did not view this as either continuing or comprehensive entanglement with the church.[124] Therefore, in upholding the constitutionality of the Good Friday holiday, the court applied a convoluted reasoning.[125] Good Friday, a holiday of admittedly deepest religious significance, could retain its status only if the court declared it sufficiently assimilated into the Hawaiian culture as to lose its purely religious meaning. The statute was upheld only by the court finding that Good Friday had become such a secular day.[126]

2. Good Friday as a Religious Holiday

A statutory prohibition against alcohol sales on Good Friday was challenged in *Griswold Inn v. Connecticut*.[127] The Supreme Court of Connecticut first considered at length the clearly religious origins of Good Friday, and the history of its observance in this country.[128] The court found the statutory prohibition violative of the Establishment Clause, since there was no clear secular purpose behind it.[129] The State's contention that concern over traffic safety was a factor in enacting the ban was dismissed as speculative at best.[130] The court also found that the statutes' primary effect was to advance religion.[131] Finally, finding that the statutes created excessive entanglement with religion, the supreme court struck them as unconstitutional.[132]

In *Mandel v. Hodges*, the California Court of Appeals struck a statute that similarly failed all three parts of the *Lemon* test.[133] Enforcement of an executive order closing California

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accomplished by closing the office doors; the freed employees may enjoy virtually any leisure activity imaginable. In contrast, the Sunday Closing Laws were originally designed to funnel people into Church." *Id.*

123. *Cammack*, 932 F.2d at 780-81.

124. *Id.*

125. *Id.* at 782. *See* Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 522-25 (1992) (criticizing the decision as a stretch of the concept of accommodation, and disturbing as discriminating against minorities and causing psychic harm); Diana McCarthy, Comment, *The Establishment Clause and Good Friday as a Legal Holiday: Has Accommodation Run Amok?*, 65 TEMP. L. REV. 195 (1992) (criticizing the decision and rejecting a permissible accommodation analysis).

126. *Cammack*, 932 F.2d at 782.

127. Griswold Inn v. Connecticut, 441 A.2d 16, 17 (Conn. 1981).

128. *Id.* at 16-19.

129. *Id.* at 21.

130. *Id.* at 22.

131. *Id.* at 21-22.

132. *Griswold Inn*, 441 A.2d at 23.

133. Mandel v. Hodges, 127 Cal. Rptr. 244, 253-56 (Cal. Ct. App. 1976).

State offices between 12 noon and 3:00 p.m. on Good Friday, while authorizing payment of salaries to state employees for the time off, was challenged.[134] Religious discrimination was alleged because no holidays other than this Christian one were accorded the same treatment.[135] In recognizing the religious nature of Good Friday, the court determined that there was no secular purpose for the statute.[136] The statute also failed under the effect and entanglement analyses, and accordingly, the court struck it as unconstitutional.[137] The inconsistent results reached in these Good Friday cases is further evidence of the unreliability of *Lemon*, and the need for a new standard.

B. The Illinois Good Friday Case

In *Metzl v. Leininger*,[138] the Court of Appeals for the Seventh Circuit applied the same standards used in the other Good Friday cases. This section first enumerates other past standards also recognized by the Seventh Circuit. Then this section shows how the result in *Metzl* was incorrect, even under the test chosen by the court. Next, this section describes the more limiting interpretation that the Seventh Circuit imposed. This section then argues that this standard evinces an attitude endangering religious freedom. Finally, this section demonstrates how this could operate as precedent to erode religious freedom.

1. The Past Standards Recognized

In *Metzl*, the Seventh Circuit acknowledged standards enunciated in Establishment Clause cases over the past few decades. For example, the court noted the basic First Amendment principles of separation of church and state, and neutrality toward all religions.[139] It reiterated the principle that no religion may be accorded special treatment.[140] The court acknowledged, too, the standard of accommodation, and that laws may benefit religion if the benefit is either secondary or too indirect to be significant.[141] This, the court noted, allows the permissible designation of Thanksgiving and Christmas as national legal holidays.[142] Those days, and even Easter, have "accreted secular rituals," whereas

134. *Id.* at 247.
135. *Id.* at 249.
136. *Id.* at 254-55.
137. *Id.* at 255-56.
138. 57 F.3d 618 (7th Cir. 1995).
139. *Id.* at 620.
140. *Id.*
141. *Id.*
142. *Id.*

Good Friday, in the Seventh Circuit's view, has not.[143]

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143. *Metzl*, 57 F.3d at 620. There are no "huge crucifixion sidewalk sales, . . . [no] frivolous passion-play gifties (though they seem to be doing pretty well now making a buck off Easter)," nor any ad campaigns "to ma[k]e us feel guilty if we don't phone home on Good Friday." Eric Zorn, *Good To Be A Holy Day Or A Holiday?*, CHI. TRIB., Apr. 8, 1993, § 2, at 1. Neither do advertisements refer to the number of shopping days until Good Friday. McCarthy, *supra* note 125, at 217. However, symbols of Good Friday might be analogized to that of the *County of Allegheny* menorah. In *County of Allegheny*, the Supreme Court recognized the ambiguous nature of a symbol that has both a purely religious meaning, and a secular, or cultural, meaning also. County of Allegheny v. ACLU, 492 U.S. 573, 613-14 (1989). The Court held that the existence of the possible secular interpretation was sufficient for the menorah display to be permissible. *Id.* at 619. *Cf. Mather v. Mundelein*, 864 F.2d 1291, 1298 (7th Cir. 1989) (Easterbrook, J., concurring) (noting the inconsistency that results when the state allows religious expression, but then attempts to cast that expression in a secular light only).

The nature of Good Friday has been considered similarly ambiguous in the courts. The Ninth Circuit recognized a similar duality of religious and secular meaning in Good Friday. Cammack v. Waihee, 932 F.2d 765, 776-77 (9th Cir. 1991). While the Seventh Circuit denied any secular component in Good Friday, it acknowledged a secular side to Easter. *Metzl*, 57 F.3d at 620. However, the significance of Good Friday is necessarily linked to that of Easter. DOM GREGORY DIX, THE SHAPE OF THE LITURGY 348-49 (1975). While one court has dismissed this essential connection as irrelevant, it did so by focusing on the superficial character of the observances, rather than the theological significance of the holidays. Freedom From Religion Found., Inc. v. Thompson, 920 F. Supp. 969, 974-75 (W.D. Wisc. 1996).

In fact, however, either Good Friday or Easter is meaningless as a holiday without the other. In early Christianity, both the crucifixion and resurrection of Christ were observed in one commemoration. DIX at 440. The entire Easter weekend, beginning with Good Friday, or possibly even Maundy Thursday, is most appropriately viewed as one inseparable commemoration since no one holiday of the three is significant in isolation from the other two. Therefore, if Easter, the most significant holiday in the Christian faith, can be seen as secular in some way, then arguably Good Friday may also be seen as having some secular component. When a symbol can be characterized as possibly both religious and secular, the presumption has been that the secular construction prevails. *County of Allegheny*, 492 U.S. at 620-21.

Symbols, including holidays, have at least three "meanings." Susanne K. Langer, *Philosophy in a New Key*, *reprinted in* LAW, LANGUAGE, AND ETHICS 511, 515 (William R. Bishin & Christopher D. Stone eds., The Foundation Press 1972). Every symbol has a signification, a denotation, and a connotation. *Id.* Accordingly, every analysis of symbols should take into account possible confusions of denotation and connotation. *Id.* Just as the *County of Allegheny* Court recognized the dual nature of symbols, 492 U.S. at 613-14, and considered their connotative meaning, *id.* at 616-17, the Seventh Circuit also recognized that symbolic meaning was at issue. *Metzl*, 57 F.3d at 624. "Modern cases dealing with the establishment clause are largely about symbols, rather than about the practical reality of American religious practices." *Id.* However, in its analysis of a particular religious symbol, the Good Friday school holiday, the Seventh Circuit erred. Good Friday in isolation has no secular connotative meaning, whereas Easter has both a denotative and connotative secular meaning. If the Seventh Circuit viewed Easter as partly connoting secularity, then the connotative presumption should extend to Good Friday also.

2. An Incorrect Result, Even Under Existing Tests

Even using the three-part *Lemon* test, however, the *Metzl* court reached an incorrect result. The court did not clearly delineate its reasoning regarding the purpose analysis from that of the effects analysis. The court characterized the Good Friday holiday designation as purely religious in purpose. It imputed the legislative motive merely on the basis of one proclamation, made by the Governor almost a year after the legislation was passed.[144] However, as noted previously, a determination of civic or cultural motivation for the enactment is possible also.[145] Therefore, it is not so clear, as the court itself admitted, that the motivation for the original enactment was purely religious.[146]

And even if it were so, under *McGowan*, a statute may still be constitutional despite a purely religious original reason for enactment.[147] As *McGowan* held, a statute is constitutional if an intervening secular purpose has developed.[148] In Illinois, the Good Friday holiday had become an accepted day off,[149] just as Sunday had become a generally accepted closing day in Maryland.[150] The holiday had been observed in Illinois schools for

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144. *Metzl*, 57 F.3d at 619. This type of source should not be given much weight in construing legislative intent. Reply Brief for Appellant at 13, Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (No. 94-2563) (citing Resolution Trust Corp. v. Gallagher, 10 F.3d 416, 421-22 (7th Cir. 1993)).

145. See *supra* note 17 for a discussion of civil religion.

146. *Metzl*, 57 F.3d at 621.

> The governor's proclamation is not definitive evidence of the statute's original purpose. And even if the purpose was exactly as he said, it might have changed in the 53 years since he spoke. If, moreover, the statute has accrued a secular justification, the effect of the statute in promoting Christianity—an effect that, to speak realistically, was probably never very great—might be diluted or even eliminated.

Id.

147. McGowan v. Maryland, 366 U.S. 420, 453 (1961).

148. *Id.* at 433-34.

149. Controversies have arisen in various school districts that have considered eliminating the Good Friday school holiday. *See, e.g.*, Margaret Van Duch, *Arlington Heights District 25 To Close Schools Good Friday*, CHI. TRIB., Feb. 24, 1995, § 2, at 5. In one suburban Chicago district, the superintendent spoke of the holiday's traditional aspect. *Id.* The superintendent noted that it is difficult to try to change a tradition. *Id.* "'It's an old holiday. Some people have in their minds how this holiday has been celebrated in the past and they don't want to change that.'" *Id.*

The holiday is also considered a tradition in downstate Illinois school districts. *See* Jennifer S. Johnson & Tony Parker, *Good Friday Court Ruling Won't Touch Area Districts*, THE PANTAGRAPH (Bloomington), June 2, 1994, at A2. Some districts did not intend to change their holiday schedule, despite the district court's ruling. *Id.* For example, in the Pontiac Township High School District, classes would not be scheduled for Good Friday, because the entire Easter weekend had become a popular travel time. *Id.*

150. *McGowan*, 366 U.S. at 447.

more than fifty years, i.e., for several generations.[151] Therefore, the presumption is that the day off had become assimilated into the secular culture.[152] The burden of disproving this was on the plaintiff,[153] and that burden was not met.[154]

Similarly, the burden of persuasion was on the plaintiff[155] to prove that the primary effect of the statute was to favor or promote Christianity.[156] The State met its burden, one of production only,[157] in showing a secular justification for the statute.[158] The State explained that continuing observance of the holiday was simply a practical solution to expected absenteeism.[159] "[T]he purpose of the law is merely to save the school

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151. *Metzl*, 57 F.3d at 625 (Manion, J., dissenting).

> [T]wo generations of students and teachers have come to regard it as a traditional long weekend in Spring, and frequently, the beginning of Spring break. In this regard, the Board claims that Good Friday is best treated like Christmas, Thanksgiving, or Sunday closing laws: a practice that may once have had a religious rationale, but is now secular, and therefore, it is said, constitutional.

Id.

152. *Id.* at 625 (Manion, J., dissenting). Manion discussed the burdens of production and persuasion in a civil rights case. *Id.* He argued that, according to the allocations of burdens set forth by the Supreme Court, the plaintiff bore the burden of persuasion throughout her case. *Id.*

153. *Id.* at 625 (Manion, J., dissenting). The Supreme Court has held that the plaintiff carries the initial burden in a Title VII civil rights action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court outlined the allocations of burdens, beginning with the plaintiff's burden to prove "by the preponderance of the evidence a prima facie case of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

154. *Metzl*, 57 F.3d at 625-26 (Manion, J., dissenting).

155. According to the Supreme Court's allocation of burdens, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Community Affairs*, 450 U.S. at 253.

156. *Metzl*, 57 F.3d at 625 (Manion, J., dissenting).

157. In a civil rights case, once a plaintiff has made a prima facie case of discrimination, the burden shifts back to the defendant to disprove the allegation. *McDonnell Douglas*, 411 U.S. at 802. The defendant must supply a "legitimate, nondiscriminatory reason" for his action. *Id.* The defendant's burden is one of rebuttal of the presumption of discrimination. *Texas Dep't of Community Affairs*, 450 U.S. at 254. The defendant must simply "produc[e] evidence . . . [of] a legitimate, nondiscriminatory reason." *Id.* In this instance, the defendant need not persuade the court, but simply produce the evidence. *Id.* at 254-55.

158. *Metzl*, 57 F.3d at 625 (Manion, J., dissenting).

159. One suburban Chicago school district voted recently to retain the Good Friday school holiday, as well as the school holidays for Rosh Hashanah and Yom Kippur. Karen Cullotta Krause, *3 Religious Days, 3 Days Off: District 214 Stays The Course After Good Friday Ruling*, CHI. TRIB., Jan. 13, 1995, § 2, at 1. The vote reflected an acknowledgement of anticipated high absenteeism. *Id.* This reality was recognized even by atheist activist Robert Sherman, who supported the decision to close the schools. *Id.* "'I'm no fan of religion, but . . . [t]he educational process would be disrupted if half the kids were out of school.'" *Id.* (quoting Sherman).

system the expense of keeping schools open on a day when very few teachers and students can be expected to attend."[160] This explanation was sufficient to meet the State's burden of production.[161] The State was required simply to provide a secular reason for the holiday, which it did.[162] The burden then shifted back to the plaintiff[163] to disprove the issue in contention. And this the plaintiff failed to do.[164]

The Seventh Circuit did not consider the question of excessive state entanglement with religion. The lower court had dismissed it as a non-issue.[165] Thus, the invalidation of the Good Friday school holiday was effected solely by the court's application of a purpose and effects analysis. The finding under that analysis, unfortunately, was flawed.

3. *The Resulting Double-Bind*

The Seventh Circuit's reasoning was also flawed when it imposed a new interpretation for Establishment Clause analysis. It was a standard by which the Good Friday statute would necessarily fail under either the Establishment Clause or the Free Exer-

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160. *Metzl*, 57 F.3d at 621.

161. The Supreme Court has attached great importance to the rebuttal value of the defendant's production of evidence of a nondiscriminatory reason for its conduct. *McDonnell Douglas*, 411 U.S. at 803. It was error to "seriously underestimate[] the rebuttal weight to which petitioner's reasons were entitled." *Id.* The *Metzl* dissent clearly shared this view. *Meztl*, 57 F.3d at 625 (Manion, J., dissenting). The production of reasons for its conduct was sufficient to meet the State's burden as defendant. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993). The mere production of nondiscriminatory reasons, whether those reasons were persuasive or not, was sufficient to rebut the presumption of intentional discrimination. *Id.*

162. As the defendant in a civil rights action, the petitioner was not required to persuade the court that it was motivated in its conduct by the reasons it produced. *See Texas Dep't of Community Affairs*, 450 U.S. at 254. That the defendant produced enough evidence to raise an issue of fact was sufficient. *Id.*

163. In a civil rights action, throughout the shift of allocations of burdens, the plaintiff always retains the burden of persuasion. *Texas Dep't of Community Affairs*, 450 U.S. at 256. Even if the evidence produced in rebuttal by the defendant is rejected by the fact-finder, the plaintiff is not entitled to a judgment in his favor as a matter of law. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2747 (1993).

164. *Metzl*, 57 F.3d at 625-26 (Manion, J., dissenting).

> The record shows that Ms. Metzl has failed to carry her burden. Good Friday has been a school holiday for half a century yet no one detected religious discrimination for all those years. Other than the governor's rather innocuous proclamation in 1941, Ms. Metzl has offered nothing that shows any present or original intent to favor Christianity over other religions. Surely Ms. Metzl must show something other than the mere fact that Good Friday is a holiday in order to prevail on her claim that the holiday is intended to favor Christians over Muslims, Jews, and others.

Id.

165. Metzl v. Leininger, 850 F. Supp. 740, 749-50 (N.D. Ill. 1994).

cise Clause. The court characterized the holiday as at once too religious and not religious enough to be constitutional. This characterization in effect subjected the Good Friday holiday to a "double-bind," making it impossible to uphold the statute.

The court viewed Good Friday as a holiday of purely religious import.[166] As shown, it rejected any possible secular explanation for the holiday observance.[167] The court found the Good Friday holiday religious in both purpose and effect. Therefore, with no secular component at all, the statute had to fail under the court's application of Establishment Clause tests.[168]

However, despite finding that the Good Friday holiday had *only* a religious nature, the court then found that the observance was not *sufficiently* religious. The court dismissed the State's evidence of the dominant adherence to Christianity[169] and thus, the widespread observance of the Good Friday holiday in Illinois.[170] In so doing, the court suggested that the observance of the holiday is, perhaps, not so overwhelming or widespread after all.[171] The court noted that not all Christians belong to a

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166. *Metzl*, 57 F.3d at 620.

167. *Id.*

168. *Id.* at 623. "Had Illinois made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case." *Id.*

169. *See* John A. McDermott, *Another Win for Militant Secularists*, CHI. TRIB., Aug. 17, 1994, at 21 (citing nationwide survey data showing that more than 86% of respondents identified their religious affiliation as Christian). These findings are mirrored by other data showing 88% of the U.S. population identifying itself as Christian. THEIMANN, *supra* note 17, at 3.

170. *Metzl*, 57 F.3d at 621.

171. *Id.* at 621. However, the holiday is widely observed throughout the state. Many districts still close on Good Friday in acknowledgement of a potential high level of absenteeism, or in response to the wishes of parents and staff. There have been on-going controversies in many districts over the possible closing of schools on religious holidays. *See, e.g.*, Karen Cullotta Krause, *Holiday Survey Surprises School Officials*, CHI. TRIB., July 27, 1995, § 2, at 1; Margaret Van Duch, *District 63 Board Retains Good Friday As A Holiday*, CHI. TRIB., Jan. 11, 1995, § 2, at 2. The decision to keep schools closed on Good Friday has been widely supported in many Chicago area districts by both parents and teachers. *See* Ray Quintanilla, *Days Off No Holiday For State's Schools: Districts Want To Reduce Time Kids Are Out Of Class*, CHI. TRIB., Aug. 27, 1995, § 2, at 1.

The issue of anticipated absenteeism surfaced in the Chicago Public School system after the 1994 district court ruling in *Metzl*. Rebecca Carr, *City Public Schools Headed For A Chaotic Good Friday: Most Teachers Off, But Kids Aren't*, CHI. SUN-TIMES, Mar. 14, 1995, at 1. The Chicago Board of Education canceled the Good Friday holiday in response to the ruling. *Id.* School principals expressed concern for the safety of students because so many teachers were expected to be absent. *Id.* According to one survey of teachers, about 80% were expected to be absent on Good Friday. *Id.* Some officials estimated that absenteeism could be even higher. *Id.* One principal estimated that no teachers at all would be present on Good Friday. *Id.* The school officials also raised the question of high absentee-

church, and those who do belong to a church do not all attend Good Friday services.[172] And furthermore, those who do attend Good Friday services may do so in the early morning[173] or in the evening—in other words, outside of school hours.[174] This implied that Good Friday is not so religiously significant a day for those who observe it to have a claim to free exercise.[175] A burden on free exercise would clearly justify accommodation of the practice.[176] Or, if those adherents to Christianity do observe the day, the court seemed to suggest that they must satisfy a test for that observance. It was not enough for the court that a majority of the state's population identified itself as Christian, and thus could be expected to consider the day deeply meaningful. The court implied a need to show actual participation in some kind of church service, in particular, one that occurs during school hours, to satisfy the claim that free exercise has been burdened.

The court found on one hand, that Good Friday is "too reli-

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ism among students, particularly in schools that have a high percentage of Catholic students. *Id.* Later, the Board of Education reversed its position, and decided to close schools on Good Friday. Daniel J. Lehmann, *City Schools Win Good Friday Off: Judge's Remarks Spark Board Reversal*, CHI. SUN-TIMES, Mar. 18, 1995, at 4. The board acknowledged the high level of anticipated absenteeism as the reason for the change. *Id.*

The same concerns were voiced by officials in other school districts downstate, as had been expressed in the metropolitan Chicago area. For example, Collinsville schools remained closed on Good Friday, in recognition of the preference of parents and staff. Linda Eardley, *Good Deal: Good Friday Holiday Now 'Spring Break'*, ST. LOUIS POST-DISPATCH, Apr. 10, 1995, at 1. Likewise, absenteeism was expected to be high in the McLean-DeWitt District if the schools were to remain open. Johnson & Parker, *supra* note 149. The McLean-DeWitt Superintendent recognized that this was the case because Good Friday "is the most important day in most Christians' lives." *Id.*

172. *Metzl*, 57 F.3d at 621.

173. Newspaper listings of church services for Good Friday do not reveal any morning services at all. The most common times for services are either in the afternoon, from 12 noon to 3 p.m., or in the evening. *See, e.g.*, *Religious Services*, CHI. TRIB., Apr. 5, 1996, § 2, at 9; Tricia Haugen, *Good Friday Way of the Cross Procession Will Visit City Landmarks*, THE STATE JOURNAL-REGISTER (Springfield), Apr. 4, 1996, at 9 (listing the times for various religious services). Historically, the traditional time of Good Friday services has been from 12 noon to 3 p.m. Dix, *supra* note 143, at 348. This tradition dates from the fourth century. *Id. See generally* HENRY CHADWICK, THE EARLY CHURCH (1975) (tracing the development of Holy Week liturgies).

174. *Metzl*, 57 F.3d at 621.

175. *But cf.*, Patricia Tennison, *District Rethinks Holiday: In Future, Good Friday May Be A School Day*, CHI. TRIB., Feb. 6, 1995, § 2, at 1 (noting response to the controversy over retaining the Good Friday school holiday). A Catholic priest emphasized the significance of the day. *Id.* He noted that, regardless of the time of day that one might attend a religious service, having the day off as a holiday increases its significance. *Id.*

176. See *supra* note 5 for a discussion of the principle of accommodation of religious practices.

gious" a day, and thus insufficiently secular to permit it to be observed as a public school holiday. By this finding, the observance of the holiday failed as an establishment of religion. Yet, on the other hand, the court ignored any possible claim to the free exercise of religion. The court was able to do so by viewing Good Friday as not "religious" enough a day for its observance to really matter to that part of the population that identified itself as Christian.

4. A Name as an Establishment of Religion

In this holding, the Seventh Circuit adopted a stance even more extreme than the one seen in Supreme Court decisions that have trivialized religion. This court expressed an attitude which would in effect nullify religious identity.[177] A religious holiday of the deepest significance in the faith of the majority of the population could be observed, and therefore, its practice accommodated, only when the religious identity of it was in fact denied. For the court to recognize it, it had to be rendered unrecognizable.

The court did not have so much trouble with the actual State action, the closing of public schools, as it did with the recognition of the reason for the action. Acknowledgement of the reason for the action would necessitate the proper naming of the holiday.[178] The court plainly stated, however, that if the Good Friday holiday were called something else, such as "a spring weekend," it would be permissible.[179]

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177. The naming of a person or of a concept is crucial to its identity; the identity and the name are inextricably connected. *See* Ernst Cassirer, *Language and Myth*, *reprinted in* LAW, LANGUAGE, AND ETHICS 404, 405 (William R. Bishin & Christoher D. Stone eds., The Foundation Press 1972) (discussing the importance of the name). Various religions have emphasized the importance of the name. *Id.* A name is never just a "mere symbol;" it operates as "proxy for its bearer." *Id.* Denying one's name, in a sense, denies one's identity or existence. *Id.*

Specifically, in both Judaism and Christianity, the name is of paramount importance. A change in one's name signifies an altered status or identity. *See, e.g.*, *Genesis* 17:5 (recounting God's renaming of Abram as Abraham upon granting him exalted status as "the father of a multitude of nations"); *St. Matthew* 16:17-18 (recounting Jesus' renaming Simon as Peter upon his recognition of Jesus' true identity). Both religions attach a special significance to the Name of God as well. *See, e.g.*, *Exodus* 3:14-15 (recounting God's revelation of His identity through His own Name); *Exodus* 20:7 (commanding against speaking aloud the Name of God). *See also* Thomas Aquinas, *The Summa Theologica, Question XIII, in* INTRODUCTION TO ST. THOMAS AQUINAS (Anton C. Pegis ed., The Modern Library 1948) (discussing the significance of the Name of God).

178. The irony of this problem was noted by a high school student. *See* Matt O'Connor et al., *Goodbye To Good Friday: Judge: Holiday Unconstitutional*, CHI. TRIB., June 2, 1994, § 2, at 1 (noting reaction to the striking of the Good Friday public school holiday). "'Any Friday away from school is a good Friday.'" *Id.* (quoting a student).

179. *Metzl*, 57 F.3d at 623. This prohibition on the straightforward naming of a

In fact, the entire problem arose when a public school teacher was confronted with the dilemma of explaining the meaning of Good Friday to her students.[180] The words about the holiday were at the heart of her complaint.[181] Somehow, the mere explanation of a religious practice was equated with a kind of coercion, or establishment.[182] In the court's view, to properly name the holiday, or to explain it, was to establish it.[183] Therefore, for this court, religion may exist only when it has been effectively denied.[184]

This attitude on the part of the court represented a further

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holiday poses a special problem when the holiday is a religious one, because "[r]eligion is in the meaning business." *See* NEUHAUS, *supra* note 6, at 60. And, meaning and language are, of course, interrelated. *Id.*

180. Brief for Appellee at 2 n.2, Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (No. 94-2563). *See* Daniel J. Lehmann, *Teacher's Suit Challenges Good Friday As Holiday*, CHI. SUN-TIMES, Mar. 8, 1993, at 4 (citing the plaintiff's proffered "awkwardness and embarrassment" at explaining the holiday). *See also* Daniel J. Lehmann, *Judge Rules Good Friday Holiday Unconstitutional*, CHI. SUN-TIMES, June 1, 1994, at 4 (similarly noting the plaintiff's reaction to making an explanation). *But cf. Religious Holidays in the Public Schools: Questions and Answers*, 8 J. L. & RELIGION 313, 314 (1990) [hereinafter *Religious Holidays*]. Teachers should recognize and inform their students about "how and when [religious holidays] are celebrated, their origins, histories and generally agreed-upon meanings." *Id. See also Joint Statement*, *supra* note 46 (stating that teaching about religious holidays is permissible); *Parent's Guide*, *supra* note 46 (noting additionally that the use of religious symbols and sacred music as part of an academic program is also permissible).

181. Other Illinois school officials have recognized that the real issue in controversies over religious holidays is the language used to describe them. *See, e.g.*, Larry Witham, *Good Friday Ruling Stirs Confusion*, THE WASH. TIMES (D.C.), June 2, 1994, at A1 (quoting an official from the Peoria schools).

182. *Cf. The Good Friday School Holiday (Editorial)*, CHI. TRIB., June 9, 1994, at 30 (describing the prevalent attitude in public schools toward the discussion of religious subjects). "One marvels that a teacher would consider it an imposition to have to explain unfamiliar things to students." *Id.*

183. Perhaps inadvertently, the court recognized the power of language. *See supra* note 168 (quoting the *Metzl* court's position on the name of the holiday). *See also* Bronislaw Malinowski, *The Language of Magic and Gardening*, *reprinted in* LAW, LANGUAGE, AND ETHICS 407, 407-09 (William R. Bishin & Christopher D. Stone eds., The Foundation Press 1972) (discussing the power of the word). In both legal and non-legal contexts, words have "mystic and binding power." *Id.*

184. For a discussion of the importance of the name to one's identity, see *supra* note 177. Furthermore, names, or identities, and myths define each other. Ju.M. Lotman & B.A. Uspenskij, *Myth—Name—Culture in* SOVIET SEMIOTICS 233, 236 (Daniel P. Lucid ed. & trans., The Johns Hopkins Univ. Press 1977) (discussing the ontological reciprocity between name and myth). For a further discussion of the political ramifications that are possible when specifically religious identity is denied, see NEUHAUS, *supra* note 6, at 126-27. There is the dramatic example of Jews in 18th century Europe who were given full citizenship rights, but denied their identity as Jews. *Id.* This made their status more tenuous, and therefore, they became more vulnerable to the powers of the state. *Id.* Dire consequences resulted, for "[w]hat the state gives, however, the state can take away." *Id.* at 127.

erosion of religious freedom.[185] In essence, the concern in *Metzl* was not really about a religious practice. An establishment interpretation could be sustained only if the proper naming of the holiday were considered a religious practice. If the actual naming of a religious holiday is prohibited, then words themselves about religion have become suspect.[186]

This holding obviously narrows the freedom of discourse about religion, and therefore, the scope of religious freedom.[187] In a school setting, discussion about religion should be permissible if it does not proselytize or advocate a particular faith or practice.[188] By neutral discussion, students can be educated about

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185. *Contra* Lehmann, Judge Rules Good Friday Holiday Unconstitutional, *supra* note 180 (quoting an official of the American Jewish Congress who saw the decision as an advancement of religious freedom). *But cf.* Donna M. Chavez, *Christmas At School: The Goal Is To Offend No One*, CHI. TRIB., Dec. 12, 1993, § 2, at 3 (quoting staff counsel for the Illinois American Civil Liberties Union). Some people found it offensive to include any religious aspect of Christmas in public school celebrations of the holiday. *Id.* For example, a controversy arose at one Chicago public school last year after the principal banned Christmas decorations. *See* Debbi Wilgoren, *Merry Whatever; Schools Tread Line Between Secular, Sacred*, THE WASH. POST, Dec. 15, 1995 at A1 (giving examples of the secularization of school observances of Christmas and Hanukkah). *See also* Jan Crawford Greenburg, *In Season To Be Tolerant, It's Still Easier Said Than Done*, CHI. TRIB., Dec. 21, 1995, § 3, at 1 (discussing school-related and other controversies over holiday observances, including a legal challenge to the playing of Christmas music in the State of Illinois Building).

186. There is an additional irony in this problem, given the religious context. As Cassirer noted, some religions place a high value on the word. *See* Cassirer, *supra* note 177, at 404-05. This is particularly true in Christianity, whose central figure is identified as the Word. *Id.* In early Christianity, church fathers commonly referred to Christ as the Word, or the Logos. For examples from the works of Tertullian, Origen, Athanasius, and others, see THE EARLY CHRISTIAN FATHERS, (Henry Bettenson ed. & trans., Oxford Univ. Press 1974). The concept of Christ as the Logos derived from the Johannine tradition. *See* THE NEW JEROME BIBLICAL COMMENTARY, at 1422 (Raymond E. Brown, S.S. et al. ed., Prentice Hall 1990) (discussing the Johannine tradition). This concept of the Logos was essential also in Gnosticism. *Id.* at 1350-53. In addition to other Greek philosophical influences, Johannine thought reflected tenets of Gnosticism. REGINALD H. FULLER, THE NEW TESTAMENT IN CURRENT STUDY 119 (1962). A redeemer myth, as well as the idea of the Logos, was present in Gnosticism. *Id.* The Gospel of St. John was the manifestation of this concept. "In the beginning was the Word, and the Word was with God; and the Word was God." *St. John* 1:1.

187. *See* Mark N. Hornung, *Good Friday Lawsuit is Troubling*, CHI. SUN-TIMES, June 3, 1994, at 35. The author identified himself as "a Jew who respects the AJC [American Jewish Congress]," yet who was disturbed by the legal action that the AJC supported. *Id.* He was concerned that the ruling would make it harder for schools to teach about religion and morality. *Id.*

188. *See Statement of Principles*, *supra* note 46 (setting guidelines for public school superintendents regarding the teaching about, and discussion of religion in public schools). Teachers are permitted to teach *about* religion, including teaching about religious holidays. *Id.* at 4 (emphasis in original). *See also Religious Holidays*, *supra* note 180 (giving guidelines to public school teachers for the discussion

different traditions and taught to acknowledge cultural diversity.[189] However, by equating words with religious practice, this

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of religion). Teachers should be familiar with the "nature and needs" of various religious groups within the school community. *Id.* at 317. They should "[p]rovide resources for teaching about religions and religious holidays." *Id.* This is permissible specifically on the elementary school level. *Id.* at 314.

These general guidelines were essentially restated in two recent publications. *See generally Joint Statement*, *supra* note 46, (discussing the teaching about religion); *Parent's Guide*, *supra* note 46, (reaffirming the constitutionality of teaching about religion, and even of using religious symbols and music in an academic setting).

However, even this degree of latitude would be impermissible to strict separationists who seek to expunge any reference to religion from public schools. *See, e.g.*, John M. Hartenstein, Comment, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, 80 CALIF. L. REV. 981, 1025 (1992) (arguing against even any secular observance of Christmas in public schools). Under this approach, although generalized teaching about religion is permissible, observing Christmas in schools would be like celebrating slavery. *Id.* at 1023.

It is this degree of pervasive secularism, to the exclusion of any religious expression, that has led some to see a need for a constitutional amendment to ensure religious equality. *See* Rep. Henry J. Hyde, *Speaking Out For a Religious Equality Amendment (Commentary)*, CHI. TRIB., Jan. 4, 1996, at 21 (providing reasons for his introduction into Congress of the Religious Equality Amendment); Michael McConnell, Religious Freedom: Testimony before the Senate Judiciary Committee, Oct. 20, 1995, (available on WL 11095849) (distinguishing between neutrality and secularism, and supporting the amendment to counter the "far-more-prevalent proselytizing that is carried on under the banner of various progressive causes"). When only secular expression is allowed, then tolerance and diversity have become "one-way streets." *Id.*

There are equally many prominent opponents of the amendment as well. *See, e.g.*, Douglas Laycock, Religious Freedom: Statement Submitted to the Senate Committee on the Judiciary, Oct. 20, 1995, (available on WL 11095847) (finding no need for a constitutional amendment, especially if it were "a school prayer amendment in thin disguise"); Martin E. Marty, *Supporting Religion*, CHRISTIAN CENTURY, Nov. 1, 1995, at 1031 (envisioning excessive government involvement in religion upon passage of such an amendment). *See also* Jennifer Ferranti, *Religious Freedom Amendment Has Many Hurdles to Clear*, CHRISTIANITY TODAY, Jan. 8, 1996, at 62 (comparing Rep. Hyde's amendment with a version proposed by Rep. Ernest Istook; and describing support for, and opposition to, both versions). For a text of both proposed amendments, see Bill Broadway, *Schism Over School Prayer*, THE WASH. POST, Dec. 2, 1995, at B7.

189. *See* Hornung, *supra* note 187 (commenting that the study of religious traditions in schools would better help students to understand each other); McDermott, *supra* note 169 (advocating recognition of religion as a legitimate part of culture, and as such, valid as a subject of study within a multicultural agenda); *Religion in Schools Remains Important (Editorial)*, CHI. SUN-TIMES, June 2, 1994, at 31 (expressing the view that it is harmful to have public schools become inhospitable to religion and spiritual values). Including religion gives students a more accurate understanding of American history and culture. McDermott, *supra* note 169. This is particularly beneficial in a pluralistic society such as ours. *Id.* Furthermore, the inclusion of religion is useful in promoting common moral values in a heterogeneous society. *Id.* For society to function, people of different backgrounds must have some common understanding and mutual trust. Hornung, *supra* note 187.

ruling places speech about religion in a suspect category.

5. *A Precedent for Complete Elimination of the Holiday*

This ruling endangers the status of the observance of the Good Friday holiday even on the district level where it is still permitted. The Illinois School Code had provisions on three levels for the accommodation of religious practices. On one level, the provision granted a statewide holiday, as specified in Section 24-2 of the school code.[190] Until this ruling, Good Friday had been included among the permitted holidays. On an intermediate level, a provision in Section 26-1 gives each district the right to determine whether or not to close for the observance of religious holi-

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This attitude of mutual understanding can be fostered by teaching students about traditions that differ from their own. *Id.* For example, aspects of Good Friday "go well beyond religion and . . . can benefit people of any religious background." O'Connor et al., *supra* note 178 (quoting a Jewish teacher commenting on the Good Friday holiday). *Cf. Religious Holidays*, *supra* note 180, (giving guidelines to public school teachers for discussing religion); *Statement of Principles*, *supra* note 46 (reaffirming the Clinton administration's support for the teaching about religion in public schools). In a pluralistic society, public schools should be sensitive to the needs of students of all faiths and of none. *Religious Holidays*, *supra* note 180, at 316.

The district court in *Metzl* expressed particular concern over the possible effect of the teaching about religion, because it was directed specifically at children of an impressionable age. Metzl v. Leininger, 850 F. Supp. 740, 748 (N.D. Ill. 1994). The court noted that such a case called for special care. *Id.* (citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)). Unfortunately, more often courts have seen the need to protect children from the influence of religion, but not from the influence of irreligion. *See e.g.*, Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2495 (1994) (Stevens, J., concurring) (finding a danger in the fact that children might follow the religious traditions passed on from their parents); Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992) (noting that adolescents are particularly susceptible to peer pressure as one justification for striking non-denominational invocations at school graduations). *See also* McConnell, *supra* note 188 (contending that progressive secular influences in schools are often impervious to legal challenge, whereas religious influences are often banned completely).

It is ironic, therefore, that those who seek "more dialogue and education about religion" have acted at the same time to suppress its mention in schools. James Hill, *Schools' Holidays Stand Corrected: Celebrations Change Names, Ways To Respect Diversity*, CHI. TRIB., Sept. 26, 1995, at 1 (quoting an official of Chicago Anti-Defamation League). Implementation of holiday name changes in area schools has been supported by officials of organizations that purport to create greater understanding among peoples of diverse backgrounds. *Id.* Such changes that actually reduce the freedom of discourse about religion have been made, even as their supporters give lip-service to cultural sensitivity. *Id.* It is also ironic that the American Jewish Congress supported Metzl's legal action. The American Jewish Congress was in fact among the signatories to the statement issued a few years earlier that supported the teaching about religion in public schools. *Religious Holidays*, *supra* note 180, at 313.

190. 105 ILCS 5/24-2 (1993).

days.[191] Finally, on the last level, a provision exists guaranteeing that an individual student may have an excused absence for the observance of a religious holiday.[192]

The Seventh Circuit stated that the provision in Section 26-1 eliminated any argument of the need for accommodation on a statewide level.[193] Since an individual school district could still close for Good Friday, there was no need to retain the holiday statewide. The lower court stated that the constitutionality of the district holiday provision was not at issue.[194] However, the *Metzl* holding creates precedent that could strike the district holiday provision, should a challenge arise on that level.[195] Already, some districts that have closed for religious holidays have taken steps to secularize that practice.[196] This trend represents a dan-

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191. 105 ILCS 5/26-1 (1993).

192. 105 ILCS 5/26-2b (1993).

193. Metzl v. Leininger, 57 F.3d 618, 619 (7th Cir. 1995).

194. Metzl v. Leininger, 850 F. Supp. 740, 749 (N.D. Ill. 1994). *But cf.*, Reply Brief for Appellant at 10, Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (No. 94-2563) (noting the inconsistency of the plaintiff's position). If Section 24-2 of the school code is unconstitutional, then Section 26-1 is likely unconstitutional also. *Id.*

195. The possibility that this ruling may force even individual school districts to eliminate religious holidays from their school calendars has been widely noted. *See, e.g., Good Ruling On Good Friday (Editorial)*, ST. LOUIS POST-DISPATCH, June 5, 1994, at 2B (noting the possibility of more legal action on the district level). Such a change would remove protection especially important to adherents of minority religions. For example, former Illinois Attorney General Roland Burris noted in response to the district court ruling that school districts observing the Jewish holidays of Rosh Hashanah and Yom Kippur may be pressured into eliminating those holidays as well. *City Desk News*, PEORIA JOURNAL STAR, June 30, 1994, at A5. Officials in a suburban Chicago school district that closed for both the Jewish holidays and Good Friday were also aware of this possibility. The issue of eliminating religious holidays surfaced again for debate in that district after the court ruling. Patricia Tennison & Ray Quintanilla, *Schools Debate Axing Holidays*, CHI. TRIB., Dec. 6, 1994, § 2, at 1.

The superintendent of the district noted that the elimination of the Good Friday holiday made the status of the Jewish holidays less secure. O'Connor et al., *supra* note 178. He said, "As long as we had Good Friday, there was a strong appeal by the Jewish community to observe the two Jewish holidays. This decision could disarm that now." *Id.* This possibility was also noted by a school board member in another suburban district. Mark Shuman & V. Dion Haynes, *Schools OK Jewish Holidays*, CHI. TRIB., Mar. 22, 1993, § 2, at 1. "'Jewish holidays could easily be inserted into [the legal action] where Good Friday appears.'" *Id.* (quoting a District 214 Board member).

196. Many individual school districts that have kept religious holidays on their schedule have changed the name of the holiday. Districts throughout the state have taken this action to meet demands that they secularize the holidays' designation. *See, e.g.*, Van Duch, *supra* note 171 (noting name changes in suburban Chicago districts); Witham, *supra* note 181 (noting a name change in the Peoria schools). The Madison Schools Superintendent acknowledged that the Good Friday holiday is now called simply "part of spring break." Eardley, *supra* note 171. The Belleville School Superintendent was more blunt in his assessment of the reason for the name change. *Id.* "'We switched the terminology from Easter break to

ger of the further erosion of freedom of religious exercise.[197]

Clearly, the striking of the Good Friday statute was based as much on semantics as on religious practice. The Seventh Circuit's holding is yet another move away from accommodation of religion. As such, the holding evidences a further shift toward hostility to religion. The standard instead should return to neutrality toward religion.

IV. REPLACE THE CURRENT STANDARD WITH ONE OF NON-COERCION

The Seventh Circuit's decision evinces basic inconsistencies in the current standards used in Establishment Clause cases.[198] This section first reviews standards from earlier cases which should still be applied for a coherent approach to Establishment Clause analysis. Then this section recommends definitively changing the standard to one based on Justice Kennedy's proposal as it was first articulated in his *County of Allegheny* dissent.

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spring break. . . . We have to deal with semantics more and more in today's society.'" *Id.*

More recently, the Rosh Hashanah holiday was redesignated as merely a "no-attendance day" in the Grayslake schools. Hill, *supra* note 189. Schools throughout the metropolitan Chicago area have made changes in terminology in response to a U.S. Department of Education advisory. *Id.* The policy directs "a big push to recognize holidays in secular terms." *Id.* (quoting the general counsel for the U.S. Dept. of Education).

This trend is evident nationwide, especially in the renaming of any Christmas related events; increasingly often, no mention at all is allowed of the religious origins of Christmas. *See, e.g.*, Wilgoren, *supra* note 185 (using the term "C-word" instead of "Christmas" to illustrate the current attitude).

197. The ruling was characterized as further prohibiting the accommodation of religious practice. Witham, *supra* note 181. It means that states cannot accommodate "the democratically expressed wishes of the people because those wishes happen to be religiously motivated." *Id.* (quoting Rev. Richard John Neuhaus). *Cf.* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J. L. & RELIGION 99, 109 (1990) (noting that there is precedent for courts to penalize students for observing religious holidays).

The offensiveness of this position was expressed by others. Shuman & Haynes, *supra* note 195. Removing Jewish holidays from the school schedule would have been "a slap in the face . . . [that would] be sending a message to the Jewish community and the community at large." *Id.* (quoting the president of a suburban Chicago Jewish community center). *See also* Daniel J. Lehmann, *Christian Groups Criticize Good Friday Ruling*, CHI. SUN-TIMES, June 2, 1994, at 12 (quoting clergy who characterized the ruling as an "attack" in a "seeming drive to make us a purely secular society"). Specifically, the practice of changing the Good Friday holiday's designation was understood as a way of devaluing the holiday. Zorn, *supra* note 143. The necessity of changing the name in order to keep the holiday on school schedules "equates religious holidays with flu epidemics or snowstorms." *Id.*

198. See *supra* note 7 for a discussion of the confused state of Establishment Clause jurisprudence.

A. Earlier Standards: Still Good Law

The Supreme Court has applied a myriad of standards in Establishment Clause cases over the last fifty years.[199] All of these standards are still good law. A comparison of the rulings before *Lemon* with more recent ones shows how the Court's attitude toward religion has become, at least, less accommodating, and arguably, more hostile. Despite this change, the Court still looks back to and applies general propositions from the earlier cases.

As far back as *Zorach*, the Supreme Court firmly acknowledged a prohibition against the state establishment of religion. The Court set an absolute prohibition on any coercive activity in support of religion. Yet, at the same time, the Court did acknowledge that religion exists and has an essential place in the lives of many Americans. The Court recognized the theistic nature of the beliefs of most Americans.[200] It dared to characterize Americans as having Judeo-Christian traditions, and as being "a religious people whose institutions presuppose a Supreme Being."[201] The Court could *accommodate* religion because it still allowed itself to *discuss* religion in terms of theism, rather than as just any amor-

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199. See *supra* note 72 for a discussion of the inconsistency in standards applied by the Supreme Court.

200. This recognition was not a prescription or establishment of a particular mode of belief. The Court simply utilized "real" language to discuss the type of religion real to most Americans. Without the proper language, the Court could not properly distinguish theistic religion from other "nonrational emotive postulates" that already receive the protection of the freedoms of speech and conscience. *See* Joel R. Cornwell, *Totem and the God of the Philosophers: How a Freudian Vocabulary Might Clarify Constitutional Discourse*, 35 J. CHURCH & STATE 521, 533 (1993) (identifying a need to use the language of theism). Once the Court has abandoned this language, it has implicitly devalued specifically religious belief. *Id.* at 535-37.

Over the years, the language employed by the Court to describe religious beliefs and practices has evolved. For an early example of the Court's characterization of religion, see Davis v. Beason, 133 U.S. 333, 342 (1890) (defining religion as "one's . . . relations to his Creator"). This type of language was still utilized into the twentieth century. *See* United States v. Macintosh, 283 U.S. 605, 625 (1931) (characterizing Americans as "a Christian people"). *See also* M. Elisabeth Bergeron, Note, *"New Age" or New Testament?: Toward a More Faithful Interpretation of "Religion"*, 65 ST. JOHN'S L. REV. 365 (1991) (examining various definitions of religion used by the Supreme Court).

For a discussion of the impact of the Court's definition of religion specifically in Establishment Clause cases, see Beschle, *supra* note 39, at 173 (noting the expanded definition of religion in Establishment Clause cases). *See also* Smith, *supra* note 88, at 296 (contending that despite the difficulty of defining "religion," lack of a consistent definition has not been a problem in Establishment Clause cases). *But cf.* Gey, *supra* note 7, at 161 (finding that a definition of religion based on theological concepts results in arbitrary discrimination).

201. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

phous "deeply held belief."[202]

The Court did not favor religion, but neither did it deny religious identity entirely. It permitted state institutions to encourage and cooperate with religious institutions. Allowing cooperation was obviously distinguishable from coercion. This spirit of tolerance and coexistence was necessary if the Court were to be truly neutral. It realized that, otherwise, if it were "callous[ly] indifferen[t]," it would actually be favoring non-belief.[203]

Lemon, however, marked a major turn away from the attitude of accommodation. The three-part *Lemon* test has been widely and severely criticized, even by Supreme Court justices themselves.[204] Despite the criticism, it has become the most pervasive standard for deciding Establishment Clause cases. The further additions, from *Lynch* through *Kiryas Joel*, have only complicated the picture. The Court has considered the contextual significance of individual displays of religious symbols without considering the entire historical context of religious practices and accommodation in this country. This has resulted in the sort of "jurisprudence of minutiae" that Justice Kennedy decried in his *County of Allegheny* dissent.[205] Each of these more recent decisions has had the net effect of devaluing religion.[206] While ignoring judicial precedent and two centuries of historical practice, the Court has not set any coherent standard for Establishment Clause evaluation,[207] and has in effect reduced religion in judicial discourse to trivia.[208] This can be resolved if the Court adopts a different standard in its Establishment Clause analysis.

B. Replacement With the Non-Coercion Standard

Justice Kennedy's proposal in his *County of Allegheny* dissent would provide a more reasonable solution than that reached by

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202. Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring).

203. *Zorach*, 343 U.S. at 314.

204. *See, e.g.*, *Kiryas Joel*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (criticizing *Lemon* as "rigid" and providing a "distorted framework" for Establishment Clause analysis). "The problem with (and the allure of) *Lemon* has not been that it is "rigid," but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire." *Id.* at 2515 (Scalia, J., dissenting).

205. County of Allegheny v. ACLU, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part, dissenting in part).

206. *See* CARTER, *supra* note 3 (illustrating this trend in recent Establishment Clause jurisprudence).

207. *See* Witte, *supra* note 6 (giving historical background behind the formulation of the Establishment Clause).

208. *See* CARTER, *supra* note 3 (providing many examples of decisions having this effect).

the Seventh Circuit. Courts would find that application of Kennedy's standard, non-coercion and no-direct-benefit to religion,[209] would be a workable alternative for evaluation of Establishment Clause issues. First, this section speculates how this standard might have impacted holdings previously considered. Next, this section applies the non-coercion standard to *Metzl*. Finally, this section shows the benefits of replacing the current analysis by trivia with the standard of non-coercion.

1. Non-Coercion in Past Cases

If the Supreme Court had applied a non-coercion and no-direct-benefit standard in past cases considered in this Note, it would have reached more consistent, and more neutral results. The school district in *Kiryas Joel* would have been upheld under a non-coercion standard. Similarly, under a non-coercion standard, the display of the creche as well as that of the menorah would have been upheld in *County of Allegheny*. The decisions on the creche display in *Lynch*, the Sunday closing laws in *McGowan*, and the released time program in *Zorach* would have been unchanged. In all instances, no coercive activity was involved, so the statute (in *Kiryas Joel*) and the state actions would have been held constitutional. None involved a direct benefit to religion either.

Lemon would have been a closer decision. Clearly, neither of the statutes involved coercive activity. It is harder to predict how the Court would have ruled under the direct-benefit principle. The Court might have reached the same result, finding both statutes in violation of the Establishment Clause. Even so, this result would have been more desirable under the non-coercion and no-direct-benefit standard. Such a ruling would safeguard against establishment of a religion, yet it would do so without providing an unreliable three-part standard as precedent.

The Good Friday ruling in *Cammack* would likely have been unchanged if a non-coercion standard had been applied. The *Griswold Inn* and *Mandel* holdings would be harder to predict. However, it is likely that the *Griswold Inn* ruling, at least, would have been the same. No coercion to any kind of affirmative participation or action was involved. But the question again becomes closer when the direct-benefit analysis is applied.

2. Non-Coercion in Metzl

Applied to *Metzl*, however, this standard would show definite-

209. *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part, dissenting in part).

ly that the State provided no direct benefit to religion; neither did it coerce any conduct when it closed public schools statewide on Good Friday. The possible benefit to religion was too indirect to be significant. Most important, the holiday did not force anyone —students or teachers— to do anything. By definition, it was a day off, a day of not doing state-compelled action (that is, a day of "not studying" and "not teaching"). It merely provided the opportunity for religious observance to those who desired and valued it. Others were free to regard the day as a spring holiday, or as a shopping day (as apparently the majority of Hawaiians do), or as whatever they might wish.

3. Non-Coercion: No Bright Line

Replacing the existing standards with one of non-coercion and no-direct-benefit would not satisfy all critics, however. Even with this new and much more reasonable standard, there would still be borderline cases. In an area like the Establishment Clause, no absolute bright line can be drawn. The inherent and necessary tension between the Establishment Clause and the Free Exercise Clause[210] prevents the imposition of a standard so clear as to guarantee an easy determination of all cases.

Adoption of the non-coercion and no-direct-benefit standard would, however, provide one definite benefit. That benefit would be one provided not to religion, but to the courts. It would permit a renewed honesty on the part of the courts. Words naming and explaining a religious practice would no longer be impermissible. The courts could, in good conscience, call a religious holiday by its proper name: Good Friday again could be called Good Friday.

CONCLUSION

In the confused state of Establishment Clause jurisprudence, an essential element has been lost. Judicial discourse about religion has evidenced a growing secularism and an increasing disregard for religious practice. In Illinois, a holiday of long-standing has been declared unconstitutional simply because its name accurately reflected the religious observance it commemorated. In dealing with Establishment Clause questions, courts have used an increasingly complicated set of tests, reaching contradictory and unsatisfactory results. Courts should adopt the non-coercion standard for evaluating these issues. The adoption of this standard would facilitate honest discourse about religion while safeguarding against impermissible establishments. Most important, it

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210. For a discussion of views on the relationship between the two Religion Clauses, see *supra* note 44.

would prevent any further erosion of religious freedom.

Joanne Yasus