

INSTALLING FOOTBATHS AT THE UNIVERSITY OF
MICHIGAN-DEARBORN: IS THE UNIVERSITY
PREVENTING SLIP AND FALL OR FALLING
FURTHER DOWN THE ESTABLISHMENT CLAUSE’S
SLIPPERY SLOPE?

*Lindsey Bosch**

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* Juris Doctor Candidate 2009, Michigan State University College of Law. The author would like to thank Professor Frank Ravitch and the *Michigan State Law Review* for their assistance and helpful comments in the writing and publishing of this Article.

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INTRODUCTION

Imagine attending a public university and encountering incense aromas permeating the air, wafting from burners specially designed for Buddhist students, strolling past a meditation room constructed for Maharishi followers, squeezing past the line of Catholic students outside newly installed confessionals, and viewing Muslim students performing one of their five daily ceremonial washings, using specially installed footbaths in the school bathrooms.¹ Although many universities tout the notion of support for a religiously diverse student body, they do not go to such great lengths to assist students' religions because the First Amendment prevents governmental entities from promulgating a "law respecting an establishment of religion, or prohibiting the free exercise thereof."²

But some universities have ignored the First Amendment's negative rights,³ particularly in the context of the Free Exercise Clause, and have chosen to replace them with positive rights, as if the Constitution demands Government to overtly support particular religions. For instance, in June of 2007, the University of Michigan-Dearborn announced plans to spend at

1. This ceremonial washing is called ablution or wudu, and it occurs before a Muslim offers his or her prayers to Allah. *See infra* Part II (discussing the religious importance of wudu and describing the precise way in which it is performed).

2. U.S. CONST. amend. I. *See generally* Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479 (2006) (providing background on the Constitution's religion clauses, specifically focusing on historical and textual interpretations of the interaction between the Establishment Clause and the Free Exercise Clause).

3. Negative rights are those rights that prevent federal government from interfering with its citizens lives; positive rights require a government to do something for its citizens. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864-68 (2001) (distinguishing between negative rights and positive rights and asserting that the Bill of Rights is negative in nature). For a case-specific example of a negative right, see *Meyer v. Nebraska*, 262 U.S. 390 (1923) (describing a child's negative right to education and a parent's negative right to raise and educate a child as that parent sees fit).

least an initial \$25,000 to install two footbaths to accommodate a Muslim footwashing ritual on its campus.⁴ When asked for its reasoning, the school cites safety and health as primary project objectives.⁵ Furthermore, the University advances its concerns for protecting bathroom infrastructure.⁶ Due to the heavy strain put upon the sinks during ritual footwashing, “the sinks [are] pulling away from walls.”⁷ To summarize its position, the University of Michigan-Dearborn says that its overall intent “is to provide for [its] students, employees, and visitors a safe and clean environment when they use [the University’s] restrooms”⁸ and the accommodation is a “reflection of [its] values of respect, tolerance, and safe accommodation of student needs.”⁹

Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion.¹⁰ Yet, Government may not actively support one particular religion without doing the same for all religious groups.¹¹ In recent months, many have spoken out against the footbaths, asserting that public institutions should not spend significant amounts of money to support any religion, for the Establishment Clause

4. The funding will be drawn from the school’s general fund, which consists of student fees that “contribute to campus infrastructure maintenance and renovation.” University of Michigan-Dearborn, *University of Michigan-Dearborn’s Position on Accommodating Student Needs*, <http://www.umd.umich.edu/accommodating-student-needs/> (last visited Mar. 3, 2009) [hereinafter *Accommodating Student Needs*]. The project includes the renovation of two unisex bathrooms. *Id.* One will take place in the University’s Fairlane Center; the other renovation will occur on the second floor of the school’s University Center. *Id.*

5. *Id.* For instance, a student at Minneapolis Community and Technical College recently injured herself while attempting to wash her feet in a sink, and other students have slipped on water that has pooled next to sinks. Tamar Lewin, *Universities Install Footbaths to Benefit Muslims, and Not Everyone is Pleased*, N.Y. TIMES, Aug. 7, 2007, at B1, available at <http://www.nytimes.com/2007/08/07/education/07muslim.html>.

6. Lewin, *supra* note 5.

7. *Id.*

8. *Accommodating Student Needs*, *supra* note 4.

9. *Id.*

10. *See infra* Section I.A (discussing free exercise rights).

11. *See, e.g.,* *Stone v. Graham*, 449 U.S. 39 (1981). In *Stone*, the Supreme Court invalidated a Kentucky statute that required all public school classrooms to post a copy of the Ten Commandments on their walls because the statute’s “pre-eminent purpose” was “plainly religious in nature.” *Id.* at 39-42. The Court asserted that it would not ignore the fact that the Ten Commandments were “undeniably a sacred text in the Jewish and Christian faiths.” *Id.* at 42. The Court also noted that the text did not serve any “educational function.” *Id.* at 42. Discounting that private money funded the display and emphasizing that the display did not serve an educational function, the Court said, “It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the ‘official support of the State . . . Government’ that the Establishment Clause prohibits.” *Id.* (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963)).

prohibits such action.¹² Responding to its opponents, school officials claim that because anyone may use the footbaths for a variety of purposes, the University is not favoring a particular group of people.¹³ Officials, however, seem unable to name a convincing list of groups other than Muslims that would utilize the footbaths.¹⁴ Additionally, the footbaths do not compare to other religious requests, such as a non-denominational prayer room, because the footbaths have to be specifically built, and maintained for a distinctive religious ritual.¹⁵ According to the chairman of the American Islamic Forum for Democracy, the Supreme Court has heard cases concerning “far less-obvious violations of [the] Establishment Clause.”¹⁶ He also conceded that “most American Muslims are currently . . . able to accommodate [their] own prayers and ablution to the spaces and facilities provided to all other faiths on public grounds.”¹⁷

Although no party has yet to file a lawsuit, opponents of the footbaths predict that courts could soon be flooded with claims alleging that instead of providing a neutral accommodation, the University has demonstrated affirmative support for a particular religion.¹⁸ These footbaths are unconstitutional because, when examining the Dearborn community, the specifics of the wudu ritual, and the school’s underlying purpose, an objective observer would conclude that the University has supported one religion.

Part I of this Comment analyzes First Amendment progeny in order to predict how the Supreme Court would decide this issue.¹⁹ Specifically, Part

12. See Lewin, *supra* note 5, at B1 (informing readers that the University’s action has influenced approximately 3,000 e-mails and 600 phone calls, voicing disapproval with the footbaths, to the University’s President and legislators). According to the school’s Admissions Office, “parents have called the office saying that they’re not going to send their children to UM-D as planned due to the decision to install foot-washing stations.” Jessica Carreras, *UM-Dearborn Awash in Foot Bath Controversy*, MICH. J., at 1.

13. Carreras, *supra* note 12.

14. *Id.*

15. Andrea Billups, *School to Provide Muslim Students with Footbaths*, WASH. TIMES, Aug. 29, 2007, available at <http://www.washingtontimes.com/news/2007/aug/29/school-to-provide32muslim-students32with-foot-bath>; see *infra* Section III.B (discussing non-denominational chapels within the accommodation context).

16. Billups, *supra* note 15.

17. *Id.*

18. *Id.* (“[T]he foot bath marks the start down ‘a slippery slope of preferential treatment of one religion over another.’ which . . . the First Amendment was established to prevent.” “Every other faith group on campus should be demanding that they be provided equal funding and space—which basically demonstrates how outrageous these accommodations are.”). See also The Big Story with John Gibson, Fox News television broadcast July 31, 2007, available at <http://www.foxnews.com/story/0,2933,291569,00.html> (“[Installing foot-washing stations is] a very dangerous road to start on. If people start to include the demands of Muslim students to change a building in one way, you can rest assured there will be Christian, Jewish, Muslim, Scientology—all kinds of other students who will want the same kind of accommodations.”).

19. See *infra* Part I.

I provides an overview of four main topics: the Free Exercise Clause, religious accommodation in public schools, equal access to school facilities, and the Establishment Clause. Each topic's examination relies on a fact-intensive case inquiry. Part II analyzes contextual facts that may be important in determining the footbaths' constitutionality.²⁰ This Part focuses on Dearborn, its demographics, and wudu.²¹ Finally, Part III examines whether the footbaths are unconstitutional.²² The analysis in Part III is based on analogizing and distinguishing the footbath accommodation to and from the facts and inquiries discussed in past cases. The footbaths cannot survive any First Amendment claim, but the ultimate answer to the footbaths' constitutionality lies within the Establishment Clause.

I. POOLING FIRST AMENDMENT PRECEDENT

At the very core of the accommodation debate is the meaning of the First Amendment's religion clauses.²³ Implementing a variety of tests and emphasizing different facts, courts have struggled to construct a clear rule regarding the interaction of the Free Exercise Clause and the Establishment Clause, especially regarding the placement of religious structures on public premises.²⁴ The Supreme Court pronounced that "[t]he establishment of the religion clause of the First Amendment means . . . [n]either a state nor the Federal Government can set up a church. Neither can it pass laws which aid one religion, aid all religions, or prefer one religion over another."²⁵ The Court has also emphasized that the Federal Government cannot "participate

20. See *infra* Part II.

21. See *infra* Section II.B.

22. See *infra* Part III.

23. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). See also Greenawalt, *supra* note 2 (describing the two clauses in detail).

24. The Court has taken a variety of positions on the subject of religious structures on public premises and many of these decisions do not make sense in light of precedent. Compare *Lynch v. Donnelly*, 465 U.S. 688 (1963) (holding that a crèche display in a public courthouse was constitutional) with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (concluding that a crèche in a public courthouse was unconstitutional). See also *McCreary County v. ACLU*, 545 U.S. 844 (2005) (holding that a Ten Commandments display was not permissible in a courthouse); *Van Orden v. Perry*, 545 U.S. 677 (2005) (deciding that a Ten Commandments display was permissible); *Zorach v. Clauson*, 343 U.S. 306 (1952) (concluding that releasing students to receive religious instruction was constitutional); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that releasing students to receive religious instruction was unconstitutional).

25. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that although New Jersey could not provide "tax-raised funds" to support a particular church, it could promote a general program that paid the bus fares of all students, whether attending a public or parochial school).

in the affairs of any religious organizations or groups and vice versa.”²⁶ However, Government cannot burden a person’s religion or forbid religious activities from occurring on certain parts of a school’s campus either.²⁷ And in some instances, Government may actually assist its citizens’ religious requests.²⁸

A. The Free Exercise Clause: Freedom to Believe, Not Liberty to Act

To analyze the footbath situation, it is important to gain a clear understanding of the Free Exercise Clause, because footbath supporters suggest that this clause aids their cause. *Sherbert v. Verner* demonstrated that there is a substantial difference between promoting and burdening a particular religion.²⁹ In that case, the Court struck down a statute which denied unemployment benefits to a Seventh-day Adventist who was dismissed from her job for refusing to work on Saturdays.³⁰ The majority noted that its decision did not foster “the ‘establishment’ of the Seventh-day Adventist religion,” for its conclusion merely reflected the government’s obligation of neutrality in the face of religious differences, and it did not represent the involvement of religion and secular institutions.³¹ In other words, the Court recognized that the statute clearly burdened Seventh-day Adventists because the statute specifically discriminated against them by not providing them with unemployment benefits. At the same time, the Court only demanded that Seventh-day Adventists be treated in the same manner as those who received unemployment benefits when dismissed from their jobs. Justice Douglas concurred in the holding, emphasizing the importance of understanding that just because the government cannot compel an individual to abandon his religious beliefs does not mean that the government has a duty to aid an individual so that he may exercise those beliefs better.³²

26. *Id.* at 16.

27. *See infra* Sections I.A, I.C.

28. *See infra* Section I.B.

29. *Sherbert v. Verner*, 374 U.S. 398, 398 (1963) (holding that a state may not construe unemployment eligibility provisions so as to require a worker to abandon his religious convictions).

30. *Id.* at 399-400. The Court recognized that the Seventh-day Adventist searched for employment elsewhere but could not find any that would not interfere with her religion; she also “expressed a willingness to accept employment at other mills, or even in another industry,” as long as she was not required to work on Saturdays. *Id.* at 399 n.2.

31. *Id.* at 409.

32. *Id.* at 412 (Douglas, J., concurring) (“[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”).

Wisconsin v. Yoder also demonstrates how the government can violate the Free Exercise Clause.³³ In that case, Amish parents sued the State of Wisconsin because they were forced to pay fines for not sending their children to high school.³⁴ The Supreme Court examined the compulsory attendance law's impact on the Amish religion and decided that it was "severe" and "inescapable," because the law forced the Amish families "under threat of criminal sanction" to act contrary to the very core of their religious beliefs.³⁵ The Court emphasized that accommodating the Amish people's religious beliefs could not be characterized as active sponsorship because "[t]he purpose and effect of such an exemption [were] not to support, favor, advance, or assist the Amish"³⁶

Sherbert and *Yoder* show how courts analyze situations when the government wrongly interferes with or burdens an individual's free exercise right.³⁷ But in 1990, the Court handed down a significant decision that weakened religious groups' arguments using the Free Exercise Clause.³⁸ In *Employment Division v. Smith*, the Supreme Court permitted Oregon to deny unemployment benefits to two individuals who ingested peyote, a drug used in Native American ceremonies.³⁹ Although the respondents argued

33. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down a state law that required children to attend school until they were sixteen years old, because the statute interfered with Amish beliefs, and the statute impinged on the fundamental right for parents to raise their children as they see fit).

34. *Id.* at 208. The Amish believed that sending their children to high school threatened their beliefs because they did not want their children subjected to secular society's "worldly" influences. *Id.* at 211-12. By sending their children to high school, the Amish faced possible admonition from their communities and a threat to their salvation. *Id.* at 209. The Amish specifically believed that the values taught in public high schools were too individual-based, not placing enough emphasis on "informal learning-through-doing." *Id.* at 211.

35. *Id.* at 218.

36. *Id.* at 234-35 n.22. The Court also relied on its *Sherbert* analysis, describing the "governmental obligation of *neutrality* in the face of religious differences." *Id.* at 235 n.22 (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (emphasis added)).

37. The Court rarely invalidates laws of general applicability, unless the laws deny benefits to a claimant who refuses to work on a day that conflicts with his or her religion or when a law interferes with a free exercise right and a fundamental constitutional right at issue. Joani S. Harrison, *Constitutional Law—First Amendment—Government Action Does Not Violate Free Exercise Clause of First Amendment When It Neither Coerces Action Contrary to Religious Beliefs Nor Prohibits Access to Practice Those Beliefs, But Merely Imposes an Incidental Burden on Religious Practice*, 20 ST. MARY'S L.J. 427, 427-36 (1989).

38. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1989) (holding that laws of general applicability are not invalidated by burdening religious acts, because to do so would invalidate many laws). *But see Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating statute that *intentionally* burdened a church's religious practices of animal sacrifice).

39. 494 U.S. at 872 (1990). Peyote is an ancient tradition that plays a "major sacramental role" among several Native American tribes; the gathering of peyote, its distribution,

that the peyote ban violated their free exercise of religion, the Court disagreed and cited several instances in which it upheld actions that seemingly burdened an individual's religion.⁴⁰ In its analysis, the majority emphasized that when determining a statute's legality, justices should not determine how important a particular religious action or tradition may be to one's religion; instead, a statute that is generally applicable must be applied across the board, without focus on how the law may affect a *particular* religion.⁴¹ In her concurrence, Justice O'Connor asserted that just because one's par-

and its ingestion are all important rituals. RICHARD EVANS SCHULTES & ALBERT HOFFMAN, *PLANTS OF THE GODS—THEIR SACRED, HEALING, AND HALLUCINOGENIC POWERS* (1992), available at <http://peyote.org>. Despite the central use of peyote in Native American worship, the Court held that the statute declaring its use illegal did not violate the First Amendment's guarantee of religious freedom. *Smith*, 494 U.S. at 890. See also Leslie L. Dollen, *The Free Exercise Clause Redefined: The Eradication of Religious Liberties in Employment Div., Dept. of Human Res. of Oregon v. Smith*, 12 *HAMLIN J. PUB. L. & POL'Y* 143, 144 (1991) (articulating that the Free Exercise Clause no longer provides the protection to religion that it did before the Court decided *Smith*).

40. *Smith*, 494 U.S. at 872. In *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944), the Court held that a mother could not use her children to distribute religious literature in the street. Further, in *Braunfeld v. Brown*, 366 U.S. 599, 599 (1961), the Court upheld Sunday closing laws, even though the laws burdened those whose religion required them to work on days other than Sunday. The Court has also asserted that one's free exercise right is not violated "by conscripting persons who opposed a particular war on grounds of conscience and religion." *Gillette v. United States*, 401 U.S. 437, 461 (1971).

41. *Smith*, 494 U.S. at 887. "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)). See also *Locke v. Davey*, 540 U.S. 712 (2004). In *Locke v. Davey*, the state of Washington did not violate the Free Exercise Clause when it denied a state sponsored scholarship to students pursuing a degree in devotional theology. *Id.* at 715. The student met the scholarship's requirements, but the state denied him the scholarship because he wanted to pursue a degree in business management and administration and pastoral ministries. Respondent claimed that the program was unconstitutional because it was not "facially neutral with respect to religion." *Id.* at 720. The Court articulated the issue as "whether Washington . . . can deny . . . such funding without violating the Free Exercise Clause." *Id.* at 719. It characterized the scholarship as mild "disfavor" and not hostility towards religion, because it did not prohibit the actual exercise of one's religion or put a substantial burden on a person's religion. *Id.* at 720. Because the State's interest in not funding religious education was substantial, and the burden placed on students who wished to study theology was minor, the Court ultimately held that the ban was constitutional. *Id.* at 725. In this case, the Court also discussed its famous "play in the joints" theory, recognizing that the Free Exercise Clause and the Establishment Clause are "frequently in tension," but "there is room for play in the joints' between them." *Id.* at 718-19 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970)). Justice Scalia feared that the Court's decision created a slippery slope and asked, "What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? . . . [R]ecall that France . . . proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today." *Id.* at 734 (Scalia, J., dissenting).

ticular religious conduct is burdened does not mean that a member of the religion has an absolute right to engage in the conduct.⁴² The Free Exercise Clause's underlying theme is that it grants citizens the freedom to believe, not the liberty to act.

B. The Crumbling Wall of Separation between Church and State

Although government is not obligated to aid its citizens' religious practices, *Everson v. Ewing Township* demonstrates that government may provide *reasonable* religious accommodations for its citizens.⁴³ In that case, the Court examined a statute that authorized reimbursement payments to parents who sent their children to parochial schools.⁴⁴ Those opposing the program asserted that such payments were unconstitutional because the reimbursements resulted in a mixture of State and religion.⁴⁵

The Court began its analysis with Thomas Jefferson's famous words that "the clause against establishment of religion was by law intended to erect 'a wall of separation between Church and State.'"⁴⁶ Despite its rhetoric against state involvement with religion, the majority held that the State could not yoke its citizens' free exercise of religion.⁴⁷ In conducting a reasonable accommodation analysis, the justices narrowed their focus and concentrated on the program's neutrality.⁴⁸ They first conceded that the payment of parochial school students' bus fares aided the children in attending their "church schools" but then announced that the state statute was merely a general program⁴⁹ that applied to citizens equally, regardless of their religious beliefs.⁵⁰ Before ending the opinion, Justice Black emphasized that the wall between church and state "must be kept high and impregnable" and that the Court would "not approve the slightest breach."⁵¹

42. *Smith*, 494 U.S. at 891-96 (O'Connor, J., concurring).

43. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (5-4 decision) (holding that reasonable accommodations are constitutional).

44. *Id.*

45. *Id.*

46. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

47. *Everson*, 330 U.S. at 1. The analysis in this case is a prime example of the "play in the joints" argument, where the Court acknowledges that the two religion clauses are in tension and attempts to reconcile them. *Locke v. Davey*, 540 U.S. 712, 718-19 (2004).

48. *Everson*, 330 U.S. at 18.

49. The Court characterized the program as one that merely helped parents transport their children securely and efficiently to school. *Id.*

50. *Id.* In fact, the Court compared the reimbursement program to general governmental provisions such as "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," all of which were granted to public *and* private schools. *Id.* at 17-18.

51. *Id.* at 18. Justice Rutledge, while first expressing his sympathy for parents who paid taxes for the benefit of public schools even though they sent their children to private schools, ultimately warned that the State's action "exactly fits the type of exaction and the

After deciding that, under some circumstances, accommodation was constitutional, the Court decided two cases involving school and religious accommodations.⁵² These two “release time” cases are seemingly in conflict with one another—they demonstrate that the Court has not reached an accommodation analysis resulting in certainty.⁵³ In *McCollum v. Board of Education of School District No. 71*, a public school used some of its classrooms to promote religious instruction for those requesting it.⁵⁴ Such religious accommodation was unconstitutional because it involved state promotion of a particular religion. Rather than remaining entirely neutral, the school opened its doors for religious instruction and mandated that those released from regular school work attend the religious instruction.⁵⁵ In the second case, *Zorach v. Clauson*, the school, rather than promoting religious instruction within its classrooms, provided students with “release time,” so that students could receive religious instruction outside of the school setting.⁵⁶ The Supreme Court deemed such activity constitutional because the public schools merely accommodated their schedules to support *outside* religious instruction.⁵⁷ The holdings of these two cases may puzzle their readers because the only real difference between them is that in *McCollum*, the religious promotion took place on school grounds, while in *Zorach*, the religious teaching occurred off-campus.⁵⁸ These holdings demonstrate that

kind of evil at which Madison and Jefferson struck” and admonished the other justices of the impossibility of drawing rational lines between types of government payments to benefit religious institutions. *Id.* at 46-49 (Rutledge, J., dissenting). The dissenting justices predicted that *Everson* was not simply a “little case over bus fares” and warned the Court that this case could be the beginning of an improper meshing of state and religion. *Id.* at 57.

52. See *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

53. A “release time” case is one in which school officials allow students to forego secular teachings for a particular amount of time in order to receive religious teachings. James E. Zucker, *Better a Catholic than a Communist: Reexamining McCollum v. Board of Education and Zorach v. Clauson*, 93 VA. L. REV. 2069 (2007) (attempting to reconcile the differences between *Zorach* and *McCollum*).

54. *McCollum*, 333 U.S. at 209-10 (8-1 decision) (concluding that release time was unconstitutional, because it promoted the Protestant, Catholic, and Jewish religions above other religions). The school allowed the students to forego secular teachings for thirty to forty-five minutes to receive instruction from a Protestant pastor, a Catholic priest, or a Jewish Rabbi. *Id.* at 208-09. The teaching did not cost the school any money, and students who chose not to engage in the religious learning went to a different area of the school for secular studies. *Id.* at 209.

55. *Id.* at 232.

56. *Zorach*, 343 U.S. at 308 (6-3 decision) (holding that release time was constitutional). However, a reader cannot ignore that the school was not entirely isolated from their students’ religious instruction. *Id.* at 307. Churches provided the schools with weekly reports, notifying the schools of the children who had been released but who had not attended their religious institutions. *Id.*

57. *Id.* at 315.

58. Zucker, *supra* note 53, at 2069.

the Court has not yet provided schools with a workable accommodation analysis, except that religious accommodations that take place off-campus are more likely to be constitutional than those accommodations that occur on school property, as long as the aid is neutral and does not promote one specific religion.⁵⁹

C. Equal Access Equals Institutional Neutrality Among School Groups

Religious groups that request a particular structure or benefit often cite the use of non-denominational chapels on public university grounds to support their wishes. However, a distinct difference exists between constructing a structure that benefits a variety of religions and a structure that only advantages one religion. The Delaware Supreme Court emphasized this difference when it decided a case involving a Free Exercise claim concerning a state university and a religious worship service request.⁶⁰ Religious worship services in a dormitory's common rooms did not violate the Establishment Clause because the common area was constructed with a neutral purpose and was available to a variety of groups, both religious and non-religious.⁶¹ Prohibiting a religious group from conducting religious exercises was a burden on one's Free Exercise right to practice his or her religion. The court reminded the University that *Everson*⁶² permitted neutral accommodation of religion while *McCollum*⁶³ prohibited promotion and advancement of religion.⁶⁴ As long as the University did not construct a special room for a religious group, religious activity could survive the First Amendment challenge, unless the University could show a "substantial interest" sufficient to sustain its acts.⁶⁵

59. *Id.*

60. *Keegan v. Univ. of Del.*, 349 A.2d 14, 16, 19 (Del. 1975) (deciding that a university could not forbid a religious group from using dormitory common areas for religious purposes). University students attempted to conduct religious services in a dormitory's common areas, but school officials contended that the Establishment Clause required the ban of all religious worship services from campus facilities. *Id.*

61. *Id.* at 16 (advancing the idea that "neutrality is the safe harbor in which to avoid First Amendment violations").

62. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that contributing funds to student transportation to parochial schools was constitutional). *See supra* Section I.B.

63. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that allowing children to receive religious instruction on school grounds was unconstitutional). *See supra* Section I.B.

64. *Keegan*, 349 A.2d at 16.

65. *Id.* at 17 (providing example of raising and supporting armies as the kind of "substantial interest" sufficient to sustain a governmental intrusion on a person's free exercise right). The United States Supreme Court has examined an equal access claim similar to the one in *Keegan*. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a court must narrowly distinguish between a religious organization's enjoyment of "mere[] 'incidental' benefits" from "primary advancement of religion"). *Id.* at 273. In *Widmar*, due to an en-

Equal access cases also encompass a considerable free speech element. That is, universities and other public institutions must be particularly careful not to prohibit a person's right to speak freely, because the Court will subject the regulations to strict scrutiny.⁶⁶ An equal access policy is not incompatible with the Establishment Clause, because it is a policy founded on generality and neutrality that does not distinguish among religions or favor religion over non-religion. In fact, equal access policies actually prevent greater entanglement between state and religion because universities are not forced to monitor and exclude religious speech.⁶⁷

D. Maintaining the Barrier between Church and State: Four Establishment Clause Tests

When deciding whether school activity violates the Establishment Clause, courts utilize an array of different tests including a historical analysis, the coercion test, the *Lemon* test, and the Endorsement Test. This Part explains these four tests and demonstrates that each accentuates different facts and generates its own unique reasoning.

1. *An Historical Analysis: A Retrospective Look at this Nation's Religious Customs*

If an historical background supports a particular accommodation or act, and the accommodation has morphed into its current state without religious motivations, courts will most likely uphold it.⁶⁸ For example, in *McGowan v. Maryland*, petitioners argued that Sunday closing laws were unconstitutional because such laws facilitated and encouraged church atten-

acted regulation that prohibited the use of university facilities for "purposes of religious worship or religious teaching," the University of Missouri informed a religious group that it could no longer use university facilities for prayer, hymn singing, Bible readings, and religious discussions. *Id.* at 265. The Christian group sued the University, claiming that the University's action denied them their Free Exercise rights, and the Court agreed with the group's contentions, noting that the forum was equally available to a "broad range" of speakers, both religious and non-religious, which was an important indicator of secular effect. *Id.* at 277. The Court also distinguished a university from an elementary school, commenting that university students are not as impressionable as younger students and, thus, were probably able to distinguish between overt support for a religion versus a neutral stance towards all religions. *Id.* at 274.

66. *Id.* at 277-79 (requiring that a regulation serve a compelling state interest that is narrowly drawn to achieve a particular end).

67. *Widmar*, 454 U.S. at 271.

68. See *Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (holding that a Ten Commandments display on a state capitol's grounds was constitutional); *McGowan v. Maryland*, 366 U.S. 420, 420 (1961) (upholding Sunday closing laws); *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) (concluding that a resolution ordering the conversion of a hearing room in a state capitol building into a prayer room was constitutional).

dance, thereby establishing a particular religion.⁶⁹ The Court began its analysis by examining the history of the statute in question and decided that although religious forces originally motivated the statutes' enactment, the statutes had lost "some of their . . . religious flavor."⁷⁰ In the Justices' eyes, secular justifications⁷¹ explained the reasoning behind the Sunday closing laws, and virtually every state in the country had some type of comparable legislation—to promote the health, safety, and general well-being of state citizens.⁷²

In a recent, divided opinion, the Court applied the historical analysis to determine the constitutionality of a religious structure erected on state grounds.⁷³ A plurality concluded that a monument inscribed with the Ten Commandments on Texas state capitol grounds did not violate the First Amendment's Establishment Clause.⁷⁴ A historical and contextual analysis played a large role in case's outcome. For instance, the Court affirmed the courts below, which stressed that the monument was only one of seventeen monuments and twenty-one historical markers on the capitol grounds, so a person "mindful of the history, purpose, and context would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion."⁷⁵ This display was passive because historical value supported it, the county placed it amongst many other non-religious structures, and people did not directly encounter the monument on a daily basis.⁷⁶ Although courts do not employ the historical test on a regular basis, they may utilize this approach when faced with a structure or policy that has occupied a regular place in this Nation's history.

69. 366 U.S. at 429-31. Courts may also determine that a government's particular support for a religion is constitutional if it is consistent with the Founding Fathers' original practices. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that the Nebraska state legislature's practice of opening each legislative day with a chaplain-led prayer did not violate the Establishment Clause because the practice was consistent with a strong and unique history of chaplain-led prayer, a practice that the Constitution's drafters did not see as a threat to the Establishment Clause).

70. *McGowan*, 366 U.S. at 433-34.

71. *Id.* at 434 (advancing the claim that such "secular justifications" included "making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come").

72. *Id.* at 435, 445.

73. *Van Orden*, 545 U.S. at 677.

74. *Id.* at 678.

75. *Id.* at 682.

76. *Id.* at 690-91. In *Van Orden*, the justices also implemented the Endorsement Test. *See infra* Subsection I.D.4.

2. *The Coercion Test: Protecting Religious Choice*

The Supreme Court has also confirmed that a public educational institution cannot apply “coercive pressure upon religious minorities to conform” to a particular type of religion.⁷⁷ In *Lee v. Weisman*, a middle school student and her father brought suit against a school when it invited a rabbi to pray at Weisman’s graduation ceremony.⁷⁸ Although the prayer was non-sectarian, the Court held that it was unconstitutional because students were forced to listen to it, even if they did not have to agree with its message.⁷⁹ The Court emphasized that virtually every student would attend the ceremony, and an essential element of Establishment Clause jurisprudence is that a State may not engage in the composition of any official prayers for recitation at an official government program.⁸⁰ The Court also warned that it did not matter if the intrusion on others was merely *de minimis*; it was enough that the prayer was from one particular religious tradition—the Judeo-Christian tradition—and that the prayer could cause confusion, embarrassment, and anger among students that were not a part of this religious tradition.⁸¹

77. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that non-denominational prayer at a school graduation ceremony was unconstitutional, because it failed the coercion test). The Court twice noted that “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Id.* at 605 n.6, 619 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

78. *Id.* at 580-81, 584.

79. *Id.* at 599. Cf. *Marsh v. Chambers*, 463 U.S. 783 (1983) (recognizing that the atmosphere in the state legislature was different than the school setting and therefore not conducive to a coercion test analysis, because the state representatives were free to disregard the opening prayers).

80. *Lee*, 505 U.S. at 587 (asserting that just because government may accommodate a person’s free exercise of religion “does not supersede the fundamental limitations imposed by the Establishment Clause”).

81. *Id.* at 589-94. Recognizing that American schools often emphasize the Judeo-Christian religion and traditions, John Hartenstein wrote a piece describing the coercive effects that school Christmas celebrations have on elementary students, specifically arguing that to the immigrant, the Establishment Clause means freedom to develop his or her own “religious identity and to share a community and identity with one’s family and one’s people.” John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, 80 CAL. L. REV. 981, 989, 1015, 1023-24 (1992) (arguing that observing the Christmas season in the nation’s elementary schools is unconstitutional under the coercion theory because children who are not of the Judeo-Christian tradition may feel ostracized and confused by in-class Christmas activities and the holiday breaks that fall within the Christmas season). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (arguing that a student-initiated school prayer has coercive elements because students who did not agree with the football prayers may feel compelled to promote them or remain silent for fear of being chastised by their peers).

3. *The Lemon Test: A Three-Pronged Approach to Analyzing State and Religion*

Realizing that Establishment Clause analyses had become too soft, the justices in *Abington v. Schempp*⁸² began to develop the *Lemon*⁸³ test. The Court declared unconstitutional a statute mandating Bible readings before the commencement of each school day.⁸⁴ The statute's effects dominated the analysis.⁸⁵ For instance, the justices emphasized testimony that non-conforming students would feel uncomfortable in the school atmosphere and may face chastisement by their fellow classmates for not engaging in the religious activity—coercion was the statute's overall effect.⁸⁶ The Court also commented that small religious advancements may soon become “raging torrent[s].”⁸⁷ Due to this potential danger, the Court realized that it was important to quash small religious advancements before they encouraged more, similar, or greater governmental religious advancements.⁸⁸ In *Lemon v. Kurtzman*, the Court delineated three factors that courts could use to analyze Establishment Clause claims.⁸⁹ The *Lemon* test embodied the purpose, effects, and neutrality elements from *Abington* and established the following three categories: (1) the state action must have “a secular legislative purpose,” (2) the state action’s “principal or primary effect must . . . neither advance[] nor inhibit[] religion,” and (3) the state action must not foster “excessive government entanglement with religion.”⁹⁰

The activity in question must satisfy *each* of the three prongs. *Stone v. Graham* further clarified the meaning of a “secular legislative purpose” and invalidated a Kentucky statute that required each public school classroom to

82. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (striking down a statute that required Bible readings before the beginning of each school day).

83. *See infra* note 89 and accompanying text.

84. *Schempp*, 374 U.S. at 203. The statute read, “[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.” *Id.* at 205.

85. *Id.*

86. *Id.* at 208, 223.

87. *Id.* at 225 (majority opinion).

88. In his concurrence, Justice Douglas asserted that the most recognizable way of unconstitutionally supporting a religion was to finance it. *Id.* at 229 (Douglas, J., concurring). He was emphatic that such contributions, even the most minor ones, cannot be made without violating the Establishment Clause. *Id.* at 230.

89. *Lemon v. Kurtzman*, 403 U.S. 602 (1972) (invalidating two statutes that provided financial aid to religious-related elementary and secondary schools). The Pennsylvania statute provided reimbursement payments to non-public school teachers for the cost of teacher salaries, textbooks, and other materials that were secular in nature. *Id.* at 610-11. Under the Rhode Island statute, the State paid nonpublic school teachers a supplement of fifteen percent of their annual salary. *Id.* at 605-08.

90. *Id.* at 612-13.

post a copy of the Ten Commandments, purchased with private contributions, on its walls.⁹¹ Kentucky argued that it fulfilled *Lemon*'s first prong because its purpose was to recognize the historical importance that the Ten Commandments have had in the development of the American legal system.⁹² But the *Stone* Court was not fooled by Kentucky's alleged secular purpose and concluded that an "'avowed' secular purpose" was not enough to avoid conflict with the Establishment Clause.⁹³ The Court urged the State to recognize that the primary purpose for posting the Ten Commandments with the public schools was "*plainly* religious in nature."⁹⁴ Further, the Court declared that even though the commandments were financed through private funds, the "mere posting of the copies under the auspices of the legislature provides 'the official support of the State . . . Government that the Establishment Clause prohibits.'"⁹⁵

Lynch v. Donnelly focused on *Lemon*'s first and second prongs.⁹⁶ When a town put together a Christmas display comprising secular figurines and a nativity scene, townspeople sued, claiming that the nativity scene dis-

91. *Stone v. Graham*, 449 U.S. 39, 40 (1981) (holding that a statute which required postings of the Ten Commandments in school classrooms was unconstitutional, because the statute did not have a secular legislative purpose).

92. *Id.*

93. *Id.* at 41.

94. *Id.* (emphasis added). For another discussion about determining whether a stated purpose is legitimate or "avowed," see *ACLU v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982). The Eleventh Circuit analyzed the constitutionality of a lighted cross on state property and implemented the *Lemon* test. *Id.* A private corporation sought approval for building a 26 by 35 foot structure in a Georgia state park that, when lit, formed the shape of either a Christmas tree or a cross. *Id.* at 1381. The Chamber announced full responsibility for the structure's fundraising and construction and emphasized that it wanted to have the structure ready for an Easter sunrise service dedication. *Id.* at 1382. Without hesitation, the Court declared the structure unconstitutional due to the missing link of the government's ability to assert a plausible secular purpose for the cross. *Id.* at 1390. To determine the chamber's true purpose, the court focused on the "religious stirrings" that led to the structure's construction. *Id.* at 1391. The Easter deadline and the inspirational statements contained in press releases served as evidence that no secular purpose for the structure existed. *Id.*

95. *Stone*, 449 U.S. at 42 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)). Justice Rehnquist dissented, asserting that the Establishment Clause does not require the public sector to be insulated from all things which may have a religious significance or origin. *Id.* at 45-46 (Rehnquist, J., dissenting). He further emphasized the legitimacy of the Kentucky statute, claiming that it is "part of preparation for a worldly life to know the roles that religion and the religious have played in the tragic story of mankind." *Id.* at 46 (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235-236 (1948) (Jackson, J., concurring)).

96. *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (5-4 decision) (articulating that a crèche display was constitutional, because it passed the *Lemon* test). *But see County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (5-4 decision) (holding that, under the Endorsement Test, a crèche display in a prominent place of a city courthouse was unconstitutional).

play was unconstitutional.⁹⁷ Although the district court determined that the City had “‘tried to endorse and promulgate religious beliefs,’” the Supreme Court, in a plurality opinion, reversed, focusing on the nativity scene in the *context* of the Christmas season as opposed to a permanent structure solely advancing the Christian belief.⁹⁸ The Court declared that it would not apply a *per se* rule because an Establishment Clause analysis depended on the particular variables of each case.⁹⁹ The Court said that the *Lemon* test did not require an “‘exclusively secular’ objective[,]” and because the nativity scene was placed among various other Christmas symbols, the City’s purpose was not solely motivated by religious considerations.¹⁰⁰ Instead, the display sent the message that the City was celebrating Christmas’s historical roots and traditions.¹⁰¹

Most cases that implement the *Lemon* test do not discuss the test’s third prong because the State’s activity usually fails one of the first two prongs.¹⁰² However, *Lemon* itself provides a useful framework for determining whether there has been excessive entanglement between the State

97. *Lynch*, 465 U.S. at 668. At the time of the suit, the display was only valued at two-hundred dollars; furthermore, the town had not spent any money on the display’s maintenance during the ten years prior to the case. *Id.* at 671. The test implemented in this case is also referred to as the “two plastic reindeer test,” because the town’s action was only deemed constitutional since the crèche was surrounded with plastic Christmas figurines, such as a Santa and reindeer. Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 635, 646 (1995) (arguing that the *Lemon* test should be a fact-intensive inquiry, specifically focusing on the state’s subsidization of the religious message and concluding that the greater the chance of subsidization, the stricter the court’s scrutiny of both purpose and effect should be).

98. *Lynch*, 465 U.S. at 672.

99. *Id.* at 678.

100. *Id.* at 680-81 & n.6.

101. *Id.* at 680. Specifically, the Court stressed that the display was “passive” and “engender[ed] a friendly community spirit of good will in keeping with the season.” *Id.* at 685. However, the dissenters recognized that the case was not as simple as the majority characterized it. *Id.* at 696 (Brennan, J., dissenting). Instead, Justices Brennan, Marshall, Blackmun, and Stevens asserted that the case was difficult, because the Christmas holiday is so familiar and integral to so many American families. *Id.* For them, just because the holiday had become more secularized over the decades did not diminish that the holiday’s beginnings rested among the Judeo-Christian nations and that for Christians, the holiday was a day for celebrating the birth of Jesus Christ. *Id.* The dissenters articulated that, at a minimum, the display had to “be nondenominational and not serve to promote religion.” *Id.* at 700. Rather than analyzing the figures surrounding the crèche, the four dissenters examined the particular message that the crèche portrayed—the celebration of Jesus Christ’s birth. *Id.* at 706-08. By representing the crèche as a mere symbol of the holiday season, “the majority d[id] an injustice to the crèche and the message it manifests.” *Id.* at 726 (Blackmun, J., dissenting).

102. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1981); *ACLU v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982).

and a particular religion.¹⁰³ To determine whether Rhode Island and Pennsylvania programs fostered excessive entanglement with religion, the Court examined the specific beneficiary institutions, the type of the aid that the State provided, and the affiliation between the government and the religious authority.¹⁰⁴ Specifically, it highlighted the following factors: the benefited institutions sat near local parishes and were marked with “identifying religious symbols;” Rhode Island and Pennsylvania directly aided those institutions; and the aid could cause political divisiveness among church supporters and advocates for the separation of church and State.¹⁰⁵ The *Lemon* test reveals that even if a public institution tries to hide a policy behind a seemingly neutral purpose, that institution will not be able to avoid a court’s inquisition into that policy’s potential effects and entanglement with religion.

4. *The Endorsement Test: Examining Effects and Protecting Non-Adherents*

Justice O’Connor concurred in *Lynch* but considered the display’s *effects* more important than the City’s underlying purpose.¹⁰⁶ Her concurring opinion established the beginnings of the Endorsement Test, essentially a re-working of *Lemon*’s second prong.¹⁰⁷ This test asks whether, irrespective of the government’s actual purpose, the practice under review conveys a

103. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (declaring two statutes that provided aid to religious schools unconstitutional, because they failed the Court’s third prong).

104. *Id.* at 615.

105. *Id.* at 615-23.

106. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring) (emphasizing that the crèche did not communicate the city government’s intention to endorse Christian beliefs). Overall, the Endorsement Test is a greater indicator of the constitutionality of a state’s action because according to Maureen MacFarlane, when governments merely assert a secular purpose, courts tend to give deference to that purpose. Maureen A. MacFarlane, *A Constitutional Quandary: Closing Schools on Days with Religious Significance*, 18 ME. B. J. 208, 211 (2003) (arguing that the closing of a public school on a day that happens to be a holiday does not violate the Endorsement Test if “(i) there is no preference or endorsement for one religion over another; (ii) the closure is a benefit that is afforded to all students and employees; (iii) no religious observance is compelled; (iv) no affirmation of religious belief is required; and (v) any benefit to religion is incidental, indirect or remote”).

107. *Lynch*, 465 U.S. at 692. Some scholars argue that too much of *Lemon*’s uncertainty has been injected into the Endorsement Test. See, e.g., Rik P. Silverman, *Seeking a Sign from Above: How Supreme Court Uncertainty Hinders Public School Religion Policies*, 12 CORNELL J.L. & PUB POL’Y 473, 487 (2003) (arguing the uncertainty among these tests results in “a serious impediment to meaningful protection of religious freedom”); Megan E. Kleinfelder, *Good Friday, Just Another Spring Holiday?*, 69 U. CIN. L. REV. 329, 355 (2000) (advancing the proposition that decisions under the Establishment Clause will continue to be unpredictable and inconsistent until the Court “clarifies the relationship between the *Lemon* test and the [E]ndorsement test” and articulates a clear standard for burdens of proof and production in cases decided under these tests).

government's message of endorsement or disapproval of a particular religion.¹⁰⁸

Justice O'Connor continued to advance her Endorsement Test in *Wallace v. Jaffree*, a case in which the Court emphasized the lower court's opinion that a "state cannot participate in the advancement of religious activities through *any* guise."¹⁰⁹ The *Wallace* opinion declared that a daily period of silence in public schools for meditation or voluntary prayer was an endorsement of religion lacking any clear secular purpose.¹¹⁰ After analyzing the legislative purpose behind the mandatory meditation, the Justices concluded that a silence period conveyed a message of state promotion of prayer.¹¹¹ Because the State had not actually prohibited or impeded students from praying, there was no need to affirmatively accommodate school prayer.¹¹² In her examination, Justice O'Connor included a description of the "reasonable observer," considering "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."¹¹³ Justice O'Connor again focused on the *effects* rather than the purpose and warned that government endorsement "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."¹¹⁴

The Endorsement Test also determined the outcome in *Allegheny v. ACLU*, a case factually similar to *Lynch* but decided differently due to a

108. *Lynch*, 465 U.S. at 692-94. Because Christmas has "strong secular components and traditions," the display was limited in time, and there was no evidence of contact with church authorities concerning the display's content or design, the City was not endorsing any distinct religion. *Id.* at 692.

109. *Wallace v. Jaffree*, 472 U.S. 38, 48 n.30 (1984) (emphasis added). The unconstitutional activity consisted of the following: teachers recited prayers in their classrooms, and an Alabama statute "provided for a one-minute period of silence 'for meditation or voluntary prayer' at the commencement of each day's classes in the public elementary schools." *Id.* at 46 n.25. See also *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

110. 472 U.S. at 56.

111. *Id.* at 59; see also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 716 (1994) (O'Connor, J., concurring) (concluding that a statute which created a special school district for practitioners of a strict form of Judaism was unconstitutional, because one religious group cannot be singled out for preferential religious treatment); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that a school's policy of informing students that intelligent design is an alternative theory to Darwin's theory of evolution violates the Establishment Clause, because it endorses the Christian religion only).

112. *Wallace*, 472 U.S. at 59.

113. *Id.* at 76 (O'Connor, J., concurring).

114. *Id.* at 69 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1963)).

strong emphasis on context and the effects.¹¹⁵ In *Allegheny*, the majority declared that a temporary crèche violated the Establishment Clause, because nothing in the crèche's setting distracted from its religious message.¹¹⁶ The distinction between *Lynch* and *Allegheny* is that the nativity scene in *Allegheny* occupied its own space, whereas the nativity scene in *Lynch* shared the spotlight with plastic holiday decorations and Christmas banners.¹¹⁷ Rather than promoting Christmas as a winter holiday, the crèche, in its prominent setting, promoted Christmas as a Christian celebration.¹¹⁸

Throughout the 2000s, the Endorsement Test has gained even greater support, and the Supreme Court handed down a significant case, invalidating student-initiated prayer in a high school setting.¹¹⁹ In *Santa Fe v. Doe*, a school board adopted a policy that allowed students to lead and initiate prayers before football games.¹²⁰ The Court scrutinized the school's endorsement of the student-initiated and led prayers, warning that a state could not hide behind formally neutral criteria and remain oblivious to the *effects*

115. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

116. *Id.* at 598.

117. *Id.* at 573. In *Allegheny*, the crèche was placed in a prominent location of a city courthouse and lined with poinsettias, angels, and two large wreaths. *Id.* at 580-81. Secular decorations did share the crèche's spotlight. *Id.* See also *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 383 (9th Cir. 1996) (holding that a religious group could not constitutionally erect a menorah in a public park because a reasonable observer would identify the City as the menorah's sponsor and the Establishment Clause "bars the government from giving sectarian religious groups preferential access to public property").

118. *Allegheny*, 492 U.S. at 617-20. Under the same test, the Court concluded that the placement of a menorah outside the building did not endorse Judaism. *Id.* Although the Court acknowledged the menorah's religious nature, it held that, unlike the crèche, the menorah did *not* endorse any religion. *Id.* The justices first acknowledged and examined the menorah's history and described the origins of Hanukkah, the ritual which a menorah is said to represent. *Id.* at 582-86. Next they discussed the menorah's context, concentrating on the fact that the 18-foot structure was positioned to one side of a 45-foot Christmas tree along with a sign that saluted liberty. *Id.* at 617. Because the menorah was placed "in the shadow of the tree," rather than in its own predominantly central position, the Court identified the object as one that simply recognized Christmas as embodying a variety of different beliefs and traditions and cultural diversity. *Id.* One must not forget, however, that just because the Court allowed this combined display does not mean that the menorah by itself would have been constitutional; the Court admonished that a display of the menorah alone might have had the effect of endorsing a minority faith. *Id.* at 616. See generally Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1037 (2005) (asserting that the Court's approach of discussing historical relevance "demonstrates that there is an important difference between explaining the history of a religious object or discussing its role in ritual or theology and carefully considering what an object's theological or ritualistic role says about it").

119. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that student-led prayers provided before high school football games had the effect of endorsing religion).

120. *Id.* at 297-99. The purposes of the prayers were to "solemnize the event, [] promote good sportsmanship and student safety, and establish the appropriate environment for competition." *Id.* at 298 n.6.

of its actions.¹²¹ The majority stressed that the *perceived* endorsement of a message was established by factors beyond the policy's text.¹²² It reviewed the policy's history and considered whether the school's name or colors were displayed when the prayers were recited.¹²³ Specifically, the Court stressed that the high school's name was splashed across banners, a crowd full of school supporters filled the stands, and cheerleaders and band members were dressed in uniform, signaling the school's endorsement of the prayer.¹²⁴ In the high-school setting, an outsider would "unquestionably perceive the inevitable pregame prayer as stamped with [the] school's seal of approval" and "delivered with the approval of the school administration."¹²⁵

Even though the school district claimed that the underlying purposes of its student-initiated prayer were to encourage free expression of ideas and to promote good sportsmanship, the Court asserted that when the State affirmatively sponsored the practice of prayer, a practice unique to one religious group, it infringed upon a person's constitutional right to religious liberty.¹²⁶ Finally, the majority concluded that an inquiry into whether a school has advanced a particular religion includes judicial interpretation of the circumstances and social facts that surround a policy's enactment.¹²⁷ When deciding whether a particular school act or policy violates the Endorsement Test, and correspondingly the Establishment Clause, a court can review the school's history, community, the context in which the policy arose, and the make-up of the student body to determine the action's underlying effects.¹²⁸

121. *Id.* at 307 n.21 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)).

122. *Santa Fe*, 530 U.S. at 307.

123. *Id.* at 307-08.

124. *Id.* at 308.

125. *Id.*

126. *Id.* at 313.

127. *Id.* at 315 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1963)).

128. *See McCreary County v. ACLU*, 545 U.S. 844, 857 n.7 (2005) (exemplifying the Court's most recent interpretation of the Endorsement Test as applied to religious structures on public grounds and declaring a Ten Commandments display in a courthouse unconstitutional, because placing a religious code alongside various political or historical documents sends a message to the reasonable observer that the county considers one religious code "as being on a par with [the] nation's most cherished secular symbols and documents"). The Supreme Court explained that the basis for its analysis was governmental neutrality—both among different religions and between religion and non-religion. *Id.* at 680 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The Sixth Circuit has also utilized the Endorsement Test to analyze whether a particular structure violates the Establishment Clause. *See, e.g., Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002). When Kentucky passed a resolution to relocate a Ten Commandments display to a more prominent position where it would be part of a historical and cultural display, protestors filed a suit. *Id.* at 474-75. The court confirmed that an intention to promote a particular religion is clear "when the State enacts a law to

II. EXAMINING THE FOOTBATHS' CONTEXT: DEARBORN AND WUDU

As previous court decisions demonstrate, context is an important element for evaluating a case under the First Amendment's religion clauses. Analyzing a situation in its context aids a court in determining the true purpose behind a religious structure and the message that it may send to the reasonable objective observer. This Part discusses the important social and background facts that will influence the footbaths' constitutionality.

A. Dearborn, Michigan and its Islamic Culture

Many people incorrectly equate Islam with race by using the terms "Muslim" and "Arab" interchangeably, thereby assuming that all Muslims are of Arabic descent. For this reason, a distinction between the two terms is important. An Arab is defined as "a member of a Semitic people of the Arabian peninsula [in southwestern Asia]."¹²⁹ A Muslim is "an adherent of Islam."¹³⁰ To wit, the highest percentage of Muslims is actually of Southeastern Asian descent rather than Southwestern Asian descent.¹³¹

Although the first "wave" of Arab immigrants to Dearborn were mostly Christians trying to escape persecution in their home countries, the second "wave" consisted of mostly Muslim immigrants.¹³² Dearborn is sometimes called "America's Muslim capital."¹³³ This Arab-Muslim community has embraced its religion and roots. In fact, many of the city's signs are

serve a religious purpose, either through the promotion of religion in general or the advancement of a particular religious belief." *Id.* at 480. The court also recognized that a secular purpose is not satisfied by "the mere existence of some secular purpose, however dominated by religious purpose." *Id.* When analyzing the Ten Commandments display under this test, the court could not ignore the State's adoption of a display that emphasized a single religious influence to the exclusion of other religions, even though the State had stressed the historical importance of the Ten Commandments. *Id.* at 482. According to the court, the reasonable objective observer would not be able to observe a historical theme apart from the religious theme. *Id.* at 488.

129. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 58 (10th ed. 2000).

130. *Id.* at 765.

131. Public Broadcasting System, *Caught in the Crossfire*, http://www.pbs.org/itvs/caughtinthecrossfire/arab_americans.html (last visited Mar. 3, 2009) (informing readers that "there are more Muslims in Indonesia than in all Arab countries combined.").

132. ISLAM IN NORTH AMERICA 50 (Michael A. Koszegi & J. Gordon Melton eds., 1992) (describing the origins of Muslim communities in North America and focusing on the religious hardships that Muslim immigrants faced).

133. Patrick Belton, *In the Way of the Prophet: Ideologies and Institutions in Dearborn, Michigan, America's Muslim Capitol*, Oct. 2003, available at <http://americacity.org/magazine/article/in-the-way-of-the-prophet-ideologies-and-institutions-belton/> (last visited Mar. 3, 2009).

written in English and Arabic and more than a dozen mosques¹³⁴ serve the community. Since 1993, the public school cafeterias in the area no longer serve pork.¹³⁵ Some of its grade schools' student populations are more than ninety percent Muslim; approximately thirty-five percent of Dearborn's total student population is Muslim.¹³⁶ Dearborn's streets, particularly Warren Avenue, are lined with examples of a thriving Arab and Islamic culture. A visitor can sample a pastry at one of its many Arabic bakeries, including Yasmeen Bakery¹³⁷ or Masri Sweets.¹³⁸ In addition, visitors can browse the colorful Hijabs¹³⁹ at Al Huda. For an evening feast of tabouli, baba ganoush, and lamb, one can try the cuisine at one of Dearborn's many Arabic restaurants.¹⁴⁰ Visitors may also observe Dearborn's many Muslim residents responding to the call to prayer that is broadcast over the speakers of the City's numerous mosques. One of those mosques is part of the Islamic Center of America.¹⁴¹ This mosque is the largest one in the United States and "is visible from airplanes flying into Detroit."¹⁴² Imam Hassan Qazwini, one of the mosque's religious leaders, said that "[h]e was attracted to Michigan because of its large concentration of Muslims and now feels at home in . . . the 'American Middle East.'"¹⁴³ A visit to Dearborn's Arab American National Museum educates visitors about Arab American history and culture; the museum is committed "to dispel misconceptions about Arab Americans and other minorities."¹⁴⁴

134. For an interesting and detailed discussion of Dearborn's Shi'a mosques, their origin, and their congregations, see MUSLIM COMMUNITIES IN NORTH AMERICA, 337-55 (Yvonne Yazbeck Haddad & Jane Idleman Smith eds., 1994).

135. PAUL M. BARRETT, AMERICAN ISLAM 16-17 (2007) (introducing true stories of Muslim immigrants and their experiences and communities in the United States).

136. *School System In Michigan Plans to Serve Muslim Food*, N.Y. TIMES, Feb. 25, 2001, at 13.

137. Yasmeen Bakery, <http://www.yasmeenbakery.com> (last visited Mar. 3, 2009).

138. Masri Sweets, <http://www.masrisweets.com> (last visited Mar. 3, 2009).

139. A Hijab is a scarf or veil that many Muslim women use to cover their heads. STEVE PAAS, BELIEFS AND PRACTICES OF MUSLIMS 166 (2006).

140. For a partial listing of Dearborn's many Arabic restaurants, see Arabic Dearborn Dining, <http://www.txore.com/arabdining.html> (last visited Mar. 3, 2009).

141. Press Release, United States Embassy, Detroit Islamic Center Opens Largest Mosque in United States (June 30, 2005), available at <http://islamabad.usembassy.gov/pakistan/h05060301.html> [hereinafter Press Release, Largest Mosque]. This mosque is able to accommodate more than 3,000 people for prayers. *Id.* For information concerning the mission, history, prayer times, and events at the Islamic Center of America, visit Islamic Center of America, <http://www.icofa.com> (last visited Mar. 3, 2009).

142. Press Release, Largest Mosque, *supra* note 141.

143. *Id.* Qazwini's goals are commendable as he seeks to break down the barriers between Muslims and non-Muslims. *Id.*

144. Arab American National Museum, <http://www.arabamericanmuseum.org> (last visited Mar. 3, 2009). This museum is the first museum in world "devoted to Arab American history and culture." *Id.*

Dearborn is a fitting setting for the Arab American National Museum because it boasts the largest percentage of Arabs in America.¹⁴⁵ According to the United States Census Bureau, Michigan is home to the highest proportion of Arab population in the nation.¹⁴⁶ In Wayne County, Arabs compose 2.7 percent of the population;¹⁴⁷ in the city of Dearborn this percentage skyrockets to 29.85 percent.¹⁴⁸ As emphasized earlier, not all Arabs are Muslims, but approximately forty percent of Dearborn's Arabs practice Islam;¹⁴⁹ it is one of the "largest concentrations of Islamic communities in the nation, with sizable groups of Lebanese, Yemeni, and Palestinian Muslims."¹⁵⁰ Dearborn's Islamic and Arabic heritage is unique, especially considering that only about one percent of the United States' population practices Islam.¹⁵¹

B. Wudu: A Muslim's Preparation for Prayer

Islam "places a heavy emphasis on actions in conformity with belief,"¹⁵² and Islam's "practice-intensive nature"¹⁵³ is evident in a Muslim's daily life. Each Muslim is to adhere to Islam's five pillars, which include the following acts: (1) confessing to oneself and others that God or Allah exists; (2) praying five times a day; (3) fasting for one month during Ramadan; (4) contributing personal funds to charity; and (5) journeying to Mecca, Saudi Arabia, once in one's lifetime.¹⁵⁴

145. G. PATRICIA DE LA CRUZ & ANGELA BRITTINGHAM, U.S. CENSUS BUREAU, THE ARAB POPULATION: 2000 (2003), www.census.gov/prod/2003pubs/c2kbr-23.pdf.

146. *Id.* at 4.

147. *Id.* Dearborn is located within Wayne County. Wayne County, Michigan, <http://www.waynecounty.com/links.htm> (last visited Mar. 3, 2009) (listing Dearborn as a "Wayne County Community").

148. DE LA CRUZ & BRITTINGHAM, *supra* note 145, at 7. The next highest percentage is 3.69%, belonging to Sterling Heights, Michigan. *Id.*

149. BARRETT, *supra* note 135, at 16 (describing Dearborn as the "Ellis Island" for Arab immigrant groups).

150. JANE I. SMITH, ISLAM IN AMERICA 59 (1999) (highlighting the history behind Dearborn's Arab immigrants). Most of these original Arab immigrants settled in Dearborn during the 1920s and 1930s, drawn by wages in the automotive industry. *Id.*

151. Central Intelligence Agency World Factbook, <http://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Mar. 3, 2009).

152. Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)*, 2007 U. ILL. L. REV. 497, 501 (2007) (arguing that "employers should be required to accommodate all practices deemed 'central' to the employee's faith, unless accommodation of those practices would result in a significant hardship to the employer"). To make his case, Zaheer specifically focuses on Islam in the workplace, describing the difficulties that many Muslims face when they need to pray, fast, or miss work for a religious holiday. *Id.*

153. Zaheer, *supra* note 152, at 497.

154. *Id.* at 501-02.

The five daily prayers are sometimes difficult to accommodate because they take place at precise times¹⁵⁵ including one “before sunrise (*fajr*),” another “around noon (*dhur*),” one “at midday (*‘asr*),” the next at “sunset (*magrib*),” and the last “after sunset (*‘isha*).”¹⁵⁶ Each mosque is equipped with a *qibla*, which indicates the “exact direction for the worshiper to face when performing the prayer.”¹⁵⁷ Before each prayer, the *muezzin*, a Muslim official who leads the calls to prayer, recites the following in Arabic, “God is most great . . . I testify that there is no God but Allah . . . I testify that Muhammad is the Messenger of God . . . There is no god but Allah.”¹⁵⁸ Before a Muslim performs one of these prayers he or she must engage in wudu.¹⁵⁹

Wudu is a “ritual cleansing”¹⁶⁰ that the Qur’an orders.¹⁶¹ Its purpose is to purify and prepare the heart and mind for prayer.¹⁶² This “ritual cleansing” is the “washing [of] one’s mouth, nose, face, forearms and feet with water.”¹⁶³ First, the person performing wudu must say “*Bismillah*,”¹⁶⁴ which means “in the name of Allah.”¹⁶⁵ Next, the person washes his hands three times, up to the wrist, and rinses out his mouth three times.¹⁶⁶ The Muslim should also cleanse his nose by sniffing water into it three times and wash his face three times.¹⁶⁷ The next step consists of washing each arm up to the

155. *Id.* at 502 (discussing the difficulty of accommodating these prayers in the workplace).

156. *Id.* The exact times may differ by as little as a few seconds from day to day; they change with each season, depending on the sun’s position. *See id.* (citing IslamicFinder.org, <http://www.IslamicFinder.org> (last visited Mar. 3, 2009) (providing a monthly time schedule for prayers)). The following times present an example of the fixed times that daily prayers take place in Dearborn, Michigan for October 26, 2007: 6:42 a.m. (*fajr*), 1:17 a.m. (*dhur*), 4:09 p.m. (*‘asr*), 6:35 p.m. (*magrib*), and 7:53 p.m. (*‘isha*). *Id.*

157. SMITH, *supra* note 150, at 10 (defining *qibla* as an “indicator of the exact direction for the worshiper to face when performing the prayer”).

158. PAAS, *supra* note 139, at 75 (defining *muezzin* as the official who “recite[s] the *adhān* or summons to prayers from the minaret or the door of the mosque.”).

159. Zaheer, *supra* note 152, at 502 (asserting that each prayer “lasts about five to ten minutes”).

160. *Id.*

161. THE QUR’AN 54, 5:6 (Thomas B. Irving trans., Amana Books 1985) (“[Whenever you intend to pray, wash your faces and your hands up to the elbows, and wipe off your heads and [wash] your feet up to the ankles.”).

162. SMITH, *supra* note 150, at 12.

163. Zaheer, *supra* note 152, at 501-02.

164. IslamiCity, Manner of Performing Prayers, <http://www.islamicity.com/Mosque/salat/salat6.htm> (last visited Mar. 3, 2009) (providing illustrations and step-by-step directions to demonstrate how wudu is performed).

165. Islamic Dictionary – Bismillah, <http://www.islamicdictionary.com/index.php?word=bismillah> (last visited Mar. 3, 2009).

166. *Id.*

167. *Id.*

elbow three times.¹⁶⁸ Muslims also have to wipe their head or hair once.¹⁶⁹ With wet fingers, a Muslim must wipe the inside and outer portions of their ears.¹⁷⁰ Finally, a Muslim has to wash each foot up to their ankles three times.¹⁷¹ According to Bilal Zaheer, Muslims are “highly encouraged” to perform the five daily prayers “in congregation at a designated place of worship, known as a masjid.”¹⁷² Each mosque encourages submission to the pillars of Islam in various degrees.¹⁷³ For example, some Muslims combine their noon and afternoon prayers if they are facing difficulties in the workplace.¹⁷⁴ If not conducted in a mosque, the prayers can take place anywhere that is “clean and appropriate.”¹⁷⁵ If water is unavailable, a Muslim may be able to perform *tayammum*, or symbolic ablution, using sand in water’s place.¹⁷⁶ Moreover, a Muslim may not have to take off his socks to perform wudu; instead, they may be able to wipe a cloth over besocked feet.¹⁷⁷ Although wudu requires a series of precise steps, a Muslim can accomplish the ritual without significant accommodation.

III. APPLYING FIRST AMENDMENT PRECEDENT TO THE UNIVERSITY’S FOOTBATHS

The University of Michigan-Dearborn should be applauded for supporting diversity and religious pluralism, but its affirmative support for one particular religious group creates a slippery slope. If found constitutional, other religious groups across the state could use the decision to erect religious displays on state grounds that are larger and more expensive than the

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Zaheer, *supra* note 152, at 502.

173. MUSLIM COMMUNITIES IN NORTH AMERICA, *supra* note 134, at 351-54.

174. SMITH, *supra* note 150, at 11.

175. *Id.* at 12.

176. PAAS, *supra* note 139, at 76 (describing the history, beliefs, eschatology, and sects of Islam).

177. MAULANA MUHAMMAD ALI, THE MUSLIM PRAYER-BOOK 6 (Ahmadiyya Anjuma Isha’at Islam 5th ed. 1998) (1939), available at http://aaiil.org/text/books/mali/muslim_prayerbook/muslimprayerbook.pdf. (“But if there are socks on, and they have been put on after performing an ablution, it is not necessary to take them off; the wet hands may be passed over them. They should be taken off, however, and the feet washed once in every twenty-four hours.”); see also Editorial, *University Toes the Line: Michigan Muslim Students’ Ablutions Raise Safety Questions. But then, when the Shoe is on the Other Foot . . .*, L.A. TIMES, Aug. 18, 2007, at A18 (asserting that Islam is very flexible; therefore, school officials should have discussed the situation with Muslim students before resorting to building footbaths); Carreras, *supra* note 12 (quoting Muslim student Saleh Al-Ahmeen saying, “The cleansing ritual, or ablution, requires only a quick wipe of the fee[t] and to spend \$25,000 on something we do not need is unnecessary.”).

footbaths. The purpose of this Part is to draw distinctions and analogies among past cases, the footbath situation, and constitutional religious accommodations, in order to demonstrate that the University of Michigan-Dearborn's action is unconstitutional.

A. No Burden on Muslim Students' Freedom to Believe

Although the University of Michigan-Dearborn cannot burden the daily practices of its Muslim students, it does not have a duty to make wudu easier for its Muslim students. Instead, the University is required to take a neutral position towards all religions.¹⁷⁸ Contrary to the constraints on the plaintiffs' religious beliefs in *Sherbert*¹⁷⁹ and *Yoder*,¹⁸⁰ the threat to Muslim students' ability to perform wudu at the Dearborn campus is not "severe" and "inescapable." In *Sherbert*, the government actually imperiled an individual's livelihood because the law impinged on her ability to balance her employment prospects with staying true to her religion.¹⁸¹ That law easily lent itself to prejudice against the Seventh-day Adventist religion because it negatively affected *only* those believers. Similarly, Wisconsin's mandatory high school rule in *Yoder* possessed potential to destroy a core Amish belief.¹⁸² In neither *Sherbert* nor *Yoder* did the government actively provide any means to strengthen respondents' religious convictions or make their religious activities easier to accomplish; instead, the Court realized that through legislation, the government was impeding the ability of these individuals to freely practice their religions.¹⁸³ In contrast, Michigan has not passed legislation that jeopardizes Islam. The University has not demonstrated particular disfavor or hostility toward Islam or prohibited Muslim students from using its sinks for wudu.¹⁸⁴ In addition, it has not enacted bylaws which would discriminate against Muslims or make Islam more difficult to practice. Muslim students are able to perform their ritual using

178. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). *See supra* Section I.A.

179. *Id.* (holding that a state cannot withhold unemployment benefits from a Seventh-day Adventist who refused to work on Saturday).

180. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a state cannot require Amish parents to send their children to school after the children reach the age of sixteen). *See supra* Section I.A.

181. 374 U.S. at 402.

182. 406 U.S. at 211 (noting that Amish parents fervently believed that sending their children to public school beyond a certain age, thereby exposing them to worldly influences, could endanger the child and parents' salvation).

183. *Sherbert*, 374 U.S. at 404 (describing the challenged law as discriminating "invidiously between religions"); *Yoder*, 406 U.S. at 218 (labeling the compulsory attendance law as "severe" and "inescapable").

184. *See Locke v. Davey*, 540 U.S. 712, 720 (2004) (holding that a state-sponsored scholarship that did not provide benefits to those pursuing a theological degree did not violate the Free Exercise Clause).

ordinary sinks and showers during the one to three times that conflict with their school schedule. Washing one's feet in a sink or shower does not appear to undermine wudu or severely threaten Islam's fundamental beliefs, because the religion permits these practices, and Muslim students across the country most likely use sinks to wash their feet.¹⁸⁵ In fact, Islam recognizes that an adherent may not always be able to perform full ablution when he or she is not within the presence of a mosque or home and authorizes a Muslim to wipe a cloth over besocked feet.¹⁸⁶

The assistance provided in *Sherbert* and *Yoder* merely allowed an individual to escape the suppression that a particular rule had on a religious group. Conversely, the aid that the University is providing to its Muslim students could be characterized as active involvement in one's religious affairs. The school decided, without encouragement or demands from its Muslim students, to fund and construct the footbaths.¹⁸⁷ The University has not observed Justice Douglas's warning that the Free Exercise Clause was not written "in terms of what the individual can exact from the government."¹⁸⁸ Instead, the University's action meets the *Yoder* Court's definition of "sponsorship" and "active involvement" because it has demonstrated support and favor for its Muslim students.¹⁸⁹ It has advanced and assisted distinct Islamic practices.

*Smith*¹⁹⁰ also weakens the University's potential arguments. As seen in *Smith*, justices are not in the business of determining whether a particular belief or practice is central to one's religion, and school officials should not make this determination either.¹⁹¹ The *Smith* Court treated peyote as a dangerous hallucinogen and minimized its importance to respondents' religion.¹⁹² Perhaps readers would be surprised to learn about peyote's dominance in at least twenty-five percent of Native American religions.¹⁹³ According to these religions, peyote¹⁹⁴ opens the mind so that the person can

185. See ALI, *supra* note 177, at 6.

186. *Id.*

187. Lewin, *supra* note 5, at A10.

188. *Sherbert*, 374 U.S. at 412 (1963) (Douglas, J., concurring).

189. See *supra* Section I.A.

190. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1989) (holding that government could constitutionally prohibit peyote use, a substance used in Native American worship). See *supra* Section I.A.

191. *Employment Div., Dep't of Human Res. of Or.*, 494 U.S. at 887.

192. See *id.* at 872.

193. OMER C. STEWART, PEYOTE RELIGION A HISTORY (1987) (providing a historical background of peyote and a detailed account of its spread to the United States). Peyote has been a part of Native American ceremonies for over four hundred years, and its use spreads from "Alberta, Canada, to west central Mexico and from Wisconsin to the Pacific Coast states." *Id.* at 3.

194. *Id.* (describing peyote as a non-habit forming substance).

communicate with their god.¹⁹⁵ This plant is heavily incorporated into Native American worship and is used in all-night ceremonies consisting of “praying, singing, eating peyote, and quietly contemplating.”¹⁹⁶ Members may face ostracization if they do not engage in peyote use.¹⁹⁷ Although the respondents in *Smith* faced a true burden towards practicing their religion, the Court did nothing to ease that burden as it did for the Amish in *Yoder*. The different holdings in these two cases demonstrate the precise reason why courts should not delve into questions of whether a practice is central to one’s religion. When courts attempt to answer the complicated question of whether a ritual is essential to a person’s religion, the result is an ad hoc analysis, based on what appears to be central rather than what truly is central.¹⁹⁸ Likewise, schools should not attempt to determine whether a particular practice is fundamental to one’s religion and then try to make that practice easier for students to accomplish. Instead, they should remain completely neutral, not interfering with a person’s religious practice. Otherwise, public schools can pick and choose, based on a similar ad hoc analysis that the Court used in *Smith*, which religions they aid. For example, if school-supported footbaths are deemed constitutional, a school could plausibly provide Catholic believers with confessionals, since Catholics believe confession to be an important aspect of religion that permeates their lives. The same school could then deny Sikh students the right to carry a ceremonial dagger¹⁹⁹ on school grounds, because the school is not familiar with Sikhism and does not understand the dagger’s spiritual significance.²⁰⁰ If the University refrains from active involvement in its students’ religious affairs and takes a neutral stance towards all religions, it will avoid arbitrary policies that favor only certain religious groups.

195. EDWARD F. ANDERSON, PEYOTE THE DIVINE CACTUS 66 (1980) (discussing peyote ceremonies and the peyote user’s religious experience).

196. *Id.* at 41. See also DAVID F. ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO (Sol Tax ed., Aldine Publishing Co. 1966) (illustrating that Native Americans use peyote largely for curing physical and mental ailments). Among the Navajos, illness is a result of trouble with supernatural forces and the tribe strives to be in good relation with these forces. *Id.* at 127. If they are not allowed to use peyote, they risk recourse among their tribe. *Id.*

197. ABERLE, *supra* note 196, at 127.

198. See ALICE MARRIOTT & CAROL K. RACHLIN, PEYOTE 17 (1972) (quoting one federal officer referring to peyote religion as “that lousy Native American Church” and asserting that peyotists have always had to shield attacks on their faith from nonbelievers, the most “formidable” attacker being the United States government).

199. This ceremonial dagger is called a *Kirpan*. W.H. MCLEOD, EXPLORING SIKHISM: ASPECTS OF SIKH IDENTITY, CULTURE AND THOUGHT (2000) (discussing Sikh traditions and the composition of Sikh communities). The dagger is symbolic of a Sikh’s spirituality, meant to inspire a Sikh in his daily life. *Id.*

200. *Id.* See generally ELEANOR M. NESBITT, SIKHISM: A VERY SHORT INTRODUCTION 48-124 (2005) (providing an insight into Sikhism’s origin and noting that a Sikh’s holy book requires its believers to wear a *Kirpan*).

B. The University of Michigan-Dearborn's On-Campus Affirmative Support for Islam

Although Government is not obligated to aid its citizens' religious practices, the Supreme Court's holding in *Everson* demonstrated that Government might provide religious accommodations for its citizens.²⁰¹ The footbath accommodation is the type of accommodation that Justice Rutledge warned about in his *Everson* dissent because the footbaths could be the beginning of a long list of demands from other religious groups.²⁰² Erecting specially-designed footbaths is distinctly different than the accommodations provided in *Everson*²⁰³ and *Zorach*.²⁰⁴ In those cases, the benefits were *general* ones that were not provided to any one specific religious group. Moreover, no affirmative subsidies were involved in those accommodations. Instead, the government merely provided reimbursement payments that had already been paid into school coffers or allowed students to leave the school premises to attend the religious institution of their choice. The footbaths can be reconciled with the *McCollum* holding, where the Court found that bringing religion into schools violated the Constitution.²⁰⁵ Even though the program involved three different religions, did not cost the school any money, and students could choose to forego the religious instruction, the Court still said that the school was promoting a *particular* religion.²⁰⁶ The footbaths will cost at least \$25,000, and the University will supply and install them. Just as the religious instruction in *McCollum* promoted and supported the Protestant, Jewish, and Catholic faiths, the footbaths promote and support Islam.²⁰⁷

Footbath supporters may argue that non-denominational chapels or serving Halal or Kosher foods are accommodations comparable to the footbaths. This is not so. Non-denominational chapels serve a wide variety of groups and purposes; schools do not construct these chapels to benefit one

201. *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947) (holding that a state could constitutionally reimburse parents for money spent on public school transportation when the parents utilized parochial schools instead). *See supra* Section I.B.

202. *Everson*, 330 U.S. at 46-49 (Rutledge, J., dissenting) (admonishing that the state action "exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck.").

203. *Id.* at 3 (majority opinion).

204. *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding that schools could constitutionally grant students release time to receive religious instruction). *See supra* Section I.B.

205. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that schools could not constitutionally permit students to forego secular teaching to receive in-class religious instruction).

206. *See id.* at 232. *See supra* Section I.B.

207. *McCollum*, 333 U.S. at 209-10.

specific religion.²⁰⁸ Muslims, Christians, Jewish students, Sikhs, or any other school group may use the chapels to hold meetings and accommodate school speakers. Standing as a symbol of “unity and serenity” and honoring members of the school who served in the Armed Forces and lost their lives, the University of Maryland’s chapel serves as the location for over one thousand activities.²⁰⁹ The University says that the chapel can be used for a variety of non-religious occasions, suggesting that it is a “great venue for lectures, concerts, services, convocations, commencement ceremonies, and weddings.”²¹⁰ Furthermore, the University’s chaplaincies represent fourteen different faiths.²¹¹ In contrast to multi-faceted university chapels, footbaths do not serve all religions and cultures; they aid one religion’s footwashing ritual.

Kosher and Halal cafeterias are constitutional religious accommodations as well, because serving this special food provides benefits to students other than Jewish and Muslim students. For example, students may order the food because they are not able to ingest processed foods, prefer the fresh ingredients used in Kosher or Halal foods, appreciate the careful way in which the food is prepared, or oppose eating certain types of animals. Dartmouth accommodates religious diets and provides a useful framework for distinguishing between serving religious food and building footbaths.²¹² In 2002, Dartmouth opened an on-campus cafeteria that serves Halal and Kosher food.²¹³ The cafeteria not only accommodates Jewish and Muslim students, but it also aids Hindus and Jainists, who follow a strict vegetarian

208. See, e.g., University of Maryland Memorial Chapel, <http://www.chapel.umd.edu/about.php> (last visited Mar. 3, 2009) (describing its non-denominational chapel as a building that annually opens its doors to more than 80,000 visitors of “all faiths, cultures and walks of life”).

209. *Id.*

210. *Id.*

211. *Id.* See also The Office of Faith and Spiritual Development at Kanley Chapel, <http://salp.wmich.edu/kanley> (last visited Mar. 3, 2009) (describing Western Michigan’s non-denominational chapel, a building financed by the William Kanley Estate). The University of Michigan Medical Center houses two chapels and offers Catholic mass, interdenominational protestant worship, and Islamic Jum’ah Prayers, in addition to providing an interdenominational chaplain team. University of Michigan Health System, <http://www.med.umich.edu/1toolbar/Support/spirit.htm> (last visited Mar. 3, 2009). Finally, the Stanford Memorial Church was built as a memorial to Mr. Leland Stanford, Jr. Memorial Church, <http://www.stanford.edu/group/religiouslife/memchu.html> (last visited Mar. 3, 2009). The Stanfords declared that the church was to be non-denominational, desiring the church “to serve the broadest spiritual needs of the university community.” *Id.*

212. Press Release, Dartmouth Coll., New Dining Facility Serves Kosher, Halal, and Sakahara Meals (Jan. 08, 2002) (on file with author) *available at* <http://www.dartmouth.edu/~news/releases/2002/jan/010802a.html> (discussing Dartmouth College’s new multi-cultural cafeteria).

213. *Id.*

diet.²¹⁴ All Dartmouth students, including those who do not observe Islam, Judaism, or Hinduism, can gather in the same cafeteria and eat together, the general public is also free to enjoy the food.²¹⁵ This accommodation would be constitutional in a public university because, although it is specifically implemented to assist religion, it does not favor or provide support for only one religion. Non-religious students and students from other religions frequent the cafeteria and enjoy food that is different from what they are accustomed to eating.²¹⁶ Finally, just as providing students with transportation to and from school is an essential part of any educational system, a cafeteria that provides students with food they will be able to ingest is an integral part of each school. The chapel and cafeteria examples show that footbaths are unconstitutional accommodations. Unless the University raises a wall between religion and state, it will face the difficult task of providing on-campus religious structures to many more religious groups.

C. The University's Accommodation Does Not Trigger an Equal Access Analysis

Even though the University claims that the use of the footbaths is available to anyone, one can still distinguish the footbaths from the room at issue in *Keegan*.²¹⁷ In that case, students were allowed to use University facilities for religious purposes because the structures were neutral facilities constructed for a general use.²¹⁸ For example, the common areas of a dormitory are used for a wide variety of purposes that *may* include religious objectives—the student senate could hold meetings there, or the environmental club could plan its next outing there. If students use the forum to pray or sing hymns, it is their free speech right to do so.²¹⁹ Allowing students to use the forum for religious activities has nothing to do with endorsing a particular religion, unless the University only allows certain religious groups to use the facility. If the University shows favoritism to one religious group, the courts would use strict scrutiny to analyze the situation and likely strike down the University's action as unconstitutional.²²⁰

214. *Id.*

215. *Id.*

216. *Id.*

217. *Keegan v. Univ. of Del.*, 349 A.2d 14, 16-18 (Del. 1975) (holding that a university could not prohibit a Christian group from using a dormitory's common areas for religious activities). *See supra* Section I.C.

218. *Keegan*, 349 A.2d at 17-18.

219. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a school policy that excluded religious speech on school grounds was unconstitutional, because it violated the "fundamental principle that a state regulation of speech must be content-neutral").

220. *Id.* at 276 (determining that the school did not have a compelling interest in preventing a religious group from using school facilities).

The footbaths are not pre-existing structures that a religious group wishes to use for a particular purpose (such as using sinks to accomplish wudu). Instead, the footbaths are *to be built for* Muslim student use. The University may assert that many different groups of people will use the footbaths—athletes to wash their sweaty bodies, and Muslims to perform wudu.²²¹ But this assumption is misplaced. Athletes do not need the footbaths; locker rooms already serve these groups. The University seems to be searching for potential groups that might use the footbaths, and its assumptions ignore wudu’s religious significance. Wudu is not just a washing of one’s body; it symbolizes purification—a necessary cleansing before prayer.²²² The footbaths are not comparable to a school’s general facilities; therefore, the University cannot employ an equal access analysis.

D. The University Fails Each Establishment Clause Test

This Part examines why the footbaths also fail each Establishment Clause test. First, a historical approach does not function well when analyzing a religious claim because the result is an ad hoc analysis based on misconceptions concerning religious beliefs. Second, a coercion analysis reveals that footbaths are not passive religious structures. Finally, the *Lemon* test and the Endorsement Test prove too stringent for the footbaths to overcome a constitutional challenge.

1. *History Does Not Support the Footbaths*

A historical background will not support the footbaths as it did for the Sunday closing laws in *McGowan*, the legislature’s prayers in *Marsh*, and the monuments in *Van Orden*.²²³ In those cases, the Court analyzed a specific tradition of a particular activity in the United States. Secular justifications, such as providing the public with a day of rest to promote public health and welfare, seemed to legitimize the Court’s decisions. Footbaths, on the other hand, are a recent phenomenon, implemented in a small number of the nation’s universities.²²⁴ The *Marsh* Court stressed that the legisla-

221. See generally *id.* at 274 (“[P]rovision[s] of benefits to [a] broad [] spectrum of groups is an important index of secular effect.”); see also Lewin, *supra* note 5 (asserting that the University has “argued that while the footbaths may benefit Muslim students, they will also be available to others, like lacross players who want to wash their feet”).

222. Zaheer, *supra* note 152, at 501-02.

223. See *Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (holding that a Ten Commandments display on a state capitol’s grounds was constitutional); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (accepting prayer in the state legislature); *McGowan v. Maryland*, 366 U.S. 420, 452-53 (1961) (upholding Sunday closing laws). See *supra* Subsection I.D.1.

224. Approximately twelve universities, including Eastern Michigan University and George Mason University, have installed foot-washing stations. Lewin, *supra* note 5, at B1.

ture's prayers did not advance any specific religion.²²⁵ Similarly, the Ten Commandments monument in *Van Orden* was placed among a variety of monuments; therefore, the state action did not demonstrate favoritism for the Christian religion.²²⁶ Cleansing one's body before performing wudu, on the other hand, is a unique tradition, which belongs solely to the Islamic faith.

A historical analysis really cannot work for any religious problem because the United States was not founded upon a specific religious tradition.²²⁷ Justice Scalia emphasized that this Nation was founded on monotheistic, specifically Christian, religious principles;²²⁸ but what he conveniently forgot is that people originally came to this nation to *escape* religious persecution.²²⁹ Thomas Jefferson's quote that the First Amendment's goal was to raise "a wall of separation between Church and State" resonates with Americans from all faiths and backgrounds.²³⁰ Asserting that the nation can support monotheistic religions, because a specific tradition allows it, threatens minority religious beliefs. When monetary support, political activism, and judicial decisions back particular religions, members of minority religions feel threatened and pressured to lose their religious identity.²³¹

The Constitution only provides exclusionary references to religion.²³² For instance, the government cannot employ any religious test for a public employee,²³³ and Congress cannot make laws respecting an establishment of religion.²³⁴ Moreover, Thomas Jefferson was a Deist, and arguably his references to God do not refer to any specific religious deity.²³⁵ In fact, Deism's religious philosophy, which is based on reason, contrasts sharply with Fideism, the understanding that faith is an essential element of any religion

225. *Marsh*, 463 U.S. at 793 n.14.

226. *Van Orden*, 545 U.S. at 691.

227. See generally DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* (2006) (providing history of religion in the American colonies, focusing specifically on the religious beliefs of Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe).

228. See *McCreary County v. ACLU*, 545 U.S. 844, 885-95 (Scalia, J., dissenting) (claiming that America never intended to exclude religion from the public forum and the founding fathers believed that encouraging religion was the "best way to foster morality").

229. ISAAC KAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 11-25 (2d ed. 2005).

230. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (The clause against establishment of religion was intended to erect "a wall of separation between Church and State.").

231. KAMNICK & MOORE, *supra* note 229, at 11-18.

232. U.S. CONST. art. VI, § 1; U.S. CONST. amend. I.

233. U.S. CONST. art. VI, § 1 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

234. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

235. KAMNICK & MOORE, *supra* note 229, at 88-109 (discussing Thomas Jefferson's religious beliefs).

because religion cannot be understood in terms of reason.²³⁶ The bottom line is that people originally came to the United States for religious freedom; citizens do not welcome encounters with religious symbols that do not correspond to their own beliefs, whether that be the Ten Commandments display in a courthouse, a menorah in a community center, or footbaths in a public school bathroom.

2. *Failing the Coercion Test: Footbaths Are Not Passive Accommodations*

If the footbaths were to pass any of the aforementioned tests, coercion might be that test. It is far fetched to think that university students would feel confused and embarrassed when encountering the footbaths. In previous cases, courts focused on the elementary or high school setting and explained that young children are vulnerable and easily molded. This argument does not work as easily in the university context because college-aged students are more mature and open-minded—they are taught to question rather than accept the status quo. But Dearborn, a city of approximately 94,000 people, boasts the highest percentage of Muslims in the United States and is home to the country's largest mosque.²³⁷ When these facts are added to the analysis, one may conclude that non-Muslim students at the University of Michigan-Dearborn could feel like outsiders in the community if the religion-specific architecture is added to the university's campus.

As the *Weisman* Court noted, it does not matter if the intrusion on the non-believers is *de minimis*.²³⁸ Just as in *Weisman*, where a graduation prayer originated from one specific religious tradition, the footbaths too represent definite Islamic traditions and beliefs. Furthermore, a person cannot underestimate the religious significance and power that an object such as a footbath may hold and the impact that it may have on those who encounter it. Professor Frank Ravitch asserts that there is no such thing as a passive religious object or symbol.²³⁹ Religious objects can be powerful because they are “symbols of and conduits to transcendent and very real truths,” and the law must account for this power.²⁴⁰ When government displays these objects, it “calls special attention to . . . a religious holiday or a specific religion or religions;” this attention or recognition results in gov-

236. See generally TERENCE PENELHUM, *GOD & SCEPTICISM: A STUDY IN SKEPTICISM & FIDEISM* (1983) (describing Fideism in detail).

237. See Press Release, Largest Mosque, *supra* note 141.

238. *Lee v. Weisman*, 505 U.S. 577, 589-94 (1992) (holding that non-denominational prayer at a graduation ceremony was unconstitutional, because the prayer intruded on others' beliefs). See *supra* Subsection I.D.2.

239. Ravitch, *supra* note 118, at 1016.

240. *Id.* at 1018 (citing PAUL TILLICH, *SYSTEMATIC THEOLOGY* 240 (1951)).

ernment religious speech.²⁴¹ A footbath is not a mere spigot; it is of central use to a symbolic daily purification. By displaying the footbath, the government is unconstitutionally promoting one religion over others and engaging in religious speech. If a test “categorically allowed government to display all religious symbols,” a state capitol could construct a large cross on its roof.²⁴² As this example shows, allowing governmental entities to construct objects of religious significance can be dangerous because it brings about the very vulnerabilities that the coercion test was constructed to guard against—citizens feeling as though they are political and cultural outsiders in their own city because they do not engage in the tradition that their city promotes.²⁴³ A Separationist approach²⁴⁴ is much more protective of outside observers because it forbids any religious display on public property, thereby guarding against any coercive government activity.²⁴⁵

Justice Souter contends that the Establishment Clause’s goal is to restrict religion to the private sphere, in order to protect individual conscience, preserve religious integrity, and foster social peace and understanding among those of different religions.²⁴⁶ His third argument in favor of preserving social peace is particularly persuasive within the Dearborn setting. When government affirmatively supports one specific religion, non-

241. *Id.* at 1077.

242. *Id.* at 1067-68 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989)) (Kennedy, J., concurring in the judgment in part and dissenting in part).

243. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (referring to nonadherents of a promoted religious belief as “outsiders, not full members of the political community”).

244. For a discussion of Separationism, see Carl H. Esbeck, *The 60th Anniversary of the Everson Decision & America’s Church-State Proposition*, 23 J. L. & RELIGION 15, 23-24 (2007-2008) (describing Separationism as a separation between institutions of government and organized religion).

245. See, e.g., Naomi Schalit, *Religion-politics mix gives rise to fear*, KENNEBEC J., (Jan. 7, 2008) available at <http://kennebecjournal.mainetoday.com/view/columns/4624240.html> (discussing the feelings that “outsiders” experience when government promotes a particular religion and arguing that America has failed in its mission in “carrying out the promise of our founding fathers and the First Amendment, that America would be a society where no religion would be favored by government”).

246. *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting) (asserting that Protestants will not underwrite Roman Catholic teachings that condemn the death penalty; Muslims will not agree to pay for a Zionist school curriculum; and a secular taxpayer will not support a Muslim’s treatment of the sexes); *Mitchell v. Helms*, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) (arguing that “compelling an individual to support religion violates the fundamental principle of freedom of conscience . . . government aid corrupts religion, . . . [and] government establishment of religion is inextricably linked with conflict”). Cf. Kevin Pybas, *Does the Establishment Clause Require Religion to be Confined to the Private Sphere?*, 40 VAL. U. L. REV. 71 (2005) (criticizing the rationales upon which Souter’s principles rest and concluding that religion should not be constrained to the private sphere).

adherents necessarily become angry.²⁴⁷ Non-Muslim students and Dearborn citizens already feel confused and angry about the footbath installation, especially because their money will fund the building and maintenance of the footbaths.²⁴⁸ These feelings do not aid in rebuilding the relations among Muslims and the rest of the community.²⁴⁹ Already bloggers abound, attempting to degrade Muslims and sacred Islamic traditions.²⁵⁰ Tension will continue to mount among students if religious structures are added to the University's campus.²⁵¹ Although the University may argue that its goal is to instill social peace and religious tolerance among students, it cannot ignore that the footbaths have fueled religious and racial discrimination.²⁵² As

247. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Bd. of Educ. v. Grumet*, 512 U.S. 681 (1994); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny*, 492 U.S. 573; *Lynch*, 465 U.S. 668; *Wallace v. Jaffree*, 472 U.S. 38 (1984); *ACLU v. Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

248. The funding will be drawn from the school's general fund, which consists of student fees that "contribute to campus infrastructure maintenance and renovation." *Accommodating Student Needs*, *supra* note 4. Lewin, *supra* note 5, at B1 (informing readers that the University's action has influenced approximately 3,000 e-mails and 600 phone calls, voicing disapproval with the footbaths, to the University's President and legislators). According to the school's Admissions Office, "parents have called the office saying that they're not going to send their children to UM-D as planned due to the decision to install foot-washing stations." Carreras, *supra* note 12.

249. See ABCNews.com, *Islamophobia Felt 5 Years after 9/11*, Sept. 9, 2006, <http://abcnews.go.com/print?id=2413473> (asserting that Muslims and Arab Americans are subjected to racial profiling and other forms of discrimination); Rick Hampton, *Fear 'as bad as after 9/11'*, USA TODAY, Dec. 12, 2006, at 1A, 5A (discussing the prejudices and hardships that Muslims in Dearborn face).

250. Posting of Debbie Schlusel to [debbieschlusel.com](http://www.debbieschlusel.com), <http://www.debbieschlusel.com/archives/002461print.html> (May 30, 2007, 10:22 EST); Dhimmi Watch, <http://www.jihadwatch.org/dhimmiwatch/archives/017978.php> (Aug. 30, 2007, 12:54 EST); Posting of T.R. Clancy to Dearborn Underground, <http://dearbornunderground.blogspot.com> (July 20, 2007, 12:24 EST).

251. For an example of how mixing religion and public education fares in Europe, see Blandine Chelini-Pont, *Religion in the Public Sphere: Challenges and Opportunities*, 2005 BYU L. REV. 611.

252. See, e.g., Posting of Cankelz to [debbieschlusel.com](http://www.debbieschlusel.com), http://www.debbieschlusel.com/archives/2007/05/exclusive_so_lo.html (May 30, 2007, 14:15 EST):

WHERE IS THE G-DAMNED ACLU NOW? Liberals. They seek to protect Muslims who physically kill us, those who want Sharia law to govern the world, those who commit acts of terrorism. The ACLU advocates violation [sic] of the U.S. Constitution . . . but only when Muslims do it. If a Christian tries it, the ACLU will spare no expense to quash it.

Id.; Posting of Steve Canuck to [debbieschlusel.com](http://www.debbieschlusel.com), http://www.debbieschlusel.com/archives/2007/05/exclusive_so_lo.html (May 30, 2007, 10:59 EST) ("One of the most common lies that Muslims tell us is that they have no intention of forcing their religion on us.").

the Los Angeles Times observes, “the university’s decision seem[s] more culturally paranoid than culturally aware.”²⁵³

3. *The Lemon Test: A Non-Secular Purpose and Effect and Entanglement with Islam*

The footbaths cannot “pass” the *Lemon* test. As seen in *Stone*, an “‘avowed’ secular purpose” is not enough to pass *Lemon*’s secular purpose prong.²⁵⁴ Although University officials cite health and safety concerns as the footbath’s purpose, one must ask whether spending thousands of dollars is the only way to accomplish university goals and whether actively supporting their Muslim students’ religion is the real goal instead.²⁵⁵ The University should consider various other options that are easier to implement, cost less than new construction, and do not fuel societal tensions. For example, the University could post signs, requiring those who splash water on the floor to clean it up, or it could require school janitors to clean the bathrooms on a more rigid schedule. The University could even reinforce the sinks to protect the bathroom infrastructure. Not only would these solutions cost less, but they would also truly embody a secular purpose—protecting students and bathroom infrastructure from harm.

As *Stone* demonstrates, courts do not automatically accept any articulated purpose.²⁵⁶ Even though the school in *Stone* said that one of its purposes was to emphasize the historical importance of the Ten Commandments, its purpose was not valid in the Court’s eyes.²⁵⁷ Similarly, just because the University may assert that its purpose is to protect students, the court will not automatically consider this purpose true or valid. A court will conclude that the purpose is “plainly religious in nature,” if the school spends a substantial amount of money for a structure that benefits only one religious group.²⁵⁸

Although the *Lynch* plurality held that a crèche display was constitutional, one must remember that one of the major reasons that the Court deemed the crèche constitutional was because it was surrounded by a pleth-

253. Editorial, *University toes the line Michigan Muslim students’ ablutions raise safety questions. But then, when the shoe is on the other foot . . .*, L.A. TIMES, Aug. 18, 2007, at A-18.

254. *Stone v. Graham*, 449 U.S. 39, 40-41 (1981) (holding that states cannot require classrooms to post the Ten Commandments, even though the state claimed that the display served educational purposes). See *supra* Subsection I.D.3.

255. *Accommodating Student Needs*, *supra* note 4.

256. See *Stone*, 449 U.S. at 41.

257. *Id.*

258. *Id.*

ora of secular symbols.²⁵⁹ The footbaths, on the other hand, will enjoy a room that does not share space with any other religious structure or symbol.²⁶⁰ The University is treating the footbaths in the same manner that the Court treated the crèche in *Lynch* when it attempted to disregard the important religious message that the crèche, a “pure religious object[,]”²⁶¹ possesses for Christians.²⁶² Attempting to diminish the religious importance of these objects or the traditions to which they relate is offensive and results in injustice to the religion and the ceremony or belief that the object represents.²⁶³

When a public institution installs a religious structure that only one religious group will use for a central part of that group’s faith, the primary effect of that accommodation *is* advancing the religion. Based on this reasoning, the University is advancing Islam. This activity violates the proposed facilitation test, an analysis which focuses on the *effects* of government activity.²⁶⁴ Under this test, “[g]overnment action that substantially facilitates or discourages religion violates the Establishment Clause.”²⁶⁵ The University of Michigan-Dearborn has facilitated Islam in the following ways: controlling the forum for wudu by constructing and maintaining the footbaths and providing “special attention and recognition to the . . . beliefs of a single religion.”²⁶⁶ Just as the plastic Christmas decorations could not deliquesce the crèche’s meaning in *Lynch*,²⁶⁷ the University cannot diminish the footbath’s religious significance by claiming that the structure is useful for a variety of everyday activities or that it is necessary to protect students from slip and fall accidents.²⁶⁸ In *Abington*, the Court warned that small advancements of one religion may soon become “raging torrent[s].”²⁶⁹ The same danger is present here. If the footbaths are deemed constitutional,

259. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1985) (stressing that plastic Christmas decorations and holiday signs took away from a crèches religious effect). See *supra* Subsection I.D.3.

260. The footbaths are to be installed in two public bathrooms. *Accommodating Student Needs*, *supra* note 4.

261. Ravitch, *supra* note 118, at 1023-25.

262. *Lynch*, 465 U.S. at 726 (Blackmun, J., dissenting) (asserting that a crèche is merely a symbol of the roots and traditions of Christmas).

263. See, e.g., *id.* at 707-18.

264. Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 546-47 (2004).

265. *Id.* at 546-47 (defining facilitation as “furthering the religious activities of a program or entity, or about furthering religious practice or the stature of a given religion or of a religion generally”).

266. *Id.* at 567.

267. See *supra* note 259 and accompanying text.

268. *Id.* at 568-73.

269. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). See *supra* Subsection I.D.3.

then the University's doors widen for further advancements of Islam or other religions in other communities.

The University's action also fails *Lemon's* third prong because its action fosters "excessive government entanglement" with religion.²⁷⁰ Not only is the University directly using public funds to create a structure for one specific religion, it will also use University resources to maintain the footbaths. In *Stone*, the unconstitutional display was financed through private funds.²⁷¹ The display in *Lynch* was valued at \$200, and the city had not spent any money on its maintenance for over ten years.²⁷² The money involved in both of those displays was hardly the \$25,000 that it will take to construct the footbaths. Furthermore, two footbaths will not be enough to accomplish the University's goals. Approximately ten percent of the student body is Muslim.²⁷³ If the footbaths are in use, these students will still go to the bathroom sinks. If forbidden to use sinks at all, the University will have to construct more footbaths, entangling additional public funds with religion to relieve the burden placed upon its students.

4. *The University of Michigan-Dearborn Endorses Islam*

According to the Endorsement Test analysis, a reasonable observer is a person who is knowledgeable about the precise context and history in which an event arises.²⁷⁴ If this observer would perceive that the University is supporting one specific religion, the University has failed the Endorsement Test.²⁷⁵ A reasonable observer would be aware roughly forty percent of Dearborn's Arab population is Muslim.²⁷⁶ Further, this informed observer would know that some of Dearborn's student populations are more than ninety percent Muslim.²⁷⁷ An observer would realize that Dearborn is home to the United States' largest mosque and that wudu is a central part of a Muslim's daily worship.²⁷⁸ In *Lynch*, Justice O'Connor stressed that the display at issue was a temporary one and came within the "holiday" context rather than the context of support for the Christian religion.²⁷⁹ The foot-

270. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See *supra* Subsection I.D.3.

271. *Stone v. Graham*, 449 U.S. 39, 39 (1981).

272. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

273. Billups, *supra* note 15.

274. *Wallace v. Jaffree*, 472 U.S. 38, 73 (1984). See *supra* Subsection I.D.4.

275. *Santa Fe Indep. Sch. Dist. v. Doe*, 503 U.S. 290, 308 (2000). See *supra* Subsection I.D.4.

276. BARRETT, *supra* note 137, at 16. See also DE LA CRUZ & BRITTINGHAM, *supra* note 145.

277. *School System in Michigan Plans to Serve Muslim Food*, N.Y. TIMES, Feb. 25, 2001, at A13.

278. Zaheer, *supra* note 152, at 501.

279. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1993) (O'Connor, J., concurring).

baths, by contrast, are not temporary structures that are a part of a larger, secular, theme. They are permanent structures that support only one purpose and one religion. In the sense that the footbaths are set apart and occupy their own space, they are similar to the unconstitutional crèche in *Allegheny*.²⁸⁰

Recall that the *Wallace* Court pointed out that because the State had not impinged on students' rights to pray in school, there was no need for a mandatory period of silence.²⁸¹ Correspondingly, because the University of Michigan-Dearborn has not interfered with its Muslims students' right to practice wudu and students were able to practice this ritual without the footbaths, there is no need for an affirmative accommodation. A person must also notice that there is a distinct difference between a period of silence to be used for meditation purposes and a \$25,000 object used to facilitate wudu. If the Court found a silence period unconstitutional, it would also logically declare the footbaths unconstitutional. Moreover, as *Wallace* demonstrates, the effects of a particular state action are more important than the asserted purpose; therefore, a court must emphasize an accommodation's actual effects rather than the University's asserted purpose.²⁸²

Allegheny demonstrates how important the Dearborn context would be in analyzing the situation because the crèche's setting determined its fate.²⁸³ Nothing in the crèche's setting distracted from its religious message; in the Court's eyes, the overall effect was promotion of the Christian faith.²⁸⁴ Just as the court concentrated on the poinsettias, angels, and wreaths that adorned the crèche, a person analyzing the footbaths would emphasize that they are going to be constructed on a university campus located in "America's Muslim capital," a proud home to a number of mosques and the prayers projected across those mosque speakers each day. One would also emphasize that wudu is a religious cleansing, unique to the Islam faith. After examining these contextual facts, a person could reasonably conclude that, just as the crèche in *Allegheny* promoted the Christian faith, the proposed footbaths will endorse Islam.

In *Santa Fe*, the Court was concerned with the message that a school's actions would send to outside observers and warned that a citizen's right to religious liberty is "abridged when the State affirmatively sponsors the par-

280. *County of Allegheny v. ACLU*, 492 U.S. 573, 580-81 (1989). The crèche occupied its own space on a courthouse's staircase. *Id.* at 580. The city placed a plaque near the display to inform the public that the Holy Name Society donated the crèche. *Id.* A tree, poinsettia plants, and an angel adorned the space as well, but secular decorations did not share the space. *Id.* at 580-81. *See supra* Subsection I.D.4.

281. *Wallace v. Jaffree*, 472 U.S. 38, 57 (1984).

282. *Id.* at 38.

283. *Allegheny*, 492 U.S. at 612-23 (1989).

284. *Id.*

ticular religious practice of prayer.”²⁸⁵ Building a structure specifically for the practice of prayer endorses prayer more forcefully than simply allowing nondenominational prayers at a school sporting event. In *Santa Fe*, the school’s activity was passive, because the school merely allowed students to choose whether they wanted a prayer.²⁸⁶ By contrast, in the University of Michigan-Dearborn context, the school, rather than its students, is actively pursuing and facilitating the practice of prayer. *Santa Fe* also emphasized that an inquiry into whether a school advanced a religion requires an examination of surrounding circumstances and social facts.²⁸⁷ Again, this is where the Dearborn context comes into the analysis. Just as the *Santa Fe* Court considered the school’s history, community, and composition of its student body, a Michigan court would examine the Dearborn community and the fact that ten percent of the University’s student body is Muslim, which is ten times greater than the overall percentage of Muslims in the United States.²⁸⁸ The footbaths signify that Muslims are favored, inside members of the Dearborn community, and non-adherents are truly outsiders, especially within the City’s political community.

CONCLUSION

Promoting religious pluralism is a commendable goal; however, when public educational institutions overtly support one religion, they are required to do the same for all religious groups. When an individual enters a university campus, he does not expect to encounter incense burners, meditation rooms, confessionals, or footbaths because the First Amendment protects citizens from governmental interference with religion. As this Comment shows, the footbaths cannot survive a First Amendment claim. The Free Exercise clause protects an individual’s freedom to believe; the clause does not ensure a person’s liberty to act. Prior to the University’s decision, Muslim students were able to accomplish wudu without interference; they did not need specially-designed structures to enhance their ritual. Likewise, an accommodation analysis does not support the University of Michigan-Dearborn and its decision. Unlike neutral accommodations enacted for a general use, the footbath accommodation specifically promotes Islam. The University’s action has not implicated equal access principles because the footbaths are not pre-existing, all-inclusive structures.

285. *Santa Fe Indep. Sch. Dist. v. Doe*, 503 U.S. 290, 313 (2000).

286. *Id.*

287. *Id.* at 315 (quoting *Lynch v. Donnelly*, 465 U.S. 688, 693-94 (1963) (O’Connor, J., concurring)).

288. Central Intelligence Agency World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Mar. 3, 2009).

The University of Michigan-Dearborn is engaged in the establishment of religion. Its activity does not coincide with past historical approaches, and as this Comment shows, a historical analysis does not truly work. Installing footbaths at the University may also result in coercion. Footbaths are not passive structures, and courts must account for the power that these religious and legal subjects possess. The footbaths fail *Lemon* as well; the school's alleged purpose will not survive court scrutiny, and the accommodation's religious effects will overshadow any seemingly non-religious objective. And finally, after examining Dearborn, its demographics, and the nature of wudu, a "reasonable observer" would conclude that the University is endorsing Islam. Only if the University abandons its plans, will it truly demonstrate its dedication to religious and cultural pluralism.