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Dancing in the Dark:  
The Eighth Circuit’s Interpretation of the Establishment Clause in *Clayton by Clayton v. Place*

JEFFREY A. LEON*

“‘It’s not just about a dance. Not anymore.’”

INTRODUCTION

The high school dance has been an integral part of the American teenage social scene for the last forty years. It has become an institution which has been memorialized in countless books, movies and songs; and has been the subject of a nostalgia craze spawned by the Stephen Spielberg motion picture *Back to the Future.* But probably nothing better certifies the high school dance as a bona fide part of the American landscape than the success of the motion picture *Footloose.*

*Footloose* is the story of the struggle of high school students to sponsor a dance in a small town in Colorado that had passed an ordinance forbidding dancing. Most viewers probably believe that bans on dancing do not exist outside the realm of celluloid. Yet the struggle played out in the movie...
Footloose has become all too real to the high school students of the town of Purdy, Missouri.

The school system of Purdy, Missouri, has a longstanding prohibition against social dancing. This ban was successfully challenged on the basis of the establishment clause in Clayton by Clayton v. Place. An appeal to the Eighth Circuit Court of Appeals led to a reversal. A petition for a rehearing en banc was denied 5-4, as was a petition for the writ of certiorari before the United States Supreme Court.

This Note discusses the constitutionality of the Purdy dance ban in the context of the Eighth Circuit's disposition of the Clayton case. Part I sets out the factual and procedural history of the struggle to rescind the dance ban. Part II introduces the Supreme Court's basic establishment clause inquiry, known as the Lemon test. Part III utilizes the Lemon test, and related inquiries developed by the Court, to analyze and criticize the Eighth Circuit's disposition of the students' establishment clause claim. Finally, this Note concludes that the Eighth Circuit erred in its application of establishment clause methodology.

I. FACTUAL AND PROCEDURAL BACKGROUND

Purdy is a small community located in the southwestern corner of the State of Missouri. The religious community has always wielded significant control over the operation of the Purdy public schools. The extent of this control is evidenced by the existence of 'school prayer and Bible songs in the late 1970's, an ongoing tradition of prayers before athletic contests, and an [sic] baccalaureate ceremony which is conducted like a church service.'

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6. 690 F Supp. 850 (W.D. Mo. 1988), rev'd, 884 F.2d 376 (8th Cir. 1989), reh'g en banc denied, 889 F.2d 192 (8th Cir. 1989), cert. denied, 110 S. Ct. 1811 (1990). "The case [filed by high school students in Purdy, Missouri] drew wide attention in part because of the similarities to the hit motion picture 'Footloose' " Chicago Tribune, Sept. 3, 1989, § 1, at 6, col. 3. This similarity was not lost on the Purdy High students, who held a rally which "climax[ed] when dozens of Purdy youths rushed in front of the crowd to dance to the theme song from Footloose " L.A. Times, Apr. 16, 1986, § 1, at 2, col. 2.

The similarity to the Footloose motion picture has thrust the Purdy dance ban into the national media. The dance ban "has been described by publications throughout the country including Playboy. Media queries have come from Australia and Taiwan, sympathetic calls from high school students around the nation, letters of support from Hollywood producers and, the ultimate ignominy, a smirking putdown from Saturday Night Live." Newsday, May 10, 1990, § II, at 4 (LEXIS, Nexis library, Current file).

7 Clayton, 884 F.2d 376.
8 Clayton, 889 F.2d 192.
9 Clayton, 110 S. Ct. 1811.
10 "There are 1200 to 1400 registered voters in the Purdy R-2 School District." Brief for Appellees at 1, Clayton by Clayton v. Place, 884 F.2d 376 (8th Cir. 1989) (No. 88-2493) [hereinafter Brief], rev'g 690 F Supp. 850 (W.D. Mo. 1988), reh'g en banc denied, 889 F.2d 192 (8th Cir. 1989), cert. denied, 110 S. Ct. 1811 (1990).
11 Brief, supra note 10, at 1.
Another manifestation of the religious community’s influence with the School Board is the existence of Purdy R-2 School District Rule 502.29, which states in part that “[s]chool dances are not authorized and school premises shall not be used for purposes of conducting a dance.”12 While the rule appears to prohibit all forms of dancing, “artistic dancing” and square dancing have been allowed by the School Board.13 While it is difficult to attribute enactment of the dance ban directly to the town’s religious community,14 the district court found a record replete with instances where the religious community in Purdy was responsible for the continued existence of Rule 502.29.15

Prior to Clayton, residents of Purdy attempted several times to rescind Rule 502.29.16 Because these attempts have failed, students have been forced to split the prom dance into on-campus/off-campus activities. For the past several years, a “banquet” has been held for the juniors and seniors of Purdy High School, with teachers acting as chaperones.17 The prom is then held off school grounds (often in neighboring communities) without teacher chaperoning or school funding. A school-sponsored breakfast has often followed the prom at about 1:00 or 2:00 a.m. Several times the banquet was held in Springfield, a sixty mile drive from Purdy.18 However, dissatisfaction with the split prom prompted some students and their parents to lobby for rescission of Rule 502.29. The parents expressed strong concern about the students “driv[ing] long distances on unfamiliar roads to attend ‘unofficial’ school dances.”19 The Clayton lawsuit was filed after an attempt to rescind the rule failed during the 1985-86 academic year.20

At trial, the district court noted that parents were told, in a January, 1986 meeting with Superintendent Richard M. Place, that they should not be surprised at the widespread opposition to social dancing since “this is a conservative, religious community.” When asked if it were the Baptists that opposed dancing, Superintendent Place stated, “Let’s just say protestants.”21 Prior to that Board meeting, at least three of the six Board members had told the parents that they opposed the proposed change on

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13. Brief, supra note 10, at 2. The brief went on to note that “[n]ot surprisingly, church policy sanctions artistic dancing and square dancing.” Id.
14. “Although the record does not indicate when the rule was enacted, the parties agree it has been in place for a long time.” Clayton, 884 F.2d at 377.
15. See infra notes 21-40 and accompanying text.
17. Id. at 854 (Teachers even chaperone the banquet when it is held off-campus.).
18. Id.
19. Brief, supra note 10, at 4. This concern was also evidenced in Footloose, which weaves a drunk-driving death into the plot. The movie hints that the death occurred because the students had to drive to another town in order to dance.
21. Id.
religious grounds, while the Board President "stated that the last time the dance issue was brought up it generated a lot of heat."23

Undaunted, a group of students requested a re-examination of the dance ban at a February 10, 1986 School Board meeting. The students wanted to hold a dance to be sponsored by Students Against Drunk Driving (SADD).24 A minister present at the meeting requested and received time to prepare a response to the students' request.

The students' request spurred into action the "Ministerial Alliance" (the "Alliance"), a group comprising the five fundamentalist Christian churches located in Purdy. Each of the Alliance churches required its congregation members to abstain from social dancing.26 Each Alliance minister, in response to the students' request, promised to preach against the evils of dancing in their Sunday sermon and to mobilize their congregation to attend the School Board meeting.27 In addition, several ministers of the Alliance privately lobbied members of the School Board.28

22. Id. Board member Keeling told a parent prior to the February 10, 1986 meeting that he opposed changing the rule because "his church preached it was wrong and immoral to dance," and later told another parent "that he did not believe in dancing because he was taught it was wrong." Id. at 852-53. Board member Negre told yet another parent that "his church is opposed to dancing." Id. at 853. After the February 10, 1986 Board meeting, Board member Henderson spoke to his church and promised that he would not vote for allowing social dancing. Id.

23. Id. at 852. This was the position of Board President Garrett, while Board member Terry "stated that he had voted for the dance in the past but caught so much 'flak' from the ministers that he would vote against it this time." Id. at 853.

24. Id. at 852.

25. Id.

26. The scriptural validity of the opposition to dancing is irrelevant. Biblical passages are subject to varying interpretations. Any attempt by a court to explicate a "correct" interpretation would cause excessive entanglement with religion by stating an official government position on matters that are purely spiritual. The fact that each church requires abstention from dancing as a membership requirement suffices to prove a religious basis for that opposition. [Eds. note—Reference to the "Alliance" has no connection with the Christian & Missionary Alliance denomination.]

27. The congregation of the First Baptist Church discussed its opposition to rescinding the prohibition against dancing and prayed for the soul of one of the congregation members who supported the students' position. Clayton, 690 F Supp. at 853. The First Assembly of God requires that members "must agree to be separate from worldliness—which includes dancing." Id. In addition, the minister of the First Assembly stated that he would refer all members who engaged in social dancing to the presbyters for counseling. Id. The reverend of the Free Will Baptist Church "believes and preaches that social dancing is sinful, scripturally prohibited, and possibly satanic. He has discussed this view with church members, has preached against dancing from the pulpit and would have a private counseling session with a member of his congregation who engaged in social dancing." Id. Opposition to the dance issue was also discussed in the services of the Macedonia Free Will Baptist Church, and the minister stated that he felt social dancing to be "inappropriate behavior." Id.

The positions of the various churches indicate the amount of social and political influence the religious community wields in Purdy. The community's opposition to dancing can only be explained in reference to the positions taken by the various denominations.

28. Id.
The Board finally met to consider the students' request on March 10, 1986. The largest crowd ever to attend a School Board meeting was present—250-400 people, nearly thirty percent of the registered voters in the Purdy R-2 School District. While "[n]o direct mention was made of religion per se at the meeting," a letter from the Ministerial Alliance was read in full by one of the Alliance ministers. The minister then asked the people who opposed dancing to stand. "The overwhelming majority of people stood in opposition to changing the rule." The School Board later met in closed session and, without a formal vote, decided to leave the rule unaltered.

Because the Board refused to sponsor a dance, a group of parents decided to rent the school and sponsor a dance themselves. Such rentals for nonschool functions were commonplace. School Board policy allowed the school to be rented on all days "except on Wednesday and Sunday evenings. Wednesday and Sunday are traditional church nights."

On April 18, 1986, the parents filed their application to rent the school for purposes of holding a dance. The School Board called a meeting on April 29, at which the Board suspended its rental policy in a special closed session. Despite the Board's decision not to rent to any outside groups, the school building and grounds have been used since then for nonschool softball athletic leagues, pick-up basketball games and even an exhibition donkey basketball game. The district court found the Board's actions on the rental request "[p]articularly significant."

With all avenues foreclosed by the School Board, the parents instituted an action on behalf of their children in United States District Court challenging the constitutionality of Rule 502.29. The parents alleged that the ban violated the establishment clause of the first amendment of the United States Constitution. The district court agreed, finding that the rule

29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 853-54.
35. Id. at 854.
36. Id. at 855. The court stated:
There would be no added cost to the school, no supervision by teachers and no classroom time attributed to extracurricular activities. Yet the school board called an emergency meeting to do away with the entire rental policy rather than allow dancing in the school. It is one thing to be opposed to the school itself sponsoring and paying for an extracurricular activity and quite another to prohibit social dancing on school property. It is clear to the Court that the reasons propounded by the majority were a mere pretext for the real religious reasoning. Thus, there is no valid secular purpose to having Rule 502.29.

37. Id. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion

U.S. Const. amend. I. This language has become known as the establishment clause.

Id.
violated all three prongs of the *Lemon* test.\(^{38}\)

The court found that the Board members' disavowals of religious intent lacked credibility.\(^{39}\) The court specifically noted that "the board’s courtroom statements that they accepted the minister’s statements at face value defy reality. It is unbelievable that 300-400 people came to the school board meeting to protest the added expense of 1 or 2 dances or the increased responsibility of teachers."\(^{40}\)

As a result of the district court’s ruling, three dances were held at the high school without incident.\(^{41}\) Despite the benign effect of three school-sponsored dances, the School Board appealed the ruling of the district court to the Eighth Circuit, which reversed.\(^{42}\) An appeal from the students for a rehearing en banc was denied 5-4, drawing a strongly-worded dissent.\(^{43}\) The Supreme Court declined to grant Clayton's petition for certiorari,\(^{44}\) thus allowing the no-dance rule to remain in effect.

### II. THE SUPREME COURT'S ESTABLISHMENT CLAUSE METHODOLOGY AND THE LEMON TEST

Most of the Court’s establishment clause methodology is a product of the last forty years.\(^{45}\) The Court’s current approach to establishment clause cases is known as the *Lemon* test.\(^{46}\) The *Lemon* test is a refined version of

\(^{38}\) *Clayton*, 690 F Supp. at 854-56. For an extended discussion of the *Lemon* test, see infra notes 45-60 and accompanying text. For a discussion and analysis of the *Lemon* test as it was applied to the facts of *Clayton*, see infra notes 61-218 and accompanying text.

\(^{39}\) The School Board argued that the rule had no religious significance; rather, the rule was seen by the Board as a reflection of Purdy's "cultural conservatism." *Clayton*, 690 F Supp. at 851. The district court judge rejected the Board's assertion by concluding that "[t]he board members were not particularly credible, either in demeanor or in the substance of their testimony." Id. at 855. See generally id. at 854-55 (describing in detail the reasons why the court found the testimony of each member of the School Board "incredible").

\(^{40}\) Id. at 855 (emphasis added).

\(^{41}\) USA Today, Apr. 17, 1990, § A, at 3, col. 6 ("Students held three school dances without mishap since the ban was first struck down in 1988"). For a description of the school's first dance, see Chicago Tribune, Dec. 12, 1988, § 1, at 6, col. 1.

\(^{42}\) *Clayton*, 884 F.2d 376.

\(^{43}\) *Clayton*, 889 F.2d 192, 193 (Gibson, J., dissenting).

\(^{44}\) *Clayton*, 110 S. Ct. 1811.

\(^{45}\) "Despite its place of special prominence in the Constitution, however, the establishment clause drew little note in the Supreme Court for more than 150 years. The clause emerged from obscurity only in 1947 in the seminal case of *Everson v. Board of Education.*" Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW U.L. Rev 1113, 1124 (1988) (footnotes omitted).

\(^{46}\) For the text of the *Lemon* test, see infra text accompanying note 51. For a discussion of the standard of review exercised by appellate courts in reviewing establishment clause cases, see infra text accompanying notes 61-65. For an extended discussion of the *Lemon* test as applied to the facts of Clayton by Clayton v. Place, 690 F Supp. 850 (W.D. Mo. 1988), rev’d, 884 F.2d 376 (8th Cir. 1989), reh'g en banc denied, 889 F.2d 192 (8th Cir. 1989), cert. denied, 110 S. Ct. 1811 (1990), see infra notes 61-218 and accompanying text.
the Court's first major attempt to expound an approach to establishment clause cases in *Everson v. Board of Education.*\(^4\) Justice Black's majority opinion in *Everson* established the foundation for the Court's current establishment clause approach. Black stated:

The "establishment of religion" clause of the First Amendment means at least this: 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.\(^4\)

The principle of Black's pronouncement has been restated by the Court in many ways,\(^4\) but the scheme most often used by the Court was developed in *Lemon v. Kurtzman.*\(^5\) Chief Justice Burger, writing for the majority in *Lemon,* explained the Court's tripartite approach:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."\(^5\)

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48. *Everson,* 330 U.S. at 15-16. Black's statement of the establishment clause makes clear that the establishment clause applies to both the state and federal governments. *Everson* expressly "incorporated" against the states the establishment clause through the fourteenth amendment's due process clause. *Id.* at 15. Thus, the School Board's status as a local governmental unit has no impact on the application of establishment clause methodology in this case.

49. For example, Justice Fortas stated:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

50. 403 U.S. 602 (1971). The use of the *Lemon* test has been repeated in so many establishment clause opinions that even the news media has recognized that "[s]ince 1971 the Court has relied on the *Lemon* test " Bates, *Ignore a Menorah,* NEW REPUBLIC, July 31, 1989, at 14, 15.

51. *Lemon,* 403 U.S. at 612-613 (citations omitted). Burger commented that the *Lemon* inquiry was developed "with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign" " Id. at 612 (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 668 (1970)). Line-drawing on the basis of these evils was necessitated by "the absence of precisely stated constitutional prohibitions " *Lemon,* 403 U.S. at 612.
If the government practice in a given case is found to be inconsistent with any of the three inquiries, the Court will find that practice unconstitutional.\textsuperscript{52} However, analysis under the Lemon test is hardly straightforward. The Lemon inquiries are only the beginning of any establishment clause adjudication.\textsuperscript{53} The Lemon Court candidly admitted that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."\textsuperscript{54} Determining where the "variable barrier" lies in a particular case requires careful line-drawing.\textsuperscript{55} The difficulty of this line-drawing led the Court in Hunt v McNair\textsuperscript{56} to describe the test as "no more than [a] helpful signpost[] .\textsuperscript{57} A look at some of the Court's decisions applying the Lemon test makes even the "helpful signpost" characterization appear charitable.\textsuperscript{58} However, the Court has muddled through these difficulties in the context of education, where it has consistently applied the Lemon test to invalidate governmental actions.\textsuperscript{59}

\footnotesize{52. "If a statute violates any of these three principles [of the Lemon test], it must be struck down under the Establishment Clause." Stone v. Graham, 449 U.S. 39, 40-41 (1980).}

\footnotesize{53. The Lemon inquiries "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." Meek v. Pittenger, 421 U.S. 349, 359 (1975).}

\footnotesize{54. Lemon, 403 U.S. at 614.}


\footnotesize{In each case, the inquiry calls for line-drawing; no fixed, \textit{per se} rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.}

\footnotesize{\textit{Id.} (quoting \textit{Walz}, 397 U.S. at 669).}

\footnotesize{56. 413 U.S. 734 (1973).}

\footnotesize{57 \textit{Id.} at 741.}

\footnotesize{58. \textit{See, e.g.,} Mueller v. Allen, 463 U.S. 388, 393 (1983). This is particularly true in the context of state aid to religious schools, as the Court itself has admitted. "It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools." \textit{Id.}

59. The Court has observed that it has "particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children." School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985). More specifically:}

\footnotesize{Using the Everson doctrine and the Lemon test, the Supreme Court has invalidated numerous government practices, many of them relating to public and private education. The Court has prohibited spoken group prayer and Bible reading in the public schools, it has invalidated a statute authorizing a moment of silent prayer at the opening of the school day, and it has refused to permit the states to mandate the teaching of "creation-science" theory alongside the theory of evolution. At the same time, the Court has made it extremely difficult for states to provide financial aid to parochial schools, striking down numerous legislative efforts to support these educational programs.}

Conkle, \textit{supra} note 45, at 1125-26.
The Court’s recent cases reaffirm the *Lemon* test’s continuing vitality in the face of a strong frontal attack from the conservative branch of the Court. While the *Lemon* test is the most appropriate framework for analyzing the errors of the Eighth Circuit’s *Clayton* panel decision, this Note will also apply establishment clause inquiries that were developed to supplement or supplant at least one of the *Lemon* test prongs.

60. The roots of the attack on the *Lemon* test are probably traceable to Justice Rehnquist’s dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985). Rehnquist argued that the Court’s establishment clause methodology had been built “upon a mistaken understanding of constitutional history,” *id.* at 92, namely that Madison “saw the Amendment as designed to prohibit the establishment of a national religion. He did not see it as requiring neutrality on the part of government between religion and irreligion.” *Id.* at 98. After a long exegesis attempting to prove this historical point, Rehnquist proceeded to attack each prong of the *Lemon* test as inconsistent with his historical interpretation. *Id.* at 108-11. However, no Justice joined Rehnquist’s dissent. (Justice White stated that he “appreciate[d] Justice Rehnquist’s explication of the history of the Religion Clauses of the First Amendment.” *Id.* at 91 (White, J., dissenting)).

However, new members of the Court have allied themselves with Rehnquist. To date, Justices Rehnquist, Scalia and Kennedy have individually written dissents attacking each of the three inquiries that comprise the *Lemon* test. For example, Rehnquist took issue with the “excessive entanglement” prong of the *Lemon* test in his dissent in *Aguilar v. Felton*, 473 U.S. 402, 420-21 (1985). Rehnquist argued that the prohibition against excessive entanglement created a “catch-22.” “[A]id must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.” *Id.* at 421. The purpose prong was the chosen target of Justice Scalia’s dissent in *Edwards v. Aguillard*, 482 U.S. 578, 610-40 (1987). Scalia argued strenuously against the continued use of the “purpose” prong of the *Lemon* test. *Id.* at 636-40. He was not at all shy in suggesting that “[a]bandoning *Lemon’s* purpose test would be a good place to start [developing clarity and predictability in establishment clause litigation].” *Id.* at 640. A similar attack is contained in Justice Kennedy’s dissent in *Allegheny*, 109 S. Ct. at 3134-46 (joined by Rehnquist, Scalia and White). Kennedy argued that the effects (or “endorsement”) prong of the *Lemon* test should be abandoned in favor of a test invalidating only governmental action that is coercive. *Id.* at 3134-35.

Despite the venomousness of these attacks, a majority of the Court has thus far clung steadfastly to the *Lemon* test. The Court’s most recent pronouncement on the establishment clause, *Allegheny*, illustrates this point. *Allegheny* concerned the constitutionality of two holiday displays in the City of Pittsburgh. While the Court could muster only a plurality on the constitutionality of the two displays, a strong majority of five reaffirmed their faith in the *Lemon* test. Both Blackmun’s opinion delivering the judgment of the Court, *id.* at 3105-11, and O’Connor’s partial concurrence, *id.* at 3119-22, contain strongly worded refutations of Kennedy’s dissent.

However, Justice Brennan’s resignation may revitalize the attempt by Rehnquist’s wing of the Court to abandon the *Lemon* test. Oliver S. Thomas, the general counsel of the Baptist Joint Committee on Public Affairs, observed prior to Brennan’s resignation that “[w]ith another appointment, we may see some radical reconstructive surgery on the establishment clause.” Bates, *supra* note 50, at 14. It remains to be seen whether Justice David Souter, President Bush’s new appointee replacing Brennan on the Court, is the radical surgeon envisioned by Thomas. However, if Souter’s record as New Hampshire’s Attorney General is any indication, the days of the *Lemon* test may be numbered. *See* Washington Post, Sept. 10, 1990, § A, at 1, col. 3, 5-6 (“As appointed attorney general under conservative Gov. Meldrum Thomson Jr., Souter defended ordering state flags lowered to half-staff on Good Friday to commemorate the death of Jesus .”).
III. THE EIGHTH CIRCUIT'S ESTABLISHMENT CLAUSE ANALYSIS

The Eighth Circuit began its analysis in *Clayton* with a statement of the proper standard of review. The Federal Rules of Civil Procedure require that “[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” The Supreme Court has said that the “clearly erroneous” standard “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” This command is particularly clear when credibility determinations are at issue.

The Eighth Circuit’s panel opinion attempted to distinguish *Clayton* by arguing that “[t]he ultimate conclusion of the [Purdy no-dancing] rule’s constitutionality is a mixed question of law and fact.” Review under a “mixed question of law and fact” standard means that the reviewing court is free to reconsider the conclusions of law applied to the findings of fact. This “mixed question” characterization, however, does not, as the Eighth Circuit panel apparently believed, give the reviewing court a free hand to overturn the findings of fact upon which the district court based its conclusions of law. These basic standard of review principles and the proper deference that should be accorded to a district court’s findings of fact underlie the analysis in this portion of the Note.

63. *Id.* at 575.

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said. That finding, if not internally inconsistent, can virtually never be clear error.

*Id.*
65. An example of this distinction is found in Justice O’Connor’s concurrence in *Lynch*:

But whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

*Lynch*, 465 U.S. at 693-94. Under O’Connor’s standard, a reviewing court could not overturn a finding of fact that a government practice historically communicates endorsement of religion. What the court can do is find an historical fact to be an insufficient basis for forming a legal conclusion that the government action is barred by the *Lemon* test.
A. The "Purpose" Prong of the Lemon Test

The first inquiry identified by the Court in *Lemon v. Kurtzman* is that "the statute must have a secular legislative purpose." In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." To be invalidated under the Lemon test, the legislature's action must be "entirely motivated by a purpose to advance religion." Therefore, a law motivated by religious purpose may be found constitutional if it also has a secular purpose. This does not mean that every asserted secular justification will be accepted by the Court at face value. To the contrary, the Court has on several occasions invalidated government actions under the purpose prong despite asserted secular justifications from the governmental actor. On those occasions, the Court invoked the "sham purpose" doctrine. Where no legitimate secular purpose can be found, the government action is unconstitutional and further inquiry under the remaining prongs of the Lemon test becomes unnecessary.

One of the most ambiguous elements of the Lemon test is the standard for determining when there is an absence of secular purpose. Justice O'Connor has suggested that the Court utilize a fully informed "objective observer" standard. Although this standard is made explicit in only a single O'Connor concurrence, it has been argued that "[t]he Court itself has interpreted the secular purpose requirement in much this way." As a consequence of the Court's refinements, application of the purpose prong of the Lemon test has become slippery. However, the purpose prong is useful in an establishment clause inquiry even where a secular purpose has been found. Professor Tribe observed in his review of the Court's establishment clause cases that "[w]here a law partly advances religion ... the [objective] observer would view a non-secular legislative motivation as additional, helpful evidence of an establishment clause violation." This


67. Id. at 612 (citations omitted).


69. Wallace, 472 U.S. at 56 (emphasis added).

70. For extensive discussion of the sham purpose doctrine, see infra notes 102-35 and accompanying text.

71. Wallace, 472 U.S. at 56. "[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose." Id.

72. "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" Id. at 76 (O'Connor, J., concurring). This approach has been described as "a helpful formulation" by at least one commentator. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-9, at 1205 (2d ed. 1988).

73. L. Tribe, supra note 72, § 14-9, at 1205. For a full explanation of Tribe's assertion, see id. § 14-9, at 1205-06.

74. Id. § 14-9, at 1212-13.
evidence could then be used to aid analysis under the effects prong of the *Lemon* test.\(^5\)

1. The Purpose Prong of the *Lemon* Test and *Clayton by Clayton v. Place*

   The district court in *Clayton* held that the School Board's refusal to withdraw its ban on dancing violated the purpose prong of the *Lemon* test.\(^6\) The court based this holding on an extensive series of credibility determinations based on the testimony of several witnesses.\(^7\) These credibility determinations, coupled with the history of the no-dancing rule in Purdy and the Board's reaction to the parents' attempt to rent the school for purposes of holding a dance, led the district court to conclude that "[t]he excessive caution surrounding anything connected with dancing undermines any assertion of a secular purpose."\(^78\)

   Despite the district court's thorough findings of fact and well-reasoned holdings, the Eighth Circuit's panel opinion found the Purdy School Board's refusal to allow dancing to have been motivated by a secular purpose. The panel offered three reasons for its reversal of the district court.

   First, the panel focused on the absence of actual record evidence of an improper purpose in the passage of Rule 502.29\(^79\) Yet the panel itself virtually admitted that analysis of the Rule's original purpose was impossible

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\(^5\) For an extensive discussion of the effects prong of the *Lemon* test, see infra notes 136-209 and accompanying text. Justice O'Connor has stated that "the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt." *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring). Tribe has identified at least two ways in which the evidence of religious motivation can be utilized under the effects prong in O'Connor's "close cases":

   When a statute is based on a publicly broadcast religious purpose, those who are charged with enforcing it may infer that religious effects in application are permitted, encouraged, or even mandated. In addition, when a religious motivation combines with religious effects, the result is to put the voice and the power of government behind religion in a way that religious motivation alone does not.


\(^6\) *Clayton*, 690 F. Supp. at 854-55.

\(^7\) The court briefly summarized its credibility determinations:

   The Court regards the following statements of the board members as unpersuasive; that no one has ever stated to them that they oppose dancing in the schools for religious reasons; that they have no idea why the community is opposed to dancing in the school; that there was no religious pressure to keep the rule; and that the rental policy was changed in response to problems with liability of the school. This Court is skeptical that it heard the complete story concerning the board members' deliberations of the rule and the religious significance of the opposition to dancing in Purdy.

*Id.* at 854-55. The court also specified which witnesses and testimony it disbelieved. *Id.*

\(^78\) *Id.* at 856.

\(^79\) *Clayton*, 884 F.2d at 379.
when it stated that "Although the record does not indicate when the rule was enacted, the parties agree it has been in place for a long time." 80 Because no one remembered when the Rule was enacted, it is unlikely that anyone remembers the legislative purpose of the Rule's enactment. Furthermore, the Supreme Court has made clear that the absence of a legislative purpose in the record does not affect a purpose prong inquiry. 81 Although the panel may have been technically correct in stating that "[t]he district court's opinion does not rest on any adverse factual findings bearing directly on the content of rule 502.29 or on the circumstances surrounding its original passage," 82 the panel did not indicate why this fact is relevant for the reviewing court.

The district court focused its purpose prong inquiry on the actions of those governmental actors who were asked to repeal the rule. 83 That focus resulted in findings of fact entitled to deference by a reviewing court under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. 84 Despite the clear mandates of both Rule 52(a) and existing Eighth Circuit precedent, 85 the panel disregarded the district court's findings without citing any precedent for its conclusion that the district court's focus was erroneous. 86

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80. Id. at 377.
   Section 290.09 [a Minnesota law allowing state taxpayers to deduct expenses related to sending their children to a private school] contains no express statements of legislative purpose, and its legislative history offers few unambiguous indications of actual intent. The absence of such evidence does not affect our treatment of the statute.
   Id. (emphasis added).
82. Clayton, 884 F.2d at 379.
83. Clayton, 690 F. Supp. at 855. "Although the intent of the decisionmakers who promulgated the rule cannot be ascertained, the school board in keeping the rule abandoned neutrality with the intent to promote a particular view in religious matters." Id. (emphasis added).
84. For discussion of the standard of review issue, see supra notes 61-65 and accompanying text.
85. An example of this precedent is Pratt v. Independent School District No. 831, 670 F.2d 771 (8th Cir. 1982). That case involved the constitutionality of a decision to remove the film The Lottery from the school's curriculum. In language strikingly similar to the case at hand, the Pratt court observed that "[t]he district court found that the objections of the board's majority had 'religious overtones'

The district court's findings are not clearly erroneous." Pratt, 670 F.2d at 776. For further discussion of Pratt, see infra notes 121-24 and accompanying text.
86. The panel must provide legal precedent to justify its disregard of the district court's finding of fact. The absence of such precedent violates the panel's own characterization of the establishment clause standard of review as a "mixed question of law and fact." See supra notes 61-65 and accompanying text. This disrespect of the district court's findings of fact drew the ire of the judges who dissented from the denial of a rehearing en banc: "The panel's conclusions in applying the Lemon test fail to give proper consideration to the findings of the district court" 87. Id. Clayton, 889 F.2d at 193.
Finally, that the School Board was being asked to repeal an existing rule, as opposed to passing a new rule, is irrelevant. The retention of the Rule by the Board is equivalent to a reenactment. The legislature may have a different motive for passing a law each time that law is reconsidered in the legislative process. The issue of retaining the Rule was debated as fully as if a rule banning social dancing was being considered for the first time. The Eighth Circuit's reasoning on this point is at best artificial, since the decision-making process is the object of establishment clause analysis, and the effect on the students is the same whether the law is being passed for the first time or merely being reenacted.87

The panel's second argument was that "plaintiffs conceded at oral argument (and the district court acknowledged) that extracurricular dancing is a wholly secular activity."88 Yet, as the judges dissenting from the denial of a rehearing en banc observed, the issue in Clayton was not whether dancing was a secular activity. Rather, "[t]he true issue in the case... is whether the 'no dance' rule has a secular purpose."89 Focusing on the secular motivations behind the Rule instead of the activity governed by the Rule is consistent with the Supreme Court's establishment clause cases. For

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87 See infra notes 136-209 and accompanying text for a complete discussion of effect prong analysis under the Lemon test.

88. Clayton, 884 F.2d at 379.

89. Clayton, 889 F.2d at 193 n.2 (Gibson, J., dissenting). It is important to note how the district court framed the issue before it:

The issue before this Court is not (as defendants contend) whether the Purdy School District must sponsor social dances, nor is it the responsibility or prerogative of this Court (as plaintiffs contend) to mandate how many, if any, or when school dances are to be held. The issue is simply whether the rule which prohibits school dances in the Purdy school system is an impermissible establishment of religion.

Clayton, 690 F. Supp. at 851. The court concluded its opinion by noting that "It would be inappropriate for this Court to order the district to sponsor school dances..." Id. at 857.

It is important to recognize the limited scope of the district court's holding, because characterizing that holding as creating a constitutional right to dance misstates the function of the establishment clause. The specific scope of this Note is whether the decision to disallow dancing in this instance occurred in a process so infused with religion as to render that decision a transgression of the establishment clause. This narrow, fact-based inquiry (as opposed to the broad-sweeping characterization of a constitutional right to dance), is consistent with Justice O'Connor's belief that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." Lynch, 465 U.S. at 694 (O'Connor, J., concurring). The Court has followed this limited inquiry in practice. The following passage from Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989), is illustrative:

It is not our responsibility to specify which permissible secular objectives, if any, the State should pursue to justify a tax exemption for religious periodicals. That charge rests with the Texas legislature. Our task, and that of the Texas courts, is rather to ensure that any scheme of exemptions adopted by the legislature does not have the purpose or effect of sponsoring certain religious tenets or religious belief in general.

Id. at 900.
example, in *Epperson v. Arkansas* the Court found unconstitutional a state law prohibiting the teaching of evolution. The Court reached this result although teaching evolution is a wholly secular activity.

The panel concluded its criticism of the district court's purpose prong analysis by observing that "there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements. In our view, the rule on its face thus satisfies the first prong of the *Lemon* analysis." This sweeping statement completely ignores the credibility judgments made by the district court as well as the testimony of several witnesses who recounted instances of religious motivation. The panel gave no reason, precedential or otherwise, why the credibility determinations and other non-record evidence so copiously detailed by the district court do not serve as an effective substitute for the absence of record evidence. In fact, the Supreme Court has made clear that the absence of record evidence "does not affect our treatment of the statute." If record evidence is the only measure of religious purpose, then the purpose prong can be "circumvented by merely omitting from a rule any explicit statement of religious purpose." The Court has adopted a broader range of acceptable evidence to avoid this easy method of circumvention.

The panel cited *Wallace v. Jaffree* as an example of good record evidence of religious motivation. The panel pointed to the following passage in *Wallace*: "The sponsor of the bill . . . inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." However, a careful reading of the remainder of *Wallace* reveals that only four members of the Court accepted the record statements of the bill's sponsor as sufficient by itself to prove improper purpose. Rather than an exclusive focus on

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90. 393 U.S. 97 (1968).
92. *Clayton*, 884 F.2d at 379 (citations omitted).
94. *Clayton*, 889 F.2d at 193 (Gibson, J., dissenting).
95. For discussion of the types of proof allowed by the Court, see supra notes 66-70 and accompanying text and infra notes 96-100 and accompanying text.
97. *Clayton*, 884 F.2d at 379.
99. Stevens delivered the opinion of the Court, in which Brennan, Marshall, Blackmun and Powell joined. Powell filed a concurring opinion. O'Connor filed an opinion concurring in the judgment. Burger, White and Rehnquist each filed separate dissenting opinions. O'Connor's concurrence stated that the record statements of a single legislator are not sufficient by themselves to prove improper purpose. *Id.* at 77. Powell's concurrence stated that "[I] agree with Justice O'Connor that a single legislator's statement is not necessarily sufficient to establish purpose." *Id.* at 65. The dissenters were obviously not persuaded by the record statements either. Thus, only four Justices felt the record focus was sufficient to prove a
the record statements of a single legislator, the Court has used the "fully informed objective person" standard to evaluate all evidence of religious motivation, record and non-record alike.100

But even assuming that *Wallace* is a case evidencing strong religious motivation, the evidence in *Clayton* is far more compelling. The *Clayton* district court, rather than relying on the record statement of one of several hundred legislators, based its decision on witness testimony and credibility determinations attributing religious motivation to every member of the School Board. Surely this is a firmer evidentiary basis than the record evidence in *Wallace*.101

2. The Secular Purpose Requirement of the *Lemon* Test and the "Sham Purpose" Doctrine

The final problem with the panel's purpose prong analysis is that no secular purpose was identified. *Lemon* requires that "the statute . . . have a secular legislative purpose."102 Great deference is normally accorded "to a State's articulation of a secular purpose, [but] it is required that the statement of such purpose be sincere and not a sham."103 Despite the precedent for scrutinizing the validity of asserted secular purposes, the panel acted as if the secular nature of the school district's purposes were obvious.104 The panel should have analyzed the asserted secular purposes under the "sham purpose" doctrine.

There is no set standard for determining whether an asserted secular purpose is a sham.105 One helpful aspect of the Court's sham purpose violation of the establishment clause under the purpose prong of the *Lemon* test. Rather, the Court looked at a whole array of additional evidence in reaching its conclusion. "[A]s noted in the Court's opinion, the religious purpose is manifested in other evidence, including the sequence and history of the three Alabama statutes." *Id.* at 65 (Powell, J., concurring).

100. For a discussion of the objective person standard, see *supra* notes 72-73 and accompanying text.

101. That conclusion sets aside, for the moment, the additional historical evidence relied upon by the *Wallace* Court. *See infra* note 117 and accompanying text.


104. Admittedly, a statute is not required to contain the secular purpose in its text or on record. "Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence.'" *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968)). This Note contends that, absent the endorsement of the religious beliefs of the majority of the citizens of the town of Purdy, the dance ban would not exist.

105. Justice O'Connor recognized this fact, but defended the sham purpose doctrine by stating that "[i] have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one . . . ," *Id.* at 75 (O'Connor, J., concurring). The sham purpose
analysis is that much less deference is given to post hoc secular purpose rationalizations. Some examples of the Court's application of the sham purpose doctrine are instructive.

In *School District of Abington v Schempp*, the Court was confronted with the constitutionality of a public school district policy requiring the daily recitation of Bible verses and the Lord's Prayer. The Court found the requirement unconstitutional despite the asserted secular purposes of "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." The Court felt that the provision allowing alternative use of the Catholic Douay version of the Bible in lieu of the King James version belied the asserted secular purposes.

In *Stone v. Graham*, the Court invalidated a Kentucky law that required public schools to post the Ten Commandments in every classroom. Kentucky attempted to fashion a secular purpose by requiring that the following caption be emblazoned in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court rejected this proffered secular purpose, arguing that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. ... [N]o legislative recitation can blind us to that fact."

The Court invoked the sham purpose doctrine against a post hoc assertion of secular purpose in *Wallace*, which involved an Alabama statute requiring a one minute moment of silence in all public schools for "meditation or voluntary prayer." While "[t]he State did not present evidence of any secular purpose" during the passage of the bill, it was argued on appeal that the moment of silence was an attempt to accommodate the free exercise rights of the state's public school students. The Court rejected this asserted inquiry is thus similar to Justice Stewart’s "I know it when I see it" standard for determining whether something is obscene. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); see Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev 495 (1986).

106. "The Court has previously found the postenactment elucidation of the meaning of a statute to be of little relevance in determining the intent of the legislature contemporaneous to the passage of the statute." Edwards, 482 U.S. at 596 n.19 (Powell, J., concurring).

108. Id. at 223.
109. Id. at 224.
111. Id. at 41 (citation omitted) (quoting Ky. Rev. Stat. Ann. § 158.178 (Baldwin 1980)).
112. Id.
113. 472 U.S. at 38.
114. Id. at 40.
115. Id. at 57 (emphasis in original).
116. Id. at 57-58 n.45.
justification because a pre-existing statute that authorized a moment of silence for "meditation" already protected that [free exercise] right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served before the enactment."

A further example is *Edwards v Aguillard*, where the Court held unconstitutional a Louisiana law that prohibited the teaching of evolution in public schools unless creationism was also taught. The avowed secular purpose of the statute was to protect academic freedom. However, the Court argued that "requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess... Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory." The Court thus found the secular purpose to be a pretext for the true religious motivation of the legislature.

Even if one were to conclude that the above precedents were an insufficient basis for the panel to have applied the sham purpose doctrine, there was precedential support for applying the sham purpose doctrine within the Eighth Circuit itself. *Pratt v Independent School District Number 831* involved the constitutionality of the school board's decision to ban the showing of the film *The Lottery*. There was substantial evidence that the School Board acted with "religious overtones." However, the Board, in its rationale to the district court, claimed that the film was removed due to excessive violence. Excessive violence would appear to be a more compelling secular justification than those justifications presented by the Purdy School Board. Nonetheless, in *Pratt*, the Eighth Circuit rejected this rationale because "the self-serving statements of the school board, made after the fact and not based on the previous record... are untenable in the light of the circumstances under which they were made."

In the above examples, the reviewing court, before commencing a sham purpose inquiry, seemed convinced that there was strong religious motivation. In *Clayton*, the evidence showed a religious motivation. The next step

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117 Id. at 59 (footnote omitted).
118 482 U.S. at 578.
119 Id. at 586.
120 Id. at 587.
121 670 F.2d 771 (8th Cir. 1982). For additional discussion of the circumstances surrounding this case, see supra note 85.
122 Id. at 776. Additional similarity to the facts in *Clayton* exist, such as the fact that "[p]arents and citizens sought to have the films removed largely on the basis of the purported negative impact the material would have on the religious and family values of students." Id. at 778.
123 Id. at 779.
124 Id. at 778 (quoting the unpublished opinion of the district court).
should have been to analyze the secular purposes asserted by the Purdy School Board under the sham purpose doctrine. The Eighth Circuit panel did not even make a pretense of undertaking a sham purpose analysis.

The asserted secular justifications in *Clayton* appear to be that allowing dancing would be costly and would increase the responsibility of teachers.125 The district court found several reasons why these asserted secular purposes were shams. First, the court found it "unbelievable that 300-400 people came to the school board meeting to protest the added expense of 1 or 2 dances or the increased responsibility to teachers."126 Instead, the court found the large turnout to be evidence that "[t]he school board adopted the reasoning of the 'majority' of townspeople, including the strongly-held religious views."127 Second, the court was skeptical that the dance ban actually achieved the asserted secular purposes. The school already sponsored banquets instead of dances,128 and the teachers already had chaperoning responsibilities at those banquets.129 The district court concluded its purpose prong analysis with the following remarks:

> It is particularly significant that no facts were requested of the opponents of the rule to ascertain whether there would be any increased costs or responsibilities. The record is devoid of any indication that the board investigated the reasons propounded by the opponents, despite the fact that the school's superintendent favored rescinding the rule and stated that he could handle any chaperoning problems.130

The school district's asserted secular justifications thus appear very similar to those in *Wallace* and *Edwards* in the sense that pre-existing legislation already protected the interests that were assertedly the object of the government action.131

The school district concocted another justification for its refusal to rent the school to parents who wished to sponsor a dance for their children. The School Board claimed that it ended its general rental policy because of liability problems, although it continued to allow its facilities to be used for other activities such as a donkey-basketball game.132 The judges who

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125. It is unclear from the record in the *Clayton* case whether the Board really offered these justifications, and if they did, whether they were of the post hoc variety.
127. Id.
128. See supra notes 17-19 and accompanying text.
130. Id.
131. In the case at hand, the asserted interests are not protected by either a no-dance or pro-dance policy. Teacher responsibilities and costs would not increase, but only shift to a different activity. If the district was truly interested in reducing costs and teacher responsibilities, it would not sponsor the banquet. In light of this fact, the district court's opinion bears repeating: "The excessive caution surrounding anything connected with dancing undermines any assertion of a secular purpose." Id. at 856.
dissented from the denial of a rehearing correctly noted that "[t]he record does not reveal why dancing poses greater liability problems than does donkey basketball." 133 The lack of congruence between the Board's refusal to rent the gym for dancing and its asserted secular aim of decreasing liability exposure gives credence to the district court's conclusion that "the reasons propounded by the majority were a mere pretext for the real religious reasoning." 134

In summary, the trial court concluded that School Board members, in their voting, were directly influenced by their own religious beliefs and those of the citizens of Purdy; that the sequence and timing of events supported the motives attributed by the trial court in its credibility judgments; and that the School Board's inability to explain how its actions would effectuate its asserted secular purposes confirmed the conclusion that those purposes were shams.

Even though the absence of a secular purpose is by itself a sufficient basis for invalidating Rule 502.29, 135 this Note will analyze Purdy R-2 School District Rule 502.29 under the remaining prongs of the Lemon inquiry

B. The "Effect" Prong of the Lemon Test

The second inquiry developed by the Lemon Court requires that a statute's "principal or primary effect...be one that neither advances nor inhibits religion.” 136 Any nonsecular effect must be "indirect, remote and incidental." 137 The Court has recharacterized the "effect" test as an inquiry into whether government practices "have the effect of communicating a message of government endorsement or disapproval of religion." 138 This Note focuses

133. Clayton, 889 F.2d at 195 n.6 (Gibson, J., dissenting); see also supra text accompanying notes 35-36.
135. See supra note 71 and accompanying text.
137 Tribe has argued:
The constitutional requirement of "primary secular effect" has thus become a misnomer; while retaining the earlier label, the Court has transformed it into a requirement that any non-secular effect be remote, indirect and incidental. This shift is analytically significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist no-aid approach to the establishment clause than the primary effect test did. In practice, however, the formulation has not always resulted in a particularly searching inquiry, and a number of forms of aid have survived.
L. Tribe, supra note 72, § 14-10, at 1215-16 (emphasis in original).
138. Lynch, 465 U.S. at 692 (O'Connor, J., concurring); see also School Dist. of Grand Rapids v. Ball, 473 U.S. 374, 389-90 (1985) (citations omitted) (where a law "conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated."); County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989) (Blackmun, J.) ("In recent years, we have paid particularly close attention to whether
on the appearance of government endorsement.\textsuperscript{139}

There are several ways government endorsement of religion can occur, the most obvious of which is governmental attempts to indoctrinate the public in the views of a particular faith.\textsuperscript{140} A more subtle case occurs when government "fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations." A governmental action may be found unconstitutional if

the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years.\textsuperscript{142}

\textsuperscript{139} There is no assertion in \textit{Clayton} that allowing dancing would be perceived by the townspeople as an official governmental disapproval of religion. The School Board would not be disapproving the beliefs of the members of the Ministerial Alliance if it allowed dancing. Rather, it would be expressing a respect for those views by not coercing those opposed to dancing to participate. The government would thus be acting in a neutral manner—neither approving nor disapproving of the community's religious beliefs.

All government action would violate the establishment clause if government is seen as disapproving religion by allowing secular activities disapproved of by religious groups to go forward, especially when the activity involved would not require participation by those who disapprove of the disputed activity on religious grounds.

\textsuperscript{140} See, e.g., \textit{School Dist. of Grand Rapids}, 473 U.S. at 385 ("[T]he Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); \textit{Stone}, 449 U.S. at 42 ("If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."); \textit{Levitt} v. Committee for Pub. Educ., 413 U.S. 472, 480 (1983) ("[T]he State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."); \textit{Lemon}, 403 U.S. at 619 ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion").

Even the four Justices desirous of abandoning the \textit{Lemon} test would find government sponsored indoctrination to be a violation of the establishment clause. See supra note 60 and accompanying text and infra notes 194-209 and accompanying text.

\textsuperscript{141} \textit{School Dist. of Grand Rapids}, 473 U.S. at 389; see also \textit{Larkin} v. Grendel's Den, Inc., 459 U.S. 116, 125-26 (1982) ("[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.").

\textsuperscript{142} \textit{School Dist. of Grand Rapids}, 473 U.S. at 390.
The district court in *Clayton* found such a symbolic union to exist in *Purdy*. On review, the panel failed to take the "particular care" that the Court has required when children are involved.

There are several approaches to determining whether the threshold of government endorsement has been overstepped in *Purdy*. This Note will analyze *Clayton* under each of the threshold approaches to the effects prong of the *Lemon* test.

1. Effect Prong Analysis Under the Separability and Breadth Inquiries

Under one approach to the threshold problem of the effect inquiry, the Court has developed a two-step inquiry: "[T]he Court has asked whether the secular impact is sufficiently separable from the religious, and whether the class benefited is sufficiently broad." By requiring that a law's secular impact be clearly separable from its religious impact, the Court is seeking to ensure that the decision-making process appears free of any appearance of establishment clause impropriety. Laws prohibiting murder are the most obvious examples of existing statutes that meet the separability requirement. Despite the existence of biblical prohibitions against murder, society clearly recognizes a purpose

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143. "The primary effect of this rule is to endorse the tenets of that particular religious group in *Purdy* who believes that social dancing is sinful." *Clayton*, 690 F. Supp. at 855.

144. The district court in *Clayton* made specific mention of the special care it was taking in light of the involvement of young children as the primary audience receiving the message of religious control of the government. *Clayton*, 690 F. Supp. at 856 ("The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children of formative years.").

145. L. Tribe, supra note 72, § 14-10, at 1216 (emphasis in original).

146. "[S]eparability's most important aspect is the subjective understanding of the individuals affected, particularly school children, as to endorsement" *Id.* § 14-10, at 1224 (emphasis added); see also Conkle, supra note 45, at 1172-74 (emphasis in original) ("Because we are attempting to protect these individuals from an injury that is essentially psychological, we are concerned with their perceptions").

This subjective approach is consistent with the Court's position that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. The separability requirement ensures that there is a distinctly secular motive available so as to avoid the need to focus exclusively on the religious component.

147. Consider also the prohibition against stealing: "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Harris v. McRae*, 448 U.S. 297, 319 (1980).

148. "Laws against murder overlap the fifth commandment of the Mosaic Decalogue." L. Tribe, supra note 72, § 14-9, at 1205.
to preventing murder beyond the simple religious command "Thou shalt not kill." 149

There are several circumstances where a statute's secular component is inseparable from its religious component. One such example is School District of Grand Rapids v. Ball, 150 which involved the constitutionality of a school district program that provided classes to private school students at public expense. The classes were conducted in space located in and leased from the private schools. The Court found the program unconstitutional because "[i]n this environment [shuffling back and forth between private school and public school classes], the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination." 151

The facts of Clayton by Clayton v. Place similarly fail to demonstrate a separable secular effect. It is important to remember that the separability analysis is conducted on a subjective basis; i.e. the ability of those actually affected by the government action to divine a separable secular effect will be determinative. 152 Given the events surrounding the deliberation of the dance issue, 153 the students of the Purdy schools cannot realistically be expected to separate a secular effect. 154


150. 473 U.S. at 373.

151. Id. at 391; cf. McCollum v. Board of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952). McCollum and Zorach both involved voluntary part-time religious instruction of public school students. However, the plan at issue in McCollum provided for the instruction to occur on school premises, whereas the instruction in Zorach was conducted outside school premises. The McCollum Court declared the on-site instruction unconstitutional, while the Zorach Court found no constitutional infirmity for privately financed instruction off public school grounds. The School Dist. of Grand Rapids Court, clearly utilizing separability analysis, explained:

The difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the McCollum program presented the students with a graphic symbol of the "concert or union or dependency" of church and state. This very symbolic union was conspicuously absent in the Zorach program.

School Dist. of Grand Rapids, 473 U.S. at 391 (citation omitted) (quoting Zorach, 343 U.S. at 312); see also Roemer v. Board of Pub. Works, 426 U.S. 736, 761 (1976) (quoting Roemer v. Board of Pub. Works, 387 F. Supp. 1282, 1288 (D. Md. 1974)) (upholding a statute giving state funds to any college or university in the state, including those with religious affiliations, that met certain criteria because the religious schools performed "essentially secular educational functions").

152. "The question, therefore, is 'what viewers may fairly understand to be the purpose' of the no-dancing rule." Clayton, 889 F.2d at 196 (Lay, C.J., dissenting) (quoting Lynch, 465 U.S. at 692 (O'Connor, J., concurring)); see also supra notes 141-44 and accompanying text and infra notes 161-62 and accompanying text.

153. See supra notes 7-32 and accompanying text.

154. The Clayton dissent emphasized the importance of Rule 502.29's context:
Most of the students in Purdy were directly aware of the religious opposition to dancing. The district court's record makes it abundantly clear that a majority of the town's parents teach their children that social dancing is a sin. And if the children did not get that teaching at home, a good portion of the district's students were probably in church when religious opposition to social dancing was openly discussed. The budgetary justifications were not even discussed until the case reached the district court, and they would seem trivial to the student compared to the religious furor that infused the dancing debate.

The Eighth Circuit's panel opinion rejected the district court's effect prong conclusions because "[n]o student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental." The panel reached this conclusion by mischaracterizing the Supreme Court's effect prong inquiry, by failing to engage in a separability analysis, and by providing absolutely no explanation for the conclusion that the effect is "indirect, remote, and incidental." The effect prong of the Lemon test does not require government to coerce abstention from privately sponsored activity in order to transgress the establishment clause. Rather, the effects prong "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." The fact that Purdy

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In Purdy, Missouri, the no-dancing rule differs little from a school's posting of the Ten Commandments on its classroom walls. The panel implies that a difference lies in the fact the Ten Commandments are religious on their face whereas the no-dancing rule is facially non-religious. This distinction, however, fails to give due regard to the religious environment that provides the no-dancing rule its lifeblood: a small town in which five churches wielding political influence teach that social dancing is sinful. Only in this context can the effect of the rule be judged.

Clayton, 889 F.2d at 196 (Lay, C.J., dissenting) (citations omitted) (emphasis added).

155. See supra note 127 and accompanying text.
156. See supra note 27 and accompanying text.
157 See supra notes 125-29 and accompanying text.
158. Clayton, 884 F.2d at 379.
159. See supra note 137 The panel's opinion fails to undertake the more searching inquiry that the Court's shift from the "primary secular effect" standard requires. The panel opinion suffers from an inability to imagine the rather obvious non-secular effects of the "Alliance" dominated decision-making process.
160. The Clayton dissent stated: The message is not diluted, as the panel opinion suggests, by the fact that the school does not coerce students into refraining from dance away from school grounds. The Supreme Court has clearly held that proof of coercion is not a necessary element of any claim under the Establishment Clause.

Clayton, 889 F.2d at 196 (Lay, C.J., dissenting); see supra note 56 (discussing Kennedy's dissent in Allegheny).
high school students are not prohibited from dancing away from school grounds does nothing to minimize the fact that the School Board has endorsed the religious beliefs of the community. The endorsement conveyed by the School Board "is no less obvious than a monument anchored to the schoolhouse lawn pronouncing 'THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES.'" Given that the endorsement inquiry receives special attention where the impressionable minds of children are involved, it is difficult to imagine how the secular effect of the no-dance rule is any more separable than was the case in School District of Grand Rapids.

The other part of the Court's threshold inquiry concerns whether the class benefited by the statute is sufficiently broad. The purpose of the breadth probe is to serve both as an independent inquiry and as a supplementary, more objective check on the subjective nature of the separability inquiry. Once again, society's murder laws provide an excellent example. Murder laws benefit a class much broader than those whose religious beliefs consider murder to be a biblical evil. All of society benefits by ensuring that people can feel secure. Such a broad class of beneficiaries avoids the appearance of a government endorsement of any one religious point of view because people who are opposed to murder for secular reasons can point solely to those secular effects as justification for the statute without looking hypocritical.

One of the Court's most recent pronouncements on the establishment clause is an excellent example of its breadth analysis. In Texas Monthly, Inc. v. Bullock, the Court declared unconstitutional a tax exemption granted to literature published or distributed by religious organizations that "'consist wholly of writings sacred to a religious faith.'" The Court, in distinguishing prior holdings, stated:

162. Clayton, 889 F.2d at 196 (Lay, C.J., dissenting).
163. See supra note 141-42 and accompanying text.
164. "[H]owever separable from religion the benefited aspect of an enterprise might be, the government's policy is frequently unconstitutional unless religious enterprises are benefited no more than, and only as part of, some much broader category." L. Tribe, supra note 72, § 14-10, at 1221.
165. Tribe has argued that "'the public consciousness certainly should not be allowed to supplant the first amendment's principles. It is here that the perspective of an objective observer, able to step back from the conventional understanding of the majority and to comprehend the viewpoint of the minority, is particularly important.'" L. Tribe, supra note 72, § 14-10, at 1224-25.
166. 109 S. Ct. 890 (1989); see also Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding unconstitutional a New York tax relief program for private school students because approximately 85% of the program's beneficiaries were students in parochial schools).
168. The Court specifically mentioned Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university can constitutionally maintain an equal access policy to its facilities, even
[W]e [have] emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.\(^6\)

This statement seems to make clear that a large number of secular beneficiaries will be required to pass the breadth analysis required by the effects prong of the \textit{Lemon} test.

There is no breadth of beneficiaries in \textit{Clayton}. The only persons benefited by the dance ban are those whose religious beliefs oppose dancing. Those whose religious beliefs embrace social dancing receive no benefit from the dance ban (there is no evidence that anyone favored the dance ban for economic reasons) except the assurance that their children will not be committing what the dance opponents believe to be a sin, a decidedly non-secular benefit. Given the influence of the Ministerial Alliance in the deliberation process,\(^7\) it is difficult to see how those in favor of allowing social dancing are beneficiaries of Rule 502.29.

2. Effect Prong Analysis Under the Community Approach\(^8\)

Another approach the Court uses in its threshold inquiry under the effects prong of the \textit{Lemon} test concerns the extent to which "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community ."\(^9\)

\begin{enumerate}
  \item where this means use by religious groups, because all student groups were potential beneficiaries, not just student religious groups; \textit{Mueller}, 463 U.S. 388 (upholding a state law allowing deduction for tuition, transportation, and nonreligious textbook expenses because nonsectarian private schools also benefited); \textit{Walz v. Tax Comm'n}, 397 U.S. 664 (1970) (upholding a tax exemption granted to nonprofit organizations despite the fact that religious groups benefited because a wide array of nonreligious, nonprofit organizations also benefited).
  \item \textit{Texas Monthly}, 109 S. Ct. at 897
  \item See supra notes 26-32 and accompanying text.
  \item For a discussion of the merits of the community approach to the effects prong of the \textit{Lemon} test, see Conkle, \textit{supra} note 45, at 1161-71, 1176-79.
  \item \textit{Lynch}, 465 U.S. at 688 (O'Connor, J., concurring). Although developed by O'Connor in her \textit{Lynch} concurrence, the language expressing concern over the preservation of community has been cited with approval in the Court's most recent establishment clause decisions. \textit{See, e.g., Texas Monthly}, 109 S. Ct. at 899-900 (alteration in original) (quoting Corporation of Presiding Bishop v Amos, 483 U.S. 327, 348 (1987)) (statute in question "[c]annot but ‘convey’ a message of endorsement’ to slighted members of the community’’); \textit{Allegheny}, 109 S. Ct. at 3101 (Blackmun, J.) (quoting the community language from \textit{Lynch} approvingly). Justice Kennedy's \textit{Allegheny} dissent somewhat bitterly noted that "[t]he majority invalidates display of the creche, not because it disagrees with the interpretation of \textit{Lynch} . but because it chooses to discard the reasoning of the \textit{Lynch} majority opinion in favor of Justice O'Connor's concurring opinion in that case." \textit{Id.} at 3140 (Kennedy, J., dissenting).
\end{enumerate}
The "community" approach is a fairly recent invention; it thus has been mentioned sparingly by the Court. However, *Friedman v. Board of County Commissioners*73 illustrates the potential direction the community inquiry could take. *Friedman* concerned the validity of the seal displayed on the county's police cars. The county seal contained a prominently displayed cross with a Spanish motto that translated to "With This We Conquer."74 The Tenth Circuit declared the display of the seal unconstitutional due to its belief that individuals stopped by a police car bearing the county seal "could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment."75 The county seal failed the effect prong analysis under the community approach because it did not reach out to a cross-section of the community any broader than those adhering to the Christian faith.

The Supreme Court has not adopted this view, but apparently finds there is no effect on a nonadherent's feeling of exclusion from the community when the government practices at issue, "although born of religion, had with time lost their religious nature."76 This conclusion is compelled by the anomalous results of *Marsh v. Chambers*77 and *Lynch*.78 *Marsh* involved a challenge to the constitutionality of Nebraska's use of a chaplain to open its legislative sessions. The Court found Nebraska's use of the chaplain constitutional because "[t]he unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat . . . ."79 *Lynch* involved the constitutionality of a holiday display that included a crèche. The Court found the display constitutional because "[t]he crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday."80 Tribe has argued that "[i]n both *Lynch* and *Marsh*, the Court implied that history had similarly neutralized the religious effects of the practices challenged in those cases."81

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73. 781 F.2d 777 (10th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
74. Id. at 778.
75. Id. at 782. However, the use of the Christian cross in municipal seals is far from fully resolved. See Chicago Tribune, Sept. 17, 1990, § 1, at 7, col. 4 (discussing the pending oral argument before the Seventh Circuit on the constitutionality of two municipal seals). In fact, the lawyer (Richard Gutman) challenging the seals invoked the community approach in his comments to the media. Id. ("Putting crosses on seals—the symbol of a town's authority—probably doesn't affect Christians, but it does affect non-Christians. It makes them feel like outsiders.").
76. L. Tribe, supra note 72, § 14-15, at 1295.
78. 465 U.S. at 668.
79. Id. at 795.
written by Justices Powell\textsuperscript{182} and O'Connor\textsuperscript{183} appear to confirm Tribe's analysis.

Breadth analysis\textsuperscript{184} also has an effect on the community inquiry. An example is the Court's decision in Allegheny The case dealt with the constitutionality of two holiday displays. The first, a crèche in a county courthouse, was held unconstitutional\textsuperscript{185} The second display was composed of a Christmas tree, a Menorah and a banner stating that the display was a celebration of liberty and diversity in the community.\textsuperscript{186} The Court found this display to be consistent with the establishment clause. Justice O'Connor's explanation of the constitutionality of that display hints that the breadth of the beneficiaries of a government practice has a strong influence on the outcome of analysis under the community inquiry.

Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens.\textsuperscript{187}

This explanation suggests that the breadth of individual beliefs recognized by the display minimized the risk that nonadherents would consider themselves relegated to the status of "outsiders" in the community.

There can be little doubt that those in Purdy who favor social dancing feel like outsiders within that community Rule 502.29 is not saved by its "history and ubiquity" given the history of divisiveness that has surrounded the Rule. If anything, the Rule's history indicates that it has been a continuous source of divisiveness in the community.\textsuperscript{188} This history of divisiveness distinguishes the Purdy dance ban from the practices involved in Marsh and Lynch. Instead, "[t]o the residents of Purdy—especially the students of Purdy R-II High School—the rule's message is unmistakably

\textsuperscript{182} "The decision in Lynch, like that in Marsh v. Chambers, was based primarily on the long historical practice of including religious symbols in the celebration of Christmas." Wallace, 472 U.S. at 64 n.5 (Powell, J., concurring).

\textsuperscript{183} "[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." Allegheny, 109 S. Ct. at 3121 (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 693 (O'Connor, J., concurring)).

\textsuperscript{184} See supra notes 164-70 and accompanying text.

\textsuperscript{185} For a description of that display, see Allegheny, 109 S. Ct. at 3093-94.

\textsuperscript{186} Id. at 3094-95.

\textsuperscript{187} Id. at 3123 (O'Connor, J., concurring).

\textsuperscript{188} See supra notes 12-37 and accompanying text and infra notes 210-18 and accompanying text; N.Y. Times, Nov. 2, 1986, § 1, at 30, col. 1 ("It had become an annual ritual, of sorts: students seeking a change in the policy, the Purdy School Board saying no.").
clear: the school district promotes the tenets of the local religious community." This endorsement clearly sends a message to adherents "that they are insiders, favored members of the political community." The fact that the nonadherents must drive more than sixty miles away when they wish to dance is a perfect example of outsider status. The sixty mile drive could not be a more apt metaphor for the isolation from the community that the opponents of Rule 502.29 must feel.

3. The Coercion Approach as an Alternative to Analysis Under the Effect Prong of the Lemon Test

The coercion approach is the alternative suggested by those Justices who wish to abandon the effect prong of the Lemon test. Analysis under the coercion approach is considerably more deferential to the actions of government. Despite the strong opposition to this approach by a majority of the Court, the Eighth Circuit's panel opinion appears to have embraced the coercion approach. This Note posits that, while proof of coercion is unnecessary to find that Rule 502.29 violates the establishment clause, the Purdy dance ban fails to survive even this lower level of scrutiny.

Justice Kennedy's dissent in Allegheny is the source of the coercion inquiry. Kennedy stated that "government may not coerce anyone to support or participate in any religion or its exercise . . ." He went on to state that "coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate . . ."

189. Clayton, 889 F.2d at 196 (Lay, C.J., dissenting). This message is magnified in Purdy by letters to the local paper with messages such as the following: "The Baptists of Purdy outnumber all the rest of the Protestants and Catholics. Not only are we the church, we are also the state. We have the right to say what goes on at our school." Quoted in N.Y. Times, Nov. 2, 1986, §1, at 30, col. 1.
191. See supra notes 17-19 and accompanying text.
192. The distinct court eloquently observed that "[t]he right to dance may not be a tenet of the Methodist, Catholic, Lutheran or Mormon Church, but the children of these faiths cannot be made to feel that their religions are inferior because their churches do not prohibit (and in some cases, actually sponsor) dances." Clayton, 690 F Supp. at 856.
193. See supra note 60.
194. Justice Blackmun stated that "when all is said and done, Justice Kennedy's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases." Allegheny, 109 S. Ct. at 3109 (Blackmun, J.).
195. See supra note 60.
196. See supra notes 158-59 and accompanying text.
197. See supra note 60.
198. Allegheny, 109 S. Ct. at 3136 (Kennedy, J., dissenting).
the Clause in an extreme case." Unfortunately, Kennedy provided precious little guidance to a court attempting to apply his approach beyond "requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually 'establishes a religion or religious faith, or tends to do so.'" However, cases with facts similar to those in Clayton may help to illustrate Kennedy’s position.

_Estate of Thornton v Caldor, Inc._ concerned the constitutionality of a Connecticut law that gave employees an absolute right not to work on their chosen day of Sabbath. The Court found this law unconstitutional because:

In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.

The Court went on to quote approvingly the following statement of Judge Learned Hand: "'The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' Yet that is precisely what has happened in Purdy, Missouri.

Rule 502.29 is coercive in that those religiously opposed to social dancing used their political power to force a duly elected governmental body to kowtow to their demands. This is coercion in its purest form: the Ministernal Alliance in Purdy sought to prevent nonadherents from engaging in a purely

199. Id. at 3137 (Kennedy, J., dissenting) (footnote omitted). However, Kennedy provided only one example of this “extreme case”: “[T]he Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall,” _Id._

200. Id. (citation omitted) (quoting _Lynch_, 465 U.S. at 678).


202. _Id._ at 709.

203. _Id._ at 710 (quoting _Otten v. Baltimore & O.R.R._, 205 F.2d 58, 61 (2d Cir. 1953)).

204. _See supra_ notes 21-36 and accompanying text. The establishment clause would mean little under the coercion approach if an inquiry into the linkage between the coercive governmental action and religious groups is not allowed. The absence of such a linkage provides an easy way for a church to establish a state religion: start by convincing the legislature to implement the more obscure, less universal tenets of their faith. After all, the establishment clause does not specify which religion is forbidden to be established (every religion is). And without conducting an inquiry into the linkage of government actions to the beliefs of specific religious groups, courts will be unable to determine whether or not a religion is being "established." An alternative approach would provide exceptions to the establishment clause, and would in fact discriminate against more established religions, since only religions with universally recognized tenets such as days of Sabbath would be precluded under the establishment clause.

This case is no different than _Estate of Thornton_. _See supra_ text accompanying notes 201-
secular activity because their beliefs counseled that the activity was wrong. In essence, the religious community of Purdy, "in pursuit of their own interests [insisted that] others must conform their conduct to [the Ministerial Alliance's] own religious necessities." After all, the dance ban was not necessary to ensure the free exercise of the rights of the members of the Ministerial Alliance. Those opposed could simply have forbidden their children from attending the dance. Thus, the sole object of the Purdy dance ban was to coerce those who did not accept the Alliance's religious position into abstaining from dancing in Purdy's public schools.

That the school did not prohibit dancing away from school grounds does not, as the Eighth Circuit panel would have it, prove the absence of coercion; rather, it merely minimizes the potential coercive impact. "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain." Because a law prohibiting activity within school grounds extends to "matters sacred to conscience and outside the school's domain" proves that Rule 502.29 has a coercive impact on the thinking of the young. If the young are anesthetized to minor encroachments by religion into the public sphere, then the stage is set for much larger encroachments when the young grow up. In the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

C. The "Excessive Entanglement" Prong of the Lemon Test

The third and final prong of the Lemon test requires that a statute "not foster 'an excessive government entanglement with religion.'" A subsidiary

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03. If no religion had a day of Sabbath, there would be no coercive effect on employers. Thus, the universality of the existence of religions with a recognized day of Sabbath was the key to the holding. The same causality approach applies in Clayton. Were it not for the religious opposition to dancing, there is no question that Rule 502.29 would not exist.

205. Estate of Thornton, 472 U.S. at 710 (quoting Otten, 205 F.2d at 61).

206. See supra notes 158-59 and accompanying text.

207. Clayton, 690 F Supp. at 856.

208. Id.

209. The Complete Madison: His Basic Writings (S. Padover ed. 1953), reprinted in Wallace, 472 U.S. at 54 n.3.

210. Lemon, 403 U.S. at 613 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The prohibition against excessive government entanglement with religion is based on two concerns:

When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

concern of the excessive entanglement prong is "the divisive political potential of these state programs."²¹¹

The district court in Clayton found the excessive entanglement prong of the Lemon test applicable to Rule 502.29 because of the "extreme divisiveness" of the dancing issue in Purdy.²¹² The Eighth Circuit's panel opinion properly rejected the applicability of the excessive entanglement prong as an independent basis for invalidation because "[p]olitical divisiveness along religious lines is not a proper consideration except in cases involving financial aid to parochial schools."²¹³ While the panel's reading of Supreme Court precedent is accurate,²¹⁴ it is too literal.

²¹¹ Lemon, 403 U.S. at 622. The Lemon Court went on to observe:

"[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government." Id. at 622-23 (citations omitted).

²¹² Clayton, 690 F Supp. at 856. The court stated that "[t]here is no question that the dance issue is deeply divisive in the Purdy area, nor is there any question that it has been a divisive issue for many years." Id. The court went on to describe "[t]he elaborate steps the school system took to ensure that dancing would not occur" Id. The court concluded that "[t]he excessive caution surrounding anything connected with dancing suggests the extreme divisiveness of this issue." Id.

Additional evidence of divisiveness includes hate mail and death threats sent to dance supporters. See Newsday, May 10, 1990, § II, at 4 (LEXIS, Nexis library, Current file) (Dance supporter Joan Fox stated that "[w]e stopped counting the hate mail and the death threats after a while.") One Purdy woman thought that her divorce was at least partially attributable to the divisions created by the dancing debate. N.Y. Times, July 20, 1988, § A, at 10, col. 5 ("It [the dancing debate] causes fist fights in school, angry glares in church, conflicts at home. 'I won't say it caused my divorce exactly, but it sure didn't do any good.'").

²¹³ Clayton, 884 F.2d at 379. The panel also argued that "[i]f anything, the rule promotes less, rather than more, school involvement in what plaintiffs contend is a religiously significant activity." Id. This argument confuses the fact that opposition to dancing is religious, not the act of dancing itself. The panel's position on this point would force government to cease all activity that any religion disagreed with, because continuation of the activity would cause government to be "entangled" with religion over that activity. In essence, the court's position would force government to favor religion, giving it almost a veto power over activities engaged in by the rest of society.

²¹⁴ The panel based its conclusion on strong dicta taken from footnotes in two Supreme Court cases. The Court in Mueller stated:

Since this [political divisiveness] aspect of the "entanglement" inquiry originated with Lemon v. Kurtzman, and the Court's opinion there took pains to distinguish both Everson v. Board of Education and Board of Education v. Allen, the Court in Lemon must have been referring to a phenomenon which, although present in that case, would have been absent in the two cases it distinguished.

The Court's language in Lemon respecting political divisiveness was made in the context of statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial
The panel failed to recognize that excessive entanglement still plays a role in applying the Lemon test to cases where the entanglement is not monetary. Justice O'Connor, who wants to abandon the excessive entanglement inquiry as an independent prong of the Lemon test, has argued that "[p]ervasive institutional involvement of church and state may remain relevant in deciding the effect of a statute which is alleged to violate the Establishment Clause . . ." However, the panel failed to consider the divisiveness caused by the Rule in its effects prong analysis.

Surely the existence of divisiveness cannot be denied. Before the pro-dance forces took their fight to court, the community was sharply split along religious lines. The magnitude of the division was made clear at the School Board meeting, where the panel would have us believe the citizens of Purdy turned out in record numbers to contest the minimal cost of a dance. Comments made by Purdy residents in the wake of the Supreme Court's certiorari denial indicate that the divisions in Purdy have hardened.

The evidence of sharp political division along religious lines over an issue that is unremarkable when viewed in its secular context would have done much to enlighten the panel's effect prong analysis. The usefulness of this evidence is magnified when one remembers that effect prong analysis depends on the subjective perception assigned to the law by the persons affected. Given the split along religious lines, the conclusion becomes inescapable that the proponents of dancing will consider the continued existence of Rule 502.29 as evidence that the Purdy School Board embraces the theology of the Ministerial Alliance.

CONCLUSION

There is little dispute over the accuracy of the district court's portrayal of the events recounted in Clayton. Given the strength of the evidence

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215. *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting); see also *Nyquist*, 413 U.S. at 797-98 ("[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws — it is certainly a 'warning signal' not to be ignored.") (citation omitted) (quoting *Lemon*, 403 U.S. at 625).

216. See *supra* text accompanying notes 125-34, explaining the fallaciousness of this assumption.

217. School Board President Glenn Garrett optimistically stated that "[t]his is not the time or place for the board to gloat. It is time for the board, administration, faculty, students, and the Purdy citizens to set about healing the divisions caused by this litigation." Chicago Tribune, Apr. 17, 1990, § 1, at 4, col. 3.

However, the comments of others indicate that the healing process will not be easy. Joan Fox, one of the parents who filed the Clayton suit, characterized the Court's certiorari denial as "an extreme victory for liars, cheats, and hypocrites." *Id.* at § 1, at 4, col. 5. Mrs. Fox's son, Howard, stated that "[u]ltimately, we will dance on their graves, figuratively." Indiana Daily Student, Apr. 19, 1990, § 1, at 7, col. 1.

218. See *supra* text accompanying notes 139-41 and note 161 and accompanying text.
identified by the district court, one would have to speculate that the Eighth Circuit panel made a willful decision to disregard the evidence. While this is only speculation, a review of opinions written by Judge Fagg (the author of the Clayton panel opinion) demonstrates a tendency to defer to the governmental unit when the action at issue is a result of the democratic process. Although a general critique of this majoritarian paradigm is beyond the scope of this Note, the majoritarian paradigm should not be invoked where the case is "about religious tyranny." The Eighth Circuit panel apparently felt that Rule 502.29 was the result of the democratic process: the School Board meeting was an example of direct participatory democracy. However, the Bill of Rights was passed to curb the excesses that participatory democracy may create. Rule 502.29 is an example of democratic excess. But the most troubling aspect of the panel's deference is that there is no reason to believe that the Ministerial Alliance, building on its court victory, will not go further in the future.

219. See, e.g., Felton v. Fayette School Dist., 875 F.2d 191, 193 (8th Cir. 1989) (Rejecting a challenge under 42 U.S.C. § 1983 (1988) to a school district "good citizenship" rule, which was used to exclude a student from an off-campus vocational education program. Judge Fagg wrote that the "good citizenship" rule served the legitimate purpose of "protect[ing] the integrity of its off-campus programs and maintain[ing] those programs' community support." Judge Fagg argued that "it is not our task to second-guess Fayette's administrators concerning the wisdom of their rule."); Lubavitch, Inc. v. Walters, 873 F.2d 1161, 1163 (8th Cir. 1989) (Judge Fagg joined an opinion by Chief Judge Lay holding a state law that prohibits erection of unattended religious symbols on state grounds to be a valid time, place and manner restriction despite the fact that the state's avowed purpose was to avoid clashing with the establishment clause.); Jacobsen v. Harris, 869 F.2d 1172, 1174 (8th Cir. 1989) (Rejecting a free speech challenge to a city ordinance requiring anyone wishing to place a newsrack on city property to acquire a permit and liability insurance. The court held the ordinance to be a valid time, place and manner restriction advancing significant interests of safety, aesthetics and space allocation.); Hill v. Blackwell, 774 F.2d 338, 343 (8th Cir. 1985) (Rejecting a claim that a prison regulation prohibiting facial hair violated free exercise rights of a Muslim inmate. Judge Fagg's opinion was based on giving "proper deference" to prison officials, despite the fact that the district court found the prison's security rationale to be exaggerated.); Salinas v. School Dist. of Kansas City, 751 F.2d 288, 290 (8th Cir. 1984) (Granted a summary judgment motion dismissing a religious group's challenge to the board rule giving greater scrutiny to rental requests from religious groups. Judge Fagg wrote that "the board's retention of authority to consider applications of some religious groups to assess the complex issues concerning the Establishment Clause" is "a reasonable justification.").

220. For an extensive discussion of the majoritarian paradigm, see Chemerinsky, Foreword: The Vanishing Constitution, 103 HARV L. REV 43 (1989). Chemerinsky described the roots of the paradigm as follows: Not surprisingly, those who disagree with Supreme Court decisions often have articulated their criticism in terms of the anti-democratic nature of judicial review. Judicial invalidation of legislation appears anti-majoritarian, and arguments appealing to democratic values always have had great power in American society. Moreover, it is often easier to criticize a decision as usurping democracy than it is to debate the substantive desirability of the ruling.

Id. at 62.

221. Clayton by Clayton v. Place, 889 F.2d 192, 195 (8th Cir. 1989) (Gibson, J., dissenting from the denial of a rehearing en banc), cert. denied, 110 S. Ct. 1811 (1990).
The panel was untroubled by the possibility that "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent..." Judge Gibson aptly stated:

In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519, may not be of earth-shattering significance. Yet, our Constitution protects all citizens, including the students at Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call this court should not ignore. Our denial of the petition for rehearing en banc turns a deaf ear to the pleas of those students.223

This conclusion is compelled by the application of even the most lenient establishment clause inquiry.

It can only be hoped that the Eighth Circuit's disposition of Clayton will not encourage fundamentalist-dominated communities in Missouri, or anywhere else, to make similar or even more intrusive forays into the realm of secular society. A loss of liberty, including ironically the freedom to live according to one's own spiritual values, would be the ultimate price of this judicial "defereence."

223. Clayton, 889 F.2d at 195 (Gibson, J., dissenting).