NOTES

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

Laura A. Bowers*

The Establishment Clause[1] 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.[2] The Supreme Court Justices are divided on Establishment Clause interpretation,[3] while Congress and other federal government agencies avoid any conduct that might lead to religious entanglement in an effort to refrain from further defining

---

* B.A., English Literature, University of Central Florida, *magna cum laude*, 1994; J.D., Stetson University College of Law, May 1998; Research Editor, *Stetson Law Review*, 1997–98.

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.[4] Consequently, lower courts have encountered difficulties when deciding Establishment Clause cases due to the lack of judicial and legislative guidance.[5] The resulting uncertainty makes it difficult for state and federal courts to identify appropriate modes of separating church and state.[6]

In 1971, the Supreme Court created a three-pronged test for activities that transcended appropriate constitutional boundaries between church and state.[7] However, because the Supreme Court has largely abandoned this "purpose," "primary effect," and "excessive entanglement" test without overruling the decision,[8] courts must follow the precedent,[9] resulting in inconsistent decisions like *M.C.L. v. Florida*.[10]

---

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.

7. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that Pennsylvania and Rhode Island public programs subsidizing secular subject materials in private religious schools violated the Establishment Clause according to a three-pronged test).

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.

10. 682 So. 2d 1209 (Fla. 1st Dist. Ct. App. 1996). In Florida, appellate courts must use juveniles' initials instead of their names. *See* FLA. STAT. § 39.069(4) (1995). Additionally, children's records are sealed by the court clerk and are not open to public inspection. *See id.*

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.[11] The juveniles destroyed walls, windows, and plumbing fixtures in several homes, causing $52,085.71 in damages.[12] 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.[13] Incriminating evidence in the case included the juveniles' own videotape of their crimes.[14] 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.[15]

The trial court declared ML delinquent and committed him to a high-risk juvenile detention center.[16] The judge also imposed probation conditions on ML, requiring that he attend moral and spiritual training, avoid media interviews, and pay restitution.[17]

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."[18] 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

---

11. *See M.C.L.*, 682 So. 2d at 1210.

12. *See id.* at 1211.

13. *See id.* For abusing the unidentified pet, the juveniles were charged with one count of cruelty to an animal. *See id.* at 1210.

14. *See id.* at 1211. The media became interested in the incriminating footage and invited ML to be a guest on several national television talk shows. *See id.* The trial judge prohibited ML from communicating with the press about the case for one year. *See id.* at 1213. The judge conditioned ML's eventual communication with the press on the fulfillment of his probation conditions, and a showing that he was mature enough to speak "appropriately about the events of his past criminal activity." *Id.* Further, the judge ordered that any compensation ML gained from the media be paid toward restitution. *See id.*

15. *See id*. ML was 13-years-old at the time of his sentencing and was therefore classified a juvenile. *See id.* at n.1.

16. *See id.* at 1211. ML's sentence at the detention center was to last until no later than his nineteenth birthday. *See id.*

17. *See M.C.L.*, 682 So. 2d at 211. The judge mandated that ML abstain from interviews even though he was heavily pursued by the media upon public disclosure that his crimes were videotaped. *See id.* at 1213. The judge imposed restitution upon ML and his parents in an amount exceeding $52,000. *See id.* at 1214.

18. *Id.* at 1211.

the court.[19] 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.]."[20]

ML appealed the probation conditions to the First District Court of Appeal on Florida and federal constitutional grounds.[21] Regarding State case law, the court distinguished *M.C.L.* from its earlier decision, *L.M. v. Florida*,[22] which held that religious instruction as part of a probationer or community controlee's sentence contravenes the First Amendment.[23] Regarding federal constitutionality, the court applied the *Lemon*[24] test in response to ML's allegation that the moral training program violated his federal constitutional rights.[25]

The First District modified the moral and spiritual training condition by deleting the word "spiritual" due to its largely religious connotation.[26] The court otherwise affirmed the moral training program under the Florida and United States Constitutions.[27] 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.[28] This Note's purpose is to examine *M.C.L. v.*

---

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.

22. L.M. v. Florida, 587 So. 2d 648 (Fla. 1st Dist. Ct. App. 1991) [hereinafter *L.M. I*], *appeal after remand*, 610 So. 2d 1314 (Fla. 1st Dist. Ct. App. 1992) [hereinafter *L.M. II*].

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. I*. *See M.C.L.*, 682 So. 2d at 1212.

24. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* text accompanying *infra* note 41.

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,[29] 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."[30] Sixteen years later, in *Abington School District v. Schempp*,[31] the Court reconsidered its "wall" analogy, acknowledging that even the Founding Fathers were religious and injected religious themes into their works.[32]

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.[33] 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.

gion in Congress and in its own Court in the form of traditional opening prayers.[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.[35]

In 1971, the Supreme Court again interpreted the Establishment Clause in *Lemon v. Kurtzman*.[36] In *Lemon*, the Court considered the constitutionality of Pennsylvania and Rhode Island statutory programs subsidizing secular subject materials in religious private schools.[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.[38]

The *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.[39] The *Lemon* Court set out a three-part test for determining constitutional combinations of church and state.[40] To pass the *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.[41] The Court has now used the *Lemon* model for over twenty years and in

---

34. *See id.* at 213.

35. *See id.*

36. 403 U.S. 602 (1971).

37. *See id.* at 606–07.

38. *See 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 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 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." *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's dictates. *See id.* at 614, 625.

39. *See* Kagan, *supra* note 8, at 644. Perhaps if it were sufficiently narrowed and consistently applied to Establishment Clause cases, the *Lemon* test could be a useful blueprint for government neutrality regarding religion. *See id.* at 650.

40. *See Lemon*, 403 U.S. at 612–13.

41. *See id*.

over thirty cases.[42]

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."[43] The Court extracted three prongs from previous Court decisions, and combined them to declare the Rhode Island and Pennsylvania statutes unconstitutional.[44]

The Eighth Circuit Court of Appeals applied the *Lemon* test in *Florey v. Sioux Falls School District*[45] to determine the constitutionality of a public school's Christmas assemblies.[46] 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.[47] 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.[48]

First, the majority was persuaded that some involvement between church and state is inevitable,[49] and, therefore, that those holidays with both religious and secular bases (such as Christmas) may be constitutionally observed by public schools through music,

---

42. *See* Susan E. Acklin, Note, Board of Education of Kiryas Joel Village School District v. Grumet: *Another Snub for* Lemon *Draws It Nearer to Its Probable Demise*, 41 LOY. L. REV. 43, 49 n.43 (1995) (discussing the Supreme Court's inconsistent use of the *Lemon* test).

43. *Lemon*, 403 U.S. at 612.

44. *See id.* at 612–13. The first two prongs came from *Board of Education v. Allen*, 392 U.S. 226, 243 (1968), and the third from *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). *See Lemon*, 403 U.S. at 612–13; Julian R. Kossow, *Preaching to the High School Choir: Rachel Bauchman, the Establishment Clause, and the Search for the Elusive Bright Line*, 24 FLA. ST. U. L. REV. 79, 90–91 (1996) (discussing recent church-state issues as they relate to the Establishment Clause). Because previous Supreme Court decisions have been integrated into the *Lemon* test, it supposedly represents a "bright line" test. *See id.* at 90. Purportedly, the test was intended to draw a bright line as to when church and state involvement becomes unconstitutional under the Establishment Clause. *See id*.

45. 619 F.2d 1311, 1314 (8th Cir. 1980) (holding that a public school's Christmas program did not violate the First Amendment).

46. *See id.*

47. *See id*. at 1313.

48. *See id.* at 1313–19.

49. *See id.* at 1313 n.3.

art, literature, and drama.[50] 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.[51] 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."[52] 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.[53]

Judge Theodore McMillian dissented in *Florey*, applying the *Lemon* test to his opinion, but applying different reasoning from the majority.[54] 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.[55] 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."[56]

The Ninth Circuit had a chance to apply the *Lemon* test in *Brown v. Woodland Joint Unified School District*,[57] which concerned a public school curriculum that allegedly taught "witchcraft."[58] In *Brown*, the controverted classroom activity involved asking children

---

50. *See id.* at 1317. The court stated that the religious holiday decorations could only be displayed temporarily during the Christmas season and only as a teaching aid of religious heritage. *See id.*

51. *See Florey*, 619 F.2d at 1316–18.

52. *Id.* at 1318.

53. *See id.* at 1318–19.

54. *See id* at 1320–30 (McMillian, J., dissenting). Judge McMillian criticized the majority for failing to mention the specifics of the challenged Christmas assemblies. *See id.* at 1323. According to McMillian, the Christmas observances in *Florey* varied between teachers and grade levels, including concerts featuring Christmas carols, evening performances, and graded assembly preparation that could span two months of the school year. *See id.*

55. *See id.* at 1321–28.

56. *Id.* at 1329.

57. 27 F.3d 1373, 1378 (9th Cir. 1994).

58. *See id.* at 1377. A teaching aid called *Impressions*, consisting of 59 books filled with educational classroom activities, contained literary selections that were read by students, followed by creative educational activities in which students would discuss or act out the reading selections. *See id.* This approach was called the "whole language" approach to reading education. *See id.*

"to discuss witches or to create poetic chants."[59] 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.[60]

The *Brown* court discussed the *Lemon* prongs individually.[61] 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.[62] 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.[63] 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.[64]

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.[65] According to the *Brown* court, the offended party has to show that an objective observer would share an identical view.[66] The court maintained that the Browns failed to meet their objective burden under the *Lemon* test and under the objective "reasonable observer" standard.[67]

In 1982, the Supreme Court decided *Lee v. Weisman*[68] and con-

---

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."[69] In *Lee*, a middle school principal invited a Jewish rabbi to conduct prayers at graduation.[70] The principal asked the rabbi to make a nonsectarian invocation and benediction.[71] 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.[72]

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.[73] 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.[74] The United States Court of Appeals for the First Circuit affirmed and adopted the district court's opinion.[75]

The Supreme Court affirmed *Lee*, expressly refusing to overrule *Lemon*.[76] 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.[77] 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.[78] 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."[79]

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*,[80] in *Agostini v. Felton*.[81]

Aguilar declared unconstitutional a publicly-funded program involving public school teachers and counselors providing remedial assistance in parochial schools.[82] 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.[83]

The majority of the Court held that the education program in *Aguilar* violated *Lemon*'s third prong by excessively entangling

---

78. *See id.* at 596. The Court used the rabbi's invocation and benediction as an example of inappropriate injection of religion at a public high school graduation. *See id.* at 597.

79. *Lee*, 505 U.S. at 597.

80. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997).

81. 117 S. Ct. 1997 (1997); *see also* Americans United for Separation of Church and State, *Analysis of* Agostini v. Felton, (last modified Aug. 29, 1997) <http://www.au.org/agostini.htm> (acknowledging the rarity of the Supreme Court overturning its own rulings).

82. *Compare Aguilar*, 473 U.S. at 405–08, *with* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). *Ball* was decided the same day as *Aguilar* and is factually similar. *See Aguilar*, 473 U.S. at 423–24 (O'Connor, J., dissenting). First, both cases involved public school teachers teaching private school students on private school grounds. *See Ball*, 473 U.S. at 375; *Aguilar*, 473 U.S. at 406. Second, religiously-affiliated private schools comprised an overwhelming number of schools in both programs. *See Ball*, 473 U.S. at 375; *Aguilar*, 473 U.S. at 406. Third, both programs involved publicly-funded materials and supplies. *See Ball*, 473 U.S. at 375; *Aguilar*, 473 U.S. at 404. Fourth, the instructors in both programs were public school employees controlled solely by public school systems. *See Ball*, 473 U.S. at 376; *Aguilar*, 473 U.S. at 406–07.

83. *See* John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507 (1996) (examining the Supreme Court's "historical inaccuracies" with respect to Establishment Clause cases). *Aguilar* has been termed an "inequitable parochial school aid decision" because it denied educational opportunities to 20,000 New York City schoolchildren due to the Supreme Court's concern that government agents would have to maintain a presence within parochial school halls to insure that no religion influenced the program. *Id.* at 522–23.

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

---

84. *See Aguilar*, 473 U.S. at 413–14. Similarly, the Court in *Ball* found several ways the education program violated the Establishment Clause: Through the possibility the teachers would "intentionally or inadvertently [inculcate] particular religious tenets or beliefs;" the possibility the programs would impress a symbolic link between church and state upon youngsters; and the possibility the programs would promote particular religions by subsidizing the religions of the private institutions involved. 473 U.S. at 385.

85. *See Aguilar*, 473 U.S. at 409.

86. *See id.* at 410.

87. *See id.* at 419–20 (Burger, C.J., dissenting); *id*. at 421–31 (O'Connor, J., dissenting). Justice O'Connor's dissent also mentions the Court's decision in *Ball*. *See id.* at 423–25.

88. *See id.* at 419 (Burger, C.J., dissenting). Quoting his dissent in a previous Establishment Clause case, Chief Justice Burger stated that the Court's responsibility is not to "apply tidy formulas by rote," but to consider whether particular statutes or practices take steps toward establishing a state religion. *Id.* (quoting Wallace v. Jaffree, 472 U.S. 38, 39 (1985) (Burger, C.J., dissenting)). Further, Chief Justice Burger acknowledged interaction between church and state as "unavoidable" and stated "an attempt to eliminate all contact between the two would be both futile and undesirable." *Id.* at 420.

89. *See id.* at 421–22 (O'Connor, J., dissenting).

90. *See id.* at 422. Examining the majority's rationale in *Aguilar*, Justice O'Connor stated that the school program would not have been struck down by the majority but for the program having been conducted on parochial school premises. *See id.* at 426. Justice O'Connor disagreed with the majority's application of entanglement in *Aguilar*, stating that if a government action passes the first two *Lemon* prongs, she would not invalidate it then on the basis of "some ongoing cooperation between church and state." *Id.* at 430.

91. *See* Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997); *see also* Americans United for Separation of Church and State, *Analysis of* Agostini v. Felton (last modified Aug. 29, 1997) <http://www.au.org/agostini.htm> (opining that *Agostini* will create greater confu-

"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

---

sion in Establishment Clause jurisprudence). Some critics consider the majority opinion to be fraught with inconsistencies because the first two prongs of the *Lemon* test (secular purpose and primary effects) were applied, but the third (excessive entanglement) prong was abandoned. *See id.* Further, the Court declared that government involvement in religion violates the Establishment Clause when it is truly "excessive," using the same modifier it disposed of and, thus, perhaps the same test it abandoned. *See id.*

92. *See Agostini*, 117 S. Ct. at 2016–19; *see also* Americans United for Separation of Church and State, *Analysis of* Agostini v. Felton (last modified Aug. 29, 1997) <http://www.au.org/agostini.htm>. Americans United for the Separation of Church and State maintains that *Agostini* represents the Court's contradictory stand that it expressly does away with the "entanglement" prong, but still needs to monitor government involvement in religion to see if the Establishment Clause is violated. *See id.* The organization states that the Court's holding in *Agostini*, that "Establishment Clause law has significant[ly] change[d]" since *Aguilar*, has little meaning and will fuel challenges to other Supreme Court Establishment Clause cases. *Id.*

93. *See Agostini*, 117 S. Ct. at 2010.

94. *See id.* at 2011.

95. *See id.* at 2014–16.

96. *See id.* at 2018–19.

97. 681 F.2d 1362, 1364 (11th Cir. 1982). Owens pleaded guilty to two violations of the Georgia Controlled Substances Act and was sentenced to 15 years probation and numerous probation conditions. *See id.* at 1364.

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

---

98. *See id.* Also in response to the EMI probation condition, Owens sought monetary damages for the alleged violation of his First Amendment rights under the Free Exercise and Establishment Clauses. *See id.* The district court stated that EMI functioned "to teach prisoners and probationers that men must live according to accepted rules of law." *Id.* at 1365 n.3 (citing Owens v. Kelley, No. 78-72-ALB, slip op. at 14 (M.D. Ga. Oct. 21, 1980)). The court also acknowledged EMI's role in incenting criminals to correct their criminal nature by exposing them to "legal, moral, and ethical principles, and proper rules of behavior." *Id.*

99. *Id.* at 1364.

100. *See id*. at 1365.

101. *Id.*

102. *See id.* The court stated:

> In searching for the proper teaching of an EMI course it is probably difficult to locate one who can teach morality without reference to religion, but that is the task which must be accomplished. We recognize that there is a fine line between rehabilitation efforts which encourage lawful conduct by an appeal to morality and the benefits of moral conduct to the life of the probationer, and efforts which encourage lawfulness through adherence to religious belief. Nevertheless, this is the line that must not be overstepped.

Id. at 1365–66.

103. *See Owens*, 681 F.2d at 1365–66.

104. *See id.* at 1366.

Appeal considered the constitutionality of requiring a juvenile delinquent to enroll in church youth programs in *L.M. v. Florida* (*L.M. I*).[105] In *L.M. I*, a juvenile delinquent contested his "community control condition,"[106] 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."[107] 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.[108] 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.[109] The court remanded the case, stating that the trial court could properly mandate secular youth programs for the juvenile's rehabilitation.[110]

The First District revisited *L.M.* when L.M. appealed the trial court's decision on remand (*L.M. II*).[111] In *L.M. II*, the juvenile contested a modified version of the religious youth group program ordered by the same judge.[112] LM was ordered to attend activities "in-

---

105. 587 So. 2d 648 (Fla. 1st Dist. Ct. App. 1991).

106. *See* FLA. STAT. § 39.054 (1)(a) (1995). Florida's statute defining the juvenile delinquent community control program states:

> [The program] must include a penalty component such as restitution in money or in kind, community service, a curfew, revocation or suspension of the driver's license of the child, or other nonresidential punishment appropriate to the offense and must also include a rehabilitative program component such as a requirement of participation in substance abuse treatment or in school or other educational program.

Id.

107. *L.M. I*, 587 So. 2d at 649.

108. *See id.*; *see also* text accompanying *supra* note 103.

109. *See id.*

110. *See id.* The court stated that LM could "benefit" from youth programs and suggested that the trial court, on remand, "impose alternate conditions of community control, including the requirement that appellant attend youth programs of a secular content." *Id.*

111. *See L.M. II*, 610 So. 2d 1314, 1315 (Fla. 1st Dist. Ct. App. 1992). The *L.M. II* opinion revealed facts that were not mentioned in *L.M. I*, including that LM was 13 at the time of his arrest and that he pleaded guilty to petit theft and trespassing. *See id.* In LM's first trial, the judge suggested that he attend the New Friendship Baptist Church youth program after noting that LM's mother was a church member. *See id.*

112. *See id.* at 1316–17. On remand, the trial judge confirmed that LM's mother was still a member of the New Friendship Church and placed LM on community control with the following conditions: 1) he was to perform 45 hours of community service within 45 days; 2) he was to "obey all reasonable rules of [his] mother" and his Health and Rehabilitative Services counselor; 3) he was under a curfew of 7:00 p.m. every evening; and

cluding, but not limited to . . . church and/or community youth programs, if the mother directs."[113] LM argued that the court order violated his federal First Amendment rights, as well as his free exercise rights under the Florida Constitution.[114]

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.[115] 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.[116]

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."[117] 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.[118] 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.[119] 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.[120]

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,[121] 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.[122]

The court discussed the factually similar case of *L.M. II*, which the First District decided in 1992.[123] 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.[124] 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."[125] 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.[126]

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.[127] Further, the trial court on remand had modified LM's condition to require that his mother choose an appropriate moral training program.[128] The court declared its position to be consonant with the

---

121. *See* M.C.L. v. Florida, 682 So. 2d 1209, 1211 (Fla. 1st Dist. Ct. App. 1996).

122. FLA. CONST. art. I, § 3.

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*

---

129. *See id.*
130. *See id.*
131. *See id.* At oral argument, the State conceded to the word's religious meaning. *See id.*
132. *See id.*; text accompanying *supra* note 26.
133. *See M.C.L.*, 682 So. 2d at 1212.
134. *See id.*; text accompanying *supra* note 25.
135. *See M.C.L.*, 682 So. 2d at 1212.
136. *See id.*
137. *See id*.
138. *See id*.
139. *Id.*
140. *Id.*

Joint Unified School District.[141] *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.[142] The *M.C.L.* court then addressed the Eleventh Circuit's holding in *Owens v. Kelley* regarding Emotional Maturity Instruction as a probation condition.[143] 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.[144] 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.[145]

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.[146] First, ML's court ordered restitution is consonant with the United States Constitution, as the court explained using *Brown*.[147] Second, the condition that ML attend a parent-chosen moral training program is valid under both the Florida and United States Constitutions.[148] 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."[149]

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

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 . . . ."[150] The Supreme Court created the *Lemon* test in 1971 as a composite of its previous Establishment Clause holdings.[151] The test was not to be a set of strict rules, but was designed to provide "helpful signposts."[152] Soon after the test's creation; however, the Court began using it exclusively to evaluate Establishment Clause cases.[153]

Although recent years have seen the Court constructively abandon the *Lemon* test,[154] it has never been overruled.[155] The Court has instead decided cases on fact-specific criteria.[156] The problem created by this constructive abandonment of *Lemon* concerns the lower courts that still have to apply the test in Establishment Clause cases.[157] *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.[158]

The Supreme Court's overturning of *Aguilar* in *Agostini* signified current-day Establishment Clause confusion and dissatisfaction with strict adherence to a "test."[159] However, the case gave no concrete standard for lower courts to apply in place of *Lemon*.[160] Nor did *Agostini* herald an official abandonment of *Lemon*.[161] 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

---

150. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397 (1993) (Scalia, J., concurring) (referring to the Supreme Court's inconsistently-applied test for improper entanglements between church and state).

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.[162] Consequently, federal courts of appeal and state courts are left using *Lemon* with its history of inconsistencies and ambiguities.[163]

In *M.C.L.*, Florida's First District Court of Appeal used *Lemon* and Florida case law to adjudicate religion to a juvenile delinquent.[164] The court cited several Establishment Clause cases and skimmed over their effect on ML's probation conditions.[165] 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.[166] The court stated that the program's *purpose*, rehabilitation, was constitutionally valid.[167] 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.[168] 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.[169] The court stated only that the probation condition advanced ML's rehabilitation, not religion.[170] 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-

---

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.

164. *See* M.C.L. v. Florida, 682 So. 2d 1209, 1211–13 (Fla. 1st Dist. Ct. App. 1996).

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 135.

tive studies for those listed.[171] Therefore, the judge promoted the advancement of particular religions by forcing ML to study them.

Third, the court stated that its rationale met *Lemon*'s third prong: The bar on excessive entanglement between church and state.[172] However, the court only said this criterion was met because no church was involved.[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."[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 *Lemon* test — as if fulfilling the mechanical test would magically make the moral training program and the reading list constitutional.[175]

The court also mentioned *Brown* in an attempt to analogize the constitutional school assignment, studying witchcraft, to the *M.C.L.* judge's assigning religious readings.[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.[177] However, in *Brown*, the witchcraft lesson could not be proven to involve students in any kind of religious practice.[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 *Brown*.[179]

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

---

171. *See M.C.L.*, 682 So. 2d at 1212.
172. *See id.*
173. *See id.*
174. *See* text accompanying *supra* note 20.
175. *See M.C.L.*, 682 So. 2d at 1212.
176. *See id.* at 1212–13.
177. *See id.* at 1212.
178. *See* text accompanying *supra* note 64.
179. *See M.C.L.*, 682 So. 2d at 1212.
180. *See id.* at 1213.

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-

---

181. *See id.* at 1212.

182. *See* L.M. v. Florida, 610 So. 2d 1314, 1315 (Fla. 1st Dist. Ct. App. 1992).

183. *See* McConnell, *supra* note 9, at 47.

184. *See* Joiner, *supra* note 83, at 511.

185. *See id*.

186. *See* Acklin, *supra* note 42, at 50 n.57. The Justices who have called for a new test to replace *Lemon* include Scalia, O'Connor, Rehnquist, and White. *See id.*

187. Engstrom, *supra* note 8, at 131.

188. *See* McConnell, *supra* note 9, at 47.

ment Clause issue: *How* much religious involvement by the government is too much? Lower courts are left to struggle with this issue.[189] 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*.[190] 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.[191]

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.[192]

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.[193] 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.