



2008

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Recommended Citation

Kelly S. Terry, Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism, 18 B.U. Pub. Int. L.J. 67 (2008).

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SHIFTING OUT OF NEUTRAL: INTELLIGENT DESIGN AND THE ROAD TO NONPREFERENTIALISM

KELLY S. TERRY*

INTRODUCTION

Imagine yourself in a biology classroom in a public high school in the year 2012. Posters depicting cell structures and anatomical systems adorn the walls. Rows of microscopes line a shelf above a sink. An American flag stands in one corner, while a human skeleton hangs in another. Amidst their backpacks and textbooks, restless teenagers sit at rows of tables facing the teacher at the front of the room. The teacher opens the class with the following statement:

We are about to begin a study of Darwin's theory of evolution. I am obligated to inform you that evolution is a theory and not a fact. Gaps exist in Darwin's theory for which there is no evidence. Once we complete the unit of study on evolution, we will undertake a unit of study on Intelligent Design, which is an alternative explanation for the origin of life that differs from Darwin's theory. The basic premise of Intelligent Design is that the world and its creatures, including humans, are much too complex to be the product of random patterns of evolution and therefore must be the product of some intelligent designer. The Intelligent Design theory does not specify the identity of the designer, but it does not rule out a supernatural creator.

This scenario may seem preposterous to proponents of separation of church and state, but it is not so far-fetched. Justices Scalia, Kennedy, and Thomas, along with former Chief Justice Rehnquist, have altered the Supreme Court's Establishment Clause¹ jurisprudence over the last twenty years and significantly weakened the "wall of separation"² between church and state. The Court's newest members, Chief Justice Roberts and Justice Alito, appear poised to continue these doctrinal changes and further diminish the boundaries between re-

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¹ "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I.

² *Everson v. Bd. of Edu. of Ewing*, 330 U.S. 1, 18 (1947).

ligion and government.³

The “wall of separation” metaphor comes from the Supreme Court’s first significant interpretation of the Establishment Clause, *Everson v. Board of Education of Ewing*.⁴ In *Everson*, the Court adopted a neutrality principle for determining whether government conduct constitutes an impermissible establishment of religion.⁵ The neutrality principle provides that government must maintain a wall of separation between church and state and “be a neutral in its relations with groups of religious believers and non-believers.”⁶ Thus, “[n]either a state nor the [f]ederal [g]overnment can set up a church” or “pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁷

In the sixty years since *Everson*, however, the Court has struggled to define what it means for government to be neutral with respect to religion.⁸ The Court’s members have repeatedly debated the definition of neutrality, and they have proposed widely divergent standards employing varying degrees of church-state separation. This disagreement produced an Establishment Clause

³ Professor Stephen Gey predicts that it is likely that

we now have a Supreme Court comprised of five members who are deeply opposed to virtually everything the Supreme Court has said about the relationship between church and state since the Court first started rigorously enforcing the Establishment Clause in 1947. We may be on the cusp of a root-and-branch change in Establishment Clause jurisprudence, which will fundamentally alter the landscape of church/state relations and produce a constitutional regime that specifically permits the government to endorse the views of the religious majority and use government programs to advance the majority’s sectarian goals.

Stephen G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 1 (2006-07); see also *id.* at 3 (Roberts and Alito are “hostile to the basic concept of separation of church and state, and will actively campaign on the Court to eradicate the principle altogether”); Stephen A. Newman, *Evolution and the Holy Ghost of Scopes: Can Science Lose the Next Round?*, 8 RUTGERS J. L. & RELIGION 11, 28 (2007) (Alito and Roberts likely “will be receptive to a trimming of the Establishment Clause in the direction of allowing a more ubiquitous religious presence in the public sphere.”).

⁴ *Everson*, 330 U.S. at 18.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 15. The Establishment Clause has been incorporated into the Fourteenth Amendment and therefore applies to the states. *Id.* at 8.

⁸ See Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 604 (2002-03) (“*Everson*’s easy statement of the neutrality principle disguised its enduring difficulty, for the principle has proven far easier to state than to apply in contested cases.”); see also Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 4 (2005) (calling *Everson* “the Court’s first formal foray into what would become a jungle of Establishment Clause jurisprudence.”).

jurisprudence that is confusing, inconsistent, and deeply divided.⁹

The appointments of Chief Justice Roberts and Justice Alito, however, stand to produce a majority that will agree on a new Establishment Clause standard. In recent cases, Justices Scalia, Kennedy, and Thomas have rejected the notion of neutrality and taken positions consistent with nonpreferentialism,¹⁰ an Establishment Clause interpretation that Justice Rehnquist proposed in 1985.¹¹ The nonpreferentialist doctrine states that government may aid religion and favor religion over nonreligion, so long as it does not establish a national church or discriminate among religions.¹² In their past writings and opinions, Chief Justice Roberts and Justice Alito also have expressed views consistent with Rehnquist's nonpreferentialist standard.¹³ Thus, if given the opportunity, they could tip the balance in favor of a radically different interpretation of the Establishment Clause.

The teaching of intelligent design in public schools may well provide that opportunity. In recent years, critics of evolution have urged state and local boards of education to mandate the teaching of this theory as an alternative to evolution.¹⁴ The fundamental premise of intelligent design is that "the world and its creatures are far too complex to have arisen through random patterns of evolution and must be the product of some intelligent designer."¹⁵ "Because intelligent design theory does not necessarily rely on any particular conception of the designer and does not require belief in any particular biblical story, such as the six-day creation or great flood, intelligent design theory is put forth as science, not religion, and thus as a worthy complement to evolution in the classroom."¹⁶

In 2005, a federal district court in Pennsylvania became the first in the nation to assess the constitutionality of teaching intelligent design in public schools.¹⁷

⁹ Stephen G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory. On a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases.").

¹⁰ See *infra* Section I.D.

¹¹ *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Rehnquist, J., dissenting).

¹² *Id.* at 106 (Rehnquist, J., dissenting).

¹³ See *infra* Section IV.A-B.

¹⁴ See, e.g., *Alexei Barrionuevo, Trustees Kill Plan to Buy Divisive Book Plano Biology Teachers Won't Receive Copies*, DALLAS MORNING NEWS, Feb. 8, 1995, at 1A.

¹⁵ Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 442 (1996-97).

¹⁶ *Id.* (citations omitted).

¹⁷ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp.2d 707 (M.D. Pa. 2005); see also Martha M. McCarthy, *Instruction About the Origin of Humanity: Legal Controversies Evolve*, 203 ED. LAW REP. 453, 464 (West 2006).

In *Kitzmiller v. Dover Area School District*, the court ruled that a school district policy mandating instruction on this theory violated the Establishment Clause.¹⁸ Both before and after *Kitzmiller*, scholars debated whether teaching intelligent design is constitutional under the Supreme Court's existing Establishment Clause standards.¹⁹ This article, however, asserts that an intelligent design case would allow the Court to reconsider its existing standards and that, with Chief Justice Roberts and Justice Alito on the Court, there is now a majority that could adopt nonpreferentialism in lieu of neutrality, thus demolishing the "wall of separation."

Following this introduction, Section I of this article traces the development of the neutrality principle, examines the different neutrality standards that the Court has employed, and explains positions taken by Justices Scalia, Kennedy, and Thomas that are consistent with Rehnquist's nonpreferentialist standard. Section II discusses three of the Court's most recent Establishment Clause decisions to provide a current snapshot of the debate over a governing standard. Section III explains how Justice Kennedy's concerns about coercion of students could prevent him from agreeing with the adoption of a nonpreferentialist standard. In Section IV, I examine the prior writings and opinions of Chief Justice Roberts and Justice Alito to demonstrate that they hold views consistent with nonpreferentialism. Sections V and VI discuss how the intelligent design debate could be the vehicle for a majority of the Court to adopt a nonpreferentialist interpretation of the Establishment Clause and explains the ramifications of such a decision. Section VII concludes the article.

I. THE COMPETING ESTABLISHMENT CLAUSE STANDARDS

Since *Everson*, members of the Court have proposed Establishment Clause standards ranging from absolute separation of church and state, to government accommodation of religion, to government promotion of religion. Professor Rodney Smith has aligned these standards along a continuum.²⁰ At one end of the continuum is strict separation, which "prohibits[s] government from aiding religion in any form."²¹ At the opposite end of the continuum is the theocratic view, which "permit[s] government to establish a national religion[.]"²² Between strict separation and the theocratic view lie varying degrees of government support and accommodation of religion.²³

¹⁸ *Kitzmiller*, 400 F. Supp.2d at 708-09.

¹⁹ See, e.g., *infra* notes 294, 296-297, and 328.

²⁰ Rodney K. Smith, *Nonpreferentialism In Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 248-51 (1991).

²¹ *Id.* at 248.

²² *Id.*

²³ *Id.* at 251.

A. Neutrality

One form of accommodation, which lies close to separation, is neutrality.²⁴ The leading expositor of this principle is Professor Douglas Laycock, who identifies three types of neutrality that the Court has employed since *Everson*.²⁵ One type is “formal neutrality”, which he defines as a prohibition on religious classifications.²⁶

The second type of neutrality, which *Everson* exemplifies, is “substantive neutrality.”²⁷ Under this standard, “the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”²⁸ By this, Professor Laycock means that

religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.²⁹

²⁴ Smith distinguishes between neutrality and strict separation based on disadvantages incurred by religion. He posits that neutrality “would permit government to aid or accommodate religion when failure to do so would disadvantage religion, while strict separation would never allow such support.” *Id.*

²⁵ Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1989-90). Professor Laycock also rejects the sharp distinction that some scholars draw between neutrality and separation. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 46 (1997) (asserting that the Court views separation as a means of “implementing neutrality among faiths and between faith and disbelief” and “has never said that separation was fundamentally distinct from neutrality or religious choice.”).

²⁶ Laycock, *supra* note 25, at 999. This definition is based on a principle of formal neutrality first articulated by Professor Philip Kurland, who asserted that the Religion Clauses must be read together to “prohibit classification in terms of religion either to confer a benefit or to impose a burden.” *Id.* (quoting Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)). Professor Laycock cites *Employment Division v. Smith*, 494 U.S. 872 (1990), as a classic example of formal neutrality. Laycock, *supra* note 25, at 1000.

²⁷ Laycock, *supra* note 25, at 1001.

²⁸ *Id.* See also Paul E. Salamanca, *Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality*, 41 BRANDEIS L.J. 575, 575 (2002-03) (“Under [substantive neutrality], courts and commentators purport to ask whether a public policy under scrutiny is likely to affect religious choices in an unacceptable way.”). But cf. Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 492 (2003-04) (arguing that “neutrality, whether [called] formal or substantive, does not exist.”).

²⁹ Laycock, *supra* note 25, at 1002. This definition reflects Professor Laycock’s own

"Disaggregated neutrality" is the third type of neutrality that Professor Laycock identifies.³⁰ This type is a subset of substantive neutrality that divides that standard into separate tests of "no advancement" of religion and "no inhibition" of religion.³¹ "Substantive neutrality always requires that the encouragement of one policy be compared to the discouragement of alternative policies."³² In other words, substantive neutrality examines a law's effects on both the advancement *and* the inhibition of religion. Disaggregated neutrality, on the other hand, examines whether a law's substantial effect is *either* to advance religion or to inhibit religion.³³ Thus, "[i]f a law has some substantial effect that advances religion, that may be the end of the case."³⁴

B. *Nonpreferentialism*

A different form of accommodation, which stands in sharp contrast to neutrality, is nonpreferentialism. On Professor Smith's continuum, nonpreferentialism is at the opposite end of the spectrum from neutrality and lies much closer to the theocratic view.³⁵ The basic premise of nonpreferentialism is that the Establishment Clause forbids only "the establishment of a national church or religion, or the placing of any one religious sect, denomination, or tradition, into a preferred legal status."³⁶ Stated affirmatively, nonpreferentialism permits the government to confer

special aid or benefits upon religion in general, as long as the aid or benefits are given without preference to any religious denominations. . . . [T]he Establishment Clause aims to keep the government from singling out certain religious sects for preferential treatment, but it does not prevent the government from showing favoritism to religion in general.³⁷

understanding of neutrality. He contends that substantive neutrality is more difficult to apply than formal neutrality because it "requires judgments about the relative significance of various encouragements and discouragements to religion." *Id.* at 1004.

³⁰ *Id.* at 1007.

³¹ *Id.*

³² *Id.* at 1008.

³³ *Id.* at 1007.

³⁴ *Id.*

³⁵ Smith, *supra* note 20, at 250-51.

³⁶ Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J. L. & PUB. POL'Y 129, 138 (1986).

³⁷ Garry, *supra* note 8, at 3. See also Richard M. Esenberg, *You Cannot Lose If You Choose Not To Play: Toward A More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 15 (2006-07) (asserting that nonpreferentialism does "not require evenhandedness between 'religion' and 'irreligion'" and permits government to "promote religion generally as long as it does not prefer one sect over another"). Professor Rodney Smith identifies three types of nonpreferentialism: (1) "religious nonpreferentialism", which is the "view that government may aid or accommodate 'religion' so long as it does so in a nonpreferential manner"; (2) "nonpreference as to matters of conscience", which is the "view that government

A majority of the Court has never adopted nonpreferentialism, but former Chief Justice Rehnquist was a strong proponent of this doctrine. In a forceful dissenting opinion in the 1985 case of *Wallace v. Jaffree*, which involved a “moment of silence” law, then-Justice Rehnquist rejected the neutrality principle and asserted that nonpreferentialism should be the interpretive standard for the Establishment Clause.³⁸ As explained in more detail below, other members of the Court, including Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Alito, subsequently have taken positions consistent with Rehnquist’s position.³⁹

C. *The Supreme Court’s Application of the Competing Standards*

1. Substantive Neutrality

Prior to Rehnquist’s advocacy of nonpreferentialism, the Court generally employed some form of neutrality. It adopted a substantive neutrality standard in *Everson*,⁴⁰ which upheld a New Jersey program authorizing reimbursement for parents of parochial school students who traveled to school on the public bus system.⁴¹ Justice Black set forth the Court’s first significant attempt to define the meaning of the Establishment Clause, stating that the

“establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, par-

may aid those seeking to act in accordance with their conscience”; and (3) “nonpreferentialism between religion and nonreligion”, which is the “view that government may aid religion when to fail to do so would demonstrate a preference for nonreligion.” Smith, *supra* note 20, at 247-48.

³⁸ *Wallace v. Jaffree*, 472 U.S. 38, 99-100 (1985) (Rehnquist, J., dissenting).

³⁹ See e.g., *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 885 (2005) (Scalia and Thomas, JJ., dissenting); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting); see also Garry, *supra* note 6, at 51 (stating that “[t]he courts have come part of the way toward recognition of the nonpreferential model” by upholding government funding programs that aid religion and upholding tax breaks given to religious organizations).

⁴⁰ *Everson v. Bd. of Edu. of Ewing*, 330 U.S. 1, 18 (1947).

⁴¹ *Id.*

ticipate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."⁴²

The articulation of this neutrality principle was a watershed moment because, "[p]rior to 1947, the Supreme Court had not, in any significant way, addressed itself to either the meaning or the scope of the Establishment Clause's prohibitions on the power of Congress."⁴³

The Court considered the reimbursement program's effects on both the advancement and inhibition of religion. Justice Black admitted that "[i]t is undoubtedly true that children are helped to get to church schools[,] and that "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."⁴⁴ Conversely, New Jersey could not inhibit its citizens' religious exercise by denying them the benefits of public welfare legislation based on their religion.⁴⁵ Balancing these competing concerns, the Court held that New Jersey met the neutrality requirement because it paid the bus fares through a general program that "help[ed] parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."⁴⁶

Soon after *Everson*, the Court applied a substantive neutrality standard to religious instruction in public schools. In *Illinois ex rel. McCollum v. Board of Education*,⁴⁷ the Court considered a challenge to a program through which public school students were "released" during school hours to attend classes in religious instruction.⁴⁸ Teachers employed by a private religious group taught the classes, which occurred on school grounds.⁴⁹

The Court struck down the program, reiterating that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another."⁵⁰ The program violated this principle because it was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."⁵¹ The Court based this

⁴² *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

⁴³ Cord, *supra* note 36, at 148.

⁴⁴ *Everson*, 330 U.S. at 17.

⁴⁵ *Id.* at 16.

⁴⁶ *Id.* at 18. The dissent advocated a strict separationist interpretation. *Id.* at 31-32 (Rutledge, Frankfurter, Jackson, and Burton, JJ., dissenting).

⁴⁷ 333 U.S. 203 (1948).

⁴⁸ *Id.* at 205-06. Students needed parental consent to attend the religious classes. *Id.* at 206.

⁴⁹ *Id.* at 207-09.

⁵⁰ *Id.* at 210.

⁵¹ *Id.*

conclusion on the program's effects, pointing out that it let religious groups use public school buildings and the state's compulsory education system to teach classes in religion.⁵² Conversely, the Court noted that prohibiting public school systems from aiding the spread of religious doctrines does not manifest government hostility to religion.⁵³

2. Disaggregated Substantive Neutrality

a. *The Emergence of Disaggregated Neutrality*

In *School District of Abington Township v. Schempp*, the Court shifted away from traditional substantive neutrality and applied a disaggregated neutrality standard to religious exercises in public schools.⁵⁴ At issue in *Schempp* were mandates in Pennsylvania and Baltimore requiring students to recite Bible verses at the beginning of each school day.⁵⁵ The Court held that these practices violated the Establishment Clause.⁵⁶

Justice Clark wrote for the majority in *Schempp*. Relying on *Everson*, he reiterated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers[.]"⁵⁷ He also pointed out that the Court had rejected the claim that the Establishment Clause forbids "only government preference of one religion over another."⁵⁸ Rather, neutrality prohibited both government preference among religions and preference for religion over nonreligion. Justice Clark explained the rationale for this prohibition:

[t]he wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official sup-

⁵² *Id.* at 211-12.

⁵³ *Id.* at 211. *McCullum* also expressly rejected nonpreferentialism. The school board's lawyers had advocated that standard, arguing that "the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." *Id.* The Court rejected this argument unequivocally. *Id.* at 211-12.

⁵⁴ 374 U.S. 203 (1963). Just prior to *Schempp*, the Court applied the neutrality standard in *Engel v. Vitale* to hold unconstitutional teacher-led prayers in public schools. 370 U.S. 421 (1962). At issue was a requirement that students recite the following "Regents' Prayer" at the beginning of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." *Id.* at 422-23. The Court held that this exercise violated the Establishment Clause because it officially established the religious beliefs embodied in the prayer. *Id.* at 425, 430. The fact that the prayer was "denominationally neutral" did not save it. *Id.* at 430.

⁵⁵ *Sch. Dist of Abington Twp. v. Schempp*, 374 U.S. 203, 205-11 (1963).

⁵⁶ *Id.* at 223-25.

⁵⁷ *Id.* at 218.

⁵⁸ *Id.* at 219 (citing *McCullum*, 333 U.S. at 211).

port of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.⁵⁹

Justice Clark's analysis culminated in a test for determining neutrality, which he phrased in the following question and answer: "what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."⁶⁰ In other words, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁶¹ This test is the classic formulation of disaggregated neutrality.⁶²

Applying this test, the Court held that the purpose of the required Bible readings was to aid religion.⁶³ The Court agreed with the finding that the Pennsylvania practice was "a religious ceremony and was intended by the State to be so."⁶⁴ Baltimore's assertion that its practice had secular purposes, such as promoting moral values, contradicting "materialistic trends," and teaching literature, was belied by the fact that students could opt out of the readings and that the allegedly secular purposes were pursued through readings from a religious text.⁶⁵ Thus, the Court concluded that Pennsylvania and Baltimore violated the First Amendment's command "that the Government maintain strict neutrality, neither aiding nor opposing religion."⁶⁶

The Court applied this disaggregated neutrality standard to school curriculum in *Epperson v. Arkansas*, which presented a challenge to Arkansas's anti-evolution statute.⁶⁷ The statute made it a misdemeanor "for a teacher in any state-supported school or university to 'teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory."⁶⁸

The Supreme Court forcefully struck down the statute as a violation of the Establishment Clause.⁶⁹ Maintaining its reliance on the neutrality principle, the Court stated that "[g]overnment in our democracy, state and national, must be

⁵⁹ *Id.* at 222.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Laycock, *supra* note 25, at 1007.

⁶³ *Schempp*, 374 U.S. at 222-24.

⁶⁴ *Id.* at 223.

⁶⁵ *Id.* at 223-24.

⁶⁶ *Id.* at 225.

⁶⁷ 393 U.S. 97, 107-09 (1968).

⁶⁸ *Id.* at 98-99 (internal citation omitted). The Arkansas statute was modeled after the Tennessee "monkey law" challenged in *Scopes v. Tennessee*, 278 S.W. 57 (Tenn. 1925). *Epperson*, 393 U.S. at 98 & n.2.

⁶⁹ The Arkansas Supreme Court had refused to decide the statute's validity under the Federal Constitution and had upheld it as a valid exercise of the state's power to prescribe the curriculum in its public schools. *Epperson*, 393 U.S. at 101.

neutral in matters of religious theory, doctrine, and practice.”⁷⁰ In its strongest rejection yet of nonpreferentialism, the Court placed religion and nonreligion on the same plane and explained that government may not favor or oppose either:

It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.⁷¹

In the context of school curriculum, this prohibition “forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.”⁷² The purpose of the Arkansas statute was to advance religion by suppressing the “teaching of a theory which, it was thought, ‘denied’ the divine creation of man.”⁷³ It therefore was not “an act of religious neutrality.”⁷⁴

b. *The Decline of Disaggregated Neutrality*

Epperson was a high point in the Court’s use of disaggregated neutrality and the broader principle of substantive neutrality. Just three years later, in *Lemon v. Kurtzman*,⁷⁵ the Court began retreating from substantive neutrality and undertook an internal debate over the governing standard for the Establishment Clause. Ostensibly, *Lemon* addressed the constitutionality of state statutes authorizing salary supplements to teachers in non-public schools, and the Court held that the statutes violated the Establishment Clause.⁷⁶ *Lemon*’s true significance, however, lies not in that result, but in its change to the Court’s Establishment Clause jurisprudence.

Chief Justice Burger wrote for the majority in *Lemon*, and he did not invoke neutrality as a guiding principle. Rather, he emphasized the Court’s struggle to articulate a clear and consistent interpretation of the Establishment Clause. Calling the language of the Religion Clauses “at best opaque,” Burger stated that the Court could “only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”⁷⁷ He then combined the “cumulative criteria” that the Court had considered in prior cases and created the

⁷⁰ *Id.* at 103-04.

⁷¹ *Id.* at 104.

⁷² *Id.* at 107.

⁷³ *Id.* at 109.

⁷⁴ *Id.*

⁷⁵ 403 U.S. 602 (1971).

⁷⁶ *Id.* at 606-07. One of the statutes also allowed reimbursement for textbooks and instructional materials in specified secular subjects. *Id.* at 607.

⁷⁷ *Id.* at 612.

now infamous "*Lemon* Test."⁷⁸ Two of the test's criteria were *Schempp*'s disaggregated neutrality standard: whether a statute has a (1) a secular legislative purpose, and (2) a primary effect that neither advances nor inhibits religion.⁷⁹ Burger added a third criterion: "the statute must not foster 'an excessive government entanglement' with religion."⁸⁰ Thus, neutrality was no longer the sole measure for assessing the constitutionality of government action.

The Court's analysis of the challenged statutes demonstrated its diminution of substantive neutrality. The Court agreed that the statutes had the secular purpose of enhancing the quality of education in all schools.⁸¹ It then declined to consider the statutes' effect on advancing religion, thus avoiding the core inquiry of substantive neutrality.⁸² Instead, the Court held that the statutes violated the Establishment Clause because they created excessive entanglement between religion and government.⁸³ The Court's entanglement analysis signaled a further retreat from *Everson*'s "wall of separation." According to Chief Justice Burger, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."⁸⁴ Thus, after *Lemon*, neutrality was no longer paramount, and the wall of separation was neither high nor impregnable.

3. Formal Neutrality

In the wake of *Lemon*, the Court further diminished substantive neutrality by applying formal neutrality in other cases, especially those involving government financial aid to religious schools. An example of the use of formal neutrality is *Mueller v. Allen*,⁸⁵ which presented a challenge to a Minnesota statute that allowed an income tax deduction for childhood educational expenses, including the costs of tuition, textbooks, and transportation.⁸⁶ The deduction was available to all parents, including those whose children attended parochial

⁷⁸ *Id.*

⁷⁹ *Id.* See also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 56 (1997) (stating that "[t]he first two prongs of the *Lemon* test are taken almost verbatim from the Court's elaboration of 'benevolent neutrality' in *Abington School District v. Schempp*"); cf. also Werhan, *supra* note 6, at 608 (asserting that first prong of *Lemon* test, "which inquires into the religious neutrality of the governmental purpose motivating the challenged statute, might be understood as 'purposive neutrality.'").

⁸⁰ *Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

⁸¹ *Id.*

⁸² *Id.* at 613-14.

⁸³ *Id.*

⁸⁴ *Id.* at 614.

⁸⁵ 463 U.S. 388 (1983). The Court also has applied formal neutrality in other cases involving government financial aid. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

⁸⁶ *Mueller*, 463 U.S. at 391.

schools.⁸⁷

According to the Court, the “more difficult” question in the case was whether the statute had the primary effect of advancing religion.⁸⁸ In assessing the effect, however, the Court disregarded the statute’s actual impact and its benefit to religious schools. Despite uncontroverted evidence that the overwhelming majority of parents eligible for the deduction had children who attended religious schools, the Court found this information irrelevant in assessing the statute’s effect.⁸⁹ Instead, the Court focused on the statute’s supposed facial neutrality, emphasizing that the deduction was available to all parents and that aid to parochial schools resulted only from the private decisions of individual parents.⁹⁰ Therefore, according to *Mueller*, government action did not advance religion so long as the action was facially neutral and did not confer benefits based on religion, even if its actual impact was to significantly assist religion.⁹¹ Thus, *Mueller* further weakened the neutrality principle by disregarding the substantive neutrality standard that the Court had followed in earlier cases such as *McCollum* and *Schempp*.⁹²

4. Accommodating Religion Based on History

The Court further weakened substantive neutrality in *Lynch v. Donnelly*⁹³ by adding an accommodation provision to the neutrality analysis. *Lynch* presented a challenge to a municipality’s inclusion of a crèche in its annual Christmas display.⁹⁴ Although ostensibly following *Lemon*, the Court significantly undermined its neutrality element by declaring that the Constitution does not require “complete separation of church and state; it affirmatively mandates accommo-

⁸⁷ *Id.* at 397.

⁸⁸ *Id.* at 396. The Court quickly found that the statute’s asserted purpose—defraying parents’ educational expenses—was both valid and secular. *Id.* at 395. It also had “no difficulty” in concluding that the statute did not excessively entangle the state in religion. *Id.* at 403.

⁸⁹ *Id.* at 400-01.

⁹⁰ *Id.* at 398-99.

⁹¹ *Id.* at 401.

⁹² See, e.g., Werhan, *supra* note 8, at 613-14 (“The *Mueller* transformation of the second element of *Lemon*, coupled with the *Mueller* Court’s ritual disregard of the purpose requirement, left the Establishment Clause seriously weakened . . .”). Werhan asserts that Justice Rehnquist recast *Lemon*’s second element

from an analysis of the substantive neutrality of the state benefit to what Douglas Laycock has labeled the ‘formal neutrality’ of the law that provided the benefit. Rather than assessing the record to measure the actual effect of the tax deduction, the Court in *Mueller* largely reduced the second element of *Lemon* to a textual review of the law providing for the benefit in order to determine whether the language was religiously neutral.

Id. at 612.

⁹³ 465 U.S. 668 (1984).

⁹⁴ *Id.* at 670-71.

dation, not merely tolerance, of all religions, and forbids hostility toward any.”⁹⁵ According to the Court, this accommodation requirement was evidenced by “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”⁹⁶

In light of this history, the majority focused “on the crèche in the context of the Christmas season”⁹⁷ and ruled that it satisfied the *Lemon* criteria.⁹⁸ Conceding that “the display advances religion in a sense,” the majority nonetheless declared that “our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action.”⁹⁹ Thus, even though the government’s display of the crèche admittedly advanced religion and promoted major tenets of the Christian faith, the Court upheld it as a lawful accommodation of religion.¹⁰⁰

5. The Emergence of Nonpreferentialism

The foregoing discussion illustrates the various definitions of neutrality that the Court employed after *Everson*. In *Wallace v. Jaffree*,¹⁰¹ however, the debate over the meaning of the Establishment Clause took on broader ramifications. It shifted from the definition of neutrality, and the type of neutrality that the Court would apply, to the more fundamental question of whether neutrality should continue to be the Court’s guiding principle.

Wallace presented the constitutionality of an Alabama statute authorizing a period of silence in public schools for “meditation or voluntary prayer.”¹⁰² Following *Lemon* and incorporating part of Justice O’Connor’s endorsement test,¹⁰³ the majority found that Alabama had enacted the statute “for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each school day.”¹⁰⁴ Such endorsement, the majority ruled, “is not consistent with the established principle that the government must

⁹⁵ *Id.* at 673.

⁹⁶ *Id.* at 674.

⁹⁷ *Id.* at 679.

⁹⁸ *Id.* at 685.

⁹⁹ *Id.* at 683.

¹⁰⁰ In a concurring opinion, Justice O’Connor suggested an “endorsement” test as a clarification of *Lemon*’s purpose and effects prongs. *Lynch*, 465 U.S. at 688-89 (O’Connor, J., concurring). Under this test, the purpose inquiry should be “whether the government intends to convey a message of endorsement or disapproval of religion[.]” and the effects inquiry should be whether the government has in fact communicated a message of “endorsement or disapproval of religion.” *Id.* at 691-92.

¹⁰¹ 472 U.S. 38 (1985).

¹⁰² *Id.* at 41-42 (quoting ALA. CODE § 16-1-20.1 (1984)).

¹⁰³ *Id.* at 55-56.

¹⁰⁴ *Id.* at 60.

pursue a course of complete neutrality toward religion.”¹⁰⁵

Wallace’s true significance, however, lies not in the majority opinion, but in the bold dissent of then-Justice Rehnquist. In his dissent, Rehnquist challenged forty years of Establishment Clause jurisprudence, asserting that *Everson*’s “wall of separation” metaphor was “a mistaken understanding of constitutional history.”¹⁰⁶ To correct this purported mistake, he urged the Court to adopt another interpretation of the Establishment Clause, one that has come to be known as nonpreferentialism.¹⁰⁷

Rehnquist based his argument on the statements of James Madison and others involved in drafting and ratifying the Establishment Clause.¹⁰⁸ From that history, Rehnquist concluded that Madison viewed the Establishment Clause “as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.”¹⁰⁹

Based on this historical analysis, Rehnquist asserted that the Establishment Clause prohibits only two government actions: establishment of a national church and government preference among religious denominations.¹¹⁰ Conversely, he asserted that the Clause “did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.”¹¹¹ Since government neutrality was not required, according to Rehnquist, the wall of separation and *Lemon*’s purpose and effects criteria should be abandoned because they rested on the “historically unsound” neutrality premise.¹¹²

Rehnquist’s advocacy of nonpreferentialism was significant for several reasons. As Professor Cord has explained,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 92 (Rehnquist, J., dissenting).

¹⁰⁷ See Smith, *supra* note 20, at 247-48, 268.

¹⁰⁸ *Wallace*, 472 U.S. at 92-100 (Rehnquist, J., dissenting).

¹⁰⁹ *Id.* at 98. Rehnquist added that Congress was not concerned about “whether the Government might aid all religions evenhandedly.” *Id.* at 99.

¹¹⁰ *Id.* at 106. Professor Laycock calls nonpreferentialism a “false claim” and argues that the “framers of the religion clauses certainly did not consciously intend to permit nonpreferential aid, and those of them who thought about the question probably intended to forbid it.” Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 878 (1985-1986). He asserts that nonpreferentialism’s “prominence and longevity” are “remarkable in light of the weak evidence supporting it and the quite strong evidence against it.” *Id.* at 877. Professor Smith, on the other hand, calls nonpreferentialism “one among a number of plausible readings of the history[.]” Smith, *supra* note 20, at 247; see also Cord, *supra* note 36, at 147 (“the ‘no-preference’ interpretation of Church-State separation is the one that the Framers intended and the Founding Fathers embraced.”).

¹¹¹ *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

¹¹² *Id.* at 107-110.

[u]ntil the Supreme Court's 1984 term, no sitting justice had clearly and forcefully challenged *Everson's* "high and impregnable wall" doctrine. That unity of Church-State ideology was shattered by Justice Rehnquist's dissent in *Wallace v. Jaffree*. Adopting the "no preference" doctrine as his own, and presenting some of the historical evidence that supports it, Justice Rehnquist, in a single opinion, called into question some of the Court's most fundamental assumptions about the degree of separation between Church and State required by the Constitution.¹¹³

While other justices had suggested different neutrality standards, Rehnquist questioned the basic premise of neutrality and asserted that the Establishment Clause does not require it.¹¹⁴ The question left after *Wallace* was whether Rehnquist could garner a majority to abandon neutrality altogether and adopt a standard permitting government to favor religion over nonreligion.

The answer to that question came just one month later in *School District of Grand Rapids v. Ball*.¹¹⁵ *Ball* involved a challenge to a state program through which teachers employed by the public schools went to the campuses of non-public schools (primarily religious schools) and taught remedial and supplementary courses.¹¹⁶ Although the Court ruled the program unconstitutional because its primary effect was promoting religion, the case demonstrates the tenuous hold of the neutrality principle.¹¹⁷ The majority felt obliged to preemptively reject nonpreferentialism, declaring that the Establishment Clause is "more than a pledge that no single religion will be designated as a state religion" and "more than a mere injunction that governmental programs discriminating among religions are unconstitutional."¹¹⁸ The Court also reaffirmed that government must "maintain a course of neutrality among religions, and between religion and nonreligion."¹¹⁹ Justice Rehnquist, however, made clear that the battle between neutrality and nonpreferentialism was far from settled. Criticizing the majority's reliance on the "faulty 'wall' premise," he dissented for the same reasons as in *Wallace*.¹²⁰

¹¹³ Cord, *supra* note 36, at 169.

¹¹⁴ *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) ("The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion").

¹¹⁵ 473 U.S. 373 (1985).

¹¹⁶ *Id.* at 375-77.

¹¹⁷ *Id.* at 397. *Ball* was subsequently overruled in part by *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini* did not overrule *Ball's* use of the *Lemon* standard. Rather, it overruled certain factual assumptions that *Ball* had relied on to find that the challenged program had the primary effect of promoting religion. 521 U.S. at 222-23.

¹¹⁸ *Ball*, 473 U.S. at 381.

¹¹⁹ *Id.* at 382.

¹²⁰ *Id.* at 400-01 (Rehnquist, J., dissenting).

D. *Other Justices Align With Elements of Rehnquist's Nonpreferentialist Standard*

1. Justice Scalia

Although Justice Rehnquist's view did not prevail in *Wallace* or *Ball*, three Justices—Scalia, Kennedy, and Thomas—have taken positions consistent with Rehnquist's nonpreferentialist standard in subsequent cases. Justice Scalia joined Rehnquist's nonpreferentialist cause in *Edwards v. Aguillard*,¹²¹ which raised the constitutionality of Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act."¹²² The Act forbade the teaching of evolution unless it was "accompanied by instruction in creation science."¹²³ Neither evolution nor creation science was required to be taught, but if one was taught, then the other had to be taught as well.¹²⁴

The majority applied the *Lemon* criteria and struck down the Act for lack of a secular purpose, finding that its aim was to advance a religious belief—creationism—and discredit a scientific theory—evolution.¹²⁵ Justice Scalia, however, wrote a dissenting opinion that then-Chief Justice Rehnquist joined. Scalia accepted, without question, the state's assertion that creation science was a scientific theory, disregarding its religious origins and concluding that "[t]he people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools[.]"¹²⁶

Scalia then urged the Court to abandon the purpose criterion altogether, repeating Rehnquist's criticism that *Lemon* was "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret[.]"¹²⁷ In advocating this change, Scalia stated that it is "far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward conse-

¹²¹ 482 U.S. 578 (1987).

¹²² *Id.*

¹²³ *Id.* at 580-81 (quoting LA. REV. STAT. ANN. § 17:286.1-17:286.7 (1982)).

¹²⁴ *Id.*

¹²⁵ *Id.* at 585-88, 593. The Court rejected the asserted secular purpose of protecting "academic freedom" because the Act's operation did not further that objective. *Id.* at 586-88. The majority also noted that special concerns exist in applying the *Lemon* criteria in the public school context, such as the fact that attendance is mandatory, that school children are impressionable, and that parents "condition their trust [in the public schools] on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584. Of the five justices who recognized these concerns, only Justice Stevens remains on the Court today.

¹²⁶ *Id.* at 611-12, 634 (Scalia, J., dissenting). He reached that conclusion despite his concession that "creation science coincides with the beliefs of certain religions[.]" *Id.* at 616.

¹²⁷ *Id.* at 636 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting)).

quences must be wrong."¹²⁸ Thus, Scalia aligned himself with Rehnquist's view that the Establishment Clause allows government to favor and advance religion over nonreligion.

2. Justice Kennedy

Justice Kennedy's opportunity to express his views on the neutrality principle and nonpreferentialism came in *County of Allegheny v. American Civil Liberties Union*, which involved a challenge to holiday displays including a crèche in a county courthouse and a menorah outside a government administration building.¹²⁹ The justices divided sharply, and there was no majority opinion. Applying various standards, a majority of the Court held that the display including the crèche violated the Establishment Clause but that the display including the menorah did not.¹³⁰

Justice Kennedy wrote an opinion concurring in the menorah ruling and dissenting from the crèche ruling, which Rehnquist, Scalia, and White joined.¹³¹ Kennedy proposed a new standard based on coercion and accommodation that substantially diminished the principle of neutrality. He asserted that the Court's past declarations that government must be neutral in matters of religion "must not give the impression of a formalism that does not exist."¹³² "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."¹³³ Kennedy identified two principles that limit this "latitude" to accommodate religion: (1) "government may not coerce anyone to support or participate in any religion or its exercise"; and (2) government "may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith.'"¹³⁴

In Kennedy's opinion, neither the crèche nor the menorah violated these limits.¹³⁵ Despite the two symbols' religious nature, he concluded that government had not exceeded its power to accommodate religion because it had not compelled anyone to participate in a religious activity, and it had not contributed "significant amounts of tax money to serve the cause of one religious faith."¹³⁶ For Kennedy, the displays were constitutional because there was "no realistic risk that the crèche and the menorah represent an effort to proselytize or are

¹²⁸ *Id.* at 639.

¹²⁹ 492 U.S. 573 (1989).

¹³⁰ *Id.* at 579.

¹³¹ *Id.* at 655 (Kennedy, J., concurring in judgment in part and dissenting in part).

¹³² *Id.* at 656-57.

¹³³ *Id.* at 657.

¹³⁴ *Id.* at 659 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

¹³⁵ *Id.* at 655.

¹³⁶ *Id.* at 664.

otherwise the first step down the road to an establishment of religion.”¹³⁷ Significantly, Kennedy’s coercion standard is consistent with nonpreferentialism, because it permits government actions that favor religion over nonreligion, so long as those actions stop short of establishing a state religion or coercing participation in or support for religion.

3. Justice Thomas

The Court later adopted Kennedy’s coercion standard in two cases involving prayer at public school functions: *Lee v. Weisman*¹³⁸ and *Santa Fe Independent School District v. Doe*.¹³⁹ In *Lee*, a majority led by Justice Kennedy applied the coercion standard to find unconstitutional clergy-led invocations and benedictions at graduation ceremonies.¹⁴⁰ In *Santa Fe*, a majority applied the coercion standard, among others, to hold unconstitutional a policy permitting students to vote on having student-led invocations at high school football games.¹⁴¹ Justice Thomas, Justice Scalia, and Chief Justice Rehnquist dissented in both cases.¹⁴²

Although Rehnquist and Scalia supported the coercion standard in *County of Allegheny*,¹⁴³ they abandoned it in *Lee*, and Justice Thomas joined them.¹⁴⁴ Penning the dissent, Scalia asserted that the coercion standard in *Lee* disregarded the Court’s obligation to construe the Establishment Clause “in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’”¹⁴⁵ He accused the majority of ignoring history and the “longstanding American

¹³⁷ *Allegheny*, 492 U.S. at 664.

¹³⁸ 505 U.S. 577 (1992).

¹³⁹ 530 U.S. 290 (2000).

¹⁴⁰ *Lee*, 505 U.S. at 587. The School Committee permitted school principals to invite the clergy members to deliver the prayers. Principals gave clergy members written guidelines regarding the prayers’ content. *Id.* at 581. Justice Souter joined the majority and also wrote a concurrence noting the vitality of the neutrality standard. He asserted that, by holding “state-sponsored prayers in public schools” to be unconstitutional “no matter how non-denominational the prayers may be”, the Court had reaffirmed *Everson*’s principle that government may not favor religion in general or one religion over another. *Id.* at 610-11 (Souter, J., concurring).

¹⁴¹ *Santa Fe*, 530 U.S. at 302-07. Following *Lee*, the majority held that even if attendance at games was voluntary, “the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” *Id.* at 312. The majority also analyzed the policy under the endorsement test and *Lemon* and held that it failed those tests as well. *Id.* at 307-08, 314-15.

¹⁴² *Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting); *Lee*, 505 U.S. at 631 (Scalia, White, and Thomas, JJ., and Rehnquist, C.J., dissenting).

¹⁴³ 492 U.S. 573 (1989).

¹⁴⁴ 505 U.S. 577, 631 (1992).

¹⁴⁵ *Lee*, 505 U.S. at 631 (quoting *Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

tradition of nonsectarian prayer to God at public celebrations generally.”¹⁴⁶ He declared that it was “senseless” to deprive society of public group prayer “in order to spare the nonbeliever . . . the minimal inconvenience of standing or even sitting in respectful nonparticipation[.]”¹⁴⁷ Justice Thomas joined all of these views.¹⁴⁸

II. A CURRENT SNAPSHOT OF THE DEBATE OVER ESTABLISHMENT CLAUSE STANDARDS

As the previous section demonstrates, Justice Rehnquist’s dissent in *Wallace* initiated a debate over the larger question of whether neutrality should continue to be the Court’s touchstone for interpreting the Establishment Clause. Three of the Court’s most recent cases—*Zelman v. Simmons-Harris*,¹⁴⁹ *Van Orden v. Perry*,¹⁵⁰ and *McCreary County v. American Civil Liberties Union of Kentucky*¹⁵¹—show that this debate has continued to intensify. This trio of cases provides a current snapshot of the Justices’ views on neutrality and nonpreferentialisms.

A. Formal Neutrality

In 2002, the Court returned to formal neutrality in *Zelman v. Simmons-Harris*, a case challenging Ohio’s Pilot Project Scholarship Program.¹⁵² The program provided tuition vouchers for students to use at private schools, including religious schools.¹⁵³ Students qualified for the vouchers if they attended a school district that was or had been “under federal court order requiring supervision and operational management of the district by the state superintendent.”¹⁵⁴ At the time of the case, the Cleveland public school system was the only district eligible for the program.¹⁵⁵ Of the 3700 students who enrolled in the program during the 1999 - 2000 school year, ninety-six percent used the vouchers to attend religious schools.¹⁵⁶ Because the program had resulted

¹⁴⁶ *Id.* at 631-32.

¹⁴⁷ *Id.* at 646.

¹⁴⁸ *Id.* at 644. Rehnquist, Scalia, and Thomas dissented in *Santa Fe*, but they did not criticize the coercion standard as they had in *Lee*. 530 U.S. at 318-320 (Rehnquist, C.J., dissenting). Instead, they tried to rebut the majority’s arguments regarding endorsement and the *Lemon* criteria. *Id.*

¹⁴⁹ 536 U.S. 639 (2002).

¹⁵⁰ 545 U.S. 677 (2005).

¹⁵¹ 545 U.S. 844 (2005).

¹⁵² 536 U.S. 639 (2002).

¹⁵³ *Id.* at 644-46.

¹⁵⁴ *Id.* at 644-45 (quoting OHIO REV. CODE ANN. § 3313.975(A)(West 2000)).

¹⁵⁵ *Id.* at 645. Cleveland’s schools were “among the worst-performing in the nation.” *Id.* at 644.

¹⁵⁶ *Id.* at 647. Forty-six of the fifty-six participating private schools had a religious affiliation. *Id.*

largely in financing attendance at religious schools, plaintiffs challenged it as a violation of the Establishment Clause.¹⁵⁷

A majority of the Court—including Justices Scalia, Kennedy, and Thomas—applied a formal neutrality standard to uphold the program.¹⁵⁸ Because the program had a secular purpose—“providing educational assistance to poor children in a demonstrably-failing public school system”—the only issue was whether the program had the effect of advancing religion.¹⁵⁹ The majority identified two factors that determine whether a government program advances religion: (1) whether its benefits are available “to a broad class of citizens defined without reference to religion”¹⁶⁰; and (2) whether those benefits are directed to religious institutions as a result of the recipients’ “genuine and independent private choice. . . .”¹⁶¹ If those questions can be answered in the affirmative, the program is neutral and does not impermissibly advance religion.¹⁶²

The Ohio program satisfied these criteria because it provided the vouchers to students irrespective of their religion, and the students chose to use the vouchers at religious schools.¹⁶³ More significantly, the majority held that the amount of aid that such private choices channel to religious institutions is irrelevant to the constitutional inquiry.¹⁶⁴ According to the Court, “[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”¹⁶⁵ The fact that ninety-six percent of the participating students had used the vouchers to attend religious schools therefore was of no consequence to the *Zelman* majority.¹⁶⁶

In a strong dissent, Justice Souter pointed out the ramifications of the majority’s standard. Accusing the majority of ignoring *Everson*’s neutrality principle, he explained that “it was not until today that substantiality of aid has clearly

¹⁵⁷ *Id.* at 648.

¹⁵⁸ *Zelman*, 536 U.S. at 648-52.

¹⁵⁹ *Id.* at 649.

¹⁶⁰ *Id.* at 651.

¹⁶¹ *Id.* at 652.

¹⁶² *Id.*

¹⁶³ *Id.* at 662-63.

¹⁶⁴ *Id.* at 651.

¹⁶⁵ *Id.* at 658.

¹⁶⁶ By permitting assistance to religion on a nondiscriminatory basis, this formal neutrality standard shares characteristics of nonpreferentialism. Professor Gey asserts that the nonpreferentialist interpretation is “inherent in the formal neutrality standard, since under a formal neutrality standard the government would be permitted to fund many different churches, which conforms to the gist of the nonpreferential notion that the government may establish religion in general so long as it does not favor a particular sect.” Gey, *supra* note 3, at 40-41.

been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools.”¹⁶⁷ Justice Souter urged a return to substantive neutrality: “to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction.”¹⁶⁸

B. Accommodation, Substantive Neutrality, and Nonpreferentialism

A pair of 2005 cases involving Ten Commandments displays further illustrates the Court’s ongoing debate over neutrality, accommodation, and nonpreferentialism. *Van Orden v. Perry* involved a challenge to a forty-year-old monument of the Ten Commandments on the Texas State Capitol grounds.¹⁶⁹ *McCreary County v. American Civil Liberties Union of Kentucky* involved a challenge to Ten Commandments displays recently hung on the walls of county courthouses.¹⁷⁰ Issuing its decisions on the same day, the Court upheld the Texas display and struck down the Kentucky displays. In doing so, various justices urged standards of accommodation, substantive neutrality, and nonpreferentialism.

There was no majority opinion in *Van Orden*.¹⁷¹ Chief Justice Rehnquist wrote a plurality opinion that Justices Scalia, Kennedy, and Thomas joined.¹⁷² Rehnquist disregarded *Lemon*, basing his analysis instead on “our Nation’s history” and “the nature of the monument.”¹⁷³ With respect to history, Rehnquist asserted “that there is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life.”¹⁷⁴ Invoking nonpreferentialism, he further asserted that the Court has not, and does not, “adhere to the principle that the Establishment Clause bars any and all

¹⁶⁷ *Zelman*, 536 U.S. at 688, 695 (Souter, J., dissenting). See also Salamanca, *supra* note 28, at 576 (arguing that *Zelman* Court “took a large step away from ostensible substantive neutrality and toward formal neutrality as the touchstone for non-establishment”); Ravitch, *supra* note 28, at 493 (*Zelman* shows that the Court is moving toward making formal “neutrality the centerpiece of Establishment Clause jurisprudence.”); cf. also *id.* at 532 (“[A]n argument could be made that aspects of the Rehnquist Court’s formal neutrality come closer to nonpreferentialism than it might appear at first glance.”).

¹⁶⁸ *Zelman*, 536 U.S. at 697 (Souter, J., dissenting). See Ravitch, *supra* note 28, at 504 & n.92 (calling Souter’s dissent “the most eloquent plea for substantive neutrality in recent years[.]”).

¹⁶⁹ 545 U.S. 677 (2005).

¹⁷⁰ 545 U.S. 844 (2005).

¹⁷¹ *Van Orden*, 545 U.S. at 677.

¹⁷² *Id.* at 680-81.

¹⁷³ *Id.* at 686.

¹⁷⁴ *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

governmental preference for religion over irreligion.”¹⁷⁵ With respect to the nature of the monument, Rehnquist found that the Ten Commandments had both religious and historical significance and that the monument was a “passive” use of the Ten Commandments.¹⁷⁶ Based on the Ten Commandments’ dual significance and the nation’s history of acknowledging religion, Rehnquist concluded that the monument did not violate the Establishment Clause.¹⁷⁷

Justice Scalia wrote a concurrence reiterating his call to change the Court’s doctrine. He stated that he would have preferred to uphold the monument

by adopting an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.¹⁷⁸

Thus, Scalia directly renewed the call to adopt nonpreferentialism.¹⁷⁹

While Justice Thomas joined the plurality, he also wrote a separate concurrence asserting that the text and history of the Establishment Clause “resis[t] incorporation against the States.”¹⁸⁰ Moreover, even assuming that the Establishment Clause governs the states, he took a much more narrow view of its scope. Thomas argued that the framers understood the word “establishment” to require “actual legal coercion” by force of law or threat of penalty.¹⁸¹ In the absence of such coercion, there is no establishment. Thus, Thomas concluded that the Texas display was not an establishment of religion because its presence did not coerce observers to do anything.¹⁸²

Justices Stevens and Souter dissented and wrote separate opinions calling for

¹⁷⁵ *Id.* at 684, n.3.

¹⁷⁶ *Id.* at 690-92.

¹⁷⁷ *Id.* at 691-92.

¹⁷⁸ *Id.* at 692 (Scalia, J., concurring) (citing *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 885-894 (2005) (Scalia, J., dissenting)).

¹⁷⁹ See, e.g., Esenberg, *supra* note 37, at 57 (noting that Scalia’s concurrence advocated a nonpreferentialist standard).

¹⁸⁰ *Van Orden v. Perry*, 545 U.S. 844, 693 (2005) (Thomas, J., concurring) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-46 (2004) (Thomas, J., concurring in judgment)). Thomas also took this position in *Zelman*. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring).

¹⁸¹ *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (citing *Newdow*, 542 U.S. at 52 (Thomas, J., concurring)).

¹⁸² *Id.* at 694. Justice Breyer did not join the plurality’s analysis, but he too struck a blow against the neutrality principle. In a separate concurrence, he declared that “tests designed to measure ‘neutrality’ alone are insufficient” because it “can be difficult to determine when a legal rule is ‘neutral’ and because” strict neutrality can foster hostility to religion. *Id.* at 699 (Breyer, J., concurring in judgment). Instead of neutrality, Breyer advocated the use of an amorphous “legal judgment” standard. *Id.* at 700.

the continued use of the neutrality standard. Expressly rejecting Scalia's call for nonpreferentialism, Stevens argued that the Establishment Clause demands neutrality in two respects: "government may not exercise a preference for one religious faith over another," and it may not "aid all religions as against non-believers."¹⁸³ In his opinion, the Texas display violated these precepts because it preferred religion over nonreligion and prescribed a "code of conduct from one God, namely a Judeo-Christian God," that polytheistic and nontheistic sects, such as Hinduism and Buddhism, reject.¹⁸⁴ By upholding a state display of a sacred religious text, the plurality had made "a mockery of the constitutional ideal that government must remain neutral between religion and irreligion."¹⁸⁵

In light of *Van Orden*, the Court appeared on the verge of abandoning the neutrality principle once and for all. Five justices had criticized the principle in varying degrees and rejected it in upholding the Texas display. However, on the very same day that he joined the judgment in *Van Orden* and criticized the neutrality principle, Justice Breyer, without explanation, provided the crucial fifth vote for a majority opinion in *McCreary County* that embraced substantive neutrality and struck down the Kentucky Ten Commandments displays.

In *McCreary*, the Ten Commandments were posted on the walls of courthouses in two counties.¹⁸⁶ County officials originally posted only the Commandments. After a lawsuit was filed, the display was modified twice and ultimately included nine framed documents: the King James Version of the Ten Commandments, "the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice."¹⁸⁷ The Court evaluated the constitutionality of this third display.

Justice Souter wrote for the majority, which included Justices Stevens, O'Connor, Ginsburg, and Breyer. He immediately invoked neutrality, declaring that the "[t]ouchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"¹⁸⁸ According to Souter, *Lemon*'s purpose prong is a core component of the neutrality principle, because "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is

¹⁸³ *Id.* at 709-10 (Stevens, J., dissenting) (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961)).

¹⁸⁴ *Id.* at 719.

¹⁸⁵ *Id.* at 735. Justice Souter agreed that "the Establishment Clause requires neutrality as a general rule[.]" *Id.* at 737 (Souter, J., dissenting).

¹⁸⁶ *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 850 (2005).

¹⁸⁷ *Id.* at 855-56.

¹⁸⁸ *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

to take sides.”¹⁸⁹ After this strong reaffirmation of the neutrality principle and *Lemon*, the majority held that the Kentucky displays had the unmistakable purpose of advancing religion and therefore were unconstitutional.¹⁹⁰

In dissent, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, asserted that the Court should abandon neutrality altogether.¹⁹¹ Scalia pointed to historical government acknowledgments of religion, such as prayers at sessions of Congress and the Supreme Court, paid congressional chaplains, and presidential proclamations.¹⁹² Scalia argued that these practices proved that the framers intended to include religion in public life.¹⁹³ After reciting this history, he asked,

[w]ith all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that “the First Amendment mandates governmental neutrality between . . . religion and nonreligion,” . . . and that “[m]anifesting a purpose to favor . . . adherence to religion generally,” . . . is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words.¹⁹⁴

According to Scalia, “[n]othing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-twentieth century.”¹⁹⁵

Scalia then went even further, arguing not only that government may favor religion in general, but that it also may favor monotheism over other forms of religion.¹⁹⁶ Although he conceded that government may not prefer one sect over another with respect to financial assistance or free exercise, he asserted that government is not required to be nondenominational when it comes “to public acknowledgment of the Creator.”¹⁹⁷ According to Scalia, “[w]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”¹⁹⁸ Justice Thomas joined this dissent.

¹⁸⁹ *Id.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

¹⁹⁰ *Id.* at 881.

¹⁹¹ *Id. passim* (Scalia, J., dissenting).

¹⁹² *Id.* at 886 (Scalia, J., dissenting).

¹⁹³ *Id.* at 886-87.

¹⁹⁴ *Id.* at 889 (internal citations omitted).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 893.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Justice Kennedy did not join the part of Scalia’s dissent that called for abandoning the neutrality principle. *Id.* at 885. He did join the part of the dissent that criticized the

This approach goes even further than Rehnquist's nonpreferentialist standard. While nonpreferentialism allows government to favor religion over nonreligion, it does not permit government to discriminate among different religious sects. The position that Justice Scalia espoused in *McCreary*, however, does just that.¹⁹⁹ Justice Souter pointed out the extraordinary scope of Scalia's approach:

[T]he dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other Members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, *e.g.*, *Wallace v. Jaffree*, 472 U.S., at 98-99, 105 S.Ct. 2479 (Rehnquist, J., dissenting), but at least religion has previously been treated inclusively. Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty.²⁰⁰

III. JUSTICE KENNEDY AS A POTENTIAL ROADBLOCK TO NONPREFERENTIALISM

Justice Kennedy likely will be the decisive vote in determining if the Court embraces nonpreferentialism or maintains some form of neutrality standard. In *County of Allegheny*, he expressed disagreement with the neutrality principle and sharply criticized it.²⁰¹ In addition, his coercion standard is consistent with Rehnquist's nonpreferentialist standard because it permits government to favor religion over nonreligion, so long as government stops short of establishing a state religion or coercing participation in religion.²⁰²

majority's interpretation of *Lemon* and argued that the displays were constitutional under *Lemon*. *Id.*

¹⁹⁹ See Esenberg, *supra* note 37, at 15 (calling Scalia's *McCreary County* dissent one of the clearest expressions of nonpreferentialism).

²⁰⁰ *McCreary Cty.*, 545 U.S. at 879-80. See also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. REV. 1097, 1098 (2006) (Scalia's dissent "may represent the beginnings of a revolution in Establishment Clause jurisprudence[.]"); Esenberg, *supra* note 37, at 10 (Scalia's dissent argues "that government is free to endorse . . . monotheistic religion.").

²⁰¹ *County of Allegheny*, 492 U.S. at 656-59 (Kennedy, J., concurring in judgment in part and dissenting in part).

²⁰² See, *e.g.*, Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1354 & n.142 (citing Kennedy's *County of Allegheny* opinion as consistent with Rehnquist's view of nonpreferentialism); Smith, *supra* note 20, at 268 (stating that Kennedy shares Rehnquist's nonpreferentialist view). Cf. also, *e.g.*, Esenberg, *supra* note

Despite this alignment with Rehnquist, however, Justice Kennedy's concerns about coercive pressures on students in public schools could block the Court's adoption of nonpreferentialism. In his opinion in *Lee v. Weisman*, Kennedy emphasized that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."²⁰³ Noting that "prayer exercises in public schools carry a particular risk of indirect coercion[.]" he explained that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."²⁰⁴ He also called the classroom a place where "the risk of compulsion is especially high."²⁰⁵ Two facts were critical to his conclusion that the graduation prayers in *Lee* coerced students to participate in a religious exercise: state officials directed the performance of the prayers, and students were "in a fair and real sense" obligated to attend the graduation ceremonies and participate in the prayers.²⁰⁶

It is unknown, however, whether Kennedy's concern about coercion is limited to students' compelled participation in traditional religious exercises, such as prayer, or whether it includes students' exposure to a religious theory on the origins of life, among other theories, as part of a science curriculum. Justice Kennedy has expressed his views regarding coercion and students in one other case, *Board of Education of Westside Community Schools v. Mergens*.²⁰⁷ *Mergens* involved a constitutional challenge to the federal Equal Access Act, which mandates that public secondary schools that maintain a "limited open forum" cannot deny equal access based on the nature of students' speech to students who wish to meet within the forum.²⁰⁸ The Court held that the Act prohibited a school district from denying a student religious club permission to meet on school premises and that this interpretation of the Act did not violate the Establishment Clause.²⁰⁹

37, at 56 (stating that Kennedy does not have a separationist view of the Establishment Clause).

²⁰³ *Lee v. Weisman*, 505 U.S. 577, 592 (1992); see also Gey, *supra* note 3, at 3 (noting that Kennedy "continues to be troubled by the persistence of religious coercion of students.").

²⁰⁴ *Lee*, 505 U.S. at 592.

²⁰⁵ *Id.* at 596.

²⁰⁶ *Id.* at 586. Though attendance at the ceremony was not a graduation requirement, the majority held that the state could not put objecting students to the choice of skipping their graduation, attending and protesting the prayers, or attending and participating in the prayers. *Id.* at 593.

²⁰⁷ 496 U.S. 226 (1990).

²⁰⁸ *Id.* at 233 (quoting Equal Access Act, 20 U.S.C. §§ 4071-74 (1984)).

²⁰⁹ *Id.* at 247, 253. The club's purposes were "to permit the students to read and discuss the Bible, to have fellowship, and to pray together." *Id.* at 232.

Writing separately, Justice Kennedy agreed that the Act did not violate the Establishment Clause because it did not have a coercive effect on students.²¹⁰ According to Kennedy, “[t]he inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity.”²¹¹ Kennedy found that the Act’s mandate of equal access for the religious club was not coercive because the Act did not authorize school authorities to require students to attend the club meetings, the meetings occurred outside of school hours, and the Act did not compel school employees to participate in club activities.²¹²

Justice Kennedy’s opinions in *Mergens* and *Lee* indicate that his concerns about coercion of students focus on compelled participation in formal religious exercises, such as prayer and worship. Both of those cases involved student participation in prayer. Providing instruction on intelligent design as one of several theories on the origin of life does not compel students to participate in a religious exercise, nor does it require them to affirm a particular belief. Thus, if Justice Kennedy’s concerns are limited to coerced student participation in traditional religious exercises, then he likely will not object to a nonpreferentialist standard that would permit the teaching of intelligent design as an alternative to evolution.²¹³

IV. ROBERTS’ AND ALITO’S RECORDS ON ESTABLISHMENT CLAUSE ISSUES

After *Van Orden* and *McCreary*, the neutrality principle first announced in *Everson* hangs by a thread. The divergent views expressed in the Court’s most recent cases, especially *McCreary*, demonstrate that its Establishment Clause jurisprudence is at a critical point. Four justices—Stevens, Souter, Ginsburg, and Breyer—continue to support the neutrality principle.²¹⁴ Justices Scalia, Thomas, and Kennedy, however, appear ready to jettison neutrality and adopt nonpreferentialism, at least in certain circumstances. That puts the newest members of the Court—Chief Justice Roberts and Justice Alito—in the position to cast the deciding votes. As Professor Chemerinsky has predicted, “[i]f the two new Justices—John Roberts and Samuel Alito—take the Rehnquist [nonpreferentialist] approach, there will be five votes to overrule the *Lemon* test and bring about the dramatic change long sought by Rehnquist.”²¹⁵

²¹⁰ *Id.* at 260-61 (Kennedy, J., concurring in part and concurring in the judgment).

²¹¹ *Id.* at 261.

²¹² *Id.* at 260-61.

²¹³ *But cf.*, e.g., Newman, *supra* note 3, at 50 (predicting that Kennedy would find an Establishment Clause violation if a school attempted to convey a religious doctrine in the classroom).

²¹⁴ Justice Breyer’s support is questionable, given his criticism of neutrality in *Van Orden*.

²¹⁵ Chemerinsky, *supra* note 172, at 1355.

A. Chief Justice Roberts

Chief Justice Roberts does not have an extensive written record reflecting his views on the Establishment Clause. Prior to his appointment as Chief Justice, he had served on the bench for only two years, as a member of the U.S. Court of Appeals for the D.C. Circuit. During that tenure, he did not decide any cases addressing the Establishment Clause. Nonetheless, his prior work as an Associate White House Counsel, as Principal Deputy Solicitor General at the Justice Department, and as an attorney in private practice shed light on his views.

1. The White House Memoranda

From 1982 to 1986, Roberts served as an Associate Counsel to President Reagan in the White House Counsel's Office.²¹⁶ In that capacity, he wrote several memos to White House Counsel Fred Fielding that illuminate his views on the meaning of the Establishment Clause.

One such memo is Roberts' June 4, 1985 analysis of the Supreme Court's opinion in *Wallace v. Jaffree*, which the Court had issued earlier that day. Roberts, a former Rehnquist law clerk, summarized the ruling and the positions expressed in the various opinions. He pointed out that, in dissent, Justice Rehnquist had "called for abandoning the *Lemon* test, arguing from historical analysis that the Establishment Clause prohibited only establishing a state religion or preferring one denomination or sect at the expense of others."²¹⁷

Then, tellingly, Roberts offered the following personal assessment of the decision:

For what it's worth, a reading of the opinions strongly suggests that the outcome of this case shifted in the writing. As I see it, Rehnquist was writing for the Court—he would not write 24 pages of dissent (longer even than Stevens's majority), and the structure and tone of the dissent is that of a majority opinion. He had five votes to uphold the statute, and tried to use the occasion to go after the bigger game of the *Lemon* test itself. O'Connor probably was in Rehnquist's original majority but was not convinced that the broad opinion applied to the facts, penning a dissent to the would-be majority—her 19-page concurrence is directed solely to that opinion, critiquing it step-by-step and analyzing none of the others. It is very unusual for a concurrence to take on a dissent in such a fashion, and at such length. O'Connor's dissent apparently persuaded Powell to drop by the wayside as well, with a lame concurring opinion focusing on *stare decisis*, as if to explain why he was changing a vote. *Thus, as I see it, Rehnquist took a tenuous five-person majority and tried to revolutionize*

²¹⁶ The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographies-current.pdf> (last visited Oct. 8, 2008).

²¹⁷ Memorandum from John Roberts, Jr., The White House to Fred Fielding (June 4, 1985) (on file with author).

*Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied.*²¹⁸

Of course, the “revolution” that Rehnquist attempted in *Wallace* was the adoption of nonpreferentialism as the governing standard for the Establishment Clause. As Roberts noted, Rehnquist had argued that the Establishment Clause permits government to favor religion in general, so long as it does not establish a national religion or discriminate among religious sects.²¹⁹ Roberts’ memo indicates his support for this position and the doctrinal shift that Rehnquist tried to accomplish.²²⁰

Two months later, Roberts wrote a memo to Fielding commenting on a speech to be given by then-Secretary of Education William Bennett.²²¹ In the draft of the speech that Roberts reviewed, Bennett stated that a “new aversion to religion” had arisen and that the Constitution had become, “in the hands of aggressive plaintiffs and beguiled judges, the instrument for nothing less than a kind of ghettoizing of religion.”²²² He criticized the neutrality principle, asserting that “neutrality to religion turned out to bring with it a neutrality to those values that issue from religion.”²²³ Finally, Bennett called the reasoning of recent Supreme Court decisions unsound and asserted that the Court had “launched an interpretation under which the First Amendment forbids precisely what many a man in the First Congress went to such pains to protect—namely, public support of religion, albeit on a nondiscriminatory basis.”²²⁴

²¹⁸ *Id.* at 2 (emphasis added).

²¹⁹ For Rehnquist’s argument, see *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

²²⁰ See PEOPLE FOR THE AMERICAN WAY, FINAL PRE-HEARING REPORT IN OPPOSITION TO THE CONFIRMATION OF JOHN ROBERTS TO THE UNITED STATES SUPREME COURT 82-84 (2005), <http://media.pfaw.org/stc/PH-report.pdf> (citing Roberts’ *Wallace* memorandum as evidence that he interprets Establishment Clause to allow government favoritism of religion); see also Jay A. Sekulow and Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 50 (2005-2006) (calling Roberts “a judge with a constitutional philosophy similar to that of his mentor, the late Chief Justice[.]”).

²²¹ Memorandum from John Roberts, Jr., The White House, to Fred Fielding (Aug. 6, 1985) (on file with author).

²²² William J. Bennett, U.S. Sec’y of Educ., Address to the Knights of Columbus Supreme Council Meeting 4 (Aug. 7, 1985) (on file with author).

²²³ *Id.*

²²⁴ *Id.* at 9 (quoting WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 60, Basic Books, Inc. 1976)). Walter Berns is professor emeritus at Georgetown University and a resident scholar at the American Enterprise Institute for Public Policy Research. See Walter Berns-Biography, <http://www.aei.org/scholars/scholarID/4/scholar.asp>.

Roberts summarized the speech's central point as an argument that the Supreme Court's recent Establishment Clause decisions "betray a hostility to religion not demanded by the Constitution."²²⁵ Although Roberts predicted that Bennett's remarks would "stir up the debate," he saw "no purely legal reason to object to them."²²⁶ Indeed, he stated that he had "no quarrel with Bennett on the merits."²²⁷ By agreeing with Bennett's view that the Establishment Clause permits public support of religion on a nondiscriminatory basis, Roberts again espoused his support for nonpreferentialism.

Finally, Roberts also indicated his support for favoring religion over nonreligion in a November 21, 1985 memo that he wrote regarding a Senate Joint Resolution.²²⁸ In the wake of *Wallace v. Jaffree*, the Senate passed a resolution proposing a constitutional amendment to overturn the decision and permit "individual or group silent prayer or reflection in public schools."²²⁹ In a memo regarding the resolution, Roberts wrote that he did not object to the Justice Department supporting it.²³⁰ According to Roberts, such support was appropriate because "the conclusion in *Jaffree v. Wallace* that the Constitution prohibits such a moment of silent reflection—or even silent 'prayer' seems indefensible."²³¹

2. The Solicitor General's Arguments in *Lee v. Weisman*

Roberts served as Principal Deputy Solicitor General in the Justice Department from 1989 to 1993.²³² During that time, *Lee v. Weisman* made its way to the Supreme Court.²³³ Represented by the Solicitor General, the United States submitted *amicus* briefs supporting the school defendants' petition for *certiorari* and their merits brief after the Supreme Court took the case.²³⁴ Deputy So-

²²⁵ Memorandum from John Roberts, Jr., The White House, to Fred Fielding (Aug. 6, 1985) (on file with author).

²²⁶ *Id.*

²²⁷ *Id.* See FINAL PRE-HEARING REPORT IN OPPOSITION TO THE CONFIRMATION OF JOHN ROBERTS, *supra* note 220, at 85-88 (citing Roberts' memorandum regarding the Bennett speech as proof of support for government favoritism of religion).

²²⁸ Memorandum from John Roberts, Jr., The White House, to Fred Fielding (Nov. 21, 1985) (on file with author).

²²⁹ *Id.* (quoting S.J. Res. 2 – Constitutional Amendment to Permit Silent Prayer in Schools).

²³⁰ *Id.*

²³¹ *Id.* See also FINAL PRE-HEARING REPORT IN OPPOSITION TO THE CONFIRMATION OF JOHN ROBERTS, *supra* note 220, at 85 (citing memorandum regarding Senate Resolution as proof that Roberts favors government support for religion).

²³² The Justices of the Supreme Court, *supra* note 216.

²³³ 505 U.S. 577 (1992).

²³⁴ Brief for the United States as Amicus Curiae Supporting Petitioners, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), 1991 U.S. S. Ct. Briefs Lexis 308; Brief for the United

licitor General Roberts signed on to both *amicus* briefs.²³⁵

The *amicus* brief at the *certiorari* stage urged the Supreme Court to hear the case and use it as an opportunity to "jettison the framework erected by *Lemon*'s tripartite analysis in circumstances where, as here, the practice under assault is a non-coercive, ceremonial acknowledgement of heritage of a deeply religious people."²³⁶ The Solicitor General argued that the Court should replace *Lemon* with "a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences."²³⁷

The Solicitor General expanded this argument at the merits stage, asserting that the case offered the Court

the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the Establishment Clause. That principle focuses on the overriding concern of the Religion Clauses—the assurance of religious liberty—and holds that civic acknowledgments of religion in public life do not offend the Establishment Clause, as long as they neither threaten the establishment of an official religion nor coerce participation in religious activities.²³⁸

According to the Solicitor General, the graduation prayers in *Lee* did not violate this principle because they neither established a state religion nor coerced participation in religious exercises.²³⁹ The Solicitor General dismissed concerns about the prayers' coercive effect, declaring that the "Framers' acceptance of ceremonial acknowledgments presupposed some minimal degree of individual tolerance" for public acknowledgments of religion that might offend some people.²⁴⁰

This view of the Establishment Clause is consistent with the tenets of non-preferentialism.²⁴¹ Both views assert that the Establishment Clause permits

States as Amicus Curiae, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), 1991 U.S. S. Ct. Briefs Lexis 264.

²³⁵ *Id.* at *308. *Id.* at *264.

²³⁶ Brief for the United States as Amicus Curiae, *supra* note 234, at *13.

²³⁷ *Id.* at *24.

²³⁸ Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 234, at *12.

²³⁹ *Id.* at *42.

²⁴⁰ *Id.* at *39. The Supreme Court expressly rejected the Solicitor General's argument that the voluntary nature of the graduation ceremony obviated any coercive effect, calling it "formalistic in the extreme" to claim that "a teenage student has a real choice not to attend her high school graduation." *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

²⁴¹ See, e.g., Garry, *supra* note 8, at 40 (asserting that under nonpreferentialist doctrine, "all nonpreferential accommodations, whether mandatory or voluntary, are constitutional, unless they have a coercive effect on someone else's religious exercise."); see also FINAL

government to favor religion over nonreligion, so long as it does not create a state religion. Roberts' position, however, goes further, asserting that the only other limit that the Establishment Clause places on government is to prohibit coerced participation in religious activities. Nonpreferentialism at least prohibits government from favoring one religious sect over another, which Roberts's position in *Lee* does not.²⁴²

3. Positions Advocated While in Private Practice

From 1993 to 2003, Roberts practiced law in Washington, D.C. In *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, Roberts represented a Catholic school that sought to claim a zoning exemption available only to private schools located on property held by religious organizations.²⁴³ The exemption relieved such schools from having to obtain a "special exception" before building certain structures.²⁴⁴ After the county granted Roberts' client the exemption, neighboring landowners challenged the grant as an Establishment Clause violation.²⁴⁵

In their brief to the Fourth Circuit, Roberts and co-counsel conceded that the exemption indirectly aided religious organizations, but they argued that such aid was a permissible exercise of the government's authority to accommodate religion.²⁴⁶ They added that "efforts to accommodate religion are invariably constitutional when the State simply chooses to relieve religious institutions of burdens placed on secular elements of society or society at large."²⁴⁷ Although Roberts was representing a client, it is noteworthy that he argued that government may confer a special status on religion and prefer it over nonreligion. Roberts argued the case himself and prevailed, as the court reversed the district court and upheld the exemption.²⁴⁸

PRE-HEARING REPORT IN OPPOSITION TO THE CONFIRMATION OF JOHN ROBERTS, *supra* note 189, at 89-91 (citing Roberts' arguments in *Lee* as evidence of his hostility to principle of government neutrality toward religion).

²⁴² In light of Roberts' high-level position, it is appropriate to conclude that these arguments reflect his personal views. According to Professor Susan Carle, who worked with Roberts at the Justice Department, he "held a political appointment of great power" and the briefs on which his name appeared "reflect his considered and thoughtful use of that power." Susan D. Carle, *What Roberts Argued*, *LEGAL TIMES*, Aug. 1, 2005, No. 31.

²⁴³ *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 284-85.

²⁴⁶ Brief of Appellant at 16, 28, *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (No. 99-2352), 2000 WL 33982797 at *16, *28.

²⁴⁷ *Id.* at 16. See FINAL PRE-HEARING REPORT IN OPPOSITION TO THE CONFIRMATION OF JOHN ROBERTS, *supra* note 220, at 91-93 (citing Roberts' advocacy in *Ehlers-Renzi* as evidence of his support for government favoritism of religion).

²⁴⁸ *Ehlers-Renzi*, 224 F.3d at 292. One judge dissented, stating that the zoning exemp-

B. *Justice Alito*

Unlike Chief Justice Roberts, Justice Alito's judicial record provides insight into his Establishment Clause views. Prior to his Supreme Court appointment, Justice Alito served for fifteen years on the U.S. Court of Appeals for the Third Circuit²⁴⁹ and participated in several cases involving the Religion Clauses. He also has addressed an Establishment Clause challenge since joining the Supreme Court. His record indicates that he has a narrow view of the Establishment Clause and favors government support for religion.²⁵⁰

1. Third Circuit Record on Establishment Clause Issues

While on the Third Circuit, Alito participated in three cases in which rights of religious expression were pitted against school concerns that permitting such speech would violate the Establishment Clause. Judge Alito consistently took the position that the right of religious expression is superior to Establishment Clause concerns.

In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, students challenged a policy allowing student-led prayer at their high school graduation.²⁵¹ Under the policy, the senior class was allowed to vote on whether it wanted "prayer, a moment of reflection, or nothing at all" at the ceremony.²⁵² The case arose after *Lee v. Weisman* but before *Santa Fe Independent School District v. Doe*. Following *Lee*, a majority of the Third Circuit *en banc* ruled the policy unconstitutional because the prayer had a coercive effect and state officials had a significant degree of control over the prayer.²⁵³

Judge Alito, however, joined a dissenting opinion.²⁵⁴ The dissent argued that the Establishment Clause should "serve the free exercise of religion" and "should not be read to prohibit activity which the Free Exercise Clause protects."²⁵⁵ Remarkably, the dissenting judges declared that the policy did not even implicate the Establishment Clause because "none of the decisions made by the graduating class concerning graduation prayer can be attributed to the

tion "looks very much like ordinary favoritism for religious property owners." *Id.* at 293 (Murnaghan, J., dissenting).

²⁴⁹ The Justices of the Supreme Court, *supra* note 216.

²⁵⁰ See PEOPLE FOR THE AMERICAN WAY, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO: "NO ONE TO THE RIGHT OF SAM ALITO ON THIS COURT" 119-31 (2006), <http://media.pfaw.org/stc/alito-final.pdf> (discussing Alito's judicial and pre-judicial records as evidence of his support for government favoritism of religion and his opposition to government neutrality).

²⁵¹ 84 F.3d 1471 (3d Cir. 1996).

²⁵² *Id.* at 1475.

²⁵³ *Id.* at 1478-81.

²⁵⁴ *Id.* at 1489 (Mansmann, J., dissenting).

²⁵⁵ *Id.*

state.”²⁵⁶ Most significantly, the dissent expressly endorsed one of the basic tenets of nonpreferentialism, asserting that the “First Amendment does not condemn legislation or official policy that has the effect of assisting religion generally; the First Amendment itself gives religion an exceptionally protected status.”²⁵⁷ Judge Alito joined all of these views.

Judge Alito dissented for similar reasons in *C.H. v. Oliva*.²⁵⁸ In that case, the mother of a kindergartener sued school officials after they removed a poster the student had drawn of Jesus from a display of his class’s work.²⁵⁹ The students had made the posters as part of an assignment to draw something that they were “thankful for.”²⁶⁰ A majority of the Third Circuit held that the complaint did not allege facts sufficient to prove liability under 42 U.S.C. § 1983.²⁶¹

Judge Alito dissented, arguing that the complaint was adequate.²⁶² Addressing the case’s merits, he stated that he

would hold that discriminatory treatment of the poster because of its “religious theme” would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school’s restriction on expression does not satisfy strict scrutiny.²⁶³

Alito rejected the school officials’ argument that avoiding an Establishment Clause violation was a compelling interest for removing the poster, stating that a reasonable observer would not have viewed the exhibition of the poster “as an effort by the school to endorse religion in general or Christianity in particular.”²⁶⁴

In another case involving religious speech at school, Judge Alito again held that religious expression takes precedence over Establishment Clause concerns. In *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township*

²⁵⁶ *Id.* at 1490.

²⁵⁷ *American Civil Liberties Union v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1496 (3d Cir. 1996) (Mansmann, J., dissenting). *See also*, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 122-23 (discussing Alito’s agreement with *Black Horse Pike* dissenting opinion).

²⁵⁸ 226 F.3d 198 (3d Cir. 2000), *cert. denied sub nom.*, *Hood v. Medford Twp Bd. of Educ.*, 533 U.S. 915 (2001).

²⁵⁹ *Oliva*, 226 F.3d at 201. The student’s poster was later returned to the display, but it was placed in “a less prominent location” at the end of the hall. *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 202-03.

²⁶² *Id.* at 206. (Alito, J., dissenting). Judge Alito said the majority based its decision on “a spurious procedural ground never raised by the defendants[.]” *Id.* at 203.

²⁶³ *Id.* at 210. *See also*, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 130-32 (discussing Alito’s *Oliva* dissent).

²⁶⁴ *Id.* at 213.

School Dist.,²⁶⁵ an organization with the stated purpose of “evangeliz[ing] boys and girls with the Gospel of the Lord Jesus Christ” sought permission to distribute flyers about its activities at schools and at “Back to School” nights.²⁶⁶ When the school district rejected the request, the organization sued.

Judge Alito upheld an injunction issued in favor of the religious organization.²⁶⁷ He held that the school district had committed viewpoint discrimination by denying the religious group’s request to distribute information, while permitting other groups, such as the PTA and the Girl Scouts, to engage in those activities.²⁶⁸ As he had done in *Oliva*, Judge Alito rejected the school district’s argument that its action was necessary to prevent an Establishment Clause violation.²⁶⁹ Despite the religious group’s avowed purpose of evangelizing children, Judge Alito declared that granting it equal access “would not have the principal or primary effect of advancing religion. Rather, the principal and primary effect would be to inform school families about available community activities and to foster a wide range of activities in the community.”²⁷⁰

2. Decisions Limiting Standing to Raise Establishment Clause Challenges

Justice Alito also has favored government support for religion by limiting who may sue to challenge government actions that aid religion. He wrote the majority opinion in *ACLU of New Jersey v. Township of Wall*, in which the Third Circuit held that two township residents lacked standing to challenge its exhibition of a holiday display.²⁷¹ Alito found that the residents had no standing either as municipal taxpayers or as victims of non-economic injuries.²⁷² Despite the township’s ownership of the crèche and menorah used in the display and its “support, direction, and/or approval” of the display’s exhibition, Alito held that the plaintiffs lacked taxpayer standing.²⁷³ He also held that the plaintiffs lacked standing based on non-economic injuries because their complaint referred to injuries arising from an earlier display that the township had erected, rather than a modified display used after the plaintiffs sued.²⁷⁴ Al-

²⁶⁵ 386 F.3d 514 (3d Cir. 2004).

²⁶⁶ *Id.* at 521-23.

²⁶⁷ *Id.* at 535-36.

²⁶⁸ *Id.* at 526-30.

²⁶⁹ *Id.* at 530-35. See also, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 128-29 (discussing Alito’s *Child Evangelism* opinion).

²⁷⁰ *Child Evangelism Fellowship*, 386 F. 3d at 534.

²⁷¹ *Am. Civil Liberties Union of N.J. v. Twp. Of Wall*, 246 F.3d 258, 260 (3d Cir. 2001).

²⁷² *Id.* at 262.

²⁷³ *Id.* at 263-64.

²⁷⁴ *Id.* at 264-66. The first display included “a crèche with traditional figures, a lighted evergreen tree, two decorated urns that are part of the complex, and four snowman banners attached to light posts at the complex.” *Id.* at 260. While the case was pending, the township erected a modified display that included a crèche, “a donated menorah, candy cane

though the plaintiffs alleged several specific non-economic injuries arising from their reaction to the initial display,²⁷⁵ Judge Alito stated that “[w]hile we assume that the [plaintiffs] disagreed with the [modified] display for some reason, we cannot assume that the [plaintiffs] suffered the type of injury that would confer standing.”²⁷⁶

Justice Alito has continued to take this narrow view of standing after his appointment to the Supreme Court. In *Hein v. Freedom From Religion Foundation, Inc.*,²⁷⁷ an organization and its members sued the director of the White House Office of Faith-Based and Community Initiatives, alleging that the office had violated the Establishment Clause by conducting conferences where faith-based organizations were “singled out as being particularly worthy of federal funding” and “the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services.”²⁷⁸ The plaintiffs asserted that the conferences also promoted religious groups over secular ones.²⁷⁹ They alleged standing as federal taxpayers.²⁸⁰

In a fractured decision, the Court held that the plaintiffs lacked standing.²⁸¹ Justice Alito wrote the plurality opinion, which Chief Justice Roberts and Justice Kennedy joined.²⁸² Alito rejected a broad reading of *Flast v. Cohen*, which had held that taxpayers have standing to challenge expenditures of federal funds as an Establishment Clause violation.²⁸³ Alito limited *Flast* to its specific facts, holding that the *Hein* plaintiffs lacked standing because they had challenged discretionary executive branch expenditures of general appropriations, rather than expenditures by Congress under its taxing and spending power.²⁸⁴ Alito conceded the plaintiffs’ contention that limiting *Flast* to congressional expenditures would permit an executive agency to use its discretionary funds “to build a house of worship or to hire clergy of one denomination and send them out to spread their faith.”²⁸⁵ He nonetheless dismissed concerns about such a “parade of horrors,” stating that “none of these things has happened,” and that “[i]n the unlikely event that any of these executive actions did take

banners rather than the less prominent snowman banners, a larger evergreen tree, and two signs . . .” *Id.*

²⁷⁵ *Id.* at 264-65.

²⁷⁶ *Id.* at 266. See also, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 126-27 (discussing Alito’s *Wall* opinion as evidence of his narrow view of Establishment Clause).

²⁷⁷ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

²⁷⁸ *Id.* at 2560.

²⁷⁹ *Id.* at 2561.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2558.

²⁸² *Id.* at 2258.

²⁸³ See *id.* at 2565-68; *Flast v. Cohen*, 392 U.S. 83, 106-06 (1968).

²⁸⁴ *Hein*, 127 S. Ct. at 2566-68.

²⁸⁵ *Id.* at 2571.

place, Congress could quickly step in.”²⁸⁶

3. Disagreement With Establishment Clause Precedent

Justice Alito also has expressed disagreement with the Supreme Court’s Establishment Clause precedents. In 1985, Alito applied for the position of Deputy Assistant Attorney General at the Justice Department. Applicants were asked to “provide any information that you regard as pertinent to your philosophical commitment to the policies of this administration, or would show that you are qualified to effectively fill a position involved in the development, advocacy, and vigorous implementation of those policies.”²⁸⁷ Alito’s response included the following statement: “In college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.”²⁸⁸ Notably, *Engel v. Vitale*, *School District of Abington Township v. Schempp*, and *Epperson v. Arkansas* were Warren Court decisions.²⁸⁹

Alito reiterated his disagreement with Establishment Clause precedent during the confirmation process for his Supreme Court appointment. Senator Robert Byrd reported that, during a private meeting with Alito prior to the confirmation hearings, Alito expressed his belief that the Supreme Court “had erred by going too far in prohibiting government support for religion at the risk of hampering individual expression of religion.”²⁹⁰

These prior statements and writings demonstrate that Justice Alito and Chief Justice Roberts have taken positions consistent with the tenets of nonpreferentialism. In particular, both have expressed agreement with the notion that the Establishment Clause accords religion a special status and permits government support for religion on a nondiscriminatory basis. Indeed, Roberts has expressly endorsed Rehnquist’s nonpreferentialist standard.²⁹¹ Thus, Roberts and Alito appear poised to align themselves with Justices Scalia, Thomas, and Kennedy if the Court has an opportunity to reconsider its Establishment Clause jurispru-

²⁸⁶ *Id.*

²⁸⁷ White House PPO Non-Career Appointment Form, Nov. 18, 1985 (on file with author).

²⁸⁸ *Id.* See also THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 120 (discussing statements in Alito’s job application as evidence of his opposition to neutrality principle).

²⁸⁹ *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁹⁰ David D. Kirkpatrick, *Nominee Is Said to Question Church-State Rulings*, N.Y. TIMES, Nov. 4, 2005, at A22. See also THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO, *supra* note 250, at 121 (discussing Alito’s statements to senators during confirmation process).

²⁹¹ See *supra* Section IV.A.1 and notes 217-19,

dence.²⁹² As discussed below, the debate over teaching intelligent design in public schools could provide that opportunity.

V. THE INTELLIGENT DESIGN DEBATE AS THE ROAD TO NONPREFERENTIALISM

A. *What Is Intelligent Design?*

Intelligent Design (also known as “ID”) is a theory about the origins of life that is presented as an alternative to evolution. The fundamental premise of intelligent design is

that purely natural forces cannot adequately explain the origin and development of living organisms. Intelligent design thus attributes the origin of life to the actions of an intelligent agent, positing that if evolution occurred at all, it was not by the process of natural selection, but by the work of an omniscient Creator.²⁹³

Intelligent design permits the possibility of supernatural causation, but it “does not attempt to address religious questions about the identity or metaphysical nature of the designer.”²⁹⁴

According to proponents of the theory, there are two indicators of intelligent design: specified complexity and irreducible complexity.²⁹⁵ The concept of “specified complexity,” proposed by mathematician William Dembski, holds that “systems or sequences that have the joint properties of ‘high complexity’ (or low probability) and ‘specification’ invariably result from intelligent causes, not chance or physical-chemical laws.”²⁹⁶ Dembski also claims to have created

²⁹² According to Professor Gey, the basic principle of separationism no longer [d]efines the field for most of the mainstream players in this area of constitutional law. . . . The debate today is not over how aggressively to pursue the central value represented by the separation of church and state. Rather, the debate today is over whether we should abandon the goal of separation altogether.

Gey, *supra* note 9, at 783-84.

²⁹³ Stephanie L. Shemin, *The Potential Constitutionality of Intelligent Design?*, 13 GEO. MASON L. REV. 621, 628-29 (2005). See also Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 461, 462 (2003) (intelligent design posits that “intelligent agency, as an aspect of scientific theory-making, has more explanatory power in accounting for the specified, and sometimes irreducible, complexity of some physical systems, including biological entities, and/or the existence of the universe as a whole, than the blind forces of unguided and everlasting matter.”).

²⁹⁴ David K. DeWolf, John G. West, & Casey Luskin, *Intelligent Design Will Survive Kitzmiller v. Dover*, 68 MONT. L. REV. 7, 28-29 (2007). See also Frances Beckwith, *Science and Religion Twenty Years After McLean v. Arkansas: Evolution, Public Education, and the New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL’Y 455 (2003) (explaining basic principles of intelligent design).

²⁹⁵ Beckwith, *supra* note 293, at 470-75.

²⁹⁶ David K. DeWolf, Stephen C. Meyer, & Mark Edward DeForrest, *Teaching the Ori-*

an “explanatory filter” that scientists can use to distinguish among chance, necessity, and design as explanations for events.²⁹⁷ The concept of “irreducible complexity,” which Professor Michael Behe developed, posits that there “are certain biochemical structures, that, being ‘irreducibly complex,’ could not have arisen through unguided natural processes.”²⁹⁸ Behe cites the “acid-powered rotary engines that turn the whiplike flagella of certain bacteria” as an irreducibly complex system.²⁹⁹ These structures are irreducibly complex because “[t]he absence of any one of [their parts] would result in the complete loss of motor function.”³⁰⁰

B. *The First Test of Intelligent Design: Kitzmiller v. Dover Area School District*³⁰¹

In 2004, a school district in Dover, Pennsylvania enacted a policy mandating an introduction to the theory of intelligent design in high school biology classes. The local school board first passed the following resolution: “Students will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.”³⁰² The school board later announced that, beginning in January 2005, teachers would be required to read the following statement to students in the ninth grade biology class at Dover High School:

The Pennsylvania Academic Standards require students to learn about Darwin’s Theory of Evolution and eventually to take a standardized test of which evolution is a part.

Because Darwin’s Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin’s view. The reference book, *Of Pandas and People*, is available

gins Controversy: Science, or Religion, or Speech?, 2000 UTAH L. REV. 39, 60 (2000) (footnote omitted). See also Beckwith, *supra* note 251, at 470-74 (explaining concept of specified complexity).

²⁹⁷ DeWolf, *supra* note 296, at 61.

²⁹⁸ Shemin, *supra* note 293, at 630-31. Numerous scientists assert that intelligent design is not a valid scientific theory because it is not testable by recognized scientific methods. For a comprehensive critique of the scientific deficiencies of intelligent design, see Matthew J. Brauer, Barbara Forrest, and Stephen G. Gey, *Is It Science Yet?: Intelligent Design, Creationism, and the Constitution*, 83 WASH. U. L.Q. 1 (2005).

²⁹⁹ DeWolf, *supra* note 296, at 62.

³⁰⁰ *Id.*

³⁰¹ 400 F.Supp.2d 707 (M.D. Pa. 2005).

³⁰² *Id.* at 708.

for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.³⁰³

Several students and parents filed a lawsuit challenging this policy as a violation of the Establishment Clause. Thus, a federal court in the Middle District of Pennsylvania became the first in the nation to decide whether it is constitutional to teach the theory of intelligent design in public school science classes.³⁰⁴

In a comprehensive opinion, Judge John E. Jones III ruled that the policy violated the Establishment Clause for several reasons. Applying the endorsement test, he found that an objective observer, whether adult or child, would easily recognize the religious nature of intelligent design.³⁰⁵ He based that conclusion on several factors, including evidence that the argument for intelligent design can be traced directly to arguments for the existence of God made by Thomas Aquinas in the 13th century.³⁰⁶ Indeed, experts who testified for the school district admitted that “their personal view is that the designer is God” and that many leading advocates of ID “believe the designer to be God.”³⁰⁷ Based on evidence such as this, and other voluminous evidence of the history and development of ID, Judge Jones concluded that ID is not a scientific theory and is “nothing less than the progeny of creationism.”³⁰⁸ Accordingly, he ruled that an objective student would view the ID policy as a strong endorsement of religion.³⁰⁹

Judge Jones then analyzed the policy under *Lemon*. Citing *McCreary County*, he stated that “the central inquiry is whether the District has shown favoritism toward religion generally or any set of religious beliefs in particular.”³¹⁰ Applying this standard, which relies on the neutrality principle, he found that the “disclaimer’s plain language, the legislative history, and the historical context in which the ID Policy arose, all inevitably lead to the conclusion that the Defendants consciously chose to change Dover’s biology curriculum to advance religion.”³¹¹ Based on these findings, Judge Jones held that there was a

³⁰³ *Id.* at 708-09.

³⁰⁴ *Id.* at 708.

³⁰⁵ *Id.* at 718.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 720-21.

³⁰⁹ *Id.* at 724.

³¹⁰ *Id.* at 746. This question would not be the central inquiry under a nonpreferentialist standard. See Section V.C, *infra*.

³¹¹ *Kitzmiller*. 400 F.Supp.2d at 747.

"blatantly religious purpose behind the ID Policy."³¹² He rejected the school district's asserted secular purpose—improving science education and encouraging students to exercise critical thinking skills—as a sham, calling it "ludicrous" to assert the existence of a secular purpose in light of the evidence showing the origin and development of the ID Policy.³¹³ With respect to the effects of the ID policy, he concluded that since ID is not science, "the conclusion is inescapable that the only real effect of the ID policy is the advancement of religion."³¹⁴

C. *The Use of An Intelligent Design Case To Adopt Nonpreferentialism*

Despite *Kitzmiller*, the debate over teaching intelligent design is far from over. Richard Thompson of the Thomas More Law Center, which represented the Dover school board, stated that "[r]egardless of the opinion, the issue of intelligent design will go forward."³¹⁵ Several scholars agree. Shortly after *Kitzmiller*, Professor David DeWolf, a leading ID proponent, criticized the decision and declared that "announcements of the demise of ID were greatly exaggerated."³¹⁶ Professor Jay Wexler disagrees with DeWolf on the legality of teaching ID, but he agrees that the issue is far from resolved, stating that *Kitzmiller* "is not likely to be the last word on the constitutionality of ID."³¹⁷

Kitzmiller will not be the last word because the controversy over intelligent design extends far beyond Dover, Pennsylvania. According to the National Center for Science Education, there has been "political activity at the school district or state level pertaining to teaching evolution in 40 states since 2001."³¹⁸ For example, after eliminating and then reinstating standards requiring schools to teach evolution, the Kansas State Board of Education "approved changes that allow criticism of evolution but do not promote or prohibit teach-

³¹² *Id.* at 756.

³¹³ *Id.* at 762-63.

³¹⁴ *Id.* at 764.

³¹⁵ Martha Raffaele, *Dover Community Split By 'Intelligent Design' Debate, Court's Decision*, CENTRE DAILY TIMES, Dec. 27, 2005, at B1. Richard Thompson is the President and Chief Counsel of the Thomas More Law Center, which describes itself as "a not-for-profit public interest law firm dedicated to the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life." See Thomas More Law Center, About Us, <http://www.thomasmore.org/qry/page.taf?id=23> (last visited Sept. 29 2008). Its purpose "is to be the sword and shield for people of faith, providing legal representation without charge to defend and protect Christians and their religious beliefs in the public square." *Id.*

³¹⁶ DeWolf, *supra* note 295, at 8.

³¹⁷ Jay D. Wexler, *Intelligent Design and the First Amendment: A Response*, 84 WASH. U. L. REV. 63, 63 (2006).

³¹⁸ McCarthy, *supra* note 17, at 458, citing, the National Center for Science Education, News Archive, Sept. 25, 2005, <http://www.ncseweb.org/pressroom.asp?branch=statement>.

ing ID.”³¹⁹ Ohio has adopted “model lesson plans for science education” that emphasize the purported “controversy” surrounding evolution.³²⁰ In 2005, “50 local school boards and 14 state legislatures considered proposals to require or specifically permit public high school science teachers to engage in a critical teaching of evolution or an affirmative teaching of intelligent design.”³²¹ Even former President George W. Bush entered the fray. During an August 2005 interview, he stated that public schools should teach both evolution and intelligent design “so people can understand what the debate is about.”³²²

Other factors also support the conclusion that the battle over intelligent design continues and will produce more legal challenges. According to one scholar,

the politics surrounding anti-evolution efforts have never been more favorable for a renewed legal assault on the teaching of evolution in the nation’s schools. The roughly twenty year cycle of Supreme Court evolution cases, the probable dilution by the Roberts Court of the Establishment Clause as a restraining force on government, the strength of the religious right in the American political arena, and the addition of two very conservative justices to the Court, each suggest that we may see a potent new challenge to the teaching of this topic reaching the High Court in the near future.³²³

³¹⁹ *Id.* at 461, *citing*, the National Center for Science Education, News Archive, Sept.25, 2005, <http://www.ncseweb.org/pressroom.asp?branch=statement>; *Id.* at 459.

³²⁰ *Id.* at 461. While the lesson plans do not mandate instruction on intelligent design, they rely heavily on a book written by a leading ID proponent. *Id.* Other states have mandated the use of disclaimers in conjunction with instruction on evolution. *See Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1324 (11th Cir. 2006) (challenging a policy requiring science textbooks to include sticker stating that evolution “is a theory, not a fact,” and that material on evolution “should be approached with an open mind, studied carefully, and critically considered”); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999) (ruling unconstitutional policy requiring teachers to read disclaimer stating that evolution was presented “to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept”), *cert. denied*, 530 U.S. 1251 (2000).

³²¹ Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J. L. & EDUC. 301, 316 (2007); *see also id.* at 316 & n. 67 (“evolution advocates perceive the intelligent design battles to be far from over”).

³²² Elisabeth Bumiller, *Bush Remarks Roil Debate Over Teaching of Evolution*, N.Y. TIMES, Aug. 3, 2005, at A14; *see also* Peter Baker and Peter Slevin, *Bush Remarks on “Intelligent Design” Theory Set Off Debate*, WASH. POST, Aug. 3, 2005, at A01.

³²³ Newman, *supra* note 3, at 2; *see also* Julie F. Mead, Preston C. Green, & Joseph O. Oluwole, *Re-Examining the Constitutionality of Prayer In School In Light of the Resignation of Justice O’Connor*, 36 J.L. & EDUC. 381, 398-400 (2007) (predicting that Roberts Court will have chance to rule on constitutionality of curricular choices about religion, including intelligent design).

Accepting a case involving issues like those in *Kitzmiller* will present a clear opportunity for the Supreme Court to reconsider its Establishment Clause doctrine. A case raising an Establishment Clause challenge to a public school's inclusion of intelligent design in its science curriculum will require the Court to choose an interpretative standard to follow. Under the Court's current standards, "[t]he question for ID, as it is for prayer, should be whether a policy introducing ID into the classroom constitutes an endorsement of religion."³²⁴ However, if a majority of the Court chooses nonpreferentialism as the governing standard, that question is irrelevant. The only questions relevant in a nonpreferentialist analysis are whether the challenged measure establishes a national religion or discriminates among religious sects. Thus, the purpose underlying a school board's decision to teach intelligent design would not matter. This difference is significant because in *Epperson* and *Edwards*—the Court's only prior decisions addressing public school instruction on the origins of life—the Court struck down anti-evolution measures for lack of a secular purpose.

Teaching intelligent design in public school science courses as an alternative to evolution would not violate the Establishment Clause under Rehnquist's nonpreferentialist standard. It would not constitute the establishment of a national religion as Rehnquist used that phrase.³²⁵ By establishing a national religion, Rehnquist meant "the designation of any church as a 'national' one," not government actions that endorse religion in general.³²⁶ Indeed, Rehnquist's standard expressly permits government to favor religion over nonreligion.³²⁷ Thus, even if intelligent design has religious origins or is based on creationism, teaching the theory in public schools will not constitute an establishment under the nonpreferentialist doctrine because it does not amount to the designation of a national church.

A school district's decision to include intelligent design in its science curriculum also would be permissible under a nonpreferentialist standard because it would not discriminate among religious sects. Several scholars have debated whether intelligent design is a legitimate scientific theory or is a religious theory.³²⁸ Indeed, this question was the central focus of the district court's inquiry

³²⁴ Jay D. Wexler, *Kitzmiller and the "Is It Science?" Question*, 5 FIRST AMEND. L. REV. 90, 99 (2006).

³²⁵ *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

³²⁶ *Id.* . Rehnquist also noted that Justice Story, a recognized constitutional scholar, had asserted that the First Amendment was designed "to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." *Id.* at 104-05.

³²⁷ *Id.* at 106; see also Section I.C.5, *supra*.

³²⁸ For articles asserting that intelligent design is a religious theory and not a scientific theory see e.g., Brauer, *et al.*, *supra* note 298; Anne Marie Lofaso, *Does Changing the Definition of Science Solve the Establishment Clause Problem for Teaching Intelligent Design in the Public Schools? Doing an End-Run Around the Constitution*, 4 PIERCE L. REV.

in *Kitzmiller*. However, even assuming that intelligent design is a religious theory, it does not prefer one religion over another. ID does not embrace the tenets of any particular religious denomination; it merely posits that the universe and its life forms are the work of an intelligent designer, which could be a supernatural creator.³²⁹ The concept of a creator is a central tenet of many religions and is recognized as one of the defining characteristics of a religious belief.³³⁰ Most of the great world religions provide a “metanarrative,” which is “a grand cosmic and/or historical story accepted by the majority of a society as expressing its beliefs about origin, destiny, and identity.”³³¹ Thus, intelligent design does not discriminate among religions; rather, it favors them all by advancing the shared concept of a creator.³³²

In assessing how an intelligent design case might alter the Supreme Court’s Establishment Clause jurisprudence, it is noteworthy that Justices Scalia and Thomas recently expressed eagerness for the Court to hear a case involving instruction on alternative theories to evolution. In 2000, they dissented from the Court’s denial of *certiorari* in *Tangipahoa Parish Board of Education v. Freiler*.³³³ The issue presented was whether a school district violated the Establishment Clause by requiring teachers to read the following disclaimer to students before beginning a unit of study on evolution:

It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to

219 (2006); Colin McRoberts and Timothy Sandefur, *Piercing the Veil of Intelligent Design: Why Courts Should Beware Creationism’s Secular Disguise*, 15 KAN. J.L. & PUB. POL’Y 15 (2005); Theresa Wilson, *Evolution, Creation, and Naturally Selecting Intelligent Design Out of the Public Schools*, 34 U. TOL. L. REV. 203 (2003). For articles asserting that intelligent design is a legitimate scientific theory see e.g., Beckwith, *supra* note 293; Johnny Rex Buckles, *The Constitutionality of the Monkey Wrench: Exploring the Case for Intelligent Design*, 59 OKLA. L. REV. 527 (2006); DeWolf, *et al.*, *supra* note 295; DeWolf, *et al.*, *supra* note 296.

³²⁹ Wexler, *supra* note 15, at 442; Beckwith, *supra* note 293, at 488-89.

³³⁰ E.g., *Edwards*, 482 U.S. at 591-92 (calling concept “that a supernatural creator was responsible for the creation of humankind” a “religious belief”); *Kitzmiller*, 400 F. Supp.2d at 720-21 (same). See also Wexler, *supra* note 317, at 66 (concept that “world was designed by an intelligent creator” is “inherently religious”).

³³¹ JOHN L. ESPOSITO ET AL., *WORLD RELIGIONS TODAY* 521, 532 (2d ed. 2006); see also *WORLD RELIGIONS FROM ANCIENT HISTORY TO THE PRESENT* 33 (Geoffrey Parrinder ed., 1971) (noting the recurrence across cultures of a concept of deity “as a creative and recreative power operating in the food quest, sex, fertility, birth, death and the sequence of the seasons.”).

³³² Even if it is asserted that intelligent design’s premise of a single designer favors monotheism, Justice Scalia takes the position that the Establishment Clause permits government to favor monotheism and publicly acknowledge the concept of a single Creator. *McCreary Cty.*, 545 U.S. at 893-94 (Scalia, J., dissenting).

³³³ 530 U.S. 1251(2000) (cert. denied).

inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.³³⁴

Justice Scalia, joined by Justice Thomas, said he would hear the case "if only to take the opportunity to inter the *Lemon* test once [and] for all."³³⁵ Even if *Lemon* was the proper test, he argued that the Fifth Circuit had misapplied it because, "[f]ar from advancing religion, the 'principal or primary effect' of the disclaimer at issue here is merely to advance freedom of thought."³³⁶ Scalia criticized the Court's inaction: "We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration."³³⁷ Thus, Scalia and Thomas demonstrated their desire for the Court to decide a case involving alternative theories to evolution and their desire to use such a case to adopt a new Establishment Clause standard.

In light of expressions such as these, an intelligent design case could easily be the means by which a majority of the Court could adopt the nonpreferentialist doctrine. Justices Scalia and Thomas have espoused support for Rehnquist's nonpreferentialist standard as well as a broader standard that permits government to favor monotheistic religions over polytheism and atheism.³³⁸ Chief Justice Roberts has expressly endorsed the Rehnquist nonpreferentialist standard,³³⁹ and Justice Kennedy too has expressed views consistent with that standard.³⁴⁰ Likewise, Justice Alito has taken the position that government may favor and support religion in general.³⁴¹ Applying a "narrowest grounds"³⁴²

³³⁴ *Id.* at 2707. The Fifth Circuit had ruled the disclaimer unconstitutional under *Lemon*, holding that its primary effect was "to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." 185 F.3d 337, 346 (5th Cir. 1999).

³³⁵ *Freiler*, 120 S. Ct. at 2708.

³³⁶ *Id.*

³³⁷ *Id.* at 2709. This position is consistent with Justice Scalia's views in his *Edwards* dissent. *See also Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

³³⁸ *E.g., McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 886-93 (2005) (Scalia and Thomas, JJ., dissenting).

³³⁹ *See supra* pp. 28-33.

³⁴⁰ *See supra* pp. 26-28.

³⁴¹ *See supra* pp. 33-37.

³⁴² *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that when the Court's decision is fragmented and a majority does not agree on a single rationale for the result, "the holding of the Court may be viewed as that position taken by those Members

analysis to the positions of these five justices, the view that they all share is Rehnquist's notion that the Establishment Clause permits government to favor religion over nonreligion. Thus, they are likely to adopt a form of nonpreferentialism that, at a minimum, includes that premise.

VI. ADOPTING NONPREFERENTIALISM WOULD HAVE CONSEQUENCES BEYOND INTELLIGENT DESIGN

"The consequences of a constitutional regime governed by the nonpreferentialist interpretation of the Establishment Clause would be extensive. The name of the theory itself indicates that the Establishment Clause would no longer serve as a bar to the incorporation into law of the majority's religious views."³⁴³ Without the Establishment Clause acting as a check, religious activities and practices that the Court previously has prohibited in the public schools could become permissible under a nonpreferentialist standard. The role of religion and religious practices in the public schools could become more prevalent. This increased presence can be seen by applying a nonpreferentialist analysis to four religious practices that the Supreme Court previously has held unconstitutional in public schools: teacher and student-led prayer, release-time for religious instruction, displays of the Ten Commandments, and Bible readings.

A. *Prayer in Public Schools*

Under a nonpreferentialist standard, public schools could institute non-denominational teacher and student-led prayer. The Court ruled unconstitutional the teacher-led prayer in *Engel v. Vitale* because it was plainly a religious exercise, and government had no business "compos[ing] official prayers for any group of the American people to recite as part of a religious program carried on by the government."³⁴⁴ The Court struck down the prayers in *Lee* and *Santa Fe* because they coerced students to participate in religious exercises.³⁴⁵

Under a nonpreferentialist standard, however, the underlying purpose and coercive effect of student and teacher-led prayer do not matter. While prayer undoubtedly is a religious exercise, the practice of reciting a prayer does not by itself amount to the designation of a national church. Prayer typically is but one aspect of a religion, and it is a practice common to many religions.³⁴⁶

who concurred in the judgments on the narrowest grounds"), *quoting* *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

³⁴³ Gey, *supra* note 9, at 755; see also *Werhan*, *supra* note 8, at 607 (stating that government-sponsored religious activity in public schools is tantamount to majoritarianism).

³⁴⁴ *Engel*, 370 U.S. at 425.

³⁴⁵ See *supra* notes 118-19.

³⁴⁶ See Parrinder, *supra* note 331, at 19 (stating that prayer is "[t]he simplest form of worship" and "can be a personal wish or invocation," offered "without ritual or priestly intermediary," or a "formal and communal rite led by priests or laymen"); see also *ATLAS OF THE WORLD'S RELIGIONS* 40 (Ninian Smart & Frederick W. Denny eds., 2d ed. 2007) (stat-

Moreover, a nondenominational prayer does not prefer one religious sect over another. Thus, nondenominational prayers like those challenged in *Engel*, *Lee*, and *Santa Fe* could withstand scrutiny under a nonpreferentialist standard.³⁴⁷ Indeed, Justice O'Connor predicted this result in her *Wallace* concurrence, when she stated that Rehnquist's nonpreferentialist approach "would permit vocal group prayer in public schools."³⁴⁸

B. *Release-Time for Religious Instruction*

Release-time for religious instruction is another area in which a nonpreferentialist standard could increase the role of religion in public schools. In *McCollum*, the Court struck down a program through which students were released during school hours to attend classes in religious instruction that were taught on public school campuses.³⁴⁹ Teachers employed by private religious groups led the classes, and classes were taught "in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi[.]"³⁵⁰ The Court held that the program violated the Establishment Clause because it was "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."³⁵¹

Such a program could survive scrutiny under a nonpreferentialist standard. By offering classes in several faiths, such as Judaism, Catholicism, Islam, Hinduism, Buddhism, and Protestant faiths, a *McCollum*-type program would not prefer one religion over another but favor all religions generally. Indeed, the lawyers defending the program in *McCollum* argued that it was constitutional because the Establishment Clause permits "impartial governmental assistance of all religions."³⁵² A *McCollum*-type program also would not constitute the designation of a national church. While such a program offers instruction in religious doctrines, it does not establish an official church sponsored by the government. Thus, a release-time program could be designed that would pass constitutional muster under a nonpreferentialist interpretation of the Establishment Clause.

ing that in Judaism, Christianity, and Islam, "it came to be believed that God spoke to humans and listened to prayers in a particular language").

³⁴⁷ See Gey, *supra* note 9, at 755 ("Under a nonpreferentialist regime, a simple nod toward ecumenism would be sufficient to satisfy the Establishment Clause, even if the implementation of the government program would favor (at least in the broad outlines) the majority's form of religious exercise.").

³⁴⁸ *Wallace*, 472 U.S. at 79 (O'Connor, J., concurring). See also Gey, *supra* note 9, at 755 ("Adopting the nonpreferentialist approach to the Establishment Clause would entail overruling all of the Court's school prayer decisions, as well as the other decisions in which the Court prohibited the government from symbolically or verbally endorsing religion.").

³⁴⁹ See *supra* at p. 8.

³⁵⁰ *McCollum v. Bd. of Educ.*, 333 U.S. 203, 208-09 (1948).

³⁵¹ *Id.* at 210.

³⁵² *Id.* at 211.

C. Bible Reading and Displaying the Ten Commandments

Reading the Bible and displaying the Ten Commandments in public schools presents closer questions under a nonpreferentialist standard. In *Schempp*, the Court struck down the practice of requiring students to recite verses from the Bible because the purpose was to aid religion.³⁵³ Similarly, in *Stone v. Graham* the Court held unconstitutional a Kentucky statute requiring a copy of the Ten Commandments to be posted on the wall of every public classroom in the State.³⁵⁴ The Court held that the statute violated the Establishment Clause because it had no secular purpose.³⁵⁵

Under the first element of the nonpreferentialist standard, however, the lack of a secular purpose is irrelevant to whether a school-sponsored religious practice violates the Establishment Clause.³⁵⁶ Displaying the Ten Commandments and reading from the Bible do not amount to the designation of a national church. Thus, these practices would satisfy the first element of nonpreferentialism.

Whether these practices could satisfy the second element of nonpreferentialism is questionable. While the Court acknowledged in *Stone* that the Ten Commandments “are undeniably a sacred text in the Jewish and Christian faiths,”³⁵⁷ they are not common to all faiths. Neither is the Bible. Thus, a strong argument can be made that displaying the Ten Commandments in public schools or having students read from the Bible would prefer one religious denomination over another.³⁵⁸ It appears that these practices would pass muster under a nonpreferentialist standard only if the Court were to adopt the broad form of the doctrine advocated by Justice Scalia, which would allow government to prefer Christian monotheism over other non-Christian faiths.³⁵⁹

VII. CONCLUSION

In *Everson v. Board of Education*, the Supreme Court established a neutrality principle as the touchstone for interpreting the Establishment Clause.³⁶⁰ The

³⁵³ See *supra* at pp. 8-9.

³⁵⁴ 449 U.S. 39 (1980) (*per curiam*).

³⁵⁵ *Id.* at 40-41.

³⁵⁶ See *supra* Section I.C.5.

³⁵⁷ *Stone*, 449 U.S. at 40-41.

³⁵⁸ See ATLAS OF THE WORLD'S RELIGIONS 241, 247 (Ninian Smart & Frederick W. Deny eds., 2d ed. 2007) (defining the Bible as “[t]he sacred book of Christians” and the Ten Commandments as a “set of religious and moral imperatives” listed in the Bible’s Book of Exodus); THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 293-96 (Paul Fargis ed. dir., 3d ed 1998) (describing the holy books of religions other than Christianity, such as the Koran (Islam), the Veda (Hinduism), and the Tao-te-ching (Taoism), and characterizing the Ten Commandments as “the foundation of both Jewish and Christian morality”).

³⁵⁹ See *supra* Section II.B (discussing Scalia’s dissent in *McCreary County*).

³⁶⁰ See *supra* at p. 2.

Court set forth the proposition that government may neither favor religion over nonreligion, nor favor one religion over another. After *Everson*, a debate ensued among the Justices over the type of neutrality standard they should apply, such as formal neutrality, substantive neutrality, or a standard accommodating historical acknowledgments of religion. Despite these differences, a majority of the Court accepted the premise that a neutrality requirement is inherent in the strictures of the Establishment Clause.

That no longer appears to be the case, however. In recent years, the debate has expanded beyond the proper neutrality standard to the more fundamental question of whether the Establishment Clause even requires neutrality. In varying degrees, Justices Scalia, Thomas, and Kennedy each have indicated that they do not believe that neutrality is required in all circumstances. Though Chief Justice Roberts and Justice Alito have not yet addressed this question on the Supreme Court, their past writings and opinions indicate that they share this view. At various times, these five Justices have expressed agreement with the basic premise of nonpreferentialism, espoused by former Chief Justice Rehnquist, that the Establishment Clause permits government to favor religion over nonreligion. These Justices appear poised to implement this doctrine if a case allowing reconsideration of the Court's Establishment Clause doctrine arises, such as a case involving teaching intelligent design in public schools.

The adoption of nonpreferentialism would effect sweeping and dramatic changes in the Court's Establishment Clause jurisprudence. It would reverse sixty years of Establishment Clause precedent and permit the government to endorse and promote religion over nonreligion. It would greatly increase the role of religion in public schools. It would finally demolish *Everson*'s wall of separation once and for all.

Supporters of nonpreferentialism base their arguments on history, arguing that this doctrine is the Establishment Clause interpretation that the Framers intended. Regardless of the historical accuracy of their view, they overlook, or perhaps even consciously disregard, the insidious side effect of nonpreferentialism—the divisiveness that it engenders. As Professor Laycock has explained,

[n]o aid is nonpreferential. Differences among Baptists, Quakers, Congregationalists, and Anglicans made nonpreferential aid unworkable in the eighteenth century. The vastly greater religious differences today make it vastly more unworkable.

For the issues that are most controversial, nonpreferential aid is plainly impossible. No prayer is neutral among all faiths, even if one makes the mistake of excluding atheists and agnostics from consideration. . . . Government-sponsored religious symbols or ceremonies, whether in schools, legislatures, courthouses, or parks, are inherently preferential. They nearly always support Christianity, and when implemented by their most ardent supporters, they support a particular strain of evangelical Christiani-

ty.³⁶¹

In a country already polarized religiously and politically, the adoption of an Establishment Clause standard that will generate even more divisiveness seems at best imprudent and at worst reckless. Nonetheless, a majority of the Supreme Court appears prepared to turn in that direction.

³⁶¹ Laycock, *supra* note 110, at 920. Similarly, Professor Gey points out that [t]here is no such thing as a generic God whose preeminence all believers and nonbelievers accept. Once members of the political majority are allowed to introduce some version of God into government and some version of God's commandments into law, it will become impossible to limit those sacred decrees and divine endorsements to benevolent and universally acceptable truisms.

Gey, *supra* note 9, at 797. See also Colby, *supra* note 200, at 1134 (because religious diversity is greater today than in the eighteenth century, "governmental acknowledgment or endorsement of religion is no longer possible without alienating and dismissing the views of millions of Americans").