COLORADO CHRISTIAN UNIVERSITY V. WEAVER: IMPLICATIONS FOR THE ESTABLISHMENT CLAUSE FOLLOWING THE DEATH OF THE "PERVASIVELY SECTARIAN" DOCTRINE

INTRODUCTION

The Tenth Circuit's recent decision in *Colorado Christian University v. Weaver*[1] reflects the chaotic state of Establishment Clause jurisprudence. This chaos stems from the very nature of religion, as well as the inherent tension between the Establishment Clause and the Free Exercise Clause. The Supreme Court's proliferation of competing, contrasting, and confusing opinions fails to provide legislatures and lower courts with meaningful guidelines when considering government action that penetrates the religious sphere. The Constitution demands more than a "when we see establishment we'll know it" mentality; it demands a consistent, logical interpretation. While the disjointed collection of Supreme Court opinions ostensibly reflects an ineffective bench, the true culprit of confusion lies in the language of the Religion Clauses. With such an immovable obstacle recognized, the American people need to rectify the situation and clarify the principles through ratification of a Constitutional Amendment.

Weaver displays the problem of attempting to legislate publicly funded scholarships in the midst of contradictory case law. Many of Colorado's publicly funded scholarships share two eligibility requirements: (1) A student must attend an institution of higher education, and (2) the institution must not be "pervasively sectarian" as a matter of state law.[2] When Colorado enacted the "pervasively sectarian" doctrine in 1977, it attempted "to make funds available as broadly as was thought permissible under the Supreme Court's then-existing Establishment Clause doctrine."[3] Ironically, because of the Supreme Court's subsequent banishment of the "pervasively sectarian" doctrine, the only way to fulfill the original goal of Colorado's scholarship legislation was to find it unconstitutional.

Part I of this Comment discusses the inherent tension between the Religion Clauses, and summarizes the competing approaches employed to analyze Establishment Clause cases. Part II reviews the Court's at-

1. 534 F.3d 1245 (10th Cir. 2008).

2. *Id.* at 1250-51. The scholarships include: Colorado Leveraging Education Assistant Partnership Program; Supplemental Leveraging Education Assistant Partnership Program; Colorado Student Grants; Colorado Work Study; and College Opportunity Fund. These scholarships are administered by the Colorado Commission on Higher Education. *Id.* at 1250.

3. *Id.* at 1251.

tempt at creating an enduring standard in *Lemon v. Kurtzman*,[4] as well as how the "pervasively sectarian" doctrine fits into the *Lemon* Test. Part III documents the beginnings of change in Establishment Clause interpretation as displayed by *Zobrest v. Catalina Foothills School District*[5] and *Agostini v. Felton*.[6] Part IV reviews the landmark decision of *Mitchell v. Helms*,[7] where the Court explicitly "buried" the "pervasively sectarian" doctrine. Part V analyzes the Tenth Circuit's treatment of the Establishment Clause after *Mitchell*, which exemplifies the pervasively sectarian debacle. Part VI concludes that the chaotic state of Establishment Clause jurisprudence reflects the insuperable conflict inherent in the language of the Religion Clauses and calls for a constitutional amendment to define the boundary of government interaction with religion.

I. THE INHERENT TENSION IN THE RELIGION CLAUSES

A. An Amendment Divided Cannot Stand

The Religion Clauses, encompassing the Establishment Clause and the Free Exercise Clause, state: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."[8] While the Establishment Clause and the Free Exercise Clause share in the protection of religious freedom, the language employed to create that protection often places them in tension.[9] For example, a prison broadcast of religious programming on inmates' televisions may be viewed as the government establishing religion, while failure to provide such programming may be viewed as denying inmates the right to exercise their religion freely.[10] Chief Justice Burger described the language of the Religion clauses as "at best opaque,"[11] and candidly acknowledged that the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."[12]

4. 403 U.S. 602 (1971).
5. 509 U.S. 1 (1993).
6. 521 U.S. 203 (1997).
7. 530 U.S. 793 (2000).
8. U.S. CONST. amend. I.
9. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1182-83 (3d ed. 2006) ("Government actions to facilitate free exercise might be challenged as impermissible establishments, and government efforts to refrain from establishing religion might be objected to as denying the free exercise of religion."). Chief Justice Burger echoed this sentiment when he noted that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668-69 (1970).
10. *See* CHEMERINSKY, *supra* note 9, at 1183 (using a military chaplain example to describe the inherent struggle between the two clauses).
11. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
12. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

While the constitutional language and the exact boundaries of government action may be unclear, there are two general guidelines that the Supreme Court has been consistent in upholding. First, early in American jurisprudence, the Court rejected the argument that every form of public financial aid to religious institutions violates the Religion Clauses.[13] The Supreme Court has stood by this notion that "[i]nteraction between church and state is inevitable, and [the Court has] always tolerated some level of involvement between the two."[14] Second, the Court has also made clear that the Establishment Clause "means at least this: Neither a state nor the Federal Government can set up a church."[15] These two guidelines place a large fence around the Establishment Clause. On one end, the Government is forbidden from creating a state church, and on the other end, the Government must provide general welfare (police, fire, sanitation) to religious institutions. While this fence provides some guidance, there is still too much room for interpretation, and the Court has struggled with drawing a hard line.

B. Lost in Interpretation

The Supreme Court's inability to "establish a clear or practical constitutional standard"[16] results in uncertainty for lower courts.[17] While the Justices appear to agree on the general concept of "separation of church and state," the variety of approaches employed to define the proper degree of separation represent the underlying discord.[18] In fact, Establishment Clause jurisprudence appears so convoluted that scholars and commentators disagree as to the correct number of approaches.[19] According to the most liberal counting, six approaches materialize from the Supreme Court's Establishment Clause jurisprudence: (1) Separation; (2)

13. Bradfield v. Roberts, 175 U.S. 291, 298 (1899) ("That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.").

14. Agostini v. Felton, 521 U.S. 203, 233 (1997) (citation omitted).

15. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947).

16. Shahin Rezai, Note, County of Allegheny v. ACLU*: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 534 (1990).

17. David Felsen, Comment, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 413 (1989) ("Lower courts lack certainty in determining which doctrinal viewpoint to apply in the *Lemon* analysis."); *see also* Mitchell v. Helms, 530 U.S. 793, 804 (2000) ("The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle.").

18. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 188 (2d ed. 2005) ("The only 'first principle' that the Court has consistently invoked is that of 'separation of church and state,' . . . . [T]he Court has developed a number of unique, and often sharply juxtaposed, approaches.").

19. *Compare* CHEMERINSKY, *supra* note 9, at 1192-93, 1196 (describing three approaches: (1) strict separation; (2) neutrality; and (3) accommodation/equality), *and* Rezai, *supra* note 16, at 507-16, 521-25 (describing three approaches: (1) strict separation; (2) accommodation; and (3) flexible accommodation), *with* WITTE JR, *supra* note 18, at 188 (outlining six approaches: (1) "separationism"; (2) "accomodationism"; (3) neutrality; (4) endorsement; (5) coercion; and (6) equal treatment).

Accommodation; (3) Neutrality; (4) Endorsement; (5) Coercion; and (6) Equal Treatment. However, both Endorsement and Equal Treatment appear to be mere tests used to assess Neutrality. Therefore, this Comment proposes four distinct approaches:

1. Separation

Separation promotes the notion that "to the greatest extent possible government and religion should be separated."[20] Justice Jackson, writing for the dissent in *Everson*, echoed Thomas Jefferson's metaphor of a wall separating church and state[21] by declaring that any form of public aid was forbidden under the First Amendment.[22] *Everson* itself takes a moderate separationist approach by holding that the challenged government action—reimbursing sectarian student's parents for bus transportation—was permissible.[23]

2. Accommodation

The second approach to Establishment Clause interpretation has been termed "Accommodation." Under this theory, the Court should "recognize the importance of religion in society and accommodate its presence in government."[24] The Accomodation approach has its roots in the eighteenth-century Puritan and Civic Republican groups.[25] The Court in *Zorach v. Clausen* first articulated the Accommodation approach by upholding the constitutionality of a New York regulation that allowed for the early release of students in order to attend religious services.[26]

While acknowledging the ideal of separation of church and state, the *Zorach* Court rejected the notion that church and state are to be separated in all situations.[27] The Court's reasoning centered around the tradi-

20. CHEMERINSKY, *supra* note 9, at 1192.

21. *Id.* (citing Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Comm. of the Danbury Baptist Assoc. (Jan. 1, 1802), *in* WRITINGS 510 (Merrill D. Peterson ed., 1984)). The majority also uses Jefferson's metaphor. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."). However, the majority's holding—affirming the constitutionality of the reimbursement of bus fare for sectarian school children—appears to contradict the spirit of this Jeffersonian rhetoric. *See id.* at 18.

22. *See Everson*, 330 U.S. at 26-27 (Jackson, J., dissenting); *id.* at 31-32 (Rutledge, J., dissenting) ("The Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

23. *See id.* at 18.

24. CHEMERINSKY, *supra* note 9, at 1196.

25. WITTE JR., *supra* note 18, at 191. Founders representing these groups argued that governments "must support some form of public religion, some common morals and mores to undergird and support the plurality of protected private religions." *Id.*

26. 343 U.S. 306, 308 & n.1, 315 (1952); *see also* N.Y. EDUC. LAW § 3210 (McKinney 2009).

27. *Zorach*, 343 U.S. at 312 ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State . . . . Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.").

tional acceptance of religion in our society.[28] Thus, five years after the separationist decision in *Everson*, the Court turned to a contrasting accommodationist approach.

3. Neutrality

After creating two competing approaches, the Court fell to the middle road with the principle of Neutrality. Under the Neutrality approach, the First Amendment requires that government be neutral towards religion. The shared principle of Neutrality existed in both the separationist *Everson* decision, as well as the accommodationist *Zorach* decision.[29] Neutrality represented an attempt at an integrated, consistent standard, and was first manifested in *Lemon v. Kurtzman*.[30]

While the test put forth in *Lemon* stands as the accepted test to determine neutrality, three competing tests have emerged to assess a regulation's neutrality. First, some Justices favor establishing neutrality through a "symbolic endorsement test"—whether a reasonable person passing by the religious symbol would conclude that the government is endorsing religion.[31] Even among those advancing the symbolic endorsement test, disputes arise as to the proper perspective from which to apply it.[32]

The second competing test to establish neutrality is Equal Treatment. Similar to Endorsement, Equal Treatment can be viewed as a measure of neutrality. In certain situations, Endorsement would prohibit government funding or alliances with religion because it may give the appearance of government advancing religion. However, Equal Treatment "allow[s] such funding and alliances so long as nonreligious parties similarly situated receive comparable treatment."[33] On a practical level, Equal Treatment has some appeal because it creates neutrality between aid given to religious and secular institutions. Yet, we must still be wary

28. The Court supports the traditionalism argument by noting the religious nature of our country, and that, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-14.

29. *Compare* Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . . State power is no more to be used so as to handicap religion, than it is to favor them."), *with Zorach*, 343 U.S. at 314 ("The government must be neutral when it comes to competition between sects.").

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

31. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-64 (1995).

32. CHEMERINSKY, *supra* note 9, at 1194-95 (discussing the contrasting views of the Justices in what government actions constitute "symbolic endorsement" of religion). Justices Scalia, Rehnquist, Kennedy, and Thomas reject the symbolic endorsement test. *See id.* at 1195. Justices O'Connor, Souter and Breyer believe the symbolic endorsement test should be applied from an informed reasonable person standard, while Justices Stevens and Ginsburg believe that Justice O'Connor enhances the reasonable person standard, and the test should be considered from the perspective of a tort law reasonable person standard. *Id.* at 1194-95.

33. WITTE JR, *supra* note 18, at 199.

of the dangers that lurk upon such a slippery path. The Constitution bars more than the establishment of religion; it bars laws "respecting" the establishment of religion. Therefore, even a foot in the door towards an establishment of religion can be unconstitutional.

Finally, the most recent method used to assess neutrality is based upon determining whether government funds were channeled through an individual, and therefore, whether the allocation of those funds to any institution was the complete private and independent choice of the individual. If government funds wind up in a pervasively sectarian institution, it was the individual's choice and, as such, the government has not aided that institution.

4. Coercion

The Coercion approach goes beyond accommodation and endorsement by finding a violation of the Establishment Clause only when government action effectively coerces people to "support or participate in any religion or its exercise . . . ."[34] Perhaps the clearest articulation of the coercion approach occurred in the majority's opinion in *Lee v. Weisman*.[35] In *Lee*, the Court confronted a case involving a high school principal who invited a rabbi to pray at the high school graduation.[36] The Court found that the principal's actions violated the Establishment Clause, and based its finding on the inherently impressionable nature of elementary and high school students.[37] Elementary and high school aged children are impressionable, and when effectively forced to attend a graduation ceremony that mandates prayer, a coercive environment has been created.[38]

These vastly differing approaches to Establishment Clause interpretation leave lower courts, and legislatures, to guess at which approach will prevail on any given statutory challenge.[39] One commentator aptly described the situation by stating that, "[b]y 1985, these cases . . . began increasingly to 'partake of the prolixity' of a bizarre byzantine code."[40]

Commentators are not the only ones left perplexed; even Chief Justice Rehnquist displayed frustration at the current state of the law:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may

34. County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989).
35. 505 U.S. 577 (1992).
36. *Id.* at 581.
37. *Id.* at 592.
38. *Id.* ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").
39. Felsen, *supra* note 17, at 419 ("The Supreme Court's failure to adopt one clear doctrinal viewpoint has resulted in inconsistencies at all levels of constitutional adjudication.").
40. WITTE JR, *supra* note 18, at 210.

> lend textbooks on American colonial history, but it may not lend a film of George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[41]

II. SETTING THE GROUND RULES: *LEMON V. KURTZMAN*[42]

The Court's 1971 decision in *Lemon* attempted to create an integrated standard by distilling a three prong test, the "*Lemon* Test," from previous opinions.[43] The *Lemon* Test, while modified in *Agostini*, has for more than three decades remained the only formal standard of review for claims arising under the Establishment Clause.[44] Yet this broad analytical framework, much like the initial fence created in *Bradfield*, left room for too much "play in the joints"[45] and wound up allowing the competing approaches of the Justices to dictate the outcome of the case.

*A. Background: The Pre-*Lemon *Cases*

1. *Everson v. Board of Education of Ewing Township*[46]

Everson presented the Court with the first opportunity to decide an Establishment Clause claim brought against a state government. The application of the First Amendment to states through the Fourteenth Amendment facilitated the Court's examination of a New Jersey statute. The New Jersey statute provided funds to reimburse parents of private school children for bus fare to the school. While the tenor of the opinion exuded separationism, the Court found that the New Jersey statute failed to breach the wall between church and state.[47] The Court classified the busing reimbursement as public welfare, and analogized it to providing police, fire, and sanitation services to churches.[48] Yet, neutrality rhetoric managed to sneak into an ostensibly separationist opinion.[49] Even at the advent of Establishment Clause cases induced by state action, the Court failed to provide a uniform standard, as evidenced by the undermining of

41. Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).
42. Lemon v. Kurtzman, 403 U.S. 602 (1971).
43. *Id.* at 612-13.
44. WITTE JR, *supra* note 18, at 188. While the *Lemon* Test stands as the only formal standard of review, the individual Justices have developed a myriad of approaches to adjudicating cases under this test, including "separationism," "accommodationsim," neutrality, endorsement, coercion, and equal treatment. *Id.*
45. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970).
46. 330 U.S. 1 (1947).
47. *Id.* at 18.
48. *Id.* at 17-18.
49. *Id.* at 18.

the majority's proclamations of strict separation by an outcome that promotes neutrality.[50]

2. *Walz v. Tax Commission of New York*[51]

The next milestone on the journey towards *Lemon* stemmed from New York's tax laws. In *Walz*, a real estate owner brought suit against the state of New York claiming that a state statute exempting religious organizations from paying property tax violated the Establishment Clause.[52] While adhering to a separationist approach, the language used by the Court in stating the standard displayed the underlying uncertainty in the proper analysis. Justice Burger mixed the phrase "room for play in the joints" with separationist rhetoric in laying forth the applicable standard. He inserted this ambiguous language for fear of imposing too rigid a standard.[53] This simple phrase, "room for play in the joints," reinforces the move away from consistency and towards subjective judicial discretion. However, as a precursor to the *Lemon* Test, the Court identified the importance of the purpose and effect of government action.[54]

B. Facts of Lemon

In 1968, Pennsylvania passed the Nonpublic Elementary and Secondary Education Act,[55] which authorized the superintendent to purchase specific secular educational materials for nonpublic schools. These materials included secular textbooks, actual expenditures for teachers' salaries, and other instructional material. A year later, Rhode Island passed the Rhode Island Salary Supplement Act,[56] which provided public funds to supplement nonpublic school teachers' salaries.[57]

C. The Lemon *Test*

In setting a standard to analyze this case, the Court drew upon prior decisions to focus its interpretation and create a lasting standard: (1) the statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither enhances or inhibits religion;

50. Justice Jackson's dissent chastised the majority for such doublespeak. *Id*. at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."). Justice Jackson's sentiments foreshadowed the difficult road ahead.

51. 397 U.S. 664 (1970).

52. *Id.* at 666.

53. *Id.* at 669 ("[R]igidity could well defeat the basic purpose of these provisions . . . .").

54. Justice Burger frames the question by asking "whether particular acts in question are *intended* to establish or interfere with religious beliefs and practices or have the *effect* of doing so." *Id.* (emphasis added).

55. 24 PA. STAT. ANN. §§ 5601-5608 (repealed 1977).

56. R.I. GEN. LAWS §§ 16-51-1 to -9 (repealed 1980).

57. The Rhode Island statute limited the aid to supplementing salaries of teachers who taught secular subjects, and such supplements could not elevate a private school teacher's salary above that of a public school teacher. Lemon v. Kurtzman, 403 U.S. 602, 607 (1971).

and (3) the statute must not foster an excessive government entanglement with religion.[58]

1. Secular Purpose

The first prong is at best an academic exercise for the statute's proponents. Showing the existence of a secular purpose merely requires the proponent of the statute to imagine any possible secular goal served by a particular statute.[59] In the case of *Lemon*, both Pennsylvania and Rhode Island argued that the statute served the secular purpose of improving secular education at both public and private schools.[60] This broad legislative purpose satisfied the Court, which explicitly noted the importance of imparting deference to legislatures.[61]

2. Secular Effect

The secular effect prong of the *Lemon* Test provides for greater analysis than the secular purpose inquiry. The Court frames the question as whether the government action "will in part have the effect of advancing [or inhibiting] religion."[62] In *Lemon*, the Court forwent deciding the effect question, and instead rested its analysis on an excessive entanglement of government and religion.

3. No Excessive Entanglement

In order to determine whether the government has created an excessive entanglement with religion, courts must consider (1) "the character and purposes of the institutions that are benefited," (2) "the nature of the aid that the State provides," and (3) "the resulting relationship between the government and the religious authority."[63]

It is under the first consideration of the entanglement inquiry that we find the "pervasively sectarian" doctrine. The term "Pervasively Sectarian" was coined by Justice Powell when he stated:

> Mr. Chief Justice Burger, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was *pervasively sectarian*, but held open that possibility for future cases: "Individual projects can be properly evaluated if and when challenges arise with

58. *Id.* at 612-13.
59. Rezai, *supra* note 16, at 518.
60. *Lemon*, 403 U.S. at 613.
61. *Id.* at 613 ("As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.").
62. Tilton v. Richardson, 403 U.S. 672, 683 (1971).
63. *Lemon*, 403 U.S. at 615.

> respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics."[64]

The Court in *Lemon* found that providing aid to a school whose religious nature is so pervasive that there can be no distinction between secular and sectarian education was unconstitutional.[65] Thus, *Lemon* cemented the Pervasively Sectarian doctrine as a pillar of the entanglement inquiry.

In observance of *Lemon*, Colorado's legislature, hoping to provide as many students as possible with aid for college, drafted the requirements for its publicly funded scholarships. Those requirements contained a provision prohibiting disbursement of scholarship funds to students who attended "pervasively sectarian" institutions.[66]

III. WINDS OF CHANGE: *ZOBREST*, *AGOSTINI*, AND "PRIVATE CHOICE"

Zobrest and *Agostini* set the stage for the eventual dissolution of the "pervasively sectarian" doctrine. *Zobrest* displayed the Court's newfound silence on the "pervasively sectarian" issue. *Agostini* modified the *Lemon* Test by folding the entanglement inquiry into the effect prong. *Zobrest*'s silence weakened the precedent backing "pervasively sectarian" analysis, and *Agostini*'s modification weakened the power of the "pervasively sectarian" inquiry by rendering excessive entanglement no longer dispositive, but merely a factor used to analyze secular effect.

A. Zobrest v. Catalina Foothills School District[67]

The Individuals with Disabilities Education Act (IDEA)[68] provides federal funding "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities . . . ."[69] James Zobrest had been deaf since birth, and when James attended a public junior high school, the State provided him with a sign-language interpreter.[70] The case arose when, at the beginning of high school, James enrolled at Salpointe Catholic High School, a sectarian institution.[71] When James requested that the school district furnish him with an interpreter at his new school, his request was denied.[72]

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64. Hunt v. McNair, 413 U.S. 734, 743 (1973) (emphasis added) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 682 (1970)).

65. *Lemon*, 403 U.S. at 616 ("The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.").

66. COLO. REV. STAT. ANN. §§ 23-3.5-102(3)(b), -3.3-101(3)(d), -3.7-102(3)(f), -18-102(9) (West 2009).

67. 509 U.S. 1 (1993).

68. 20 U.S.C.A. §§ 1400-1490 (West 2009).

69. § 1400(d)(3).

70. *Zobrest*, 509 U.S. at 4.

71. *Id.*

72. *Id.*

In explaining neutrality through private choice, the Court shifted its focus from the nature of the institution to the way in which the institution received the funding. Essentially, the question became whether the government directly or indirectly provided the aid. The Court determined that because the government provided aid to the student, and it was his or her (or his or her parent's) private choice where to use that aid, that the government was not violating the Establishment Clause.

By settling upon private choice as the correct test by which to measure neutrality, *Zobrest* not only declined to entertain the "pervasively sectarian" nature of the new school, but also discarded the use of the endorsement test. This case presented a situation where placing a government employee in a sectarian school presented a symbolic union between the government and the school. The Court unsatisfactorily addressed (1) the very real appearance that the government was in union with the institution by nature of providing a government employee at a sectarian school, and (2) the fact that the government employee would be relaying religious messages. The only on-point response mustered by the Court was unconvincing; "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school."[73]

B. Agostini v. Felton:[74] *Folding the Entanglement Inquiry into the Effect Inquiry*

Agostini involved a reconsideration of the Court's prior decision in *Aguilar v. Felton*,[75] which prohibited New York from "sending public school teachers into parochial schools to provide remedial education to disadvantaged children . . . ."[76] While acknowledging that *Lemon* still controlled the inquiry, the Court modified its "understanding of the criteria used to assess whether aid to religion has an impermissible effect."[77] This modification "simplified" the *Lemon* Test by folding the entanglement prong into the effect prong. This change diluted the strength of the entanglement inquiry by transforming a dispositive issue into merely one of several factors used to assess secular effect.[78]

Practically, this modification permitted the Court to abandon the presumption that sending state-paid teachers to sectarian schools inevitably results in "the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[79] These words exemplify the consequence of the modification of the "per-

73. *Id.* at 13.
74. 521 U.S. 203 (1997).
75. 473 U.S. 402 (1985).
76. *Agostini*, 521 U.S. at 208.
77. *Id.* at 223.
78. Mitchell v. Helms, 530 U.S. 793, 808 (2000) ("[W]e therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect.").
79. *Agostini*, 521 U.S. at 223.

vasively sectarian" doctrine. By downgrading the importance of the entanglement inquiry, the Court effectively weakened the "pervasively sectarian" standard.

IV. BREAKING DOWN THE WALL: *MITCHELL V. HELMS*[80]

With the stage set, *Mitchell* employed the neutrality approach to explicitly bury the "pervasively sectarian" doctrine. *Mitchell* represented the endpoint in the Supreme Court's journey towards full subjectivity.[81] Such subjectivity is an impermissible use of the Court's authority, and has transformed our highest court into "a national theology board."[82]

A. Factual Background

Under the Education and Consolidation Act of 1981,[83] federal funds were provided to state educational agencies to improve elementary and secondary education. These funds were distributed by Local Educational Authorities ("LEAs") to both public and private schools.[84] Religious private schools were among the schools qualified to receive federal funds. However, in an attempt to prevent any possible inference of government sponsorship of religion, the statute included two safeguards. First, all "services, materials, and equipment" supplied to the schools was required to be "secular, neutral, and nonideological."[85] Second, private schools were required to apply for educational equipment and, if approved, the equipment was loaned—not given—to the school.[86] Despite these safeguards, opponents of the funding program challenged the legislation as a violation of the Establishment Clause, based upon the large percentage of sectarian private schools receiving aid.[87]

B. The End of the "Pervasively Sectarian" Doctrine

The plurality opinion provided four justifications for burying the "pervasively sectarian" doctrine. First, the relevance of the doctrine in precedent cases was in "sharp decline."[88] The doctrine had not been used to strike down an aid program since the 1985 decisions *Aguilar* and *Ball*.[89] Indeed, the Court failed to even mention the "pervasively sectarian" doctrine in an establishment case decided a mere one year after *Ball*

80. 530 U.S. 793 (2000).

81. *See* Tilton v. Richardson, 403 U.S. 672, 678 (1971) ("The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.").

82. County of Allegheny v. ACLU, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part).

83. 20 U.S.C.A. §§ 7301-7373 (West 2009).

84. *Mitchell*, 530 U.S. at 802.

85. 20 U.S.C.A. § 7217a(a)(1)(A)(i).

86. 20 U.S.C.A. § 7217a(a)(3), (c)(1).

87. *Mitchell*, 530 U.S. at 803-04.

88. *Id.* at 826.

89. *Id.*

and *Aguilar*.[90] Finally, *Agostini* and *Zobrest* had upheld aid aimed at "pervasively sectarian" elementary and secondary schools.[91]

Second, the Court shifted its emphasis to the private choice of the individuals, and away from the nature of the institution.[92] The Court argued that in a situation where private choice dictates which institutions receive government funds, the pervasively sectarian entity had not received any special favor from the government.[93]

Third, the inquiry into the recipient's religious views to determine whether a school was pervasively sectarian was "not only unnecessary but also offensive."[94] Such an inquiry raised serious excessive entanglement issues.[95]

Finally, the Court pointed to the bigoted history of hostility towards pervasively sectarian schools. Opposition to aiding sectarian schools began in the 1870s, when Congress considered passing the Blaine Amendment.[96] Promoted by Protestant legislators, the Blaine Amendment would have amended the Constitution to bar any aid to sectarian ("code for 'Catholic'") institutions.[97] "In short," the Court concluded, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[98]

V. A POST-*MITCHELL* LANDSCAPE: *COLORADO CHRISTIAN UNIVERSITY V. WEAVER*

The Tenth Circuit's recent decision in *Weaver* represents the consequence of the discretionary precedent set by *Mitchell*. *Mitchell*'s exchange of the "pervasively sectarian" for a private choice analysis completely erodes any consistency in the standards for evaluating Establishment claims. *Weaver*'s procedural posture and analysis displayed confusion at both the district and appellate levels, and its holding reflects the confusion faced by state legislatures.

90. *Id.*
91. *Id.* at 827.
92. *Id.* ("[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose.").
93. *Id.* ("If a program offers permissible aid to the religious (including the pervasively sectarian), the a religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be.").
94. *Id.* at 828.
95. *Id.* ("[C]ourts should refrain from trolling through a person's or institution's religious beliefs.").
96. *Id.*
97. *Id.*
98. *Id.* at 829.

A. Facts

Colorado provided scholarships to eligible students who attend any accredited college in the state (public or private, secular or religious) so long as that institution was not deemed "pervasively sectarian" by government officials.[99] The relevant provision had been interpreted, by the Colorado Commission on Higher Education, to require the fulfillment of six enumerated criteria: (1) the faculty and students are not exclusively of one religious persuasion; (2) there is no required attendance at religious convocations or services; (3) there is a strong commitment to principles of academic freedom; (4) there are no required courses in religion or theology that tend to indoctrinate or proselytize; (5) the governing board does not reflect nor is the membership limited to persons of any particular religion; and (6) funds do not come primarily or predominantly from sources advocating a particular religion.[100]

Colorado Christian University ("CCU") applied to participate in the financial aid programs in September, 2003. A financial aid officer became skeptical of the application, and upon further review the Commission concluded that CCU failed three of the six criteria. First, the Commission concluded CCU's courses impermissibly indoctrinated the school's students.[101] Second, CCU's board of trustees reflected a single religion.[102] Third, the university impermissibly required attendance at religious ceremonies.[103] The Commission rejected CCU's application, as well as the application of Naropa University, but provided funding to Regis University and University of Denver, both of which are religiously affiliated.[104] Therefore, the Commission drew a line between sectarian schools and "pervasively" sectarian schools.[105]

B. Procedural Posture

After being denied by the Commission, CCU brought suit alleging that the funding statutes, and subsequent Commission action, violated the Free Exercise, Establishment, and Equal Protection Clauses.[106] The district court granted summary judgment for the state defendants. Confused as to the proper standard to apply, the district court settled upon rational

99. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1250 (10th Cir. 2008).
100. *Id.* at 1250-51.
101. *Id.* at 1253.
102. *Id.*
103. *Id.*
104. While the opinion clearly paints the University of Denver ("DU") as a Methodist Institution, DU's affiliation with the Methodist church is more complex. The Colorado Constitution recognizes the school as "Denver Seminary," and the school does boast a Theological Graduate Program. However, as the University Chaplain explains, "there is (as far as I can tell) NO tight connection. In this way, DU is like Northwestern, Syracuse, USC, and others that have a Methodist heritage, but not necessarily a tight linkage." E-mail from Gary R. Brower, University Chaplain, University of Denver, to author (Mar. 25, 2009, 19:01 MST) (on file with author).
105. *Id.* at 1258.
106. *Id.* at 1253.

basis for adjudicating the Free Exercise argument, and heightened scrutiny for the Establishment and Equal Protection Clause arguments.[107] In finding for the state, the district court allowed the government to justify its impermissible violation of the Establishment Clause through its interest in "vindicating its state constitution."[108]

C. The Tenth Circuit's Analysis

The Tenth Circuit's analysis in *Weaver* can best be described as disjointed. The court began by seeking answers in recent Supreme Court precedent, which it interpreted as a statement of legislative discretion.[109] Emboldened by this interpretation, the Tenth Circuit included a heightened scrutiny analysis within the *Lemon* framework. Yet, wary of presenting too radical an analysis, the Tenth Circuit coupled the heightened scrutiny analysis with the accepted neutrality approach.

1. A Stepping Stone: *Locke v. Davey*[110]

Locke represents the most recent decision by the Supreme Court addressing the provision of federal funds to religious colleges. *Locke* reiterated the "private choice" holding in *Mitchell*.[111] However, the Court drew a limiting line by prohibiting the use of a government scholarship to fund a degree in "devotional theology."

The Commission in *Weaver* argued that "*Locke* subjects all 'state decisions about funding religious education' to no more than a 'rational basis review.'"[112] The Tenth Circuit replied that *Locke* does not stand for a rational basis standard, but rather interprets the decision to promote "balancing interests."[113] Fortunately, the Tenth Circuit did not pursue this standard, but rather stated, "[w]e need not decide in this case whether such a balancing test is necessary or how it would be conducted," because *Locke* is distinguishable from *Weaver*.[114] The court found the two cases distinguishable because (1) the Colorado statute expressly discriminates among religions by permitting "sectarian" schools to receive aid, but not those schools that are "pervasively sectarian," and (2) the characterization as "sectarian" or "pervasively sectarian" entails

107. *Id.*
108. *Id.*
109. *Id.* at 1254.
110. 540 U.S. 712 (2004).
111. *Id.* at 719 (stating that "pervasively sectarian" colleges are not necessarily prohibited from receiving government funds, because the "link between government funds and religious training is broken by the independent and private choice of recipients").
112. *Weaver*, 534 F.3d at 1254-55 (quoting Brief of Appellees at 33, *Weaver*, 534 F.3d 1245 (No. 07-1247), 2007 WL 4778873).
113. *Id.* at 1255-56 ("The Court's language [in *Locke*] suggests the need for balancing interests: its holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." (quoting Locke v. Davey, 540 U.S. 712, 720, 725 (2004))).
114. *Id.* at 1256.

intrusive governmental scrutiny into religious beliefs and practices.[115] While the Tenth Circuit rejected the balancing test, it did borrow the notion of legislative discretion from the opinion.[116]

2. Discriminating Among and Within Religions

Responding to CCU's argument that the Colorado statute impermissibly discriminated among religions, the State provided three arguments. First, the Commission argued that "Colorado's law . . . distinguishes not between types of religions, but between types of institutions."[117] Second, the Commission argued that "discriminatory funding is permissible because the State is entitled to discriminate in spending legislation in ways that it could not if legislating directly."[118] Third, the Commission assumed that discrimination in favor of some religions is permissible as long as the discrimination is not based on "animus."[119]

In response to the first argument by the Commission, the court discussed discrimination among religions, a discussion which centered on the preferential treatment of some religious institutions over others.[120] The court began by addressing the purpose of the Colorado statute, and found that the "sole function and purpose of the challenged provisions of Colorado law . . . is to exclude some but not all religious institutions . . . ."[121] Instead of determining whether the purpose was secular, the Court stated that this case is subject to "heightened constitutional scrutiny."[122] Yet, the Tenth Circuit did not follow a heightened scrutiny analysis. Rather, it proceeded to discuss the abolishment of the "pervasively sectarian" doctrine in the Supreme Court as well as in other circuits.[123]

Second, the Commission argued that "discriminatory funding is permissible because the State is entitled to discriminate in spending legislation in ways that it could not if legislating directly."[124] The State attempted to parallel government funding choices pertaining to religious institutions with government funding choices pertaining to healthcare funding for both abortion and childbirth.[125] The Court did not accept this

115. *Id.*
116. *Id.* at 1254 ("There is room for legislative discretion. *Locke* is the Supreme Court's most recent and explicit recognition of that discretion.").
117. Brief of Appellees at 51, *Weaver*, 534 F.3d 1245 (No. 07-1247), 2007 WL 4778873.
118. *Weaver*, 534 F.3d at 1259.
119. *Id.* at 1260.
120. *Id.* at 1259.
121. *Id.* at 1258 (citations omitted).
122. *Id.*
123. *Id.* at 1258-59.
124. *Id.* at 1259.
125. *Id.* at 1259-60 (discussing Harris v. McRae, 448 U.S. 297, 315-318 (1980), and Maher v. Roe, 432 U.S. 464 (1977)).

analogy: "The right to choose abortion is a right to be free of undue burdens; the right to religious liberty is a right to government neutrality."[126]

Finally, the Commission argued that it may discriminate in favor of some religions and against others so long as the discrimination was not based on "animus" against a religion. The Tenth Circuit replied that while it is certainly necessary that a regulation not be motivated by animus, it is not sufficient to keep the law constitutional merely because it was not motivated by animus.[127]

3. Intrusive Religious Inquiry: Entanglement Discussion

The *Lemon* Test came back to life in the final section of the Tenth Circuit's opinion. After using neutrality and heightened scrutiny to move through the purpose prong, the court analyzed the effect prong by focusing on the prohibition of "excessive entanglement" between religion and government.[128]

The Tenth Circuit found two entanglement issues pertaining to the challenged Colorado provision. First, and most potentially intrusive, was the requirement that the Commission staff "decide whether any theology courses required by the university 'tend to indoctrinate or proselytize.'"[129] The court focused on the reasons for disqualifying CCU as a proper recipient of funds. The court appeared concerned with the amount of discretion being placed in the hands of a government official to decide the religious nature of the applicant.[130] For example, the Commission was left free to define such words as "indoctrinate" and "proselytize."[131]

Even more intrusive than defining the terms by which to measure an institution's religious practice was the actual measurement of those practices. The court noted that inquiries of such an intrusive nature have "long been condemned by the Supreme Court."[132] Moreover, the Tenth

126. Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004), *quoted in Weaver*, 534 F.3d at 1260.

127. *Weaver*, 534 F.3d at 1260 ("If First Amendment protections were limited to 'animus,' the government could favor religions that are traditional, that are comfortable, or whose mores are compatible with the State, so long as it does not act out of overt hostility to the others.").

128. *Id.* at 1261 ("Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits . . . .").

129. *Id.* (quoting COLO. REV. STAT. § 23-3.5-105(1)(d) (2008)).

130. *See id.* at 1261.

131. *Id.* at 1262.

132. *Id.* ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." (citing New York v. Cathedral Acad., 434 U.S. 125, 133 (1977))).

Circuit noted that the subjective nature of such an assessment was susceptible to abuse.[133]

The second intrusive entanglement issue presented by the challenged Colorado law was the assessment of the religious affiliation of the board of trustees. The Tenth Circuit rightly took issue with government officials determining what a Catholic, Jewish, or Muslim "policy" on education would look like. Such an inquiry involves the government official making conclusions about religion that they are not able to make without excessively entangling themselves in religion.[134]

4. Governmental Interest

The court ended its analysis by discussing the government's interest. In doing so, the Tenth Circuit validated the use of heightened scrutiny in Establishment Clause adjudication. The court assumed, based upon Supreme Court precedent, that heightened scrutiny should be used as the analysis for non-entanglement Establishment Clause issues. The Tenth Circuit stated that "Establishment Clause violations, by contrast, are usually flatly forbidden without reference to the strength of governmental purposes."[135] Then, using *Larson* as its base, which the court admitted stood "alone among Establishment Clause cases," the Tenth Circuit concluded that "statutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny . . . aris[ing] under the . . . Establishment Clause . . . while those involving other Establishment Clause issues, such as excessive entanglement, are unconstitutional without further inquiry."[136] After stating the court's proclivity for heightened scrutiny, the court failed to employ it because it stated that the Commission "scarcely has any justification at all."[137]

D. A Heightened Scrutiny of the Tenth Circuit's Analysis

The Tenth Circuit's confusion over the proper standard became apparent when the court began discussing strict scrutiny. Essentially, discrimination based on religion or between religions will be analyzed using strict scrutiny whether arising under the Free Exercise Clause (*Lukumi*); Establishment Clause (*Larson*); or Equal Protection Clause (*Locke*). Yet, understanding that *Lemon* is the "enduring standard," the Tenth Circuit conceded that statutes involving other Establishment clause issues, such as excessive entanglement, are unconstitutional without further inquiry.

133. *Id.* at 1262-63 ("The line drawn by the Colorado statute, between 'indoctrination' and mere education, is highly subjective and susceptible to abuse. . . . The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes.").

134. *Id.* at 1263.

135. *Id.* at 1266.

136. *Id.* (citations omitted).

137. *Id.* at 1267.

So which is it? By "other Establishment Clause issues,"[138] is the court referring to the three prongs of the *Lemon* Test? The truth is that the opinion is not clear exactly what standard is to be applied to the variety of issues present in such an Establishment Clause interpretation.

It appears as though the Tenth Circuit knew that this statutory provision was unconstitutional based upon the death of the "pervasively sectarian" doctrine in *Mitchell*. However, the court's outcome-determinative analysis produced a soup of standards, and reflected a very real confusion as to how they should proceed. The opinion referenced rational basis, heightened scrutiny, the *Lemon* Test, and even a balancing test. However, the court never really fully developed any cogent analysis, but instead picked certain aspects of each standard to shoot down the Commission's arguments.

Perhaps the confusion in *Weaver* was best revealed during the discussion of heightened scrutiny. The court used one Supreme Court case as precedent for its bold assertion, but in the same sentence admitted the singleness of that opinion.[139] In application, such a standard would allow the government to justify its actions, and place the decision of whether the government's interest is "compelling" in the hands of a judge. That dynamic leads to the government judging its own actions against a discretionary standard, instead of against a consistent predictable rule.

VI. AN APPEAL FOR A CONSTITUTIONAL AMENDMENT

When creating the Constitution, our forefathers traded oppression for freedom. Imbedded within the general idea of freedom is a desire for religious freedom.[140] The Establishment Clause and Free Exercise Clause stand as twin manifestations of that desire.[141] Yet, the sublime language carefully chosen to guard that freedom has placed far too much discretion with the Supreme Court.[142] The Supreme Court Justices, as a microcosm of society as a whole, view this language through six differing, and often competing, lenses.[143] Such discord within the nation's

138. *Id.* at 1266.

139. *Id.* (citing Larson v. Valente, 456 U.S. 228, 246 (1982)).

140. JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 84 (2006) ("[T]he nation was not 'Christian' but rather a place of people whose experience with religious violence and the burdens of established churches led them to view religious liberty as one of humankind's natural rights—a right as natural and as significant as those of thought and expression.").

141. As John Quincy Adams stated, "Civil liberty *can* be established on no foundation of human reason which will not at the same time demonstrate the *right* to religious freedom . . . ." Letter from John Quincy Adams to Richard C. Anderson (May 27, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS 1820-1823, at 466 (Worthington Chauncey Ford ed., 1917).

142. This is not to say that the Justices of the Supreme Court do not agree upon the purpose of the Clauses, but rather they approach its meaning in different ways. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 694 (1970) (Harlan, J., dissenting) ("I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application.").

143. *Sees* discussion *supra* Part I.B.

highest court has clouded our understanding and subsequent interpretation of the Religion Clauses. Why are these clauses so difficult to understand? While myriad social, philosophic, theocratic, and political factors could be contemplated, two complementary and inherent reasons that conspire to frustrate the Religion Clauses stand out.

First, the nature of religion presents a unique challenge. Religion is such a personal aspect of human life, whether one is a believer or not, that it stands closer to our hearts than the other liberties protected by the Bill of Rights.[144] History is pockmarked with drastic actions prompted by religion. Nations go to war over religion, people commit suicide in the name of religion, and religion ignites revolutions. The same cannot be said for the right to trial by jury, the right to reasonable search and seizure, or the right to bear arms.

Second, the language used to protect religion has failed to enlighten the modern era. The long line of jurisprudence, from *Everson* to *Locke*, makes clear that even our most exalted arbiters find the language of the Religion Clauses vague and misleading.[145] Such difficulty with the interpretation of the clauses has led directly to confusion among lower courts and legislatures. *Weaver* typifies this dilemma by displaying both the effect of the Supreme Court's confusion on the Colorado Legislature, as well as the consequence of lower courts using contrasting precedent.

It is often the duty of lawyers to play with language and to interpret that language to the client's advantage. Whether it is a constitutional clause, a statutory provision, or an administrative regulation, vague or general language can be twisted to support differing propositions. When vague language creeps into a statute, the state or federal legislative body can amend the statute, and bring greater clarity and understanding to society. However, we are often loathe to change the language of the supreme law of the land—our federal Constitution. But *should* we be so unwilling to change our Constitution? Chester Antieau echoed this sentiment in his book, *A U.S. Constitution for the Year 2000*: "Although the individuals who gave us the original Constitution were great thinkers, it must be understood that they found it perfectly appropriate for the document to be amended whenever the people saw fit."[146]

This does, however, raise the question of which parts of the Constitution need clarity, since all aspects of the Constitution need interpreta-

144. *See* MEACHAM, *supra* note 140, at 5-6 ("Yet because faith is such an emotional subject for both believers and nonbelievers, discussion of the question of religion and public life can often be more divisive than illuminating.").

145. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 221-22 (2d ed. 1994) ("[T]he Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the justices.").

146. CHESTER JAMES ANTIEAU, A U.S. CONSTITUTION FOR THE YEAR 2000, at vii (1995).

tion, and Justices often argue as to the correct interpretation. Essentially, what makes the Religion Clauses so special? Certainly the very nature of religion elevates these clauses, and when coupled with the "opaque" language used to protect religious freedoms, the practicality of a clarifying amendment becomes clear. Many commentators would dismiss such a drastic measure, and would instead attempt to persuade the Justices that a specific definition or solution is correct.[147] Yet, these commentators miss the problem. It is not the analysis that is flawed, but the nature of the Amendment itself. An Amendment that affects our religious freedom by using broad, malleable language leaves too much to interpretation. The case law addressing religious freedom screams loudly that now is the time for change. It is time to bring freedom of religion into the twenty-first century, and finally clarify what we the people mean by phrases such as "religious establishment" and "free exercise."

CONCLUSION

Chaos best describes the present state of Establishment Clause jurisprudence. This confusion stems from the inherent tension between the Religion Clauses of the First Amendment, the variety of approaches created by the Supreme Court to interpret these clauses, and the very nature of religion itself. The foregoing examination of Establishment Clause jurisprudence displays the Court's fruitless search for a workable standard. The failure to create a consistent, workable standard results in decisions such as *Weaver*, where lower courts begin to create their own dysfunctional analysis while staying within the broad framework of the *Lemon* Test. One option would be to continue the wild-west showdown in the Supreme Court and persist on the Court's long journey towards the prophetical standard. The second option would be to recast the declaration of our religious freedom in clear, contemporary language. The flexible nature of our Constitution not only allows for periodical amendment, it demands such an amendment when the original language prohibits the pursuit of justice in the most sacred of liberties.

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147. *See, e.g.*, Rezai, *supra* note 16, at 536-40 (proposing the "correct" definition and standard to employ when interpreting the Establishment Clause).

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