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and
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Throughout 1989 and 1990, mayors and city councils, governors, as well as the Congress and President of the United States, were asked to and did proclaim 1990 as the International Year of Bible Reading.[1]

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1. This worldwide campaign was sponsored by the International Bible Reading Association [hereinafter IBRA], a tax-exempt organization whose headquarters are located in Murfreeboro, Tennessee. Although styled as a coalition of Judeo/Christian leaders, it is a subsidiary of the Bible Pathway Ministry, a nondenominational Christian ministry. According to the Association's chairman and founder, Dr. John A. Hash, the Association's "original goal was to energize a billion people to read through their Bible

Although most of these proclamations were passed with little fanfare or concern for their constitutional implications, such governmental action of singling out and promoting the sacred writings of one religion over others undermines basic constitutional principles respecting the relationship between government and religion.

The first amendment to the United States Constitution contains both an establishment clause and a free exercise clause.[2] Central to both clauses is the principle of "neutrality."[3] The free exercise clause and the establishment clause were intended to leave to individual citizens' own judgment and conscience, free from those dominant in government, the realm of religious or non-religious belief.[4] As a result, the Supreme Court has historically interpreted the Free Exercise Clause to prevent governmental action which penalizes or burdens one for his or her religious beliefs or practices[5] and has interpreted the establishment clause to prevent governmental aid or promotion of religion or particular religious beliefs and practices.[6]

At the present time, however, an ideological war is being fought

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each year, [however] this number could double or triple as Christians unite and boldly proclaim God's word." *See* IBRA documents (on file with author).

2. The first amendment to the United States Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST., amend. I. Although the language of the amendment and its legislative history limited the applicability of the amendment to Congress, both clauses have been made applicable to the states through the fourteenth amendment. TRIBE, AMERICAN CONSTITUTIONAL LAW 1161-62 (2d ed. 1988); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (incorporation of free exercise clause); Everson v. Board of Educ., 330 U.S. 1, 8 (1947) (incorporation of establishment clause).

3. ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.1, at 341 (1986).

4. *Cantwell*, 310 U.S. at 304. In United States v. Ballard, 322 U.S. 78 (1944), a unanimous Court said, "[t]he Framers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the veracity of his religious views." *Id.* at 87.

5. Galloway, *Basic Free Exercise Clause Analysis*, 29 SANTA CLARA L. REV. 865, 869 (1989).

6. Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1090, 1091 (1989) [hereinafter Note, *Sharpening*].

in the United States Supreme Court with the winning side determining the future scope of the religious clauses of the first amendment.[7] During its 1989 term, the Court unexpectedly reversed over thirty years of Free Exercise analysis, by removing the amendment as a bar against broadbased statutes which unreasonably burden individuals' religious practices and leaving it to the political process to determine whether a particular religious practice is protected.[8] While the establishment clause has yet to meet a similar fate, it now appears that at least four of the Justices currently sitting on the Court are inclined to abandon well-established establishment clause precedent[9] and shift a large part of the

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7. Both through commentators and the opinions of the individual members of the Supreme Court, a lively debate is occurring concerning the proper establishment clause analysis. *See* McConnell, *The Religious Clauses of the First Amendment: Where is the Supreme Court Heading?*, 1990 FIRST AMENDMENT LAW HANDBOOK 269-83 (1990); Cord, *Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation*, 10 HARV. J.L. & PUB. POL'Y. 47 (1982); Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 68 YALE L.J. 1739 (1989); Note, *Invocations and Benedictions — Is the Supreme Court 'Graduating' to a Marsh Analysis?*, 65 U. DET. L. REV. 769 (1988).

8. In Employment Division v. Smith, 110 S. Ct. 1595 (1990), the Court held that a state prohibition against the use of peyote did not violate the Free Exercise Clause where the peyote was used in a Native-American religious ceremony. Prior to this decision, the test under the Free Exercise Clause was to determine whether the government had placed a burden on the observance of a religious belief or practice and, if so, whether a compelling government interest justifies the burden. *Id.* at 1610 (O'Connor, J., concurring). However, the Court refused to apply the traditional compelling state interest analysis, holding that facially neutral laws of general applicability need not constitutionally make any exemption to accommodate an individual's religious beliefs under the Free Exercise Clause. Such accommodation, if any, is left to the political process, notwithstanding the relative political disadvantage of those persons whose religious practices are not widely engaged in or accepted. *Id.* at 1606.

9. The current establishment clause test was enunciated by the Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). However, in a more recent decision, Justice Kennedy, with Chief Justice Rehnquist and Justices White and Scalia concurring, criticized this test when he wrote that "[i]n keeping with the usual fashion of recent years, the majority applies the *Lemon* test. . . . I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. Our cases often question its utility in providing concrete answers to establishment clause questions, calling it but a "'helpful signpos[t]'" or "'guidelin[e]'" to assist our deliberations rather than a comprehensive test. Substantial revision of our establishment clause doctrine may be in order; but it is unnecessary to undertake that task today. . . ." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655-56 (1989)

determination concerning when church and state can mix to the political process. At issue in this battle is the future vitality of the establishment clause as a bulwark against government support and sponsorship of majority religious views.[10]

It is imperative that the determination of what constitutes an impermissible establishment of religion not be relegated to the political process. For if the Court allows the political system more freedom to aid religious practices by limiting the effect of the establishment clause, government aid and promotion will flow to those religions that constitute the political majority — that is, mainstream Christian religions — to the detriment of those of us who hold less popular religious views or none at all.[11]

The determination of whether the government may properly promote an International Year of Bible Reading must be viewed from this perspective. Such an official sanction should be seen as nothing more or less than an attempt by the government to promote the religious practices of the political majority. This article will discuss the dangers which these actions create and why, utilizing the current tests employed by the Court, these governmental proclamations violate the establishment clause.

I. 1990 AS THE INTERNATIONAL YEAR OF BIBLE READING

In December of 1989, the Congress of the United States passed a joint resolution designating 1990 as the International Year of Bible Reading.[12] The resolution requested the President to "issue a

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(citations omitted).

10. One commentator has argued that there is a clear danger the establishment clause may be read by at least four members of the Supreme Court as a protection for Christianity. *See* Note, *Sharpening*, *supra* note 6, at 1086-87.

11. Those who consider themselves to be Christian compose 84% of the population of the United States. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990 55 (1990).

12. S.J. Res. 164 (also known as Public Law 101-209) which was approved on December 7, 1989, reads as follows:

Whereas the Bible has made a unique contribution in shaping the United States as a distinctive and blessed nation and people;

Whereas deeply held values springing from the Bible led to the early settlement of our nation;

Whereas many of our great national leaders, such as Presidents Washington, Jackson, Lincoln, and Wilson, paid tribute to the important influence the Bible has had in the development of our nation;

Whereas President Jackson called the Bible "the rock on which our Republic rests":

Proclamation recognizing both the formative influence the Bible has had on many societies of the world and the value of the study of the Bible."[13]

In passing the resolution Congress did not simply wish to recognize the historical or literary value of the Bible, but wanted people to read the Bible and see God's revelations in it.[14] Senator Don Nickles,[15] the author of the Joint Resolution, made this patently clear when, in introducing the Resolution, he described it as one that "promotes the actual reading of the Bible."[16] President George Bush, in furtherance of the Congressional Resolution, then issued a proclamation premised on the belief that the Bible contained "revelations of God's intervention in human history" and "invited all Americans to discover the great inspiration and knowledge that can be obtained through the thoughtful reading of the Bible."[17]

Whereas the history of our Nation illustrates the value of voluntarily applying the teachings of the Bible in the lives of individuals and of families; and

Whereas numerous individuals and organizations around the world are joining hands to encourage international Bible reading in 1990; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That 1990 is designated as the "International Year of Bible Reading." The President is authorized and requested to issue a proclamation recognizing both the formative influence the Bible has had on many societies of the world and the value of the study of the Bible.

S.J. Res. 164, 101st Cong., 1st Sess., (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News (103 Stat.) 1838. The resolution was sponsored by 58 Senators and 230 Representatives.

13. *Id.*

14. *See infra* note 16 and accompanying text.

15. Republican United States Senator from Oklahoma.

16. S.J. Res 164, 101st Cong., 1st Sess., 135 CONG. REC. S7251-52 (1989). Senator Nickles finished his introduction of the Resolution by quoting President Lincoln's statement that "no man was ever worse for living according to the directions of the Bible . . . take all of this book [the Bible] upon reason that you can, and the balance on faith, and you will live and die a happier man." *Id.*

17. Presidential Proclamation 6100, which was issued by President Bush on February 22, 1990, reads as follows:

> Among the great books produced throughout the history of mankind, the Bible has been prized above all others by generations of men and women around the world — by people of every age, every race, and every walk of life.
>
> The Bible has had a critical impact upon the development of Western civilization. Western literature, art, and music are filled with

images and ideas that can be traced to its pages. More important, our moral tradition has been shaped by the laws and teachings it contains. It was a biblical view of man — one affirming the dignity and worth of the human person, made in the image of our Creator — that inspired the principles upon which the United States is founded. President Jackson called the Bible "the rock on which our Republic rests" because he knew that it shaped the Founding Fathers' concept of individual liberty and their vision of a free and just society.

The Bible has not only influenced the development of our Nation's values and institutions but also enriched the daily lives of millions of men and women who have looked to it for comfort, hope, and guidance. On the American frontier, the Bible was often the only book a family owned. For those pioneers living far from any church or school, it served both as a source of religious instruction and as the primary text from which children learned to read. The historic speeches of Abraham Lincoln and Dr. Martin Luther King, Jr. provide compelling evidence of the role Scripture played in shaping the struggle against slavery and discrimination. Today the Bible continues to give courage and direction to those who seek truth and righteousness. In recognizing its enduring value, we recall the words of the prophet Isaiah, who declared, "[t]he grass withereth, the flower fadeth; but the word of our God shall stand forever."

Containing revelations of God's intervention in human history, the Bible offers moving testimony to His love for mankind. Treasuring the Bible as a source of knowledge and inspiration, President Abraham Lincoln called the Great Book "the best gift God has given to man." President Lincoln believed that the Bible not only reveals the infinite goodness of our Creator, but also reminds us of our worth as individuals and our responsibilities toward one another.

President Woodrow Wilson likewise recognized the importance of the Bible to its

Numerous other governmental bodies and officials, such as Governor Guy Hunt of Alabama, also proclaimed 1990 as the

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readers. "The Bible is the word of life," he once said. Describing its contents, he added:

You will find it full of real men and women not only but also of the things you have wondered about and been troubled about all your life, as men have been always; and the more you will read it the more it will become plain to you what things are worth while and what are not, what things make men happy — loyalty, right dealing, speaking the truth . . . and the things that are guaranteed to make men unhappy — selfishness, cowardice, greed, and everything that is low and mean. When you have read the Bible you will know that it is the Word of God, because you will have found it the key to your own heart, your own happiness, and your own duty.

Cherished for centuries by men and women around the world, the Bible's value is timeless. Its significance transcends the boundaries between nations and languages because it carries a universal message to every human heart. This year numerous individuals and associations around the world will join in a campaign to encourage voluntary study of the Bible. Their efforts are worthy of recognition and support.

In acknowledgment of the inestimable value and timeless appeal of the Bible, the Congress, by Senate Joint Resolution 164, has designated the year 1990 as the "International Year of Bible Reading" and has authorized and requested the President to issue a proclamation in observance of this year.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the year 1990 as the International Year of Bible Reading. I invite all Americans to discover the great inspiration and knowledge that can be obtained through thoughtful reading of the Bible.

Proclamation No. 6100, 55 Fed. Reg. 6783 (1990), *reprinted in* 1 U.S. Code Cong. & Admin. News A16-17 (1990).

International Year of Bible Reading.[18] While the particular wording of these proclamations varied, by the end of 1990 numerous national, state and local officials had endorsed 1990 as the International Year of Bible Reading.[19] In most communities where such proclamations were issued

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18. Governor Hunt's Proclamation reads as follows:

> WHEREAS, the Bible, the Word of God, has made a unique contribution in shaping the United States as a distinctive and blessed nation and people; and
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> WHEREAS, deeply held religious beliefs springing from the Holy Scriptures led to early settlement of our nation; and
>
> WHEREAS, many of our great national leaders, such as Presidents Washington, Jackson, Lincoln, and Wilson, paid tribute to the important influence the Bible has had in the development of our nation; and
>
> WHEREAS, the history of our nation clearly illustrates the value of voluntarily applying the teaching of the Holy Scriptures in the lives of individuals, families, and societies; and
>
> WHEREAS, the Bible provides a major source for all people of the world; and
>
> WHEREAS, the renewing of knowledge and faith in God through Holy Scripture reading can strengthen nation, families, and individuals, and
>
> WHEREAS, numerous individuals and organizations around the world are joining hands to encourage international Bible reading in 1990.
>
> NOW THEREFORE, I, Guy Hunt, Governor of the State of Alabama, do hereby proclaim the year 1990 as INTERNATIONAL YEAR OF BIBLE READING in Alabama, and urge all Alabamians to study the Holy Scriptures and apply their teachings in all actions and interactions.

Proclamation of Governor Guy Hunt of Alabama (on file with author).

19. The authors are unaware of the exact number of governmental bodies which were asked to or have declared 1990 to be the International Year of Bible Reading. According to IBRA, as of October 1990 proclamations had been issued by governors in the following 36 states: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska,

there was little, if any, opposition, but in others, albeit a minority, such governmental action sparked tremendous political controversy.[20]

All of the acts and proclamations had at least one thing in common — they served to officially sanction the Bible — the preeminent doctrine of Christianity. "[T]he place of the Bible as an instrument of religion cannot be gainsaid. . . ."[21] The proclamations, which tied belief in God to the teaching of the Bible, necessarily exclude a significant portion of religious people, not to mention those who do not believe in religion at all.[22] Undeniably, a belief in God is not inherent in, or even compatible with all types of religious practice.[23] Any proclamation

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Nevada, New Hampshire, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. *See* IBRA documents, *supra* note 1, (on file with author).

20. In the City of Benicia, a community of approximately 25,000 persons in northern California, the mayor's refusal to sign such a proclamation created a major political controversy. N.Y. Times, Aug. 27, 1990, § A, at 12, col. 4. As a result, the City Council adopted by a 3-to-2 vote a proclamation similar to the one made by Governor Hunt, *supra* note 18. After substantial opposition from the Mayor, city residents, the American Jewish Congress, the American Civil Liberties Union and Americans United for Separation of Church and State, the following proclamation was substituted by another 3-to-2 vote.

WHEREAS, the Bible, in its various versions, has made a unique contribution to the moral and cultural values of our great Nation and its people; and

WHEREAS, so many of America's settlers and immigrants came to our shores in order to practice their religious beliefs, free from governmental restriction; and

WHEREAS, some of the greatest leaders of our Nation, such as Presidents Washington, Jackson, Lincoln and Wilson, paid tribute to the important influence the Bible has had in the development of our Nation; and

WHEREAS, the Bible provides a major source of both inspiration and history for a substantial number of the World's people; and

WHEREAS, numerous individuals and organizations around the World are joining hands to proclaim 1990 as the "International Year of Bible Reading,"

NOW, THEREFORE, BE IT RESOLVED that the City of Benicia recognizes the unique contribution made by the Bible to our society and the value of the study of the Bible, and hereby proclaims the year of 1990 as "International Year of Bible Reading."

See IBRA documents, *supra* note 1, (on file with author).

21. Abington School District v. Schempp, 374 U.S. 203, 224 (1963).

22. At least in Everson v. Board of Educ., 330 U.S. 1 (1946), the United States Supreme Court has recognized that the establishment clause protects atheists, as well as believers. *Id.* at 15-16.

23. "Among religions in this Country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." Torasco v. Watkins, 367 U.S. 488, 495 n.11 (1961).

which exalts the Bible as the most prized book above all clearly places the Bible in a superior position relative to and at the expense of other religious or secular teachings. While attempts may be made to rationalize such proclamations as nothing more than confirmations of this Country's "Judeo-Christian tradition,"[24] the tradition so characterized is one seen predominantly from a Christian perspective.[25]

II. EXISTING CONSTITUTIONAL TESTS

No reported cases have analyzed the constitutionality of governmental proclamations endorsing 1990 as the International Year of Bible Reading. In 1982, however, Congress declared,[26] and thereafter

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24. The Supreme Court has, in one case, utilized this "tradition" as a basis for approving certain governmental action. *See* Marsh v. Chambers 463 U.S. 783, 793 (1983) (approving legislative prayer). Certain Justices would like to see the establishment clause applied in the future with "proper sensitivity to our traditions." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1988) (Kennedy, J., dissenting).

25. "The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion." People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (S.Ct. Ill. 1910), *quoted in* Abington School District v. Schempp, 374 U.S. 203, 282 n.58 (1963). In fact, the Bible is generally defined as the collection of sacred writings of the Christian religion, comprising both the Old and New Testaments. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 144 (1989).

26. S.J. Res 165, (also known as Public Law 97-280), reads as follows:

> Whereas the Bible, the word of God, had made a unique contribution in shaping the United States as a distinctive and blessed nation and people;
>
> Whereas deeply held religious convictions springing from the Holy Scriptures led to the early settlement of our Nation;
>
> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States;
>
> Whereas many of our great national leaders--among them Presidents Washington, Jackson, Lincoln, and Wilson--paid tribute to the surpassing influence of the Bible in our country's development, as in the words of President Jackson that the Bible is "the rock on which our Republic rests";

President Ronald Reagan proclaimed, 1983 to be the Year of the Bible.[27]

> Whereas the history of our Nation clearly illustrates the value of voluntarily applying the teachings of the Scriptures in the lives of individuals, families and societies;
>
> Whereas this nation now faces great challenges that will test this Nation as it has never been tested before; and
>
> Whereas that renewing our knowledge of and faith in God through Holy Scripture can strengthen us as a nation and a people: Now, therefore, be it:
>
> Resolved by the Senate and House of Representatives of the United States of America and Congress assembled, That the President is authorized and requested to designate 1983 as a national "Year of the Bible" in recognition of both the formative influence the Bible has had on our Nation, and our national need to study and apply the teachings of the Holy Scriptures.

S.J. Res. 165, 97th Cong., 2nd Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1211 (Oct. 4, 1982).

27. Presidential Proclamation 5018 was issued by President Reagan on February 3, 1983, and reads as follows:

> Of the many influences that have shaped the United States of America into a distinctive Nation and people, none may be said to be more fundamental and enduring than the Bible.
>
> Deep religious beliefs stemming from the Old and New Testaments of the Bible inspired many of the early settlers of our country, providing them with the strength, character, convictions, and faith necessary to withstand great hardship and danger in this new and rugged land. These shared beliefs helped forge a sense of common purpose among the widely dispersed colonies — a sense of community which laid the foundation for the spirit of nationhood that was to develop in later decades.
>
> The Bible and its teachings helped form the basis for the founding Fathers' abiding belief in the inalienable rights of the individual, rights which they found implicit in the Bible's teachings of the inherent worth and dignity of each

individual. This same sense of man patterned the convictions of those who framed the English system of law inherited by our own Nation, as well as the ideals set forth in the Declaration of Independence and the Constitution.

For centuries the Bible's emphasis on compassion and love for our neighbor has inspired institutional and governmental expressions of benevolent outreach such as private charity, the establishment of schools and hospitals, and the abolition of slavery.

Many of our greatest national leaders — among them Presidents Washington, Jackson, Lincoln, and Wilson — have recognized the influence of the Bible on our country's development. The plainspoken Andrew Jackson referred to the Bible as no less than "the rock on which our Republic rests." Today our beloved America and, indeed, the world, is facing a decade of enormous challenge. As a people we may well be tested as we have seldom, if ever, been tested before. We will need resources of spirit even more than resources of technology, education, and armaments. There could be no more fitting moment than now to reflect with gratitude, humility, and urgency upon the wisdom revealed to us in the writing that Abraham Lincoln called "the best gift God has ever given to man...But for it we could not know right from wrong."

The Congress of the United States, in recognition of the unique contribution of the Bible in shaping the history and character of this Nation, and so many of its citizens, has by Senate Joint Resolution 165 authorized and requested the President to designate the year 1983 as the "Year of the Bible."

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, in recognition of the contributions and influence of the Bible on our Republic and our people, do hereby proclaim 1983 the Year of the Bible in the United States. I encourage all citizens, each in his or her own way, to reexamine and rediscover its priceless and timeless message.

Two federal district court cases discussed the constitutionality of the 1982 action.

In *Gaylor v. Reagan*,[28] plaintiffs sought to have the court enjoin President Reagan from taking any action as a result of the 1982 Congressional resolution. Since the Presidential Proclamation had not yet been issued, District Judge James E. Doyle found the case not ripe for determination.[29] Although the case was dismissed on procedural grounds, the court made clear that should President issue the proclamation that it would most likely be unconstitutional.[30]

In *Zwerling v. Reagan*,[31] a different federal district court held such presidential action to be constitutional.[32] There, Judge Manuel L. Real found that neither the 1982 Congressional Resolution nor the Presidential Proclamation was a "law" as that term is used in the establishment clause.[33] Judge Real believed that for a law to exist there must be some type of obligation or sanction imposed.[34] Finding neither compulsion nor obligation, both the Congressional resolution and the Presidential Proclamation were upheld.[35] Supreme Court decisions, however, belie this analysis by recognizing that neither compulsion nor coercion is required for there to be a violation of the establishment

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Proclamation No. 5018, 48 Fed. Reg. 5527, *reprinted in* 1983 U.S. Cong. & Admin. News A12-13.

28. 553 F. Supp. 356 (W.D. Wis. 1982).

29. *Id.* at 361.

30. *Id.* "As chief executive it is surely within the power of the President to exhort the entire nation to mark 1983 as a year of reflection and contemplation. It is surely within his power to exhort the people of the United States in 1983 to draw upon those wonderfully rich and various wellsprings of tradition — ethnic, regional, religious, and non-religious — from which they draw their strength and resolve. It is surely within his power to identify and to proclaim his own tradition and to express his respect for those differing but equally proud traditions. To accomplish such constitutional exhortation in the context of a "Year of the Bible" would be a remarkable feat. But doubt that he can perform it does not justify the exercise of the injunctive power of this court against the President, if such power exists." *Id.*

31. 576 F. Supp. 1373 (C.D. Ca. 1983).

32. *Id.* at 1376-77.

33. *Id.* at 1376.

34. *Id.* "[A law] is a matter of compulsion and does not take the nature of a plea, suggestion or request." *Id.*

35. *Id.* at 1378.

clause.[36] Consequently, neither of the cases addressed the pivotal issue of whether those "laws" violated the establishment clause.

A. The Establishment Clause

The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion."[37] In 1947, the Supreme Court recognized that the establishment clause was intended, in the words of Thomas Jefferson, to erect "a wall of separation between Church and State."[38] In recent years, however, Jefferson's wall of separation has been besieged and some justices have even threatened to dismantle it.[39] Nevertheless, most acknowledge that, at a minimum, the establishment clause means that neither Congress nor states may pass a

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36. In Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 597-98 n.47 (1989), the Court was asked to reconsider its position that proof of coercion is not a necessary element for an establishment clause violation. The majority of the Court refused to do so, and applied "the controlling endorsement inquiry, which does not require an independent showing of coercion." *Id.* Notwithstanding such recent precedent, the Court again is being asked during its 1990 term to ignore *stare decisis* and reject the view that coercion is not required. *See* Greenhouse, *Supreme Court to Take Fresh Look at Disputed Church-State Boundary*, N.Y. Times, Mar. 19, 1991, § A, at 16, col. 4.

37. U.S. CONST. amend I.

38. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145 (1878)).

39. Then Justice, now Chief Justice Rehnquist, wrote:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.
>
> . . .
>
> There is simply no historical foundation for the proposition that the framers intended to build "the wall of separation" that was constitutionalized in *Everson*.
>
> . . .
>
> The "wall of separation between Church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

Wallace v. Jaffree, 472 U.S. 38, 92, 106, 107 (1985) (Rehnquist, J., dissenting).

law which grants a preference to a particular religion or sect.[40]

Originally, it was not clear whether the establishment clause prohibited the government from preferring Christianity over non-Christian religions; for, it was the belief of some that the establishment clause merely prohibited government from choosing between different Christian sects.[41] Although James Madison, the author of the first amendment, did not subscribe to this latter view,[42] the apparent popular sentiment at the time the first amendment was adopted was that Christianity ought to receive encouragement from the state so far as this was not incompatible

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40. "The government is neutral, and, while protecting all, it prefers none, and it *disparages* none." Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963) (quoting with approval Minor v. Bd. of Education of Cincinnati, (Ohio Super. Ct. 1870) (unpublished opinion of Taft, J.)) (emphasis in original). Even Chief Justice Rehnquist, who some have called the Justice with the least expansive view of the establishment clause, adopts the "no preference doctrine." *See* Cord, *supra* note 7, at 48.

41. "[A]t one time it was thought that . . . [the freedom to choose one's creed] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace*, 472 U.S. at 52-53.

42. James Madison believed that both religion and government could best achieve their high purposes if each were left free from the other within its respective sphere; he thus urged that the 'tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence [sic] of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others.'

TRIBE, *supra* note 2, at 1159.

As Madison wrote:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens and one of [the] noblest characteristics of the late Revolution. The freeman of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principal, and they avoided the consequences by denying the principal. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?

Wallace, 472 U.S. at 53 n.38 (quoting MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* THE COMPLETE MADISON (S. Padover ed. 1953)).

with the private right of conscience and freedom of religion.[43] But, while the protection of different Christian sects may have been the intent of some of the original Framers of the Constitution, the Supreme Court has never adopted such a narrow view.[44]

Rather, the Court has held that the first amendment embraces the right of an individual to select any religious belief or none at all.[45] The foundation of the Court's posture is its recognition that, by adopting the precepts of a religion as its own, government improperly adopts that religion and implies that its nonadherents are outsiders.[46] In order to avoid this impermissible message, government must remain religiously

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43. Historian Joseph Story, in fact, wrote:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [first amendment], the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 593 (1851), *quoted in Wallace*, 472 U.S. at 52 n.36.

44. *See, e.g.*, Torasco v. Watkins, 367 U.S. 488, 495 (1960).

45. [T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among 'religions'--to encompass intolerance of the disbeliever and the uncertain.

Wallace, 472 U.S. at 53.

46. Any endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 595 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). For a discussion of the dangers arising from such governmental endorsement, *see* TRIBE, *supra* note 2, at 1285-88.

neutral.[47] From this principle of neutrality emerged the rule that the establishment clause is violated when governmental action "conveys a message of government endorsement or disapproval of religion."[48]

The neutrality of the Court was illustrated in its decision in *Allegheny County v. Greater Pittsburgh ACLU*.[49] *Allegheny County* dealt with the custom of placing religious objects on government property.[50] A sharply divided Court held that a creche in a county courthouse violated the establishment clause, whereas a menorah displayed with a Christmas tree outside a city-county office building did not.[51] Although the result was premised on various rationales,[52] a majority of the justices believed that the appropriate test for evaluating such governmental action was whether the governmental practice constituted an endorsement or

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47. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions and between religion and nonreligion. Only in this way can we 'make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary' and 'sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma.'

Grand Rapids School District v. Ball, 473 U.S. 373, 382 (1985) (citations omitted).

48. *Id.* at 389. This rule was first enunciated by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668, 690 (1983). *See also Wallace*, 472 U.S. at 56 (O'Connor, J., concurring).

49. 492 U.S. 573 (1989).

50. *Id.* at 578.

51. *Id.* at 621.

52. Justices Blackmun and O'Connor, albeit in separate opinions, reached this result by applying the endorsement test. *Id.* at 612 (Blackmun, J., for the Court); *id.* at 627 (O'Connor, J., concurring). Justices Brennan, Marshall and Stevens would have invalidated both displays under this test because they believed that the city-county official display also implied governmental endorsement of particular religions. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part); *id.* at 654 (Stevens, J., concurring in part and dissenting in part). The four dissenting justices, who rejected the endorsement test, believed both displays to be valid. *Id.* at 655 (Kennedy, J., dissenting).

disapproval of religion.[53] The majority opinion, however, specifically left open the question as to whether proclamations such as a National Day of Prayer were constitutional.[54]

Utilizing current Supreme Court doctrine, the remainder of this Article will examine the constitutionality of the Bible Reading Proclamations. While the Court has developed no fixed *per se* rules regarding the establishment clause,[55] three separate tests for evaluating governmental action under the Establishment clause have been used:[56] (1) the three-prong test enunciated in *Lemon v. Kurtzman*,[57] (2) the historical exception test of *Marsh v. Chambers*,[58] and (3) the strict scrutiny test for facially discriminatory action enunciated in *Larson v. Valente*.[59] This article concludes that the proper test to apply is the *Larson* test, and that, regardless of the test applied, the International Year of Bible Reading proclamations are unconstitutional.

1. *Lemon Analysis*. — To date, the three-part test enunciated in *Lemon* has primarily guided the Supreme Court's inquiry in establishment clause cases.[60] Under this analysis, if a governmental practice is found to have either a religious purpose or effect, or to create excessive entanglement between government and religion, that practice violates the establishment clause.[61]

The first requirement under the *Lemon* test is that the challenged activity have a primarily secular purpose.[62] While the Court has never required that governmental action be motivated by an exclusively secular

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53. *Id.* at 612.

54. "It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality." *Id.* at 603 n.52.

55. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

56. *See generally* Galloway, *supra* note 5.

57. 403 U.S. 602 (1971).

58. 463 U.S. 783 (1983).

59. 456 U.S. 228 (1982).

60. Grand Rapids School District v. Ball, 473 U.S. 373, 382 (1985); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 592 (1989).

61. *Lemon*, 403 U.S. at 612-13; Stone v. Graham, 449 U.S. 39, 40-41 (1980).

62. Professor Laurence Tribe has suggested that the 'purpose' test should not stand as an independent test, but more like a 'warning signal' so as not to discourage religious participation in the political process. TRIBE, *supra* note 2, at 1212-14, 1282.

purpose,[63] the government cannot intend to either promote religion in general or to advance a particular religious belief.[64] In such an inquiry, one considers the text of the statute and its legislative history[65] along with other evidence to determine if the governmental action is motivated primarily by a secular purpose.[66]

Second, the governmental action, even if it is unintended, must not have the essential effect of influencing, either positively or negatively, the pursuit of a religious tradition or the expression of a religious belief.[67] The determinative issue under the 'effect' prong of the test is whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as disapproval, of their individual religious choices."[68]

As recently articulated by Justice O'Connor:

> [T]he endorsement test captures the essential command of the Establishment Clause, namely that government must not make a person's religious beliefs relevant to their standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.' We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and

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63. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

64. Edwards v. Aguillard, 482 U.S. 578, 585 (1987). "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586-87.

65. Justice O'Connor has suggested that the Court limit itself to the statutory text, its official legislative history and its interpretation by the responsible administrative agency. *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring).

66. In *Edwards*, 482 U.S. at 585-92, the Court, in striking down Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in the Public School Instruction Act," looked at a variety of evidence to demonstrate that the Act was not intended to promote its stated purpose of protecting academic freedom. *See also Wallace*, 472 U.S. at 56-59.

67. TRIBE, *supra* note 2, at 1214.

68. Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985).

> beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.[69]

Determination of whether the primary effect of a government act is one of aiding religion is to be judged by an objective standard which looks only to the reaction of the average receiver of the government communication or to the average observer of the government action.[70] In determining whether an objective observer would believe that his or her beliefs are being endorsed or disapproved, it is not necessary that there be direct financial contact between the government and religion; symbolic benefits such as the transference of prestige from the government to the religion have been deemed sufficient.[71]

The final prong of the Lemon test is that the practice not result in excessive entanglement between government and religion.[72] Notwithstanding the potential for entanglement, it would appear under the narrow test developed by the Court that an excessive entanglement would not result from such proclamations. The concept of excessive government entanglement has been limited to actions resulting in administrative entanglement between government and religion.[73] However, proclamations endorsing particular religious practices certainly have the potential for creating political divisiveness.[74] Nevertheless, the prospect of political divisiveness is not a product of entanglement which by itself

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69. Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (citations omitted).

70. *Id.* at 630-31 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

71. Larkin v. Grendel's Den, 459 U.S. 116, 125-26 (1982). *See also* Friedman v. Board of County Commissioners, 781 F.2d 777 (10th Cir. 1985), where plaintiffs sought to prohibit a county from continuing to utilize a seal which contained a cross. There, the Court of Appeals found that the cross on the seal gave "an appearance or imprimatur of impermissible Church-State authority." *Id.* at 781. Specifically, the Court found that certain religious adherents, such as Native Americans, would look at the seal as ominous because it "certainly does not memorialize their 'Christian heritage' but rather of those who sought to extinguish their culture and religion." *Id.* at 781-82.

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

73. Mueller v. Allen, 463 U.S. 388, 403 (1983); Aguilar v. Felton 473 U.S. 402, 409-12 (1985).

74. While there was public opposition in some communities, see *supra* note 19, the absence of such opposition may not prove lack of political divisiveness but rather that the opponents have a sense of futility in opposing the majority. *Lynch*, 465 U.S. at 703 (Brennan, J., dissenting).

will invalidate governmental action, although it is a factor to consider.[75] In fact, the prospect of such divisiveness is recognized as "a 'warning signal' not to be ignored."[76] With this warning signal in mind, we will proceed to examine the Bible proclamations under the other two prongs of the *Lemon* test.

It is unclear what secular purpose or motive the proponents of such proclamations would assert to satisfy the first prong of the *Lemon* test.[77] However, it is instructive to look at prior Supreme Court decisions as they deal with discussions of the purposes put forward by states in substantiating school Bible reading and similar conduct.

In *Abington School District v. Schempp*,[78] school districts sought to validate their daily Bible reading by claiming that it was necessary for "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature."[79] Without disagreeing with the secular purposes put forth by the State, the Court invalidated the practice, holding that the reading of the Bible could not put separated from its clearly religious function.[80]

In *Stone v. Graham*,[81] the Supreme Court struck down the state of Kentucky's practice of requiring the posting of the Ten Commandments in each schoolroom. Notwithstanding the state's assertion that the secular purpose behind the posting was to teach the Ten Commandments as related to their adoption as the fundamental legal concept of Western Civilization and the Common Law,[82] the Court found that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian

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75. *Lynch*, 465 U.S. at 684; Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 339 n.17 (1987).

76. Committee of Public Educ. v. Nyquist, 413 U.S. 756, 797-98 (1973). The vice of governmental entanglement which causes political divisiveness is that religious institutions will be induced to become rivals for a place at the public trough. *Lemon*, 403 U.S. at 622.

77. The use and display of religious texts and doctrine in the public school, outside a general course of study, have consistently been invalidated for not having a secular purpose. *See* Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments); Wallace v. Jaffree, 472 U.S. 38 (1985) (mandatory period of silence for meditations or voluntary prayer); Edwards v. Aguillard, 482 U.S. 578 (1987) (mandated teaching of creation science).

78. 374 U.S. 203 (1963).

79. *Id.* at 223.

80. *Id.* at 224.

81. 449 U.S. 39 (1980).

82. *Id.* at 41.

faiths, and no legislative recitation of a proposed secular purpose can blind us to that fact."[83]

In *Edwards v. Aguillard*,[84] the Supreme Court invalidated a Louisiana statute which required that public schools which teach evolution must teach "creation science" as well, notwithstanding the school district's assertion that the law promoted academic freedom. The Court, citing *Schempp* and *Stone*, found that it "need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."[85]

Applying *Schempp*, *Stone* and *Edwards* to the International Year of Bible Reading compels the conclusion that the purpose behind the proclamations was to promote religion. While the President and Congress may truly believe that the International Year of Bible Reading and the reading of the Bible promotes socially acceptable conduct, that secular purpose does not hide the religious motivation, evidenced by the wording of particular proclamations[86] and the openly admitted, religious motivations of its sponsors.[87]

A similar result is reached under the primary effect prong of the *Lemon* test. Utilizing the endorsement test, the resolution impermissibly endorses a particular religious doctrine.[88] Those who do not hold the Bible to be sacrosanct will justifiably view the government conduct as

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83. *Id.* (citations omitted).

84. 482 U.S. 578 (1986).

85. *Id.* at 590 (footnote omitted).

86. The Presidential Proclamation refers to how the Bible, which contains "revelations of God's intervention in human history," has "enriched the daily lives of millions of men and women, who have looked to it for comfort, hope and guidance." Moreover, quoting President Woodrow Wilson, the proclamation states: "When you have read the Bible you will know that it is the Word of God, because you will have found it the key to your own heart, your own happiness, and your own duty." *See* Proclamation, *supra* note 17, 27. Similarly, Governor Hunt's proclamation describes the Bible as "The Word of God" and encourages all Alabamians "to study the Holy Scriptures and apply their teachings in all actions and interactions." *See supra* note 18. *Compare* Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985), where the Court made note that the statute referred to "meditation or voluntary prayer" in determining that it was motivated by an improper purpose.

87. *See supra* note 1.

88. In fact, those justices who reject the endorsement test admit such proclamations could not "withstand scrutiny under a faithful application of this formula." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

singling out the foundation of the Christian religion for special benefit to constitute a government endorsement. If the posting of the Ten Commandments in a public school classroom[89] or the display of a creche in a county courthouse[90] are viewed as endorsements, then an official proclamation that exalts the reading of a particular religious text clearly constitutes an impermissible endorsement. As Justice Blackmun wrote in striking down a state law which singled out religious publications for the benefit of tax-exempt status: "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[91] Government endorsement of Bible reading is, at a minimum, equally intolerable.[92]

2. *The Marsh Exception.* — To avoid a declaration of unconstitutionality under the *Lemon* test, those who seek to uphold the proclamations would likely argue that the proclamations come within the exception to the *Lemon* analysis which the Supreme Court articulated in *Marsh v. Chambers*.[93] In *Marsh*, the Court choose not to apply the *Lemon* test where there was clear historical evidence that the Framers of the Constitution did not intend to prohibit a particular governmental action.[94] There, the Court upheld the Nebraska Legislature's practice of having each of its sessions begun with a prayer led by a state-paid chaplain.[95] In so doing, the Court examined the practice in light of its historical context.[96]

The Court found that legislative prayers were both widespread[97] and venerable.[98] The theory is that since those who drafted the Bill of Rights took part in the establishment of Congressional Legislative prayers,

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89. Stone v. Graham, 449 U.S. 39, 42 (1980).

90. *Allegheny County*, 492 U.S. at 598 (display of creche has effect of endorsing patently Christian message: "Glory to God because of the birth of Jesus Christ").

91. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring).

92. State endorsement of the Bible should actually be a more egregious violation, because endorsement of the Bible singles out specific religious beliefs, whereas the tax exemption did not discriminate amongst religions.

93. 463 U.S. 783 (1983).

94. *Id.* at 795.

95. *Id.* at 784, 793.

96. *Id.* at 792.

97. *Id.* at 789 n.11 (noting that most state legislatures begin their sessions with prayer and a few states have a formal requirement to do so).

98. *Id.* at 786.

they could not have intended the establishment clause to prohibit their own contemporaneous practice.[99] This unbroken practice of legislative prayer gave the Court "abundant assurance that there is no real threat" to the concerns protected by the establishment clause.[100]

The Court also dismissed the claim that the practice in Nebraska appeared to show a preference for the Presbyterian sect, based on the fact that the chaplain for the last 16 years had been a member of that Christian denomination.[101] The Court found that history outweighed any alleged preference, based on its finding of no evidence of an impermissible motive for reappointment nor evidence that the prayer opportunity was used to proselytize.[102]

Thus, if in a particular case there is comparable history of acceptance going back to the Framers, the government could prevail under the *Marsh* test.[103] To date, however, *Marsh* has generated no progeny

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99. *Id.* at 788 n.8. For instance, the Court noted that Madison, who drafted the establishment clause, was one of the first members of the House of Representatives who was appointed the task of choosing the Congressional Chaplain. *Id.* This fact shed "light not only on what the draftsmen intended the establishment clause to mean, but also on how they thought the Clause applied to the practice authorized by the First Congress — their actions revealed their intent." *Id.* at 790.

100. *Id.* at 795.

101. *Id.* at 793-94.

102. *Id.* The Court noted that it could not, " . . . any more than members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* The Court's comment seems remarkable. For a person who believes in a particular faith, whether it be Presbyterian, Catholic, Buddhist, Islam or Judaism, the affiliation of the priest, minister, or leader is central. To believe otherwise, would mean that there would be no difference to a Catholic couple whether a priest, rabbi or buddhist monk presided at their wedding, or to a Jew whether a rabbi or priest performed the Bar Mitzvah ceremony.

103. One Court of Appeals saw the *Marsh* analysis as the Supreme Court's "'grandfathered' exceptions to the general prohibition against officially composed theological statements." Hall v. Bradshaw, 630 F.2d 1018, 1023 n.2 (4th Cir. 1980). That court went on to state that:

> Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, they can safely occupy their own small, unexpandable niche in the Establishment Clause doctrine. Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary

in the Supreme Court.[104] Nevertheless, at least four of the Justices now sitting apparently believe that the establishment clause doctrine must be applied with "proper sensitivity to our traditions."[105] History, however, has not[106] and should not be used to justify governmental

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> agencies of government sufficiently cabin them in and distinguish them from new, open-form theological expressions published under the aegis of the state.

Id. See also Note, *Sharpening*, *supra* note 6, at 1108.

The primary focus of those who preach an expansive view of *Marsh* has been in cases which discuss religious invocations or benedictions. *See* Comment, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U.L. REV. 1001 (1989); Comment, *Stein v. Plainwell Community Schools — the American Civil Religion and the Establishment Clause*, 15 HASTINGS CONST. L.Q. 533 (1988). The two federal courts of appeal that have dealt with this issue have adopted different analyses, one applied the *Lemon* test: Jaeger v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989), and the other applied *Marsh*: Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987). Interestingly, each found the invocation at issue violated the establishment clause despite their use of different tests. *See also* Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 281 Cal. Rptr. 34, 809 P.2d 809 (Cal. S. Ct. 1991).

104. It was the *Marsh* majority's failure to even discuss why the *Lemon* test was not being applied which led some to predict the demise of the *Lemon* test. *See, e.g.*, McConnell, *supra* note 7, at 271. However, the Supreme Court has not applied this analysis to date, and, in fact, in its most recent establishment clause cases, has applied the three-prong *Lemon* test. *See* Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990) (Equal Access Act); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (religious holiday displays); Bowen v. Kendrick, 487 U.S. 589 (1988) (Adolescent Family Life Act).

105. *Allegheny County*, 492 U.S. at 656 (Kennedy, J., dissenting). The dissenting justices apparently believed that "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *Id.* at 670 (Kennedy, J., dissenting).

106. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees." Marsh v. Chambers, 463 U.S. 783, 790 (1983). It is obviously correct that no one acquires a vested or protected right in violation of the constitution by long use, even when that span covers our entire national existence and indeed predate it. Yet an unbroken practice . . . is not something to be lightly cast aside. *Id.* (citing with approval Walz v. Tax Comm'n., 397 U.S. 664, 678 (1970)).

endorsement of religious practices or beliefs.[107] History has its place in establishment clause analysis only in so far as it "provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys an endorsement of religion."[108] For instance, a practice may outgrow its religious roots in the common understanding of nonadherents as well as adherents.[109]

Nonetheless, unlike legislative prayer, which has been an unbroken historical practice since the founding of the country, there is no long and detailed history of governmental endorsement of Bible reading. While one may be able to point to isolated examples of Presidential proclamations or other governmental actions involving the Bible, the only substantially similar actions were the Congressional resolution and Presidential Proclamation designating 1983 as the Year of the Bible.[110]

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107. As Justice Brennan recognized over twenty-five years ago:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Abington School Dist. v. Schempp, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring). More recently, Justice Blackmun, writing for a majority of the Court, went a step further when he stated:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. . . . Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.

Allegheny County, 492 U.S. at 604-05 (footnote omitted).

108. *Id.* at 630 (O'Connor, J., concurring).

109. *Id.* Such an approach was taken by the Ninth Circuit Court of Appeals in its pre-*Marsh* decision in Arnow v. United States, 432 F.2d 242 (9th Cir. 1970). There, the Court of Appeals upheld the inscription of "In God We Trust" which appears on all United States currency and coins and is the declared national motto of the United States. In reaching this result, the Court found that neither use had any religious connotation, but rather was of a patriotic or ceremonial character and bore no true resemblance to a government sponsorship of a religious exercise. *Id.* at 243.

110. *See supra* notes 26-17, 27.

Therefore, it is highly questionable whether there would be a sufficient factual basis to utilize the *Marsh* exception to the *Lemon* test to uphold these proclamations.[111]

Even if *Marsh* is applied, the unconstitutionality of the proclamations becomes apparent. This is not a situation, like the one in *Marsh*, where the conduct is purely ceremonial with no attempt to proselytize. Senator Nickles' made this plain when in introducing the Joint Resolution, he stated that the difference between the present resolution and the 1982 Year of the Bible, was that the present Resolution actually encouraged Bible reading.[112]

Furthermore, since the governmental action encourages persons to read the Bible, and places the Bible in a position where it is to be regarded as a book fundamental to our national culture, it can only be viewed as an attempt to proselytize. For practicing Christians, the meaningful part of reading the Bible is not the literary value of text. One does not read the Bible the same way one reads the great classics of literature; Christians read the Bible to divine the word of God. The President's Proclamation admitted this when it described the Bible as "[c]ontaining revelations of God's intervention in human history."[113]

Once it is determined that the Bible is a religious text, and that Congress, in promoting its reading, is actually promoting the reading of a particular religious philosophy, then even under the *Marsh* analysis the Congressional and Presidential Action, declaring 1990 to be the International Year of Bible Reading, must fall.

3. *Larson Analysis.* — Even if the Court found the endorsement of the Bible to be a practice "deeply embedded in the history and tradition of this country,"[114] such a practice constitutes an unconstitutional preference for a particular religious doctrine. In *Larson v. Valente*,[115] the Supreme Court invalidated a Minnesota statute which imposed certain registration and reporting requirements on those religious organizations which solicited more than 50% of their funds from non-members, on the

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111. The dissenting justices in *Allegheny County* would not apply this test so narrowly, but would likely cite a variety of traditional practices involving the Bible, including other isolated Presidential proclamations. *Allegheny County*, 492 U.S. at 655-79 (Kennedy, J., dissenting). It is reasonable to assume that these justices would find that such practices should be utilized in analyzing the constitutionality of the proclamations at issue. *Id.*

112. 135 CONG. REC. S7251-52 (remarks of Senator Nickles).

113. *See supra* note 17, 27.

114. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

115. 456 U.S. 228 (1982).

basis that the statute discriminated against certain religious organizations in violation of the establishment clause.[116] "[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[117] The Court found the *Lemon* test inapplicable, since it was "intended to apply to laws affording a uniform benefit to *all* religions."[118] *Lemon* was not intended to apply to statutes which, like the Minnesota statute, discriminated among religions.[119] The Court then fashioned the *Larson* test, a test tailored precisely for denominational preference.

Unlike the *Marsh* exception which has spawned no progeny, the Supreme Court has recently reaffirmed the validity of the *Larson* test,[120] saying:

> *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*.[121]

Under the *Larson* test, if a governmental action facially discriminates among religious denominations, the court applies a strict scrutiny analysis: (1) the government must have a compelling interest, and (2) the governmental action must be narrowly tailored to further that interest.[122]

Like the statute in *Larson*, which was found to be facially discriminatory,[123] governments singled out a particular demonination for a benefit when they proclaimed 1990 to be the International Year of Bible Reading. The International Year of Bible Reading was an endorsement

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116. *Id.*

117. *Id.* at 243. In this sense, the court tied the free exercise clause of the first amendment to the establishment clause by stating that: "Free exercise thus can be guaranteed only when Legislatures — and voters — are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245.

118. *Id.* at 252 (emphasis in original).

119. *Id.*

120. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 695-703 (1989).

121. *Id.* (citation omitted).

122. *Id.* (quoting Larson v. Valente, 456 U.S. 228, 246-47 (1982)).

123. *Id.*

of what is universally regarded as the sacrosanct writings of Christianity, and a call by government to read these sacrosanct writings. Even if such proclamations promote a secular interest that such governmental endorsement advances, strict scrutiny demands that interest to be not only compelling, but the proclamation must be tightly focused to further that interest.[124] As Justice Brennan observed: "[G]overnment may not employ religious means to serve secular interests, however legitimate they may be; at least without the clearest demonstration that non-religious means will not suffice."[125]

It is questionable whether any non-religious compelling governmental interest exists,[126] but even assuming, *arguendo*, that such an interest does exist, it is doubtful that it could not be achieved through a secular means.[127] Instead, it seems clear that the proclamations were

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124. *See* United States v. Carolene Products, 304 U.S. 144, 153-54 n.4 (1938).

125. Abington School Dist. v. Schempp, 374 U.S. 203, 265 (1963) (Brennan, J., concurring).

126. *Id.*

127. Weismann v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd* 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (1991). In *Weismann*, the District Court judge, finding a religious high school's invocation to be unconstitutional, suggested a non sectarian benediction which might have been followed. The Court stated that the rabbi who delivered the benediction could have substituted the following:

> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we are thankful. May these young men and women grow up to enrich.
>
> For the Liberty of America, we are thankful. May these new graduates grow up to guard it.
>
> For the political process of America in which its citizens may participate, for its court system where all can seek justice we are thankful. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we are thankful. May the graduates of Nathan Bishop Middle School so live that they might live to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

precisely intended to and do promote the reading of a particular sectarian religious doctrine. Such official promotion cannot be countenanced so long as the establishment clause exists.

III. CONCLUSION

The establishment clause of the first amendment provides a substantive limitation on government action. As Justice Jackson eloquently stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[128]

Over the years, the Supreme Court has struggled to determine the exact scope of these limitations. Although the Court has stated that "Americans are a religious people whose institutions presuppose a supreme being,"[129] the Court nonetheless has limited government involvement in the private religious realm.[130]

The principle of state neutrality with respect to religion serves to foster political inclusion of all citizens by ensuring that no one becomes an outsider because of his or her religious beliefs or lack thereof. We as a nation profess that all religions in this country are on equal footing. In contrast, the Bible proclamations provide official sanction to the religious

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Id. at 74 n.10.

128. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

129. Zorach v. Clauson, 344 U.S. 305, 313 (1952).

130. *Abington*, 374 U.S. at 226. In the words of the Court:

> The place of religion in our society is an exaulted one, acheived through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or affect be to aid or oppose, to advance or retard. *Id.*

doctrine of Christianity. In so doing the proclamations send a message that we are a Christian nation which merely tolerates non-adherents.[131] To uphold such discriminatory official governmental action which glorifies the majority religion is in essence to declare, contrary to the constitutional principle of governmental neutrality, that all religions are not on an equal footing.[132]

The vice of the Bible proclamations is not that religious activists participated in the political process,[133] but rather that the subject matter of the governmental action is improper. It is the conspicuous governmental promotion of a particular religious doctrine that is

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131. For instance, in 1986, a Federal District Judge in Chicago ignored accepted Constitutional principles and declared that the United States was indeed a Christian nation which had adopted "a benign tolerance for non-believers." American Jewish Congress v. City of Chicago, No. 85 C9471 (N.D. Ill Nov. 15, 1986), *rev'd*, 827 F.2d 120 (7th Cir. 1987). The trial court stated:

> The truth is that America's origins are Christian with the result that some of our fondest traditions are Christian, that our Founding Father's intended and acheived full religious freedom for all within a context of a Christian nation and the First Amendment as it was adopted, rather than as we have rewritten it.

Id. Although quickly reversed on appeal, the District Court decision must be seen as ominous.

132. The dissenting judges in Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989), would probably argue that the Bible Reading Proclamation "falls well within the tradition of Government accommodation and acknowledgment of religion that has marked our history from the beginning." *Id.* at 663 (Kennedy, J., dissenting). Such arguments are misplaced. As the majority stated in *Allegheny County*: "[A]n accommodation . . . under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*.' . . . Defined thus, the concept of accommodation plainly has no relevance to the display of the creche in this lawsuit." *Id.* at 613 n.59 (quoting Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (emphasis in original)). Applying the *Allegheny County* majority analysis, the Bible Reading Proclamation should create a similar result as they do not lift an identifiable burden on the exercise of religion, but rather create an impediment for non-Christians to freely practice their religion.

133. "Adherents of particular faiths and individual churches frequently take strong positions on public issues. . . . [O]f course, churches, as much as secular bodies and private citizens have that right." Walz v. Tax Comm'r., 397 U.S. 664, 670 (1970). *See also* McDaniel v. Paty, 435 U.S. 618 (1978) (Brennan, J. concurring). "Religionists no less than members of any other groups enjoy the full measure of protection afforded speech, association and political activity generally." *Id.* at 641.

impermissible.[134] The Supreme Court must continue to send a clear message that governmental endorsement of religion or religious beliefs, practices or doctrine is unacceptable.

Adoption of a standard of review, as in *Marsh*, which pays deference to historical tradition, wrongly defers to previously-established religious practices instituted by the majority at the expense of the minority.[135] Such deference undermines the very core of the establishment clause.

Those who seek to maintain the integrity of the establishment clause through the use of the *Lemon* test may need to expand their strategy by the use of the *Larson* test. The traditional *Lemon* test is not only under attack, but has been characterized as a guideline rather than a fixed rule.[136] *Larson* provides a fixed rule and it should be utilized as a vehicle to ensure the survival of the establishment clause as a bulwark against the use of the political process for governmental promotion of

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134. As Professor Tribe has written:

> [T]he fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience. When Madison objected to the coerced contribution to religion by an individual taxpayer, it was surely not out of concern for the taxpayer's pocket; and when the Supreme Court in Flast v. Cohen [392 U.S. 83 (1968)] held that taxpayers have standing to challenge religious expenditures despite the ordinary rule against taxpayer standing, it was not out of a judgment that taxpayers' economic interests were truly at stake . . . The only way to understand Madison's concern, or to make sense of the Court's conclusion in Flast v. Cohen, is to recognize in the religion clauses a fundamental personal right not to be a part of a community whose official organs endorse religious views that might be inimical to one's deepest beliefs.

TRIBE, *supra* note 2, at 1283.

135. *See* Note, *Sharpening*, *supra* note 6, at 1112-20.

136. Mueller v. Allen, 463 U.S. 388, 394 (1982); Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984).

religion.[137] Where governmental action conveys the impression that a particular religion or religious belief or doctrine is being favored or disfavored, it can only survive if it can withstand the strict scrutiny standard of review.[138]

Application of a strict scrutiny test sends a clear message to government officials, as well as to religious activists, that government cannot be used to promote religious doctrine or practices.[139] Since there is no compelling non-religious governmental interest that cannot be achieved by non-religious means, Bible proclamations and other forms of symbolic endorsement of religion by government cannot stand.

To those who may say that all this commotion concerning a symbolic endorsement is a waste of time and paper, one need only recall the words of the Supreme Court over twenty-five years ago: "[i]t is no defense to urge that the religious practice here may be a relatively minor encroachment upon the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent; and in the words of Madison, '[i]t is proper to take alarm at the first experiment on our liberties.'"[140]

Importantly, those that take the 'much ado about nothing' view would probably not be so cavalier if the book being honored was something other than the Bible. Imagine the commotion that would occur

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137. In Larson v. Valente, 456 U.S. 228 (1982), the Court indicated that the statute in question would also fail the *Lemon* test. *Id.* at 252.

138. Such a standard of review was, in fact, designed to protect religious and other minorities. In United States v. Carolene Products, Co., 304 U.S. 144 (1938), the Supreme Court began to carve out a principled basis for departure from general principles of judicial restraint. In the now famous footnote 4, Justice Stone, writing for the Court, recognized the need for added protection from the political system for minorities, including religious minorities, stating that

> . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153-54 n.4.

139. "Although strict scrutiny . . . ordinarily appears as a standard for judicial review, it may also be understood as admonishing lawmakers and regulators as well to be particularly cautious of their *own* purposes and premises and of the affects of their choices." TRIBE, *supra* note 2, at 1451 (emphasis in original).

140. Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

if instead of promoting Bible reading, Congress and the President had proclaimed the Koran[141] to be the Word of God and encouraged it to be read. If President Bush had declared that — regardless of their beliefs — Christians, Jews, Hindus, Buddhists, Atheists and Agnostics alike should read the Koran, the political repercussions would have been tremendous. Such a scenario, of course, is highly unlikely — because the political process favors the strong, and religious minorities generally do not have such strength.

If the establishment clause, like the free exercise clause, is left to the vagaries of the political system, what the Supreme Court saw as a "trickling stream" in 1963 will "all too soon become a raging torrent."[142] If our High Court decides that government may properly endorse and promote the reading of the Bible, the preeminent work of Christianity, the relationship between government and religion becomes, in effect, a decision by and for the politically powerful and the establishment clause will then be relegated to a historical footnote.

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141. The Koran is the sacred book of the Muslims. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 666 (1983).

142. *Abington*, 374 U.S. at 225.