

A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion

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The Supreme Court has never addressed the constitutionality of public elementary school Christmas holiday observances. This Comment argues that such celebrations offend the Establishment Clause of the First Amendment. The author begins by discussing the role of religion in the American immigrant's struggle for identity in a new homeland and the ways in which religious observances provide identity to all people, especially religious and ethnic minorities. With this background, he then turns to the schools, arguing that Christmas rituals inevitably express sectarian Christian religious content, and thus are a kind of proselytization that violates the Establishment Clause of the First Amendment when sponsored by public schools. The author applies each of the existing Supreme Court theories of Establishment Clause violations—the Lemon test's purpose, effect, and entanglement branches; Justice O'Connor's "endorsement" test; and Justice Kennedy's "coercion" test—to the problem of public elementary school Christmas holiday observances. Taking into account the impressionability of elementary school students, compulsory school attendance, and the perspectives of non-Christians, the author concludes that public school Christian holiday observances should be found unconstitutional. The First Amendment must protect not only the religious beliefs of Christians but also the religious identities of all Americans. To faithfully uphold the Establishment Clause of the First Amendment, the Court must take into account the perspectives of non-Christian members of society. Only by eliminating religious observances from elementary schools can government protect the religious interests of all Americans.

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Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants.

—Justice William O. Douglas¹

It is difficult to imagine walking into an elementary school after Thanksgiving and not seeing evidence of the impending Christmas holiday. Because the Supreme Court has prohibited religious prayer in public schools,² most schools try to avoid conveying any explicit Christian message in their holiday observances.³ Diversity of ethnicity and religious practice in many urban areas has also led some schools to include other holiday observances in their "winter holiday"⁴ celebrations.⁵ But Christmas is so widely accepted and entrenched in American culture that its religious origins and content are usually overlooked, and few would seriously consider altogether proscribing Christmas observances in public elementary schools.

The Supreme Court's view of the constitutional significance of Christmas mirrors that of most Americans. Although it has never addressed the constitutionality of public elementary school holiday observances,⁶ the Court has found that observance of Christmas and Hanukkah by public entities does not necessarily violate the First Amendment's command, made applicable to the states by the Fourteenth Amendment, that government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷ My purpose is to challenge the Christian perspective of the general American public and legal community by introducing an understanding of what religion and religious freedom can mean to religious minorities and by demonstrating that what the majority of Christian Americans consider secular is not religiously neutral to non-Christians. I apply existing Supreme Court theories of Establishment Clause violations—the *Lemon*

1. *Engel v. Vitale*, 370 U.S. 421, 442 n.8 (1962) (Douglas, J., concurring).

2. *Engel v. Vitale*, 370 U.S. 421 (1962).

3. See, e.g., Don Lattin, *New Drive for Studying Religion in the Schools*, S.F. CHRON., Dec. 22, 1989, at A1.

4. *County of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989) (plurality opinion).

5. See Lattin, *supra* note 3. Examples of other celebrations include *Las Posadas*, a Mexican observance in honor of the story of Mary and Joseph's search for lodging, and Kwanzaa, an "African" harvest festival invented in the 1960s to offer American blacks an alternative to Christmas and Hanukkah. *Id.* For an account of Kwanzaa, see CEDRIE MCCLESTER, *KWANZAA: EVERYTHING YOU ALWAYS WANTED TO KNOW BUT DIDN'T KNOW WHERE TO ASK* (1990).

6. One circuit court, however, has found them constitutional. *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). *Florey* is discussed briefly *infra* note 171 and more comprehensively in Steve L. Pevar, *Public Schools Must Stop Having Christmas Assemblies*, 24 ST. LOUIS U. L.J. 327 (1980) (arguing that because Christmas is a religious holiday, school officials may not bring its celebration into the classroom).

7. U.S. CONST. amend. I; *Everson v. Board of Educ.*, 330 U.S. 1 (1947); see also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (public display of Hanukkah menorah upheld); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche display by city upheld).

test,⁸ Justice O'Connor's "endorsement" test,⁹ and Justice Kennedy's "coercion" test¹⁰—to holiday observances in public schools and argue that, taking into account the impressionability of elementary school students and the perspective of non-Christians, public school holiday observances should be found unconstitutional.¹¹

Part I of this Comment discusses the history of the American immigrant's search for identity in a new homeland and the central role of religion in that struggle. Part II examines the way in which religious observances provide identity to all people, especially religious and ethnic minorities. While Christians define themselves primarily in terms of belief or faith, religions such as Judaism, Islam, Zen Buddhism, and other non-Christian religions, especially as manifested in the United States, tend to define their members by practice and ritual rather than by belief in god. Part III examines constitutional law regarding religious indoctrination in the public schools and the observance of religious holidays by public entities. The Supreme Court has not yet addressed the issue of whether holiday celebrations in public elementary schools are a form of religious indoctrination or a form of permissible public celebration. I argue that Christmas rituals inevitably express religious content, and thus violate the Establishment Clause of the First Amendment when sponsored by public schools. The First Amendment should protect not only the religious beliefs of Christians but also the religious identity of religious minorities. The Supreme Court tends to treat Christian worship as the model by which all religious activity should be judged under the First Amendment, resulting in a denial of First Amendment protection to religious minorities. To faithfully uphold the Establishment Clause of the First Amendment, the Court must take into account the perspectives of non-Christian members of society. Only by eliminating religious observances from elementary schools can government protect the religious interests of all Americans.

8. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (setting out three-part test examining purpose, effect, and "entanglement").

9. *Lynch*, 465 U.S. at 688-94 (O'Connor, J., concurring) (clarifying *Lemon*); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1984) (O'Connor, J., concurring in the judgment) (introduction of the "objective observer"); *Allegheny*, 492 U.S. at 592-94 (majority applying "endorsement" test).

10. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part) (setting out "coercion" test).

11. I focus only on the celebration of Christmas in the public elementary schools, but the analysis is equally applicable to other religious holidays—such as Easter, feast days of the Christian saints Patrick and Valentine, and Halloween—that are widely observed in schools. Readers should also bear in mind that holiday traditions of other cultures, introduced in the schools to balance the celebration of Christian or "American" holidays, likely have strong religious origins and overtones even though they may appear secular to most Americans.

I

FROM THE OUTSIDE LOOKING IN: THE IMMIGRANT AND
RELIGIOUS TOLERANCE*A. Becoming an American: The Processes of Immigration and
Assimilation*

American immigration has always posed the same questions for American culture: How must the immigrant change to fit into American society? How must American society adapt to accommodate the new immigrant? This Section discusses the assimilation process that the immigrant undergoes in becoming American and concludes that religion is often a central aspect of the immigrant's identity—an aspect that the immigrant is not expected to forsake upon integration into American society.

Assimilation can be generally defined as the process by which people of two cultures merge and cultural differences disappear.¹² Professor Milton Gordon identified several subprocesses of assimilation, the most significant of which were "cultural assimilation," or changing one's cultural patterns, including religious beliefs and observances; "structural assimilation," or entering social groups and institutions; "identificational assimilation," or ethnic self-identification with the majority culture; and "marital assimilation," or large-scale intermarriage.¹³ By examining the degree to which American immigrants have achieved these subprocesses, Gordon evaluated how successfully different ethnic minority groups have been assimilated.¹⁴ He concluded that not only is "cultural assimilation" probably achieved first but that it is also the only subprocess some immigrant groups ever complete.¹⁵ The assimilation process does not necessarily, however, lead to the immigrant's absorption into the host culture. Gordon evaluated three different models that describe the varying types of interaction between the immigrant group and the host culture: the "melting pot" theory, "cultural pluralism," and "Anglo-conformity."¹⁶

The melting-pot theory "envisaged a biological merger of the Anglo-Saxon peoples with other immigrant groups and a blending of their respective cultures into a new indigenous American type."¹⁷ While this model might accurately describe the intermarriage that occurred among early European immigrants of English, Irish, German, Huguenot, Dutch,

12. MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE* 61-68 (1964) (reviewing various definitions of assimilation offered by scholars).

13. *Id.* at 70-71 (tbl. 5). Gordon also noted that "structural assimilation" is particularly significant because once it is achieved, the other subprocesses follow. *Id.* at 81.

14. *Id.* at 75-80.

15. *Id.* at 77.

16. *Id.* at 85. Gordon identified these models normatively as "'philosophies' or goal-systems of assimilation," yet he examined each descriptively in terms of historical application. *See generally id.* at 84-159 (detailed analysis of each model).

17. *Id.* at 85.

and Swedish stock,¹⁸ it is not generally applicable to the experience of most other immigrants.¹⁹ The melting-pot idea also fails to describe how the resulting "race" came to identify itself in cultural terms.

The concept of cultural pluralism does not suffer from such limitations. This theory postulates that immigrants retain significant portions of their home culture while adopting American citizenship and integrating into a single American political and economic system.²⁰ While this model might fairly describe what was observed in many immigrant groups throughout the colonial period and nineteenth century,²¹ it actually blurs two separate observations: for long periods of American history new immigrants continued to flow into the country, keeping the immigrant culture alive with new blood; meanwhile, earlier immigrant families tended to discard their home-country culture and became absorbed into the existing American culture.²²

According to Gordon, the most comprehensive explanatory paradigm of assimilation treating American history from the period of colonialism to the present is the Anglo-conformity model. This "demanded the complete renunciation of the immigrant's ancestral culture in favor of the behavior and values of the Anglo-Saxon core group."²³ The Anglo-conformity model assumes the desirability of maintaining English institutions, language, cultural patterns, and even racial types as standard.²⁴ It involves adopting Anglo-Saxon ideal "types" as our mythical heroes (such as Washington and Lincoln) and as our icons of popular culture.²⁵ The Anglo-conformity model can explain, for example, how sharing the dominant Anglos' language allowed the Irish to successfully assimilate despite being a foreign, Catholic group.²⁶

Professor Gordon concluded that immigrants neither shaped a new hybrid American society nor achieved cultural pluralism. Instead, the prior existence of Anglo institutions, the pervasiveness of the English language, and the dominance of the Anglo-Saxon population forced latecomers to fit into "existing white Protestant society."²⁷ When immigrants did not achieve this conformity willingly or rapidly enough, they were helped along by political and social "Americanization" movements based on suspicion and contempt of the non-Anglo foreigner.²⁸ In sum,

18. *Id.* at 87.

19. *Id.*

20. *Id.* at 85.

21. WILL HERBERG, *PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 33 (1956).

22. *Id.*

23. GORDON, *supra* note 12, at 85.

24. *Id.* at 88.

25. HERBERG, *supra* note 21, at 33-35.

26. *Id.* at 157-63.

27. GORDON, *supra* note 12, at 127.

28. *Id.* at 98-103.

America has not been a melting pot. Rather, it has been a "‘transmuting pot’ in which all ingredients have been transformed and assimilated to an idealized ‘Anglo-Saxon’ model."²⁹

Assuming that assimilation in the Anglo mold is the path down which immigrants are led into American culture, it is important to know how extensively and in what areas immigrants must assimilate in order to succeed.³⁰ Professor Will Herberg articulated a useful starting point, suggesting nationality, language, and culture as some of the things immigrants must surrender in order to become American.³¹ In return, they must accept the "religion of democracy": the unifying "American Way of Life" and its faith in free enterprise, the Constitution, egalitarianism—and even sanitation.³²

Recent demands that immigrants adopt the English language are an example of the Herberg hypothesis. Although there have been trends toward bilingual education and ballots, many states have seen political efforts to assert the primacy of English with legal force.³³ Generally, immigrants who do not adopt the language become and remain ghettoized or at least assimilate much more slowly.³⁴ Beyond political and social standards, the degree to which the state may dictate personal aspects of the immigrant's life is limited. While states may, for example, prohibit marriage arrangements in violation of the American norms of monogamy, heterosexuality, and adulthood,³⁵ the state may not compel a

29. HERBERG, *supra* note 21, at 33-34.

30. Failure to achieve the right amount of assimilation can be costly to any group. *See* GORDON, *supra* note 12, at 108-09 (examining Black, Indian, and Hispanic minorities). Considering that the normative model of assimilation has been Anglo-conformity, it is not surprising that those least able to achieve assimilation have been those most racially, and thus immutably, unlike the prototype. *Id.* at 129.

31. HERBERG, *supra* note 21, at 35.

32. Will Herberg, *America's Civil Religion: What It Is and Whence It Comes*, in AMERICAN CIVIL RELIGION 76, 79 (Russell E. Richey & Donald G. Jones eds., 1974). Regarding sanitation, Herberg cited a placard posted in many restaurants across the country that read: "Sanitation is a way of life. As a way of life, it must be nourished from within and grow as a spiritual ideal in human relations." *Id.*

33. *See* Keith White, *Sponsor Renews Push to Make English the Official Language*, Gannett News Service, Sept. 17, 1991 (18 states have already declared English their official language), available in LEXIS, Nexis Library, GNS File.

34. *See* GORDON, *supra* note 12, at 108-09. Of course, at appropriate times and places Americans also embrace their minorities' colorful folk traditions, music, and exotic cuisines. These things enrich public pageants, give expression to the full diversity this country represents, and remind each American of his or her own forsaken heritage. *See, e.g., id.* at 138 (describing the "Labor Museum" created by Jane Addams at Hull House, where immigrant women demonstrated their native spinning and weaving techniques in order to create and maintain awareness of their cultures among the different members and generations).

35. *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1878) (upholding Utah's ban on bigamy); Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (upholding Georgia's ban on sodomy as applied to homosexual men); CAL. CIV. CODE § 4101 (West 1991) (setting forth minimum age of consent for marriage); CAL. PEN. CODE § 261.5 (West 1991) (setting statutory rape age); *see also* A. JAMES REICHEL, RELIGION IN AMERICAN PUBLIC LIFE 120-22 (1985) (discussing Reynolds and related cases).

parent to send a child to secondary school³⁶ or the pledging of allegiance to the flag³⁷ when those practices conflict with an individual's rights of conscience. And the state cannot compel participation in religious worship.³⁸

B. *Religious Identity of Immigrants*

Just as there are strong pressures on immigrants to assimilate, there are equally compelling forces that keep immigrants apart from larger society. Immigrants hold on to their home culture in part because they find security in the familiar³⁹ and in part because they are not able to find a home easily in the new society—a society often hostile to foreigners.⁴⁰ The need to gravitate toward those who share natural bonds of land, language, or religion—to find a safe harbor among the unfamiliar—is a need for self-identification. This need for self-identification, which arises from “the identity crises that are endemic to emigration,”⁴¹ has been called “a visceral human instinct.”⁴²

Describing the American immigrant experience, Professor Herberg explained that once in America, the characteristics by which one customarily identified oneself in the old country⁴³ became invalid and often the only bond one could hope to find with another was a common language. Driven by this new linguistic grouping, a national-ethnic identity arose.⁴⁴ Through the church organization, which was structured along linguistic lines so that all could understand the services, group identity thus evolved into common religious, linguistic, and cultural (that is, national) heritage.⁴⁵ It is difficult for immigrants to assimilate, however, while retaining their home language, culture, or manner of living. Religion, on

36. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

37. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

38. *County of Allegheny v. ACLU*, 492 U.S. 573, 660-61 (1989) (Kennedy, J., concurring in part and dissenting in part) (citing cases that prohibit government from compelling participation or attendance at religious activities).

39. See HERBERG, *supra* note 21, at 28; see also RONALD L. JOHNSTONE, *RELIGION AND SOCIETY IN INTERACTION: THE SOCIOLOGY OF RELIGION* 267 (1975).

40. See, e.g., GORDON, *supra* note 12, at 92 (noting religious, economic, and political fears about “foreigners”); see also C. BEZALEL SHERMAN, *THE JEW WITHIN AMERICAN SOCIETY: A STUDY IN ETHNIC INDIVIDUALITY* 141-48 (1965) (illustrating religious, ethnic, and national prejudices against Jewish immigrants).

41. RAYMOND B. WILLIAMS, *RELIGIONS OF IMMIGRANTS FROM INDIA AND PAKISTAN* 278 (1988).

42. Leroy S. Rouner, *To Be at Home: Civil Religion as Common Bond*, in *CIVIL RELIGION AND POLITICAL THEOLOGY* 125, 125 (Leroy S. Rouner ed., 1986).

43. One example was the village of one's birth. Herberg, *supra* note 21, at 24.

44. *Id.* at 25-26.

45. *Id.* at 27; see also WILLIAMS, *supra* note 41, at 32-35 (the same processes are taking place today with respect to newer immigrant groups from India). Williams acknowledged the possibility of religious identification for Indians analogous to that seen by Herberg for Europeans, *id.* at 280, and identified typical patterns of formal religious ceremony nonattendance in the second generation, *id.* at 288.

the other hand, is clearly one cultural element that immigrants are not expected to change in order to conform with any American norm.

[T]he perpetuation of ethnic differences in any serious way is altogether out of line with the logic of American reality. The newcomer is expected to change many things about him[self] as he becomes American—nationality, language, culture. One thing, however, he is *not* expected to change—and that is his religion. And so it is religion that with the third generation has become the differentiating element and the context of self-identification and social location.⁴⁶

Not only is religion an acceptable means through which to carve out self-identity in American society but, given the alternatives, it may be the only possibility.⁴⁷

In the United States, religion is the social category with clearest meaning and acceptance in the host society, so the emphasis on religious affiliation and identity is one of the strategies that allows the immigrant to maintain self-identity while simultaneously acquiring community acceptance. . . . Apart from its spiritual dimension, religion is a major force in social participation; it develops and at the same time sacralizes one's self-identity, and thus the religious bond is one of the strongest social ties.⁴⁸

Under the First Amendment, Americans of every religious background are guaranteed the same freedoms. The Supreme Court summarized this ideal when Justice Stevens wrote for the majority in *Wallace v. Jaffree*:⁴⁹

[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.⁵⁰

First Amendment freedoms are important to immigrants for the same reasons they are important to other Americans. But to the immigrant

46. HERBERG, *supra* note 21, at 35.

47. *Cf.* WILLIAMS, *supra* note 41, at 27 (elements important to Indian immigrants as stated in *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* 33-34 (Fredrik Barth ed., 1969)). The elements of identity listed as possible choices for Indian immigrants were tribe, caste, language group, region, and state. Williams added religion to this list. Perhaps only in the early stages of immigration, through which many Indians are now passing, can factors other than religion play a serious role in forming group identity.

48. *Id.* at 11-12 (experience of Indian immigrants in America). *But cf.* JOHNSTONE, *supra* note 39, at 145 (labor unions, fraternal lodges, newcomers' clubs, and political parties also provide group identification).

49. 472 U.S. 38 (1985).

50. *Id.* at 52-53 (footnotes omitted).

the Establishment Clause means more than freedom of worship—it means freedom to develop one's own religious identity and to share a community and identity with one's family and one's people.

II

COMPARISON OF RITUAL ACROSS RELIGIONS

This Part discusses what constitutes religious identity through a comparative analysis of how ritual and symbolism function in different religions and cultural traditions. The differing roles of ritual and symbolism provide the starkest contrasts between Christianity—the religious context familiar to most Americans—and Judaism, Islam, and other religions. While Christian tradition focuses on “belief” as the major religious criterion, other traditions place much more emphasis on ritual. Therefore, a Supreme Court focus on belief as the value that the First Amendment protects will inevitably leave these minority religions without the protection of the First Amendment and underestimate the effect of exposing non-Christian children to Christian rituals in public school Christmas observances.

A. Religion as Transmitter of Social Identity

While it is understandable that religion came to be the unifying cultural force among religious immigrants in America, it may be surprising to discover that religion can serve the same self-locating function for those immigrants who never considered themselves religious in their homelands.⁵¹ If religion is, for many people, “more than commitment to a set of religious beliefs, symbols, and rituals,”⁵² for many it also is less; religion can serve instead primarily as a means of identifying with one's group.

Professor Kent Greenawalt, in attempting to develop a useful way to analyze what is and is not religion for purposes of the First Amendment,⁵³ identified various elements of the “indisputably religious”:

[A] belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repentance and forgiveness of sins; “religious” feelings of awe, guilt, and adoration; the use of sacred texts; and organization to facilitate the cor-

51. See WILLIAMS, *supra* note 41, at 11; see also JOHNSTONE, *supra* note 39, at 267.

52. JOHNSTONE, *supra* note 39, at 267.

53. Greenawalt avoids the suggestion that he or anyone can offer a useful “definition” of religion. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 762-64 (1984).

porate aspects of religious practice and to promote and perpetuate beliefs and practices.⁵⁴

Greenawalt acknowledged that none of these elements is indispensable to religion, including belief in god, and that the list could be expanded or organized differently.⁵⁵ By neglecting to mention ritual behavior other than worship, Greenawalt revealed Christian bias. Non-Christians often find their most significant religious expression in ritual forms other than those listed.

American Jews are the most familiar example of a group that expresses its religious identification primarily in nontheistic terms through adherence to religious symbols and rituals. Although identification among Jews has been growing in importance, the religious aspect of Jewish ritual has been reduced largely to insignificance.⁵⁶ Morton Rosenstock observed of American Jews that their religion is usually lacking in personal faith and traditional practice; fundamental, however, are group identification and loyalty.⁵⁷ Modern American Jewish religion has been called "symbolic Judaism" because it emphasizes items of nostalgic cultural value (for example, Yiddish words, Jewish objects, and selective religious rituals) that "help socialize the children into an awareness of and affection for their Jewish identity."⁵⁸ Indeed, Hanukkah has grown from a holiday of minor importance to a major means of expressing that Jewish identity during the time of year in which Christmas is so prominent.⁵⁹ The persistence of *kashruth* (Jewish dietary law),⁶⁰ even in token form, is more a testament to the special significance of these rules in expressing Jewish apartness than to some basic level of orthodox belief.⁶¹

54. *Id.* at 767-68.

55. *Id.* at 768.

56. See HERBERG, *supra* note 21, at 205-12; see also PETER W. WILLIAMS, AMERICA'S RELIGIONS: TRADITIONS AND CULTURES 19-25 (1990) ("[T]o be a good Jew is not primarily to believe the correct ideas, but to do the correct things." *Id.* at 19.).

57. Morton Rosenstock, *The Jews: From the Ghettos of Europe to the Suburbs of the United States*, in IMMIGRANT EXPERIENCE IN AMERICA 158 (Frank J. Coppa & Thomas J. Curran eds., 1976).

58. GORDON, *supra* note 12, at 194 (citing Herbert J. Gans, *American Jewry: Present and Future*, 21 COMMENTARY 422-30 (1956)).

59. MAE S. ROCKLAND, THE HANUKKAH BOOK x-xi (1975).

60. "Kosher" is the adjective describing food prepared according to these dietary rules.

61. See, e.g., HUSTON SMITH, THE WORLD'S RELIGIONS 300 (1991) ("Jews are united more by what they do than by what they think."); WILLIAMS, *supra* note 56, at 19-25 (contrasting Judaism as a way of life against Judaism as a belief system); see also MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY 38-41 (1970) (noting nontheistic aspect of Jewish ritual); MARSHALL SKLARE, AMERICA'S JEWS 111-17 (1971) (discussing nonreligious reasons for Jewish observance, identifying criteria to explain why certain rituals are kept and others discarded, and noting the trend in American Jewish practice of downgrading sacramentalism and upgrading moralism).

Evidence of Jewish ritual-as-religion is common, not simply because Judaism is the non-Christian religion with which Americans have the most experience, but primarily because Jewish writers have provided a wealth of written resources on the Jewish experience in America and the enigma of Jewish identity. Cf. WILLIAMS, *supra* note 56, at 368 ("The separability of these

Judaism is not the only religion whose primary expression is through ritual rather than faith. Islam is also defined in terms of ritual. A Muslim is not one who believes certain ultimate truths but rather one who keeps the five sacred practices (or pillars) of Islam: recitation of the *La 'ilaha*; praying toward Mecca five times daily; giving of alms; keeping the fast during *Ramadan*; and making the *hajj* to Mecca at least once during one's lifetime.⁶²

Existing sociological evidence suggests that Jews and Muslims are also not the only minorities for whom religious rituals serve to form group identity, especially for children. For example, Professor Raymond Williams' work with immigrant Indian families indicated that the main purpose of the extensive network of home religious-study groups among Hindus in the United States is to provide Hindu children with religious training, and thus with a Hindu identity—"so they will not get lost in American society."⁶³ For groups with fewer numbers, such as Jains, Sikhs, and Muslims, the need for religious identification is even greater.⁶⁴

Zen Buddhism is another example of a religion whose primary features do not resemble those of Christianity. Zen does not purport to promote an ethical belief system, a moral practice, or a view of the "ultimate"; yet it is commonly accepted as a religion, and the Supreme Court has recognized it as such in dicta.⁶⁵ According to Shunryu Suzuki, a Zen Buddhist monk, Zen consists essentially of the practice of *zazen*—that is, ritual sitting and meditation.⁶⁶ "Zazen practice is the direct expression of our true nature. Strictly speaking, for a human being, there is no other practice than this practice; there is no other way of life than this way of life."⁶⁷ Zen does not envision the achievement of any understanding of "God" as the goal of the ritual practice. "The most important point in our practice is to have right or perfect effort. . . . Our effort in our practice should be directed from achievement to non-achievement."⁶⁸ "If you think you will get something from practicing zazen, already you are

concepts—people, culture, religion—has been a perennial topic of debate among religious and secular Jews alike.").

62. 2 THE WORLD'S GREAT RELIGIONS: RELIGIONS OF THE WEST 117-18 (1963); see also F.K. KHAN DURRANI, A PLAN OF MUSLIM EDUCATIONAL REFORM 7-8 (2d enlarged ed. 1986) (criticizing western distinction between sacred and profane as arising from dualistic nature of Christianity and not applicable to Islam in which "everything that promotes life and contributes to the . . . well being of men and nations is religious"); *id.* at 27 (when a child knows the *practice* of prayer, there is no wisdom in requiring the child also to learn the same thing intellectually; the average man needs only to know the practice).

63. WILLIAMS, *supra* note 41, at 47.

64. *Id.* at 63-102.

65. *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (Maryland's requirement that a person profess a belief in God in order to qualify for the office of notary public violated the First and Fourteenth Amendments).

66. SHUNRYU SUZUKI, ZEN MIND, BEGINNER'S MIND 23 (1981).

67. *Id.*

68. *Id.* at 59.

involved in impure practice."⁶⁹

How can a simple ritual, devoid of any explicit connection to theism, faith, or morality, be thought of as religious? The answer is different for different religions. Joseph Campbell explained that western religions relate primarily to the universe through the medium of ritual directed at a god.⁷⁰ By contrast, eastern religions, such as Zen, view worship of gods as *per se* misdirected.⁷¹ Campbell defined eastern religions, as well as all ancient religions, as "religions of identity," characterized by "mythic identification." In such traditions the ultimate goal of ritual practice is "the realization of one's own identity with this [ultimate] reality and recognition of its presence in all things."⁷² In western religions—"religions of relationship"—such an identity with the world is not possible, for the creator and the created are distinct.⁷³ Within such a belief system, the human being is "related to" but not identified with god,⁷⁴ and the relationship arises only through birth into the group and through observance of the rituals of the covenant between man and god. In other words, the goal of ritual practice in these religions is to place worshippers within their religious group and to give them a religious identity. According to Campbell, "[n]o other means [of relating to god] are known or admitted to exist."⁷⁵

Some sociologists have also theorized that religion is fundamentally a means of group identification. Emile Durkheim conceived of religion as the symbolic expression of a group's unity,⁷⁶ as nothing more than society's norms, roles, and relationships expressed in another form.⁷⁷ W. Lloyd Warner, building on Durkheim's concept, found that belief in a sacred being is the symbolic form of the intense need to belong to something larger and more powerful than oneself and to incorporate a part of that within oneself.⁷⁸ Ritual ceremonies, he argued, impress this social need upon people and make them aware of the existence of something beyond themselves which they believe to be sacred.⁷⁹ Yet that which is beyond the individual is "no more than the awareness on the part of individuals and the collectivity . . . of their participation in a social

69. *Id.* at 60.

70. See Joseph Campbell, *The Secularization of the Sacred*, in *THE RELIGIOUS SITUATION*: 1968, at 601, 609-14 (Donald R. Cutler ed., 1968).

71. See *id.* at 602.

72. *Id.*

73. *Id.* at 609.

74. *Id.* at 609-14.

75. *Id.* at 610.

76. JONATHAN S. WOOCHEER, *SACRED SURVIVAL: THE CIVIL RELIGION OF AMERICAN JEWS* 13 (1986).

77. JOHNSTONE, *supra* note 39, at 32, 142-43.

78. W. Lloyd Warner, *An American Sacred Ceremony*, in *AMERICAN CIVIL RELIGION*, *supra* note 32, at 89, 108-09.

79. *Id.* at 109.

group.”⁸⁰ That is, religion in its most basic form, even theistic religion, might ultimately best be understood as a form of group identification⁸¹ and religious rituals as the primary means of experiencing identity with the group.

Professor Milton Gordon explained why some adherents of theistic religions might be unaware of the role their religious practices play in transmitting social identity:

[A]ll of the major religious faiths—Jews, Catholics, and Protestants—operate functionally so as to perpetuate ethnic communality in the general population. The Protestants are least aware of the process since their majority status and historical precedence in America tend to make them unaware of the Protestant assumptions and criteria operative in many of the institutions which are labeled as “American” and “community-wide.”⁸²

Even when religious rituals are generally devoid of any theistic component, functioning primarily to give adherents religious group identity, they can still be understood as primarily religious. Marshall Sklare postulated that the increase in Jewish ritual observed among families with young children could “be viewed in a sacred rather than a secular context, for in impressing on his child the importance of Jewish survival, the parent is involved in making an ultimate commitment.”⁸³ Especially for people whose religions are closely identified with ethnicity (Jews and Hindus, for example), passing on one’s identity to one’s children, sharing with them one’s only tangible connection with an irretrievable past extending back as far as the origins of the race or tribe, giving them rituals to help them place themselves at the living end of an eternity of human history—those endeavors are almost necessarily of a religious nature.

The function of religious ritual as a transmitter of social identity, rather than as a tool of religious indoctrination, is underscored when rituals are performed in a language other than English. Even when rituals have clear religious meaning in their original language, that meaning will be lost on children who speak only English. Rather than attempting to explicitly translate the “religious” message, some religious leaders rely on the ritual acts themselves, without explanation, to communicate unarticulated messages to the children.⁸⁴ The clearest message such unex-

80. *Id.* For an examination of the distinction between the secular and the sacred and an attempt to identify what remains sacred in modern culture, see Huston Smith, *Secularization and the Sacred: The Contemporary Scene*, in *THE RELIGIOUS SITUATION*: 1968, *supra* note 70, at 583.

81. *Cf.* WILLIAMS, *supra* note 41, at 47 (Hindu parents state that while they participate in religious groups to show devotion to God, they involve their children primarily to foster group identity).

82. GORDON, *supra* note 12, at 241.

83. MARSHALL SKLARE & JOSEPH GREENBLUM, *JEWISH IDENTITY ON THE SUBURBAN FRONTIER* 74 (2d ed. 1979).

84. WILLIAMS, *supra* note 41, at 286-87.

plained rituals can convey to the child is the message of belonging. Through the ritual experience children become a part of—identify with—the group with whom they share that experience, whether the immediate family or a larger religious or cultural group.

Often, however, Supreme Court decisions have demonstrated that religious practice is not protected by the First Amendment unless it shares stereotypical characteristics with the generally accepted religious practices of the Christian majority.⁸⁵ Members of minority religions—even ancient, well-established religions with millions of adherents and widely recognized and verifiable rituals—are deprived of their equality and their constitutionally guaranteed religious freedom by such decisions. Constitutional rights are meaningless if not used to protect minorities from the tyranny of the majority, expressed in the guise of rules of “‘general applicability.’”⁸⁶

B. Teaching “Americanism”: The Role of the Public Schools in Acculturation and Identity Formation

The public schools are a powerful tool for introducing children to the dominant culture and assimilating them into it.⁸⁷ While children of the majority are presumably indoctrinated into the dominant culture both inside and outside the home, immigrant parents, who may never fully adopt American language and culture, are not equipped to pass the new culture on to their children. The assimilation of immigrant children into the dominant culture must, therefore, take place outside the home: on the streets, with friends, and particularly in school.⁸⁸

The public schools have been enormously successful in acculturating immigrant children and the children of immigrants.⁸⁹ This acculturation is accomplished by bringing these children into an atmosphere of American national unity, enforced through the authority of the school

85. See, e.g., *Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (denying Native American Church members who wished to use peyote for religious rituals an exemption from a criminal statute prohibiting its use); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (refusing to grant an exemption under the Free Exercise Clause to an Orthodox Jew who wished to wear a yarmulke in violation of the military dress code, even though the code allowed the wearing of crosses, rings, and other symbols typical of Christian identity).

86. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

87. See Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1271, 1276-92 (1991) (describing the judicial view of the mission of the schools as the “inculcation of values”).

88. See SHERMAN, *supra* note 40, at 30 (identifying the school as the most important institution for assimilating immigrant children into the dominant culture, and explaining school's effects on the psyches of immigrant children).

89. GORDON, *supra* note 12, at 244-45 (describing the extent to which second-generation immigrants are and will be acculturated and identifying public schools as one of the primary sources of acculturation).

and through the peer group.⁹⁰ In this environment children are given a second set of rituals with which to establish a group identity in addition to that being formed within the family and the parents' religious group—children are taught the “religion of democracy” through American history, social studies, and civics.⁹¹ “[W]hatever contest ensued between the behavior models of the parents' culture and those of the general American society . . . there was no question as to which would be the winner.”⁹²

Formal lessons are not the only way schools influence the behavioral development of children.⁹³ Children are also affected by more subtle experiences, including school celebration of holidays. Children probably gain some sense of the importance and meaning of a holiday from the length of time public schools are closed to celebrate that holiday. Whereas the commemoration of people like Lincoln and Washington, whom children study in their formal history and civics lessons, might together merit only one combined Presidents' Day holiday,⁹⁴ Christmas usually commands a full two-week vacation.⁹⁵ To the degree that vacation time is a measure of the cultural importance of a holiday, school children are taught to hold Christmas in high regard.

Time off, however, is only one means by which society conveys to children the importance of a holiday. Halloween, St. Patrick's Day, and Valentine's Day are not typically marked by school closings;⁹⁶ yet the time and activity devoted to these holidays in the school curriculum can be significant. Activities in anticipation of Christmas, such as theme art,

90. SHERMAN, *supra* note 40, at 30-31. According to Sherman, two important assimilating tools of the public school are compulsory attendance and the creation of an atmosphere of national unity. By taking children out of the home for a significant portion of the day, compulsory attendance removes the child from the influence of the parents' culture. *Id.* at 30. Further, in the atmosphere of national unity created by the schools, it becomes the patriotic duty of the child to speak English. *Id.* The schoolchild is then immersed in a group of American children, where English is not only the language of instruction and of authority but is also an immediate necessity for communicating with one's peers. Especially in cities with significant non-English-speaking populations, children often come from diverse linguistic backgrounds. English becomes the *lingua franca* of the new American child's multicultural world.

91. Herberg, *supra* note 32 (describing American political and social beliefs, including democratic ideals, as a “religion”).

92. GORDON, *supra* note 12, at 107 (describing how acculturation weakened and eventually overpowered ties to previous culture and threatened immigrant family interactions).

93. See John F. Wilson, *A Historian's Approach to Civil Religion*, in AMERICAN CIVIL RELIGION, *supra* note 32, at 115, 130. Wilson noted Phillip Hammond's suggestion that it is not through formal teaching but through competitive sports, student elections, etc., that civil religion (Herberg's “religion of democracy”) would be taught in public schools. *Id.* Wilson further noted that Hammond echoed J. Paul Williams' earlier view of the school as the primary institution for teaching “civil religion.” *Id.*; see also Herberg, *supra* note 32, at 84 (articulating Williams' view that democracy is taught as religion).

94. Some school districts continue to honor both Lincoln and Washington on their traditional birthdays. See, e.g., 1991-92 Berkeley Unified School District Calendar (1991).

95. See, e.g., *id.*

96. See, e.g., *id.*

music, storytelling, pageants, and plays, often occupy a significant amount of school time during November and December. School time devoted to holiday activities can be of greater influence than school closings because children might find no special meaning in school closings if, as with weekends and summer vacation, the time off is not marked by special activities underscoring the holiday's significance. Because the significance of a holiday can be suggested by the amount of time and number of activities devoted to its observance, what children learn by observing a holiday such as Christmas is of some consequence.

Common patterns of holiday observance in schools incorporate a wide array of traditional activities, including symbolic objects, colors, foods, and myth-like stories.⁹⁷ Many of the activities try to draw connections between school and home observances. For example, students might be asked to make objects in school that can be used in home celebrations (such as Christmas tree ornaments), to talk about what they will be doing at home during Christmas, or to share their Christmas gifts with the class after the holiday season is over. Most schools are careful not to celebrate Christmas with an explicitly theistic message because of the obvious constitutional implications.⁹⁸ But even ritual observances that are intended to be secular can serve a religious function, and thus raise constitutional concerns in the public school context.

Of course, nonreligious holidays can also involve ritual and symbolism that lead individuals to identify with a larger group. Warner's examination of Memorial Day rites in a small town suggested that such civil ceremonies "are rituals of a sacred symbol system which functions periodically to unify the whole community."⁹⁹ School celebration of Christmas could arguably operate in a similar fashion by advancing children in a secular way into the larger society.¹⁰⁰ The question, then, is whether Christmas observances in the public schools draw children into society on a purely secular level or whether they also or primarily operate on a religious level. The next Section addresses that question.

C. Observance of Christmas in the Public Elementary Schools as Religious Indoctrination

In American society, as perhaps in any secular society, religious and nonreligious training are usually allocated to separate institutions.

97. See generally GEORGE W. DOUGLAS, *THE AMERICAN BOOK OF DAYS* (1948) (description of American holiday observances, chronologically by day).

98. Lattin, *supra* note 3, at A12 (noting total lack of religious reference in school holiday celebrations).

99. Warner, *supra* note 78, at 91 (discussing how Memorial Day celebrations have many of the same characteristics and serve many of the same functions as religious rituals).

100. Cf. Greenawalt, *supra* note 53, at 768 (questioning whether any of several identified elements of religion are "sufficient" to make something religious because many of the same features of religion have "nonreligious manifestations").

Fusion of religious and nonreligious education is inappropriate unless a society is unitary and its members share common group identity, institutions, and values. For example, in societies not self-consciously secular, children's upbringing can consist almost entirely of their religious upbringing, "and any question of the *relation* between religion and education would not [make] sense."¹⁰¹

But education, whether religious or nonreligious, is not confined to formal institutional means. It also takes place informally through conversation, the retelling of myths and stories, and observation of and participation in ritual practices. In primitive societies all socialization, including religious socialization, is achieved this way.¹⁰² This same informal religious socialization goes on all around American children, despite the official separation of religious and general education.¹⁰³

Informal socialization continues even inside the schoolhouse door. Whether or not children are formally instructed in religion, modern school holiday observances are likely to socialize on the informal level. For example, a teacher probably would not give a formal lesson on why children should decorate Christmas trees or instruct children on the feelings and expectations they should develop at Christmastime, but might have children make Christmas decorations or read a Christmas story.

Of course, whether children will understand the meaning of school holiday observances like Christmas as religious or secular is difficult to determine. But a child need not be conscious of the religious nature of a ritual for that ritual to instill religious identification in the child. Like Jewish and Hindu holiday observances, Christian rituals need not contain a theistic component to perform a religious function.¹⁰⁴ Young children learn their religious identity primarily through informal means. Only later do children supplement their socialization through formal cognitive learning.¹⁰⁵ Thus, although children are capable of observing and emulating the rituals associated with mature religious belief from an early age, it is not until later in their development that they are able to fully appreciate the role and purpose, or even the existence, of religious

101. Harvey G. Cox, *The Relationship Between Religion and Education*, in RELIGION AND PUBLIC EDUCATION 99, 99 (Theodore R.Sizer ed., 1967) (discussing the relationship between religious and educational institutions, and identifying the theological and pedagogical issues that arise where these institutions intersect).

102. JOHNSTONE, *supra* note 39, at 78. Some people believe that primitive man more closely perceived the original meanings of his rituals and symbols and that we have forgotten the meanings through the ages; but this might not be so. It is a modern innovation to analyze our cultural symbols; ancient man simply lived them. See CARL G. JUNG, *Approaching the Unconscious*, in MAN AND HIS SYMBOLS 81 (1964) (discussing the origin of and basis for symbolic rituals like Christmas).

103. Johnstone, *supra* note 39, at 78, 80 (informal socialization remains important in industrialized society).

104. See WILLIAMS, *supra* note 41, at 287 (concerning foreign language rituals). Rituals in a tongue the children do not understand cannot carry any explicit message. Cf. *supra* text accompanying note 63 (discussing the function served by Hindu religious study groups).

105. JOHNSTONE, *supra* note 39, at 89.

beliefs.¹⁰⁶

Dr. Carl Jung has observed that even many adult participants in religious rituals do not consciously understand the symbolic meaning of the rituals:

You may ask many civilized people in vain for the real meaning of the Christmas tree or of the Easter egg. The fact is they do things without knowing why they do them. I am inclined to the view that things were generally done first and that it was only a long time afterward that somebody asked why they were done.¹⁰⁷

Despite the fact that children and even many adults might not recognize the religious significance of Christmas rituals, the idea that Christmas has a primarily secular meaning is difficult for non-Christians to accept. Certainly participants and nonparticipants are usually distinguished along religious lines.¹⁰⁸ Children learn their nominal religious identity from an early age.¹⁰⁹ As they learn the Christmas ritual, they discover it to be something that differentiates the labels "Muslim" and "Jew" from "Catholic" and "Protestant." To a child, a "Christian" is one who celebrates Christmas, while a "Jew" or "Muslim" does not.

Justice O'Connor has suggested that Christmas is both secular *and* religious.¹¹⁰ Assuming this were true, the public schools could in theory ensure that children be exposed only to the secular, not the religious aspects of Christmas. But to a child just beginning to develop a religious identity, this distinction between secular and religious has no meaning. Some scholars have found that "[t]he young child tends to confuse religious identity with nationality and racial designations."¹¹¹ Children are only beginning to develop the means to classify their knowledge; the Christmas ritual will be just one among many lessons learned formally and informally at school, on a par with spelling and arithmetic lessons, rules of personal hygiene, playground manners, and lunch-line decorum.

The child's inability to distinguish between the "secular" and the

106. *Id.* at 90.

107. JUNG, *supra* note 102, at 76 (discussing how people often participate in symbolic rituals without understanding the content of ideas conveyed or represented by those rituals).

108. It is true that Jehovah's Witnesses and some other Christian groups do not observe Christmas. Early Christians did not celebrate Christmas, condemning observance of all birthdays as a repugnant, heathen custom. DOUGLAS, *supra* note 97, at 626. It is only fair to note that some acculturated Jews, on the other hand, do celebrate Christmas. *Cf. id.* at 632-33 (as to why Jews should celebrate Christmas). Still, it seems that the common reaction to being told that someone does not celebrate Christmas is to conclude that the person is Jewish. Yet if Christmas were a secular "American" holiday the more natural reaction would be to conclude that the person is a foreigner.

109. See JOHNSTONE, *supra* note 39, at 90 (citing David Elkind, *Age Changes in the Meaning of Religious Identity*, in REVIEW OF RELIGIOUS RESEARCH 6, 34-40 (1964)).

110. *County of Allegheny v. ACLU*, 492 U.S. 573, 633-35 (1989) (O'Connor, J., concurring in part and in the judgment).

111. JOHNSTONE, *supra* note 39, at 78 (citing David Elkind, *Age Changes in the Meaning of Religious Identity*, in REVIEW OF RELIGIOUS RESEARCH 6 (1964)).

"religious" aspects of Christmas is compounded by the fact that the child's mind, searching consciously or unconsciously for the meaning of Christmas rituals, will not be limited to the controlled "secular" context of the school celebration. Children will try to glean meaning from whatever sources their surroundings offer. In searching for the symbolic meaning of rituals, children are not sent alone into a barren wilderness. Rather, they are released every day into a world in which only government actors are constrained by the First Amendment; the Constitution does not limit private actors to a secular presentation of Christmas. Children searching for the meaning of Christmas will have no trouble discovering a religious message that has been carried worldwide for nearly two thousand years. The ritual is emblazoned on stamps¹¹² and repeated in television and radio advertisements, "news" stories, broadcasts of midnight mass, and the lyrics of ubiquitous Christmas hymns;¹¹³ it is on storefronts, private lawns, churchyards—even in public parks and on the courthouse steps.¹¹⁴

The difficulty in separating the "secular" and "religious" aspects of Christmas is not limited to children, however. Suggesting that Christmas is both secular and religious is tantamount to suggesting that prayer is both secular and religious. Prayer might involve going to a particular building, reading from certain prescribed texts, eating and drinking particular substances, and mouthing certain formulaic utterances—all actions having secular purposes as well.¹¹⁵ In the context of the religious purpose of supplication to a god, however, the acts are raised to religious significance. Similarly, the religious nature of religious hymns might be

112. During the Christmas season, the Postal Service often issues Christmas stamps bearing religious paintings. The Court has noted that religious paintings are unobjectionable in a museum setting. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). But the Christmas season is not a secular context—art might be honored at any time of year but the Postal Service does not choose to honor religious paintings at all times of the year. At Christmastime the secular excuse is unconvincing.

113. Consider Christmas television programming. The Christmas episode of nearly every weekly television series, whether or not directed at children, revolves around the idea of Santa Claus. Often a lifelong disbeliever is converted or characters overcome with doubt and cynicism from the previous eleven months have their faith restored through "witnessing" what every grownup knows to be impossible. *Cf. CHARLES DICKENS, A CHRISTMAS CAROL* (1843) ("Bah! Humbug!"-type sees the light and discovers how wonderful Christmas really is); *DR. SEUSS, HOW THE GRINCH STOLE CHRISTMAS* (1967) (same). Writers and producers, and many viewers, might feel that these programs present a secular Christmas theme that all should find simply heartwarming; yet the retelling of these popular Christmas myths is hardly secular. Perhaps presentation of Christ's miraculous conception would be inappropriate in the popular media; however, the magical feats of Santa—squeezing his immense jolliness through millions of impossibly skinny chimneys on a single night—is no less miraculous. The unmistakable effect is to evoke thoughts of the religious miracle and message of Jesus Christ, forsaken by the harried and jaded, and to rephrase Christ's brotherly love in the quotidian terms of Santa's holiday gift-giving spirit.

114. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (display on courthouse steps); *Lynch*, 465 U.S. at 668 (park display).

115. For example, this litany could just as easily describe eating out.

thought to reside in their words; but that does not mean that one can separate the lyrics from the tune and thereby create one religious and one secular song, or that the church organist is somehow involved in a secular act while the choir is involved in a religious one. Ultimately, Christmas rituals can only be reasonably understood as religious because such rituals can never be truly divorced from the broader religious context in which they arose.

Cultural rites operate to express cultural meaning. Through their symbols they tell participants and observers about society and about the role of members within that society.¹¹⁶ When public schools observe Christmas, they give children a rich repertoire of deeply symbolic language. Christmas celebrants might become so accustomed to this symbolism that they no longer register the holiday as religious and are unaware of any conscious impact of the holiday's language and symbols. "Yet symbols which are tenaciously adhered to can hardly be dismissed as altogether meaningless. They must mean something. . . . Symbols are the only means of communication. They are the only means of expressing value; the main instruments of thought, the only regulators of experience."¹¹⁷

Justice Brennan acknowledged in his *Allegheny* concurrence that mere objects can carry religious meaning depending on the context.¹¹⁸ Although many commentators agree that it is nearly impossible to arrive at a useful definition of the term "religion" for constitutional purposes,¹¹⁹ Justice Brennan attempted to develop a working definition of "religious symbol." He said that the First Amendment prohibits government "display of an object that 'retains a specifically Christian [or other] religious meaning.'"¹²⁰ He thus acknowledged the religious roots of "secular" holidays by finding that mere objects can be infected with religious significance.¹²¹ Professor Greenawalt also recognized this principle by noting

116. Cf. DOUGLAS, *supra* note 61, at 38 ("For communication about religion to take place, the structure of the symbols must be able to express something relevant to the social order.").

117. *Id.* at 37-38. Douglas explained that the meaning of ritual should not be underestimated—"empty" rituals are not perpetuated. *Id.* at 37. As I have argued, the meaning of, for example, Friday abstinence for Catholics, or *kashruth* for Jews, is that of "belonging." See generally CHRISTOPHER I. EJIZU, OFO: IGBO RITUAL SYMBOL 1-10 (1986) (definition and importance of symbols, especially religious symbols, and their operation on various levels of consciousness); JUNG, *supra* note 102 (origins of symbolic ritual and the significance of Christmas rituals in particular).

118. *County of Allegheny v. ACLU*, 492 U.S. 573, 639 (1989) (Brennan, J., concurring in part and dissenting in part).

119. See, e.g., Greenawalt, *supra* note 53, at 763 ("[A]ny dictionary approach oversimplifies the concept of religion, and the very phrase 'definition of religion' is potentially misleading.").

120. *Allegheny*, 492 U.S. at 637 (1989) (Brennan, J., concurring in part and dissenting in part) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 708 (1984) (Brennan, J., dissenting)).

121. See *id.* at 639-40. Justice Brennan differed with Justice O'Connor and others who saw holiday symbols as "necessarily secular," pointing out that Justice O'Connor could only find that the Christmas tree and menorah presented a permissible message of religious freedom by concluding that both the Christmas tree and menorah were religious symbols. *Id.* If the tree had really been

that history can operate in two directions—either robbing symbols of religious significance or instilling it in them. “If everyone has come to regard Santa Claus as a nonreligious symbol, the government’s [display of him] would not be religious. On the other hand, if everyone thought seriously of Santa Claus as a Christian saint . . . the government’s acts would support religion.”¹²²

As long as Christmas rituals are allowed in the schools, some children will be torn by competing loyalties. In the classroom and among school friends, the celebration of Christmas is the normal and expected custom; it becomes integrated with the basic school curriculum, like reading and writing. The process of self-identification becomes more complicated for children when the rituals and symbolism taught to them in the classroom, and informally reinforced in the surrounding society, are unlike those of their parents. While non-Christian parents present the message that December 25th is indistinguishable from other days, non-Christian children feel pressure to embrace Christmas celebrations as their own in order to achieve full assimilation into American society. Ultimately, children are left to their own devices in filtering the different and sometimes conflicting messages about religious identity learned at home, in school, and through observation of the world at large.

III

SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE: KEEPING RELIGIOUS OBSERVANCE OUTSIDE THE SCHOOLS

In the previous Parts, I argued that religion can play a central role in an individual’s search for identity and that religion is not only about faith but also about symbols, practices, and rituals.¹²³ With these under-

secular, the display’s message would not have been one of religious plurality but only an endorsement of Judaism. *Id.*

122. Greenawalt, *supra* note 53, at 794 (discussing what should be the constitutional status of symbols that arguably have religious and secular content).

123. One characteristic feature to note in all First Amendment religion cases, whether under the Free Exercise or the Establishment Clause, is that no one seems to know just what “religion” is. The Court has occasionally been willing to classify certain activities as being religious. For example, classroom prayer qualifies. *See Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (“It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious . . .”). Reading and posting the Bible qualifies. *School Dist. v. Schempp*, 374 U.S. 203, 224 (1963) (Bible inarguably an instrument of religion, used in this case for a religious purpose); *see also Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*) (“The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”).

At times the Court has even been willing to say what definitely *cannot* be classified as religion. For example, the Court has stated that government actions such as using the words “God save the United States and this honorable court” to open Court sessions and declaring Thanksgiving a public holiday are “the only ways reasonably possible in our culture . . . of solemnizing public occasions.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring). But there has never been a serious attempt to

lying values and concepts in mind, I now turn to Supreme Court First Amendment jurisprudence to test the constitutional validity of public elementary school Christmas holiday observances. I start by discussing the historical background of the Supreme Court's treatment of religion in general and in the public schools in particular. I then consider the five modern Establishment Clause approaches to church-state interactions—the *Lemon* test's purpose, effect, and entanglement branches, Justice O'Connor's endorsement test, and Justice Kennedy's coercion test—in the context of public school Christmas observances. Such observances fail to pass constitutional muster under any of these approaches because they amount to state-supported religious indoctrination, which is forbidden by the First Amendment.

A. *The Problem of Church, State, and School*

The history of religious freedom in the United States has been one of struggle by religious minorities to share in the rights guaranteed by the First Amendment. Originally, the First Amendment functioned primarily to protect Protestants from the imposition at a national level of particular practices of competing sects¹²⁴ and only later, as Catholic immigrants streamed into the country, gradually recognized the religious rights of non-Protestants.¹²⁵ While many of the most egregious examples

define religion in the cases. Nor should such an attempt necessarily be made, for it is not at all obvious that religion could ever be successfully defined. See Greenawalt, *supra* note 53, at 762-69 (1984). Greenawalt avoids, and would help courts avoid, having to offer an explicit definition of "religion" by using an analogical approach: defining what is religious in any given case by analogy to the indisputably religious. *Id.*

For purposes of this Comment, it is not necessary to define religion any more precisely than has already been done in the cases. Part II has, however, attempted to expand the reader's current understanding of the "indisputably religious" to include the use of well-known religious symbols and rituals to bring children into the religious group by inculcating in those children religious group identity.

124. Nine of the original colonies had state-established religions. James E. Wood, Jr., *New Religions and the First Amendment*, in RELIGION AND THE STATE 185, 188 (James E. Wood, Jr. ed., 1985). These establishments soon began to give way under the pressures of a growingly diverse population. Neil C. McCluskey, *The New Secularity and the Requirements of Pluralism*, in RELIGION AND PUBLIC EDUCATION, *supra* note 101, at 231, 234 (discussing secularization of schools and the attendant reduction in the influence of previously dominant sectarian Protestant idcas). Virginia, for example, ended its church establishment soon after the American Revolution, while Connecticut, New Hampshire, and Massachusetts waited until 1818, 1819, and 1933, respectively. In many states, the established religion was replaced by multiple establishments. See R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 20-38 (1950) (discussing establishment of religion in the colonies and the formation of multiple establishments); see also *Engel*, 370 U.S. at 428 n.10 (discussing colonies' varied approaches to established religion).

125. The gradual decline of Protestant control over the public schools is reflected in state court decisions and constitutions and statutes adopted during the nineteenth century and into the twentieth. One of the most important cases was a decision of the Ohio Supreme Court upholding Cincinnati's prohibition of religious instruction and Bible-reading. BUTTS, *supra* note 124, at 138 & n.37 (citing *Board of Educ. v. Minor*, 23 Ohio St. 211 (1872)); see also *School Dist. v. Schempp*, 374 U.S. 203, 272-75 (1963) (Brennan, J., concurring); 2 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 488-500 (1950) (giving text of seven state constitutional provisions prohibiting

of state-imposed Protestant and Christian sectarianism in the schools have been gradually eliminated,¹²⁶ a strong core bias in favor of Christianity has been left behind. Many immigrants to America today face state-sponsored antagonism to their religious beliefs because they are not Christians—they are Muslims, Sikhs, Hindus, Buddhists, and Jews, to name just a few religious groups. To these people, a religious freedom conceived of as the freedom to practice any form of Christianity whatsoever is really no freedom at all. This Section looks at the background to testing the constitutionality of public elementary school Christmas holiday observances, emphasizing the special circumstances of children compelled to attend the public schools and there be indoctrinated with the state's values and beliefs—including religious values and beliefs that Christian Americans do not seem to be able to regard as religious at all.

Such religious values and beliefs, instilled in public school children in the guise of holiday celebrations, offend the religious beliefs of non-Christians even though as Christian traditions they might have lost much of their religious import for Christians. By observing the Christian rituals of Christmas, even without any theistic message, schools pass on to children a Christian tradition just as much as Jews and Hindus pass their traditions on to their children through holiday celebrations.¹²⁷

aid to sectarian schools and various laws governing religious instruction in public schools); James E. Wood, Jr., *Religion and Education in American Church-State Relations*, in RELIGION, THE STATE AND EDUCATION 25, 30 (James E. Wood, Jr. ed., 1984) ("[B]y the 1870s most state constitutions expressly divorced religion from the public educational system and state courts widely espoused church-state separation for the public school."). In 1910 the Illinois Supreme Court ruled that reading the King James Bible and reciting the Protestant version of the Lord's Prayer in school was forbidden by the Illinois Constitution. REICHLEY, *supra* note 35, at 146; *cf.* Knowlton v. Baumhaver, 166 N.W. 202 (Iowa 1918) ("well settled" that taxes not to be used for religious instruction, particularly sectarian), *cited in* 2 STOKES, *supra*, at 69 n.228.

126. Originally the schools were sectarian extensions of the churches. DONALD E. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 4 (1963). Indeed, religious instruction was "one of the primary purposes for which schools were founded in the first place in the British colonies." REICHLEY, *supra* note 35, at 136. Educators believed the Bible to be the primary educational tool. BOLES, *supra*, at 7-10 (discussing textbooks used in colonial schools); *see also* 2 STOKES, *supra* note 125, at 52 (discussing the fundamental role that religious instruction played in Massachusetts schools). But reading from the King James Bible and reciting the Lord's Prayer daily were Protestant practices, unacceptable to Catholics. BOLES, *supra*, at 15-16, 23 (discussing the controversy in Massachusetts and elsewhere, after the passage of laws banning sectarian instruction in public schools, over whether Bible-reading is "sectarian"); BUTTS, *supra* note 124, at 118, 138 (discussing how Bible-reading seemed nonsectarian to Protestants but not to Catholics).

Sectarian Protestant teaching, and Christian prayer and practices in general, have been phased out gradually in the schools. *See id.* at 116-18 (discussing the early development of nonsectarian schools); 2 STOKES, *supra* note 125, at 50-61 (discussing the evolution of secularized education in Massachusetts and Connecticut in particular); *cf.* 1827 Laws of Mass., ch. 143, § 7 (Massachusetts law banning sectarian texts), *cited in* BUTTS, *supra* note 124, at 131 n.24; REICHLEY, *supra* note 35, at 137 (discussing the withdrawal of state support for religious instruction as the population became more diverse). More recently, the Supreme Court's decisions in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District v. Schempp*, 374 U.S. 203 (1963), officially made sectarian practices in public schools illegal in all states.

127. *See supra* note 104 and accompanying text.

In the development of freedom-of-religion jurisprudence, the Supreme Court has been keenly aware of the precarious situation of schoolchildren who are compelled by the state to tolerate whatever messages the state wishes to communicate in its schools. The Court's concern for protecting impressionable young minds has its roots in the earliest First Amendment cases, including those not directly interpreting the Establishment Clause.¹²⁸ It echoes concerns of the founding fathers¹²⁹—concerns that have been re-echoed in university,¹³⁰ public school,¹³¹ parochial school,¹³² and even nonschool Establishment Clause cases,¹³³ irrespective of outcome. Justice Brennan, writing for the Court in *Edwards v. Aguillard*,¹³⁴ summarized this line of dicta: "Students in [the public schools] are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."¹³⁵

Similarly, in his concurrence in *School District v. Schempp*, Justice Brennan explicitly recognized the difference between young children and

128. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (unconstitutional to compel children in public schools to salute flag and recite pledge of allegiance). The Court observed: "That [states] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

129. See *School Dist. v. Schempp*, 374 U.S. 203, 235 (Brennan, J., concurring) (quoting Thomas Jefferson's admonition against "putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently inured for religious inquiries," 2 WRITINGS OF THOMAS JEFFERSON 204 (memorial ed. 1903)).

130. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (contrasting church-related university programs, characterized by academic freedom, with parochial elementary school programs, whose policy is to "assure future adherents to a particular faith by having control of their total education at an early age," and noting that "college students are less impressionable and less susceptible to religious indoctrination" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970))).

131. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (striking down a Louisiana statute that forbade teaching the theory of evolution in public schools unless accompanied by instruction in "creation-science," and noting that students in public schools were impressionable and that the state could influence them due to attendance requirements, pupils' emulation of teachers, and peer pressure); *Weisman v. Lee*, 908 F.2d 1090, 1096 (1st Cir. 1990) (Bownes, J., concurring) (middle-school graduation benediction delivered by clergy and invoking a deity held to violate the Establishment Clause) ("Middle school students are at a very different stage in their development and relationship to prayers than state legislators."), *aff'd*, 112 S. Ct. 2649 (1992).

132. *School Dist. v. Ball*, 473 U.S. 373, 390 (1985) (striking down publicly financed programs that provided secular education to students in parochial school classrooms) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.").

133. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding state legislative prayer) ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' . . .").

134. 482 U.S. 578 (1987); see *supra* note 131.

135. *Aguillard*, 482 U.S. at 584 (citations omitted).

adults as an important factor in Establishment Clause cases.¹³⁶ It helps to explain, for example, why it is not unconstitutional for government to support military or prison chaplains¹³⁷ or to open legislative sessions with a prayer,¹³⁸ and why religious colleges may receive tax monies for building grants¹³⁹ while parochial elementary schools may not receive public help even for field trips or maps.¹⁴⁰

Unlike the cases involving adults, the cases involving "religious exercises in the public schools present a unique problem."¹⁴¹ Adults are not as likely to be indoctrinated by the presentation of religious material as are elementary schoolchildren, who have not yet formed a strong religious identity.¹⁴² While adults generally will not misunderstand the government's role in a religious activity,¹⁴³ schoolchildren are "very susceptible to the influence of their teachers."¹⁴⁴ Unlike adults who may absent themselves if a religious message is not to their liking,¹⁴⁵ children might not be able to distinguish between a teacher's request for voluntary action and a command that must be obeyed.¹⁴⁶ And, of course, children in the public schools have no option to absent themselves from compulsory school attendance.

Thus in any First Amendment inquiry in the elementary school context, the special susceptibility of young children must be taken into account. It is a distinct issue that sharpens any test:¹⁴⁷ state action that

136. 374 U.S. 203, 252-53 (1963) (Brennan, J., concurring) (distinguishing between college students who attend classes voluntarily and elementary school students whose class attendance is mandatory).

137. *Id.* at 297-99.

138. *Id.* at 299-300; *cf.* *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the Nebraska Legislature's practice of paying a chaplain with tax monies to open sessions with a prayer).

139. *See Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (upholding state grants to religious universities for building construction).

140. *Cf. Wolman v. Walter*, 433 U.S. 229, 252-55 (1977) (holding state funding of parochial school field trips to be "an impermissible direct aid to sectarian education," relying in part on *Meek v. Pittenger*, 421 U.S. 349 (1975), which held state funding of maps and charts in parochial schools to be unconstitutional).

141. *Schempp*, 374 U.S. at 294 (Brennan, J., concurring).

142. *See id.* at 276 (quoting *State ex rel. Finger v. Weedman*, 226 N.W. 348, 354 (S.D. 1929), which struck down a policy of expelling Roman Catholic children from public school for refusal to attend opening exercises where King James version of Bible and Lord's Prayer were read without sectarian comment, noting that children are "immature, without fixed religious convictions").

143. *See Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

144. *Schempp*, 374 U.S. at 262 n.28 (Brennan, J., concurring) (quoting *O'Connor v. Hendrick*, 96 N.Y.S. 161, 169 (App. Div. 1905), *aff'd*, 77 N.E. 612 (N.Y. 1906), which held that teachers dressed in Catholic religious garb administering Catholic prayers constituted improper religious training in public school).

145. *Id.* at 299-300.

146. *Id.* at 263 n.28 ("[In school] a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form.") (quoting *State ex rel. Freeman v. Scheve*, 93 N.W. 169, 170 (Neb. 1903)).

147. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("[I]n employing the three-pronged *Lemon* test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools.").

passes constitutional scrutiny when it affects the general public can constitute impermissible religious indoctrination when it takes place in an elementary school.¹⁴⁸

B. Testing Christmas Celebrations in the Public Elementary Schools

1. The Lemon Test

In its modern Establishment Clause jurisprudence the Supreme Court has generally applied a test formulated twenty years ago in *Lemon v. Kurtzman*.¹⁴⁹ While disagreement exists over the value of this test¹⁵⁰ and various members of the Court have at times denied its primacy or attempted to abandon it,¹⁵¹ only once since 1971 has the Court decided an Establishment Clause case without referring to *Lemon*.¹⁵² Under *Lemon v. Kurtzman*, government action violates the Establishment Clause if it cannot meet a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹⁵³ The test is disjunctive: if any branch¹⁵⁴ is not met, the state program

148. How sharp this inquiry has been is demonstrated by the Court having struck down, with only two exceptions, every public school practice that it has reviewed as possibly offending the Establishment Clause. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (holding unconstitutional a public middle school's inclusion of clergy offering prayers as part of its official graduation ceremony); *Aguillard*, 482 U.S. at 583-84 (striking down a statute requiring teaching of "creation-science" if evolution is taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down a statute that provided a moment of silence for "meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (striking down a statute requiring posting of the Ten Commandments in classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statutory ban on the teaching of evolution); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down teacher-led student recitation of prayers and Bible verses selected by the state); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down teacher-led student recitation of state-composed prayer); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (striking down a release-time program involving religious instruction on school grounds). The two exceptions were *Board of Education v. Mergens*, 496 U.S. 226 (1990) (upholding the practice of permitting extracurricular student religious clubs the same privileges as nonreligious clubs), and *Zorach v. Causon*, 343 U.S. 306 (1952) (upholding a release-time program for religious instruction off school grounds).

149. 403 U.S. 602 (1971).

150. Numerous scholars have decried the *Lemon* test. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-83 (1980) (criticizing "entanglement" test); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 827-31 (1984) (also criticizing "entanglement" test); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 891-96 (1984) (criticizing "secular purpose" test).

151. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 68-70 (1985) (O'Connor, J., concurring); *id.* at 108-13 (1985) (Rehnquist, J., dissenting) (suggesting abandoning the test); *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984).

152. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (decided primarily on historical grounds, relying on evidence of the framers' original intent with respect to legislative prayer).

153. *Lemon*, 403 U.S. at 612-13.

154. The branches are "purpose," "effect," and "entanglement." See *id.*

fails.

Lemon decided two lower court cases.¹⁵⁵ Both Rhode Island and Pennsylvania had programs aimed at reducing the financial burden on parochial schools and their employees by supplementing some teachers' salaries with state funds. Teachers participating in the program were not to spend any time giving religious instruction.¹⁵⁶ In essence, these programs sought to duplicate secular public school instruction in a parochial school setting under the guidance of parochial school administrators. The Court held these programs unconstitutional because they fostered an "excessive entanglement" between government and religion¹⁵⁷ in violation of the third branch of the *Lemon* test.

In formulating its test, the *Lemon* Court looked to past decisions in which tax support of religious activity had been upheld. The Court cited *Board of Education v. Allen*¹⁵⁸ as the source of the first and second parts of the new test, but both branches of this test can be properly, and more clearly, traced to *School District v. Schempp*, decided in 1963.¹⁵⁹

The test may be stated as follows: 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. That is to say that 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.¹⁶⁰

Neither the first nor second part of the test could resolve the immediate issue in *Lemon*. The Court was unable to conclude that the legislatures of either Rhode Island or Pennsylvania had intended to advance religion with their school-aid programs.¹⁶¹ Nor could the Court deter-

155. *Id.* at 606-07.

156. *Id.* at 608, 610.

157. *Id.* at 609, 607-11.

158. 392 U.S. 236 (1968) (lending of textbooks to private school students by public schools did not violate the Establishment Clause).

159. 374 U.S. 203, 222 (1963) (unconstitutional to require the reading of Bible passages and the reciting of the Lord's Prayer in classroom). *Schempp* cited *Everson v. Board of Education*, 330 U.S. 1 (1947), and *McGowan v. Maryland*, 366 U.S. 420 (1960), as sources for the test. *Everson* upheld a state law reimbursing parents of children in private religious schools for the costs of busing their children to school. 330 U.S. at 16-17. In discussing the impropriety of denying the benefits of "public welfare legislation" to any person on the basis of their faith or lack of faith, the Court cited as an example the public provision of police services to protect parochial school children as well as public school children. *Id.* at 17. Such services "would serve much the same purpose and accomplish much the same result" as state aid for free transportation of children. *Id.* *McGowan* noted that *Everson* had "found that the purpose and effect of the statute in question was general 'public welfare legislation,'" *McGowan*, 366 U.S. at 443-44 (citation omitted), and applied this reasoning to an analysis of Sunday closing laws. The Court found that these laws emphasized "secular considerations," and therefore did not implicate the Establishment Clause. *Id.* at 444.

160. *Schempp*, 374 U.S. at 222 (citations omitted).

161. *Lemon*, 403 U.S. at 613.

mine that secular textbooks had in fact been used to teach religion.¹⁶² Under the *Schempp* test, the state-aid plans would stand.

The Court's difficulty lay in the fact that it had tried to evaluate establishment of religion in the parochial school context under a test developed for the public school context. In the public school, the state is unquestionably the authority—everything that occurs in the public school is ultimately either at the command of or with the consent of the state. As the state may not establish any religion, any activity with religious content immediately becomes suspect. Conversely, in the parochial school context religious activity and indoctrination are the norm;¹⁶³ it is state involvement in the religious activity rather than religious activity itself that becomes suspect. The *Schempp* test, therefore, was inappropriate for the problem in *Lemon*.¹⁶⁴

The Court next looked to *Walz v. Tax Commission*,¹⁶⁵ a case involving the state's relationship with a religious institution. From *Walz*, which had upheld the exemption of religious organizations from state taxation, the *Lemon* Court derived the third part of its test prohibiting excessive government entanglement with religion.¹⁶⁶ Curiously, the *Walz* Court had not openly established a new test or even implied that it was consciously modifying the existing *Schempp* formulation. Rather, recognizing that any government action could occasion some degree of involvement with religion, the Court examined whether an "excessive entanglement" existed so that it could determine the degree to which a state law might permissibly advance or inhibit religion.¹⁶⁷ The emphasis was on "excessive" rather than "entanglement."¹⁶⁸ Indeed, in *Walz* the Court affirmed rather than invalidated the state's grant of tax-exempt status to churches, as it had affirmed the theoretically neutral state-aid

162. *Id.*

163. See *School Dist. v. Ball*, 473 U.S. 373, 388-89 (1985) (striking down a program that provided classes to parochial school students at public expense in classrooms located in and leased from the parochial schools).

164. The Court applied the *Schempp* test in *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding state aid to all students, including parochial school students, in the form of textbook loans), *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a state law preventing public school teachers from teaching evolution), and *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding the State's right to exempt religious organizations from general tax laws). Both *Allen* and *Walz* applied the *Schempp* test and found no establishment of religion. In the only public school case, *Epperson*, establishment of religion was found, however, under the *Schempp* test. These holdings suggest that the *Schempp* test would not support a finding of establishment of religion in the private school context and thus that *Schempp* is the wrong test to use in the private parochial school context.

165. 397 U.S. 664 (1970).

166. *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674). The Court found "entanglement" in the government's supervision of the parochial schools' ostensibly secular teaching techniques and educational programs. *Id.* at 613-14.

167. *Id.* at 614 ("examin[ing] the form of the relationship for the light that it casts on the substance").

168. *Id.*

programs in *Everson v. Board of Education*¹⁶⁹ and *Board of Education v. Allen*.¹⁷⁰

Since the *Lemon* decision in 1971, the Supreme Court has heard only two cases in which it was asked to consider the constitutionality of holiday celebrations.¹⁷¹ In *Lynch v. Donnelly*,¹⁷² decided in 1984, the Court considered the propriety of a city's sponsorship of an annual crèche display as part of a larger commercial Christmas display.¹⁷³ *County of Allegheny v. ACLU*,¹⁷⁴ decided in 1989, likewise concerned a government's public display of a crèche and also required the Court to examine the propriety of a menorah displayed side by side with a Christmas tree on the lawn of a public office building.¹⁷⁵

In *Lynch* the Court applied the three branches of the *Lemon* test,¹⁷⁶ finding an adequate secular purpose for the crèche display¹⁷⁷ and no

169. 330 U.S. 1 (1947).

170. 392 U.S. 236 (1968).

171. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Lower courts, however, have addressed the issue on several occasions. For example, in *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit examined the federal government's public display of a crèche. In 1980 the Eighth Circuit decided a question remarkably close to the issue under consideration here. In *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980), the school district's annual Christmas programs and pageants were challenged but upheld as not overstepping the bounds of propriety under the Establishment Clause. In dissent Judge McMillian recounted the Supreme Court's doctrine favoring the protection of young children from state-supported religious activity. *Id.* at 1326 (McMillian, J., dissenting). Judge McMillian would have held the school holiday celebrations unconstitutional. *Id.* For an analysis of the facts and constitutional issues in *Florey*, see Pevar, *supra* note 6. Most recently, the Ninth Circuit decided that Hawaii's observance of Good Friday, declaring the day a holiday and allowing many state and local government offices to close, was not an establishment of religion under the *Lemon* test. See *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992). The case largely follows the spirit that moved the plurality in *Allegheny*, and therefore does not offer a fresh perspective. See *id.* at 766-69; *infra* note 177. The California Supreme Court forbade the City of Los Angeles' annual practice of marking the passage of Easter by illuminating windows in City Hall to form the shape of a cross. *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978). The case was decided under the state constitution's religion clause. Because the focus of this Comment is the U.S. Supreme Court's adjudication of the Establishment Clause, these cases are not analyzed further herein.

172. 465 U.S. 668 (1984).

173. A factual description of the physical setting of the crèche may be found *infra* note 188.

174. 492 U.S. 573 (1989).

175. *Id.* at 578 (plurality opinion).

176. Although the Court emphasized that the *Lemon* test need not be applied at all in Establishment Clause cases, it proceeded nevertheless to apply the test step by step. See *Lynch*, 465 U.S. at 678-79.

177. The city had "principally taken note of a significant historical religious event long celebrated in the Western World." *Id.* at 680. Celebrating the holiday and depicting its origins were held to be legitimate secular purposes. *Id.* at 681. This step of the analysis in *Lynch* demonstrates how the Court may allow a religious symbol to escape Establishment Clause prohibition simply by declaring that it is not religious but historical. Cf. *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (Court using precisely the same tactic to reach the opposite conclusion with respect to the posting of the Ten Commandments). The Court's willingness to accept such an implausible secular

excessive entanglement of the government with religion.¹⁷⁸ The Court's analysis under the effect branch proceeded almost entirely by analogy.¹⁷⁹ The Court considered the likely effects of the crèche display relative to those of other practices upheld in previous cases: state aid to church-affiliated schools and universities,¹⁸⁰ Sunday closing laws,¹⁸¹ and legislative prayer.¹⁸² The Court found that, as in these latter cases, display of the crèche merely happened to coincide with the tenets of some religions¹⁸³ and that any benefit Christianity derived from the coincidence was merely "indirect," "remote," or "incidental"—no more an endorsement of religion than a museum exhibit of religious paintings.¹⁸⁴

The underlying rationale in *Lynch* would lead to clearly objectionable results in the school context. The Court's finding that the Christmas display's purpose was purely historical¹⁸⁵ would seem to indicate that a crèche display would be appropriate even in the public elementary schools. Indeed, if Christ's birth were considered a purely historical event and Christmas merely the recognition of that event, then the entire Christmas celebration could plausibly be financed by the public school board as a history lesson and provided without discrimination to both public and church schools.¹⁸⁶ Even those who see no harm in public school Christmas celebrations might find it disturbing to have the gov-

governmental purpose discloses why the purpose test alone might not adequately address the problem raised in this Comment. The Court has, however, demonstrated its unwillingness to accept a government's profession of a secular purpose at face value. See *id.* at 41; see also *Mansfield, supra* note 150, at 891-96.

The recent Ninth Circuit case, *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992), demonstrated another reason why the purpose test is ineffective against very familiar religious observances. In that case, the court concluded that the state chose to observe Good Friday for secular, not religious purposes. The legislature ostensibly enacted the holiday to satisfy the need for another holiday during the spring, and to this extent the decision might have been a wholly secular one. *Id.* at 775-76. Still, the court never analyzed the reasons the legislature came to consider Good Friday as one of the possible alternatives, as opposed to, for example, a random Tuesday in April. It is interesting to note that the legislature's alternate choice for a holiday was Lincoln's birthday. *Id.* at 775. It is inconceivable that the court would have suggested that the choice of Lincoln's birthday would have been arbitrary, having nothing to do with honoring the dead president.

178. *Lynch*, 465 U.S. at 684. This conclusion is consistent with the discussion of the *Lemon* test. See *supra* text accompanying notes 161-67. One would not expect to find "excessive entanglement" relevant to a religion-in-public scenario because the entanglement test is primarily applicable to the government-in-religion problem.

179. Professor Kent Greenawalt proposed such an analogical approach in his article, *Religion as a Concept in Constitutional Law*, *supra* note 53, at 762-69, which defined what is religious in a particular case by analogizing to indisputably religious cases.

180. *Lynch*, 465 U.S. at 681-82 (citing several cases).

181. *Id.* at 682 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)).

182. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

183. *Id.*

184. *Id.* at 683.

185. See *supra* note 177.

186. Cf. *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding public provision of books, standardized testing and scoring, diagnostic health services, and guidance services to parochial

ernment justify financing religious celebrations¹⁸⁷ in parochial schools by claiming a historical purpose.

The Court's analysis in *Lynch* cannot easily be extended to public elementary school holiday observances because of the contextual differences between an open public display and a holiday observance in a classroom. Whatever profane or secular effect the commercial context might have produced in the *Lynch* crèche display,¹⁸⁸ that context is not present in the school classroom. On the contrary, the general educational context of seriousness, discipline, and authority suggests that a similar display would be interpreted by children to be part of a larger lesson to be learned. Although school authorities can try to control what they teach to children, the danger of religious indoctrination lies in the fact that teachers cannot control what children will ultimately learn.¹⁸⁹ And while non-Christian parents can be present to temper unwanted religious messages their children might get from a public display, they cannot similarly police the classroom to counter the religious meaning Christmas holds for Christians.¹⁹⁰

Following *Lynch*, the Supreme Court considered the religious nature of public Christmas observances again in *County of Allegheny v. ACLU*.¹⁹¹ *Allegheny* concerned a privately donated crèche displayed on the grand staircase of the Allegheny County courthouse building.¹⁹² Not far away, on the lawn of the city-county building, the City of Pittsburgh also displayed a forty-five-foot-tall Christmas tree and an eighteen-foot-tall menorah along with a sign dedicating the display to liberty.¹⁹³ Only

schools); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding public provision of secular textbooks to parochial schools).

187. *Cf. Allegheny*, 492 U.S. at 615 n.62 (plurality opinion) ("If public officials . . . participate in the secular celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands, or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause." (quoting *Lynch*, 465 U.S. at 710-11 (Brennan, J., dissenting))).

188. That display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner [reading] 'SEASONS GREETINGS,'" as well as the crèche. *Lynch*, 465 U.S. at 671. The Court has since held that these additional "secular" symbols of Christmas were pivotal in deciding that the crèche display was constitutional. *See Allegheny*, 492 U.S. at 598-602.

189. The one lesson children will undoubtedly learn is how to properly observe Christmas, whether or not the observance is openly linked to Christian doctrine. That alone is a lesson non-Christian parents might not want their young children to get in school.

190. Parents must constantly struggle, if only because of a budget constraint, to minimize the impact of commercial messages on their children. Similar vigilance is generally neither required nor practiced with regard to classroom lessons.

191. 492 U.S. 573 (1989).

192. *Id.* at 579-80 (plurality opinion).

193. *Id.* at 582, 587. The sign, entitled "Salute to Liberty," bore the mayor's name. Beneath the title it read: "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 582.

the crèche and the menorah were challenged as offending the First Amendment.¹⁹⁴

The Court did not consider the purpose and entanglement branches of the *Lemon* test, as those issues were not presented on appeal.¹⁹⁵ The Court found that the effect branch of the *Lemon* test, formulated as "endorsement,"¹⁹⁶ demanded an inquiry into the particular context or physical setting of the religious presentation.¹⁹⁷ By comparing the contexts in *Lynch* and *Allegheny*, the two cases were distinguished despite the fact that each involved government sponsorship of a crèche. The Court placed particular emphasis on the lack of secularity in the symbols surrounding the *Allegheny* crèche—which included floral accents, occasional Christmas choir presentations, and a written banner borne by an angel declaring "*Gloria in Excelsis Deo!*"¹⁹⁸—and on the "unmistakable message" of support and promotion conveyed by placement of the crèche on the grand staircase,¹⁹⁹ the "main" and "most beautiful" part of the courthouse building.²⁰⁰

The Court's reliance on the context in which acknowledged religious symbols are found is confusing and destined to produce unpredictable results. In *Lynch*, reliance on context suggested that even the most evocative religious symbol can be reduced to constitutional irrelevance when surrounded by a sufficient mass of secular matter. In *Allegheny*, however, the Court expressly acknowledged that an element of the display that elsewhere would carry no particular religious symbolism—such as the flowers surrounding the crèche—served to heighten rather than detract from the religious significance of the crèche.²⁰¹ Coupled with flowers and the religious message "*Gloria in Excelsis Deo!*" the crèche became an unconstitutional endorsement of religion.²⁰² Applied to the

194. *Id.* at 588.

195. *Id.* at 594 n.45.

196. See *infra* Section III.B.2 (Justice O'Connor's endorsement test).

197. *Allegheny*, 492 U.S. at 597-601. Blackmun offered this rule both in section III.B of the opinion, in which he was joined only by Justice Stevens, *id.* at 597, and in section IV of the opinion, in which he was joined by a majority, *id.* at 598.

198. *Id.* at 580 n.5 (translated as "Glory to God in the Highest").

199. *Id.* at 600.

200. *Id.* at 599 (quoting Brief for Appellants). The *Allegheny* Court directly rejected the arguments that Christmas is a national holiday and that the city, by merely celebrating the holiday, did not establish religion.

[This argument] would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. . . . The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

Id. at 601.

201. *Id.* at 599.

202. *Id.* at 601-02 ("[The County] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause.").

classroom setting, the focus on context could produce bizarre results. For example, it is conceivable that a crèche would be allowed in a public elementary school if it were overshadowed by the clutter of secular school projects and artworks crowding the typical classroom.

Allegheny's reliance on context is disturbing not only because it produces inconsistent results but also because the Court did not indicate from whose perspective the context should be viewed. For example, Justice Blackmun, writing only for himself, applied the endorsement test to the menorah and Christmas tree, starting from the premise that the Christmas tree alone "is not considered an endorsement of Christian faith."²⁰³ But he never adequately explained *who* does not find this to be an endorsement or how he had arrived at that conclusion.²⁰⁴ Justice Blackmun recognized that for such a finding, generally one must take into account the views of non-Christians, and he referred to Justice O'Connor's "reasonable observer" standard.²⁰⁵ Still, there is nothing in the opinion to suggest that the Justices specifically considered how non-Christians perceive Christmas trees.²⁰⁶

Beyond the issue of perspective, *Lynch* and *Allegheny* ultimately do not provide a satisfactory answer to the public elementary school holiday question because they did not consider the special circumstances of young children confronted with religious symbols in a setting established primarily for the purpose of indoctrinating those children. In *Allegheny* Justice Blackmun explicitly conceded that what might be a constitutional display in front of City Hall might not be so "when located in a public school,"²⁰⁷ but the Court has not yet specifically addressed the issue of public elementary school holiday observances.

It is against this background that I turn now to apply each of the three branches of the *Lemon* test to public elementary school Christmas holiday observances. Such observances, I will demonstrate, fail all three branches of the *Lemon* test when considered in the special circumstances

203. *Id.* at 617.

204. The sources cited for this proposition all suffer from the same narrow perspective. None acknowledge that there might be a large number of non-Christians, concededly the minority in this country, who do not share this secular view of the Christmas tree and other symbols. Indeed, Justice Blackmun and others would have us believe there are actually two holidays called "Christmas," both falling on the same day: one marks the miraculous virgin birth of the Christian messiah and the other is essentially a national day of good cheer and gift giving, simply part of a "winter-holiday season." Cf. *id.* at 615-17, nn.62 & 65-66 (discussing whether the combined display of a Christmas tree, a sign saluting liberty, and a Hannukah menorah endorse religious faith or a secular holiday season).

205. *Id.* at 620.

206. For example, while Justice O'Connor at one point suggested "the Christmas tree is widely viewed as a secular symbol," *id.* at 633 (O'Connor, J., concurring in part and in the judgment), she then limited this proposition: "A Christmas tree displayed in front of city hall, in my view, cannot fairly be understood as conveying government endorsement of Christianity." *Id.*

207. *Id.* at 620 n.69 (plurality opinion) (discussing combined Christmas tree and menorah display).

of captive public school children and the First Amendment's command that the state not impose religious beliefs upon them.

a. Purpose

Public school Christmas holiday observances necessarily fail the purpose branch of the *Lemon* test because Christmas is inescapably a religious holiday,²⁰⁸ and therefore it is not possible to imagine any plausible secular reason for the state to be actively involved in this religious activity. No pretense is made that public school children are "studying" Christmas and its attendant practices and rituals—the purpose of school holiday observances is to celebrate Christ's birth with religious hymns and symbolism indistinguishable from the practices and rituals of Christian families and Christian churches. Such celebrations are really just church services transplanted into the public schools. If the public schools wanted to indoctrinate students in the Christian religion, Christian holiday celebrations would be the way to do so.

Arguments that these celebrations are secular in nature are unconvincing. First, they are an insult to Christianity, implying that the Christian faith has lost all meaning for its adherents and that its message has been trivialized to a secular basis indistinguishable from, say, Mother's Day. Second, if school authorities really intended to celebrate the secular "winter holiday," they would have programs in the schools focused on, for example, the microeconomics of the season. But children are not engaged in calculating retail profit margins, learning how to staff in anticipation of the holiday shopping bonanza, or plotting merchandizing and sales strategies. The bells are ringing in the schools, but they are not the bells of cash registers—they are church bells glorifying the birth of Christ.

A government interest in celebrating the birth of Christ is an impermissible interest. As with creation science, school prayers, and posting of the Ten Commandments,²⁰⁹ the state has no secular purpose in promoting Christmas holiday celebrations in the schools, and the practice is therefore invalid under the purpose branch of the *Lemon* test. What is impermissible to teach, recite, or post cannot be made permissible if it is sung, acted out in pageants, or presented symbolically. No non-Christian child should be forced by the state to sing paeans to the Christ child—any more than a Christian child should be compelled to keep

208. See *supra* text accompanying notes 104-17.

209. Each of these public school practices has been held in violation of the Establishment Clause under the purpose branch of the *Lemon* test. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating a Louisiana statute prohibiting teaching of evolutionary theory unless creation theory was also taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating a state-mandated classroom minute of silence for meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (invalidating a state law requiring a copy of the Ten Commandments to be posted in each classroom).

kosher, bow towards Mecca, or cut out lingam and yoni to decorate classroom walls.

b. Effect

If schoolteachers and administrators believe they are simply incorporating general American traditions into the classroom curriculum and not recognizing the religious content of holiday activities and observances, the purpose branch of the *Lemon* test might be said not to have been violated. Although the true intentions of school officials are a factual matter that cannot be resolved here, I accept that most school officials probably lack conscious, sinister, specific intent to use holiday programs to indoctrinate children. Nevertheless, the second branch of the *Lemon* test—the effect branch—commands that activities of school officials must have a “principal or primary effect . . . that neither advances nor inhibits religion.”²¹⁰ Of course, a celebration and glorification of Christ’s birth necessarily has the effect of advancing religion, and so it fails to pass constitutional muster under the effect branch of the *Lemon* test.

The religious trappings of public elementary school Christmas celebrations are simply unavoidable—Christmas is inescapably a holiday commemorating and celebrating the birth of Christ, and it cannot be mistaken for a secular occasion. The underlying message is a Christian one that will confirm the religious beliefs of some children and confuse or offend the religious beliefs of others.²¹¹ Indeed, if the celebration of Christmas lacked a primarily religious effect, Christian churches likely would have abandoned its celebration long ago. The whole point of Christmas is inherently religious—it is to send the message to the world that Christ the Savior is born and to promote the adoration of the baby Jesus. The religious songs and symbols of Christmas are used by Christians precisely to spread their faith. This message cannot be “balanced” by the inclusion of any amount of secular material—the “secular” loses its meaning in the religious context and serves to promote rather than neutralize the religious effect.²¹² The rituals and symbols of Christmas are designed to have a religious effect and thus are impermissible in a state-sponsored setting such as the public elementary schools.

210. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

211. Of course, harm (in the sense of offending non-Christians) is irrelevant in judging the constitutional validity of public elementary school Christmas celebrations—or any state-sponsored religious activity. “First, the Constitution prohibits religious establishments even if everyone wanted them and even if no one was harmed by them. Harm is irrelevant. Second, harm is presumed to exist whenever there is an establishment of religion. *Every* religious establishment causes harm.” Pevar, *supra* note 6, at 351 n.111. The Supreme Court has recognized that “the indirect, coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

212. For an example, see *supra* text accompanying note 201.

The First Amendment does not permit the state to compel school children to participate in such a sectarian religious exercise.

c. Excessive Entanglement

Finally under the *Lemon* test, public elementary school Christmas holiday celebrations fail to pass constitutional scrutiny because they "foster an excessive government entanglement with religion."²¹³ This occurs in two separate ways. First, and most importantly, by celebrating this Christian holiday the state necessarily aligns itself with a sectarian cause—the celebration and promotion of the Christian religion. The schools side with Christian believers, throwing their weight on the side of Christian rituals, practices, and symbols. Second, by becoming involved in making a determination of how much religion is permissible in Christmas celebrations and displays, and in decreeing what is religious and what is secular, school officials, state legislatures and the courts have become entangled in sectarian matters. The restriction and surveillance of Christmas celebrations is itself impermissible and can only be avoided by forbidding the state to actively participate in and promote all religious displays, ceremonies, and celebrations. The Court's holiday celebration cases²¹⁴ illustrate this problem—the Justices became excessively entangled in deciding when a crèche is merely historical and when it is an unmistakable message of support and promotion of the Christian faith, and mired in debate concerning the religious and secular status of Christmas trees, menorahs, and other religious symbols. The Court can never be certain that any of these religious symbols has been sufficiently secularized to pass constitutional muster, so it has committed itself to a continual entanglement with religion by taking on the task of decreeing what is and is not religious in particular contexts. Such a task of continuous supervision of state-sponsored activity, and the symbols used therein, entraps both schools and courts in an endless religious controversy that the First Amendment commands be avoided.

2. Justice O'Connor's Endorsement Test

In 1984 Justice O'Connor proposed a "clarification" of the purpose and effect branches of the *Lemon* test in her concurring opinion in *Lynch v. Donnelly*.²¹⁵ *Lynch* involved the annual Christmas display of a crèche

213. *Lemon*, 403 U.S. at 613.

214. See *supra* notes 171-206 and accompanying text.

215. 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring); see also *Wallace v. Jaffree*, 472 U.S. 38, 67-70 (1985) (O'Connor, J., concurring) (laying out the proposed "endorsement test"). Justice O'Connor has promoted her endorsement test in subsequent cases. But cf. *School Dist. v. Ball*, 473 U.S. 373, 398-400 (1985) (O'Connor, J., concurring) (analyzing the case without reference to the endorsement test).

For commentary supportive of Justice O'Connor's endorsement test, see, e.g., Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The*

by the City of Pawtucket, Rhode Island.²¹⁶ Parsing the *Lemon* test, Justice O'Connor identified two ways in which Establishment Clause violations arise, harking back to the two distinct roots of the test: first, "excessive entanglement" of government in independent religious institutions is prohibited;²¹⁷ second, "government endorsement or disapproval of religion" is forbidden.²¹⁸

In her concurrence in *Wallace v. Jaffree*, Justice O'Connor offered a further refinement in her thinking, stating that endorsement is measured by "whether an objective observer . . . would perceive [the activity] as a state endorsement" of religion.²¹⁹ The endorsement test garnered the support of the majority in *County of Allegheny v. ACLU*²²⁰ and is currently an "official" test for Establishment Clause violations.

Before turning to the core concern of Justice O'Connor's endorsement test as it applies to public elementary school Christmas holiday celebrations, it should be noted that such celebrations also violate the excessive entanglement root identified by Justice O'Connor. In *Board of Education v. Mergens*,²²¹ a school district had provided after-school meeting space to various student groups but had tried to deny such accommodation to a Christian club, fearing that to allow the meetings would constitute an establishment of religion.²²² A plurality of the Court applied the *Lemon* test and found that allowing private religious speech, even on school premises, does not amount to a government endorsement of religion.²²³ Extracurricular, private, after-school clubs are more closely analogous to the private parochial school setting than the public school classroom because they involve no public school supervision or teaching. For this reason, the excessive entanglement test rather than the effect test was appropriate in *Mergens*.²²⁴

Untapped Potential of Justice O'Connor's Insight, 64 N.C. L. REV. 1049 (1986) (explaining the endorsement test and arguing against accepting ingrained, historical practices that violate the Establishment Clause); William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 361 (1991) (supporting the endorsement test, but questioning the premise that members of nonendorsed religions should not be made to feel like outsiders); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (arguing in favor of the endorsement test because it recognizes the substantial role symbols play in religions and the significance of symbolic state action). For a contrary view, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (arguing that the endorsement test's focus on symbols makes it difficult to apply in any principled fashion).

216. For the facts, opinions, and analysis of this case, see *supra* notes 172-84 and accompanying text.

217. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

218. *Id.* at 688.

219. 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

220. 492 U.S. 573 (1989).

221. 496 U.S. 226 (1990).

222. *Id.* at 232-33.

223. *Id.* at 248-53 (plurality opinion).

224. *Id.* Once the Court had analyzed the after-school activities as separate from the school

Although the facts of *Mergens* do not suggest the types of endorsement problems inherent in the celebration and observance of Christian holidays in public schools, much of the Court's analysis focused precisely on an issue that does have important implications for any analysis of public elementary school holiday celebrations. *Mergens* involved high school students, and Justice O'Connor felt it important to point out just how much students at that age resemble university students and how little they resemble elementary school students.²²⁵ "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."²²⁶ Because Justice O'Connor's endorsement test focuses on the effect of government speech and actions on the audience, the audience's age and impressionability must be considered as well as the context in which those actions occur. High school students are expected to understand sophisticated concepts, such as First Amendment rights and the legal and political theories on which such rights are founded. But neither Justice O'Connor nor any other Supreme Court Justice has ever expected elementary-school-age children to possess these same discriminating faculties. "[I]n the eyes of impressionable youngsters,"²²⁷ state action such as that approved in *Mergens* can imply an official endorsement of religion.

A reasonable observer's comparison of the *Mergens* program and elementary school Christmas activities would note an additional difference beyond the younger age and greater impressionability of the students participating in the latter. The Court in *Mergens* placed considerable emphasis on the voluntariness of the religious activities and also emphasized that the religious group was only one of many groups

function—that is, as “‘noncurriculum related student groups [meeting] on school premises during noninstructional time,’” 496 U.S. at 235 (quoting the Equal Access Act, 20 U.S.C. § 4071(b) (1988))—the problem became like a release-time case, such as *Zorach v. Clauson*, 343 U.S. 306 (1952), which upheld a public school program releasing children for participation in religious classes held off the public school campus and administered and taught by nonpublic school personnel. As in *Zorach*, *Mergens* involved no aid to parochial schools and no religious teaching on the part of the public school. Indeed, the Court began its analysis not by referring to any public school case, but rather to *School District v. Ball*, 473 U.S. 373 (1985), which struck down state payment of salaries for teachers of state-mandated subjects in parochial schools. The proper inquiry in such a case is not whether religion is advanced or endorsed but whether there is excessive government entanglement. The proper focus in *Mergens* was the school administration's lack of involvement in a way directly affecting the affairs of the Christian club.

225. *Mergens*, 496 U.S. at 250 (plurality opinion). This was an important point strategically because a similar policy had already been invalidated for students at a public university in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case, Justice O'Connor joined the Court, which noted that “[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.” *Id.* at 274 n.14. Drawing a successful parallel with *Widmar* virtually guaranteed the outcome in *Mergens*.

226. *Mergens*, 496 U.S. at 250 (plurality opinion).

227. *Id.* (quoting *School Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

that met after school.²²⁸ The religious activity at issue in Christmas celebrations in the public schools is compulsory, not one of many options from which students may choose.

It is this setting of impressionable youngsters, compelled to attend school at the command of the state, that is crucial to the application of the endorsement test to public elementary school Christian holiday observances. What the endorsement test really asks is whether the reasonable observer would conclude that the state intended to advance or inhibit religion—indicating a violation of the Establishment Clause—or whether the advancement or inhibition was merely the by-product of general welfare legislation, which would indicate no violation.²²⁹ If the perspective of the reasonable observer were understood to encompass that of the reasonable non-Christian as well as the Christian observer, and if the special context of elementary-level education were taken into account, public elementary school observance of religious holidays would have to be found in violation of the Establishment Clause of the First Amendment.

Taking first the problem of the hidden Christian bias of the endorsement test's reasonable observer, I have already argued that this seemingly neutral standard is an illusion and has been applied in a way that reflects a Christian bias.²³⁰ The perspective of non-Christians is ignored by this observer, who is firmly planted in the Christian faith. It is from within this faith that religious symbols are understood and judged. As a further example of this phenomenon, consider Justice Blackmun's and Justice O'Connor's observations in *Allegheny* that the menorah is usually taken as a religious symbol,²³¹ a viewpoint to be expected of most Americans, for whom the menorah alone might represent the Jewish faith. But that would hardly be the significance of the menorah when displayed in Tel Aviv, where most people are Jewish. Conversely, in countries where most people are not Christian, the Christmas tree and

228. 496 U.S. at 243-47.

229. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Justice O'Connor focused on the individual's "standing in the political community" as the value the Establishment Clause is meant to protect. *Id.* at 687. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688. Linking the First Amendment protection of religious freedom to the unrelated concept of political standing muddies constitutional doctrine. While the Establishment Clause is implicated when schools celebrate religious holidays, Justice O'Connor's focus on standing in the political community is applicable only by analogy to elementary school children. The First Amendment concerns rights of conscience, not just political rights, and protection of First Amendment rights has never depended on whether a person's political standing in the community is affected.

230. See *supra* notes 203-06.

231. *County of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989) (plurality opinion); *id.* at 633 (O'Connor, J., concurring in part and in the judgment).

associated symbols are seen as symbols of Christianity.²³²

There is an underlying Christian cultural bias within the Court. This bias prevents those who labor under it from recognizing that for non-Christians the context in which Christmas displays are seen is not the narrow physical context of a flower-bedecked courthouse staircase but is instead the larger social and temporal context in which all such Christmas displays are found. To illustrate: One may ask what it is about a crèche that can make it an unambiguously religious symbol. If presenting the birth of Jesus as a divine event is the indisputably religious element, then presumably a crèche on the courthouse staircase without angels and the words "Glory to God in the Highest!" would pass constitutional muster.²³³ If the religious character comes from the depiction of Jesus in any form, then that particular symbol could be removed. But would a manger scene on public display at Christmastime without statues of the Biblical characters be any less religious? If no distinction results even with the removal of religious symbols, then where is the line between the secular and the religious? Ultimately, it would seem that any display at a city hall between Thanksgiving and New Year's depicting almost any of the elements of the story virtually every American will recognize as the miraculous birth of Jesus Christ will have religious content and bear a religious message. It would hardly be any different if a city simply erected, in twenty-five-foot red and green neon letters, the words "December 25." Even without any apparent religious content or message, the effect would be the same: passersby would understand it as the city's commemoration and endorsement of Christmas Day and all that it signifies. In the end, this inquiry should reveal that the temporal context is at least as important as the physical one in giving Christmas displays their meaning.

But there is a broader context of religious and cultural experience in which such public displays must be analyzed.²³⁴ For the majority of Americans who celebrate Christmas, seeing a Christmas display in public might not suggest the explicitly religious aspects of the holiday unless recognized religious symbols, such as a cross or figures of Jesus, Mary, and the three kings, are included—and even then the message might be taken as nonreligious. To non-Christians, who are less familiar with the holiday in their personal experiences, that same Christmas display imine-

232. Cf. A. Khalique et al., *Development of Religious Identity and Ethnocentrism in Indian Children—A Pilot Study*, 29 PSYCHOL. STUD. 18, 18-19 (1984) (chart 1) (examining religious identification among Indian students as young as four to five years old by displaying pictures of religious symbols, rites, etc., and using as a symbol of Christians' "important festival" a picture of a Christmas tree).

233. Cf. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding a crèche in a commercial context absent these elements to be constitutional).

234. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-15, at 1293 (2d ed. 1988) (endorsement should be evaluated from the perspective of a non-adherent).

diately carries religious connotations. The non-Christian is not likely to stop to analyze whether particular symbols are present or absent, or even to know what the different symbols represent to Christians. Instead, the display might be seen as a message by and for Christians in their own symbolic language, just as monolingual English speakers might casually disregard the Spanish-language signs in a neighborhood's shop windows as messages not intended for them while understanding the implicit message: "Spanish spoken here."²³⁵

One constitutional scholar recommends that courts should determine whether or not something is religious by judging how closely the subject's characteristics resemble those of the paradigmatically or "indisputably religious."²³⁶ But as helpful as such an approach might be, it ultimately relies on an individual judge applying his or her own idea of the indisputably religious, and this idea will vary from judge to judge depending on the judge's religious background. It was Justice Blackmun's own religious experience that told him that a Christmas tree does not endorse Christian faith; likewise, his lack of a Jewish person's experience made it necessary to analytically discuss whether or not a menorah symbolizes Jewish faith.²³⁷ The Court's claim that the "reasonable observer" would find no religious symbolism or message in a forty-five-foot-tall lighted Christmas tree in front of city hall on December 25th suggests that there is no room in Establishment Clause jurisprudence for the opinions of the reasonable Jew, Muslim, Hindu, or atheist—the "reasonable observer" is in reality a "reasonable Christian."

When this biased "reasonable observer" is asked to make judgments in the special context of elementary-level education, the result is that Christian rituals, practices, and symbols fail to be recognized for what they really are: an establishment of religion—state-sponsored religious indoctrination of those persons in society, young children, who are least able to recognize proselytism and resist it. Christmas celebrations in the public elementary schools are not merely the by-product of general welfare legislation; they plainly are a message that the Christian religion is favored or preferred, and thus fail to pass constitutional muster when examined by a genuinely impartial, reasonable observer heeding Justice O'Connor's endorsement test.

235. Cf. ANYA P. ROYCE, *ETHNIC IDENTITY: STRATEGIES OF DIVERSITY* 149 (1982) (contrasting the symbol set used by the ethnic group to identify its members with that reduced set used by outsiders to recognize the group).

236. Greenawalt, *supra* note 53, at 767.

237. Compare *County of Allegheny v. ACLU*, 492 U.S. 573, 613 (1989) (plurality opinion) ("The menorah, one must recognize, is a religious symbol . . .") with *id.* at 616 ("The Christmas tree, unlike the menorah, is not itself a religious symbol.").

3. Justice Kennedy's Coercion Test

This is not yet really a test but rather an indication of the direction in which the Court's growing conservative faction might be heading.²³⁸ In his opinion in *County of Allegheny v. ACLU* Justice Kennedy rejected Justice O'Connor's endorsement test as "a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence"²³⁹ that was insensitive to "our heritage" and bordered on "latent hostility toward religion."²⁴⁰ Believing that religion must be recognized and accommodated by the state, Justice Kennedy located the "great object" of Establishment Clause jurisprudence in *Marsh v. Chambers*,²⁴¹ which had upheld the practice of legislative prayer based on its long history and which he believed "stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."²⁴² The two limiting principles in the Court's cases at "the border between accommodation and establishment" were, he believed, that government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."²⁴³

Thus, "coercion is the sole touchstone of an Establishment Clause violation."²⁴⁴ As possible indicators of coercion, Justice Kennedy suggested being "compelled to observe or participate in any religious ceremony or activity," contribution by a city or county of "significant amounts of tax money," and the absence of freedom "to ignore" the state's messages and symbols of religious holidays.²⁴⁵

Without going into the nuances of Justice Kennedy's viewpoint, the persuasiveness of his doctrinal analysis, or the many surprising and unwelcome results his formulation might portend in other contexts, one can see that public elementary school Christmas celebrations fail to pass constitutional muster when subjected to his coercion test. First, as the Court itself emphasized in upholding the legislature's practice in

238. A number of commentators have proposed tests based on whether state action is "coercive." See, e.g., Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

239. 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

240. *Id.* at 657.

241. 463 U.S. 783 (1983).

242. *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

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

244. *Id.* at 660.

245. *Id.* at 664.

Marsh,²⁴⁶ the audience of that prayer was an adult one, "not readily susceptible to 'religious indoctrination.'" ²⁴⁷ Second, public elementary school Christmas celebrations "place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."²⁴⁸ Indeed, no non-Christian religious holidays are generally recognized by public schools. The long Christmas holiday, and the Christian ritual, practice, and symbolism inherent in its celebration in the schools, fulfill each and every one of Justice Kennedy's indicators of coercion: elementary schoolchildren are compelled to observe and participate in Christian religious ceremony and activity; the public schools are supported by significant amounts of tax money and in Christmas celebrations this tax money "serve[s] the cause of one religious faith";²⁴⁹ and schoolchildren, compelled by compulsory attendance laws promulgated by the state, are not free to ignore these celebrations nor to "turn their backs."²⁵⁰ These public school Christmas celebrations do not present a *risk* of "the first step down the road to an establishment of religion"²⁵¹—they *are* an establishment of religion.

The historical argument proves too much, as to both ancient and American history. Whether the birth of Christ as depicted and celebrated at Christmas is properly understood as history or mythology is one of the prime questions defining the religious differences among us.²⁵² As American history and tradition, celebration of Christmas, at least in the public schools, is no more legitimate than would be celebration of slavery, the exclusive male franchise, or any other practices that do not comport with the commands of the Constitution as we understand them today. Religion simply does not have to be accommodated in this way—even were the government to cease all its support of Christian ritual in the public elementary schools, Christmas would continue to be celebrated by Christians unimpeded in their homes and churches, and the public celebration of the secular, mercantile holiday that is an American tradition would not be harmed in any way. Christmas and Christianity do not depend on state indoctrination of schoolchildren. As this coer-

246. 463 U.S. 783 (1983).

247. *Id.* at 792 (quoting *Tilton v. Richardson*, 403 U.S. 672, 686 (1971)).

248. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

249. *Id.* at 664.

250. *Id.*

251. *Id.*

252. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 708 & n.14 (Brennan, J., dissenting) (the distinction "'constitute[s] the ultimate division between Judaism and Christianity'" (quoting M. BUBER, *ISRAEL AND THE WORLD* (1948), reprinted in *DISPUTATION AND DIALOGUE: READINGS IN THE JEWISH-CHRISTIAN ENCOUNTER* 281-82 (F. Talmage ed., 1975))). Even were the historical accuracy of Jesus not in dispute, the history is of interest to many precisely because of its religious significance, not simply because of its antiquity.

cion is both unnecessary and unconstitutional, there is no reason—least of all one based on tradition or nostalgia—to continue it.

Whatever the ultimate fate of Justice Kennedy's coercion test, the Supreme Court did not attempt to apply it in a formalistic way when deciding the most recent Establishment Clause challenge to a public school practice. In *Lee v. Weisman*,²⁵³ the Court forbade the inclusion of clergy who offer prayers as part of an official public school graduation ceremony. Justice Kennedy, writing for the Court, noted that the controlling precedents as they relate to prayer and religious exercise demand "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"²⁵⁴ because in "the classroom setting . . . the risk of compulsion is especially high"²⁵⁵—"the student [is] left with no alternative but to submit."²⁵⁶ This context requires that public school cases be distinguished from *Marsh v. Chambers*.²⁵⁷ Indeed, in any context, "a literal application of the coercion test would render the Establishment Clause a virtual nullity"²⁵⁸ Thus, the coercion test, regardless of any validity in other contexts, is not strictly, and certainly not woodenly, applicable in the public school context. And as I have already argued, even if it were, it would result in public school Christian holiday observances being found unconstitutional.

IV CONCLUSION

The difference in the way Christmas is experienced by the Christian and by the non-Christian child leads to the failure of public elementary school observances of Christmas to pass muster under any constitutional test. School observances of Christmas endorse, and thus advance, the Christian religion by reinforcing the home experience and private religious training and identification of Christians. Simultaneously, school observances of Christmas disapprove of other religions by inhibiting the religious identification of non-Christians with their own families' religious traditions. The most vulnerable and innocent members of society are thus given the message that their religion is either approved of or disapproved of by their teacher, their school, and their government.

Religious minorities are made to feel uncomfortable—even bitter—

253. 112 S. Ct. 2649 (1992) (affirming application of three-part Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), by district court and court of appeals).

254. *Id.* at 2658.

255. *Id.* at 2660.

256. *Id.*

257. *Id.* at 2660-61. "[T]his is not a case like *Marsh v. Chambers*, in which government officials invoke spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead." *Id.* at 2678 n.8 (Souter, J., concurring) (citation omitted).

258. *Id.* at 2673.

when the state insists on celebrating the Christian religion in the public schools.²⁵⁹ And such celebrations are of no comfort to Christians, whose religion is debased and secularized when what they regard as a sacred occasion is celebrated in a less than sacred manner. The evil here is that the sacred is made profane when the state incorporates a religious activity into the stream of secular life. The interest of both minorities and the majority is that the state keep out of religious life. Nothing is gained by state celebrations of Christmas in the public elementary schools—but, ultimately, everything of true religious value might be lost. Religion is inherently a matter of private conscience, not a matter that should be handed over to the care of the state. The only way that the state can recognize and accommodate religion is to stay out of it entirely.

The Court has found official endorsement and disapproval of religion to be prohibited by the First Amendment. As Justice Douglas observed in *School District v. Schempp*, “[t]he vice of all . . . arrangements [of administering religious practices in schools] is that the state is lending its assistance to a church’s efforts to gain and keep adherents.”²⁶⁰ Education of young children—even in secular matters—is in its essence indoctrination.²⁶¹ When Christmas rituals become an integral part of the educational process, they have the primary effect of inducting very young children into the traditions and practices of the Christian religion.

I have not taken issue with all use of religious texts, music, and history in the public schools. As the Court itself observed in its *Schempp* decision, presentation of the Bible is appropriate in the classroom when it is part of a real educational lesson.²⁶² Public schools may teach about religion as long as they do not observe religious rituals or teach children what to believe.²⁶³ Especially for high-school-age children, whom the Court has found to be less susceptible to improper religious influences, reading and analyzing selected passages from the Bible, learning to understand and appreciate the context, history, and techniques of religious art, and learning to perform music or sing songs originally composed in praise of a Christian God, all can be legitimate educational enterprises.

259. See *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 1, 182-83 (1984) (“The entire period of the Christmas holiday season, characterized by learning Christmas carols in public schools and seeing Christmas displays in stores, vividly reminds religious minorities of their differences with and alienation from the dominant Christian culture.”).

260. 374 U.S. 203, 228 (1963) (Douglas, J., concurring) (school prayer and Bible-reading prohibited).

261. See *Board of Educ. v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part and in the judgment) (entirely appropriate for public schools to “inculcat[e] fundamental values”); *id.* at 879 (“[S]chool is designed to, and inevitably will, inculcate ways of thought and outlooks . . .”); cf. *Roe*, *supra* note 87, *passim* (work of schools should not be to inculcate values but rather to develop students’ capacities to think for themselves).

262. *Schempp*, 374 U.S. at 225.

263. *Id.* at 224-25.

But under the same standard, government cannot justify having public elementary school children read Christmas stories, create Christmas art and decorations, sing Christmas carols, or decorate the classroom and exchange gifts at Christmastime. Even if an art, music, or reading lesson focuses on a Christmas theme occasionally throughout a grade-school career, the repetition of such activities year after year in the same seasonal context can leave no doubt that such holiday observances stand apart from other coursework. Simply put, studying religion is constitutionally permissible; practicing it is not.

Finally, I have not taken issue with the Court's present method of analyzing religious establishment cases. Rather, I have proposed a careful application of the various constitutional tests that encompasses, first, a proper understanding of the special protection needed for elementary school students and, second, a fair recognition of the views of non-Christians. When the Court faces a challenge to Christmas holiday observances in the public elementary schools it must take into account the reasonable non-Christian members of American society if it is to faithfully uphold the Establishment Clause of the First Amendment.