MOSS V. SPARTANBURG COUNTY: HOW THE FOURTH CIRCUIT GOT IT WRONG AND WHAT IT MEANS FOR THE FUTURE

INTRODUCTION

In August of 2012, the Fourth Circuit Court of Appeals decided *Moss v. Spartanburg County School District Seven*,[1] a case of first impression in Establishment Clause jurisprudence.[2] At issue was whether it was constitutional for public school students to receive academic credit for private religious instruction they received during release time.[3] In the battle over the proper role of religion in schools, few stones have been left unturned. Advocates on both sides of the spectrum pay close attention to novel Religion Clause cases, as the proper relationship between religion and the State remains ever in limbo. This makes *Moss* particularly important, both for how it was decided and for what this decision might mean in other jurisdictions going forward.

The decision in *Moss* spoke directly to one of the most convoluted aspects of establishment jurisprudence: the proper role of religious instruction in public education. Specifically, the court had to determine whether a South Carolina statute that allowed public schools to give public school credit for private religious instruction constituted an establishment of religion in violation of the First Amendment.[4] In 2006, South Carolina passed the Released Time Credit Act ("RTCA"), which allowed public schools to give up to two public school credit hours to students who partook in private religious instruction during release time.[5] Further, the grades students received as part of these classes were reported back to the public school districts.[6]

This Note will focus both specifically on the Fourth Circuit's opinion in *Moss*, and more generally on how this opinion fits into the larger world of Establishment Clause precedent. Part I will briefly discuss the factual background leading up to the *Moss* decision. Part II will then give an overarching history of the Supreme Court's

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1. 683 F.3d 599 (4th Cir. 2012).
2. The Tenth Circuit decided a related issue in 1981, but that case is distinguishable on multiple grounds. *See generally* Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981); *see also infra* Subpart III.A.
3. *Moss*, 683 F.3d at 601.
4. *Id.*
5. S.C. CODE ANN. § 59-39-112 (Supp. 2012).
6. *Moss*, 683 F.3d at 602–03.

Establishment Clause jurisprudence, particularly as it pertains to public schools. Part III will look specifically at the Fourth Circuit's decision in *Moss*. Subpart III.A will consider whether the Fourth Circuit properly applied the *Lemon* test in upholding the RTCA. Subpart III.B will then examine the broader implications of the Fourth Circuit's decision and determine whether other jurisdictions will reach consistent results if and when they consider this issue.

I. ABOUT THE CASE

In 2006, South Carolina passed the RTCA, a statute that allowed South Carolina public school students to receive academic credit for religious instruction that they received during release time from school.[7] It allowed students to receive up to two hours of credit "for the completion of release time classes in religious instruction."[8] The RTCA did not in itself allow students to pursue religious instruction during release time. Instead, it referenced a previous statute that already allowed for this.[9] The RTCA simply made academic credits available for students who pursued religious release time instruction.[10]

After the General Assembly adopted the RTCA, Spartanburg County School District Seven ("School District" or "the Defendant") adopted a policy pursuant to the statute allowing its students to receive academic credits for release time religious instruction.[11] In response to this policy, Robert Moss and his daughter Melissa, Ellen Tillet, and the Freedom From Religious Foundation (collectively "the Plaintiffs") filed suit pursuant to 42 U.S.C. § 1983, alleging that the RTCA was unconstitutional because it violated the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[12] They filed suit in the United States District Court for the District of South Carolina, with the School District as the sole defendant.[13]

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7. § 59-39-112(A).
8. *Id.*
9. *See id.*
10. *See id.* The statute added that the religious classes in question had to be evaluated under "secular criteria" and that the award of credits must be decided in a manner "neutral" towards religion. *Id.* § 59-39-112(A)(1)–(2). Part (B) listed what constituted "secular criteria" for the purposes of evaluation. *Id.* § 59-39-112(B).
11. *Moss*, 683 F.3d at 602 (2012). The policy incorporated the language of the RTCA. *Id.* For the purposes of this Note, all references to the RTCA hereinafter refer to both the South Carolina statute and the Spartanburg Policy.
12. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 676 F. Supp. 2d 452, 454 (D.S.C. 2009).
13. *Id.*

The School District moved to dismiss.[14] Specifically, it contended that the Plaintiffs did not have standing to bring their claim under section 1983 and, even if they did, they did not state a viable claim under either the Establishment Clause or the Equal Protection Clause.[15] The District Court granted the Defendant's motion on the Equal Protection Clause claim, but held that the Plaintiffs did have standing and had alleged sufficient facts to constitute a plausible claim for relief under the Establishment Clause.[16]

Prior to trial, both parties moved for summary judgment.[17] The District Court denied the Plaintiffs' motion and granted the Defendant's motion.[18] The court held that, when construing the facts in the light most favorable to the Plaintiffs, the RTCA still survived the tripartite *Lemon* test for establishment of religion because it had the secular purpose of accommodating parental wishes, its principal effect was not to advance religion, and it did not foster excessive entanglement between the State and religion.[19] The Plaintiffs timely appealed.[20]

On appeal, the Fourth Circuit affirmed the District Court's grant of summary judgment for the Defendant.[21] The court, also applying the *Lemon* test, found that none of the three prongs was violated.[22] The court strongly likened the RTCA to the policies previously upheld by the Supreme Court and the Fourth Circuit, where students were allowed to pursue uncredited religious instruction while released from school.[23] Like the District Court, the Fourth Circuit held that the RTCA had the secular statutory purpose of accommodating parents' wishes for their children to be allowed to pursue religious education, that it did not advance religion because the policy itself was neutral toward religion, and that it did not entangle the State with religion.[24] For each of these prongs, the court strongly likened the RTCA to policies upheld in *Zorach v. Clauson* and *Smith v. Smith*,[25] which are discussed in

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14. *Id.*
15. *Id.*
16. *Id.* at 459–60.
17. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 775 F. Supp. 2d 858, 863 (D.S.C. 2011).
18. *Id.*
19. *Id.* at 877, 881–82.
20. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599, 604 (4th Cir. 2012).
21. *Id.* at 611.
22. *Id.*
23. *Id.* at 608–09 (comparing the RTCA to policies upheld as constitutional in *Zorach v. Clauson*, 343 U.S. 306 (1952) and *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975)).
24. *Id.* at 610–11.
25. *Id.* at 608–09.

detail in Part II below. Because the court found that the RTCA satisfied all three prongs of *Lemon*, it upheld the statute.[26] Plaintiffs filed for certiorari to the Supreme Court, which was denied.[27]

II. BACKGROUND

The First Amendment is the only place in which the Constitution speaks directly to the proper role of religion in the sphere of state function. It states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[28] The first portion of this is commonly referred to as the Establishment Clause. The latter is called the Free Exercise Clause.

Determining the proper scope of each of these clauses has proven to be extraordinarily difficult for courts.[29] This may be in part due to brevity of the language, as the Framers decided to dispatch with the relationship between church and State using a grand total of fifteen words.[30] More fundamentally, however, these two clauses appear to be in friction with one another. The Establishment Clause, on its face, can be read to broadly separate religion from the State.[31] Yet the Free Exercise Clause explicitly limits the State's ability to wholly separate itself from religion.[32] Striking the proper balance between these two provisions has been a perpetual challenge for federal courts and one that they have never been able to satisfactorily overcome.[33] If courts err on the side of the Establishment Clause, advocates for religious freedom might argue that the Free Exercise Clause is being violated. On the other hand, when courts find in favor of free exercise, critics can complain that they are contravening the purpose of the First Amendment by allowing for the establishment of religion.

The proper role of religion in public schools has resulted in a substantial amount of Supreme Court adjudication.[34] This is unsurprising. According to the Department of State, "[a]lmost 90 percent of American students below the college level attend public

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26. *Id.* at 611.
27. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 133 S.Ct. 623 (2012).
28. U.S. CONST. amend. I.
29. *See infra* Subparts II.A–C.
30. U.S. CONST. amend. I.
31. *Id.*
32. *Id.*
33. Indeed, the entire purpose of this Note is to contend with the complexities of an issue that would otherwise not exist if the Court had clarified its position on Establishment Clause jurisprudence. *See infra* Subparts II.A–C, III.
34. *See infra* Subparts II.A–C.

elementary and secondary schools."[35] Thus, during the school year, nine out of ten American students come in contact with the State on a daily basis through the administration of public education. It is understandable that proponents of church and State separation would view public schools as a prime battleground for their cause just as it is also understandable that advocates of free exercise would target public schools. It might be troubling for parents who want their children brought up under a particular religious doctrine to each day send their children to a venue where religion plays absolutely no role. And parents and children who view the roles of public education and religious instruction as separate might find the presence of prayer and religious texts in public schools at very least disconcerting. Thus, for better or worse, activists on both sides utilize public education as a vehicle for advocating their causes in federal court.

A. The Development of Religion Clause Jurisprudence

Though a complete discussion of Supreme Court cases on this matter is impractical and unwarranted for the purposes of this Note, there are a few seminal decisions that must be discussed in some detail in order to frame *Moss* in the proper context. Before looking specifically at the role of religion in schools, we must turn first more generally to the interplay between church and State. The Supreme Court's 1878 decision *Reynolds v. United States*[36] remains a landmark decision on this issue. In this case, Reynolds, a Mormon, was arrested for bigamy.[37] He argued that it was his "religious duty" to practice polygamy and that laws outlawing the practice violated his First Amendment right to free exercise.[38] Rejecting this argument, the Court cited a famous letter by Thomas Jefferson where he stated the following: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' *thus building a wall of separation between church and State.*"[39] This was the Court's first use of the now famous "wall of separation" language.

The "wall of separation" was first tested in the context of schools in the 1925 case *Pierce v. Society of Sisters*.[40] In this case, the Court determined the constitutionality of an Oregon law requiring its

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35. *A Diverse Educational System*, INFOUSA, http://www.ait.org.tw/infousa/enus/education/overview/ch6.html (last visited July 24, 2013).

36. 98 U.S. 145 (1878).

37. *Id.* at 146.

38. *Id.* at 161–62.

39. *Id.* at 164 (emphasis added).

40. 268 U.S. 510 (1925).

citizens to attend public school.[41] The act in question, the Compulsory Education Act, required all students ages eight to sixteen to attend public school.[42] In its original form, the statute included an exception for private schools, but a 1922 amendment removed this exception.[43] This had the practical effect of barring Oregonian students from receiving primary religious education even if they or their parents desired it.[44]

The Supreme Court, in a unanimous decision, found the Oregon law to be unconstitutional.[45] It did so using liberty grounds under the Fourteenth Amendment,[46] as the First Amendment had not yet been incorporated against the states.[47] Yet, even though the Court did not expressly address the free exercise question, its opinion was rife with language suggesting that it was generally unconstitutional to limit a parent's ability to provide her child with religious education should she choose to do so.[48] The Court reasoned that the Oregon law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" and that "those who nurture [children] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations."[49] This protection of parental rights closely mirrors language the Court has subsequently used when discussing the free exercise of religion; indeed, Justice Kennedy has noted that *Pierce* likely would have been decided on First Amendment grounds had it been brought before the Court after incorporation.[50] Whatever *Pierce*'s role in the context of free exercise, it remains vitally important to the present discussion, because it found private religious education to be constitutionally protected.

The Court again examined the role of religion in public schools in the landmark 1943 decision *West Virginia State Board of*

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41. *Id.* at 530.
42. *Id.*
43. *Id.* at 533.
44. *Id.* at 534.
45. *Id.* at 534–35.
46. *Id.*
47. There is a case that held that the First Amendment did not apply. *See generally* United States v. Cruikshank, 92 U.S. 542 (1875). Interestingly, the Court would incorporate the First Amendment against the states only one week after it decided *Pierce*. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). Yet, the Establishment Clause itself was not expressly incorporated until 1947. *See* Everson v. Bd. of. Educ., 330 U.S. 1, 15 (1947).
48. *See Pierce*, 268 U.S. at 534–35.
49. *Id.*
50. *See* Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) ("[*Pierce*], had [it] been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of . . . religion.").

Education v. Barnette.[51] In 1942, the West Virginia Board of Education adopted a policy requiring all public school students to "participate in the salute honoring the [United States] represented by the [American] Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."[52] The Barnettes, who were Jehovah's Witnesses, filed suit arguing that the policy violated their First Amendment rights, because their religion forbade them from saluting symbols of political institutions.[53]

The Court sided with the Barnettes and held that the West Virginia policy violated the First Amendment.[54] Writing for a six-person majority, Justice Jackson made the following declaration:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[55]

This decision directly overturned a previous ruling, where the Court found a policy forcing Jehovah's Witnesses to partake in the Pledge of Allegiance to be permissible under the First Amendment.[56] It also served as fair warning that, while church and state were theoretically separate under *Reynolds*, the guarantee of free exercise meant that the separation was not absolute.

The Court returned to the question of religion in schools just four years later when it decided *Everson v. Board of Education*.[57] This suit stemmed from a New Jersey statute that allowed local school boards to reimburse transportation costs to and from school, even when the schools were private religious institutions.[58] The Court, in a five-to-four decision, upheld the policy under the First Amendment because the reimbursements were granted regardless of religion, were paid directly to the parents of the students, and did not go to the religious institutions themselves.[59] This opinion proved vital for three reasons. First, it reiterated that the Free Exercise Clause allowed parents to have at least some choice in how their children were to be educated, which inevitably will result in

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51. 319 U.S. 624 (1943).
52. *Id.* at 626.
53. *Id.* at 629–30.
54. *Id.* at 642.
55. *Id.*
56. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598 (1940).
57. 330 U.S. 1 (1947).
58. *Id.* at 3.
59. *Id.* at 18.

permissible interactions between the State and religious institutions.[60] Second, it explicitly incorporated the Establishment Clause of the First Amendment through the Fourteenth Amendment.[61] Perhaps most importantly, however, Justice Black's majority opinion included the following synopsis of what the Establishment Clause entails:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[62]

While not in itself a practicable test, this statement served both as a summary of much of the Court's previous establishment and free exercise jurisprudence, as well as general guidelines for courts and legislators going forward.[63] It also reiterated that, despite cases finding that the Free Exercise Clause permitted some interaction between public schools and religion, the Establishment Clause still created "a wall of separation."[64] What Justice Black did not say was just how high this wall stood.

B. Supreme Court Tests for Establishment of Religion

1. The Lemon *Test*

The Court would not venture to articulate precisely what the "wall of separation" entailed until 1971, when it decided what many regard as *the* landmark Establishment Clause case, *Lemon v. Kurtzman*.[65] In this case, the Court created what has come to be known as the "*Lemon* test." This test is a three-pronged analysis

60. *Id.* at 16–17.
61. *Id.* at 15.
62. *Id.* at 15–16 (citations omitted).
63. Paul G. Kauper, Everson v. Board of Education*: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 307 (1973).
64. *Everson*, 330 U.S. at 18.
65. 403 U.S. 602 (1971).

designed to determine whether a particular statute violates the Establishment Clause.[66] First, a statute must have a secular legislative purpose.[67] Next, the statute's "principal or primary effect must be one that neither advances nor inhibits religion."[68] Third and finally, "the statute must not foster 'an excessive government entanglement with religion.'"[69] If the statute satisfies all three of these requirements, then it does not violate the Establishment Clause.[70] If it fails any one of the three, however, then it violates the Establishment Clause and is unconstitutional.[71]

In the four decades since *Lemon* was decided, the Court has had the opportunity to define and clarify the *Lemon* test on multiple occasions. Perhaps the most fundamental clarification has been the shift in the Court's view of the first prong, which requires that a statute have a secular legislative purpose. In 1984, the Court decided the case *Lynch v. Donnelly*,[72] a five-to-four decision upholding the constitutionality of a Christmas display put up by the city of Pawtucket, Rhode Island, in the city shopping district.[73] Justice O'Connor wrote a concurrence that turned out to be the deciding vote in the case, arguing that the display, which included a crèche, did not violate the Establishment Clause.[74] She wrote that the "proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of *endorsement or disapproval of religion*."[75] The express incorporation of "endorsement" language into the first prong of *Lemon* was accepted by a majority of the Court the following year in the case *Wallace v. Jaffree*.[76]

2. *The Endorsement Test*

In 1989, five years after Justice O'Connor first used "endorsement" language in *Lynch*, the Court decided *County of Allegheny v. ACLU*,[77] where, at least in the minds of many courts and scholars, it affirmatively adopted "endorsement" as an

66. *Id.* at 612–13
67. *Id.* at 612.
68. *Id.*
69. *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
70. *Id.* at 612–13.
71. *Id.*
72. 465 U.S. 668 (1984).
73. *Id.* at 668.
74. *Id.* at 694 (O'Connor, J., concurring).
75. *Id.* at 691 (emphasis added).
76. 472 U.S. 38, 61 (1985) ("[O]ne of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'").
77. 492 U.S. 573 (1989).

alternative to *Lemon* in Establishment Clause analysis.[78] In *Allegheny*, the allegedly unconstitutional behavior was the presence of a crèche on the steps of the county courthouse and of a menorah outside of a government building.[79] While the majority opinion made mention of the *Lemon* test as one way the Court has undertaken establishment analysis[80]—and never stated that it was not applying *Lemon*—it only focused on the first of the three prongs and concentrated entirely on what constituted a state endorsement of religion.[81] The Court noted other opinions where the concept of endorsement appeared, albeit perhaps under other names such as "favoritism" and "promotion," and concluded that, regardless of language, this "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[82] The majority then, without mentioning *Lemon* once, spent nearly thirty pages analyzing whether the crèche and menorah constituted a state endorsement of religion.[83]

Justice O'Connor's concurrence in *Allegheny* further supports the notion that the endorsement test is something wholly separate from *Lemon* analysis. While concurring with the majority's judgment, Justice O'Connor took the opportunity to write separately in order to explain why she believed the endorsement test to be a practicable alternative to *Lemon* and to respond to criticism that had been leveled against it since she first proposed it in *Lynch*.[84] She noted that the Court had never expressly confined itself to *Lemon* for establishment cases and argued instead that courts must look at the "*unique circumstances* to determine whether [government action] constitutes an *endorsement* . . . of religion."[85] This tends to show what legal scholars and other federal courts have come to recognize: that the endorsement test now stands as a viable alternative to *Lemon*.[86]

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78. *See, e.g.*, Elizabeth A. Harvey, Freiler v. Tangipahoa Parish Board of Education*: Squeeze the* Lemon *Test out of Establishment Clause Jurisprudence*, 10 GEO. MASON L. REV. 299, 300 (2001) (expressly recognizing the *Allegheny* Endorsement test).

79. *Allegheny*, 492 U.S. at 578.

80. *Id.* at 592.

81. *Id.*

82. *Id.* at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

83. *Id.* at 592–621.

84. *Id.* at 623–37.

85. *Id.* at 624–25 (second emphasis added).

86. *See, e.g.*, Harvey, *supra* note 78, at 300–01.

3. The Coercion Test

In addition to altering the *Lemon* test over the years and evolving the endorsement test from it, the Court has also formulated an alternative test for Establishment Clause cases, seemingly out of whole cloth. In *Lee v. Weisman*,[87] a 1992 case in which the plaintiff challenged prayers at public school graduation ceremonies, the Court adopted the "coercion test."[88] Justice Kennedy, writing for the majority, noted that "in the hands of government what might begin as tolerant expression of religious views may end in a policy to indoctrinate and coerce,"[89] and that the Establishment Clause "at a minimum . . . guarantees that government may not coerce anyone to support or participate in religion or its exercise."[90] He then observed that the school principal's decision to include prayers in the invocation and benediction was attributable to the state[91] and that it was "an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[92] Kennedy found the prayer to be "a state-sanctioned religious exercise in which the student was left with no alternative but to submit,"[93] and noted that "[n]o holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise."[94] As such, the majority held that the prayers violated the Establishment Clause.[95]

C. Recent Developments

In the wake of *Allegheny* and *Lee*, establishment jurisprudence was left in a state of relative disarray. Now presented with at least three distinct options, which test would federal courts apply? Interestingly, in *Lee* the Court had an opportunity to alleviate this confusion by simply replacing the previous tests with the newly articulated coercion test, but it expressly declined to do so.[96] Despite both the petitioner and the United States writing in amicus for the Court to abandon (or at very least reconsider) the *Lemon* test, Justice Kennedy wrote that the Court could "decide the case

87. 505 U.S. 577 (1992).
88. *See, e.g.*, Harvey, *supra* note 78 (expressly recognizing the Coercion test first formulated in *Lee*).
89. *Lee*, 505 U.S. at 591–92.
90. *Id.* at 587.
91. *Id.*
92. *Id.* at 588.
93. *Id.* at 597.
94. *Id.* at 599.
95. *Id.*
96. *Id.* at 587.

without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured."[97] Thus, in the wake of these cases, *Lemon* gained two companions in the sphere of establishment analysis, but it was not overturned.

Commentators have found this result to be highly undesirable.[98] As such, in the two decades since *Lee* was decided, there have been calls for the Court to clarify precisely where it stands on the Establishment Clause and, in particular, whether the *Lemon* test survives.[99] Legal scholars have offered numerous possibilities as to how to clarify Establishment Clause jurisprudence.[100]

In addition, *Lemon* has had critics on the Supreme Court from both sides of the perceived ideological divide. Justice Stevens, a liberal, called for *Lemon* to be abandoned, writing that "[r]ather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment."[101] Similarly, Justice Rehnquist, a conservative, stated that "[t]he three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service."[102] In 1993, the year after *Lee* was decided, Justice Scalia wrote the following scathing criticism of *Lemon* in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*[103]:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly

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97. *Id.*

98. *See, e.g.*, Marcia S. Alembik, Note, *The Future of the* Lemon*: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1174–75 (2006) (discussing the difficulties created by multiple establishment tests and advocating for a modified version of *Lemon*); Lisa M. Kahle, Comment, *Making "Lemon-Aid" from the Supreme Court's* Lemon*: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 363 (2005) (arguing for the adoption of a modified version of the *Lee* coercion test).

99. *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005) (declining to overturn the *Lemon* test).

100. For examples of possibilities for clarifying Establishment Clause jurisprudence, see, e.g., Alembik, *supra* note 98, at 1197–205 (proposing that the Court articulate or adopt a modified version of the *Lemon* test); Kahle, *supra* note 98, at 386–97 (calling for *Lemon* to be abandoned altogether and replaced with some version of the *Lee* coercion test).

101. Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

102. Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

103. 508 U.S. 384 (1993) (Scalia, J., concurring).

> killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term [in *Lee*], was, to be sure, not fully six feet under.[104]

Yet despite all of this, the Court directly applied *Lemon* as recently as 2000[105] and declined to reconsider its continued applicability as recently as 2005.[106] For better or worse, for the time being the *Lemon* test, the endorsement test, and the coercion test all remain good law, and it is up to the lower courts to determine which to apply in a given case.

Not surprisingly, there is great variance among the circuits as to which test or tests to apply. While it is difficult to pinpoint a precise rule for each circuit, a survey of recent establishment cases exposes no fewer than six different test formulations.[107] The most common approach, adopted in some form by six circuits, appears to be *Lemon*. Two circuits do so without mentioning the endorsement test,[108] including the Fourth Circuit in *Moss*.[109] Two others incorporate endorsement into *Lemon* analysis.[110] These circuits still apply all three prongs of *Lemon* separately.[111] The final two apply something that they call the *Lemon*/endorsement test, which interprets the endorsement test to encompass the first two prongs of *Lemon*.[112] The result of this strategy appears to be a multi-prong

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104. *Id.* at 398.

105. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000).

106. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005).

107. To determine this, I did a WestlawNext search of recent decisions, filtering the search results by circuit. *See generally, e.g.*, Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599 (4th Cir. 2012) (applying the *Lemon* test without mentioning the Endorsement test); Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1 (1st Cir. 2010) (applying all three tests—*Lemon*, Endorsement, and Coercion—separately); Weinbaum v. Las Cruces, N.M., 541 F.3d 1017 (10th Cir. 2008) (interpreting the Endorsement test to encompass the first two prongs of the *Lemon* test); Skoros v. New York, 437 F.3d 1 (2d Cir. 2006) (incorporating the Endorsement test into the *Lemon* analysis, applying all three prongs of the *Lemon* test separately); ACLU Neb. Found. v. Plattsmouth, Neb., 419 F.3d 772 (8th Cir. 2005) (foregoing all three tests in favor of a test based on history); Modrovich v. Allegheny Cnty., 385 F.3d 397 (3d Cir. 2004) (applying the *Lemon* and Endorsement tests separately, noting that it does so because the Supreme Court has not given clear direction in this area of the law).

108. *See, e.g.*, *Moss*, 683 F.3d at 608; King v. Richmond Cnty., Ga., 331 F.3d 1271, 1275 (11th Cir. 2003).

109. *See Moss*, 683 F.3d at 608.

110. *See Skoros*, 437 F.3d at 30; ACLU of Ohio Found. v. Ashbrook, 375 F.3d 484, 490 (6th Cir. 2004).

111. *See Skoros*, 437 F.3d at 16–39; *Ashbrook*, 375 F.3d at 490–94.

112. *See Weinbaum*, 541 F.3d at 1038; Books v. Elkhart, Ind., 235 F.3d 292, 301–02 (7th Cir. 2000).

hybrid test that is based on the endorsement test and on the entanglement prong from the original *Lemon* test.[113]

The variance in analysis among the remaining five circuits is greater still. Two attempt to cover all bases by applying each of the three tests separately when analyzing a particular set of facts.[114] Thus far, it appears these circuits have come to the same conclusion under all three tests, which has avoided the difficult situation of where one test results in a violation of the First Amendment while another does not.[115] The Third Circuit applies the *Lemon* test and the endorsement test separately, noting that it does so specifically because the Supreme Court has left this area of law unclear; however, it does not apply the coercion test at all.[116] The Fifth Circuit recognizes all three tests but will apply only one in any given case.[117] It makes this determination based on the specific facts of the case at hand when compared to Supreme Court precedent.[118] Finally, the Eighth Circuit, while recognizing the existence of *Lemon*, appears to have foregone all three of these tests in favor of a test based on history.[119] It is probably an understatement to characterize the circuit courts' jurisprudence in Establishment Clause cases as confused.

D. The Constitutionality of Release Time Programs

Having established the general contours of establishment jurisprudence, we must now turn specifically to the history of the issue most relevant in *Moss*: the constitutionality of religious education during release time from public school. The Supreme Court has twice directly considered this issue, first in 1948 in the case *McCollum v. Board of Education of School District No. 71*,[120] and again three years later in *Zorach v. Clauson*.

In *McCollum*, a school district policy allowing for public school students to pursue private religious education during release time on public school grounds was challenged as violating the Establishment Clause.[121] The policy allowed a coalition of Jewish,

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113. *See Weinbaum*, 541 F.3d 1030–31; *Books*, 235 F.3d at 301–02.

114. *See generally* Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1 (1st Cir. 2010); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007 (9th Cir. 2010).

115. *See Hanover*, 626 F.3d at 9–14; *Newdow*, 597 F.3d at 1042.

116. *See* Modrovich v. Allegheny Cnty., Pa., 385 F.3d 397, 400 (3d Cir. 2004).

117. *See* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343–44 (5th Cir. 1999).

118. *Id.*

119. *See generally* ACLU Neb. Found. v. Plattsmouth, Neb., 419 F.3d 772 (8th Cir. 2005) (applying only the *Lemon* test to find that a display of a Ten Commandments monument did not violate the establishment clause).

120. 333 U.S. 203 (1948).

121. *Id.* at 205–06.

Catholic, and Protestant groups to offer weekly classes in religion to public school students, which they would attend during set release time from class.[122] In order for their children to attend, parents simply had to request so in writing to the school.[123] The classes were taught by instructors selected by the respective religious institutions, who were employed using no public funding.[124] The instruction took place on public school grounds in public school classrooms.[125] Moreover, while this instruction was occurring during release time, students whose parents chose not to have them participate were required to leave their classrooms and go to another part of the school in order to partake in secular activities.[126] The attendance of students in the religious classes was reported back to the students' public school instructors.[127]

The Court found this policy to be in blatant violation of the Establishment Clause.[128] The majority opinion emphasized "the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education" and concluded that this was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[129] The Court explained that "[r]eligious education so conducted on school time and property is patently woven into the working scheme of the school [and] [t]he [district's] arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."[130] The Court found that this "falls squarely under the ban [on establishing religion] of the First Amendment" and thus held the policy to be unconstitutional.[131]

In *Zorach*, the Court was faced with a similar policy to that in *McCollum*—in that it allowed public school students to receive religious education during release time—but with one vital difference: the religious instruction in *Zorach* was to take place away from public school grounds.[132] The policy challenged in *Zorach* allowed students to be released from school and, upon written request from their parents, go to specific religious institutions to

122. *Id.* at 207–09.
123. *Id.* at 207.
124. *Id.* at 208–09.
125. *Id.* at 209.
126. *Id.*
127. *Id.*
128. *Id.* at 212.
129. *Id.* at 209–10.
130. *Id.* at 227.
131. *Id.* at 210.
132. Zorach v. Clauson, 343 U.S. 306, 308 (1952).

receive instruction.[133] The religious institutions themselves covered all costs attached to the program and only interacted with the public schools insofar as they reported attendance records back to the public school administrators.[134] Further, those students who were not released to pursue religious instruction remained in their respective classrooms to partake in secular activities.[135]

The *Zorach* Court found the New York City policy to be constitutional, stating that it "would have to press the concept of separation of Church and State to [the] extreme[] to condemn the . . . law on constitutional grounds."[136] The Court emphasized that students under the New York City policy were not receiving instruction on public school grounds as they were in *McCollum*.[137] Further, the majority opinion focused on the role of religion in American life, stating that "[Americans] are a religious people whose institutions presuppose a Supreme Being" and said that "[w]hen the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[138] The Court noted that the program at issue was designed to do just that because it "further[ed] the religious needs of all students"[139] and that it could not strike it down "unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people."[140] The Court declined to "read into the Bill of Rights such a philosophy of hostility to religion" and upheld the policy.[141]

While the Supreme Court has not taken a release time case since *Zorach*, the issue has not entirely gone away. Both *Zorach* and *McCollum* were decided pre-*Lemon*, so there was at least some question after the Court developed its three-part test as to whether *Zorach* was still good law.[142] After *Lemon*, plaintiffs brought challenges to release time policies in the Second Circuit,[143] the Fourth Circuit,[144] and the Tenth Circuit.[145] The Fourth and Tenth Circuits both upheld the general rule of *Zorach*—that religious instruction during release time is constitutional if it does not occur

133. *Id.*
134. *Id.* at 308–09.
135. *Id.* at 308.
136. *Id.* at 313.
137. *Id.* at 315.
138. *Id.* at 313–14.
139. *Id.* at 313.
140. *Id.* at 315.
141. *Id.*
142. *See* Smith v. Smith, 523 F.2d 121, 123 (4th Cir. 1975).
143. Pierce v. Sullivan W. Cent. Sch. Dist., 379 F.3d 56 (2d Cir. 2004).
144. *Smith*, 523 F.2d at 121.
145. Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).

on school grounds—under *Lemon* analysis.[146] The Second Circuit upheld a similar policy without ever contemplating *Lemon*.[147] Given that the only three circuits to face this issue post-*Lemon* upheld the general holding in *Zorach*, and that there has otherwise been a vacuum of litigation on the subject, it appears to be of consensus that, despite being decided before the development of modern Establishment Clause tests, the holding in *Zorach* survives.

In regards to the more specific policy at issue in *Moss*, however, only the Tenth Circuit has considered anything closely related in the case *Lanner v. Wimmer*.[148] There, the school board had implemented a policy that stated the following:

> Credits for work taken in released-time classes should be recognized by public schools only upon an official transcript of credits from the institution conducting such classes, and upon evaluation on the same basis that similar credits from established private high schools are evaluated. (The State board has authorized high schools to recognize not to exceed two units of Bible history for work taken in private seminaries or schools. Such credit may be counted as an "elective" but may not fill any requirements for required instruction in the fields of social studies, English or literature. No credit is to be given to courses devoted mainly to denominational instruction.)[149]

The Tenth Circuit made two separate determinations as to the constitutionality of the policy. First, it held that it was unconstitutional for the school to determine what constituted "mainly denominational instruction" under the policy because it impermissibly entangled the school with religious institutions.[150] This was because it required the school to determine "what is religious and what is not."[151] Alternatively, the court held that if the credit was being granted only for determining whether a student had the requisite educational hours to participate in extracurricular activities and to graduate, or if it was being compiled for financial aid purpose, then this did not violate the Establishment Clause.[152] It reached this conclusion because such a policy did not require the public school itself to make any determination as to religious content, nor indeed to involve itself with the religious institutions at

146. *See Lanner*, 662 F.2d at 1353–54; *Smith*, 523 F.2d at 125.
147. *See Pierce*, 379 F.3d at 60–61.
148. *See Lanner*, 662 F.2d at 1360.
149. *Id.*
150. *Id.* at 1360–61.
151. *Id.* at 1361.
152. *Id.* at 1362–63.

all beyond accepting the attendance records of students and administering credit, no entanglement issues were not present.[153]

III. ANALYSIS

A. The Fourth Circuit Opinion

As noted above, the Fourth Circuit still applies the general *Lemon* analysis for Establishment Clause claims. Yet, the Establishment Clause portion of the Fourth Circuit's opinion in *Moss* is wanting on legal analysis. This is in large part due to the fact that the court, though applying *Lemon*, never makes it clear which portion of the test is being applied where. Instead it makes numerous conclusory statements without justifying precisely why its conclusion is correct. Closer analysis of the *Moss* opinion will demonstrate that the Fourth Circuit misapplied *Lemon* in reaching its decision.

1. Secular Purpose

The Fourth Circuit misapplied *Lemon* in determining that the RTCA had a secular purpose. In its opinion, the court first noted that *Smith v. Smith* had held that release time programs in and of themselves had secular purposes because "the schools aim[ed] only to accommodate the wishes of the students' parents."[154] The court then stated, in conclusory fashion, that "*Smith* . . . guide[s] the proper disposition of this case,"[155] and that the RTCA "enabled the School District to accommodate the desires of parents and students to participate in private religious education in Spartanburg County."[156]

Yet summarily stating that a previous case governs and regurgitating the operative language in relation to the present issue do not necessarily make it so. The court should have endeavored to explain *why* its holding from *Smith* was dispositive in *Moss*, a task it did not undertake anywhere in its opinion. Had it done so, the court would have recognized that the policy in *Smith* and the RTCA do not serve the same legislative purpose. In *Smith*, the challenged policy was merely one that allowed students to pursue religious education during release time.[157] This is virtually identical to the one that was upheld in *Zorach*, and it is a policy that is presumably still valid under *Lemon*.[158] And this is also a policy that South

153. *Id.* at 1362.
154. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599, 609 (4th Cir. 2012) (internal quotation marks omitted).
155. *Id.*
156. *Id.* at 610.
157. *See* Smith v. Smith, 523 F.2d 121, 122 (4th Cir. 1975).
158. *See id.* at 124.

Carolina already had in place long before the passage of the RTCA. Section 59-1-460 of the South Carolina Code, passed in 1992, states that "[a public school] may adopt a policy that authorizes a student to be excused from school to attend a class in religious instruction."[159] Had this been the statute challenged in *Moss*, the court's conclusion as to its secular purpose would have been wholly supported by *Smith*. Because it was not, however, the court should have considered in more detail just what purpose the RTCA serves.

The RTCA serves only to supplement section 59-1-460. It does not replace section 59-1-460, nor does it provide an independent means through which students can be released to pursue private religious education. All students authorized to receive academic credit under the RTCA are only able to do so because they have utilized section 59-1-460 to be released from school in the first place.[160] Thus, the RTCA does not merely accommodate the parental desire for their children to receive religious instruction; section 59-1-460 already wholly accommodates this wish. Instead, the parental desire that the RTCA obviously serves is the desire for children to receive academic credit for the instruction they are receiving pursuant to section 59-1-460. This is true because providing academic credit is the *only* function the RTCA adds to the code that was not already covered by section 59-1-460. As such, the proper inquiry, and the one the Fourth Circuit should have considered, is whether this purpose—the parents' desire for their children to receive academic credit for release time religious instruction—is secular.

This is in contrast with the policy the Supreme Court considered in *Zorach*. That policy was comparable to section 59-1-460 in that it allowed students who were released from school to pursue religious instruction. The *Zorach* policy did not extend academic credit to students who pursued this instruction, nor did it grant academic credit to those students who remained behind.[161] It had the secular purpose of accommodating parental wishes to have children receive religious education, which made the determination (at least implicitly) a free exercise concept.[162] In contrast, a policy like the RTCA goes beyond the mere accommodation of parental desires present in the *Zorach* policy—which was *already available* in South Carolina through section 59-1-460—by providing academic credit to those students whose parents choose to exercise section 59-1-460 for the purpose of religious release time instruction. Unlike the *Zorach* policy, the only purpose that could be served by the

159. S.C. CODE ANN. § 59-1-460(A) (2004).

160. *See* S.C. CODE ANN. § 59-39-112(A) (Supp. 2012) (indicating that the credits are for classes as specified in section 59-1-460).

161. *See* Zorach v. Clauson, 343 U.S. 306, 308 (1952).

162. *See id.* at 314–15.

RTCA is to reward students who pursue religious instruction with academic credit, thereby accommodating the wholly nonsecular parental wish that students receive religious instruction as part of their public school education.

Had the Fourth Circuit properly identified this purpose, then it is likely that it would have been compelled to find that purpose to be nonsecular. Here, the parental desire is for public school students to receive public school credits for private religious education. This, in effect, is an avenue through which private religious instruction can be incorporated into public school curricula. Thus, the purpose of the RTCA is not, as the Fourth Circuit said, "to accommodate the desires of parents and students to participate in *private* religious education."[163] Instead it accommodates the parents' desire for their students to participate in *public* religious education. The Supreme Court has made clear—and it is unarguable at this juncture—that public religious education does not exist in the United States because it blatantly violates the Establishment Clause.[164] As such, the Fourth Circuit should have found that the RTCA's purpose was clearly not secular, and therefore it violated the Establishment Clause.

2. Primary Effect

The Fourth Circuit's conclusion that the RTCA did not have the primary effect of advancing religion is also largely absent of any legal rationale beyond a few unsubstantiated conclusions.[165] The court, as it did for the first prong of *Lemon* analysis, seemed to be of the mind that *Zorach* (which did not even apply the *Lemon* test) and its previous decision in *Smith* so clearly controlled in this case that it would be superfluous to go into detail as to why.[166] In fact, beyond noting that the second prong of the *Lemon* test exists,[167] the court nowhere mentioned or applied it at all. The court merely stated that "[t]he fact that a public school accepts credits for released time courses does not alter the analysis under any one of *Lemon*'s three prongs in view of the neutral administrative manner adopted by the School District for adopting those credits."[168]

In reaching this conclusion, the Fourth Circuit neglected to consider a fairly obvious argument that the RTCA fails the second prong of *Lemon*: that the RTCA on its face advances religion. It allows students to receive public school academic credits for

163. Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599, 610 (4th Cir. 2012) (emphasis added).
164. *See supra* Part II.
165. *See Moss*, 683 F.3d at 611.
166. *Id.* at 609.
167. *Id.* at 608.
168. *Id.* at 609–10.

"released time classes *in* religious instruction."[169] The word "in" is used to restrict the type of release time classes for which academic credit is available. It is limited to only religious instruction. Had the drafters used less constricting language—perhaps had they said "including religious instruction"—then an argument could be made that religious instruction was only one of many release time courses for which academic credits were available. They did not do so. Thus, a plain reading of the RTCA suggests that its benefits only apply to students pursuing religious instruction.

Furthermore, there is nothing in the legislative history of the RTCA or the South Carolina Code to suggest that the RTCA was passed in order to put students pursuing religious instruction during release time on equal footing with those who pursue secular education during release time.[170] There is no other provision in the South Carolina Code that provides similar benefits to students pursuing nonreligious instruction during these times.[171] There is also no language in any of the Spartanburg County School District Seven curriculum documents granting students access to credit for other release time activities.[172] The obvious reading of this is that nonreligious students, or even religious students who choose to pursue instruction in secular subject matter, have no means through which they might receive academic credit for their studies. Even if they do, the fact remains that the only release time credit guaranteed by the South Carolina legislature is that for religious instruction. Coupled with the language of the RTCA, the lack of other similar statutes or written policies for nonreligious courses means that only students who choose religious courses reap the benefits of the RTCA. In other words, the RTCA provides preferential treatment to religious courses and to the students who choose to partake in them. Unlike in *Smith*, where the release time policy left religious students and nonreligious students on equal footing because neither had their academic standing advanced as the result of the policy, under the RTCA, students partaking in religious instruction have greater opportunity to receive academic credits, thereby giving them an advantage in fulfilling the requirements for graduation. As a result, this advances religious

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169. S.C. CODE ANN. § 59-39-112(A) (Supp. 2012) (emphasis added).

170. *See id.* § 59-39-112; S. 2006-148, 116th Sess. (S.C. 2006).

171. *See* Brief Amici Curiae of the American Humanist Association and the Secular Student Alliance in Support of Appellant Seeking Reversal at 14, Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599 (4th Cir. 2012) (No. 11–1448).

172. *See Instruction and Curriculum Resources*, SPARTANBURG SCH. DISTRICT SEVEN, http://spartanburg7.org/departments/instruction_and_curriculum/ (last visited Apr. 21, 2013).

education by rewarding those who choose to partake in it in a way that is simply not available for those who choose not to.

3. Entanglement

In regard to the entanglement prong of *Lemon*, the Fourth Circuit opinion gave slightly more justification for upholding the RTCA than it did for the other two prongs. The Court noted that the law "avoid[ed] the potential perils inherent in any governmental assessment of the 'quality' of religious instruction" by employing a policy in which the release time courses would be evaluated by accredited private religious institutions and not by the school district itself.[173] The court contrasted this with the policy the Tenth Circuit struck down in *Lanner*, where the school district itself had to make a judgment as to whether religious instruction was "mainly denominational" and held that the RTCA alleviated the concerns present in that case.[174]

Yet this general conclusion overlooked a fundamental difference between the *Lanner* holding and the policy embodied by the RTCA. *Lanner* was concerned by two fact-specific extremes. On one end was a policy where the public school itself had to partake in the assessment of the religious content of classes.[175] On the other end was a policy that merely allowed the school to provide general credits for release time instruction.[176] The RTCA is not directly comparable to either. While it is true that the RTCA moves the assessment element of religious instruction out from under the purview of the public schools, it does not, as the court appeared to suggest,[177] merely allow schools to passively grant general credits. Students who partake in release time religious instruction are not only entitled to academic credits for their religious instruction but also receive grades for the courses they take.[178] These grades can be entered into the students' public school transcripts, where they presumably have an effect on the students' class standing. Thus, while public schools are not required to assess the classes or the students themselves, these assessments are directly incorporated into the public school function when the school receives the grades from the religious institutions, enters them into student transcripts, and calculates class standing. The public schools and religious

173. *Moss*, 683 F.3d at 610.
174. *Id.*
175. Lanner v. Wimmer, 662 F.2d 1349, 1361 (10th Cir. 1981).
176. *Id.* at 1362.
177. *See Moss*, 683 F.3d at 603, 609–10.
178. *See id.* at 610.

institutions are not nearly as separate as the court seemed to argue.[179]

The Fourth Circuit also found that the RTCA did not impermissibly entangle public schools and private religious institutions by likening the grant of academic credits to those given to transfer students.[180] The court noted that a transfer student from a private religious institution would receive credit even for his or her grades in religious classes.[181] This comparison ignores the fundamental difference between students pursuing religious instruction during release time and transfer students: the temporal separation between religious and public education present in the latter does not exist in the former. In the context of schools, transfer by definition means "to *withdraw* from one educational institution [in order] to enroll at another."[182] Thus, for transfer students, education at one institution must fully conclude before it commences at the next. Under the RTCA, students can pursue religious and public education simultaneously and receive academic credit for both. While the Supreme Court held in *Zorach* that some concurrent education is permissible, it has never gone to the extreme the RTCA now creates by allowing students to use private religious education as a means through which they can complete their public school requirements. Thus, unlike with transfer students, where applying credits for religious is a one shot deal that happens when the student leaves private religious instruction for secular public education, under the RTCA, the school applies credits for religious instruction to students for whom it simultaneously grants credits for secular public education. In short, under the RTCA, religion and public education directly overlap one another in a way that does not exist with transfer students. The court's reliance on this analogy in upholding the RTCA under the entanglement prong is misplaced.

B. Implications of the Fourth Circuit's Decision

Whether rightly or wrongly decided, the Fourth Circuit's decision in *Moss* promises to extend beyond the Circuit's borders. Indeed, *Moss* did not go unnoticed. National news sources such as

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179. Although similar grades might be available for students pursuing non-religious instruction (though, as noted above, there is no evidence of this in Spartanburg County School District Seven or in the South Carolina Code) this is immaterial to the entanglement prong of *Lemon* analysis. The question is only whether the policy impermissibly entangles the school with religion, not whether the school is also similarly entangled with secular functions.

180. *Moss*, 683 F.3d at 610.

181. *Id.*

182. *Transfer*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1328 (11th ed. 2012) (emphasis added), *available at* http://www.merriam-webster.com/dictionary/transfer (last visited July 31, 2013).

USA Today and the *Huffington Post* reported on the decision, briefly thrusting the decision into the national (albeit dim) spotlight.[183] The Beckett Fund for Religious Liberty, which describes itself as "a non-profit, public-interest legal and educational institute with a mission to protect the free expression of all faiths,"[184] lauded the decision, calling it "a tremendous victory for religious education across the country."[185]

While the full extent of what the *Moss* decision portends has yet to unfold, it logically follows that similar policies will start cropping up elsewhere in the country. This seems likely both because the establishment of religion remains a deeply divided (and litigated) topic,[186] and because groups like the Beckett Fund expressly noted the implications this decision has for other parts of the country.[187] Thus, other circuits will almost certainly be faced with similar issues in the foreseeable future. Given the varying approach in which the circuits analyze religious cases, a circuit split on this topic is a distinct possibility. If, in the future, another circuit applying *Lemon* employs a more measured approach to this issue (rather than concluding the policy is constitutional with minimal substantiation, as the Fourth Circuit did) then a split seems likely under *Lemon* alone. When this is coupled with the vast number of tests (and results) employed by the different circuits in regards to establishment questions,[188] a circuit split goes from possibility to near inevitability.

For instance, a court applying the endorsement test to a policy similar to the RTCA could very likely come to a different conclusion than the Fourth Circuit did in *Moss*. This test states that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief."[189] This means that the

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183. *See, e.g.*, Ron Barnett, *Ruling Lets S.C. Students Earn Credit for Religion Classes*, USA TODAY (July 3, 2012, 11:02 AM), http://usatoday30.usatoday.com/news/education/story/2012-07-03/religion-courses-credit/55998826/1; Gregory Kristof, *South Carolina Students May Receive Credit for Religious 'Released Time' Courses, Court Rules*, HUFFINGTON POST (July 6, 2012, 4:41 PM), http://www.huffingtonpost.com/2012/07/06/sc-ruling_n_1654390.html.

184. *Our Mission*, BECKETT FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/our-mission/ (last visited Feb. 28, 2013).

185. Emily Hardman, *4th Circuit Rules for Student's Right to Receive Religious Education*, BECKETT FUND FOR RELIGIOUS LIBERTY (June 29, 2012), http://www.becketfund.org/4th-circuit-rules-for-student%E2%80%99s-right-to-receive-religious-education.

186. *See* Kristof, *supra* note 183.

187. *See* Hardman, *supra* note 185.

188. *See* discussion of circuit court tests for establishment *supra* Subpart II.C.

189. Allegheny v. ACLU, 492 U.S. 573, 593–94 (1989).

government cannot play favorites or promote religion.[190] Policies like the RTCA do exactly that. First, by providing in a state statute that religious instruction (and religious instruction alone) can be granted public school academic credit, the State of South Carolina is taking an express position on the role of religion in education. This position can certainly be characterized as "favoritism,"[191] as it provides benefits for religious instruction that are not otherwise available for comparable nonreligious courses. By limiting academic credits only to religious instruction, the RTCA on its face promotes religious education. Thus, a fair reading of the RTCA under the endorsement test can result in the opposite conclusion reached by the Fourth Circuit. Given that at least eight circuits apply some form of the endorsement test (either on its own or incorporated into *Lemon*),[192] it seems virtually inevitable that at least one of these jurisdictions would find a policy similar to the RTCA in violation of the Establishment Clause.

A similar result would likely be reached by a jurisdiction applying the coercion test. Justice Kennedy stated that the Establishment Clause "at a minimum . . . guarantees that government may not coerce anyone to support or participate in religion or its exercise."[193] By providing preferential treatment in the form of academic credits only for those students who pursue religious instruction, the RTCA puts students who would otherwise not pursue religious instruction between the proverbial rock and hard place. Either they forego religious instruction and directly forfeit the two credits hours they could have been awarded (not to mention the grade, which could have bearing on their academic standing), or they choose to take religious courses that they otherwise would not have taken. In other words, by rewarding students who pursue religious instruction with academic credits not otherwise available, South Carolina has incentivized religious education. Such a policy coerces students to pursue religious education when, all things being equal, they would not do so. Such a policy, by Justice Kennedy's definition, violates the Establishment Clause under the coercion test.

In sum, compelling arguments can be made both that the Fourth Circuit incorrectly decided *Moss* and that the case might come out differently under either of the other tests employed by the Supreme Court in establishment cases. If and when other jurisdictions begin adopting similar policies due to the decision in *Moss*, this issue seems to be heading directly for a circuit split. *Moss*

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190. *Id.*

191. *See id.* at 593–94.

192. *See* discussion of circuit court tests for establishment *supra* Subpart II.C.

193. Lee v. Weisman, 505 U.S. 577, 587 (1992).

v. Spartanburg County is not simply a weak decision in isolation but a decision that further complicates the already complex field of establishment jurisprudence. The ramifications of the decision will arguably be felt for years to come.

CONCLUSION

In upholding the RTCA under the Establishment Clause, the Fourth Circuit improperly applied the *Lemon* test. Had it fully considered each of the three prongs in isolation, rather than simply providing a conclusory finding that the policy was constitutional, it would have had to contend with strong arguments in favor of overturning the statute under each of the prongs. Furthermore, had the Fourth Circuit applied either of the other two Establishment Clause tests formulated by the Supreme Court—the Endorsement test or the coercion test—there is a strong argument that it would have found RTCA to be unconstitutional under those tests as well. This result has significant implications for the future. If and when other jurisdictions begin to adopt policies similar to the RTCA, other circuit courts applying a variety of tests will likely come to different conclusions as to their constitutional viability. This will prove problematic because it will serve to further complicate the already convoluted world of establishment jurisprudence.

Samuel R. V. Garland[*]

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