

SEEKING A SIGN FROM ABOVE: HOW SUPREME COURT UNCERTAINTY HINDERS PUBLIC SCHOOLS' RELIGIOUS POLICIES

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The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the [s]tate is it more vital to keep out divisive forces than in its schools.

— Felix Frankfurter¹

INTRODUCTION

Despite decades of law and policy that demand otherwise, public schools remain hotbeds of controversy on the question of how much religion in the classroom is too much. Charged with drawing and then policing the fine line between church and state, schools struggle to set policies that will satisfy parents, teachers, and courts. Restrictive rules against religious instruction anger both a fiercely religious public trying to control the curriculum and teachers who resent limits on their craft. Lax policies encourage teachers to overstep settled boundaries, triggering complaints from parents trying to protect their children from religious

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¹ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (holding that public schools cannot require religious education).

indoctrination. Litigation naturally ensues, on two levels. First, when a suit arises, courts must determine the contours of the church-state division and decide whether a particular action by a school or teacher violates the Constitution. Second — and perhaps more important — courts must determine how far litigation-wary schools can go in their attempts to avoid violations in the first place.

As a recent Second Circuit decision reveals, though, answering only the second question fails to solve the underlying problem. In 1999, the Second Circuit decided *Marchi v. Board of Cooperative Educational Services*,² upholding a school's broad policy barring a teacher from making religious references in class. The case sent the clear message that schools may indeed go to great lengths to keep improper religious influences out of the classroom. On its face, the decision suggests that children will receive strong protection from unconstitutional religious instruction, but *Marchi* cannot operate in a vacuum. School policies are only as strong as the law supporting them, and until that law of church and state — the first question — becomes easier to navigate, controversies, injuries, and litigation in schools will persist.³

Marchi's legacy will remain a function of the constitutional tests for when religious influence becomes improper, but those tests exist in a state of flux, with a court's choice difficult to predict. Whether the current *Lemon*⁴ test prevails or a successor emerges, the value to *Marchi* will lie in the certainty and authority it carries. *Marchi* will realize its potential as an Establishment Clause vanguard only after the Supreme Court simplifies church-state jurisprudence and settles on an approach that clearly and consistently protects religious freedom. In the absence of certainty, schools may be unwilling to risk litigation, and *Marchi*'s promise will deteriorate into a course that follows majority opinions at the cost of not protecting children.

Effective rules governing religion in the classroom will emerge only after schools receive clearer guidance on the extent of their authority, guidance that the current state of Establishment Clause law cannot provide. This note explores the need for a more certain statement or test of the Establishment Clause, from the perspective of *Marchi*'s possible impact on school policies. Part One introduces the courts' approaches to the Establishment Clause as well as the context of schools' interests in what happens in their classrooms. Part Two examines the *Marchi* deci-

² *Marchi v. Bd. of Coop. Educ. Servs.* ["*Marchi v. B.O.C.E.S.*"], 173 F.3d 469 (2d Cir.), cert. denied, 528 U.S. 869 (1999).

³ This note does not address the related, though distinct, issues involving student-initiated religion, religious groups' right of access to school facilities, and evolution vs. creationism in the curriculum. The narrow issue remains schools' rights regarding policies that govern teachers' use of religion in the classroom.

⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

sion and its potential to strengthen school policies. Part Three explores the gap between current law and *Marchi*'s potential, showing how a more certain statement of the law would honor *Marchi* and provide fuller Establishment Clause protection.⁵ The note concludes that *Marchi* represents an important first step but will travel only as far as the larger world of constitutional law and policy allows.

I. THE SETTING

A. THE ESTABLISHMENT CLAUSE

The Constitution requires that "Congress shall make no law respecting an establishment of religion."⁶ Given the nation's strong religious heritage, however, complete separation of church and state has never been the aim.⁷ Even in public schools, the First Amendment imposes no ban on religion in all forms.⁸ Rather, the Establishment Clause⁹ prohibits only governmental "sponsorship, financial support, and active involvement" in religious activity.¹⁰

The starting point for evaluating the Establishment Clause remains *Lemon v. Kurtzman*,¹¹ decided by the Supreme Court in 1971. *Lemon* articulated a three-part test that a state statute or activity must pass in order to satisfy the Establishment Clause. The state action (1) must have a secular purpose, (2) must have the primary effect of neither advancing nor inhibiting religion, and (3) must not foster an excessive government-

⁵ However, this note does not attempt to advocate what an alternative Establishment Clause approach should be or even whether a new approach is necessary. That question implicates much broader constitutional issues and deserves far more comprehensive treatment than this note can provide. I remain limited to the conclusion that coherent school policy requires a more certain statement of the law, whatever that statement ultimately is.

⁶ U.S. CONST. amend. I. The prohibition is also binding on the states and their actors, through the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). Justice Thomas has recently questioned whether the Establishment Clause places the same restrictions on the states as it does on the federal government. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). "When rights are incorporated against the [s]tates," he wrote, "they should advance, not constrain, individual liberty" — a conclusion that would allow states "greater latitude [than Congress] in dealing with matters of religion and education." *Id.* The notion of a federal-state disparity on incorporated rights had been raised before. See *Beauharnais v. Illinois*, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting); *Roth v. United States*, 354 U.S. 476, 503–04 (1957) (Harlan, J., dissenting).

⁷ See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) ("this [n]ation's history has not been one of entirely sanitized separation between [c]hurch and [s]tate").

⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

⁹ The Establishment Clause is only that part of the First Amendment prohibiting the establishment of religion. It is distinct from the Free Exercise Clause (as well as from the protections of freedom of speech, press, assembly, and petition), which guarantees additional rights beyond the scope of this note.

¹⁰ *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

¹¹ 403 U.S. 602 (1971).

tal entanglement with religion.¹² An action that fails any of the prongs is unconstitutional.¹³ However, as Part Three details, courts attempting to apply *Lemon* have generated refinements, shifts in emphasis, and much confusion. Nonetheless, the case remains in force as the Supreme Court's test for state-sponsored religion, and it continues to provide the initial framework for Establishment Clause analysis.¹⁴

Lemon is significant for setting the minimum requirements school for policies that attempt to keep impermissible religion out of the classroom. Whatever policy or action the school takes, it must, at least, satisfy *Lemon*'s standard against state-sponsored religion.¹⁵ Certainly, a state must not allow its teachers to take actions that violate a *Lemon* prong. From this starting point, a key question arises: How far may a school go to avoid such violations in the first place?

B. POLICYMAKING IN THE SCHOOLS

Schools enjoy broad authority to prescribe, proscribe, and otherwise control what their teachers say in the classroom. School officials may exert this control over both the school's official curriculum and a teacher's unsanctioned statements. Most simply, *any* in-class speech by a public school teacher "is unquestionably an exercise of state power."¹⁶ The state certainly has the power to set its curriculum,¹⁷ and even when a teacher departs from the approved curriculum, her words carry the weight of the state and may be regulated as such.¹⁸ This state action clearly implicates *Lemon* and its progeny, with the consistent result that the government may not sponsor, support, or actively involve itself in religious activity.¹⁹ State liability is potentially quite broad, and thus the state has a clear interest in setting policies that keep teachers on the safe side of the line.

¹² *Id.* at 612–13.

¹³ *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

¹⁴ *Brown v. Gilmore*, 258 F.3d 265, 275 (4th Cir. 2001) ("*Lemon* . . . while criticized over the years, remains binding precedent").

¹⁵ See *Lemon*, 403 U.S. at 612–13 (1971).

¹⁶ W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301, 332 (1998).

¹⁷ See, e.g., *Hennessy v. City of Melrose*, 194 F.3d 237, 244 n.1 (1st Cir. 1999) ("The public school curriculum . . . lies well within the province of state regulation."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our [n]ation is committed to the control of state and local authorities.").

¹⁸ *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) ("a teacher's classroom speech is part of the curriculum"); see also *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 776–77 (10th Cir. 1991) ("a teacher's expression in the 'traditional classroom setting' also bears the imprimatur of the school") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

¹⁹ *Lemon*, 403 U.S. at 612–13 (1971).

Of course, teachers — like students — do not shed their constitutional rights at the schoolhouse gate,²⁰ although they do not enjoy a meaningful right to academic freedom. Rather, the school's right to set its curriculum "implies a corresponding right to require teachers to act accordingly."²¹ When a conflict with children's rights arises, it is the teachers whose rights must yield: School policies may "adjust those [teachers'] rights to the needs of the school environment."²² Therefore, the school's interest in not violating the Establishment Clause overrides any free-speech rights a teacher might claim.²³

Yet while courts, including the Supreme Court, have been reluctant to interfere with curriculum decisions,²⁴ they have recognized the Establishment Clause as a limit on that deference.²⁵ Indeed, the Establishment Clause itself may set the only bounds on the state's power to shape a curriculum.²⁶ *Lemon* dictates these limits: If students mistake the teacher's medium for a religious message — a "substantial" likelihood even with high-school students²⁷ — then the school ends up "endorsing" religion, a clearly unconstitutional result.²⁸ Therefore, schools have not only a right but also an affirmative duty to set curricula and to develop policies that keep those curricula within the bounds of the Establishment Clause.

Schools act toward their students in a context different from other government interactions with citizens, and those differences underlie a school's leeway for regulating speech in the classroom. Most obviously, public school students are a captive audience. A teacher's audience is "decisively different from a street corner soapbox."²⁹ Rules for expansive public-forum freedom of speech simply do not apply to the public

²⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²¹ *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992); *see also*, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989); *Cary v. Bd. of Educ.*, 598 F.2d 535, 544 (10th Cir. 1979).

²² *Romano v. Harrington*, 664 F. Supp. 675, 678 (E.D.N.Y. 1987) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

²³ Thomas E. Wheeler II, *Religious Expression by Teachers: Whose Classroom Is It?*, 118 EDUC. L. REV. 571, 589 (1997).

²⁴ *See* Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 697–98 (1990).

²⁵ *See* *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987) (citing *Stone v. Graham*, 449 U.S. 39, 42 (1980)).

²⁶ *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992) (citing *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1080 (6th Cir. 1987) (Boggs, J., concurring)).

²⁷ *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

²⁸ Wheeler, *supra* note 23, at 587.

²⁹ *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 776 (10th Cir. 1991).

school teacher.³⁰ Similarly, courts do not follow the analysis used in other situations in which the state attempts to regulate its employees' speech.³¹ Rather, the state's "peculiar responsibilities" in education dictate an approach heavily weighted in favor of protecting children.³²

A highly significant basis of schools' authority in this *sui generis* context is the special susceptibility to religious endorsement that courts attribute to children. As the Supreme Court has stated, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."³³ This choice reflects more than a judicial determination that children deserve additional protection. Legal observers, donning the mantle of social scientists, speak authoritatively of the impact of formal education on children's development. For example, "The authority to conduct and control childhood education thus carries with it the ability to determine what conception of the good life shall dominate children's formative years."³⁴ This leads naturally to the conclusion that "in many ways public schools are an indoctrinator's dream."³⁵ Courts thus have no doubt that the stakes are high.

Working from this point, courts have paid close attention to and provided "scrupulous protection" to claims that implicate religious instruction in public schools.³⁶ Expressed bases for this protection include students' possible reliance on teachers as role models,³⁷ involuntary presence,³⁸ impressionability,³⁹ inability to distinguish between teachers and

³⁰ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 270 (1988) (noting that schools do not share the traditional attributes of public forums).

³¹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

³² *Miles*, 944 F.2d at 777 (applying the standard from *Hazelwood* that requires actions merely to be reasonably related to a legitimate pedagogical interest, 484 U.S. at 273).

³³ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

³⁴ Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 947 (1996).

³⁵ Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 425 n.25 (1995).

³⁶ *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378–79 (6th Cir. 1999).

³⁷ *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

³⁸ *Cf. id.* at 584 n.5 (noting that there is far less concern for undue influence at the college level, where students voluntarily choose their courses).

³⁹ *Id.*; see also *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

preachers,⁴⁰ peer pressure,⁴¹ and limited experience.⁴² These rationales carry the greatest weight in the elementary school context. As the Court observed, “The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.”⁴³ Accordingly, courts view the age of the children at risk as “an important factor” in *Lemon* analysis.⁴⁴ Against this backdrop, the Second Circuit set down its clearest signal that schools’ permissive powers are strong indeed.⁴⁵

II. THE POTENTIAL

A. *MARCHI v. B.O.C.E.S.*

Dan Marchi was a high-school special education teacher in upstate New York. A dozen years into his career, he “underwent a dramatic conversion to Christianity” and began incorporating his new religious beliefs into his instruction.⁴⁶ In 1991, he “shared this experience with his students” and “modified his instructional program to discuss topics such as forgiveness, reconciliation, and God.”⁴⁷ The special education program’s director met with Marchi in the fall of 1994 and sent him a cease-and-desist letter, prohibiting “any references to religion” in class, including Marchi’s “personal beliefs about the role of religion in our society and its value to families.”⁴⁸ Yet Marchi defied the order and refused to change his classes.⁴⁹ In the spring of 1995, the school association⁵⁰ suspended Marchi for insubordination and conduct unbecoming a teacher,

⁴⁰ See *Edwards*, 482 U.S. at 584.

⁴¹ *Id.*; see also *Jabr v. Rapides Parish Sch. Bd. ex rel. Metoyer*, 171 F. Supp. 2d 653, 662 (W.D. La. 2001) (“We reject the School Board’s argument that a ten[-] or eleven-year-old fifth-grade student has the discretion to resist . . . in front of the student’s peers.”). But note that four Supreme Court justices believed that high-school students likely *were* capable of distinguishing between government and private endorsement of religion. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250–51 (1990) (O’Connor, J., concurring). In *Lemon*, however, the majority addressed special protection the same for high schoolers as for elementary-school students. See *Lemon v. Kurtzman*, 403 U.S. 602 *passim* (1971). In higher education, the distinctions are great enough to “warrant[e] a difference in constitutional results.” *Sch. Dist. v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring).

⁴² *Ball*, 473 U.S. at 390.

⁴³ *Id.*

⁴⁴ *Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997).

⁴⁵ The theme throughout this note is schools’ power. I use the term “school” broadly to include whatever actor — school official, school board, board of education, state agency — exercises authority over public education in a particular situation.

⁴⁶ *Marchi v. B.O.C.E.S.*, 173 F.3d 469, 472 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 472–73.

⁵⁰ The Board of Cooperative Educational Services (B.O.C.E.S.) is a regional cooperative association of school districts that administers special education programs. *Id.* at 472. In the

and a hearing officer later affirmed those charges and imposed a six-month suspension.⁵¹

In 1996, Marchi returned to work, pledging to follow the school's directive.⁵² Instead, "shortly after" he returned, Marchi sent a letter to one parent that read: "Ryan had a good day today. I thank you and the [lord] for the tape[;] it brings the Spirit of Peace to the classroom. . . . May God Bless you all richly!"⁵³ Marchi argued that because the communication was with a parent, not a student, he believed it to be outside the scope of the school's order.⁵⁴ His supervisor disagreed and ordered Marchi not to give religious messages again, although he did not punish Marchi.⁵⁵ That summer, Marchi sued the school association for alleged civil rights violations, including the claim that the school's directive to keep religion out of the classroom was unconstitutionally vague and overbroad.⁵⁶

The U.S. District Court for the Northern District of New York first denied Marchi's motion to enjoin the school from enforcing its directive.⁵⁷ Judge Frederick J. Scullin Jr. then granted the school's motion for summary judgment, and Marchi appealed, insisting that the prohibition on "any references to religion" was vague and overbroad.⁵⁸ The Second Circuit reviewed the dismissal *de novo*, considering the directive both as applied and on its face.⁵⁹ Writing for the unanimous panel, Senior Judge Jon O. Newman affirmed the district court and held the directive a constitutional exercise of the school's authority.⁶⁰

The court focused its analysis on the *Lemon* test, which it acknowledged "has been criticized . . . [but] has not been overruled."⁶¹ However, the court noted that the Supreme Court "appears to have modified the

context of school-teacher-student relations, the board functions as the school entity — it is the relevant state actor — and I refer to it as such.

⁵¹ *Id.* at 473.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 473–74. Marchi sued under 42 U.S.C. § 1983, alleging that (1) B.O.C.E.S. violated his rights to academic freedom, free association, and free speech, as well as his rights under the Religious Freedom Restoration Act; (2) B.O.C.E.S. denied him due process and retaliated against him upon his return to teaching; (3) the directive was unconstitutionally vague and overbroad; and (4) the directive had been applied to protected speech with a parent. *Id.* (The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, was subsequently declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

⁵⁷ *Marchi*, 173 F.3d at 473–74.

⁵⁸ *Id.* While Marchi initially alleged several civil rights claims, he appealed only the dismissal of the claim that the school's directive was unconstitutionally vague and overbroad. *Id.*

⁵⁹ *Id.* at 474–75.

⁶⁰ *Id.* at 475–81.

⁶¹ *Id.* at 475. See *supra* Part I.A for a discussion of *Lemon*.

test” to emphasize whether the state action can be reasonably viewed as endorsing religion.⁶² In addition, Newman drew on several other principles that have emerged from Establishment Clause analyses: (a) that the state may have a compelling interest in avoiding an Establishment Clause violation;⁶³ (b) that schools have the authority and the constitutional duty to ensure that their teachers do not inculcate religion;⁶⁴ and (c) that a government employer must be given leeway — “breathing space” — in its regulation of religious speech.⁶⁵ This aggregation of concerns, rather than merely the test from *Lemon*, formed the framework for considering Marchi’s appeal.⁶⁶

The Second Circuit held the school’s directive to be valid both as applied and on its face. As applied, the key factor was B.O.C.E.S.’s “strong, perhaps compelling, interest in avoiding Establishment Clause violations.”⁶⁷ Any action by a teacher that “giv[es] the impression that the school endorses religion” places the school at risk, and the school may guard against such action.⁶⁸ While this element weighed heavily in the school’s favor, the court acknowledged that Marchi’s action was only “slight in its references to religion.”⁶⁹ However, public elementary and secondary education adds the element of children. Children are deemed particularly susceptible to religious indoctrination, and thus the state has the added responsibility to prevent such instruction.⁷⁰ While the danger is greatest with younger children, even “[t]he likelihood of high school students equating [the teacher’s] views with those of the school is substantial.”⁷¹ As a result, the school’s interest in avoiding a violation prevailed: The directive was valid so long as “school authorities could reasonably be concerned that [the teacher’s action] would expose it to non-frivolous Establishment Clause challenges.”⁷² This conclusion shows one dimension of the school’s scope of authority to create religion policies: Classroom action may be barred as soon as it could give rise to a parent’s colorable lawsuit.

⁶² *Marchi*, 173 F.3d at 475 (citing *Agostini v. Felton*, 521 U.S. 203, 234 (1997)).

⁶³ *Id.* (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

⁶⁴ *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

⁶⁵ *Id.* at 476.

⁶⁶ *Id.* at 475–76.

⁶⁷ *Id.* at 477 (citing *Lamb’s Chapel*, 508 U.S. at 394).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (remarking also that a teacher “is not just any ordinary citizen. He is a teacher . . . clothed with the mantle of one who imparts knowledge and wisdom.”).

⁷¹ *Id.*

⁷² *Marchi*, 173 F.3d at 477.

The prohibition against “using any reference to religion” in the classroom was also upheld as facially valid.⁷³ Due process requires that a statute cannot be so vague that “people of common intelligence must guess at its meaning.”⁷⁴ In this case, the policy’s “references to religion” language was “as clear as the context permits” and sufficient to give a teacher fair notice of what was prohibited.⁷⁵ The court continued:

Aware that precise delineation of sanctionable conduct is close to impossible, courts have granted schools, acting in their capacity as employers, significant leeway. . . . [T]he relevant inquiry is whether, “based on existing regulations, policies, discussions, and other forms of communication between school administrators and teachers,” it was “reasonable for the school to expect the teacher to know that her conduct was prohibited.”⁷⁶

This analysis reveals the second dimension of the school’s authority: A school need not articulate in advance “every imaginable situation that might fall within” its regulation.⁷⁷

At the heart of this outcome lie the court’s theoretical foundations: a compelling state interest, the special susceptibility of children in public schools, and the *Lemon* test of the Establishment Clause’s lower limits. The *Marchi* court thus brought forward its twofold principle to form the most comprehensive statement to date of schools’ policymaking power to prevent Establishment Clause violations: Fear of a lawsuit is sufficient justification for a policy, and that policy may be overbroad and less than precise in its prohibitions.

B. *MARCHI*’S POTENTIAL

From that starting point, *Marchi* offers a potent defense of Establishment Clause values. Schools that assert their privilege to enact strong policies for avoiding in-class indoctrination or to make strong responses to individualized situations may do so knowing that these efforts will find support in the courts. If teachers or parents who want more religion (or less restriction) in the classroom mount a challenge, the school can stand firm on *Marchi* and know that the balance of interests likely weighs in its favor. *Marchi* offers a straightforward framework that removes much uncertainty from the issue. A school confronted with a possible Establishment Clause challenge can easily plug its specifics into

⁷³ *Id.*

⁷⁴ *Id.* at 480 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993)).

⁷⁷ *Id.*

the generous *Marchi* formulation: Is the challenge non-frivolous? If so, the school can ban seemingly slight religious intrusions, even if the policy ends up constraining the teacher more than necessary or even if the policy does not specifically prohibit the conduct in question.⁷⁸

Marchi could even help decide cases in which the school did not fashion a formal policy but merely took some action, such as suspending a teacher, after receiving complaints. In that situation, *Marchi*'s principle of breathing room offers strong support for the action.⁷⁹ The school can act preemptively — stopping borderline conduct even before it becomes a clear constitutional problem — “even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.”⁸⁰ Again, the school need only point to a reasonable fear of litigation.⁸¹ While an over-eager school might try to use this power as a sword against teachers rather than as a shield to protect students, courts would be unlikely to uphold policies in which the school's claim of litigation fears was merely a pretext. Courts ably detect pretextual explanations in other religious contexts,⁸² and thus this possible abuse does not undermine *Marchi*'s principle.

Of course, whether acting by policy or ad hoc, a school must be mindful of the prevailing outer limits of the Establishment Clause. A school still cannot take action to bar all religious references from the classroom. History classes may study the Bible,⁸³ and holiday celebrations may include Christmas and Hanukkah displays.⁸⁴ A lesson is not improper simply because it happens to overlap with religious beliefs; teaching that murder is morally wrong, for instance, is perfectly acceptable.⁸⁵ Were a school to heed such an over-zealous complaint, it could be open to a suit by the teacher, alleging a violation of the Free Exercise and Free Speech clauses.⁸⁶ However, this subset of indisputably permit-

⁷⁸ See *id.* at 477, 480. The Supreme Court has rejected any defense of religious intrusion on the grounds that the invasion was small; as James Madison warned in 1785, “it is proper to take alarm at the first experiment on our liberties.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 65 app. (1947).

⁷⁹ See *Marchi*, 173 F.3d at 476.

⁸⁰ *Id.*

⁸¹ See *supra* Part II.A for discussion of *Marchi*'s holding.

⁸² See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) (holding that in the *Lemon* inquiry, a state's asserted “secular purpose” must be “sincere and not a sham”).

⁸³ *Sch. Dist. v. Schempp*, 374 U.S. 203, 300 (1963).

⁸⁴ *Sechler v. State Coll. Area Sch. Dist.*, 121 F. Supp. 2d 439, 451, 453 (M.D. Pa. 2000).

⁸⁵ See *Bowen v. Kendrick*, 487 U.S. 589, 612–13 (1988) (recognizing that on some “sensitive and important” issues, “it is not surprising that the [g]overnment's secular concerns would either coincide or conflict with those of religious institutions”).

⁸⁶ Cf. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (striking down state university's policy excluding religious groups from open-forum policy, holding in part that Free Exercise concerns may outweigh a state's interest in achieving a greater separation of church and state than the Establishment Clause requires).

ted (non-frivolous) religion in the public school classroom is small. Most school policies to restrict religion will be upheld, if for no reason other than that they clear the low hurdle of being “reasonably concerned” about litigation.⁸⁷

Already, courts in the Second Circuit have used *Marchi* to uphold school policies. Relying heavily on *Marchi*, a district court ruled that a school acted lawfully in ordering a teacher to remove or cover a T-shirt that read “Jesus 2000.”⁸⁸ That court specifically relied on the principles of compelling state interest and giving the school administrators leeway in drafting their response.⁸⁹ The judge noted that the school’s proscription would stand even if the teacher’s shirt were not an unconstitutional religious intrusion, a clear indication that overbroad policies may be valid nonetheless.⁹⁰ Another court, upholding a school’s policy of allowing an Earth Day celebration, emphasized the school’s *duty* to ensure that its teachers do not inculcate religion.⁹¹ *Marchi*’s approach also has upheld state action in contexts beyond the classroom.⁹² These extensions, where the rationale of special susceptibility does not apply, demonstrate subsequent courts’ acceptance of the remaining foundations — the compelling state interest in avoiding Establishment Clause violations and the need to give government leeway in crafting religion policies for its employees.

This approach, now the law in the Second Circuit, is at the leading edge of education and Establishment Clause jurisprudence nationwide. However, it is an advance beyond the analysis elsewhere only in the degree and forcefulness of its declaration. The Seventh Circuit relied on the state’s interest in upholding the removal of a substitute teacher who offered to forgo assigning homework if the students would keep his Bible discussion a secret.⁹³ The Ninth Circuit recognized that a school’s interest in avoiding constitutional violations trumped a teacher’s right to discuss religion with his students.⁹⁴ And the Tenth Circuit similarly ruled that a school could prohibit a teacher from reading the Bible silently during class.⁹⁵ These decisions acknowledge that full protection for students under the Establishment Clause requires a strong approach,

⁸⁷ See *Marchi v. B.O.C.E.S.*, 173 F.3d 469, 477 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999).

⁸⁸ *Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19 (D. Conn. 2001).

⁸⁹ *Id.* at 27–28.

⁹⁰ *Id.* at 28 (citing *Marchi*, 173 F.3d at 476, for the need to give government “leeway”).

⁹¹ *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 76–80 (2d Cir. 2001).

⁹² See *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 165–66 (2d Cir. 2001) (upholding state’s right to limit the religious speech of its employees — here, sign language interpreters).

⁹³ *Helland v. S. Bend Cmty. Sch. Corp.*, 93 F.3d 327, 330–32 (7th Cir. 1996).

⁹⁴ *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

⁹⁵ *Roberts v. Madigan*, 921 F.2d 1047, 1052–58 (10th Cir. 1990).

one that recognizes the state's compelling interest and its leeway in decisionmaking.

For many years, "Establishment Clause jurisprudence has been remarkably consistent in sustaining virtually every challenge to government-sponsored religious expression or involvement in the public schools."⁹⁶ *Marchi* represents another step forward — its low fear-of-litigation standard and permissible overbreadth combine to give schools unprecedented authority to head off constitutional violations before they occur.

III. THE GAP

A. THE MESS — IS *LEMON* COMING OR GOING?

While *Marchi* offers schools broad discretion, its central features — the fear-of-litigation standard and permissible overbreadth — can operate only in the larger context of the Establishment Clause jurisprudence centered on *Lemon*. Unfortunately, *Lemon* suffers from a lack of confidence: While Supreme Court opinions continue to trot it out as the standard, the justices have suggested numerous alterations and new emphases. In 2000, a plurality of the Court acknowledged that "*Lemon* has been modified, that subsequent cases had 'pared' factors . . . and that certain other opinions no longer are good law."⁹⁷ The Court's decision in *Zelman v. Simmons-Harris*⁹⁸ in 2002, upholding certain voucher programs, did not even mention *Lemon*, although it did identify the central question in *Lemon*'s language — whether the program "has the forbidden 'effect' of advancing or inhibiting religion."⁹⁹ More straightforwardly, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the Court's denial of certiorari in *Tangipahoa Parish Board of Education v. Freiler*¹⁰⁰ in 2000, seeking "to take the opportunity to inter the *Lemon* test once and for all."¹⁰¹ Despite their efforts, the test lives on, at least for now.

⁹⁶ *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 377 (6th Cir. 1999).

⁹⁷ *Sechler v. State Coll. Area Sch. Dist.*, 121 F. Supp. 2d 439, 446 n.11 (M.D. Pa. 2000) (citing *Mitchell v. Helms*, 530 U.S. 793, 808 (2000)).

⁹⁸ 536 U.S. 639 (2002).

⁹⁹ *Id.* at 648–49. However, Justice O'Connor — who has been notoriously flexible with *Lemon* — wrote in her concurrence that the decision did not "signal a major departure from" previous Establishment Clause jurisprudence. *Id.* at 668 (O'Connor, J., concurring).

¹⁰⁰ 530 U.S. 1251 (2000).

¹⁰¹ *Id.* at 1253. As Justice Scalia once much more vividly put it:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

During the past decade of Establishment Clause cases, the Court has both used a modified *Lemon* test and applied other tests in place of *Lemon*.¹⁰² Indeed, the Court “seems to support a practice of aggregating or omitting certain tests depending on the facts of each case.”¹⁰³ Justice O’Connor has attempted to justify this proliferation of paths, writing: “[T]he same constitutional principle may operate very differently in different contexts. . . . Experience proves that the Establishment Clause . . . cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.”¹⁰⁴ Two of these approaches have gained particular prominence, often appearing as substitutes for the original *Lemon* method.

In 1984, Justice O’Connor developed a two-pronged test that found state action to violate the Establishment Clause if it (1) is excessively entangled with religion or (2) endorses or disapproves of religion.¹⁰⁵ The test considers the government’s intent, and the answer may depend on “judicial interpretation of social facts.”¹⁰⁶ The Court soon used O’Connor’s endorsement test as part of its *Lemon* analysis for government displays of religious objects.¹⁰⁷ By then, however, Justice Kennedy had suggested a new two-part test for coercion: The government must neither (1) coerce participation in religion nor (2) directly benefit religion.¹⁰⁸ By 1992, the Court was using Kennedy’s approach to analyze prayer at graduation ceremonies.¹⁰⁹ That test, too, became a frequent (and frequently criticized)¹¹⁰ member of the Court’s Establishment Clause methodology.

This longstanding reluctance to either strictly apply *Lemon* or expressly overrule it has left lower courts in a state of “confusion.”¹¹¹ Thus

Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

¹⁰² Jon Veen, Note, *Where Do We Go From Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 RUTGERS L. REV. 1195, 1195 (2000) (citing *Agostini v. Felton*, 521 U.S. 203, 234 (1997), as an example of a modified *Lemon* and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000), as an example of using the coercion test instead).

¹⁰³ Andrea Ahlskog Mittleider, Case Note, *Freiler v. Tangipahoa Parish Board of Education: Ignoring the Flaws in the Establishment Clause*, 46 LOY. L. REV. 467, 482 (2000).

¹⁰⁴ Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 718, 720 (1994) (O’Connor, J., concurring); see also Penny J. Meyers, Note, *Lemon Is Alive and Kicking: Using the Lemon Test To Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231, e254 (1999).

¹⁰⁵ *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

¹⁰⁶ *Id.* at 694.

¹⁰⁷ *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 592–94 (1989).

¹⁰⁸ *Id.* at 659 (Kennedy, J., concurring in part and dissenting in part).

¹⁰⁹ *Lee v. Weisman*, 505 U.S. 577, 592–98 (1992).

¹¹⁰ See Veen, *supra* note 102, at 1219.

¹¹¹ Allen M. Brabender, Case Comment, *The Movement Towards Neutrality as the Single Criteria [sic] for Determining the Constitutionality of School Aid Under the Establishment Clause: Mitchell v. Helms*, 120 S. Ct. 2530, 77 N.D. L. REV. 97, 107 (2001). See, e.g., Warner

today, while a court must acknowledge that *Lemon* remains binding precedent, the neat center of that test paints only part of the picture. Add-ons such as O'Connor's and Kennedy's emphases may play a role, and critics of *Lemon* — both on the Court and in academia — continually offer substitutes.¹¹² Until the Supreme Court hands down a ringing endorsement of *Lemon* in some form,¹¹³ eliminating the currents of discontent, Establishment Clause jurisprudence will continue to unfold under a cloud of uncertainty. And as *Marchi* demonstrates, that uncertainty can prove a serious impediment to meaningful protection of religious freedom.

B. *LEMON'S* ROLE IN SCHOOL POLICYMAKING

Marchi lets a school act whenever it fears non-frivolous litigation, but it does not answer the question of what challenges are frivolous. And although courts will allow *some* overbreadth, they surely will not grant schools free rein to make policies without regard to the values served by the Constitution in its entirety, a balance that implicates free speech and free exercise as well as establishment.¹¹⁴ Therefore, *Marchi* remains vulnerable to shifts in the floor below it, and the current uncertainty in that floor — exhibited in the less-than-enthusiastic support for *Lemon* — threatens to undermine the Second Circuit's strides.

1. *Frivolousness and the Risk of Litigation*

As Judge Newman stated in *Marchi*, school authorities need only a reasonable concern of “non-frivolous Establishment Clause challenges” in order to sustain a policy prohibiting religious activity.¹¹⁵ In the current state of fluidity, with *Lemon* “clarifications” emerging every few years and the applicable test a fresh question for each case,¹¹⁶ very few challenges may be so outlandish as to be “frivolous.” For example, a parent may complain that a teacher uses Bible passages as reading comprehension exercises. Is that claim frivolous? *Marchi* can only point the analysis toward *Lemon*. And under *Lemon* as it stands, this is a close

v. Orange County Dep't of Probation, 827 F. Supp. 261, 266 (S.D.N.Y. 1993) (“we are wary of relying upon *Lemon*”);

¹¹² See, e.g., Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 382–91, 440–57 (1998).

¹¹³ For example, while the Court stated that it was applying *Lemon* in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 314 (2000), it did not take the opportunity to sweep away the rumors of *Lemon's* demise that litter the periphery and lower courts.

¹¹⁴ See Wheeler, *supra* note 23, at 581.

¹¹⁵ *Marchi v. B.O.C.E.S.*, 173 F.3d 469, 477 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999).

¹¹⁶ See Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring).

case;¹¹⁷ the challenge, then, is likely not frivolous, and the school could proscribe such conduct.

But tweak *Lemon* and the result becomes less obvious. Under a test for endorsement, such as O'Connor's, the claim is far less likely to succeed.¹¹⁸ To some courts, it may indeed be frivolous to demand a policy prohibiting this activity, and a school that implemented such a policy could find itself in court on the other side — facing a suit by angry parents or teachers asserting that the rule infringed *their* First Amendment rights. *Marchi* could not save this situation, despite the Second Circuit's commitment to a broad grant of school authority. And given the Supreme Court's unwillingness to shore up an Establishment Clause test, it is no great leap to envision the shift in results described above; indeed, O'Connor's endorsement test has decided several cases.¹¹⁹

The significant consideration is not that the Supreme Court may or may not introduce a new test for constitutional interpretation. Rather, it is the uncertainty that will persist until the Court takes such a step or disclaims any intention to do so. At first glance, this uncertainty may appear to strengthen *Marchi*, for if the school cannot know in advance what test will apply, then many more potential challenges will be non-frivolous. But upon consideration of a school's likely response to these court challenges, this uncertainty likely will produce the opposite effect and weaken *Marchi*.

Although *Marchi* could ultimately vindicate a school's action by finding that the specter of litigation was real enough, in many cases this will occur only after there actually *is* litigation. As *Marchi*'s own facts show, the school successfully defended its responses to the teacher's religious activity.¹²⁰ But this victory came at the cost of enduring five years of the teacher's lawsuit.¹²¹ *Marchi* gives schools a powerful trump

¹¹⁷ Applying the *Lemon* factors: (1) the exercise *does* have a secular purpose (teaching reading comprehension); (2) its primary effect *might* advance religion (a fact-sensitive inquiry); and (3) it *might* foster excessive government entanglement with religion (again, fact-sensitive). See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹¹⁸ See *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). While there may be some "entanglement," judges likely would find it less than "excessive," and any "endorsement" of religion is of a subtlety likely to escape judicial analysis in such a religious environment as contemporary American society.

¹¹⁹ See, e.g., *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989). And as O'Connor has suggested, different tests may apply in different situations. *Kiryas Joel*, 512 U.S. at 718, 720 (1994) (O'Connor, J., concurring).

¹²⁰ *Marchi*, 173 F.3d at 480.

¹²¹ Indeed, B.O.C.E.S. endured a legal "saga" with Dan Marchi that lasted from his first suspension in 1994 until the Supreme Court's denial of certiorari late in 1999. See Rick Karlin, *High Court Refuses to Hear Teacher's Appeal*, TIMES UNION (Albany, N.Y.), Oct. 5, 1999, at B1.

card, but the ante of years' worth of litigation may be so high that it never gets played.¹²²

The cost of litigation — even litigation that a party is likely to win — can be great enough to change that party's behavior enough to avoid the litigation in the first place.¹²³ As a result, schools may shy away from confronting teachers and parents over strong religious policies, for government limits on religion are generally unpopular.¹²⁴ The Establishment Clause exists to protect the minority from excessive intrusions, but it is this minority status that likely will make up school administrators' minds. Weaker policies invite complaints from students who find their Establishment Clause rights threatened, but these students will be fewer in number than those lining up to sue over a policy they feel is too strong. A litigation-averse school will look at the numbers and make a quick decision to take its chances with the smaller class of plaintiffs.

The basis behind this seemingly counterintuitive result — that even though *fewer* lawsuits will be frivolous, schools will adopt *weaker* policies — is the ability of American spirituality to stare down the Constitution. The fact remains that religious sentiment runs strong in the United States — often surging even higher during periods of increased self-reflection¹²⁵ — and this holds true in schools as much as in other con-

¹²² Challengers to such policies are more likely to be well-funded and willing to wait out protracted litigation. In recent years, for example, the Rutherford Institute bankrolled an unsuccessful two-year challenge to Columbine High School's decision not to allow religious symbols in its memorial project. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 893 (2003); Owen S. Good, *Court Rejects Columbine Suit*, ROCKY MTN. NEWS (Denver, Colo.), Jan. 14, 2003, at 4A. The group also funded the successful appeal in which the Supreme Court ruled that schools must grant religious groups the same after-school access to public facilities as other groups. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); David G. Savage, *Justices Allow Church Club to Meet in School*, L.A. TIMES, June 12, 2001, at A1. Two other similar entities, the American Center for Law and Justice and the Center for Individual Rights, led the successful effort to force a university to give student activity funds to a religious newspaper, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Laurie Goodstein & Joan Biskupic, *In Two Rulings, High Court Redefines Relationship Between Church, State*, WASH. POST, June 30, 1995, at A1.

¹²³ See, e.g., Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 ILL. L. REV. 43, 53 (recognizing the economic theory of cost-benefit analysis). Even behavioral critics agree that potential litigants choose strategies to achieve the best possible outcome. See *id.*; Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118 (1996).

¹²⁴ For example, consider the Religious Freedom Restoration Act, passed "to overturn an unpopular decision of the Court that Congress perceived as limiting the protection afforded religious exercise." Laura S. Nelson, *Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 CARDOZO L. REV. 721, 731 (1999). The Court, in turn, invalidated the act. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In the education context, a 1999 poll revealed that "Americans . . . overwhelmingly believe the government should allow prayer in the school." Albert R. Hunt, *Americans Decry Moral Decline*, WALL ST. J., June 24, 1999, at A9.

¹²⁵ For instance, witness the dramatic surge in public religion after Sept. 11, 2001. See, e.g., George H. Smith, *Atheists Tune in "God Bless America,"* NEWSDAY, Oct. 30, 2001, at

texts.¹²⁶ Schools likely will find it difficult to enact unpopular policies that benefit small minorities, the Constitution notwithstanding. While the character of that minority may vary from place to place, public religion is necessarily an intrusion upon some members of a heterogeneous society. The *Marchi* facts present an easier case, but in more borderline situations, a school may choose to side with the voting majority and take its chances in court against the Establishment Clause challenge of a minority.¹²⁷ Therefore, while continued uncertainty might *allow* a school to go to greater lengths in setting religion policies, that same uncertainty makes it less likely that the school *actually will* do so. School officials are unlikely to push the envelope in the face of popular opposition, and only upon a clear signal from the Supreme Court of where those boundaries lie will they feel comfortable taking countermajoritarian actions to the extent that *Marchi* permits.

Until that clarification, however, and with the Establishment Clause's lower limit a floating target, schools will cling to the lowest common denominator from the prevailing tests. While policies and responses theoretically could be stronger, administrators will aim lower to minimize unpopularity as well as litigation costs. Under this scenario, *Marchi* quickly loses its force as a *prospective* deterrent on improper religious intrusion by teachers and is left merely to vindicate the school after a long and costly lawsuit. Unwilling to endure that cost just to take the chance that an Establishment Clause claim will survive the *Lemon* test *du jour*, schools will follow the majority and skimp on religious protection.

2. Overbreadth and Imprecision

Marchi's other foundation — its tolerance of overbreadth and imprecision — also suffers at the hands of Supreme Court indecision. Overbreadth is inescapably a function of the underlying constitutional interpretation that shapes its breadth. Here, uncertainty about how far or how consistently the Supreme Court will apply Establishment Clause protections makes *Marchi* a poor expression of school authority. A liberal *Lemon* test — seeing religion-advancing primary effects and excessive entanglement in a wider range of state action — already provides

A43 (describing "the recent proliferation of 'God Bless America' signs" and concluding that even Smith, a renowned atheist writer, would view this response positively).

¹²⁶ See Charles Lane, *Calif. School's Sign Runs Afoul of ACLU: Group Finds "God Bless America" Message "Divisive," Demands Its Removal*, WASH. POST, Oct. 12, 2001, at A6.

¹²⁷ See, e.g., *Brown v. Gilmore*, 258 F.3d 265 (4th Cir.), *cert. denied*, 534 U.S. 996 (2001) (upholding state law requiring a minute of silence at the start of every school day). In *Brown*, the state prevailed in the face of directly adverse Supreme Court precedent, *Wallace v. Jaffree*, 472 U.S. 38 (1985), by persuading the court to limit the previous ruling to its facts and adopt a strained interpretation of mixed motives. See *Brown*, 258 F.3d at 279–81.

the school great latitude in prohibiting impermissible activity. *Marchi*'s dictate that the school can bar more conduct than it foresees¹²⁸ then brings an even greater amount of in-class activity within the purview of acceptable policy. By contrast, a more restrictive Establishment Clause analysis, such as Justice Kennedy's coercion test,¹²⁹ narrows religion policy's breadth — and overbreadth.

The relevant thread is that the poles of Establishment Clause jurisprudence lie far enough apart that setting a course for one will lead a school significantly astray from the other. When a policymaker cannot tell in advance which test will prevail, it constrains the resulting policy to the lowest common denominator of Supreme Court pronouncements, and if the action in question exceeds that policy yet otherwise falls even in the middle of other situations, justification for that policy may have to rely on a great deal of overbreadth. And while *Marchi* certainly deems a certain degree of overbreadth acceptable, some constraint must exist, for otherwise the overbreadth would swallow the limits. Only a certain foundation — knowing which Establishment Clause approach will apply — permits schools to set effective policies and allows courts to ensure protective results.

C. *MARCHI* IN A WORLD OF CERTAINTY

Filling the gaps in *Marchi*'s message will require a settled, predictable basis of Establishment Clause jurisprudence. Given the existing "confusion" among lower courts,¹³⁰ this statement of certainty must come from the Supreme Court. Whether a commitment to *Lemon*, a clear emphasis on one of its derivatives, or a new approach entirely, this clarification will empower *Marchi* more by its presence than its actual content. A stable Establishment Clause jurisprudence would shift the balance of litigation risks in favor of schools that protect students from religious intrusion.

A protective standard will deter more free-exercise complaints by parents and teachers, and schools will be more likely to adopt policies that track the standard. Such a stronger test, one that finds Establishment

¹²⁸ *Marchi v. B.O.C.E.S.*, 173 F.3d 469, 480 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999); see also *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).

¹²⁹ See *Lee v. Weisman*, 505 U.S. 577, 587–88 (1992) (discounting concerns about divisiveness, holding that "neither its existence nor its potential necessarily invalidates the [s]tate's attempts to accommodate religion"). Although Kennedy acknowledged that divisiveness would be relevant to such an "overt religious exercise in a secondary school" as prayer at graduation, his approach still leaves a high hurdle to clear in future claims of divisiveness in which the religion is less "overt." See also Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 B.Y.U. EDUC. & L.J. 1, 14 (recognizing that Kennedy's analysis in *Lee v. Weisman* paid little attention to divisiveness in voicing only "apparently unfounded concern" about this element of coercion).

¹³⁰ Brabender, *supra* note 111, at 107.

Clause violations more readily, gives *Marchi* maximum potential: The combination of few non-frivolous challenges and permissible overbreadth that reaches much state conduct leaves schools with vast authority to prevent and eliminate religious intrusion in their classrooms.¹³¹

CONCLUSION

The Supreme Court's Establishment Clause jurisprudence has traveled a twisted and still winding road. While broad principles against state endorsement of religion remain constant, the contours of those values — and, more important, the method for discerning whether a particular activity runs astray of them — continues to be a shot in the dark. In the midst of this uncertainty, the Second Circuit has offered a ringing endorsement of public schools' authority to make policies and take actions to prevent constitutional violations in the classroom.¹³² The court ruled that schools could take otherwise drastic action (that is, trumping a teacher's First Amendment and Free Exercise rights) once faced with a non-frivolous threat of litigation. And that action could be overbroad and imprecise, given the state's position of regulating its own employees. Moreover, this approach is "especially appropriate in an areas such as discipline of teachers," where the state's compelling interest and children's special susceptibility to indoctrination converge.¹³³

Yet the Supreme Court's underlying inability to set a course and stick to it threatens to leave *Marchi* a hollow promise. Either a stronger or weaker Establishment Clause test would add weight behind *Marchi*'s broad goals; a clouded and unpredictable test does not. Full realization of the Second Circuit's vision — in which schools enjoy maximum discretion in taking action to combat potential violations — will emerge only with clarity. The bottom line is clear: *Marchi* represents a potential windfall in the long-running effort to ensure that public schools do not cross the line between church and state, but that victory can come only after a clear sign emerges from the Supreme Court's clouded vision.

¹³¹ Even a weaker test would still yield the benefit of reducing schools' exposure to litigation. Of course, such a statement of the law — one that is less protective of children and more tolerant of governmental ties to religion — offers such a gain only at the cost of possible religious indoctrination and divisiveness. *See supra* Part I.B.

¹³² *Marchi*, 173 F.3d at 469.

¹³³ *Id.* at 480 (quoting *DiLeo v. Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976)).