M.C.L. v. FLORIDA: A VIGNETTE OF THE INCONSISTENCIES PLAGUING ESTABLISHMENT CLAUSE JURISPRUDENCE

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The Establishment Clause has become the source of public debate in recent years due to inconsistent rulings at every level of the United States judicial system in cases regarding the separation of church and state. The Supreme Court Justices are divided on Establishment Clause interpretation, while Congress and other federal government agencies avoid any conduct that might lead to religious entanglement in an effort to refrain from further defining


This Note is dedicated, in loving memory, to my grandmother, Norma E. Christensen, 1902–97. Special thanks to my parents, John and Dr. Marcia Bowers, for their unconditional love and support.

1. U.S. CONST. amend. I. The Establishment Clause states, “Congress shall make no law respecting an establishment of religion . . . .” Id.

2. See infra Part II.A–B.

3. Some Supreme Court Justices have created alternate tests for Establishment Clause cases. See County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy identified his criteria as: 1) the government may not coerce citizens to participate in or exercise religion; and 2) the government may not directly benefit religion with the pretense of avoiding hostility towards religion. See id. at 659; Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O’Connor, J., concurring). Justice O’Connor formulated the “endorsement test” in which she opined that the Establishment Clause exists to prevent government from communicating that the practice of religion is preferred, or that one particular religion is preferred over another. See id. at 70. Neither the coercion nor the endorsement test have been adopted by the Supreme Court; thus, they are not Establishment Clause standards for lower courts to follow.
the Establishment Clause. Consequently, lower courts have encountered difficulties when deciding Establishment Clause cases due to the lack of judicial and legislative guidance. The resulting uncertainty makes it difficult for state and federal courts to identify appropriate modes of separating church and state.

In 1971, the Supreme Court created a three-pronged test for activities that transcended appropriate constitutional boundaries between church and state. However, because the Supreme Court has largely abandoned this “purpose,” “primary effect,” and “excessive entanglement” test without overruling the decision, courts must follow the precedent, resulting in inconsistent decisions like M.C.L. v. Florida.

4. See Mark DeWolfe Howe, The Garden and the Wilderness 97 (1965) (discussing religion and government in American constitutional history). Howe concludes that Congress and government agencies would struggle to justify a singular definition of the Establishment Clause, so they let “the sleeping dogs of religious controversy . . . lie, . . . carefully avoid[ing] conduct that might arouse them.” Id.

5. See infra Part IV.

6. See Howe, supra note 4, at 97.


8. See id. at 612–13; Carole F. Kagan, Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause, 22 N. Ky. L. Rev. 621, 634 (1995) (examining a possible modification of the Lemon test). Both the left and right wings of government have criticized Lemon for failing to provide “a useful framework for Establishment Clause analysis.” Id.; see also Kristin M. Engstrom, Comment, Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test, 27 Pac. L.J. 121, 122 (1995) (commenting on the need for more clarity in Supreme Court Establishment Clause cases). Lower courts have grown increasingly frustrated with the Supreme Court’s disregard of the Lemon test and typically make their decisions on a case-by-case basis. See id. The Court has professed its adherence to the Lemon test, yet strayed from the test’s original terminology in recent decisions. See id. at 130. Thus, it is hard to define which criteria the Supreme Court will use in considering future Establishment Clause cases. See id. at 149.

9. See Michael W. McConnell, Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Current Confusion, A.B.A. J., Feb. 1997, at 46 (1997) (discussing the unclear First Amendment standard relating to religion). The Supreme Court may ignore its own precedent, but lower courts may not likewise stray from the Supreme Court’s holdings. See id. at 47. Because the Lemon test is deeply ambiguous, lower courts have given it contradictory interpretations. See id. at 46.

I. FACTUAL ANALYSIS OF M.C.L. v. FLORIDA

M.C.L. (ML) and other juveniles committed a series of burglaries in Duval County, Florida between January 20, 1995 and February 8, 1995. The juveniles destroyed walls, windows, and plumbing fixtures in several homes, causing $52,085.71 in damages. They also abused an animal by forcing a bag over its head, blowing marijuana smoke into the bag, and throwing the pet from person to person. Incriminating evidence in the case included the juveniles' own videotape of their crimes. After the thirteen-year-old ML was arrested, he pleaded guilty to eight burglary counts and one count of cruelty to animals in exchange for the State dropping three other burglary counts.

The trial court declared ML delinquent and committed him to a high-risk juvenile detention center. The judge also imposed probation conditions on ML, requiring that he attend moral and spiritual training, avoid media interviews, and pay restitution.

The conditions surrounding ML's moral and spiritual training required that he and his mother “attend an organized spiritual training program (chosen by his mother) for at least two hours each week.” ML was also required to spend a minimum of thirty minutes each day practicing some type of moral and spiritual training, to be recorded in his daily journal for inspection by the counselors or
the court. The judge mandated that ML's moral and spiritual training proceed as follows: “During the next 9 months, he shall have covered in this personal spiritual training at least the lives of Moses, Kings David and Solomon of Israel, Jesus of Nazareth, Mohammed, Buddha, Confucius, George Washington, Abraham Lincoln, and Martin Luther King[,] Jr.”

ML appealed the probation conditions to the First District Court of Appeal on Florida and federal constitutional grounds. Regarding State case law, the court distinguished M.C.L. from its earlier decision, L.M. v. Florida, which held that religious instruction as part of a probationer or community controlee's sentence contravenes the First Amendment. Regarding federal constitutionality, the court applied the Lemon test in response to ML's allegation that the moral training program violated his federal constitutional rights.

The First District modified the moral and spiritual training condition by deleting the word “spiritual” due to its largely religious connotation. The court otherwise affirmed the moral training program under the Florida and United States Constitutions. HELD: The moral training assigned by the trial judge, including studying the lives of several religious leaders, does not violate Florida or federal religious Establishment Clauses because it: (1) fosters rehabilitation; (2) has a valid secular purpose; (3) neither advances nor inhibits religion; and (4) avoids excessive entanglement between government and religion.

19. See id. ML's daily journal requirement was to begin immediately and, if possible, was to continue during any commitment program. See id.
20. Id.
21. See id. at 1211–12. ML also appealed the media abstention and restitution orders. See id. at 1213–14.
23. L.M. I, 587 So. 2d at 650. ML's appeal on Florida constitutional grounds was based on the First District's holding in L.M. See M.C.L., 682 So. 2d at 1212.
25. See M.C.L., 682 So. 2d at 1212.
26. See id. The court affirmed the mother's participation in ML's rehabilitation and the media abstention order, but reversed and remanded the restitution order. See id. at 1214.
27. See id. at 1212–13.
28. See id.
Florida in light of contrary Establishment Clause precedent. This Note will address the historical ramifications of selected Establishment Clause cases, discuss the M.C.L. court's misapplication of those cases, and critically examine the incomplete reasoning that led to this vague and unsound decision.

II. HISTORICAL ANALYSIS

A. Public Education Cases

In 1947, the United States Supreme Court interpreted the Establishment Clause to be an inflexible tool, stating in dicta that it was created to provide “a wall of separation between church and state.” Sixteen years later, in Abington School District v. Schempp, the Court reconsidered its “wall” analogy, acknowledging that even the Founding Fathers were religious and injected religious themes into their works.

The Supreme Court in Abington summarized several of its mid-Twentieth Century opinions regarding the First Amendment Establishment and Freedom of Religion Clauses while striking down prayer in public schools. The Court recognized the presence of reli-

29. Because ML’s probation condition is analogous to a public school’s mandatory education curriculum, it is appropriate to examine M.C.L. in light of the public education Establishment Clause cases.
30. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (holding that a New Jersey statute reimbursing parents of children attending private (including parochial) schools for transportation costs did not violate the Establishment Clause because the program advanced a public purpose; see Americans United for Separation of Church and State, In 1962 Madalyn Murray O’Hair Kicked God, the Bible and Prayer out of Public Schools . . . and 10 Other Myths About Church and State (last modified Aug. 29, 1997) <http://www.au.org/myths.htm>. In Thomas Jefferson’s 1802 letter to the Danbury Baptist Association, he declared that Americans, by drafting the First Amendment, had erected a “wall of separation between church and state.” Id. Interestingly, a very similar phrase had been used 150 years earlier by Colonial religious liberty pioneer Roger Williams. See id.
31. 374 U.S. 203 (1963) (holding that the government’s role with regard to religion is one of strict neutrality, making public school prayer unconstitutional).
32. See id.
33. See id. at 225. In Abington, the plaintiffs’ children were subjected to school broadcasts of verses from the Holy Bible and the recitation of the Lord’s Prayer every morning. See id. at 207. Students could have been excused from any school-related religious activity with a parent or guardian’s written request. See id. The plaintiffs claimed that the religious exercises at their children’s school were antithetical to their family’s beliefs, and that having their children excused would only result in the children forming a negative relationship with teachers and fellow students. See id. at 208.
igion in Congress and in its own Court in the form of traditional opening prayers.\textsuperscript{34} However, the Court stated that despite the Founding Fathers' individual religious beliefs, together they ultimately believed in the unalienable rights of man and that, although the United States has a historical connection to Christianity, religious freedom is a constitutionally protected right regardless of denomination.\textsuperscript{35}

In 1971, the Supreme Court again interpreted the Establishment Clause in \textit{Lemon v. Kurtzman}.\textsuperscript{36} In \textit{Lemon}, the Court considered the constitutionality of Pennsylvania and Rhode Island statutory programs subsidizing secular subject materials in religious private schools.\textsuperscript{37} The Court affirmed the district court's decision to strike down the statutes because they violated the First Amendment Establishment and Free Exercise Clauses.\textsuperscript{38}

The \textit{Lemon} test has taken its place in history as the precedent declaring that American government should avoid endorsing or interfering with religion by staying out of the religion business.\textsuperscript{39} The \textit{Lemon} Court set out a three-part test for determining constitutional combinations of church and state.\textsuperscript{40} To pass the \textit{Lemon} test, a government practice must: (1) have a secular purpose; (2) have a primary effect neither advancing nor inhibiting religion; and (3) avoid excessive entanglement between government and religion.\textsuperscript{41} The Court has now used the \textit{Lemon} model for over twenty years and in

\textsuperscript{34} See \textit{id.} at 213.
\textsuperscript{35} See \textit{id.}
\textsuperscript{36} 403 U.S. 602 (1971).
\textsuperscript{37} See \textit{id.} at 606–07.
\textsuperscript{38} See \textit{id.} at 609. The Court reasoned that the government was not to specifically aid religion, and that government funding of religious schools entangled the church-state relationship, precisely what the Establishment Clause and Free Exercise Clause were created to avoid. See \textit{id.} at 616. Further, the Court rationalized that government funding of private religious schools would open the door to government examination of schools' financial records to track expenditures. See \textit{id.} at 620. The Court feared such a relationship as being "pregnant with dangers of excessive government direction of church schools and hence of churches." \textit{Id.} The Court acknowledged that some relations between church and state are inevitable, but concluded that state aid must be squared with the Establishment Clauses' dictates. See \textit{id.} at 614, 625.
\textsuperscript{39} See Kagan, \textit{supra} note 8, at 644. Perhaps if it were sufficiently narrowed and consistently applied to Establishment Clause cases, the \textit{Lemon} test could be a useful blueprint for government neutrality regarding religion. See \textit{id.} at 650.
\textsuperscript{40} See \textit{Lemon}, 403 U.S. at 612–13.
\textsuperscript{41} See \textit{id.}
over thirty cases.  

Chief Justice Warren Burger, author of the Lemon majority opinion, prefaced the three-part test by stating that the Establishment Clause should be examined “with consideration of the cumulative criteria developed by the Court over many years.” The Court extracted three prongs from previous Court decisions, and combined them to declare the Rhode Island and Pennsylvania statutes unconstitutional.

The Eighth Circuit Court of Appeals applied the Lemon test in Florey v. Sioux Falls School District to determine the constitutionality of a public school's Christmas assemblies. In Florey, parents and students sued the South Dakota Sioux Falls School Board, seeking declaratory and injunctive relief and alleging that the board violated the Establishment and Free Exercise Clauses by conducting Christmas assemblies. The majority opinion evaluated the school board's policy statement regarding the relationship between church and state as it applied to school functions and then applied the three prongs of the Lemon test.

First, the majority was persuaded that some involvement between church and state is inevitable, and, therefore, that those holidays with both religious and secular bases (such as Christmas) may be constitutionally observed by public schools through music,
Second, the majority stated that teaching students United States customs and cultural heritage using religion is acceptable, but that predominately religious activities violate the Establishment Clause. Third, the majority stated that the observance of school board rules regulating church/state activities is the state's "means to ensure that the district steers clear of religious exercises." Thus, the court found no entanglement problem with *Florey* because the school board's guidelines validly regulated religious presentations and allowed students to be excused from any objectionable activities if they so chose.

Judge Theodore McMillian dissented in *Florey*, applying the *Lemon* test to his opinion, but applying different reasoning from the majority. Thus, Judge McMillian did not criticize the majority's use of *Lemon*; however, he was able to plug in antithetical analysis to the majority's reasoning under every prong. In defense of his dissent, McMillian stated: "The above analysis may be regarded by some as hypersensitive or even antireligious. It is not. Judicial scrutiny of the relationship between religion and government must be particularly scrupulous in the context of the public school."

The Ninth Circuit had a chance to apply the *Lemon* test in *Brown v. Woodland Joint Unified School District*, which concerned a public school curriculum that allegedly taught "witchcraft." In *Brown*, the controverted classroom activity involved asking children
“to discuss witches or to create poetic chants.” The Brown family sought injunctive and declaratory relief, stating that their children's state and federal rights under the Religion Clauses were being violated by the witchcraft exercise.

The *Brown* court discussed the *Lemon* prongs individually. First, the court stated that the school district acted within the first prong of the *Lemon* test because the curriculum's purpose was primarily secular. Second, the court stated that the curriculum did not advance nor prohibit religion by teaching myths and folklore, nor did it endorse religion or ask students to reasonably believe that they were participating in religious rituals. Third, the court stated that the curriculum did not foster excessive entanglement between government and religion because no federal funds were involved, nor was an overtly religious exercise at issue.

The court concluded that because a child's impression of a state action may seem hostile to his or her religion, this alone is not a sufficient violation of the Establishment Clause. According to the *Brown* court, the offended party has to show that an objective observer would share an identical view. The court maintained that the Browns failed to meet their objective burden under the *Lemon* test and under the objective “reasonable observer” standard.

In 1982, the Supreme Court decided *Lee v. Weisman* and con-

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59. *Id.*
60. *See id.* at 1376–77. The Browns wanted the court to use the subjective standard of an impressionable child, but the court preferred to use the objective “reasonable observer” standard and the *Lemon* test. *See id.* at 1378–79. In asserting the “impressionable child” perspective, the Browns contended that the subjective standard was appropriate to determine whether a challenged practice makes the impression on a child of either endorsing or disapproving of religion. *See id.* at 1379. The court reasoned that “[i]f an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself or herself.” *Id.*
61. *See id.* at 1378–84.
62. *See Brown*, 27 F.3d at 1378.
63. *See id.* at 1381. The Browns argued that certain *Impressions* selections promoted the practice of the religion “Wicca,” or witchcraft. *See id.* at 1377.
64. *See id.* at 1383.
65. *See id.*
66. *See id.*
67. *See id.*
68. 505 U.S. 577 (1992) (holding that a religious exercise at a public school graduation violates the Establishment Clause as public schools are not to persuade or compel
sidered whether a religious exercise may be constitutionally conducted at a public school's graduation ceremony where graduates are “induced to conform.” In Lee, a middle school principal invited a Jewish rabbi to conduct prayers at graduation. The principal asked the rabbi to make a nonsectarian invocation and benediction. The plaintiffs, a graduate and her father, sought a permanent injunction in federal district court to prohibit public school officials from asking clergy to conduct future graduation ceremony invocations and benedictions.

The district court found that the challenged exercise violated the Establishment Clause and enjoined the school from inviting clergy to conduct future graduation ceremony invocations and benedictions. The district court applied Lemon to its reasoning, stating that the principal's actions violated the second part of the test by advancing or inhibiting religion, but omitted discussion about either the first or third prongs of the Lemon test. The United States Court of Appeals for the First Circuit affirmed and adopted the district court's opinion.

The Supreme Court affirmed Lee, expressly refusing to overrule Lemon. The Court stated that its decision was based on the fact that the clergy's function at the graduation was a “formal religious observance” which conflicted with rules pertaining to prayer exercises for students. Further, the Court held that the First Amendment cannot require citizens to forfeit rights and benefits, such as attending a high school graduation, in order to avoid conforming to

students to participate in religious exercises).

69. See id. at 599.
70. See id. at 581.
71. See id. The principal also gave the rabbi the customary pamphlet entitled “Guidelines for Civic Occasions” prepared by the National Conference of Christians and Jews. See id. The pamphlet recommended that public prayer at nonsectarian civic ceremonies “be composed with inclusiveness and sensitivity.” Id.
72. See id. at 584. Plaintiffs tried to enjoin the rabbi's participation at the ceremony, but the district court denied the motion for lack of adequate time to consider the case. See id.
73. See id.
74. See Lee, 505 U.S. at 584–85.
75. See id. at 585.
76. See id. at 587 (stating "we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in Lemon v. Kurtzman.").
77. See id. at 587.
state-sponsored religious practices. However, the Court stated its holding in *Lee* does not invalidate “every state action implicating religion . . . if one or a few citizens find it offensive.”

Although the Court did not back down on the *Lemon* test in *Lee*, in 1997 the Justices undertook the unusual practice of overturning one of their recent decisions, *Aguilar v. Felton*, in *Agostini v. Felton*.

*Aguilar* declared unconstitutional a publicly-funded program involving public school teachers and counselors providing remedial assistance in parochial schools. The result was that 20,000 New York City public school students, most of whom were educationally deprived and from low-income families, were denied remedial education because the Supreme Court feared that after-school instruction within parochial schools created an improper appearance of entanglement between church and state.

The majority of the Court held that the education program in *Aguilar* violated *Lemon*’s third prong by excessively entangling
church and state and the program was declared unconstitutional.84 Despite the fact that a system had been adopted to monitor the religious content of the publicly funded classes,85 The Court maintained that such a program would possibly lead to administrative entanglement between church and state.86

Chief Justice Burger, author of the Lemon majority opinion, and Justice O'Connor each wrote dissenting opinions in Aguilar discounting the Lemon test.87 Justice Burger criticized the majority's use of the Lemon test as obsessive, and stated that such a strict adherence to the test impedes the country's long-range interests.88 Justice O'Connor also criticized the Court's loyal adherence to Lemon's entanglement prong.89 Disagreeing with the Court's entanglement analysis, Justice O'Connor questioned the utility of Lemon's entanglement prong in most cases as a separate Establishment Clause standard.90

Justice O'Connor's majority opinion in Agostini referred to Aguilar as "no longer good law"91 and outlined the Supreme Court's
“significant change” from previous Establishment Clause viewpoints.92 First, the majority abandoned the presumption that public employees' placement on parochial school campuses is equivalent to state-sponsored religious indoctrination or that it forms a symbolic union between church and state.93 Second, the Court departed from its former view that all government aid to religious school education was invalid.94 The majority opinion narrowed Lemon's entanglement prong by stating that church and state inevitably interact and that entanglement must be “excessive” before government has violated the Establishment Clause.95 In conclusion, the Court declined to wait for a “better vehicle” with which to examine Aguilar and, thus, failed to formulate a new test or strike down Lemon.96

B. The Federal and Florida Religious Probation Condition Cases

Considered by the M.C.L. Court

Beyond the public school cases, many other facets of governmental activity have been criticized as violating the Establishment Clause. The United States Court of Appeals for the Eleventh Circuit considered the separation of church and state as it related to criminal probation conditions in Owens v. Kelley.97 Owens, a probationer, sued several county officials, seeking declaratory and injunctive
relief against the enforcement of a rehabilitation program he was ordered to attend called Emotional Maturity Instruction (EMI).98

The district court explained that its complex sentencing was intended to make Owens' probation “a meaningful rehabilitative experience.”99 However, Owens alleged that EMI was based on Biblical teachings because EMI recommended that its students read the Bible.100

The court stated that the program was unconstitutional if, in fact, religious teachings were promoted by EMI, because requiring probationers to submit themselves to courses “advocating the adoption of religion or a particular religion” violated the Establishment and Free Exercise Clauses.101 The court stated that although EMI is hard to teach without some religious references, the First Amendment mandates that the government refrain from injecting any religion into EMI programs.102 Thus, the Owens court held that religious moral instruction, when required as part of a probationer's rehabilitation program, violates the probationer's First Amendment rights under the Establishment Clause and the Freedom of Religion Clause.103 The court remanded Owens for a factual determination of whether religious indoctrination was part of EMI.104

Nearly a decade after Owens, Florida's First District Court of
Appeal considered the constitutionality of requiring a juvenile delinquent to enroll in church youth programs in *L.M. v. Florida (L.M. I)*. In *L.M. I*, a juvenile delinquent contested his “community control condition,” which required him to “get with the pastor” of his mother’s church and to enroll in any and all of the church’s youth programs. The appellate court applied the holding of *Owens*, stating that a trial court cannot require a probationer or community controlee to submit to religious instruction without violating the First Amendment of the United States Constitution. The appellate court described the trial court’s requirement as “erroneous” because it delegated the determination of the juvenile’s rehabilitation needs to a church pastor. The court remanded the case, stating that the trial court could properly mandate secular youth programs for the juvenile’s rehabilitation.

The First District revisited *L.M.* when L.M. appealed the trial court’s decision on remand (*L.M. II*). In *L.M. II*, the juvenile contested a modified version of the religious youth group program ordered by the same judge. LM was ordered to attend activities “in...
excluding, but not limited to . . . church and/or community youth programs, if the mother directs.”

LM argued that the court order violated his federal First Amendment rights, as well as his free exercise rights under the Florida Constitution.

The appellate court affirmed the trial court's amended version of the previous order, which assigned rehabilitation to the boy's mother rather than a church pastor. The First District affirmed the modified order, agreeing with the trial court that putting the juvenile's rehabilitation in his mother's hands was proper because Florida law presumes that parents control their minor children.

The First District held that by assigning youth programs, the trial court was attempting to put the boy in a position to be taught "acceptable social and moral values before his antisocial attitude and conduct mold him into a hardened criminal." The court stated it is not unreasonable nor illegal to require the boy to obey his mother when it is her choice that the boy attend religious youth programs. The court expressly passed on the question of how to enforce the child's probation condition if he refused to attend his mother's chosen religious activities. Therefore, L.M. II illustrates Florida’s acceptance of community control for juvenile delinquents that requires parents to assign youth programs for their children's rehabilitation as they see fit, using religion if they wish.

III. M.C.L. COURT’S ANALYSIS

4) he was to obey his mother's demands, including attending “community or church programs” chosen by his mother. Id. at 1316.

113. Id.
114. See id. at 1318.
115. See id. at 1316–17.
116. See id. The trial judge defended his order by stating that he could properly delegate the youth program to the probationer's mother because she already had legal custody and control. See id.
117. L.M. II, 610 So. 2d at 1318.
118. See id.
119. See id. The court passed on the question of how to make an uncooperative child obey a parent's religious directions by stating: “[T]o what extent a court can or should have authority to enforce parental directions when the child refuses to obey presents significant issues that need not be decided on this record.” Id.
120. See id.
The *M.C.L.* court considered both Florida and federal Establishment Clause holdings in its decision. Judge Arthur Lawrence, author of the *M.C.L.* opinion, began by quoting the Florida Constitution's Establishment Clause, which states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The court discussed the factually similar case of *L.M. II*, which the First District decided in 1992. ML relied on the court's overruling of a religious probation condition in *L.M. I* as part of his Florida constitutional objection to the moral training program requiring that he study the works of several religious leaders. The court reiterated its holding in *L.M. I* that “[r]equiring a probationer or community controlee to submit to a course of religious instruction contravenes the First Amendment.” However, the court stated ML’s argument ignored the fact that, in *L.M. II*, the court found parent-directed instruction of a juvenile delinquent at a church facility constitutional.

The court then distinguished *M.C.L.* from *L.M. I*, noting that ML’s probation condition “merely mandates that ML study renowned moral leaders,” and, unlike *L.M. I*, did not mandate enrollment in any church group or instruction by a church pastor. Further, the trial court on remand had modified LM’s condition to require that his mother choose an appropriate moral training program. The court declared its position to be consonant with the

123. See *M.C.L.*, 682 So. 2d at 1211–12; see also text accompanying *supra* note 113.
124. See *M.C.L.*, 682 So. 2d at 1212.
125. *Id.* (quoting *L.M. I* v. Florida, 587 So. 2d at 648, 649 (Fla. 1st Dist. Ct. App. 1991)); see text accompanying *supra* note 111.
126. See *M.C.L.*, 682 So. 2d at 1212; text accompanying *supra* notes 114–16.
127. *M.C.L.*, 682 So. 2d at 1212.
128. See *id.*
Florida Constitution and its holding in *L.M. II*.129

After standing by its *L.M.* holdings, the court noted that the word “spiritual” in “moral and spiritual training” was ambiguous in its meaning.130 The court agreed with ML's contention that the religious connotation of the word “spiritual” made it unconstitutional.131 Consequently, the court struck the words “and spiritual” from the trial judge's order.132

Turning to the United States Constitution, the court deferred to the Supreme Court's guidance in determining when government action violates the First Amendment.133 The First District applied the three-part *Lemon* test to evaluate the constitutionality of ML's moral and spiritual training program.134 First, the court stated that the probation condition had a valid secular purpose — ML's rehabilitation.135 Second, the court stated that the probation condition primarily advanced ML's rehabilitation rather than religion.136 Finally, the appellate court held that the condition did not entangle church and state because no church was involved.137 Therefore, the court concluded that ML's probation condition passed all three prongs of the *Lemon* test.138

Discussing the trial judge's actions, the appellate court noted that he had ordered ML to read about “individuals who have made significant contributions to the code of civilized conduct upon which societies exist,” and, thus, did not mandate any religious practices.139 Additionally, the court viewed the reading list as an intellectual history lesson which “neither necessitates the study of religion nor is unconstitutional.”140

After applying *Lemon*, the court referred to *Brown v. Woodland*
Joint Unified School District. Brown had also applied the Lemon test, and held that a public school curriculum asking children to pretend they were witches did not require the children's practice of witchcraft in violation of the federal establishment clause or the California Constitution. The M.C.L. court then addressed the Eleventh Circuit’s holding in Owens v. Kelley regarding Emotional Maturity Instruction as a probation condition. The court agreed with the Owens holding that it is probably hard to create an educational and moral rehabilitation program without religious reference, but that it was a constitutional requirement. Further, the First District agreed with the Owens holding that there is a “fine line” between rehabilitation that advocates morality and rehabilitation efforts that use religion to encourage lawfulness.

The M.C.L. court held that the “fine line” between morality and adherence to religious belief mentioned in Owens applied to the instant case for two reasons. First, ML’s court ordered restitution is consonant with the United States Constitution, as the court explained using Brown. Second, the condition that ML attend a parent-chosen moral training program is valid under both the Florida and United States Constitutions. Overall, the First District affirmed ML’s probation condition notwithstanding the deletion of the words “and spiritual” from the judge’s order of a “moral and spiritual training program.”

IV. A CRITICAL EXAMINATION OF M.C.L.

Justice Scalia summed up best the Supreme Court’s increasing confusion over the Lemon test: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little

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141. See M.C.L., 682 So. 2d at 1212 (citing Brown, 27 F.3d at 1373).
142. See id.
143. See id. at 1212–13; see also text accompanying supra note 103.
144. See M.C.L., 682 So. 2d at 1213.
145. Id.; see text accompanying supra note 102.
146. See M.C.L., 682 So. 2d at 1213.
147. See id.
148. See id.
149. See id.
children . . . ." The Supreme Court created the Lemon test in 1971 as a composite of its previous Establishment Clause holdings. The test was not to be a set of strict rules, but was designed to provide "helpful signposts." Soon after the test's creation; however, the Court began using it exclusively to evaluate Establishment Clause cases.

Although recent years have seen the Court constructively abandon the Lemon test, it has never been overruled. The Court has instead decided cases on fact-specific criteria. The problem created by this constructive abandonment of Lemon concerns the lower courts that still have to apply the test in Establishment Clause cases. M.C.L. exemplifies how state courts bound by the Lemon test have misapplied it, thus warranting a clear answer regarding whether lower courts should keep applying an abandoned standard.

The Supreme Court's overturning of Aguilar in Agostini signified current-day Establishment Clause confusion and dissatisfaction with strict adherence to a "test." However, the case gave no concrete standard for lower courts to apply in place of Lemon. Nor did Agostini herald an official abandonment of Lemon. As a result, Agostini is proof that the Court's selective abandonment and adoption of the ambiguous Lemon test has provided lower courts with the

151. See supra note 44 and accompanying text.
152. Stephanie E. Russell, Sorting Through the Establishment Clause Tests, Looking Past the Lemon, 60 Mo. L. Rev. 653, 653 n.5 (1995) (discussing the various alternative tests Supreme Court Justices have formulated since Lemon).
153. See id. at 653.
154. See McConnell, supra note 9, at 47.
155. See id.
156. See Engstrom, supra note 8, at 123.
157. See id.
158. See McConnell, supra note 9, at 47.
159. But see Agostini, 117 S. Ct. at 2026 (Souter, J., dissenting). Unhappy with Agostini's abandonment of the "test" mentality, Justices Souter, Stevens, and Ginsburg dissented, stating "constitutional lines have to be drawn . . . constitutional lines are the price of constitutional government." Id.
160. See supra text accompanying note 96.
161. See Agostini, 117 S. Ct. at 2008. The Court quoted and mentioned the application of Lemon, but did not expressly overrule it. See id.
opportunity to manipulate the *Lemon* precedent. Consequently, federal courts of appeal and state courts are left using *Lemon* with its history of inconsistencies and ambiguities.

In *M.C.L.* v. Florida, Florida’s First District Court of Appeal used *Lemon* and Florida case law to adjudicate religion to a juvenile delinquent. The court cited several Establishment Clause cases and skimmed over their effect on ML’s probation conditions. Likewise, the court’s brief and unsupported application of the *Lemon* test in *M.C.L.* is worth examination.

First, the court concluded that its decision was consonant with the United States Constitution because the program in question satisfied the *Lemon* test’s first prong: It had a valid secular purpose. The court stated that the program’s purpose, rehabilitation, was constitutionally valid. However, the court failed to address the true issue at bar: The constitutionality of the means of rehabilitation. The ends of ML’s rehabilitation were not in dispute — ML wanted a decision striking down the form of the rehabilitation, namely, the religious overtones of the moral training program. However, the court omitted any specific explanation of how a moral training program, including the study of several religious leaders, had a valid secular purpose.

Second, the court stated that its decision comported with *Lemon*’s second prong: The prohibition on advancing or inhibiting religion. The court stated only that the probation condition advanced ML’s rehabilitation, not religion. Yet, ML was left without an explanation of how religion is not advanced (or inhibited) through his moral training program. Judge Lawrence covered several religions in his order, but the list certainly was not inclusive of all religions; nor did he clarify whether ML was free to substitute alterna-

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162. See Joiner, supra note 83, at 547 (stating the *Lemon* test represented “jurisprudence in which inconsistency was the only hallmark”).
163. See McConnell, supra note 9, at 47.
165. See id.
166. See id. at 1212.
167. See id.
168. See text accompanying supra note 21.
169. See *M.C.L.*, 682 So. 2d at 1212. The judge ordered ML to study “at least” the listed historical figures, but did not suggest others for ML’s studies. Id. at 1211.
170. See text accompanying supra note 195.
tive studies for those listed.\textsuperscript{171} Therefore, the judge promoted the advancement of particular religions by forcing ML to study them.

Third, the court stated that its rationale met \textit{Lemon}'s third prong: The bar on excessive entanglement between church and state.\textsuperscript{172} However, the court only said this criterion was met because no church was involved.\textsuperscript{173} The court ignored the possible entanglement between government and religion regarding the policing of the reading list the trial judge had instructed ML ambiguously to “cover.”\textsuperscript{174} Is a probation officer to give ML theologic pop-quizzes to make sure ML is doing his reading? The court upheld the intrusive order by giving one-sentence answers to the \textit{Lemon} test — as if fulfilling the mechanical test would magically make the moral training program and the reading list constitutional.\textsuperscript{175}

The court also mentioned \textit{Brown} in an attempt to analogize the constitutional school assignment, studying witchcraft, to the \textit{M.C.L.} judge's assigning religious readings.\textsuperscript{176} The court failed to address how the study of the Jewish, Christian, Muslim, Buddhist, and Confucian religions are similar to the study of witchcraft, except to say that the subjects were intended as an “intellectual history” lesson.\textsuperscript{177} However, in \textit{Brown}, the witchcraft lesson could not be proven to involve students in any kind of religious practice.\textsuperscript{178} For ML to fulfill his probation condition, he had to obtain and study widely used and revered books of religious worship, unlike the students in \textit{Brown}.\textsuperscript{179}

Despite factually similar cases declaring the adjudication of religion unconstitutional, the First Circuit distinguished \textit{M.C.L.} to make it seem vastly different from its factually similar counterparts. Regarding the \textit{M.C.L.} court's reference to \textit{Owens}, which held that probation conditions could not be contingent on religious teachings, the court agreed with the holding, but omitted a comparison of \textit{M.C.L.} to \textit{Owens}.\textsuperscript{180} The court's rationale apparently was thus: In \textit{Owens}, the probationer was exposed to Christianity alone, whereas

\begin{enumerate}
\item \textsuperscript{171} See \textit{M.C.L.}, 682 So. 2d at 1212.
\item \textsuperscript{172} See id.
\item \textsuperscript{173} See id.
\item \textsuperscript{174} See text accompanying \textit{supra} note 20.
\item \textsuperscript{175} See \textit{M.C.L.}, 682 So. 2d at 1212.
\item \textsuperscript{176} See \textit{id.} at 1212–13.
\item \textsuperscript{177} See \textit{id.} at 1212.
\item \textsuperscript{178} See text accompanying \textit{supra} note 64.
\item \textsuperscript{179} See \textit{M.C.L.}, 682 So. 2d at 1212.
\item \textsuperscript{180} See \textit{id.} at 1213.
\end{enumerate}
in *M.C.L.*, the probationer was supposed to “cover” several different religious and historical leaders. Thus, the introduction of multiple religions in *M.C.L.* supposedly removed the impropriety of the state promoting any singular religion.

The strikingly factually similar *L.M.* cases were applied to *M.C.L.*, insofar as the choice of a moral training program was left to a parent instead of a judge or priest.\(^{181}\) However, *L.M. II*’s reasoning was not sufficiently applied to ML’s reading list. If the First District truly wanted to follow its logic in *L.M. II*, it could have stated that the trial judge would entrust ML’s mother with composing a reading list of moral leaders.\(^{182}\) By doing so, the judge could have fulfilled his responsibility to encourage rehabilitation without adjudicating religion. However, the *M.C.L.* court worked with what it had: The illogical *Lemon* test.

The First District is not solely to blame for *M.C.L.*’s unconstitutional result, however. The Supreme Court thoroughly confused the judiciary regarding the Establishment Clause with its case-by-case decisions.\(^{183}\) The *M.C.L.* court *had* to follow *Lemon* because it was without reference to a clearer, overruling precedent. Unfortunately, the First Amendment’s Framers did not give explicit instructions about the actions encompassed by the Establishment Clause.\(^{184}\) Apparently, they wanted to prevent the forming of a national religion, but failed to define less radical prohibited actions.\(^{185}\)

In recent years, four Supreme Court Justices have called for a new test to replace *Lemon*.\(^{186}\) Their proposed replacement tests rely on the words “accommodation,” “endorsement,” and “coercion,” instead of “secular purpose,” “primary effect,” and “entanglement.”\(^{187}\) Although the Court has largely abandoned *Lemon*, though, the test remains the standard for lower courts to decide Establishment Clause cases.\(^{188}\)

The Supreme Court left unanswered an important Establish-
ment Clause issue: How much religious involvement by the government is too much? Lower courts are left to struggle with this issue. The result is lower court decisions like M.C.L., resulting in the adjudication of activities which may violate the Establishment Clause. The remnants of Lemon, then, leave lower courts with an ambiguous standard that allows them to justify their own religiously-biased agendas in the name of the United States Constitution and at the expense of probationers' First Amendment rights under the Establishment Clause.

V. CONCLUSION

The Supreme Court meant to clarify the ambiguous First Amendment Establishment Clause in Lemon. However, when the Lemon standard failed to work consistently, the Court fumbled with variations, resulting in individual Justices steadily withdrawing their support for the test — and confusing the country about Lemon's applicability and staying-power.

M.C.L. is evidence that Florida, like other states, struggles with Lemon, using the test to assign one-sentence justifications to complex Establishment Clause controversies. M.C.L.'s moral training program and reading list may be viewed by the court as constitutional, but the First District has not given an adequate explanation of how that rationale is justified. The First District's limited reasoning is at least in part due to the Supreme Court's inconsistent adherence to an outdated precedent.

Just as the United States Constitution is an imperfect document, the Supreme Court can be an imperfect interpreter. However, the ambiguities of the First Amendment need to be interpreted as clearly as possible by the Justices so the law is clear and uniform throughout the land. The Supreme Court needs to provide a better standard in future Establishment Clause cases so that lower courts understand the law and are prevented from justifying their own

189. See id.
190. See supra Part II.A.
191. See supra note 3.
192. See McConnell, supra note 9, at 47.
193. See id. McConnell called for the Court to say definitively whether or not it has dispensed with the Lemon test. See id. McConnell states that the Court could achieve Establishment Clause clarity with five simple words: "The Lemon test is overruled." Id.
religious-biased agendas with an outdated, ambiguous test that has plagued American law for decades.