

February 2005

But Could They Pray at UVA? The Fourth Circuit's Application of the Supreme Court's School Prayer Jurisprudence to the Virginia Military Institute's Adult Cadets

Alexander A. Minard

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Repository Citation

Alexander A. Minard, *But Could They Pray at UVA? The Fourth Circuit's Application of the Supreme Court's School Prayer Jurisprudence to the Virginia Military Institute's Adult Cadets*, 13 Wm. & Mary Bill Rts. J. 997 (2005), <https://scholarship.law.wm.edu/wmborj/vol13/iss3/9>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

**BUT COULD THEY PRAY AT UVA?
THE FOURTH CIRCUIT'S APPLICATION OF THE
SUPREME COURT'S SCHOOL PRAYER JURISPRUDENCE
TO THE VIRGINIA MILITARY INSTITUTE'S ADULT CADETS**

Alexander A. Minard*

INTRODUCTION

The Supreme Court recently denied certiorari for a Fourth Circuit case involving a rather rare school prayer situation — school prayer at an institution of higher learning.¹ The Virginia Military Institute (VMI), a state-run military school in Lexington, Virginia, had a tradition of praying prior to their communal dinner each night. The Fourth Circuit upheld a district court opinion striking down the prayer as unconstitutional because it violated the Establishment Clause.²

The response to the Fourth Circuit's ruling was far-reaching, playing out in the newspapers and even in Congress. The Virginia Attorney General immediately vowed to appeal the decision to the Supreme Court, which he did.³ The superintendent of VMI, General Josiah Bunting, wrote an editorial in the *Wall Street Journal*, arguing for the benefits of the prayer and criticizing the district court for ignoring crucial facts.⁴ One of the dissenting judges wrote an editorial in the *Richmond Times-Dispatch* after rehearing was denied, arguing that the Fourth Circuit's ruling went too far, and that the prayer is "the most benign form of

* Alexander Minard is a JD candidate at the College of William & Mary School of Law. He graduated from Kenyon College with a bachelor of arts in political science. He wishes to thank his parents and Maureen Salmon for their advice and encouragement.

¹ *Bunting v. Mellen*, 124 S. Ct. 1750 (2004) (denying certiorari because the dispute was insufficient and there was a lack of a direct circuit split), *denying cert.* to 327 F.3d 355 (4th Cir. 2003). Justice Stevens wrote the opinion denying certiorari, joined by Justices Ginsburg and Breyer; Justice Scalia dissented, joined by Chief Justice Rehnquist. 124 S. Ct. at 1751.

² *Mellen v. Bunting*, 327 F.3d 355 (4th Cir.), *reh'g denied en banc*, 341 F.3d 312 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1750 (2004). The Fourth Circuit split six-six on its vote for rehearing, and so the motion was denied. *Mellen*, 341 F.3d at 312.

³ *Mellen*, 327 F.3d 355, *petition for cert. filed*, 72 U.S.L.W. 3421 (U.S. Dec. 11, 2003) (No. 03-863); see Jerry Markon, *Federal Court Upholds Ban on VMI Prayers*, WASH. POST, Aug. 14, 2003, at B5.

⁴ Josiah Bunting III, *Houses of Worship: Grace Under Fire*, WALL ST. J., Feb. 15, 2002, at W11.

religious observance.”⁵ Walter B. Jones, Jr., a Republican representative from North Carolina and a member of the House Armed Services Committee, even introduced a bill that would protect the United States Naval Academy, which has a similar prayer, from the Fourth Circuit’s ruling in *Mellen*.⁶

Over the past fifty-five years, the Supreme Court has heard several cases involving school prayer situations at elementary and secondary schools. The jurisprudence is not entirely consistent; over time, the Court has employed at least three different tests.⁷ However, there is no controlling jurisprudence regarding school prayer at public colleges or universities. As the Fourth Circuit noted, “the [United States Supreme] Court has never directly addressed whether the Establishment Clause forbids state-sponsored prayer at a public college or university.”⁸ Perhaps that is partly because of the rarity of such situations, but also perhaps it is a situation which the Supreme Court has been unwilling to wade into. In 1997, both the Sixth and Seventh Circuits upheld prayer at graduation ceremonies of public universities.⁹ The Supreme Court likewise denied certiorari in both of those cases.¹⁰

School prayer at public colleges and universities presents an interesting nexus to review the Court’s jurisprudence in the area. The Supreme Court has been fairly consistent in striking down school prayer at elementary and secondary schools, or at least in limiting the policies to very specific circumstances.¹¹ Fear of the coercive nature of communal prayer at public schools is the common justification that seems to run throughout many of its decisions. In other words, the Court has

⁵ J. Harvie Wilkinson, *We Should Be Slow To Discount the Sustaining Role of Faith*, RICH. TIMES-DISPATCH, Aug. 31, 2003, at E3. The judge concluded: “There is, however, a balance to be struck between enforcing the vital dictates of the Establishment Clause and the need not to visit hostility upon religious observance in all its forms.” *Id.*

⁶ Ariel Sabar, *GOP Bill Backs Meal Prayers; Move Is Replying to Ruling Against VMI’s Supper Grace; Sponsor’s ‘Concern Is Annapolis’; ACLU Has Criticized Naval Academy’s Ritual*, BALT. SUN, Oct. 13, 2003, at B1. Within a month of introducing the bill, Representative Jones gathered twenty-three co-sponsors. *Id.*

⁷ See *infra* Part I.

⁸ *Mellen*, 327 F.3d at 366.

⁹ *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997) (holding that offering non-sectarian prayers or moments of silence at a university function did not violate the Establishment Clause), *cert. denied*, 523 U.S. 1024 (1998); *Tanford v. Brand*, 104 F.3d 982 (7th Cir.) (holding that giving non-sectarian invocation and benediction at a public university graduation ceremony was permissible under *Lee v. Weisman*, 505 U.S. 577 (1992), and did not violate the Establishment Clause), *cert. denied*, 522 U.S. 814 (1997).

¹⁰ *Chaudhuri v. Tennessee*, 523 U.S. 1024 (1998), *denying cert. to* 130 F.3d 232 (6th Cir. 1997); *Tanford v. Brand*, 522 U.S. 814 (1997), *denying cert. to* 104 F.3d 982 (7th Cir. 1997).

¹¹ See *infra* Part I.

been primarily worried that students at elementary and secondary schools are minors in a position of relative powerlessness and high impressionability.¹² Yet, students at public colleges and universities are presumptively not minors, nor are they passive subjects. *Marsh v. Chambers*¹³ is the only Supreme Court decision regarding a similar policy where the participants (both willing and unwilling) were not minors. There, the Court upheld the Nebraska legislature's practice of opening sessions with a prayer.¹⁴ At a public college or university, would the Court be worried about "coercing" adults into praying? Would the Court be more willing to allow adults to exercise their religious rights freely? Would the Court ignore any "coercion" concerns and strictly rule on establishment grounds?

The Court's current jurisprudence is extremely unhelpful prospectively. Not only has the Court employed several different tests, seemingly choosing on a whim which to apply, but each test demands an intensive review of the specific facts of each case, followed by rather tenuous conclusions. Indeed, although the Fourth Circuit seemed to think that VMI's prayer obviously violated the Constitution, it granted that General Bunting could reasonably have believed otherwise.¹⁵ In an area so fraught with disagreement, shouldn't the guiding precedent be more clear?

This Note argues that school prayer at public institutions of higher learning should be unconstitutional, even without the coercive element (because of the non-minor status of students). Any prayer implemented by a government actor should be held to violate the Establishment Clause. This does not mean that the government must be openly hostile to religion. The First Amendment includes two clauses pertaining to religion: the Establishment Clause and the Free Exercise Clause.¹⁶ When it is the government that *acts*, a religious practice is "established." Whether the government *allows* religious acts to occur is in the purview of the Free Exercise Clause. VMI's supper prayer is the former.

This Note analyzes prior Supreme Court jurisprudence regarding school prayer and its application to prayer at public colleges and universities. Part I reviews the history of school prayer cases in the Supreme Court, starting in 1947 with *Everson v. Board of Education*,¹⁷ and the respective tests and reasoning

¹² See *infra* notes 57–59 and accompanying text.

¹³ 463 U.S. 783 (1983).

¹⁴ *Id.* at 792.

¹⁵ *Mellen*, 327 F.3d at 376. In fact, General Bunting continues to believe otherwise. In his *Richmond Times-Dispatch* editorial, he wrote, "the court has profoundly misunderstood VMI's purposes and, more important, has profoundly misjudged the intellectual independence of VMI's cadets." Bunting, *supra* note 4.

¹⁶ The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

¹⁷ 330 U.S. 1 (1947) (holding that New Jersey's spending of tax-raised funds to pay the bus fares of parochial school students as part of a general program, under which it paid the

used in each successive case. Part II addresses the *Mellen* case specifically, paying particular attention to the unique nature of VMI and the Court's prior treatment of the Institute in *United States v. Virginia*.¹⁸ Finally, Part III offers recommendations for how the Supreme Court should resolve the law in terms of school prayer at public colleges and universities. Despite the Court's procedural dodging of the issue at the heart of the dispute,¹⁹ it is likely that school prayer, even at institutions of higher learning, will be an issue that American courts will face again. Current jurisprudence provides little or no consistent guidance, and there probably will be a case in the future that the Supreme Court cannot avoid deciding because of procedural gamesmanship. A moment of silence, for example, would be appropriate in situations in which people decide that an event requires solemnity. Participants would be allowed to exercise freely their religious or areligious preferences.²⁰

fares of students attending both public and other schools, was not prohibited by the First Amendment's Establishment Clause).

¹⁸ 518 U.S. 515 (1996) (holding that VMI's admission policy excluding women violated the Fourteenth Amendment's Equal Protection Clause).

¹⁹ Justice Stevens denied certiorari because "there no longer is a live controversy between Bunting and respondents regarding the constitutionality of the prayer." *Mellen*, 124 S. Ct. at 1751.

²⁰ Although it relied on a questionable reading of *Lemon* in doing so, the Fourth Circuit recently upheld minute-of-silence legislation in *Brown v. Gilmore*, 258 F.3d 265 (4th Cir.) (holding that Virginia's statute mandating the establishment of a "minute of silence" in state public schools satisfied the three prongs of the *Lemon* test because it had a legitimate secular purpose, neither advanced nor hindered religion, and the state had not become excessively entangled with religion), *cert. denied*, 534 U.S. 996 (2001). The Fourth Circuit distinguished the Virginia statute from the Alabama moment-of-silence statute previously held unconstitutional by the Supreme Court in *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that the statute had *no* secular purpose based on legislative history). The Fourth Circuit noted that the factual record before it in *Brown* was markedly different from that in *Wallace*, because there was no evidence that Virginia was acting "in open defiance of federal constitutional law," as Alabama had clearly done. *Brown*, 258 F.3d at 280. Indeed, in *Wallace*, the Court implied that a minute-of-silence with a secular purpose could be constitutional. *Wallace*, 472 U.S. at 59 (noting that a legislative intent to "protect[] every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday" was constitutionally unobjectionable); *see also id.* at 66 (Powell, J., concurring) ("[T]he 'effect' of a straightforward moment-of-silence statute is unlikely to 'advanc[e] or inhibi[t] religion.' Nor would such a statute 'foster an excessive government entanglement with religion.'" (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968), and *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted) (alteration in original)); *id.* at 73 (O'Connor, J., concurring) ("Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."). Finally, unlike in Alabama, Virginia teachers were not actively leading their students in chants and prayers. *Brown*, 258 F.3d at 281.

I. A BRIEF HISTORY OF THE SUPREME COURT'S FIRST AMENDMENT RELIGION
 JURISPRUDENCE AS IT RELATES TO SCHOOLS

In 1947, the Supreme Court heard *Everson v. Board of Education*.²¹ New Jersey enacted a statute in 1941 authorizing “its local school districts to make rules and contracts for the transportation of children to and from schools.”²² The defendant Board of Education “authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system.”²³ Parents of students who attended Catholic parochial schools were included in the program. The Court laid out the meaning of the Establishment Clause at length:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.²⁴

The Court went on to analyze the New Jersey statute in light of the above definition of the Establishment Clause. It wrote: “[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.”²⁵ The Court did not follow a rigorous review of the policy, nor did it apply a formulaic test. Rather, it held merely that the statute did not violate the Establishment Clause, primarily because it applied equally to both students of public schools and students of parochial schools. In conclusion, the Court stated, “The First Amendment has erected a wall

²¹ 330 U.S. 1 (1947).

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.* at 15–16. The Court prefaced this description by stating that the Establishment Clause meant “at least” that number of restrictions; therefore, the list should be understood as a “floor” and not exhaustive. *Id.* at 15.

²⁵ *Id.* at 16.

between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."²⁶

It was not until 1962 that the Supreme Court heard another important Establishment Clause case involving schools. In *Engel v. Vitale*,²⁷ the Court overturned a New York state program requiring daily classroom invocation of God's blessing as prescribed in the Regent's prayer.²⁸ The Court held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."²⁹ Furthermore, the Court stated that the prayer's violation of the Establishment Clause could not be cured by the fact that "the Regent's prayer is 'non-denominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room."³⁰ It is interesting to note that, in a footnote, the Court distinguished the recitation of the Regent's prayer from the "officially encouraged" recitation of "historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being."³¹

²⁶ *Id.* at 18. Interestingly, the "wall of separation" concept has crept into many people's understanding of the First Amendment. However, the language comes not from any official legislative history of the amendment, but rather from a political constituent letter Thomas Jefferson wrote as President to the Danbury Baptist Association in Connecticut in 1802. Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between Church and State.*

Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 54–55 (2002) (emphasis added). Of course, the phrase may have been coined first by Roger Williams, founder of the colony of Rhode Island. *See id.* at 41.

²⁷ 370 U.S. 421 (1962).

²⁸ *Id.* at 424–25. The State Board of Regents composed the following prayer, which it directed to be said aloud by each class at the beginning of the day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

²⁹ *Id.* at 425.

³⁰ *Id.* at 430.

³¹ *Id.* at 435 n.21. This distinction is interesting on two levels. First, the Court finds a difference between the two practices of officially encouraged prayer and officially

The following year, the Court heard two companion cases involving Pennsylvania and Maryland state requirements that schools begin each day with a Bible reading.³² Without laying out a standardized test, which the Court would do in later cases, it held that schools could not sponsor any type of prayer because states could not “pass laws which aid one religion, aid all religions, or prefer one religion over another.”³³ The Court came down strongly on the side of the Establishment Clause in both of these cases, in part due to the school’s explicit adoption of Christian prayer. It claimed that it was not sacrificing the freedoms of the Free Exercise Clause at the expense of the Establishment Clause. The Court stated, “we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected,

encouraged patriotic recitations, even though both include references to God. Recently, the Court relied on procedural issues to dodge the ultimate issue of whether the phrase “Under God” in the Pledge of Allegiance was constitutional. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004). After the Ninth Circuit held that the phrase was unconstitutional, there was an immediate and significant backlash against the decision. *See* Scott Gold, *An Angry Chorus Vows to Keep God in the Pledge*, L.A. TIMES, June 28, 2002, at A1; Charles Lane, *U.S. Court Votes to Bar Pledge of Allegiance: Use of ‘God’ Called Unconstitutional*, WASH. POST, June 27, 2002, at A1. The Supreme Court reversed the judgment of the Ninth Circuit because Mr. Newdow, who sued on behalf of his (then) kindergarten-aged daughter who was subjected to the teacher-led recitation, “lack[ed] the right to litigate as her next friend” as her mother enjoyed exclusive legal custody. *Newdow*, 124 S. Ct. at 2311; *see also id.* at 2307. The Court concluded: “When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.” *Id.* at 2312. Three Justices concurred in the judgment, but each criticized the Court for sidestepping the ultimate issue. *See id.* at 2312 (Rehnquist, C.J., concurring); *id.* at 2321 (O’Connor, J., concurring); *id.* at 2327 (Thomas, J., concurring). Thus, the phrase is curiously left untouched, for now.

Second, the language the Court uses to refer to “the Deity” and “a Supreme Being,” seems to be deferential to the concepts. *Engel*, 370 U.S. at 435 n.21 (emphasis added). In only this passing footnote, the Court ducks the issue of whether such related professions of belief in God are likewise unconstitutional. *Id.*

³² *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). The Pennsylvania law required: “At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.” *Id.* at 205. As practiced at Abington Senior High School, the Bible reading was broadcast over an intercom into each room and was followed by the recitation of the Lord’s Prayer, where students stood and said the prayer in unison. *Id.* at 207. The Maryland rule “provided for the holding of opening exercises in the schools of [Baltimore], consisting primarily of the ‘reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer.’” *Id.* at 211.

³³ *Id.* at 216.

collides with the majority's right to free exercise of religion."³⁴ Later cases would become more difficult, as school policies adapted to the Court's jurisprudence and became less explicitly Christian, or even, in some cases, less explicitly about reciting a prayer.

The first case in which the Court enunciated a discernible test for determining whether a state's policy was excessively entangled with religion did not involve a school prayer.³⁵ Instead, the test arose out of state aid to church-related elementary and secondary schools. The Court laid out a three-prong test by combining the reasoning of some of its prior Establishment Clause cases. As stated by the Court, the test was the following: "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.'"³⁶ In a remarkable retreat from its earlier strict separationist stance, the Court noted that "total separation [between church and state] is not possible in an absolute sense."³⁷ It continued: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."³⁸ The Court then embarked on a detailed, fact-specific analysis of the Rhode Island and Pennsylvania statutes, finally holding that they were indeed unconstitutional.³⁹

³⁴ *Id.* at 225–26. Again, it is interesting to note a passing comment made by the Court in a footnote:

We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

Id. at 226 n.10. VMI is, of course, a military school, but one run by the state of Virginia. However, each cadet has volunteered to attend the Institute and, moreover, the supper prayer at issue in *Mellen* does not concern the voluntary use of state facilities.

³⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that Rhode Island and Pennsylvania statutes providing state aid to church-related elementary and secondary schools were unconstitutional). It was the three-prong test laid out in *Lemon* that the Fourth Circuit relied on in overturning VMI's supper prayer. *See Mellen*, 327 F.3d at 370–71.

³⁶ *Lemon*, 403 U.S. at 612–13 (quoting *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citation omitted).

³⁷ *Id.* at 614.

³⁸ *Id.*

³⁹ *Id.* at 607–11.

Next, in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,⁴⁰ the Court adopted a test laid out originally by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*.⁴¹ Neither *Lynch* nor *Allegheny* involved school prayer, but both did involve the display of religious symbols by a city during the Christmas and Hanukkah holiday season. Only five years apart, the Court came to opposite conclusions in these cases, particularly in regards to the display of the nativity scene.

Justice O'Connor expressed in her *Lynch* concurrence, "I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis."⁴² She went on further: "It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."⁴³ In applying her test, she looked to both the purpose and the effect of the government's act.⁴⁴ As for the purpose, she wrote that the "proper inquiry" is "whether the government *intends* to convey a message of endorsement or disapproval of religion."⁴⁵ She then turned to the effect of the act; in so doing, she noted that it does not "require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."⁴⁶ Finally, although she wrote that "[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny,"⁴⁷ she found that the city did not violate the Establishment Clause through its display of a crèche, because it neither "intended to endorse" nor "had the effect of endorsing Christianity."⁴⁸

Four years later, in *Allegheny*,⁴⁹ the Court adopted Justice O'Connor's endorsement test. In a similar situation — a city displaying a nativity scene during the Christmas season — the Court nonetheless came to the opposite holding of *Lynch*.⁵⁰

⁴⁰ 492 U.S. 573 (1989) (holding that the city's display of a crèche outside city and county buildings violated the Establishment Clause, but that the display of a Hanukkah menorah next to a Christmas tree did not unconstitutionally endorse the Christian and Jewish faiths).

⁴¹ 465 U.S. 668 (1984) (holding that the city did not violate the Establishment Clause by displaying a nativity scene in its Christmas display, notwithstanding the religious significance of the nativity scene); *id.* at 687 (O'Connor, J., concurring).

⁴² *Id.* at 687 (O'Connor, J., concurring).

⁴³ *Id.* at 688–89.

⁴⁴ *Id.* at 690.

⁴⁵ *Id.* at 691 (emphasis added).

⁴⁶ *Id.* at 691–92.

⁴⁷ *Id.* at 694.

⁴⁸ *Id.*

⁴⁹ *County of Allegheny v. ACLU*, 492 U.S. 573, 595–97 (1989).

⁵⁰ *Id.* at 601–02.

However, there was a distinguishing fact: in *Allegheny*, the nativity scene included an angel holding a banner that read, "Gloria in Excelsis Deo!"⁵¹ After a detailed description of the decorations, Justice Blackmun, writing for the Court, outlined the Court's test: "In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."⁵² Subtly noting the Court's shift to the endorsement test, he wrote:

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."⁵³

The third test established by the Court came in an actual school prayer case. A public school student sought an injunction to prevent invocations and benedictions at the graduation ceremonies of schools in Providence, Rhode Island.⁵⁴ The Court declined to reconsider its decision in *Lemon*, stating that the case at bar was so straightforward as not to require the Court to reconsider "the general constitutional framework by which public schools' efforts to accommodate religion are measured."⁵⁵ However, the Court did highlight a new factor for deciding these cases, despite its claims to the contrary. It elevated what was before only mentioned in passing to be *the* determinative factor in school prayer cases.⁵⁶ The Court stated that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools."⁵⁷

It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own

⁵¹ *Id.* at 580. Translated from Latin, the phrase means, "Glory to God in the Highest!"

⁵² *Id.* at 592.

⁵³ *Id.* at 593–94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

⁵⁴ *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the policy of the city of Providence was unconstitutional because "[t]he government involvement with religious activity . . . is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school").

⁵⁵ *Id.*

⁵⁶ See, e.g., *Engel*, 370 U.S. at 430–31; *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 261–62 (1990) (Kennedy, J., concurring).

⁵⁷ *Lee*, 505 U.S. at 592.

religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character.⁵⁸

It is interesting to note that the Court refused to “address whether that choice [of whether to participate or protest] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”⁵⁹ The determinative factor, then, is the coercive effect of the practice on the minor student at a public school, rather than any of the factors laid out in the Court’s prior jurisprudence.

When the Fourth Circuit decided *Mellen v. Bunting*, it had no less than three tests from which to choose, none of which had been explicitly overruled or rejected by the Supreme Court.⁶⁰ Facing a novel policy — prayer by adult students — the Fourth Circuit had little guidance from the nation’s highest court on which test to apply.

II. THE VIRGINIA MILITARY INSTITUTE AND *MELLEN V. BUNTING*

A. A Brief Description of VMI and the Supper Roll Call

The Virginia Military Institute was founded in 1839 in Lexington, Virginia. Citizens of Lexington, a young lawyer named John Thomas Lewis Preston in particular, decided that the military post should be converted into a military college in order to bring some discipline to the soldiers living there.⁶¹ The plan was approved by Virginia’s General Assembly, and thus was born what is now one of only two state-run military colleges in the country.⁶²

⁵⁸ *Id.* at 594.

⁵⁹ *Id.* at 593.

⁶⁰ A fourth case, and the most recent, did not introduce a new test, but merely addressed a subtle shift in school prayer policies. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a school district policy allowing student-led, student initiated prayers before high school football games was facially unconstitutional because it was impermissibly coercive). The Court essentially treated the case as a refinement of *Lee*.

⁶¹ *See* 1 COLONEL WILLIAM COUPER, ONE HUNDRED YEARS AT V.M.I. 14–36 (1939) (quoting Preston’s own account of the Institute’s creation); *see also* HENRY A. WISE, DRAWING OUT THE MAN: THE VMI STORY (1978).

⁶² COUPER, *supra* note 61, at 29; *see also* A Brief History, at <http://www.vmi.edu/show.asp?durki=1792> (last visited Jan. 17, 2005). The Institute was shelled and burned during the Civil War in June 1864, but reopened in October of the following year. Since its founding, alumni have fought in every war involving the United States. *Id.* The Citadel in South Carolina is the only other state-run military college in the United States. *See The*

The Institute has been at the center of controversy before; in 1996, the Supreme Court ruled that VMI was in violation of the Equal Protection Clause because it did not accept women.⁶³ While it is a military-style school, it is state-run: "The Virginia General Assembly, not the Department of Defense, controls VMI."⁶⁴ Its students are required to enroll in one of the Reserve Officer Training Corps (ROTC) programs, but graduates are not necessarily commissioned in the United States military. The mission of the school is,

to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.⁶⁵

To that end, "VMI utilizes an adversative method of training, modeled on an English educational philosophy and once characteristic of military instruction. The adversative method features physical rigor, mental stress, equality of treatment, little privacy, minute regulation of personal behavior, and inculcation of certain values."⁶⁶

The Fourth Circuit's factual findings of the methods by which VMI trains its students, particularly in their first year when they are known as "rats," was determinative in later holding the Institute's supper prayer to be unconstitutional. "In preparing its cadets for military leadership, VMI seeks to teach self-control, self-discipline, and the subordination of personal desires to the greater good. The adversative method involves a rigorous and punishing system of indoctrination."⁶⁷ The district court judge in *United States v. Virginia*⁶⁸ found that "[t]he VMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to

Citadel: Profile, at <http://www.citadel.edu/r3/about/profile/index.shtml> (last visited Mar. 24, 2005). Norwich University, founded in 1834 in Vermont, is a private military school. WISE, *supra* note 61, at 13.

⁶³ *United States v. Virginia*, 518 U.S. 515 (1996). The Fourth Circuit in *Mellen* relied heavily on the factual conclusions of *United States v. Virginia. Mellen*, 327 F.3d at 361, 371.

⁶⁴ *Mellen*, 327 F.3d at 375-76 n.13.

⁶⁵ MISSION STUDY COMMITTEE OF THE VMI BOARD OF VISITORS REPORT (May 15, 1986), *quoted in United States v. Virginia*, 518 U.S. at 521-22.

⁶⁶ *Mellen*, 327 F.3d at 361.

⁶⁷ *Id.*

⁶⁸ 766 F. Supp. 1407 (W.D. Va. 1991).

impart.”⁶⁹ The Fourth Circuit referred to “submission and conformity” as “central tenets of VMI’s educational philosophy,” which is a “program of indoctrination.”⁷⁰

Henry A. Wise, in his 1978 book about the history of the Institute, offers a different perception of VMI’s teaching methodology. In a passage that pre-dates even VMI’s resistance to co-education, Wise defends VMI’s uniqueness:

The most ardent supporters of the VMI way do not now, nor did they in more tranquil times, claim that it is for every young man. And it is relevant in this context to point out that those who associate with VMI men would be quick to say that they, whether cadets or alumni, are highly individualistic persons — anything but automatons.⁷¹

Wise’s characterization seems in line with those who have attended VMI and those who defend the school. The factual findings about VMI’s teaching methods by the Supreme Court in *United States v. Virginia*, and the Fourth Circuit’s reliance on them, seem to demean the cadets and the proud tradition of VMI.

VMI previously had a similar meal-time prayer, but discontinued it in 1990 when the school switched to cafeteria-style dining.⁷² When General Bunting became superintendent in 1995, he reinstated “a traditional [Supper Roll Call] formation and family-style dining, including the supper prayer,” every day except Saturday, in an effort “to bring a stronger sense of unity to the Corps.”⁷³

Room and board at VMI, which are required, cover the cost of all meals. Although “[c]adets (other than rats) do not technically have to eat in the mess hall,” there are few other options.⁷⁴ Following the lead of the Supreme Court in reviewing religion cases, the Fourth Circuit engaged in an extensive description of the

⁶⁹ *Id.* at 1421.

⁷⁰ *Mellen*, 327 F.3d at 361.

⁷¹ WISE, *supra* note 61, at 4.

⁷² It is unclear at what point VMI first instituted the supper prayer. Some trace it back to the 1950s. See Chris Kahn, *VMI Alumni Upset About Prayer Ruling*, ASSOCIATED PRESS NEWSWIREs, Jan. 25, 2002. Others claim the cadets recited the prayer on and off since the school’s founding in 1893. See Ariel Sabar, *Court Case Could Affect Naval Academy Prayer: VMI Cadets Challenge Required Meal Grace*, BALTIMORE SUN, Mar. 30, 2002, at 1A. In a footnote, the district court mentions that the prayer may have been abandoned in 1972, in response to the D.C. Circuit’s ruling in *Anderson v. Laird*, 466 F.2d 283 (1972), *cert. denied*, 409 U.S. 1076 (1972), which held that the federal military service academies’ mandatory chapel requirement was unconstitutional. VMI voluntarily ended its own chapel requirement after *Anderson*. See *Mellen*, 181 F. Supp. 2d at 622 n.2.

⁷³ *Mellen*, 327 F.3d at 362 n.5. For a description of the SRC, see *infra* notes 68–74 and accompanying text.

⁷⁴ *Mellen*, 327 F.3d at 361–62 n.3.

circumstances surrounding VMI's supper prayer. The Fourth Circuit described VMI's supper as follows:

The first seating begins with the "supper roll call" (the "SRC"), initiated by a bugle call summoning the Corps into formation in front of the Barracks. After an accountability report, the colors are struck, and the Corps marches in review past the TAC Officer (the VMI faculty member in charge) to the mess hall. First classmen (cadets in their final year) are authorized to fall out of the SRC formation before the Corps marches to the mess hall. Once the formation reaches the mess hall, other cadets, except for the rats, may fall out. The rats are required to march into the mess hall and eat supper during the first seating.⁷⁵

VMI altered the process somewhat after the fall of 2001, when the lawsuit was filed.⁷⁶ The court continued:

After the rats and other remaining cadets have entered the mess hall, the Corps is called to attention, and the Regimental Commander — the senior cadet officer — presents the Corps to the TAC Officer. . . . [T]he command "REST" is given. . . . The daily announcements are made, and the Cadet Chaplain then reads the supper prayer to the assembled Corps.⁷⁷

The Post Chaplain "has composed a separate supper prayer for each day."⁷⁸ And while the prayer refers to either "God" or "Father," it does not specifically mention "Jesus."⁷⁹ In other words, it is not explicitly Christian, although it is implicitly monotheistic. "The Corps must remain standing and silent while the supper prayer is read, but cadets are not obliged to recite the prayer, close their eyes, or bow their heads."⁸⁰

⁷⁵ *Id.* at 362.

⁷⁶ *Id.* at 362 n.4. For the purposes of the lawsuit, the district court and the Fourth Circuit reviewed the policy that was in place at the time the lawsuit was filed. *Id.* This Note will also only review the original SRC.

⁷⁷ *Id.* at 362.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

General Bunting, in his *Wall Street Journal* editorial, criticized the court's factual findings.⁸¹ His description of the SRC deserves full mention, as he characterizes several crucial aspects differently:

It begins with a series of bugle calls in the barracks alerting cadets to the approaching mandatory formation. Cadets form in their platoons, companies and battalions for roll call The companies march in formation to the mess hall, to a drum cadence, parading past the officer in charge.

Just before entering the mess, all but our new cadets may fall out of formation and go their own way. They may enter the mess hall later, while the meal is still being served. Those who proceed into the mess hall are called to attention while the senior cadet presents the corps to the officer in charge. Then they are ordered to "rest," a position that requires them to remain standing, but not attentive.

A brief, nonsectarian, inclusive blessing is then recited over the loudspeaker by a cadet. . . . After grace, the cadets continue with their meal.

VMI requires no participation in this grace. There is no mandatory head bowing, hand folding, eye closing or other manifestation of a prayerful attitude. In fact, cadets at rest can talk quietly, eat, drink . . . in short, disengage from the point in the ceremony where the prayer is recited. They are merely expected to remain standing until the ceremony is concluded.⁸²

Thus, according to General Bunting, the SRC is not conducted in a coercive atmosphere, but rather is just another ritualistic step in which cadets must participate, perhaps no different from roll call or daily announcements.⁸³

In response to a complaint by a student who ultimately became one of the plaintiffs, General Bunting wrote, "[T]he Constitution does not prohibit our saying grace before supper [Prayer] is a precious link to our heritage and an admirable

⁸¹ Bunting, *supra* note 4.

⁸² *Id.* General Bunting's description comports with alumni's description of the supper prayer. Bob Munno, VMI '81, remembered: "It was nothing major. . . . Somebody would talk over the microphone, it would be garbled and nobody could understand him anyway." Kahn, *supra* note 72.

⁸³ For a criticism of the casual treatment of what most believe should be a formal, serious event, see *Anderson*, 466 F.2d at 299 (Leventhal, J., concurring) (criticizing the Naval Academy's mandatory chapel attendance requirement as debasing religion). See also *infra* note 101 and accompanying text.

practice for a school of our provenience and culture.”⁸⁴ Before the court, he argued that “prayer during military ceremonies and before meals is part of the fabric of our society, and that the drafters of the First Amendment did not intend to prohibit prayer before meals at a military school.”⁸⁵ On the other hand, the plaintiffs:

[E]mphasize[d] that the supper prayer is composed by a state official (the VMI Post Chaplain) and that it is delivered on a daily basis at mealtime, when the Corps is assembled as a “family.” Furthermore, the prayer is delivered as part of an official VMI function, entirely controlled by the school.⁸⁶

The plaintiffs, two third-year cadets, filed suit against General Bunting, charging that the supper prayer violated their rights under the Establishment Clause of the First Amendment and under Virginia state law.

B. The District Court Opinion

The district court, in granting partial summary judgment for the plaintiffs, concluded:

Because of the intense, coercive environment created by the Institute’s adversative method, under which students are instructed to “subordinate [their] own personal desires and well-being to the good of the whole unit,” the primary effect of this practice has been to compel students to participate in a state-sponsored religious exercise. Finally, because the prayers are drafted and recited at the direction of the Institute’s Superintendent, the result is that government has become impermissibly entangled with religion.⁸⁷

Relying on a mixture of factual findings from the Supreme Court’s earlier VMI case, *United States v. Virginia*, and from the pleadings in *Mellen*, the district court found that the adversative method was an essential aspect of the education a VMI cadet receives.⁸⁸

⁸⁴ *Mellen*, 327 F.3d at 363 (internal quotations omitted) (first alteration in original).

⁸⁵ *Id.* at 369 (characterizing General Bunting’s argument).

⁸⁶ *Id.*

⁸⁷ *Mellen*, 181 F. Supp. 2d at 621 (alteration in original).

⁸⁸ *Id.* at 622.

In defense of the prayer, General Bunting argued that it was part of a “larger, non-religious ceremony known as Supper Roll Call.”⁸⁹ He argued also that the prayer served “to give the cadets a chance to become alive to a spiritual dimension in their lives. . . . It accommodates the faith of those who come with faith. For others, it provides a brief moment of reflection on the importance and value of things beyond themselves.”⁹⁰ Moreover, “the prayer exposes cadets to the sorts of religious expressions they can expect to experience in the military at a variety of gatherings and ceremonies.”⁹¹ Finally, he asserted that the supper prayer reflected the “American tradition of expressing thanks and seeking divine guidance,” and provided a link to the traditions of America and the Institute.⁹²

The plaintiffs asked the court to review the prayers under the three-prong *Lemon* test, while the defendant argued that the deference to history and tradition showed in *Marsh* was more appropriate.⁹³ The court rejected the defendant’s assertion of academic freedom.⁹⁴ The court began its analysis by noting that “[s]ince 1971, when *Lemon v. Kurtzman* was decided, the *Lemon* test has been applied to every Establishment Clause case except for one. The lone exception is *Marsh v. Chambers*.”⁹⁵ The court stated that the holding of *Marsh* was limited to “the particular historical circumstances presented in that case.”⁹⁶ Since VMI’s supper prayer did not share the “unique history” of legislative prayer, because “public colleges and universities like VMI did not even exist at the time that the First Amendment was drafted,” the court refused to analyze the prayer under *Marsh*.⁹⁷ The court proceeded to apply the three-pronged *Lemon* analysis.

The first prong of *Lemon* requires the practice at issue to have a secular purpose.⁹⁸ The defendant offered three secular purposes of the prayer, all of which the court found to be lacking. General Bunting first suggested that the “supper

⁸⁹ *Id.* at 623.

⁹⁰ *Id.* (internal quotations omitted).

⁹¹ *Id.* at 624 (internal quotations omitted).

⁹² *Id.* (internal quotations omitted).

⁹³ *Id.*

⁹⁴ *Id.* The defendant argued, in the alternative of a *Marsh* analysis, that the court should review the supper prayer under several academic freedom cases, rather than as a pure Establishment Clause case. *Id.* The court reviewed the several cases cited by the defendant, but found they were inapplicable to the case at bar and concluded: “Further evidence of the inapplicability of the academic freedom cases to the present situation is Defendant’s inability to define an appropriate test to determine when, in his words, ‘academic freedom concerns are outweighed by Establishment Clause concerns.’” *See id.* at 625–27. This issue was not raised on appeal. *Mellen*, 327 F.2d 355.

⁹⁵ *Mellen*, 181 F. Supp. 2d at 624 (citation omitted).

⁹⁶ *Id.* at 625 (quoting *N.C. ACLU v. Constangy*, 947 F.2d 1145, 1148 (4th Cir. 1991)).

⁹⁷ *Id.* at 625. *See infra* note 126 for criticism of relying on temporal distinctions to support constitutional clauses.

⁹⁸ *Lemon*, 403 U.S. at 612.

prayers aid the educational mission of VMI by encouraging cadets to reflect on and develop their own spiritual dimension.”⁹⁹ The court thought that the “only logical conclusions that can be drawn from this purpose is that part of the Institute’s educational mission . . . is religious indoctrination.”¹⁰⁰ Distinguishing teaching religion from practicing religion, the court noted that the academic purposes advanced by General Bunting were “reminiscent” of those advanced in *Anderson v. Laird*.¹⁰¹ The court cited Judge Leventhal’s concurring opinion in that case, which quoted the response of an amicus curiae brief: the government’s explanation is “a “shocking” claim to debase and manipulate religious worship as a mere instructional tool.”¹⁰² The court, therefore, found that General Bunting’s first purpose failed to define the prayer as secular.

General Bunting next asserted that the prayers serve the “pedagogical and institutional purpose of familiarizing cadets with [the tradition of prayer and thanksgiving], including its relevance to the Founders and the principal heroes of the nation and the Institute.”¹⁰³ The court responded that “[n]o language in the prayers refers to this history or tradition,”¹⁰⁴ and that, moreover, the Supper Roll Call did not constitute a ceremony that required solemnization.¹⁰⁵ The court thereby distinguished the supper prayer at VMI from the prayers in both *Chaudhuri* and *Tanford*.¹⁰⁶

Finally, General Bunting offered that the prayers “accommodate[d] the spiritual needs and free exercise rights of cadets, whose opportunities to meet those needs and exercise those rights are limited by the demands of barracks life and the highly structured nature of the VMI program.”¹⁰⁷ The court dismissed this purpose because General Bunting insisted that VMI must do more than offer the cadets the opportunity to pray and “provide some affirmative support as a means of accommodating the religious needs of the cadets.”¹⁰⁸ The court stated that, because VMI was “composing and reciting specific prayers upon which students are directed to reflect,”¹⁰⁹ this purpose could not be secular.

⁹⁹ *Mellen*, 181 F. Supp. 2d at 629 (internal quotations omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 629–30. In *Laird*, the United States Secretary of Defense argued that “[t]he sole purpose of chapel attendance is to develop in the cadets, through observation of the impact of religion on the lives of others during actual worship services, that sensitivity to religious emotion which is required of a military leader.” *Id.* at 630 (quoting *Anderson v. Laird*, 466 F.2d 283, 299 (D.C. Cir. 1972) (Leventhal, J., concurring)) (alteration in original).

¹⁰² *Id.* (quoting *Anderson*, 466 F.2d at 299 (Leventhal, J., concurring)).

¹⁰³ *Id.* (internal quotations omitted).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 631.

¹⁰⁶ *Id.*; see also *supra* note 9.

¹⁰⁷ *Mellen*, 181 F. Supp. 2d at 631 (internal quotations omitted).

¹⁰⁸ *Id.* at 632 (internal quotations omitted).

¹⁰⁹ *Id.*

Although the court found that VMI's supper prayer failed the first prong, it continued its analysis. The second prong of *Lemon* requires that the prayer's "principal or primary effect must be one that neither advances nor inhibits religion."¹¹⁰ The court found that, even assuming a secular purpose, VMI's supper prayer would fail this prong as well.¹¹¹ Refusing to read the Supreme Court's religion cases as establishing one standard for children (as minor students) and another for adults, the court instead asserted that the Supreme Court's jurisprudence implies that courts must review Establishment Clause challenges on a case-by-case basis.¹¹² The court stated that "in conducting an analysis of an Establishment Clause claim, a court must be particularly vigilant in those situations where citizens may be subtly and indirectly coerced to participate."¹¹³ Again, the court distinguished VMI's supper prayer from the prayers in *Chaudhuri and Tanford*.¹¹⁴ The court found that while both those circuit courts "considered the age of the complainants, their constitutional focus was also on coercion."¹¹⁵ It concluded that, while it was "permissible, and perhaps greatly beneficial, to use such intense, coercive methods to train and prepare military and civilian leaders," it was "unconstitutional to use these same methods to exact conformity with a state-imposed religious practice."¹¹⁶

The third and final prong of *Lemon* requires that the prayer "not foster an excessive government entanglement with religion."¹¹⁷ VMI's supper prayer could not survive this prong, either. The court concluded:

The prayers are drafted by the VMI Chaplain, and they are read, at the direction of the Superintendent, at each night's supper in the VMI mess hall. These prayers are recited, not just because Defendant wishes to accommodate the religious needs of his cadets, but because he wishes to focus the Corps' thoughts on the particular subject embraced by the VMI prayer. Thus . . . "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events."¹¹⁸

¹¹⁰ *Lemon*, 403 U.S. at 612.

¹¹¹ *Mellen*, 181 F. Supp. 2d at 633.

¹¹² *Id.* at 634.

¹¹³ *Id.* at 635.

¹¹⁴ *Id.* at 635–36.

¹¹⁵ *Id.* at 635.

¹¹⁶ *Id.* at 636.

¹¹⁷ *Lemon*, 403 U.S. at 613 (internal quotations omitted).

¹¹⁸ *Mellen*, 181 F. Supp. 2d at 637 (citations omitted).

After finding that VMI's supper prayer failed all three prongs of the *Lemon* test, the court granted the plaintiffs' request for a declaratory judgment that the prayer violated their rights under the Establishment Clause and ordered a permanent injunction requiring VMI to cease the prayers.¹¹⁹

C. The Fourth Circuit's Opinion

Within a year of the district court's opinion, a three-judge panel of the Fourth Circuit heard oral arguments.¹²⁰ The Fourth Circuit issued a unanimous opinion affirming in part and vacating in part the district court's ruling.¹²¹ The Fourth Circuit began by noting that they would review, de novo, the district court's award of summary judgment.¹²² The court then reviewed the relevant jurisprudence of both the Supreme Court and of other circuits before concluding that it would "assess the supper prayer against the principles announced in *Lee* and *Santa Fe*, and . . . then apply the *Lemon* criteria, treating the endorsement test as a refinement of *Lemon*'s second prong."¹²³ It stated, "[b]ecause the Court has applied a variety of tests (in various combinations) in school prayer cases, federal appellate courts have also followed an inconsistent approach."¹²⁴ Clearly, the Fourth Circuit was unsure of how the Supreme Court would approach the situation, and so it decided to try each of the various tests promulgated by the Court in the hopes that it could therefore protect itself from being overturned on appeal.

The Fourth Circuit refused to apply *Marsh*'s reasoning¹²⁵ because (1) *Marsh* was limited to its specific facts (that Congress authorized legislative prayer at the same time that it produced the Bill of Rights), and (2) public universities and military colleges did not exist when the Bill of Rights was adopted.¹²⁶

¹¹⁹ *Id.* at 638.

¹²⁰ The panel included Judge King, Senior Judge Hamilton, and Senior Judge Greenberg of the Third Circuit, who was sitting by designation. *See Mellen*, 327 F.3d 355.

¹²¹ The court affirmed the district court's decision that the plaintiffs had alleged a violation of their constitutional rights, but held that General Bunting was entitled to qualified immunity. *See id.* at 376.

¹²² *Id.* at 363.

¹²³ *Id.* at 371. In so deciding, the court also rejected General Bunting's argument to apply the *Marsh* analysis. *Id.*

¹²⁴ *Id.* at 370.

¹²⁵ *See Marsh v. Chambers*, 463 U.S. 783 (1983).

¹²⁶ *Mellen*, 327 F.3d at 369–70. Interestingly, Nebraska, the state whose legislative prayer was in dispute in *Marsh*, was not a state when the United States Congress authorized legislative prayer and adopted the Bill of Rights. The logic used to justify limiting *Marsh* to its particular facts seems disingenuous; what if the authorization of legislative prayer had come a week earlier, or a week later, than the production of the Bill of Rights? To say that Congress did not intend the First Amendment to apply in the context of opening legislative sessions with prayer, but meant it to apply to every other instance of public prayer is

First, the court stated: “Under the Supreme Court’s decisions in *Lee* and *Saniau Fe*, school officials may not, consistent with the Establishment Clause, compel students to participate in a religious activity.”¹²⁷ General Bunting argued that “VMI’s cadets are mature adults, who will not feel coerced to participate in the supper prayer,” and that “members of the Corps (other than rats) may avoid the prayer by falling out of the SRC formation before the Corps enters the mess hall.”¹²⁸ The court dismissed both reasons.

The Fourth Circuit also found that *Chaudhuri* and *Tanford* could be distinguished. It concluded that “[b]ecause of VMI’s coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.”¹²⁹ The court relied on language in *Chaudhuri* and *Tanford* highlighting that the audience in both cases — mature adults — would not be coerced by the prayers at issue. However, the court ignored that both decisions relied more on the fact that the audience was composed of mature adults than whether they were placed in a coercive environment. In other words, the Fourth Circuit inappropriately elevated the “coercion” element of those decisions at the expense of the “mature adults” element in order to distinguish *Chaudhuri* and *Tanford* from *Mellen*.

illogical. This distinction is perhaps just a convenient way of dismissing the justification as it applies to other practices the Court wishes to strike down. The Court has similarly written off defenses of public prayer in regards to the Pledge of Allegiance and the fact that currency contains the phrase “In God We Trust.” See *Lynch*, 465 U.S. at 716–17 (Brennan, J., dissenting) (“[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.”). It is only further evidence that this area of the law is in complete disarray when Justice Brennan can write a statement like that. Furthermore, by predicating this one exception on “history and tradition,” the Court necessarily elevates Christian practices above those of other religions; obviously, other religions do not enjoy the same history and tradition in America. Therefore, “the Court seems more apt to secularize practices derived from Christianity, thus preferring Christianity over other religions.” Ashley M. Bell, Comment, ‘*God Save This Honorable Court*’: How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1307 (2001). This curious opinion adds to the inconsistency of the Supreme Court’s Establishment Clause jurisprudence.

¹²⁷ *Mellen*, 327 F.3d at 371.

¹²⁸ *Id.*

¹²⁹ *Id.* at 371–72. Again, the court relied on the adversative method as characterized by the Supreme Court in *United States v. Virginia*. Although it refers to VMI cadets as “mature adults,” the court clearly does not treat them as such, because under VMI’s adversative teaching method cadets are subjected to “obedience and conformity” as the “central tenets of the school’s educational philosophy,” and presumptively — at least under the court’s reasoning — cannot make independent decisions as a result. *Id.* at 371.

The court also found that the “voluntariness” of the supper prayer was insufficient to save the practice, referring to it as merely “technical.”¹³⁰ Although “VMI’s upperclass cadets could avoid the mess hall in order to shield themselves from the prayer,” the court found that “the communal dining experience” was “undoubtedly experienced as obligatory.”¹³¹ Finding that “the First Amendment does not in any way prohibit VMI’s cadets from praying before, during, or after supper, the Establishment Clause prohibits VMI from sponsoring such religious activity,”¹³² the court concluded that VMI’s supper prayer cannot survive the *Lee* coercion test.

When reviewing the supper prayer in terms of the second test, *Lemon*’s three prongs, the court found that (1) the “state-sponsored activity” had “an overtly religious character”;¹³³ (2) “[t]he supper prayer has the primary effect of promoting religion, in that it sends the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer”;¹³⁴ and (3) there was an excessive government entanglement with religion because “VMI has composed, mandated, and monitored a daily prayer for its cadets.”¹³⁵ The supper prayer was, therefore, unconstitutional.

For the first prong, General Bunting asserted the same secular purposes before the Fourth Circuit as before the district court.¹³⁶ The Fourth Circuit believed that General Bunting’s purposes were insufficient to overcome the religious purposes of the prayer, worrying that he sought “to obscure the difference between educating VMI’s cadets about religion, on the one hand, and forcing them to practice it, on the other.”¹³⁷ Nevertheless, it granted him the benefit of the doubt and turned to the second and third prongs of the *Lemon* test.¹³⁸

For the second prong, the court held that “[t]he supper prayer has the primary effect of promoting religion, in that it sends the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer.”¹³⁹ It continued: “Even though VMI intended the supper prayer to be both inclusive and nondenominational, the Establishment Clause prohibits a state from promoting

¹³⁰ *Id.* at 372.

¹³¹ *Id.* One wonders how the Fourth Circuit could have removed all doubt from that conclusion without a complete record before it to support the claim.

¹³² *Id.*

¹³³ *Id.* at 373.

¹³⁴ *Id.* at 374.

¹³⁵ *Id.* at 375.

¹³⁶ *Id.* at 373. General Bunting offered three purposes. *Id.*; see *supra* Part II.B.

¹³⁷ *Mellen*, 327 F.3d at 373.

¹³⁸ *Id.* at 374.

¹³⁹ *Id.*

religion by authoring and promoting prayer for its citizens.”¹⁴⁰ Therefore, the supper prayer violated the second part of *Lemon*, the “primary effect” prong.¹⁴¹

Despite the supper prayer failing under the second prong, the court continued its analysis to the third prong. It found an excessive entanglement because “VMI has composed, mandated, and monitored a daily prayer for its cadets.”¹⁴² Therefore, under both the *Lee* coercion test and the three prongs of *Lemon*, the Fourth Circuit found VMI’s supper prayer violative of the Establishment Clause of the First Amendment.

D. The Fourth Circuit’s Denial of Appellant’s Petition for Rehearing and Rehearing En Banc

General Bunting, as the defendant-appellant, appealed the Fourth Circuit panel’s ruling.¹⁴³ The vote returned was six-six and, failing to garner a majority, General Bunting’s appeal for a rehearing en banc was denied.¹⁴⁴ Three judges filed dissenting opinions.

Judge Widener dissented primarily because he felt the panel relied “on what it obviously believe[d] is some kind of impure motivation on the part of VMI”¹⁴⁵ and because of the several examples of “the frequent and implicitly approved use of prayer and like religious symbolism by branches of the United States government in situations and ceremonies similar to the VMI supper prayer.”¹⁴⁶

Judge Wilkinson, who would also write an editorial criticizing the opinion in the *Richmond Times-Dispatch*, dissented because “[n]ot every public religious observance is a First Amendment violation.”¹⁴⁷ Rather than violating the Establishment Clause, Judge Wilkinson wrote that “[t]he supper prayer at Virginia Military Institute is the most benign form of religious observance. It is brief and non-sectarian, and it takes place in a higher education setting in which the dangers

¹⁴⁰ *Id.* at 375. In a footnote, the court noted that the inclusive and nondenominational nature of the supper prayer is insufficient because (1) it “takes a particular view of religion, one that is monotheistic, patriarchal, and indebted to Judeo-Christian values and conventions of worship,” and (2) “the Establishment Clause prohibits a state from sponsoring any type of prayer, even a nondenominational one.” *Id.* at 374 n.12.

¹⁴¹ *Id.* at 374.

¹⁴² *Id.* at 375.

¹⁴³ *Mellen v. Bunting*, 341 F.3d 312 (4th Cir. 2003), *denying reh’g en banc to* 327 F.3d 355 (4th Cir. 2003).

¹⁴⁴ *Id.* at 313.

¹⁴⁵ *Id.* (Widner, J., dissenting).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 319 (Wilkinson, J., dissenting); *see also* Wilkinson, *supra* note 5 and accompanying text.

of coercion are minimal.”¹⁴⁸ Judge Wilkinson noted that the facts are critical in all Establishment Clause challenges.¹⁴⁹ He argued the facts that VMI cadets are adults, that the prayer is non-sectarian, and that the prayer takes place in a military setting should be sufficient to uphold the practice as constitutional.

Judge Wilkinson doubted that “cadets who are deemed ready to vote, to fight for our country, and to die for our freedoms, are so impressionable that they will be coerced by a brief, non-sectarian supper prayer.”¹⁵⁰ He argued that Supreme Court jurisprudence limits the coercion element to school-age children, and that “the opportunities presented at VMI are altogether open; no one is forced or coerced to attend the school, and neither are they now prohibited from doing so.”¹⁵¹ He found the coercive element utterly lacking because both attendance and participation were voluntary.¹⁵² He concluded that none of the restrictions imposed upon cadets while at “‘rest’ . . . could possibly coerce a dissenting cadet into believing that he or she was participating in the prayer or was signaling any approval of it to others.”¹⁵³

Second, Judge Wilkinson asserted that the secular purposes proposed by General Bunting were not offensive because they “are not the property of any sect. And they do not contain the slightest hint of proselytization to cadets. They are common to all faiths or even to no faith.”¹⁵⁴

Finally, Judge Wilkinson pointed to the military aspect of VMI’s educational philosophy. He concluded: “In the considered judgment of the school officials, the supper roll call ceremony — including the religious observance — furthers VMI’s core mission by training cadets to become more complete soldiers and civilians.”¹⁵⁵ Judge Wilkinson cited the experience of “school officials with considerable military backgrounds” who have determined that SRC “will best achieve VMI’s mission.”¹⁵⁶

¹⁴⁸ *Mellen*, 341 F.3d at 319.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 320.

¹⁵² *Id.* at 321. “The panel found that [the prayer is coercive], but in doing so the panel speculated as to the social pressures that VMI’s educational system might impose upon cadets.” *Id.*

¹⁵³ *Id.* Judge Wilkinson continued, “No cadet could reasonably believe that the act of standing, in this context, signaled assent to the prayer — all cadets *must* stand for altogether secular reasons, as ordered by school officials for such things as daily announcements.” *Id.*

¹⁵⁴ *Id.* at 322. It is hard to understand how Judge Wilkinson can characterize the act of praying to “God” as common to no faith, but he supported his position by pointing to clearly religious acts by the federal government supported by the Supreme Court, such as legislative prayer and imprinting “In God We Trust” on coins. *Id.* at 322–23.

¹⁵⁵ *Id.* at 323.

¹⁵⁶ *Id.* For VMI’s mission, Judge Wilkinson quoted the Supreme Court from *United States v. Virginia*. VMI’s mission “is to produce citizen-soldiers, men [and women] prepared for leadership in civilian life and in military service.” *Id.* (quoting *United States v. Virginia*, 518 U.S. at 520) (internal quotations omitted).

He went on to suggest that since the panel ruled the supper prayer unconstitutional, it had somehow upset the “unit cohesion and bonding [that] are necessary ingredients of success [in fighting a war].”¹⁵⁷ Judge Wilkinson seems to undermine his own argument that the supper prayer is not coercive when he characterizes the communal ceremony of SRC as creating bonds that will “sustain soldiers in their darkest and most dangerous hours.”¹⁵⁸ If it is not coercive, how can it also create a communal bond?

Judge Wilkinson asserted that the supper prayer satisfied the three prongs of the *Lemon* test.¹⁵⁹ Pointing to the panel’s acceptance of General Bunting’s secular purposes (which was done for the sake of argument), Judge Wilkinson claimed that the primary purposes were permissible and that there was no excessive entanglement because there was “no need for VMI to interact with any religious organizations.”¹⁶⁰ Though questionable, Judge Wilkinson’s characterization of the prongs of *Lemon* is reasonable, and his conclusions serve to accentuate the problems posed by the Supreme Court’s jurisprudence; the tests give judges great latitude in interpreting individual cases.

The third dissenting judge, Judge Niemeyer, chose to dissent because the panel extended “Supreme Court jurisprudence — which has never found unconstitutional prayer in public colleges and universities — and creates a conflict with the Sixth and Seventh Circuits.”¹⁶¹ Judge Niemeyer likewise minimized the coercive element and highlighted that the cadets were at VMI voluntarily.¹⁶² Judge Niemeyer concluded with a history of the Establishment Clause, arguing that the panel opinion misinterpreted its purpose.¹⁶³

The dissenters point out many of the shortcomings of Supreme Court jurisprudence. All of them, however, made normative arguments, at root appealing to public (i.e., Christian) sympathies by implicitly arguing that cadets should keep quiet if they do not like the prayer. There is little legal precedent — other than the suspect and weak *Marsh* opinion — to which the dissenters refer. While explicitly arguing that VMI’s supper prayer does not violate the Establishment Clause, the dissenters ultimately show the inherent weaknesses in how the Supreme Court has dealt with these issues in the past. There is little definitive guidance for judges to apply the tests outside of the similar situations for which they were created.

¹⁵⁷ *Id.* at 323.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 324.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 326 (Niemeyer, J., dissenting).

¹⁶² *Id.* at 327–28.

¹⁶³ *Id.* at 329–31.

E. The Supreme Court's Denial of Certiorari

It is rare for the Supreme Court to issue an opinion when it grants or denies certiorari; usually, it is only reserved for important cases.¹⁶⁴ When the Court denied certiorari for *Mellen*, Justice Stevens wrote an opinion explaining the Court's reasons for the denial. He was joined by Justices Ginsburg and Breyer. Justice Scalia dissented, and he was joined by Chief Justice Rehnquist. The Court dodged the ultimate issue — the constitutionality of VMI's supper prayer — on a procedural ruling, much as it had done in the Pledge of Allegiance case.¹⁶⁵

Justice Stevens explained that the Court denied certiorari because it lacked jurisdiction, since there no longer was a “live controversy” between the superintendent and the cadets “regarding the constitutionality of the prayer”¹⁶⁶ and because there was “no injunction presently barring VMI from reinstating the supper prayer.”¹⁶⁷ He went on to state that “none of the parties has a present stake in the outcome”¹⁶⁸ due to the plaintiffs' graduation and General Bunting's retirement; indeed, “VMI itself is not a party” to the suit.¹⁶⁹

Justice Scalia, in an impassioned dissent, argued that the Court needed to grant certiorari and resolve the dispute. He wrote:

The weighty questions raised by petitioners — about the proper application of *Lee* where adults rather than children are the subjects, and about the constitutionality of traditional religious observance in military institutions — deserve this Court's attention, particularly since the decisions of two other Circuits are in apparent contradiction as to whether *Lee* can extend so far.¹⁷⁰

Justice Scalia dissented for three reasons. First, he was concerned with Justice Stevens's apparent desire to repudiate the Court's *Saucier* procedure.¹⁷¹ Second,

¹⁶⁴ “[E]xcept when [J]ustices want to record strong opposition to the denial of cert., . . . dissents are now rarely published.” DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 210 (6th ed. 2003). For a general discussion of the certiorari process, see *id.* at 190–233.

¹⁶⁵ See *supra* note 31 and accompanying text.

¹⁶⁶ *Mellen*, 124 S. Ct. at 1751.

¹⁶⁷ *Id.* at 1752.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1753 (Scalia, J., dissenting).

¹⁷¹ See *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that before a court may determine whether a government official is entitled to qualified immunity, it must first consider whether the official's actions violated a constitutional right). Here, Scalia asserted that the Court must first determine the constitutional issue before dismissing the case, in order “to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.” *Mellen*,

Scalia refuted Stevens's assertion that the Court lacked jurisdiction, writing that a court may always determine whether it holds jurisdiction, which is "the precise issue [Scalia] would consider on certiorari."¹⁷² Finally, Scalia challenged Stevens's conclusion that the Fourth Circuit's ruling is distinguishable from the Sixth and Seventh Circuits' rulings.¹⁷³ He wrote:

[T]he basis for the distinguishing — that this was a supper prayer at a state military college, whereas the other cases involved graduation prayers at state nonmilitary colleges — is, to put it mildly, a frail one. (In fact, it might be said that the former is *more*, rather than *less*, likely to be constitutional, since group prayer before military mess is more traditional than group prayer at ordinary state colleges.)¹⁷⁴

Justice Scalia concluded, "VMI has previously seen another of its traditions abolished by this Court. This time, however, its cause has been ignored rather than rejected — though the consequence will be just the same."¹⁷⁵

Justice Stevens, responding to the dissent's critique, wrote:

Justice Scalia is quite wrong, however, when he states that the "procedural tangle" created by our constitutional-question-first procedure explains our denial of certiorari in this case. Indeed, it is only one of three reasons for not granting review. The other two are, first, that we have no jurisdiction, and second, that the alleged conflict of authority is more apparent than real.¹⁷⁶

124 S. Ct. at 1754. Justice Scalia concluded:

In sum, we have before us in this petition a constitutional issue of considerable consequence on which the Courts of Appeals are in disagreement. The only apparent obstacle to our review is in fact an additional incentive to our review, so that we might eliminate the confusion spawned by our civil-rights constitutional-issue-first jurisprudence.

Id. at 1755 (Scalia, J., dissenting) (footnote omitted).

¹⁷² *Mellen*, 124 S. Ct. at 1756 (Scalia, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1755 (citation omitted).

¹⁷⁶ *Id.* at 1751. Because there is no longer a "live controversy" between *Mellen* and *Bunting*, Stevens concluded that the Court lacked jurisdiction to resolve the constitutionality of the supper prayer. Additionally, Stevens concluded that the circuit split — between the Fourth Circuit's ruling that VMI's prayer was unconstitutional and the Sixth and Seventh Circuits' rulings that similar prayer at colleges were constitutional — could be distinguished, and thus did not require Supreme Court resolution. *Id.* at 1751–52.

III. RECOMMENDATIONS

A. *Concerning the Establishment Clause Generally*

The Supreme Court's Establishment Clause jurisprudence, and the *Lemon* test in particular, has been extensively criticized both from within the Court itself and by academics. Professor McCarthy writes: "Some commentators and Justices have voiced their frustration . . . by referring to it as 'chaotic,' 'doctrinal gridlock,' a 'legal quagmire,' contradictory and unprincipled, 'ad hoc,' 'intuitive,' and a 'maze.'"¹⁷⁷ Professor Paulsen argues that *Lemon* itself is dead.¹⁷⁸ According to Ashley Bell: "When questioning the Supreme Court's modern Establishment Clause jurisprudence, critics consistently return to one theme — its lack of consistency."¹⁷⁹ Perhaps most harshly, Professors Jeffries and Ryan write: "In terms of the conventional sources of 'legitimacy' in constitutional interpretation, the Supreme Court's Establishment Clause decisions are at least very venturesome, if not completely rootless."¹⁸⁰ Still, some cling to a hope that the Court can rise above its fact-specific, ad hoc decisions:

The Establishment Clause is emblematic of this harmonizing endeavor as it seeks to ensure both the autonomy of religion from governmental interference and that a person's religious beliefs (or lack thereof) will in no way affect his full inclusion within the political community. . . . Perceived in this light, the Establishment Clause possesses the potential to safeguard our pluralistic society by enshrining both freedom of conscience in religious matters as an inviolable constitutional right and religious tolerance as an indispensable constitutional imperative.¹⁸¹

¹⁷⁷ Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 124 (2000) (citations omitted).

¹⁷⁸ Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 800–13 (1993) (criticizing *Lemon* as lacking doctrinal coherence and arguing that it no longer commands a majority of the Court). Paulsen includes a list of significant cases in which individual Justices have voiced their dissatisfaction with the *Lemon* test. *Id.* at 813–19. *But see* Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993) (responding to Professor Paulsen's article and arguing that the converse is true).

¹⁷⁹ Bell, *supra* note 126, at 1274. Bell calls the Court's line-drawing "arbitrary." *Id.* at 1304.

¹⁸⁰ John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281 (2001).

¹⁸¹ Charles Gregory Warren, Comment, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669, 1670 (2003) (citations omitted).

Amidst the criticism are some constructive suggestions for how the Court can climb out of the Establishment Clause hole into which it has dug itself over the years.

Supreme Court opinions tend to look at history in order to justify the interpretation and reasoning of the Court's decisions.¹⁸² However, in the Establishment Clause cases, any thorough historical analysis is curiously lacking, or even more distorted than usual, by the Court. Of course, for the Court to announce that the original intent of the Founders was strictly separationist, they must necessarily ignore history. For not only was religion inextricably linked with most state governments at the time of the adoption of the Constitution and beyond,¹⁸³ but one of the prominent sources of strict separation was a byproduct of religion itself in public schools.¹⁸⁴

Any understanding of the Court's religion jurisprudence must be understood in the context of the social and political forces surrounding its decisions. While not entirely without legal foundation, the decisions are undeniably affected by the changing composition of America's citizens. As the country became more pluralistic and dominated less by mainstream Protestantism, America as a society, and the Court in particular, was forced to reevaluate our understanding of religious expression and religious freedom.

Disputes concerning the Establishment Clause have primarily arisen out of two situations: the funding of religious (almost strictly Catholic) schools, and prayer in public schools.¹⁸⁵ The former situation was born of nativist bigotry; the majority of America at the advent of "common schools" (the precursor of what were to

¹⁸² See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003) (analyzing the roles of the Constitution's text, its original understandings, and its history in constitutional interpretation).

¹⁸³ At the time the First Amendment was adopted, "[w]ith the barely arguable exception of Rhode Island, no American state could have been found in compliance with the modern understanding of separation of church and state." Jeffries & Ryan, *supra* note 180, at 292. Indeed, seven of the fourteen states maintained government-sponsored churches, and several others sought to advance Christianity in other ways. *Id.* McCarthy also writes that "support for the notion of keeping civil and sectarian affairs discrete was by no means universal at the time the Constitution was adopted. . . . But given the sketchy record of deliberations when the amendment was written and adopted, the original intent cannot be delineated with certainty." McCarthy, *supra* note 177, at 123 (citation omitted). White remarks that immediately after adopting the Bill of Rights, the Framers "prayed when it was done." John D. White, Casenote, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), 39 S. TEX. L. REV. 165, 166 (1997).

¹⁸⁴ See *infra* notes 185–99 and accompanying text.

¹⁸⁵ See Jeffries & Ryan, *supra* note 180, at 281 ("These two propositions — that public aid should not go to religious schools and that public schools should not be religious — make up the separationist portion of the modern Establishment Clause.").

become public schools) was Protestant.¹⁸⁶ During that same period, America experienced a marked and rapid increase of Catholic immigrants.¹⁸⁷ Because the latter situation — school prayer — was an essential part of early public education, and because school prayer was strictly Protestant, Catholic immigrants opened their own schools.¹⁸⁸ In their article, *A Political History of the Establishment Clause*, Jeffries and Ryan note: “For most of its history, public education in America had been unabashedly patriotic and unmistakably Protestant. . . . Early common schools featured Bible reading, prayer, hymns, and holiday observances, all reinforced by the exhortations of the teacher and the pervasive Protestantism of the texts.”¹⁸⁹ Because Catholics had essentially been forced out, and in some cases literally beaten out, of the Protestant “public” schools, they struggled to get the government to fund their schools.¹⁹⁰ Because the Protestants were terrified of a Pope-controlled Catholic immigrant population overthrowing their Protestant-dominated government, they viciously opposed any funding of Catholic schools.¹⁹¹ Jeffries and Ryan argue: “The real origins of the modern Establishment Clause lay not so much (or at least not only) in the utterances of Madison and Jefferson but in the political experiences and values [in mid-twentieth century America] that made aid to religious schools so problematic.”¹⁹² Therefore, when the Court opened the door and ventured into the arena of the Establishment Clause within public schools, it did so removed from the moorings of both the original understanding of the First Amendment and the particular historical development of that understanding. However, its language did not reflect that disconnect.¹⁹³

¹⁸⁶ *Id.* at 297–99.

¹⁸⁷ *Id.* at 299–300. Less than one percent of Americans were Catholic when the United States was founded. In the one hundred years between 1830 and 1930, the number of Catholics in the U.S. swelled from 600,000 to 24,000,000. In those last thirty years alone, 1900–1930, the number doubled. *Id.* at 300.

¹⁸⁸ *Id.* (“If the public schools were Protestant, the Catholics wanted their own schools, and for that, they needed money.”).

¹⁸⁹ *Id.* at 297–98.

¹⁹⁰ *Id.* at 300. “In Maine and Massachusetts, Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds in Philadelphia rioted over whether Catholic children could be released from the classroom during Bible reading.” *Id.*

¹⁹¹ In a recent case upholding a government program that provided computers and other instructional materials to parochial schools, Justice Thomas, writing the plurality opinion, discussed the “shameful pedigree” of the label “pervasively sectarian,” noting that it has historically been used as a codeword for “Catholic.” Justice Thomas went on to state that the doctrine was “born of bigotry.” *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000).

¹⁹² Jeffries & Ryan, *supra* note 180, at 297.

¹⁹³ Jeffries and Ryan note:

Indeed, many accounts of the history of the Establishment Clause take a direct flight from James Madison to the present, with perhaps a brief detour to buzz the airport of Reconstruction. . . . Neither the Bill of Rights nor the Fourteenth Amendment had much to do with the

In *Everson*, where the Court began its Establishment Clause project, the Court “embraced . . . that the Establishment Clause mandated a substantive policy of separation of church and state . . . [and] that the policy condemned neutral support of all religions as well as favoritism among them.”¹⁹⁴ Because of the heated dispute between Protestants and Catholics, “the *Everson* opinions told Protestants that hostility to parochial [Catholic] schools sprang not from sectarian rivalry or narrow self-interest but from high principle.”¹⁹⁵ At the time, the various sects of Protestantism were united against any government funding of parochial schools. However, when the issue changed to prayer in school, the Protestant coalition began to fracture.¹⁹⁶ In overturning prayer in school — beginning with the *Engel* case — “[n]ot surprisingly (and not for the last time), the [J]ustices championed the dominant views of the nation’s elite as against popular opinion.”¹⁹⁷ While politicians publicly championed the idea of school prayer, they did little to overturn the Court’s opinions.¹⁹⁸ Instead, the only proactive group in supporting school prayer was conservative evangelicals.¹⁹⁹

In a departure from their previous strict separation stance, the Court softened in the 1990s.²⁰⁰ In *Mergens*, the Court pronounced that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause

establishment of religion. The origins of the modern Establishment Clause lay not in the late eighteenth century, but in the nineteenth and twentieth. Accordingly, any attempt to understand where we are and how we got here must focus on exactly those periods that conventional history neglects.

. . . .
 . . . We think it plain that the separationist project begun in *Everson* did not result from legal analysis. Neither the constitutional text nor demonstrable original intent nor pre-existing doctrine or precedent determined that decision.

Id. at 369.

¹⁹⁴ *Id.* at 291. The authors also note that the Court applied these policies to the states through the Fourteenth Amendment, which they argue, unlike the incorporation of other amendments to the states, is not a foregone conclusion. *Id.* at 294–96. For the purposes of this Note, the author will assume that the Court has correctly incorporated the Establishment Clause through the Fourteenth Amendment, and that Virginia, as the federal government, is bound by the constraints laid out in the First Amendment.

¹⁹⁵ *Id.* at 315.

¹⁹⁶ *Id.* at 319.

¹⁹⁷ *Id.* at 326.

¹⁹⁸ *Id.* at 325.

¹⁹⁹ *Id.*

²⁰⁰ See Roald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court’s Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881 (1993) (arguing that the holding of *Mergens* suggests that the Court’s long-standing adherence to the strict separationist doctrine in public schools is waning).

forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”²⁰¹ In subsequent cases, “[p]rivate decisions to express religious ideology in public schools have been upheld on the rationale that such expression does not represent the government, and the circumstances under which religious expression is considered ‘private’ are expanding.”²⁰² McCarthy writes: “The federal judiciary appears to be on a course of expanding the reach of the nondiscrimination model and reducing the perceived governmental role associated with devotional activities in public schools and the use of public funds in religious schools.”²⁰³ McCarthy further argues that these “small inroads” could perhaps end with religious establishments in education.²⁰⁴ This fear, however, seems to be overblown. Certainly, allowing moments of silence, with clearly no intent to establish a formalized prayer, or refusing prospectively to prohibit individuals or groups of individuals from praying on government property, is a far cry from either a state religion or even formalized school prayer.

Some commentators have proposed, as an alternative to the Supreme Court’s approach, a “practical nonpreferential” approach.²⁰⁵ In his article, Kevin Evans argues that the Framers “intended to prevent the creation of a national church and the federal preference of one or more religious sects over others; there was no intent to prohibit the encouragement or furtherance by the federal government of religion by nonpreferentialist means.”²⁰⁶ Practical preferentialism involves a two-step test.²⁰⁷ “The first consideration would be whether the challenged action is nonpreferential on its face The second consideration would be whether all religions necessarily can be treated similarly.”²⁰⁸ Bell finds practical preferentialism lacking and suggests combining it with the *Marsh* analysis: “*Marsh* recognized that the *Lemon* analysis fails to take into account history and demonstrated the Court’s willingness to forego *Lemon*, even if it resulted in the development of the secularization approach.”²⁰⁹

Seeking an area for compromise, G. Sidney Buchanan suggests that Establishment Clause cases can be better resolved by simply asking three questions:

²⁰¹ Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

²⁰² McCarthy, *supra* note 177, at 163–64.

²⁰³ *Id.* at 165.

²⁰⁴ *Id.* at 165–66.

²⁰⁵ Bell, *supra* note 126, at 1309; *see also* Kevin D. Evans, *Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis*, 64 ST. JOHN’S L. REV. 41, 98–103 (1989).

²⁰⁶ Evans, *supra* note 205, at 99 (footnotes omitted). Given the practices in place at the time of the adoption of the First Amendment, and the lack of legislative history surrounding its adoption, that explanation is as likely as that advanced by those who point to Jefferson’s “wall of separation” comment.

²⁰⁷ *Id.* at 99–100.

²⁰⁸ *Id.*

²⁰⁹ Bell, *supra* note 126, at 1311 (citations omitted).

“First, who is the establisher? Second, what is being established? Finally, at which level of government is the establishment occurring?”²¹⁰ Conceding, as the Supreme Court has, that we are “a religious people whose institutions presuppose a Supreme Being,”²¹¹ Buchanan argues that “the question of prayer in governmental institutions cannot be resolved in an absolutist way. . . . Accordingly, a careful balancing of competing values is required to achieve a workable resolution of the [three] questions confronted in this article.”²¹²

B. The First Amendment as Applied to VMI

There is an atmosphere of “coercion” in some aspects of a VMI cadet’s life. But it is unclear whether the Fourth Circuit was in a position to determine that the cadets felt coerced by the supper prayer.²¹³ It was relatively simple for the Supreme Court to do so in its school prayer cases, because in each of those situations the students were minors, and therefore presumptively more susceptible to coercion. Here, VMI is admittedly different from all but six other colleges in the United States.²¹⁴ Still, it is doubtful that VMI cadets, or any of the students at America’s other military colleges, are any less capable than students at Indiana University or Tennessee State University of realizing that they can ignore the supper prayer if they do not agree with its content or the act of praying itself. Not only is it a conclusion solely based on the judge’s intuition that such an atmosphere must be per se coercive, even to an 18- or 19-year-old college student who has been admitted to a highly selective college, with no specific factual support in the record, but also it is highly offensive to those cadets who are capable of making such a distinction without the paternalistic intervention of the courts.²¹⁵

²¹⁰ G. Sidney Buchanan, *Prayer in Governmental Institutions: The Who, the What, and the At Which Level*, 74 TEMP. L. REV. 299, 299 (2001).

²¹¹ *Id.* at 354 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)) (internal quotations omitted).

²¹² *Id.* at 354.

²¹³ In fact, the plaintiff cadets did not plead as much in their complaint. *See Wilkinson, supra* note 5 (Plaintiffs “conceded that they faced no adverse consequences for any failure to take part in the prayer, and they did not even claim that they felt pressure to attend or participate in the observance, apart from the basic requirement to stand.”). At the least, there is some factual dispute whether cadets feel coerced, *see Kahn, supra* note 72, and a legal finding of coercion, without definitive factual support in the record, is necessarily a subjective determination by the judge, and therefore less favorable as an element to any test. Not only does it fail to provide any prospective guidance to educators, it also allows one judge (or a panel of judges) to make normative judgments with little or no factual or legal foundation.

²¹⁴ The United States Naval Academy, the United States Military Academy at West Point, the United States Air Force Academy, the Citadel, the Coast Guard Academy, and the United States Merchant Marine Academy are all similar military colleges.

²¹⁵ Of course, the danger of the opposite logic — as applied in *Marsh* and other cases —

Such formalistic exercises of school prayer should be prevented in public institutions of higher learning as they are in elementary and secondary schools, but not for any reason put forth by the Fourth Circuit. No court, particularly in factual situations involving non-minors, should have to wade into the subjective quagmire of determining whether the saying of a prayer “coerces” the audience. Whether a particular exercise is properly characterized as a “prayer” has never been at issue in any of these cases. Even in those cases in which the prayer is ultimately allowed, courts have done so with the full acknowledgment that the act was indeed a prayer.²¹⁶ Therefore, the only test should be: (1) is it a prayer, and if so, (2) is it a government-sponsored event or a government actor? If yes, then the act should be held unconstitutional. Prayers that tend to pass the current Supreme Court jurisprudence are so watered down in content that they have virtually lost any meaning, and should thus be undesirable even to those who wish to reintroduce prayer into schools or other government-sponsored settings.

Some may argue that this proposed test would go too far. The First Amendment does include two clauses pertaining to religion: the Establishment Clause and the Free Exercise Clause. Many argue that by being strictly separationist, as it was for many years, the Court would be going beyond the antiestablishment of religion and infringing on the student’s free exercise rights. Yet, which free exercise rights are VMI cadets enjoying by listening to a prayer written and read by another person? If we were to accept the benefits of the prayer, even communal prayer, how does an institutionalized process further that purpose, particularly when it is mandatory, in a way that promotes a student’s free exercise rights? As non-minors, the cadets’ free exercise rights are at issue.

At VMI, coercion and conformity rub in the opposite direction, too. If the cadets pray prior to supper, even if that practice does not violate the Constitution in terms of the Establishment Clause, it violates the Free Exercise Clause in terms of the cadets’ freedom to pray. It is not the individual cadets exercising their freedom; rather, it is the Institute that is praying for them. Therefore, analyzing prayer at public institutions of higher learning demands a new paradigm.

is the reliance on history and tradition to justify these practices, and to conclude that they are virtually harmless given their history and tradition.

Although the Court was trying to preserve history and tradition, “it would, no doubt, come as a surprise to those who offer legislative prayers that their efforts are constitutional only because the Court construes their words to be the functional equivalent of the gavel used to bang a meeting to order.”

Bell, *supra* note 126, at 1306 (quoting Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 63 (1993)).

²¹⁶ See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding a state legislature’s practice of opening sessions with a prayer).

C. Proposed Remedy

The appropriate remedy to this situation, if we as a society are uncomfortable completely removing prayer from all situations, is to allow a moment of silence instead. Some commentators have argued that this is actually letting school prayer in through the “back door.”²¹⁷ However, (1) the Fourth Circuit has recently upheld Virginia’s “minute-of-silence” statute; (2) with non-minors, coercion is no longer a concern; and (3) a moment of silence would not infringe on a cadet’s free exercise (or non-exercise) of her religion.

In upholding Virginia’s minute-of-silence statute, the Fourth Circuit noted that, as written, the statute had “at least two purposes, one of which is clearly secular and one of which may be secular even though it addresses religion.”²¹⁸ It continued: “To the extent that the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious purpose. And to the extent it is designed to permit students to pray, it accommodates religion.”²¹⁹ In other words, it protects students from being unwillingly exposed to religious prayer, while at the same time, allowing students who wish to exercise their freedom to pray the ability to do so. The court went on to hold that there was no excessive entanglement between the government and religion.²²⁰ The statute limits the involvement of the teacher (in Establishment Clause cases, the agent of the government) to informing the students of their options during the minute of silence, options that are facially secular. The government’s “involvement in religion is negligible, left only to informing students that one of the permissible options during the moment of silence is prayer.”²²¹ Nor did the state endorse religion, because there was “simply no evidence to indicate that Virginia has promoted any religion or promoted religion over nonreligion.”²²²

Mellen will not be the case that reaches the Supreme Court. There are admittedly few situations in which prayer arises in a controversial setting at a college or university. Moreover, the factual situation involved in *Mellen* is

²¹⁷ See Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL’Y REV. 267 (2002); see also *id.* at 322 (explaining that moment-of-silence legislation violates the Establishment Clause because it amounts to the government telling “schoolchildren how or when they should pray”). But see Linda D. Lam, Note, *Silence of the Lambs: Are States Attempting To Establish Religion in Public Schools?*, 56 VAND. L. REV. 911, 937 (2003) (arguing that moment-of-silence statutes do not violate the Establishment Clause, but instead, “when written and applied in a neutral fashion, provide a compromise between those who desire a complete separation of government and religion and those who do not”).

²¹⁸ *Brown*, 258 F.3d at 276.

²¹⁹ *Id.*

²²⁰ *Id.* at 278.

²²¹ *Id.*

²²² *Id.*

decidedly unique. But the area seems to be in flux. Commentators and Supreme Court Justices alike have been declaring the *Lemon* test dead for years. It is possible that the Court will decide to clarify the matter, particularly since there is no guiding precedent for prayer involving non-minors. The companion case to the school prayer area is *Newdow*, which could affect the status of ceremonial deism. If the Court decides to strike down the pledge of allegiance on religious, rather than coercion, grounds, the result could affect the ability of courts to argue subsequently that such things as university invocations and benedictions are harmless.

It is difficult to accept that the distinction between allowing prayer to open a legislative session while not allowing it at a college event is merely that legislatures have done it longer. Alleged history and tradition should not be allowed to trump constitutional rights. The Third Circuit has announced that “impermissible practice can not be transformed into a constitutionally acceptable one by putting a democratic process to an improper use.”²²³ Why then can the Court, a notably undemocratic institution, decide that an otherwise impermissible practice *can* be transformed into a constitutionally acceptable one simply by putting the mark of history and tradition on it?

CONCLUSION

The Fourth Circuit correctly upheld the district court’s decision that held VMI’s supper prayer as unconstitutional. However, the Fourth Circuit should have better justified the result, instead of relying on the tenuous logic that VMI is “different” because it is a military school. It is demeaning to the cadets of VMI to say that they were subjected to a constitutionally impermissible establishment of religion because the nature of their education makes them “impressionable.” Are VMI’s cadets, many of whom go on to have successful careers largely outside of the military, that much different from Nebraska’s legislators, or even from their peers at the University of Virginia? Were UVA students subjected to a prayer situation — whether similar to VMI’s or Indiana University’s — would that still be unconstitutional?

The reasoning of both courts in all three decisions, along with that of the dissenters, shows the convoluted nature of the Supreme Court’s school prayer jurisprudence. When removed from the context of school prayer at elementary and secondary schools, it provides little or no guidance to lower courts. There must be more substance to the jurisprudence in this area when applied to adults. Fact-specific cases demand contextual analysis and flexibility. Unfortunately, that approach also leads to confusion. The Supreme Court has repeatedly muddied the school prayer waters with numerous decisions involving numerous lines of rea-

²²³ *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1477 (3rd Cir. 1996).

soning.²²⁴ For that reason, the Supreme Court should not have denied certiorari and passed on an opportunity to affirm the result and clarify the rationale for the law.

The issue of religion is certainly not one that will soon recede, so this area of Supreme Court law begs for, and deserves, a more consistent and honest approach than it has to date. Most important, it is an issue that demands some sort of compromise and balance between the Establishment Clause and the Free Exercise Clause. Without a compromise, no court will enjoy the support of the citizenry. America is a country that is, and has been for quite some time, undergoing remarkable changes in the religious composition of her citizens. In order to protect all of them in their varied beliefs and disbeliefs — from any infringement on their freedom from government-supported religion and their freedom to practice their own religion — the courts must be vigilant at both ends of the spectrum. That vigilance would be better served by consistent legal guidance on what is and what is not constitutional. In the area of school prayer at an institution of higher learning, a moment-of-silence would be a policy that would protect the entire spectrum.

The Fourth Circuit should have decided the case better — not differently — by not relying on the tenuous and faulty military school logic. The Supreme Court should not have passed on the opportunity to affirm the result and clarify the rationale for the law.

²²⁴ See *supra* Part I.