

THE PROTECTION AND ALIENATION OF  
RELIGIOUS MINORITIES: ON THE EVOLUTION OF  
THE ENDORSEMENT TEST

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INTRODUCTION

The United States Supreme Court uses the Endorsement Test, among others, to determine whether a particular state practice implicating religion

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passes constitutional muster. While commentators have noted that the test is difficult for lower courts to apply and is likely to yield dissimilar results for relatively similar cases, too little attention has been paid to the ways that the test itself has evolved. More recent applications of the test have conveyed a message far different from the one previously communicated, and the former difficulties surrounding the test have been replaced by new, related difficulties. Commentators' claims to the contrary notwithstanding, the Endorsement Test is often not used to protect minority religious viewpoints; instead, it is applied to validate practices that seem to violate the express terms of the test and to reject the reasonableness of those individuals feeling offended when their religious views or practices are ignored or undermined. A test that had once appeared to have so much promise now seems more likely to be used to oppress than to promote respect for religious or secular viewpoints.

Part I of this article addresses the evolution of the Endorsement Test, first analyzing its text and application in Justice O'Connor's concurrence in *Lynch v. Donnelly*.<sup>1</sup> It then discusses the test's further elaboration in subsequent cases. Part II discusses the adoption of the Endorsement Test by the Court in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*,<sup>2</sup> including an examination of the difficulties inherent in the test as illustrated in the very opinion in which it was adopted as a constitutional standard. Part III discusses post-*Allegheny* attempts by the Court to clarify or modify the test. These attempts suggest that the Justices do not understand or appreciate the difficulties posed by their own, or others', formulations of the test. The article concludes that the Endorsement Test, as currently applied, does no independent work; instead, it is used to rationalize results reached independently and to impugn the judgment or knowledge of those who reach a different conclusion regarding the offensiveness of a religious practice.

### I. THE EVER-CHANGING ENDORSEMENT TEST

Since modern Establishment Clause jurisprudence began about sixty years ago,<sup>3</sup> the Court has articulated several tests to determine whether a

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1. 465 U.S. 668 (1984).

2. 492 U.S. 573 (1989).

3. See Vivian E. Hamilton, *Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone*, 110 W. VA. L. REV. 501, 508 n.45 (2007) ("Modern Establishment Clause jurisprudence began with the Supreme Court's ruling in *Everson v. Board of Education*, 330 U.S. 1 (1947)."); Naomi Rivkind Shatz, Comment, *Unconstitutional Entanglements: The Religious Right, the Federal Government and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 499 (2008) (discussing "[t]he first modern Establishment Clause case, *Everson v. Board of Education of Ewing Township*"); James E. Zucker, Note, *Better a Catholic than a Communist: Reexamining McCollum*

particular state law or practice violates Establishment Clause guarantees. The most well-known are the *Lemon Test*,<sup>4</sup> the Endorsement Test,<sup>5</sup> and the Coercion Test,<sup>6</sup> although the Court has sometimes suggested that practices with a long historical pedigree are unlikely to be struck down under the Establishment Clause.<sup>7</sup> The Court has never clearly articulated the circumstances under which one test rather than another should be employed,<sup>8</sup> which has led to confusion in the circuits as to which test or how many tests to apply in different situations.<sup>9</sup> Yet, it should not be thought that the tests

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v. Board of Education *and* *Zorach v. Clauson*, 93 VA. L. REV. 2069, 2074 (2007) (“Many commentators have noted that the modern Establishment Clause dates from the Court’s decision in *Everson v. Board of Education* in 1947.”).

4. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

5. See Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward A New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 225-26 (2007) (“[M]any of the Justices have embraced the ‘endorsement test,’ which was originally proposed by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*.”).

6. See Julie F. Mead, Preson C. Green & Joseph O. Oluwole, *Re-Examining the Constitutionality of Prayer in School in Light of the Resignation of Justice O’Connor*, 36 J.L. & EDUC. 381, 391 (2007) (“First, the venerable, though much maligned, *Lemon* test remains, and while its use has diminished over time in the cases involving prayer, it has yet to be overturned or discarded as a guiding framework. Second, O’Connor’s Endorsement Analysis is central to the Court’s thinking on several issues. Applying this test requires consideration of whether a reasonable observer would conclude that a state action endorses or merely accommodates religion. Finally, the Coercion Test, articulated in *Lee v. Weisman* and applied again in *Santa Fe v. Doe*, must be considered when examining some issues of prayer in school. The Coercion Test asks whether the “machinery of the state” has been marshaled to coerce individuals to pray.” (internal citations omitted)).

7. See *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding starting legislative sessions with prayer after noting that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”).

8. See *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (stating that “[b]ecause the Court has applied a variety of tests (in various combinations) in school prayer cases, federal appellate courts have also followed an inconsistent approach.”); see also B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 493 (2005) (discussing “a widely recognized inconsistency, confusion, and apparent subjectivity in the Supreme Court and lower court cases dealing with public displays of religious symbolism”).

9. See, e.g., *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999) (“Our multi-test analysis in past cases has resulted from an Establishment Clause jurisprudence rife with confusion and from our own desire to be both complete and judicious in our decision-making. See, e.g., *Doe ex rel. Doe v. Beaumont Independent School District*, 173 F.3d 274, 295 (5th Cir.) (analyzing school district’s “Clergy in Schools” volunteer counseling program utilizing *Lemon*, endorsement, and coercion tests), *on reh’g en banc* (1999); *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 280 (5th Cir.1996) (examining state statute permitting public school students to initiate nonsectarian, nonproselytizing prayer at compulsory and noncompulsory school events pursuant to the *Lemon*, endorsement, and coercion tests); *Clear Creek II*, 977 F.2d 963, 966-969, 972 (employing *Lemon*, en-

themselves have remained static, and that the only relevant question has been which test is ascendant.<sup>10</sup> Indeed, it is underappreciated that the fine-tuning of the Endorsement Test over the years has rendered it a much different test, although a separate issue is whether these changes more accurately capture the tacit view of the Justice who initially offered that test.

#### A. The *Lemon* Test

When considering the evolution of the Endorsement Test, it is helpful to consider the *Lemon* Test, if only because Justice O'Connor offered the Endorsement Test as a clarification of the existing jurisprudence.<sup>11</sup> In *Lemon v. Kurtzman*,<sup>12</sup> the Court articulated the standards to determine whether Establishment Clause guarantees had been violated. Analyzing past cases, the *Lemon* Court discussed the "cumulative criteria developed by the Court over many years."<sup>13</sup> The Court stated that "[f]irst, the statute must have a secular legislative *purpose*; second, its principal or primary *effect* must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government *entanglement* with religion.'"<sup>14</sup>

The Court has used the *Lemon* test to strike down a number of statutes and programs.<sup>15</sup> As recently as 2005, the Court suggested that the Ten

dorsement, and coercion analysis to uphold a school district resolution permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at graduation ceremonies.").

10. Cf. Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home for Minority Religions?, 81 ST. JOHN'S L. REV. 819, 833 (2007) ("Conventional wisdom assumes that the most likely *Lemon* replacement under the new majority will be the 'coercion' test."); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 149 ("[S]everal Justices oppose the non-endorsement concept as too stringent, while the test's adherents disagree on its precise content."). But see Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499 (2002) ("The Court has implicitly abandoned the *Lemon* test for the validity of enactments under the Establishment Clause, and has instead adopted an approach championed by Justice O'Connor—the 'endorsement' test.").

11. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("I write separately to suggest a clarification of our Establishment Clause doctrine.").

12. 403 U.S. 602 (1971).

13. *Id.* at 612.

14. *Id.* at 612-13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 674 (1970)). For the remainder of this article, the first prong will be termed the "purpose" prong and the second prong will be termed the "effect" prong.

15. See generally *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (striking down Ten Commandments display because it violated *Lemon* purpose prong); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (striking down tax exemption solely for religious publications as violating the *Lemon* purpose prong); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a Louisiana law regarding teaching of creation science as violating the *Lemon* purpose prong); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled by Agos-*

Commandments displays located in two different Kentucky county courthouses<sup>16</sup> violated the *Lemon* Test's purpose prong.<sup>17</sup> It would be inaccurate to suggest, however, that the *Lemon* Test has been wholeheartedly accepted by members of the Court. First, the test itself has undergone some modification. For example, in *Agostini v. Felton*,<sup>18</sup> the Court modified the *Lemon* Test by incorporating the entanglement prong into the effect prong,<sup>19</sup> at least insofar as aid to public schools is concerned.<sup>20</sup> Second, modifications notwithstanding, the Court has been inconsistent with respect to when the *Lemon* Test should be applied.<sup>21</sup> Furthermore, several members of the Court have at different times expressed dissatisfaction with the test.<sup>22</sup>

#### B. The Endorsement Test

Perhaps as a way of making the *Lemon* Test more acceptable,<sup>23</sup> Justice O'Connor offered the Endorsement Test in her concurrence in *Lynch v. Donnelly*,<sup>24</sup> where she noted that state endorsement of religion "sends a

*tini v. Felton*, 521 U.S. 203 (1997) (striking down a school program as violation of *Lemon*); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down a requirement that employees not be forced to work on their religious Sabbath as violating the *Lemon* effect prong because it impermissibly advanced religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down a statute involving time for prayer in school as violating the *Lemon* purpose prong).

16. *McCreary County*, 545 U.S. at 851 ("In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus.").

17. *Id.* at 860.

18. 521 U.S. 203 (1997).

19. *Id.* at 233 ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

20. *See Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) ("[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.").

21. *Compare McCreary County*, 545 U.S. 844 (2005) (striking down a Ten Commandments display as a violation of *Lemon*) with *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding the constitutionality of a Ten Commandments display and suggesting that the *Lemon* test was not applicable to this kind of case).

22. *See Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test."); *see also Cutter v. Wilkinson* 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (discussing "the discredited test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)").

23. *Cf. Justin T. Wilson, Note, Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 607 (2007) ("As *Lemon* proved dissatisfying to more and more Justices, the 'endorsement test'—in reality, a gloss on *Lemon*—became a more palatable alternative to some.").

24. 465 U.S. 668 (1984).

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. Disapproval sends the opposite message.<sup>25</sup> By offering such a test, she seemed to suggest that the Establishment Clause offers special protection for minority religious viewpoints, perhaps on the theory that majority religious viewpoints and practices would be unlikely to be targeted for adverse treatment by legislatures.<sup>26</sup> Of course, such a test requires further elaboration, for example, whether an individual's sincere report that a religious display makes her feel like an outsider should suffice to establish that Establishment Clause guarantees have been violated.<sup>27</sup> In any event, Justice O'Connor's description of the test implied that the Constitution includes special protections to assure that individuals will not be disadvantaged on the basis of religion.

Justice O'Connor explained that the Endorsement Test could be used to determine whether the "purpose" or the "effect" prong of the *Lemon* Test had been violated:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>28</sup>

Such a test on its face seems relatively easy to apply. If the state engages in a practice with the intention of promoting religion or if a state practice conveys a message of religious endorsement, then the practice will violate the Establishment Clause. However, in the very opinion in which she

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25. *Id.* at 688 (O'Connor, J., concurring). See also Jordan C. Budd, *Cross Purposes: Remediating the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 215 (2004) ("The endorsement standard rests on the principle that government may not communicate a message of political exclusion or inferiority to religious nonadherents.").

26. Cf. Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 147 n.94 (2002) ("RFRA was predicated upon the assumption that judges would deal more fairly than legislators with burdens on the religious practice of unpopular faiths."); Shahin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 538 (1990) ("[I]n most circumstances government responds to the desires of the majority.").

27. Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring in the judgment) (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)) ("Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement.").

28. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

explained the test, Justice O'Connor did not carefully delineate what belonged in the purpose rather than the effect analysis.

At issue in *Lynch* was whether the inclusion of a crèche in a winter display erected by the city of Pawtucket, Rhode Island, violated the Establishment Clause.<sup>29</sup> To analyze whether there had been improper endorsement, it was necessary to consider both the message the town intended to convey and the message the town actually conveyed.<sup>30</sup> Justice O'Connor commented that "[t]he purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action."<sup>31</sup> By this she presumably meant that the message the town intended to convey was the focus of the purpose prong, and the message that had actually been conveyed was the focus of the effect prong.

Justice O'Connor then offered an analysis of the term "meaning." She began by suggesting that "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."<sup>32</sup> Here one would likely assume that O'Connor was contrasting what the speaker intends to say with the "objective" message received as if she were contrasting the purpose and effect prongs. If this interpretation were correct, then the Endorsement Test would consider the subjective meaning under the purpose prong and the objective meaning under the effect prong.

To determine the subjective (or intended) meaning, listeners might be able to consider a variety of factors depending upon what information is available. For example, some will be able to take into account the context in which the statement was made or will be able to ask clarifying questions,<sup>33</sup> whereas others will rely solely on the text of the statement itself.<sup>34</sup> Thus, some attempting to discern a speaker's intent will have access to a wealth of information, whereas others will be limited to making a judgment solely based on the words themselves. The discussion of the *Lemon* Test thus far seems perfectly clear in that there are two aspects to be considered: purpose and effect. The speaker's purpose may be clarified either by considering context or by considering responses to questions directed at the speaker. Those who do not have the benefit of information about the context or access to the speaker's responses will have to make a somewhat less informed judgment about the speaker's purpose by letting the words speak for themselves.

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29. *Id.* at 670-71.

30. *Id.* at 690.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

Yet, the purpose and effect prongs suddenly became conflated when Justice O'Connor noted that for those who must make a judgment based solely on the words themselves, "the message actually conveyed may be something not actually intended."<sup>35</sup> The whole previous discussion had been about not what was actually conveyed, but instead, what was actually intended. Then, Justice O'Connor shifted the discussion away from correct or incorrect inferences about speaker intention and instead focused on what was conveyed rather than on what was intended to be conveyed.<sup>36</sup>

A number of points might be made about this (perhaps unconscious) shift. First, while it is of course true that those who must infer intent without having access to context or speaker clarifications may infer something not actually intended, the same point can be made about those who have access both to context and to speaker clarifications. It is neither surprising nor helpful to note that individuals may misapprehend speaker intent, and the implication that *only* people who do not have access to context and speaker clarification may be mistaken about intent is a position that few, if any, theorists would expressly embrace.<sup>37</sup>

Second, by contrasting what is intended in light of context and speaker clarification with what is objectively conveyed based on text alone, Justice O'Connor misleads those who wish to better understand the Endorsement Test. Assuming that a speaker is honest when answering questions, listeners who are aware of the context and who have the benefit of clarifying answers are presumably more likely to be correct about the speaker's intent. However, when comparing those who have access to context and speaker clarification with those who only have access to the text, Justice O'Connor did not simply say that the former would be more likely than the latter to correctly infer intent. Instead, she suggested that the former would be more likely to capture "subjective" intent while the latter might have access to what was actually conveyed, even if not actually intended. But the En-

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35. *Id.*

36. *Id.* at 691-92.

37. It is by no means unusual for individuals with the same relevant information to nonetheless reach different conclusions. *See, e.g.,* Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1555 (11th Cir. 1995) (citing Barfield v. Orange County, 911 F.2d 644, 649 (11th Cir.1990)) ("This case presents one example of the vagaries of administrative determinations which the *Barfield* court identified: two government officials knowledgeable in the area of employment discrimination law reached different conclusions after independently reviewing the same facts."); United States v. Demes, 941 F.2d 220, 223 n.2 (3d Cir. 1991) (noting that "different finders of the fact can reasonably draw opposite conclusions from the same historical record"). It is precisely because reasonable fact-finders might reach different conclusions based on the same facts that appellate courts cannot overrule lower courts merely because they might have read the facts differently. *See* Ind. Metal Prods. v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971) ("Thus we may not set aside conclusions reasonably inferred by the Board simply because we would have drawn a different inference from the same facts.") (citing NLRB v. S. Bell Tel. & Tel. Co., 319 U.S. 50, 60 (1943)).

dorsement effect prong focuses on whether, “*irrespective of government’s actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval.”<sup>38</sup> If those who only have the text itself may not capture subjective intent, but still can lay claim to the message actually conveyed, then one would think that those who understand a text to be conveying a message of religious disapproval are correct about the message actually conveyed and thus should be able to establish that the effect prong has been violated.

One way to understand the contrast discussed above would be to picture two groups. Group One attends a lecture where it hears high government officials make certain comments about a particular state practice. The attendees understand the context in which the practice occurs and, further, there is a question and answer period after the address so that any lingering questions can be answered. Group Two knows of the practice but does not attend the lecture. Members of this group understand little if anything about the context in which the practice occurs and, further, are not given a transcript of the speaker’s remarks or the questions and answer period following those remarks. Arguably, members of Group One would have a better sense of why the state was engaging in the practice at issue. Group One would have access to relevant information to which members of Group Two would not. Nonetheless, members of Group Two would be able to talk about the message conveyed by the practice, even if they would not have access to information that would have helped them make a more reliable assessment of the state’s purpose in engaging in the practice.

While this scenario seems to capture what Justice O’Connor envisioned, there is reason to believe that she also contemplated other scenarios. She noted that “[i]f the audience is large, as it always is when government ‘speaks’ by word or deed, some portion of the audience will inevitably receive a message determined by the ‘objective’ content of the statement, and some portion will inevitably receive the intended message.”<sup>39</sup> But this suggests that even when an audience has access to both context and speaker clarification, some will correctly ascertain the state’s intent and message while others will not. Further, that divergence will *not* be due to differences in the kinds of information to which the different audience members have access.

Sometimes the objective and subjective meaning will coincide. Those who only have access to the text will make the same inferences about intent and meaning as will those who have access to additional information. However, where those meanings do not coincide, it need not be because only some have access to relevant information. Rather, it could be for a

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38. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (emphasis added).

39. *Id.*

variety of other reasons, such as that members of the audience have differing beliefs and histories or that the audience members might focus on different aspects of the discussion.<sup>40</sup> Further, where a large audience has access to the same information and different members reach contradictory conclusions about the state's purpose, the important question for purpose prong analysis involves determining which view will be credited as being correct. Justice O'Connor understands that individuals with access to the same information will nonetheless reach different conclusions. However, she says nothing about how to determine who has accurately described the message the state intends to convey, even though such a determination is the central concern of the purpose prong.

To make matters even more complicated, a speaker might not be forthright in revealing the state's purpose. Statements made by a speaker might be intended to confuse rather than clarify, and an audience might wrongly infer that a practice was not religiously motivated, for example, because of misleading answers.<sup>41</sup> In such a case, those who knew about the practice but did not also have access to obfuscating responses might have a better chance of correctly discerning the state's purpose.

It might be thought that the difficulties in discerning intent are notorious,<sup>42</sup> and thus, it is unfair to criticize the Endorsement Test for failing to solve problems that may be insoluble.<sup>43</sup> Yet, the law requires that judgments be made about intent in a variety of areas,<sup>44</sup> and it is not at all clear

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40. See Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 85 (1990) ("What is normally conveyed may well be a variety of messages to different audiences.").

41. A separate question is whether a secret purpose to promote religion is barred by the Establishment Clause. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) ("A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.").

42. See Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 700 (2006) (noting that "legislative intent is often difficult to discern").

43. See Ellen P. Aprill & Nancy Staudt, *Theories of Statutory Interpretation (and Their Limits)*, 38 LOY. L.A. L. REV. 1899, 1906-07 (2005) (citing Cheryl Boudreau, Mathew D. McCubbins & Daniel Rodriguez, *The Intentional Stance*, 38 LOY. L.A. L. REV. 2131, 2133-35 (2005)) ("[I]n reality it is virtually impossible to discern actual intent given the collective nature of the legislative process.").

44. Jamin B. Raskin, *Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause—Commentary on Measured Endorsement*, 60 MD. L. REV. 761, 764 (2001) ("This purpose inquiry is the essential interpretive methodology not just in Establishment Clause jurisprudence, but in free speech and Equal Protection jurisprudence as well.").

that discerning intent is as impossible as is sometimes claimed.<sup>45</sup> Further, Justice O'Connor seems to have added complexity and confusion rather than clarification to the purpose prong analysis.

Regrettably, Justice O'Connor also added more confusion than clarification when she discussed the effect prong of the Endorsement Test. While her statement that "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval,"<sup>46</sup> seems relatively straightforward, its meaning and proper application become much more difficult to understand upon examination of Justice O'Connor's explanatory remarks. For example, she made clear that "the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."<sup>47</sup> Rather, she suggested that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."<sup>48</sup> Yet, this suggests that the Endorsement Test does not require invalidation of state practices secretly promoting religion, because no message of endorsement is thereby communicated. Thus, according to Justice O'Connor's view, government promotion of religion that is hidden from view is protected not merely because no one thinks to challenge it, but because it is permissible in that it is not actually communicating a message of endorsement.

Justice O'Connor seemed to complicate the test further when she suggested that the effect prong is only violated by practices that "make religion relevant, in reality or public perception, to status in the political community."<sup>49</sup> She offered no accompanying explanation regarding whether an actual message of endorsement affects status in the community (in which case nothing but endorsement must be shown),<sup>50</sup> or whether this status-in-

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45. See Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1228 (2007) ("[W]e argue that the idea of legislative intent is sound and not an oxymoron.").

46. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

47. *Id.* at 691-92.

48. *Id.* at 692.

49. *Id.*

50. See Feigenson, *supra* note 40, at 78 (suggesting that no additional element is added) ("[U]nder Justice O'Connor's theory, government action that lacks a concrete effect on political standing is, nevertheless, invalid if it endorses religion."); see also Kathryn Elizabeth Komp, Note, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301, 313 (2005) (noting that "[Justice O'Connor] explained, '[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. . . . [P]ractices having that effect . . . make religion relevant, in reality or public perception, to status in the political community.' Thus, Justice O'Connor suggested, state action that appeared to endorse a particular religious denomina-

the-community criterion creates an additional hurdle, for example, requiring one to show that one's ability to participate politically has somehow been affected.<sup>51</sup> If nothing in addition to endorsement must be shown, then it is unclear why comments about status in the political community have been included. If something else must be shown, it is unclear what that would be. Must one show obstacles to voting that had been put into place<sup>52</sup> or difficulties in forging alliances with groups having intersecting interests?<sup>53</sup> If the latter, would those difficulties have to be a result of the state endorsement of religion rather than simply by virtue of the group having non-majoritarian religious beliefs? These questions are left unanswered.

By mentioning status in the political community, Justice O'Connor may direct the focus of discussion away from endorsement. If the evil to be avoided is interference with one's ability to participate politically, then it is not at all clear that endorsement is even relevant to the analysis; rather, it would seem that the creation of roadblocks for minority political participation is what must be rectified.<sup>54</sup> When such roadblocks have been created, they must be removed; however, absent such roadblocks, there would be no

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tion, or religion generally, could not withstand Establishment Clause scrutiny." *Id.* (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (omissions in original)).

51. For the suggestion that endorsement might not have practical political effects, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1447 (2000) ("[W]hat about an endorsement of religion R, or of religion in general, uttered by a government about which citizens are generally disillusioned, and whose officials are generally viewed as corrupt and petty?"); cf. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 709 n.181 (2002) ("[T]he harm of endorsement is the actual reduction in political equality that results from the psychological impact of the endorsement message on favored and disfavored citizens alike.").

52. Cf. Kevin M. Detroy, *A Coherent Standard, If You Please: The Supreme Court's Failure to Adhere to a Consistent Standard in Establishment Clause Cases and Why a Revision of Justice O'Connor's Endorsement Test May Be Just What Is Needed*, 33 N. KY. L. REV. 571, 609 (2006) ("Working from this notion that non-adherents will be alienated from the political process, we can offer a standard by which cases should be evaluated. Government endorsement of religion, either intended or unintended, violates the Establishment Clause when such action would have the reasonable effect, in light of the values embodied in both the Free Speech and Free Exercise clause, of discouraging political participation by non-adherents due to their religious affiliation.").

53. Cf. Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991) (noting that suspect status analysis involves the assumption that groups with that designation "will probably be unable to make use of the usual political processes to bring about changes in legislation adversely affecting them, they will be unable to avail themselves of one of the safeguards built into our political system").

54. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 307-08 (1987) (suggesting that if in fact political standing has been impacted by one's religion, then that is the evil to be avoided and the focus on endorsement is simply the wrong focus).

reason to believe endorsement constitutionally objectionable. If the state's endorsement of religion is indeed constitutionally impermissible, that presumably is so even if no particular groups have thereby been impeded from participating in the political process.

Perhaps the most confusing aspect of Justice O'Connor's analysis is her statement that "[e]xamination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning."<sup>55</sup> Given that a state practice will not pass constitutional muster if either the purpose or the effect prong has been violated,<sup>56</sup> it is not true that both the subjective and objective components must be considered in order to establish that a state practice fails to pass constitutional muster. On the contrary, both of these components have to be examined to establish that the action does *not* have a forbidden meaning and *passes* constitutional muster. Thus, if the purpose prong is violated because the subjective intent is to endorse religion, then no more needs to be shown to establish that the practice is unconstitutional.<sup>57</sup> By the same token, if the effect prong is violated because the state conveys a message of religious endorsement, then no more needs to be examined to show that the practice does not pass muster.<sup>58</sup> It is only when analysis under one of the prongs does *not* reveal a violation that analysis under the other prong is required.<sup>59</sup>

Perhaps Justice O'Connor merely made a somewhat infelicitous choice of words when discussing the conditions under which subjective and objective meaning must be considered. After all, she expressly stated that violation of either prong would suffice to establish a constitutional violation.<sup>60</sup> However, before one concludes that the Endorsement Test described in Justice O'Connor's *Lynch* concurrence is indeed protective of minority

55. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

56. *See id.* ("The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.").

57. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) ("Thus, in *Wallace v. Jaffre*, the Court held unconstitutional Alabama's moment-of-silence statute because it was 'enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities.' The Court similarly invalidated Louisiana's 'Creationism Act' because it 'endorse religion' in its purpose.").

58. *See Susanna Dokupil, "Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609, 633 (2005) ("But, regardless of purpose, if the effect endorses religion, the display is still unconstitutional.").

59. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("An affirmative answer to either question should render the challenged practice invalid.").

60. *See id.*

religious rights,<sup>61</sup> it might be helpful to examine how she applied such guarantees to the case at hand.

### 1. *The Purpose Prong*

Justice O'Connor noted that the *Lemon* purpose prong requires the Court to examine whether the state intended to endorse or express disapproval of religion.<sup>62</sup> After pointing out that the celebration of public holidays having both religious and cultural significance can be motivated by secular purposes,<sup>63</sup> she reasoned that Pawtucket had not intended to endorse Christianity or convey a message of disapproval of any other religion.<sup>64</sup> Indeed, she concluded that "[t]he evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols."<sup>65</sup>

Certainly, it was possible that Pawtucket had not intended to endorse one religion in particular or religion more generally. Someone reading her concurrence might have assumed that Justice O'Connor had carefully considered the record and decided that there simply was no evidence that Pawtucket had such an illicit intention. However, examination of the *Lynch* district court opinion<sup>66</sup> puts Justice O'Connor's concurrence in a much different light and alerts readers that her Endorsement Test offers far less protection than might first have been thought.

The district court heard testimony that individuals who saw the crèche viewed it as state endorsement.<sup>67</sup> Further, many citizens objected to the suit

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61. Cf. James M. Lewis & Michael L. Vid, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 694 (1990) (discussing "Justice O'Connor's sensitivity toward the feeling of exclusion from the political community"). But see Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 719 (2001) (noting that Justice O'Connor's "test's rationale seemed to focus on the perspective of nonadherents, asking whether they were sent a message that they were outsiders, but her application of that test did not rely on their perspective at all"); Smith, *supra* note 54, at 294 ("O'Connor has explained that the "no endorsement" test seeks to prevent government from sending messages which lead some citizens to believe that they are "outsiders" because of their religious beliefs. If that is the purpose of the test, however, then the pertinent fact controlling the application of the test should be neither the perhaps indiscernible intent of government officials nor the imagined perceptions of a fictitious observer; the controlling standard, rather, should be the actual perceptions of real citizens.").

62. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

63. *See id.*

64. *Id.*

65. *Id.*

66. *See Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), *rev'd*, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

67. *Id.* at 1157 ("[T]hey view the City's erection of the creche as demonstrating the City's support for the Christian religion.").

because they believed that Pawtucket could and should support the religious views of the majority of the local populace.<sup>68</sup> After the lawsuit was filed, the mayor held a press conference where he vowed to “fight vigorously the ACLU’s attempt to take Christ out of Christmas.”<sup>69</sup> Nor was it only the mayor who believed that removing the crèche from the display would be the equivalent of taking Christ out of Christmas. A large number of letters to the editor appearing in the local newspaper suggested that “the birth of Christ is the essence of Christmas, and that the presence of the creche, as a symbol of this spiritual core, is necessary to preserve the true meaning of the holiday.”<sup>70</sup> Ultimately, the district court concluded that a significant percentage of the population “regarded the dispute over the nativity scene as implicating religious beliefs and values.”<sup>71</sup>

While Pawtucket claimed that the holiday display was to promote downtown business, the court heard testimony that removal of the nativity scene from the display would not adversely affect business.<sup>72</sup> The district court considered the city’s claim that the purpose of the display was cultural or traditional,<sup>73</sup> but noted that merely because “a practice is observed for a sufficient length of time to give it the status of one of our traditions does not mean that the belief or practice ceases to be religious or to be identified with one group.”<sup>74</sup> For example, the court noted:

Recitation of the Lord’s Prayer has been a practice of many, if not most, Americans for generations. However, even though its time-honored and widespread observance may make it a tradition, and indeed even an element of our culture, it remains essentially religious and Christian. We cannot permit the labels “cultural” or “traditional,” even when validly applied, to blind us to the nature of the object so described.<sup>75</sup>

Presumably, the district court offered the example of the recitation of the Lord’s Prayer precisely because the United States Supreme Court had already examined whether its daily recitation in the schools violated constitutional guarantees. In *School District of Abington Township v. Schempp*,<sup>76</sup> the Court struck down a school policy involving recitation of the Lord’s Prayer,<sup>77</sup> notwithstanding the Court’s recognition that “religion has been closely identified with our history and government.”<sup>78</sup> While a public dis-

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68. *See id.* at 1158.

69. *Id.* at 1159.

70. *Id.* at 1161.

71. *Id.*

72. *Id.* at 1159.

73. *Id.* at 1170.

74. *Id.* at 1171.

75. *Id.*

76. 374 U.S. 203 (1963).

77. *See id.* at 223.

78. *Id.* at 212.

play is not the equivalent of required recitation in the schools, calling something cultural or traditional should not end the inquiry regarding whether a practice is religious and hence prohibited by the Establishment Clause. Insofar as Pawtucket wanted to include or retain the nativity scene in the display precisely because of the “fundamentally religious significance of the crèche,”<sup>79</sup> neither culture nor tradition should be permitted to immunize that inclusion from Establishment Clause review.

Although Justice O’Connor rejected that the purpose behind inclusion of the nativity scene was to promote the religious content of the holiday, the evidence suggested otherwise, given the articulated desire to keep Christ in Christmas.<sup>80</sup> Had more testimony been offered at trial about how inclusion of the crèche was for a secular purpose, however, it would likely still have been insufficient to establish that the “evident” purpose of including the crèche was secular.<sup>81</sup> Substantially more evidence of the secular purpose and substantially less evidence of the religious purpose would have been required to justify Justice O’Connor’s conclusion that the district court finding of unconstitutional purpose was “clearly erroneous.”<sup>82</sup>

It might be argued that the evidence presented did not address why the crèche was originally included, but only addressed why it was retained in the display. Even if that were true, the *retention* for religious reasons would presumably have been enough to violate Establishment Clause guarantees.<sup>83</sup> The district court offered three reasons to believe that the city was retaining the crèche in the display for religious purposes. First, the city had never attempted to undermine the perception that it was promoting religion, for example, by displaying a notice of non-endorsement.<sup>84</sup> Second, only the religious heritage and traditions of the Christian majority had been part of the city’s ceremonies and displays,<sup>85</sup> which cast doubt on the claimed neutral purpose behind city practices.<sup>86</sup> Third, the court offered the city’s own argument in defense of the crèche to support the finding that the city’s purpose was not secular. The city argued that “[i]f government could cele-

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79. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1167 (D.R.I. 1981), *rev’d*, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

80. *See supra* notes 68-70 and accompanying text.

81. *See Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O’Connor, J., concurring).

82. *Id.*

83. *See Books v. City of Elkhart*, 235 F.3d 292, 315-16 (7th Cir. 2000) (Manion, J., concurring in part, dissenting in part) (citing *Bridenbaugh v. O’Bannon*, 185 F.3d 796, 799 (7th Cir. 1999)) (“What matters, however, is not the City’s purpose in 1958—when Elkhart could constitutionally have a religious purpose—but the City’s purpose today.”).

84. *Donnelly*, 525 F. Supp. at 1172 (“First, the City has never attempted to disclaim, by means of a written notice or otherwise, any endorsement of the religious message that a crèche—particularly when included as part of a Christmas display during the Christmas season—conveys.”).

85. *Id.*

86. *Id.*

brate a national holiday only by removing all of its religious elements, the Establishment Clause would have achieved the very hostility toward religion which the Supreme Court has long and consistently disavowed as inimical to our constitutional tradition.”<sup>87</sup> But the court rejected this argument, reasoning:

It is hard to see how limiting the City’s celebration of Christmas to the secular aspect that permits its designation as a national holiday in the first place is hostile to religion—unless by “hostility” the City means that a lavish celebration of the holiday which does not include some reference to Christ will aggrandize the secular dimension of Christmas to the detriment of the churches and religious groups who are struggling to “keep Christ in Christmas.”<sup>88</sup>

Thus, the court inferred that the city wanted to retain the crèche precisely because the city feared that not doing so would make the display too secular.

The district court offered a variety of reasons to support its conclusion that the *Lemon* purpose prong had been violated.<sup>89</sup> While the evidence was strong, it might be thought that a different court could have reached a different conclusion. But even if a different court might have made a contrary finding, reversal of the *Lynch* district court nonetheless remained unjustified. Justice O’Connor’s conclusion that the district court finding was clearly erroneous—that no reasonable court could have found a violation of the purpose prong based on the evidence presented—was simply unfathomable given the test that she had articulated. This suggests at the very least that the Endorsement Test she described is not to be interpreted literally.

## 2. *The Effect Prong*

While a finding of religious purpose would have sufficed to invalidate inclusion of the crèche,<sup>90</sup> the district court also found that the primary effect of including the nativity scene was to promote religion.<sup>91</sup> Justice O’Connor’s explanation of why the *Lemon* effect prong was not violated when understood in light of the Endorsement Test was no more satisfying than her analysis of the purpose prong under the Endorsement Test.

The district court examined the display, noting that the nearly life-sized nativity scene did not play an insignificant part in the setting and was located in an especially prominent place.<sup>92</sup> The court discussed the “view-

87. *Id.* at 1172-73.

88. *Id.* at 1173.

89. *See supra* notes 84-87 and accompanying text.

90. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

91. *See Donnelly v. Lynch*, 525 F. Supp. 1150, 1180 (D.R.I. 1981), *rev’d*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (noting the court’s finding of “impermissible effect”).

92. *Id.* at 1167-77.

ers' reasonable inference that the creche is there because the City supports that message and wishes to promulgate it,"<sup>93</sup> and noted that the city had done nothing to undercut such an inference.<sup>94</sup> The district court concluded that the display's effect was to create the appearance of an official imprimatur on Christian beliefs.<sup>95</sup> When Justice O'Connor rejected the district court's finding with respect to the message communicated by the crèche, she suggested that these "subsidiary findings" regarding the size and prominence of the display were compatible with the conclusion that there had been no violation of the Establishment Clause.<sup>96</sup> However, her analysis of why that was so is quite telling.

Justice O'Connor noted that the district court said that the "government was understood to place its imprimatur on the religious content of the creche."<sup>97</sup> Rather than offering evidence to suggest that there had been no such understanding, she instead suggested that "whether a government activity communicates endorsement of religion is not a question of simple historical fact."<sup>98</sup> On the contrary, the analysis is "in large part a legal question to be answered on the basis of judicial interpretation of social facts."<sup>99</sup> Thus, the fact that members of both majority and minority religions believed that the display communicated a message of government endorsement of Christianity in particular was not enough to establish a violation of the effect prong. Because the display could not "fairly be understood to convey a message of government endorsement of religion,"<sup>100</sup> the district court finding was wrong as a "matter of law,"<sup>101</sup> according to O'Connor, even if the court was correct that the "practice under review in fact convey[ed] a message of endorsement"<sup>102</sup> and was understood to do so by members of both majority and minority religions.

While Justice O'Connor's initial discussion of the Endorsement Test implied that the test would prevent religious minorities from feeling like

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93. *Id.* at 1177-78.

94. *Id.* at 1178.

95. *Id.* at 1177.

96. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). The District Court's subsidiary findings on the effect test are consistent with this conclusion. The court found as facts that the crèche has a religious content, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional, and that the city did not seek to counteract any possible religious message. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 694.

100. *Id.* at 693.

101. *Id.* at 694.

102. *Id.* at 690.

second-class citizens,<sup>103</sup> her application of the test suggested that it was far less protective than originally supposed. However, her Endorsement Test, even when considered in light of its application, was presumably more protective of minority religious rights than was the other Endorsement Test employed in *Lynch*.<sup>104</sup>

#### B. An Alternative Understanding of the Endorsement Test from *Lynch*

When commentators discuss the Endorsement Test offered in *Lynch*, they often focus on the test offered in Justice O'Connor's concurrence.<sup>105</sup> However, the *Lynch* majority also discussed endorsement,<sup>106</sup> although that opinion employed a comparative analysis in which state endorsement of religion would be held to violate constitutional guarantees only if the state practice at issue involved more of an endorsement than had previously been upheld by the Court.<sup>107</sup> Thus, the *Lynch* majority<sup>108</sup> rejected the district court finding that the primary effect of including the crèche was to advance religion,<sup>109</sup> reasoning that:

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103. See Budd, *supra* note 25, at 190 (“The primary objection to Justice O'Connor's standard, advanced by a number of scholars and embraced to some degree by several Justices of the Supreme Court, is that the test is too protective of separationist interests by wrongly defining the constitutional right in terms of an intangible ‘expressive’ injury subjectively experienced by an idealized observer.”).

104. But see *infra* notes 215-21 and accompanying text (suggesting that the two tests may be less far apart than is commonly suggested).

105. See, e.g., Maya Anderson, Note, *The Constitutionality of Faith-Based Prison Programs: A Real World Analysis Based in New Mexico*, 37 N.M. L. REV. 487, 499 (2008) (“The endorsement test, another proposed modification to *Lemon*, was offered by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly* in 1984.”) (citations omitted); Modak-Truran, *supra* note 5, at 225-26 (“[M]any of the Justices have embraced the ‘endorsement test,’ which was originally proposed by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*.”) (citations omitted); Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 n.1 (2007) (“The endorsement test was first introduced by Justice O'Connor in her influential concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).”); Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J.L. & EDUC. 301, 314 (2007) (“The endorsement test was introduced in a concurrence by Justice O'Connor in the Court's 1984 decision *Lynch v. Donnelly*.”); Detroy, *supra* note 52, at 600 (“The endorsement test made its formal debut in Justice O'Connor's concurrence in *Lynch v. Donnelly*.”).

106. Wilson, *supra* note 23, at 607 (“Justice O'Connor originally postulated the test in her concurrence in *Lynch v. Donnelly*, in part because the *Lynch* majority used the word ‘endorsement.’”).

107. See *Lynch*, 465 U.S. at 681.

108. The *Lynch* majority opinion commanded the votes of five members of the Court. The opinion was written by Chief Justice Burger, who was joined by Justices Powell, White, and Rehnquist. Justice O'Connor provided the fifth vote in her concurring opinion.

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

[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and *more an endorsement of* religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools; expenditure of public funds for transportation of students to church-sponsored schools; federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education; noncategorical grants to church-sponsored colleges and universities; and the tax exemptions for church properties sanctioned in *Walz*. It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland*; the release time program for religious training in *Zorach*; and the legislative prayers upheld in *Marsh*.<sup>110</sup>

Here the Court suggested that the relevant constitutional issue was not whether there was an endorsement of religion, but rather to what degree religion was endorsed. The alleged endorsement at issue in *Lynch* would not be held unconstitutional as long as it involved no more of an endorsement of religion than had other practices whose constitutionality had been upheld against an Establishment Clause challenge.

Yet this is at best a regrettable way to understand the applicable test, especially when one considers that the Court had previously implied in most if not all of the cited cases that by upholding the constitutionality of the benefit at issue, religion was not being promoted; instead, it was merely not being disadvantaged. To better understand why the *Lynch* majority's Endorsement Test analysis was at best misleading, it is helpful to briefly examine the cases the Court used to support its rationale.

In *Board of Education v. Allen*, the Court upheld the lending of textbooks to parochial schools.<sup>111</sup> After noting that "each book loaned must be approved by the public school authorities; only secular books may receive approval,"<sup>112</sup> the Court implied that the statute at issue was merely affording secular benefits neutrally among students.<sup>113</sup> Similarly, in *Everson v. Board of Education*, the Court upheld a program that reimbursed school transportation costs, even if the children were attending parochial schools.<sup>114</sup> The *Everson* Court suggested that the legislation at issue did "no more than pro-

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110. *Lynch*, 465 U.S. at 681-82 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Marsh v. Chambers*, 463 U.S. 783 (1983)) (emphasis added).

111. 392 U.S. 236, 238 (1968) ("We hold that the law is not in violation of the Constitution.").

112. *Id.* at 244-45.

113. *See id.* at 243 ("The law merely makes available to all children the benefits of a general program to lend school books free of charge.").

114. *See* 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

vide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”<sup>115</sup>

The same point might be made about *Tilton v. Richardson*, in which the Court upheld the Higher Education Facilities Act<sup>116</sup> authorizing federal grants and loans for construction by colleges and universities.<sup>117</sup> The Court noted that the monies were authorized “only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.”<sup>118</sup> Thus, although federal funds were being used to finance construction of buildings on the campuses of religiously affiliated universities,<sup>119</sup> the Court suggested that the buildings at issue were “indistinguishable from a typical state university facility.”<sup>120</sup> Further, the Court found that these institutions’ “predominant higher education mission [was] to provide their students with a secular education.”<sup>121</sup> For these reasons among others, the Court concluded that this Act was unlikely to cause the “substantive evils against which the Religion Clauses were intended to protect.”<sup>122</sup>

In *Roemer v. Board of Public Works of Maryland*,<sup>123</sup> the Court examined a state statute authorizing grants to private secular and sectarian colleges, contingent on those monies not being used for “sectarian purposes.”<sup>124</sup> Institutions of higher learning that primarily awarded theological or seminary degrees were not eligible to receive grants.<sup>125</sup> Those institutions still eligible for funding had to include an affidavit stating that the funds would not be used for religious purposes.<sup>126</sup> In rejecting the challenge to the statute, the *Roemer* Court suggested that “religious institutions need not be quarantined from public benefits that are neutrally available to all,”<sup>127</sup> as if

115. *Id.*

116. *See* 403 U.S. 672, 689 (1971) (“We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part of § 754(b)(2) providing a 20-year limitation on the religious use restrictions contained in § 751(a)(2).”).

117. *See Tilton*, 403 U.S. at 674-75.

118. *Id.* at 679-80.

119. *See id.* at 676. The universities whose buildings were at issue were Sacred Heart University, Annhurst College, Fairfield University, and Albertus Magnus College. *Id.*

120. *Id.* at 680.

121. *Id.* at 687.

122. *Id.* at 688.

123. 426 U.S. 736 (1976).

124. *Id.* at 739.

125. *Id.* at 741-42.

126. *Id.* at 742 (“An application must be accompanied by an affidavit of the institution’s chief executive officer stating that the funds will not be used for sectarian purposes, and by a description of the specific nonsectarian uses that are planned.”) (citation omitted).

127. *Id.* at 746.

refusing to permit sectarian schools to have access to these grants would make the state less than neutral.<sup>128</sup>

The Court also discussed the importance of neutrality in *Walz v. Tax Commission of the City of New York*,<sup>129</sup> where the Court explained that “[t]he course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”<sup>130</sup> At issue in *Walz* was New York City’s grant of a property tax exemption to religious organizations.<sup>131</sup> The Court explained that each “judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.”<sup>132</sup> The tax exemption was found neither to establish nor to interfere with religious beliefs and practices; instead, the City was merely adhering to a policy of neutrality by affording this exemption.<sup>133</sup> Justice Brennan justified the tax exemption at issue by noting that these religious organizations, “among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.”<sup>134</sup> Justice Brennan also pointed out that religious organizations contribute to society in unique and important ways, and that it was permissible for the state to afford religious organizations a tax exemption when it was also affording such exemptions to a plethora of other organizations providing unique societal benefits.<sup>135</sup> Precisely because such a range of organizations were afforded this tax bene-

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128. See *id.* at 747 (“Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity.”).

129. 397 U.S. 664 (1970).

130. *Id.* at 669.

131. See *id.* at 666.

132. *Id.* at 669.

133. See *id.* at 669-70.

134. *Id.* at 687 (Brennan, J., concurring).

135. See *id.* at 688-89 (citing *Wash. Ethical Soc’y v. D.C.*, 249 F.2d 127, 129 (1957) (“Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society. To this end, New York extends its exemptions not only to religious and social service organizations but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions ‘organized exclusively for the moral or mental improvement of men and women.’”) (internal citations omitted). The majority, however, refused to rely on this reasoning. See *Walz*, 397 U.S. at 674 (majority opinion) (“We find it unnecessary to justify the tax exemption on the social welfare services or ‘good works’ that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need.”).

fit, it could not be claimed that the state was picking out religious organizations for special favoritism.<sup>136</sup>

Maryland's Sunday Closing Laws were challenged as a violation of the Religion Clauses in *McGowan v. Maryland*.<sup>137</sup> The Court admitted that those laws were originally passed to aid religion,<sup>138</sup> but then sought to determine whether such laws retained their religious character.<sup>139</sup> The Court found that the current statutes were designed to promote secular objectives,<sup>140</sup> for example, to provide one day during the week when family and friends could do things together.<sup>141</sup>

In the above cases, the Court appealed to religious neutrality to uphold programs benefiting religious and other groups. On first glance, such a rationale might seem ill-suited to uphold the program at issue in *Zorach v. Clauson*,<sup>142</sup> which involved a challenge to a New York program permitting students to be released from school for off-site religious instruction.<sup>143</sup> However, the *Zorach* Court noted that the release time program neither involved "religious instruction in public school classrooms nor the expenditure of public funds"<sup>144</sup> and suggested that interpreting the Constitution to prohibit this kind of program "would be to find in the Constitution a re-

136. *Id.* at 689 (Brennan, J., concurring) ("The very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference."); *see also id.* at 696 (Harlan, J., concurring) ("The statute also satisfies the requirement of neutrality. Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

137. *McGowan v. Maryland*, 366 U.S. 420, 422 (1961) (One of the "questions presented [is] whether . . . the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.").

138. *See McGowan*, 366 U.S. at 431 (arguing that there was "no dispute that the original laws which dealt with Sunday labor were motivated by religious forces").

139. *Id.* ("But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.").

140. *See id.* at 444 ("In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.").

141. *See id.* at 451 ("Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together.").

142. 343 U.S. 306 (1952).

143. *Id.* at 308.

144. *Id.* at 308-09.

quirement that the government show a callous indifference to religious groups.”<sup>145</sup>

In most of the cases cited by the *Lynch* majority, the Court implied that the programs at issue were not endorsing religion but were instead permissible under a theory of neutrality.<sup>146</sup> The possible exception to this rule was *Marsh v. Chambers*,<sup>147</sup> which involved a challenge to the Nebraska Legislature’s practice of beginning each session with a prayer offered by a state-paid chaplain.<sup>148</sup> Rather than discuss whether this practice promoted religion, the Court simply noted the long historical pedigree of the practice.<sup>149</sup> The Court characterized this way of beginning legislative sessions as “simply a tolerable acknowledgment of beliefs widely held among the people of this country,”<sup>150</sup> implying that even legislative prayer did not involve an endorsement of religion. While it is implausible to suggest that offering a prayer is merely the equivalent of an acknowledgment of widely held beliefs,<sup>151</sup> the *Marsh* Court was nonetheless trying to shoehorn legislative prayer into the neutrality-to-religion paradigm.

Misrepresentation of the past jurisprudence notwithstanding, the *Lynch* Court did offer an implicit theory of endorsement. Thus, two theories of endorsement were offered in *Lynch*: comparative endorsement in the opinion written by Chief Justice Burger and non-comparative endorsement in the concurring opinion written by Justice O’Connor. In subsequent opinions applying the Endorsement Test,<sup>152</sup> Justice O’Connor’s concurring opinion provided the basis for determining what ultimately constitutes state endorsement.

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145. *Id.* at 314.

146. See Mark Strasser, *Thou Shalt Not?*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 439, 449 (2006) (“In almost all of the cases cited by the Court in *Lynch*, the ‘benefits’ at issue were characterized as generally available, such that denying them to religious organizations would be treating the latter in a less than neutral manner.”) (citations omitted).

147. 463 U.S. 783 (1983).

148. See *id.* at 784-85.

149. *Marsh*, 463 U.S. at 786 (noting that “the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country”).

150. *Id.* at 792.

151. Cf. Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 63 (1993) (noting that “prayer is an inherently religious activity” and that such prayers “usually are delivered by religious leaders, persons for whom the words uttered have religious meaning”) (citations omitted).

152. See, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

## D. Clarifications of and Modifications to O'Connor's Endorsement Test

Justice O'Connor's concurrence in *Lynch* raised many questions, and she attempted to clarify her position in subsequent concurring opinions. It is debatable, however, whether her subsequent explanations modified the test originally conceived<sup>153</sup> or, instead, clarified what she had initially proposed.<sup>154</sup> In *Wallace v. Jaffree*,<sup>155</sup> the Court addressed an Alabama statute that authorized a one-minute period of silence in the schools for "meditation or voluntary prayer,"<sup>156</sup> despite the prior existence of a statute requiring public schools to have a one-minute period of silence for "meditation."<sup>157</sup> The Court struck down the statute at issue because the Court could discern "no secular purpose"<sup>158</sup> for passage of the statute. In her concurrence, Justice O'Connor suggested that the statute at issue violated both the purpose and the effect prongs of the Endorsement Test,<sup>159</sup> which "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."<sup>160</sup> She was not thereby suggesting that the Alabama law was constitutionally infirm merely because it authorized a moment of silence. After all, a moment of silence need not be used to pray,<sup>161</sup> and for that very reason the state's mandating that there be a moment of silence need not be endorsing that the time be used for prayer rather than reflection.<sup>162</sup>

When suggesting that moment-of-silence laws pass muster, Justice O'Connor was not implying that an applied challenge to such a statute would fail even if, for example, a state employee such as a teacher urged his

153. See, e.g., Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 112 (1990) (suggesting that Justice O'Connor slightly modified the test in her *Wallace v. Jaffree* concurrence).

154. A separate question is whether Justice O'Connor's view has been misinterpreted by many. See Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1149 (2002) ("Justice O'Connor's endorsement approach has gained a wide following on the Court, including among the Court's separationists, although the trend has been to interpret the test more strictly than Justice O'Connor initially envisioned.").

155. 472 U.S. 38 (1985).

156. *Id.* at 40 (citing ALA. CODE § 16-1-20.1 (Supp. 1984)).

157. *Id.* (citing ALA. CODE § 16-1-20 (Supp. 1984)).

158. 472 U.S. at 56.

159. *Id.* at 67 (O'Connor, J., concurring) ("[I]n light of the findings of the courts below and the history of [the statute's] enactment, . . . there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools.").

160. *Id.* at 70.

161. *Id.* at 72 ("a moment of silence is not inherently religious").

162. *Id.* at 73 ("By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period.").

pupils to pray during that silent time.<sup>163</sup> Indeed, in many cases, a number of factors would have to be considered before a conclusive judgment could be made about the constitutionality of a practice. Precisely because the ultimate conclusion regarding endorsement is so dependent on context and other factors, the “question cannot be answered in the abstract.”<sup>164</sup>

The case at hand did not involve the practice in a particular classroom but, instead, whether a particular statute constituted religious endorsement. To resolve that issue, the court had to “examine the history, language, and administration of . . . [the] statute to determine whether it operate[d] as an endorsement of religion.”<sup>165</sup>

Yet, urging the courts to consider history and context will not suffice—courts must have some guidance with respect to the vantage point that they should adopt when taking all of these factors into account. Justice O’Connor offered some suggestions about what courts should do when moment-of-silence laws were at issue: the inquiry into the legislation should be “deferential and limited,”<sup>166</sup> and courts should not attempt to psychoanalyze the members of the legislature.<sup>167</sup> She indicated that if a “plausible secular purpose” was asserted or if the statute included language disavowing an attempt to promote prayer over other possible uses of those moments, then as a general matter the stated purpose should be accepted.<sup>168</sup>

Justice O’Connor’s discussion of a “plausible secular purpose” was ambiguous. She might have meant that it had to be plausible that the secular purpose would in fact be served by the statute, which would require the Court to examine whether the statute was reasonably calculated to achieve the stated secular purpose. Or, she might merely have meant that it had to be plausible that the statute was motivated, at least in part, by secular rather than religious purposes. In the latter case, the court would not need to examine whether the statute was likely to achieve the secular purpose but merely whether some secular purpose had been offered. This latter deferential meaning seems to capture her view, as was illustrated by a colloquy that she had with Justice Rehnquist about the purpose prong.<sup>169</sup>

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163. *Id.* (“[T]he message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.”).

164. *Id.* at 74.

165. *Id.*

166. *Id.*

167. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.)).

168. *Id.* (O’Connor, J., concurring) (“If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent.”).

169. *See infra* notes 172-77 and accompanying text.

In his *Wallace* dissent, Justice Rehnquist commented that if the purpose prong was merely intended to preclude legislatures from stating that they aimed to promote religion, then “the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion.”<sup>170</sup> Here, he was suggesting that the purpose prong does little work if so construed.<sup>171</sup> Rather than respond that Justice Rehnquist had misunderstood the requirements imposed by the Endorsement Test as she understood it, Justice O’Connor replied that requiring the government to articulate a secular purpose and omit any statements about supporting religion “is precisely tailored to the Establishment Clause’s purpose of assuring that government not intentionally endorse religion or a religious practice.”<sup>172</sup>

Justice O’Connor’s interpretation takes away much of the prong’s force because legislative officials should have little difficulty postulating and articulating some secular purpose to support a piece of legislation, even if their purpose was in fact to promote religion. Justice O’Connor recognized the possibility that legislators would claim a secular purpose despite not having one,<sup>173</sup> although she expressed confidence that courts could spot such misrepresentations.<sup>174</sup> Notwithstanding her expression of confidence in the ability of courts to spot false assertions of secular purpose, Justice O’Connor did not envision courts frequently striking down state practices under the purpose prong. Indeed, she expressly stated that application of the purpose prong would rarely result in a holding that the Establishment Clause had been violated.<sup>175</sup>

In determining the effect of a state practice such as the institution of a moment of silence, Justice O’Connor explained that the “relevant issue is whether an *objective observer*, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.”<sup>176</sup> Commentators have suggested that by invoking the reaction of an objective observer (rather than that of an actual person), Justice O’Connor changed her previous position.<sup>177</sup> However, a

170. *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

171. *See id.* (“The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that.”).

172. *Id.* at 75 (O’Connor, J., concurring).

173. *Id.* (“It is of course possible that a legislature will enunciate a sham secular purpose for a statute.”).

174. *Id.* (“I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one.”).

175. *See id.* at 75 (“the secular purpose requirement alone may rarely be determinative in striking down a statute”).

176. *See id.* at 76 (emphasis added).

177. *See Smith, supra* note 54, at 272 (“[C]ontrary to her language in *Lynch*, which had suggested that the relevant perceptions were those of real human beings who are the recipients of messages from government, O’Connor now made clear that the dispositive

few points are worth noting regarding the test described in *Wallace*. First, Justice O'Connor made clear in her *Lynch* concurrence that she was not interested in actual public perceptions, describing them as mere "historical fact."<sup>178</sup> Thus, she had already suggested in *Lynch* that the actual reactions of individuals of minority or majority faiths would not establish state endorsement. Second, objective observers who have the requisite knowledge and understanding might nonetheless reach different conclusions about whether a state practice conveys a message of endorsement.<sup>179</sup> Commentators fail to emphasize that Justice O'Connor was not simply suggesting that as long as the judge is an informed, objective observer the judge's considered judgment about whether a state practice communicated a message of religious endorsement must be accepted. Justice O'Connor noted that a "moment of silence law that is clearly drafted and implemented so as to

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question is whether the law would be perceived as endorsement by an 'objective observer' who is familiar with the text, legislative history, and implementation of the law in question."); see also Detro, *supra* note 52, at 601-02 (citing *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring)) ("In *Wallace v. Jaffree*, Justice O'Connor, again speaking from the confines of a concurrence, refined her analysis by making two notable alterations. . . . [Including that] the question of whether a given governmental act endorses religion is one that should be answered from the viewpoint of 'an objective observer, acquainted with the text, legislative history, and implementation of the statute.'"); Lisa M. Kahle, Comment, *Making "Lemon-Aid" from the Supreme Court's Lemon: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 367 n.83 (2005) (citing *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring)) ("Although Justice O'Connor stressed how governmental endorsement of religion affects 'real' people in *Lynch*, she stated in *Wallace v. Jaffree* that '[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement. . . .' From O'Connor's contradictory statements, it is not easy to discern whether the endorsement test is actually concerned with the 'hypothetical objective observer' or whether it focuses on 'real' people."); see also Julie Van Groningen, Note, *Thou Shalt Reasonably Focus on Its Context: Analyzing Public Displays of The Ten Commandments*, 39 VAL. U. L. REV. 219, 230 n.54 (2004) ("In *Wallace*, Justice O'Connor changed the relevant perceptions; the relevant perceptions are no longer from any person but from an objective observer."); Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 502 n.167 (2003) (citing *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)) ("In *Lynch*, Justice O'Connor suggests that nonadherents are "ordinary citizens," actual flesh and blood human beings, who are the recipients of the government's message. . . . In a subsequent case, she proposes a type of 'reasonable person standard,' suggesting that the nonadherent is an objective observer fully informed of all the facts: 'The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'")

178. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

179. See Choper, *supra* note 10, at 519-20 ("An objective observer holding separationist views of the First Amendment might be quick to perceive government's contact with religion as endorsement; one following [an accommodationist approach] might have a different reaction.") (quoting Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48).

permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, *should pass this test*.<sup>180</sup> O'Connor is not merely telling the informed objective observer to make the best judgment possible; on the contrary, she is informing the judge what he or she must find as a matter of law.

Given Justice O'Connor's exposition in *Wallace*, it is much less surprising that she suggested that the *Lynch* district court judge was in error as a matter of law, even though that judge was presumably objective and knowledgeable. In essence, Justice O'Connor believed that even the objective observer standard was too open-ended and that only certain "objective, knowledgeable" judgments should prevail.

Ironically, Justice O'Connor's attempt to explicate *Estate of Thornton v. Caldor*<sup>181</sup> in light of the Endorsement Test seemed to undercut the position that she suggested in *Wallace*. At issue in *Thornton* was whether a Connecticut law giving employees the right not to work on their religious Sabbath violated constitutional guarantees.<sup>182</sup> The Court held that providing workers with such a right violated the Establishment Clause<sup>183</sup> after noting that statutes must not only have a secular purpose but "their primary effect must not advance or inhibit religion."<sup>184</sup>

Justice O'Connor explained that an objective observer would perceive the statute as conveying a message of endorsement.<sup>185</sup> However, a number of points might militate against such a finding by a knowledgeable court. For example, an informed, objective observer would know that the Court upheld Sunday Closing Laws against an Establishment Clause challenge in *McGowan*, even though such laws had initially been "motivated by religious forces."<sup>186</sup> If Sunday Closing Laws promote the secular justification of offering "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 to come,"<sup>187</sup> then it might be thought permissible to expand the range of days on which an individual might have one day to recoup. Or, it might be thought that because the Sunday Closing Law was not an endorsement, an

180. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (emphasis added).

181. 472 U.S. 703 (1985).

182. *See id.* at 704-05 ("We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.").

183. *See id.* at 710-11.

184. *See id.* at 708; *see also id.* at 711 (O'Connor, J., concurring) ("The Court applies the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and concludes that Conn. Gen. Stat. § 53-303e(b) (1985) has a primary effect that impermissibly advances religion.").

185. *See Thornton*, 472 U.S. at 711 (O'Connor, J., concurring).

186. *McGowan v. Maryland*, 366 U.S. 420, 431 (1961).

187. *Id.* at 434.

objective observer would similarly not consider the Connecticut law an endorsement.

The informed, objective observer would also know that the Court in *Braunfeld v. Brown*<sup>188</sup> upheld a statute<sup>189</sup> that prohibited selling certain commodities on Sundays,<sup>190</sup> even for those sellers who could not sell those commodities on another day of the week because of their religious beliefs.<sup>191</sup> Such laws at the very least seem to favor those whose Sabbath is Sunday. Indeed, Justice Brennan, in his concurring and dissenting opinion in *Braunfeld*, suggested that it would not only be permissible but obligatory for the state to exempt from such a law those who observe Sabbath on a day other than Sunday.<sup>192</sup> While the Connecticut law was not identical to the law suggested by Justice Brennan, it might be thought close enough to escape the charge of religious endorsement.

Further, the informed, objective observer would know that the Court in *Sherbert v. Verner*<sup>193</sup> held that South Carolina could not deny unemployment benefits to someone who refused to work on her Sabbath.<sup>194</sup> An objective observer might believe that the state was neither attempting to, nor actually conveying endorsement of the Sabbath; instead, it was either trying to protect the public fisc or, perhaps, attempting to afford to individuals who did not celebrate Sabbath on Sunday the same benefits that were afforded to those who did.<sup>195</sup>

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188. 366 U.S. 599 (1961).

189. *Id.* at 609 (“[W]e cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.”).

190. *See id.* at 600 (“This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.”).

191. *See id.* at 601 (“Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.”).

192. *See id.* at 614-15 (Brennan, J., dissenting); *see also* *Gallagher v. Crown Kasher Super Mkt. of Mass.*, 366 U.S. 617 (1961) (upholding the application of a Sunday Closing Law to a kosher butcher); *see id.* at 630 (“we do not find that the present statutes’ purpose or effect is religious.”). *But see id.* at 642 (“Mr. Justice Brennan and Mr. Justice Stewart dissent. They are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion.”).

193. 374 U.S. 398 (1963).

194. *See id.* at 404 (“Here not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”).

195. *See id.* at 409 (“In holding as we do, plainly we are not fostering the ‘establishment’ of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing

In her *Thornton* concurrence, Justice O'Connor distinguished the law giving employees the right not to work on their Sabbath from Title VII:

Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.<sup>196</sup>

Yet, one might be surprised that the objective observer who believed Title VII constitutionally permissible would nonetheless view the Connecticut law as conveying a message of endorsement. Even if the objective observer rejected that such a law was simply a tempered measure trying to prevent individuals hostile to religion from imposing burdens on religious minorities,<sup>197</sup> one would think that, by citing fiscal concerns springing from *Sherbert*,<sup>198</sup> the state would have established a secular motivation. After all, individuals who refused to work on their Sabbath might be fired, and the state might then have to offer them unemployment compensation. The state's seeking to decrease the number of unemployed individuals receiving compensation implicates secular concerns.

Justice O'Connor suggested in *Wallace* that in most cases the articulation of a secular purpose will suffice to avoid the charge that the state was

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more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.”)

196. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

197. *Cf. id.* at 713 (“Like the Connecticut Sabbath law, Title VII attempts to lift a burden on religious practice that is imposed by private employers”). In a subsequent case, Justice O'Connor discussed how an objective observer might view a state attempt to limit burdens on religion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment) (“To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute. Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action. The determination whether the objective observer will perceive an endorsement of religion ‘is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.’”) (internal citations omitted).

198. *See* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 221 (2007) (noting that *Sherbert* might have implications for *Caldor* which did not seem to have been taken into account).

endorsing religion.<sup>199</sup> Thus, her *Wallace* concurrence suggests that the statute at issue in *Thornton* does not violate the Establishment Clause.

Suppose that Connecticut was thought to be communicating that individuals should not be denied employment merely because of their religious practices. Even so, that would not suffice to establish impermissible purpose or effect. While the state might be trying to prevent private employers from burdening religious practice, Justice O'Connor had already made clear in her *Wallace* concurrence that the "endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy."<sup>200</sup> She also pointed out in her *Lynch* concurrence that "the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."<sup>201</sup> Thus, Justice O'Connor created enough room for states to consider and acknowledge religion in a variety of ways without violating Endorsement guarantees.

One of the difficulties arising from O'Connor's *Wallace* concurrence is that one infers that objective observers, even when informed of all relevant information, will rarely find impermissible purpose.<sup>202</sup> But, presumably, the objective observer is unlikely to find an impermissible effect (a communication of a message of endorsement) in situations in which there is no finding of an impermissible purpose to endorse<sup>203</sup> (for example, because the awareness of history and legislative purpose militating against a finding of impermissible purpose also militates against a finding of an impermissible message). If this is the case, one would have expected Justice O'Connor to state in *Thornton* that the objective observer would not have found either an attempt to convey or an actual conveyance of religious endorsement.

On its face, the Endorsement Test itself does not seem particularly difficult to understand. However, the explanations offered by Justice O'Connor seem to contradict either its express language<sup>204</sup> or the gloss on it

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199. See *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring).

200. *Id.* at 70 (O'Connor, J., concurring).

201. *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring).

202. See *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring).

203. See Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 447 (2006) ("In [the *Wallace*] concurrence, the effects portion of Justice O'Connor's endorsement test began its slow collapse into the government purpose portion of the same test.").

204. See *supra* notes 62-82 and accompanying text (discussing why Justice O'Connor was offering an untenable position when suggesting that the *Lynch* district court opinion was clearly erroneous).

that she herself had previously offered.<sup>205</sup> One would expect the result to be the opposite of what Justice O'Connor stated in both *Lynch* and *Thornton*. This suggests that the Endorsement Test may not be doing any independent work but, instead, is invoked to rationalize a result that has been reached some other way.

## II. THE COURT ADOPTS THE ENDORSEMENT TEST DESPITE ITS INHERENT DIFFICULTIES

*Lynch* and its progeny suggest that the Endorsement Test as originally stated does not reflect how it was applied. What arguably violated the express language of the test was instead deemed permissible, while what would not have seemed an endorsement in light of context and history was nonetheless described as impermissible. Confusing history notwithstanding, the Court adopted the Endorsement Test in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*.<sup>206</sup>

### A. The Endorsement Test and Establishment Guarantees

In *Allegheny*, the Court adopted a version of the Endorsement Test as a constitutional standard to determine whether the Establishment Clause had been violated. Ironically, the differing views articulated by the Justices in that very opinion foreshadowed how use of the Endorsement Test might result in sincerely held religious beliefs being ignored or disparaged.

The objects at issue in *Allegheny* were: (1) a crèche placed in the Grand Staircase of the Allegheny County Courthouse; and (2) a Hanukkah menorah placed next to both a Christmas tree and a sign saluting liberty outside the City-County Building.<sup>207</sup> Before determining whether either display violated Establishment Clause guarantees, the Court reached a consensus about the test in light of which that determination would be made.

Emphasizing that the important point was not the exact term used,<sup>208</sup> the Court noted that it had recently “paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.”<sup>209</sup> Justice O'Connor’s *Lynch* concurrence was singled out for special praise because it provided a “sound analytical

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205. See *supra* notes 185-205 and accompanying text (discussing how the objective observer in *Thornton* might not have found that the state was either attempting to convey or actually conveying an endorsement of religion).

206. 492 U.S. 573 (1989).

207. *Id.* at 578.

208. See *id.* at 593 (“Whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same.”).

209. *Id.* at 592.

framework for evaluating governmental use of religious symbols.”<sup>210</sup> The Court mentioned two salient features of that concurrence:

(1) “[T]he concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion.”<sup>211</sup> Here, the Court contrasted Justice O’Connor’s view with the *Lynch* majority view of comparative endorsement that distinguished between “permissible and impermissible endorsements.”<sup>212</sup>

(2) “[T]he concurrence articulates a method for determining whether the government’s use of an object with religious meaning has the effect of endorsing religion,”<sup>213</sup> namely, examining the message conveyed by the government practice.<sup>214</sup> Yet, determination of the message conveyed by a government practice is heavily dependent upon the context in which that practice occurs,<sup>215</sup> and context might include a variety of factors including, for example, the legal background in light of which the statute was written. Depending on how context is spelled out, the difference emphasized by the *Allegheny* Court<sup>216</sup> between the *Lynch* majority (comparative endorsement) and the *Lynch* concurrence (non-comparative endorsement)<sup>217</sup> may hardly be worth mentioning.

The *Lynch* majority suggested that a practice would violate the effect prong of the Establishment Clause only if it involved more endorsement of religion than previous practices whose constitutionality against an Establishment Clause challenge had already been upheld.<sup>218</sup> Suppose, however, that the *Lynch* majority opinion is understood somewhat differently. Rather than drawing a line between permissible and impermissible endorsements, suppose instead that *Lynch* is read as drawing the line between endorsement on one hand and neutrality on the other. After all, in each of the opinions cited by the *Lynch* majority, the Court claimed to be upholding neutrality or, perhaps, attempting to avoid hostility to religion.<sup>219</sup>

While it might be noted that the *Lynch* Court explicitly discussed *how much* state endorsement of religion occurred rather than *whether* there had been state endorsement of religion,<sup>220</sup> even that point would not be dispositive. The *Lynch* majority might have been differentiating between (1)

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210. *Id.* at 595.

211. *Id.*

212. *Id.* at 594.

213. *Id.* at 595.

214. *See id.*

215. *See id.*

216. *See supra* notes 209-10 and accompanying text.

217. *See supra* text preceding note 152 (distinguishing between these two different ways of viewing endorsement).

218. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984).

219. *See supra* notes 111-52 and accompanying text.

220. *See Lynch*, 465 U.S. at 681.

whether those aware of the state practice had inferred a message of endorsement, and (2) whether there had been endorsement as a matter of law. Unless there had been the latter, the inferred message of endorsement might be called permissible endorsement or endorsement as a matter of historical fact.<sup>221</sup> If this interpretation of the *Lynch* majority opinion is correct, then the difference between that opinion and Justice O'Connor's *Lynch* concurrence is one of terminology rather than substance. Justice O'Connor also distinguished between inferred endorsement as a matter of historical fact (which might nonetheless pass constitutional muster), and endorsements as a matter of law (which would not pass muster).<sup>222</sup>

Perhaps the *Lynch* majority and concurrence would reach different results in different cases. However, those differing results might not be due to the tests themselves but to differing intuitions regarding which kinds of endorsements should be considered violations of the Establishment Clause. Indeed, given the apparent willingness of members of the Court to characterize the same state practice as religiously neutral at one point and as a religious endorsement at a different point, it is rather surprising that the *Allegheny* Court was convinced that the *Lynch* concurring opinion provided a "sound analytical framework"<sup>223</sup> for determining whether the Establishment Clause had been violated.

#### B. Application of the Test

After finding an allegedly important substantive difference between the *Lynch* majority and concurring opinions, the *Allegheny* Court set out to determine whether either of the displays at issue had conveyed a message of approval or disapproval of religious beliefs.<sup>224</sup> Applying the test described in Justice O'Connor's *Lynch* concurrence, the *Allegheny* Court found that the display of the crèche was unconstitutional<sup>225</sup> but that the display involving the menorah, Christmas tree, and sign did not convey a message of endorsement and hence was not unconstitutional.<sup>226</sup> In her concurrence, Justice O'Connor agreed that "placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity."<sup>227</sup> She explained that because of the great diversity of religious tradi-

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221. See *supra* notes 93-98 and accompanying text (discussing Justice O'Connor's dismissal of the actual inferences of state religious endorsement as simple historical fact).

222. See *supra* notes 98-99 and accompanying text.

223. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989).

224. See *id.* at 597.

225. See *id.* at 602.

226. See *id.* at 620.

227. *Id.* at 627 (O'Connor, J., concurring in part and concurring in the judgment).

tions flourishing in the United States,<sup>228</sup> the state could not endorse some but not other religious beliefs and practices without communicating to nonadherents that they were “outsiders or less than full members of the political community.”<sup>229</sup> She thus seemed to employ a principle that would be very protective of non-majoritarian religious beliefs.

Yet, protestations about the importance of nonadherents’ religious views notwithstanding, Justice O’Connor seemed to ignore those very views when discussing why the history and ubiquity of a practice is relevant for Endorsement Test purposes. She explained that a practice’s longevity and the degree to which it is widespread must be considered “part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.”<sup>230</sup> However, her examples of practices that do not convey endorsement seemed to conflate the question of whether particular religious beliefs were endorsed with the question of whether religious *rather than* secular beliefs were endorsed. She wrote:

It is the combination of the longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with “God save the United States and this honorable Court,” as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of *particular religious beliefs*.<sup>231</sup>

Justice O’Connor seemed to believe that both prayers at the beginning of legislative sessions and opening Court sessions with an invocation for God’s help are analogous to Thanksgiving, which she characterized “as a public holiday, despite its religious origins, [that] is now generally understood as a celebration of patriotic values rather than particular religious beliefs.”<sup>232</sup> She then summed up Endorsement analysis:

The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.<sup>233</sup>

It is rather difficult to accept Justice O’Connor’s suggestion that Thanksgiving, the opening of Court sessions with “God save the United States and this honorable Court,” and beginning legislative sessions with a prayer are analogous. Justice O’Connor is likely correct that some view

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228. *See id.* (“We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all.”).

229. *Id.*

230. *Id.* at 630.

231. *Id.* at 630-31 (emphasis added).

232. *Id.* at 631.

233. *Id.*

Thanksgiving as secular rather than religious, although a separate issue is whether a person might reasonably view it as either.<sup>234</sup> While some might consider the opening of Court sessions merely solemnizing,<sup>235</sup> it would be unsurprising if a committed atheist felt excluded when witnessing this practice.<sup>236</sup> Similarly, an individual witnessing the opening of legislative sessions with prayer might feel excluded if the prayers involved an understanding of God that he or she did not share.<sup>237</sup>

While the language used in the opening of Court sessions does not privilege *one* particular religion's view of God, it certainly contradicts some religious views regarding the nature or existence of God.<sup>238</sup> The same might be said of legislative prayers. If the Establishment Clause indeed requires not only neutrality among religions, but also neutrality between religion and non-religion,<sup>239</sup> it is difficult to see how Justice O'Connor's observer could be thought both objective and informed when concluding that these practices do not privilege some religions over others.

Justice O'Connor suggested that the menorah, Christmas tree, and sign passed constitutional muster.<sup>240</sup> First, she noted that the Christmas tree was not viewed as a religious symbol.<sup>241</sup> Yet the natural question following such an assertion might be, "By whom?" It would be unsurprising if devout

234. *Cf. id.* at 642-43 (Brennan, J., concurring in part and dissenting in part) (suggesting that reasonable people can have quite different judgment about whether something is religious in nature).

235. *See infra* notes 295-99 and accompanying text (discussing practices that are both solemnizing and religious).

236. *Cf. Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring in the judgment in part and dissenting in part) (discussing the reaction of the reasonable atheist when hearing others recite the Pledge of Allegiance including the words "under God").

237. *See id.* at 673-74 ("[I]t seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.").

238. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 888 (2005) (Scalia, J., dissenting) ("The sessions of this Court continue to open with the prayer 'God save the United States and this Honorable Court.'"). Neither atheists nor polytheists would share this conception of the Deity.

239. *See Allegheny*, 492 U.S. at 644 (Brennan, J., concurring in part and dissenting in part).

240. *See id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display and when the opinion acknowledges that tree cannot reasonably be understood to convey an endorsement of Christianity. One need not characterize Chanukah as a 'secular' holiday or strain to argue that the menorah has a 'secular' dimension . . . in order to conclude that the city of Pittsburgh's combined display does not convey a message of endorsement of Judaism or of religion in general.").

241. *See id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment).

members of other faiths disagreed with her assessment.<sup>242</sup> Noting that the Christmas tree was “widely viewed as a secular symbol of the holiday,”<sup>243</sup> Justice O’Connor rejected the idea that the placement of such a tree in front of City Hall could fairly be understood as state endorsement of Christianity.<sup>244</sup> Yet one wonders whether such an assessment would be different if something similar to what occurred in *Lynch* occurred in the context of a Christmas tree display in front of City Hall.<sup>245</sup> Suppose the ACLU were to challenge such a display, and the Mayor and general populace were to accuse the ACLU of trying to take Christ out of Christmas by forcing the display’s removal. Or, suppose that the general populace understood the lit tree to represent the religious aspects of Christmas, Justice O’Connor’s assertion to the contrary notwithstanding. Would the reasonable or objective observer simply ignore that the tree was widely viewed as religious?

Let us assume that the Christmas tree is a secular symbol, despite the ongoing debate over that very issue.<sup>246</sup> The next question might be how the

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242. See Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1081-82 (2005) (“If Christmas were a ‘public’ holiday and a Christmas tree were a *completely* secularized object, it would be more likely that those who practice other faiths would be willing to have one. Yet a devout Jew, Muslim, Hindu, or other non-Christian would be unlikely to have a Christmas tree since Christmas is neither a Jewish, Muslim, Hindu, or Buddhist holiday, nor is it considered a ‘public’ holiday by many Atheists”); see also Joel S. Jacobs, *Endorsement as “Adoptive Action:” A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29, 47 (1994) (“[F]or the most part, those people who do not identify themselves as Christians and have Christmas trees belong to no religion or have rejected most of their own religious traditions. For example, an observant Christian is far more likely to celebrate Christmas than an observant Jew or Muslim.”); cf. Katrin Bennhold, *After 100 Years, France Questions its Secularity Riots Prompt a Debate Over ‘Laicite’*, Dec. 20, 2005 INT’L HERALD TRIB. 3, available at 2005 WLNR 20550249 (“As Christmas trees light up at schools across France and students prepare for the holidays, some Muslims complain about double standards. Lhaj-Thami, president of the Union of Islamic Organizations in France, argues that the 1905 law is not incompatible with Islam, but that it needs to be applied fairly. ‘In theory we are all equal, but in reality we are not,’ said Breze, who was born in Morocco. ‘Why is a Christmas tree allowed when a discreet head scarf is not? All we’re asking is for France to be true to its values.’”).

243. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 633 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

244. See *id.*

245. See *supra* notes 62-65 and accompanying text (describing circumstances in *Lynch* when the ACLU challenged the inclusion of the crèche in the display).

246. There is an annual debate in newspaper Letter to the Editor pages about precisely this question. Compare, for example, Letters, PHILA. INQ. Jan. 1, 2008, at B02, available at 2008 WLNR 39811 (“Misguided Americans argue that Christmas trees are not religious symbols and therefore are appropriately placed in inappropriate places.”) with Letters to the Editor, BALT. SUN Dec. 26, 2007, at A20, available at 2007 WLNR 25438041 (“While festively lighted trees may appear during the months in which various light-themed celebrations take place, many of them religious (e.g., Hanukkah, Christmas and Kwanzaa), they certainly are not symbols of any religious faith or doctrine.”).

menorah should be viewed, and the different views expressed in *Allegheny* are illuminating. Justice Blackmun, who wrote the *Allegheny* opinion, suggested that the menorah combined religious and secular elements.<sup>247</sup> Justice O'Connor disagreed, announcing that the menorah was "the religious symbol of a religious holiday."<sup>248</sup>

Such an announcement raises two distinct problems. First, it undercuts the tenor of the analysis of the Christmas tree. Justice O'Connor suggested that "the Christmas tree, whatever its origins, is not regarded today as a religious symbol."<sup>249</sup> This implies that the Christmas tree had once been religious, was probably both religious and secular for some period, and then became predominantly secular in nature.<sup>250</sup> Other religious symbols might also undergo this same kind of transformation, and one way to characterize the disagreement between Justices Blackmun and O'Connor is about whether the nature of the menorah had changed from a purely religious object to one with both religious and secular meaning. Rather than supporting her conclusion that the Christmas tree is secular and the menorah religious, Justice O'Connor simply stated what the objective observer would think. Yet, presumably, the objective observer's assessment might depend on whether many communities paired a Christmas tree with a menorah and other "secular" symbols to announce the winter season. Given the implicit recognition that the religious nature of symbols might change over time, it is difficult to understand how Justice O'Connor could simply announce what the objective observer would say with respect to a particular symbol.

A related difficulty involves how opinions by the Court are used. *Allegheny* is cited for the proposition that Christmas trees convey a secular message as a matter of law,<sup>251</sup> not merely that Christmas trees conveyed such a message at the time the opinion was handed down. Yet the implicit claim in *Allegheny* is that the Christmas tree is a secular symbol *at a particular point in time*. Presumably, the symbol could again be widely viewed as religious (perhaps during some spiritual revival), but *Allegheny* would still be cited for the proposition that the Christmas tree is secular, notwith-

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247. See *Allegheny*, 492 U.S. at 613-14 ("The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.")

248. *Id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment).

249. *Id.* at 633.

250. See *id.* ("[T]he Christmas tree is a predominantly secular symbol.")

251. See, e.g., *Adland v. Russ*, 307 F.3d 471, 488 (6th Cir. 2002) ("The forty-five foot Christmas tree in *Allegheny*, displayed during the holiday season, obviously conveyed a primarily secular, holiday message to a viewer.") (citations omitted); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 343 (7th Cir. 1990) ("In *Allegheny*, five justices specifically addressed the secular nature of Christmas trees and found them to be secular symbols, and we believe that the majority of the other four justices would agree. Justice Blackmun stated unequivocally that '[t]he Christmas tree . . . is not itself a religious symbol.' Justice O'Connor agreed 'that the Christmas tree, whatever its origins, is not regarded today as a religious symbol.'" (internal citations omitted).

standing the hypothesized change in public perception. By the same token, courts may cite *Allegheny* for the proposition that the menorah is religious,<sup>252</sup> even though one would expect that public perceptions might change, especially if it is common to see the Christmas tree and menorah in what might come to be widely perceived as secular displays. The Endorsement Test, whether using an objective or actual observer, is misused insofar as it is thought to yield a judgment that would stand through time about the religious nature of an object, given the possibility of a change in public or “objective observer” perceptions.

Even if one accepts that the Christmas tree is secular and the menorah is religious, the question then becomes how the objective observer would view the secular Christmas tree when placed next to a menorah and a sign saluting liberty.<sup>253</sup> One issue is whether the tree secularizes the menorah or the menorah makes the tree more religious.<sup>254</sup> Yet that is only one of several possible ways that a reasonable person might understand the display. Someone else might construe the tree as in some way representing Christianity,<sup>255</sup> the menorah as in some way representing Judaism, and the sign as suggesting that the liberty of choosing between those religions is protected.<sup>256</sup> The display might also be viewed as connecting religious liberty

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252. See *ACLU v. McCreary County*, 354 F.3d 438, 481 (6th Cir. 2003) (“In both *Lynch* and *Allegheny*, the Supreme Court approved of displays that contained inherently religious, even sectarian, symbols: the crèche and the menorah.”); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 486 (5th Cir. 2001) (“In *Allegheny*, the Supreme Court separately tested the endorsement effects of two separately displayed religious symbols, a crèche (the sole symbol in a seasonal display inside the County Courthouse), and a menorah . . .”).

253. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 634 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“[T]he relevant question for Establishment Clause purposes is whether the city of Pittsburgh’s display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one’s own beliefs.”).

254. Cf. *id.* at 642 (Brennan, J., concurring in part and dissenting in part) (“I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree.”).

255. See *Jacobs*, *supra* note 242, at 46 (“While Christmas trees may seem innocuous to those who display them, they retain Christian symbolism. Christmas trees, as the name suggests, have long had a strong association with Christianity.”).

256. See *Kahle*, *supra* note 177, at 378 (“given the religious symbolism of the menorah, it is reasonable that an observer might believe that the government is promoting both the Christian and Jewish religions”). Cf. *Allegheny*, 492 U.S. at 616 (“[T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.”).

with the Judeo-Christian heritage, which might be viewed as privileging particular religions over others.<sup>257</sup>

### C. What Is the *Allegheny* Endorsement Test?

When one considers the discussions of the Endorsement Test in *Allegheny*, it is simply unclear whether there has been yet another modification to the test and, if so, what that modification is.<sup>258</sup> For example, it is unclear whether the test has reverted back to the *Lynch* interpretation, which suggests that something widely perceived as secular is secular for endorsement purposes.<sup>259</sup> Certainly, Justice O'Connor implied that the existence of a widespread perception justified the claim that the Christmas tree is a secular symbol. However, a cautionary note must be sounded before one concludes that she is relying on actual perceptions, because she announced that the tree was widely viewed as secular without citing studies to support her claim. Announcing that it is widely perceived in a particular way absent supporting evidence might be another way of describing how she believes the tree should be perceived rather than reporting how it in fact is perceived.

Even had she cited studies, it would have been important to know whether the individuals surveyed were Christian, rather than non-Christian, since members of those different groups might view the Christmas tree differently. For example, when Justice O'Connor suggested that the Christmas tree represents the secular dimensions of the holiday and the crèche represents the religious dimensions,<sup>260</sup> she may have been offering a distinction that non-Christian individuals might not make—at least some individuals of

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257. Cf. Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 55 n.194 (2006) (suggesting that Justice Scalia believes that “government may both privilege and venerate Judeo-Christian beliefs”).

258. A separate question is whether the majority and the concurrence are discussing the same Endorsement Test. One might well have thought that the much-lauded test articulated in O'Connor's *Lynch* concurrence would have led to a different result in that very case, see *supra* notes 62-104 and accompanying text, which may well mean that the majority and concurrence understood that very test somewhat differently. See *supra* note 154 (suggesting that members of the Court have very different understandings of Justice O'Connor's Endorsement Test).

259. Cf. Matthew J. Astle, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 FAM. L.Q. 733, 747 (2004) (arguing that the “endorsement test considers the government's intent as well as the law's actual effect on the perceptions of the public”).

260. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 633 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (“[T]he Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions.”).

other faiths might view both as representing a religious holiday.<sup>261</sup> While she might (and did) assert that such a view is incorrect, there is something fundamentally at odds with the spirit of the Endorsement Test to tell individuals who view a Christmas tree as representing a religious holiday that they are simply wrong as a matter of law.<sup>262</sup>

Perhaps *Allegheny* is suggesting that the reasonable observer should consider widely held perceptions as evidence of whether a practice constitutes an endorsement<sup>263</sup> rather than simply dismiss such perceptions as mere historical facts. Yet, notwithstanding the Allegheny Court's protests to the contrary,<sup>264</sup> this is not the view suggested by Justice O'Connor in her *Lynch* concurrence, where she was relatively uninterested in actual perceptions.<sup>265</sup> Indeed, the more the Endorsement Test relies on the judgment of the informed, reasonable or objective observer, the less helpful widely held perceptions will be unless there is some mechanism to assure that the people with those perceptions are not misinformed or under-informed. Without such assurances, these widely held perceptions might simply mislead rather than illuminate.<sup>266</sup>

Some of the difficulties associated with the Endorsement Test were illustrated in the very opinion that adopted this test as a constitutional standard. The members of the Court could not agree about which symbols were religious and which were secular. Nor could the Court agree about how to determine whether a religious message was secularized by a secular message. One telling aspect of the opinion was that the Justices offered differing accounts of what the reasonable observer would say, implying that the

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261. See *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 343 (7th Cir. 1990) ("Lubavitch [is] asserting that a Christmas tree standing alone represents Christianity or the religious aspect of Christmas.").

262. See *id.* ("Lubavitch's argument borders on the frivolous in view of current case law.").

263. For the suggestion that the Endorsement Test should make use of such perceptions, see *Diamond & Koppelman*, *supra* note 61, at 716 ("[I]n cases involving allegations that the Establishment Clause has been violated, a systematic assessment of reactions from members of the community to the display or symbol at issue can assist courts in determining whether the particular display conveys a message of religious endorsement.").

264. See *supra* notes 210-17 and accompanying text (discussing the *Allegheny* Court's lauding of Justice O'Connor's *Lynch* concurrence).

265. See *supra* notes 99-102 and accompanying text (discussing Justice O'Connor's dismissal of actual perceptions as mere historical fact).

266. Cf. *Raskin*, *supra* note 44, at 763 ("And if the public's actual perceptions are not controlling—that is, if *the court itself* must determine the constitutional meaning of the semiotics of a government-erected display . . . then it is hard to see how the actual perceptions of a certain randomly assembled group of citizens are even *relevant* to the endorsement analysis. It is more likely to be distracting and misleading.").

reasonable observer could have only one reaction to the symbols at issue,<sup>267</sup> even though the Justices themselves illustrated that reasonable observers might have quite different reactions to the same display. At the very time that the Court was adopting the test as a constitutional standard, the Court illustrated how the test might be used to ignore, rather than take account of, reasonable reactions to the state promotion of religious matters.

### III. SUBSEQUENT ATTEMPTS TO CLARIFY THE ENDORSEMENT TEST

While *Allegheny* adopted the Endorsement Test as a standard to determine whether the Establishment Clause had been violated, the opinion raised at least as many questions as it answered with respect to how the test should be applied. For example, use of an objective observer standard leaves open the role that actual perceptions should play when analyzing whether a message of endorsement has been conveyed. Subsequent opinions attempted to clarify, or perhaps modify, the Endorsement Test.

#### A. The *Pinette* Spin on Endorsement

Members of the Court offered additional ways to understand the Endorsement Test in *Capitol Square Review & Advisory Board v. Pinette*.<sup>268</sup> At issue was whether the Ohio Ku Klux Klan could place a cross on Capitol Square, a plaza surrounding the statehouse in Columbus, Ohio.<sup>269</sup> In holding that the state could not assert Establishment Clause grounds to justify denying the Klan the right to erect the cross, the plurality held that “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.”<sup>270</sup> In essence, the plurality dismissed the concern that individuals might wrongly infer state endorsement, suggesting that “given an open forum and private sponsorship, erroneous conclusions do not count.”<sup>271</sup>

In her concurrence, Justice O’Connor rejected the plurality’s limitations regarding when perceptions of endorsement might make a practice unconstitutional, suggesting that “an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism.”<sup>272</sup> For example, she suggested that

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267. *But see* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 642 (1989) (Brennan, J., dissenting) (suggesting that reasonable observers might have very different reactions to the displays at issue).

268. 515 U.S. 753 (1995).

269. *See id.* at 757-58.

270. *Id.* at 770.

271. *Id.* at 765.

272. *Id.* at 774 (O’Connor, J., concurring in part and concurring in the judgment).

endorsement might be inferred in a case involving private religious speech in a public forum unless there was a “sign disclaiming government sponsorship or endorsement.”<sup>273</sup> Unfortunately, Justice O’Connor’s explanation did not do much to clarify the standard. For example, she noted that “a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.”<sup>274</sup> Suppose, for example, that the entire grounds were filled with crosses—what would the reasonable observer say? Would that answer depend upon the observer’s knowledge concerning the number or type of people who sought to make use of that forum to exhibit a display? Or, would the reasonable person be “justified” in inferring state endorsement without knowing the method of selection or the range of displays that were candidates for exhibition? Justice O’Connor’s explanation leaves all of these questions unanswered.

One of the difficulties in applying the Endorsement Test is that members of the Court disagree about how much knowledge the reasonable observer must have.<sup>275</sup> Justice O’Connor suggested that she did not accept that the Endorsement Test “should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge,”<sup>276</sup> noting that there is “always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.”<sup>277</sup> Yet the Establishment Clause does not require that a display be removed merely because one individual might feel uncomfortable after viewing the display.<sup>278</sup> While it seems fair to suggest that one misinformed individual’s feelings of discomfort should not suffice to invalidate a display,<sup>279</sup> such a point hardly establishes that actual perceptions should not be

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273. *Id.* at 776.

274. *Id.* at 777.

275. *Id.* at 778-79 (O’Connor, J., concurring in part and concurring in the judgment) (citing *Allegheny*, 492 U.S. at 630 (O’Connor, J., concurring in part and concurring in judgment)) (“Today, Justice Stevens reaches a different conclusion regarding whether the Board’s decision to allow respondents’ display on Capitol Square constituted an impermissible endorsement of the cross’ religious message. Yet I believe it is important to note that we have not simply arrived at divergent results after conducting the same analysis. Our fundamental point of departure, it appears, concerns the knowledge that is properly attributed to the test’s ‘reasonable observer [who] evaluates whether a challenged governmental practice conveys a message of endorsement of religion.’ In my view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by Justice Stevens.”).

276. *Id.* at 780 (O’Connor, J., concurring in part and concurring in the judgment).

277. *Id.*

278. *Id.* (“A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.”).

279. Diamond & Koppelman, *supra* note 61, at 753 (“Justice O’Connor is quite correct that the idiosyncratic views of a few people cannot be enough to sustain a finding of impermissible endorsement.”); Hill, *supra* note 8, at 517 (“Justice O’Connor’s heuristic of

considered. Suppose that many people believe that a display conveys a message of endorsement. Taking into account widespread misperceptions of endorsement would not *seem* to have the same potential costs as would allowing one person's misperceptions to suffice to establish a display's constitutional invalidity.<sup>280</sup>

It may be, for example, that virtually all displays will be offensive to some.<sup>281</sup> However, Justice O'Connor's point regarding the individual with a particular quantum of knowledge is much less helpful than one might initially think. Given the great diversity of religious belief in this country,<sup>282</sup> it would be unsurprising if almost any display involving religion was offensive to several *groups* of citizens. In almost, if not all, of the cases in which Justice O'Connor's hypothetical individual objects, there would be at least a few *groups* of individuals objecting. While her point is well-taken that *one* individual should not be able to invalidate a display, it may turn out that it would be a very rare case indeed in which *only* one person would find that a particular display conveys a message of religious endorsement or disapproval.

The appeal of the suggestion that one misinformed or under-informed individual's reactions should not be enough to invalidate a display is in part based on the intuition that if only one person is offended, the reaction may be so idiosyncratic that it should not be given weight, especially if other people of the same religion do not react similarly. The appeal of such a suggestion is also based on the intuition that the reactions of an individual who misunderstands something important do not provide an appropriate basis for invalidation. This latter rationale might also prevent certain *groups* from having a display invalidated on Establishment Clause grounds.

Justice O'Connor emphasized the importance of the observer having relevant information when deciding whether a particular practice conveyed a message of religious endorsement or disapproval:

Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display. Today's proponents of the endorsement test all agree that we should attribute to the observer

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the reasonable observer may incorporate this concept of consensus to some extent: the 'reasonable observer' seems, in part, intended to look to the views of the broader society and exclude the views of hypersensitive 'eggshell plaintiffs.'").

280. Cf. Diamond & Koppelman, *supra* note 61, at 716 ("Rather, in cases involving allegations that the Establishment Clause has been violated, a systematic assessment of reactions from members of the community to the display or symbol at issue can assist courts in determining whether the particular display conveys a message of religious endorsement."). *But see infra* text following note 279 (suggesting that there may be relatively few displays that only offend one person's religious sensibilities).

281. See *supra* note 279 and accompanying text.

282. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring) (discussing the "dizzying religious heterogeneity of our Nation").

knowledge that the cross is a religious symbol, that Capitol Square is owned by the State, and that the large building nearby is the seat of state government. In my view, our hypothetical observer also should know the general history of the place in which the cross is displayed. Indeed, the fact that Capitol Square is a public park that has been used over time by private speakers of various types is as much a part of the display's context as its proximity to the Ohio Statehouse.<sup>283</sup>

But once Justice O'Connor increases the amount of knowledge the reasonable observer must have, her disagreement with the *Pinette* plurality becomes more complicated. Presumably, the *Pinette* plurality and Justice O'Connor are disagreeing about whether an individual, who understood that particular speech that was private and in a public forum, would nonetheless impute a message of endorsement to the state. Justice Scalia states in the plurality that that private religious expression in a public forum could not be viewed as state endorsement. But it is simply unclear whether Justice O'Connor's hypothetical reasonable, informed observer would ever view private expression in a public forum as an endorsement by the state.

Justice Souter wrote a concurrence in *Capitol Square*, joined by Justice O'Connor,<sup>284</sup> in which he explained that "in some circumstances an intelligent observer may *mistake* private, unattended religious displays in a public forum for government speech endorsing religion."<sup>285</sup> Certainly, to suggest that such misunderstandings might occur is accurate.<sup>286</sup> The important question, though, is whether such a misunderstanding should be taken into account when examining the constitutionality of a display for Establishment Clause purposes.<sup>287</sup> For example, the absence of a (sufficiently large) disclaimer might as a practical matter induce one to wrongly infer government endorsement.<sup>288</sup> However, if knowledge can be imputed to the hypothetical observer, then the question would be whether someone *who knew that the display was privately owned and that its placement on state*

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283. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted).

284. *Id.* at 783 (Souter, J., concurring in part and concurring in the judgment).

285. *Id.* at 785 (emphasis added).

286. *See id.* at 786 ("I do not understand that I am at odds with the plurality when I assume that in some circumstances an intelligent observer would reasonably perceive private religious expression in a public forum to imply the government's endorsement of religion.").

287. *See id.* ("My disagreement with the plurality is simply that I would attribute these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis under our precedents, where I believe that such reasonable perceptions matter."). *But see* Smith, *supra* note 54, at 290 ("A doctrine which formally adopted misinformation and misperceptions as the standard for determining the constitutionality of a potentially broad array of public measures would seem, to put it mildly, anomalous.").

288. *See Capitol Square*, 515 U.S. at 785 (Souter, J., concurring in part and concurring in the judgment) (suggesting that the plurality admits that "an observer might be 'misled' by the presence of the cross in Capitol Square if the disclaimer was of insufficient size or if the observer failed to enquire whether the State had sponsored the cross").

*grounds was not supported by the state* might nonetheless wrongly infer state endorsement.

Justice Stevens suggested in his dissent that the views of the reasonable non-adherent should determine whether a particular display violates the Endorsement Test.<sup>289</sup> However, he recognized that such a standard would be indeterminate, because one reasonable nonadherent might believe a display to be an endorsement while another might not. Justice Stevens argued that in such a case the display would constitute an endorsement.<sup>290</sup>

Justice Stevens's point that two equally informed individuals of different faiths might well react differently to the same display is well-taken, although its implications are less clear than one might think. Consider, for example, how two individuals, one a Reformed Jew and the other an Orthodox Jew, might view a Christmas tree outside City Hall.<sup>291</sup> These individuals might react very differently with respect to whether the Christmas tree constitutes state endorsement, especially if the Reform Jew places a Christ-

289. *See id.* at 799 (Stevens, J., dissenting) (“At least when religious symbols are involved, the question whether the State is ‘appearing to take a position’ is best judged from the standpoint of a ‘reasonable observer.’ It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.”); *see also* Feigenson, *supra* note 40, at 55 (“By asking only whether a suitably defined ‘objective observer’ or ‘reasonable observer’ would perceive endorsement or disapproval of religion in the government’s behavior, Justice O’Connor excludes the perceptions of the people most in need of the establishment clause’s protection: community members who may be alienated or marginalized by the government action.”); Steven A. Seidman, *County of Allegheny v. American Civil Liberties Union: Embracing The Endorsement Test*, 9 J.L. & RELIGION 211, 235 (1991) (“Without accounting for an outsider’s perspective accounted during the decision-making process, the courts and the government inevitably send a message that if ‘non-Christians feel alienated, that was *their* problem.’” (citation omitted)); Anjali Sakaria, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483, 493 (2002) (quoting Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 481) (“By not focusing on the viewpoint of a nonadherent, the objective observer standard is at odds with the fundamental purpose of the endorsement test. The objective observer standard ‘relays the message to religious minorities that their perceptions are wrong; or even worse, that their perceptions do not matter.’ If the Court wishes to send a message that the religious beliefs of the minority are to be respected, the Court should replace the objective observer with a reasonable nonadherent for the purposes of the endorsement test.”).

290. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) (“If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display.”).

291. *See* Julie Wiener, *Oy Christmas Tree*, N.Y. JEWISH WEEK, Manhattan Edition, Dec. 21, 2007 (“I know many Jews see Christmas trees as the ultimate litmus test, believing that one simply cannot raise Jewish children with an evergreen in the home. They may be right. However, I’ve encountered enough families that do have trees that I’m skeptical that one tradition can trump everything else - not unless Jewish identity is defined primarily as ‘I don’t do Christmas, therefore I am Jewish.’”).

mas tree in his home every December. Thus, even individuals not of the faith represented by a display might disagree about whether a religious message is being communicated and so of course might disagree about whether a particular display constitutes state endorsement of religion.<sup>292</sup>

Justice Stevens suggested that for a “religious display to violate the Establishment Clause . . . it is enough that *some* reasonable observers would attribute a religious message to the State.”<sup>293</sup> Thus, Justice Stevens suggests that Establishment Clause guarantees would be violated if reasonable Orthodox Jews believed that a display conveyed a message of endorsement of religion.

Justice Stevens’s explication of the Endorsement Test makes clear what should be done when reasonable observers disagree about whether a display conveys a message of religious endorsement. However, even if his suggestion were adopted, there would still be difficulties applying the test, precisely because the Endorsement Test is not grounded in the actual reactions of reasonable observers. Would some reasonable, non-adherent observers infer state endorsement when a private individual posted a religious message in a public forum where there was a statement expressly disavowing endorsement? If not, would that be because no reasonable person would reject the truth of a sign disclaiming endorsement? These are just some of many questions that remain despite Stevens’s attempt to clarify the test.

Assume that no reasonable non-adherent would infer state endorsement of religion if there were a very large sign expressly disavowing endorsement. The question would then become whether the absence of such a sign would justify an inference of endorsement. If, for example, the observer knew that the state was not endorsing a private message appearing in a public forum,<sup>294</sup> then it should be irrelevant that the state had failed to

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292. Cf. Jacobs, *supra* note 242, at 76 (“Any attempt to base the test on the use of a ‘reasonable nonadherent’ would be hopeless. . . . There is simply no way of selecting a single set of religious beliefs with which to imbue the ‘reasonable minority person.’”).

293. See *Capitol Square*, 515 U.S. at 807 (Stevens, J., dissenting); see also Lewis & Vid, *supra* note 61, at 693 (“The solution to this problem is to allow *any* reasonable observer’s genuine objection to signal an establishment clause violation. The insight is simple: reasonable observers may disagree on what constitutes an endorsement of religion, and there is little ground to favor one perspective over another. To avoid impermissible effects, it is necessary to give minority views veto power; if any reasonable observer perceives the governmental action as an endorsement of religion, then the action is impermissible under the establishment clause. Under this formulation, the emphasis would shift from reasonableness to the genuineness of the perception of endorsement. This approach gives more weight to the feelings of religious minorities.”).

294. But see Budd, *supra* note 25, at 220 (“[A] religious display on public property--irrespective of its public or private sponsorship--implicates the endorsement prohibition because an objective observer will likely attribute the sectarian message to the owner of the underlying land.”).

erect a sign explaining something that the objective, *informed* observer already knew.

While there is something appealing in suggesting that an individual with bizarre beliefs should not be able to have a display invalidated on Establishment Clause grounds, the discussions in the *Pinette* plurality, concurrence, and dissent illustrate how difficult it can be to impose a meaningful knowledge requirement without severely hampering the usefulness of the Endorsement Test. Absent some clear criteria suggesting when an individual is sufficiently informed for her reactions to count, it would almost always be possible to dismiss reactions of offense to certain displays as either under-informed or misinformed. Regrettably, the variability and elastic nature of the Endorsement Test's knowledge requirement was again illustrated in subsequent opinions.

#### B. What Type of Knowledge Can Be Imputed to an Observer?

Implicit in *Santa Fe Independent School District v. Doe*<sup>295</sup> was the issue of what kind of knowledge should be imputed to the objective observer, although no Justice directly addressed the question. *Santa Fe* involved a school policy permitting students to participate in two elections. The first election determined whether there would be an invocation at football games.<sup>296</sup> If students voted to have an invocation, a second election would be held to determine who would deliver it.<sup>297</sup> The school did not give the speaker license to introduce the football game in any way she saw fit. Rather, the oration had to comport with school policy, which required that "the 'statement or invocation' be 'consistent with the goals and purposes of this policy,' which [were] 'to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.'"<sup>298</sup> The *Santa Fe* Court noted that a "religious message is the most obvious method of solemnizing an event."<sup>299</sup> Further, this religious message would be delivered over the school's public address system<sup>300</sup> prior to the game, where the school's name would be written on banners and flags and where spectators would wear clothing bearing the school's name.<sup>301</sup> The Court concluded that "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."<sup>302</sup> Justice O'Connor joined the opinion in full.<sup>303</sup>

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295. 530 U.S. 290 (2000).

296. *Id.* at 297.

297. *Id.*

298. *Id.* at 306 (citation omitted).

299. *Id.*

300. *Id.* at 307.

301. *Id.* at 308.

302. *Id.*

The *Santa Fe* opinion is somewhat surprising in light of past endorsement jurisprudence. For example, while attendees of a football game might infer school endorsement if they were unaware that the orator was selected by the student body rather than the school, they might be less inclined to believe that the oration was endorsed by the school if they had been informed of the election procedure. They might instead believe, for example, that the invocation was private rather than government speech and thus did not involve state endorsement.<sup>304</sup>

The Court's implicit claim that a solemnizing religious message would violate both the purpose and effect prong is somewhat surprising, given that solemnizing is viewed as a *secular* goal.<sup>305</sup> Indeed, given the deference accorded to state assertions of secular purpose by the objective observer, one would think the state desire to solemnize and to promote good sportsmanship and fair play would go far to immunize the charge of state endorsement of religion. One certainly would not expect Justice O'Connor to sign on to an opinion that seemed so contrary to her understanding of the Endorsement Test.<sup>306</sup>

*Santa Fe* suggests that an objective observer will infer endorsement of religion if he or she knows that a government program will foreseeably and actually promote religion. If that is the case, however, then one would expect the objective observer to infer endorsement of religion when a state program foreseeably and actually results in many children receiving religious education who would not have received that education otherwise. Yet, in *Zelman v. Simmons-Harris*,<sup>307</sup> the Court reached the opposite conclusion when it held that a reasonable observer would not infer religious endorsement merely because a school voucher program provided many students a religious education. Indeed, the *Zelman* Court suggested that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."<sup>308</sup>

The Court often uses the language of endorsement when upholding or striking state policies. Yet, what constitutes an endorsement in one case is not an endorsement in another and, even more surprising, the Court consistently suggests that no reasonable observer could disagree with the Court's

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303. See *id.* at 292.

304. See *id.* at 324 (Rehnquist, C.J., dissenting) ("[I]f there were speech at issue here, it would be *private* speech.").

305. See *id.* at 322 (discussing the "the secular purpose of solemnization").

306. See *infra* note 314 and accompanying text (discussing Justice O'Connor's contrasting solemnification with the conveyance of a religious message).

307. 536 U.S. 639 (2002).

308. *Id.* at 655 (first emphasis added).

ultimate conclusion.<sup>309</sup> The Court has come to use the Endorsement Test to suggest that those who disagree are “unreasonable” or “uninformed,” rather than as a useful tool for determining violations of the Establishment Clause.

### C. Justice O’Connor’s Endorsement Clarifications in *Newdow*

In her concurrence in *Elk Grove Unified School District v. Newdow*,<sup>310</sup> Justice O’Connor sought to clarify the Endorsement Test. She reaffirmed that it assumes the “viewpoint of a reasonable observer,”<sup>311</sup> because she explained that given the “dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity.”<sup>312</sup> After all, she noted, “[n]early any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.”<sup>313</sup> Yet there is something amiss in analogizing the individual who is sincerely offended by a religious display to a heckler. Hecklers are often characterized as wrongly denying another the right to speak.<sup>314</sup> By contrast, in this kind of case an individual reports her sincere reaction and is then pejoratively analogized to a heckler.

Perhaps the “dizzying religious heterogeneity of our Nation” speaks to why the Endorsement Test is not helpful in determining Establishment Clause violations. Presumably, reasonable non-adherents might be of-

309. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 872 (2005) (“No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.”); *Zelman*, 536 U.S. at 640 (“No reasonable observer would think [that such] a neutral private choice . . . carries with it the *imprimatur* of government endorsement.”).

310. 542 U.S. 1 (2004).

311. *Id.* at 34 (O’Connor, J., concurring in the judgment).

312. *Id.* at 34-35.

313. See *id.* at 35 (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (O’Connor, J., concurring in part and concurring in the judgment)). See also Steven H. Aden, *Who Speaks for the State?: Religious Speakers on Government Platforms and the Role of Disclaiming Endorsement*, 9 WM. & MARY BILL RTS. J. 419, 428 (2001) (“Today, in a society in which urban public schools may include large numbers of Buddhist, Hindu, Muslim, Jewish, and Sikh students, as well as practitioners of fetishistic and animistic religions, atheists and agnostics, the term ‘nonsectarian’ has become meaningless. Because of this rich diversity, virtually any expression of sincere religious devotion in the public sphere is likely to cause offense to some.”).

314. See, e.g., Owen M. Fiss, *What Is the Federalist Society?*, 15 HARV. J.L. & PUB. POL’Y 5, 5 (1992) (discussing “the hecklers who denied [William Shockley] the right to speak”); David P. Currie, *The Constitution in the Supreme Court: 1946-1953*, 37 EMORY L.J. 249, 265 (1988) (“[T]he heckler’s veto may deprive us of arguments that lie at the heart of first amendment protection . . . ; the heckler’s veto rewards the enemies of freedom for their misbehavior.”). Cf. Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 404 (1999) (discussing the “beleaguered speaker suffering the verbal attack on his right to speak [by a heckler]”).

fended by a variety of displays.<sup>315</sup> If such a test is too robust because it excludes too much, then the test itself should not be used.<sup>316</sup> However, to say that a test is too robust suggests that one has a theory of how much should be excludable in light of history, current demographics, and more. Regrettably, neither commentators nor members of the Court have offered a plausible and non-controversial method for determining whether too much is being excluded. Further, whether or not there is some independent standard by which to determine when a test excludes too much, there simply is no warrant for disparaging an individual who, with relevant knowledge, nonetheless perceives government endorsement of religion.

Justice O'Connor explains that, because the reasonable observer employs "a community ideal of social judgment, as well as rational judgment,"<sup>317</sup> such an observer would never consider a practice in isolation but instead would consider the origins and context of the practice. This would include a consideration of the place of the practice in "our Nation's cultural landscape."<sup>318</sup> However, Justice O'Connor seems to assume a particular view about our Nation's cultural landscape that individuals of both majority and minority faiths might not share. For example, Justice O'Connor noted that for "centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine providence."<sup>319</sup> Even if such pronouncements *can* solemnize an occasion, that hardly means that in an individual instance they in fact *do* solemnize. Further, even if they are solemnizing, that does not mean that they are not also invoking Divine Provenance or endorsing religion. *Santa Fe* was predicated on the notion that a statement meant to solemnize might also be religious,<sup>320</sup> so it should hardly be thought that the announced purpose of solemnizing could somehow immunize a practice from Establishment Clause review.

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315. Cf. Brady, *supra* note 154, at 1149 ("[I]n the hands of separationists and others who interpret the test strictly, the endorsement approach has moved very close to separationism.").

316. Choper, *supra* note 10, at 510 ("I do not believe that mere feelings of offense should rise to the level of a judicially redressable harm under the Establishment Clause, absent any real threat to religious liberty."); Smith, *supra* note 54, at 313 ("Ultimately, a degree of alienation must be acknowledged as an inevitable cost of maintaining government in a pluralistic culture.").

317. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring).

318. *Id.* (citing *Pinette*, 515 U.S. at 781).

319. *Newdow*, 542 U.S. at 36 (O'Connor, J., concurring).

320. See *supra* notes 295-98 and accompanying text.

Justice O'Connor argues that the state can refer to and acknowledge God without offending constitutional guarantees,<sup>321</sup> notwithstanding that some, such as nonbelievers or polytheists, would reasonably feel excluded if their fundamental perceptions about the world were frequently contradicted by the State. She further suggests that a particular category of statements, those involving "ceremonial deism,"<sup>322</sup> are immunized from review. However she fails to explain why those aware of the religious heritage of this country would be wrong to feel excluded when viewing or hearing statements that fall into this category. Nor does she explain why individuals would be wrong to infer that statements falling into this category at the very least endorse religion.<sup>323</sup>

Justice O'Connor's *Newdow* concurrence reiterates some of the positions she has taken in the past regarding endorsement. However, it also repudiates the position articulated in *Santa Fe*, her having signed onto that opinion without reservations notwithstanding. Rather than clarify the test, her *Newdow* concurrence reinforces the view that although different Justices refer to the Endorsement Test, there is no uniformly applied test. Rather, different Justices have varying ideas about what the test is, what type of actual or imagined observer should apply that test, and ultimately, what results such a test will yield.

#### CONCLUSION

Some commentators criticize the Endorsement Test for failing to clarify whether the reasonable observer is of a majority or minority religion,<sup>324</sup> noting that those of a majority religion might not feel offended by a religious display celebrating their religion.<sup>325</sup> Yet, at least as initially proposed,

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321. *Newdow*, 542 U.S. at 37 (O'Connor, J., concurring) ("[G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution.").

322. *Id.*

323. *See id.* at 36 ("The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.").

324. Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1525-26 (1998).

[T]he O'Connor formulation fails to resolve whether the observer will have the perspective of one in the religious majority or religious minority, and whether the observer will have the perspective of an adherent or a nonadherent of the religion on display. It is impossible to amalgamate, or average, these perspectives into one "hypothetical observer."

*Id.* at 1526 (citation omitted).

325. *See Sakaria*, *supra* note 289, at 492 ("The fundamental problem with Justice O'Connor's objective observer test is that her objective observer still measures objectivity against the backdrop of a Christian society. The objective observer is functionally a reason-

the issue was not merely whether individuals were offended by a state practice. In addition, the Establishment Clause would also be violated when some individuals were made to feel as if they were insiders on the basis of religion. Thus, it may be that in a variety of cases both majority and non-majority adherents would agree that a message of religious endorsement was offered; although they might disagree about whether such a message should be permitted. For example, many in Pawtucket believed that the crèche involved religious endorsement and that it nonetheless should have been permitted.<sup>326</sup>

Under some circumstances, the reasonable non-adherent would infer a religious message whereas the reasonable adherent would not.<sup>327</sup> Further, in some situations, reasonable non-adherents would disagree about whether a religious message was being communicated.<sup>328</sup> Justice Stevens suggests that under all of these circumstances, the state practice would violate the Establishment Clause, because some reasonable non-adherents would find the display offensive.<sup>329</sup>

Justice Stevens's approach might seem best for Establishment Clause purposes<sup>330</sup> because the removal of a religiously offensive message would presumably be welcomed by those offended, and those claiming that the message was secular rather than religious should not be religiously offended by the message's removal. It may not be that simple, however, since the removal itself might be viewed as hostile to religion, even if the initial message was not viewed as religious. Justice Thomas stated that "the message

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able Christian and therefore is less likely to see the offensiveness of a government action that supports Christianity. For many non-Christians or atheists, the religious nature of a crèche or prayer does not easily fade into the background, regardless of how long the practice has persisted."); Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 265 (2006) ("[T]he majority bias critique is the most persuasive criticism of the endorsement test."); Hill, *supra* note 8, at 522 ("[T]he notion of societal consensus appears to be a majoritarian one, drawing upon and reflecting the power structure of society. As such, reliance upon societal consensus will tend to warp the jurisprudence of religious symbolism toward the perspective of adherents to majority—that is, Christian—religions.").

326. See *supra* notes 63-65 and accompanying text.

327. See Hill, *supra* note 8, at 531 (noting that a "Jew and an Evangelical Christian may both view the same crèche display but receive different messages from it—that the display may profoundly offend and alienate the former observer, while barely registering with the latter, for instance").

328. See *supra* notes 285-88 and accompanying text.

329. See *supra* note 290 and accompanying text.

330. See Sakaria, *supra* note 289, at 502 (2005) ("The endorsement test I propose furthers this purpose by asking whether, from the perspective of the reasonable nonadherent, the law sends a message of favoritism for a particular religious group."); Rezai, *supra* note 26, at 538 ("The establishment clause, however, is designed to protect religious minorities. Therefore, it better serves the purpose of the first amendment to apply the endorsement standard from the perception of a reasonable nonadherent.").

sent by removal of the sign or display . . . may well appear to him to be an act hostile to his religious faith.”<sup>331</sup>

Regrettably, Justice Thomas did not explore what the “reasonable observer” would infer in the event that a display was removed. Would such an observer view the desire not to offend as offensive? If so, then it would seem that the removal of the crèche in *Allegheny* would itself be offensive. Indeed, Justice Kennedy implied as much in his concurring and dissenting opinions in *Allegheny*.<sup>332</sup>

Suppose that out of respect for non-adherents, Allegheny County never put up any winter displays with religious overtones. That would not violate any guarantees.<sup>333</sup> Thus, the County could create a display containing a snowman, ice skaters, and hot chocolate. Suppose, however, that after being assured that the Christmas tree was secular, the County decided to include such a tree in the display without including a crèche, menorah, or other religious objects. Surely, it might be thought, the reasonable observer would not find such a practice to be constitutionally objectionable. However, Justice Kennedy cast doubt on that proposition in his concurring and dissenting *Allegheny* opinion, writing:

If government is to participate in its citizens’ celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government’s attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious.<sup>334</sup>

If, out of a desire not to make non-Christians feel like second-class citizens, the failure to erect a crèche in a winter display containing a Christmas tree can be characterized as a violation of the Endorsement Test, then it

331. *Van Orden v. Perry*, 545 U.S. 677, 697 (Thomas, J., concurring). *But cf.* *Lee v. Weisman*, 505 U.S. 577, 629 (1992) (Souter, J., concurring) (“Religious students cannot compla[n] that omitting prayers from their graduation ceremony would, in any realistic sense, ‘burden’ their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony.”).

332. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“The majority holds that the County of Allegheny violated the [Establishment] Clause by displaying a crèche in the county courthouse, because the “principal or primary effect” of the display is to advance religion within the meaning of *Lemon v. Kurtzman*. . . . This view of the [Establishment] Clause reflects an unjustified hostility toward [religion].”).

333. *See id.* at 664 (“The Religion Clauses do not require government to acknowledge these holidays.”).

334. *See id.* at 663-64.

seems clear that the Endorsement Test is unlikely to be a useful tool. Many “secular” winter displays would seem subject to the charge that they were hostile to religion because not including religious elements.

Some commentators imply that the Endorsement Test is too robust if it does not allow individuals to have their deeply felt religious needs accommodated by the government.<sup>335</sup> Indeed, some members of the Court seem to fear that use of the Endorsement Test will subject those of the majority religion to unfair treatment, as if they will become second-class citizens under Endorsement analysis.<sup>336</sup> But when these comments about second-class citizenship are made, it is important to understand what is at issue. What is being discussed is *not* whether individuals will be permitted to engage in their own religious practices, but whether the government should itself be permitted to speak in ways that support those beliefs and practices. Suppose, for example, that Justice Stevens is correct that the message of the Texas Ten Commandments display at issue in *Van Orden v. Perry*<sup>337</sup> is clear: “This State endorses the divine code of the ‘Judeo-Christian’ God.”<sup>338</sup> The question at hand is whether that should be enough to establish that the display is impermissible under the Endorsement Test, given that many in this country do not accept or practice the Judeo-Christian tradition.

Cases that require application of the Endorsement Test have yielded rulings that are internally inconsistent<sup>339</sup> and nearly impossible to apply.<sup>340</sup> This lack of consistency is unsurprising, given that there are many varia-

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335. See Choper, *supra* note 10, at 511 (“[I]f the perspective that determines the validity of government action turns on ‘the message received by the minority or nonadherent,’ this would grant something that I find too close to a self-interested veto for the minority and too restrictive of government accommodations that seek to satisfy deep-felt religious needs.”).

336. See *Allegheny*, 492 U.S. at 677 (Kennedy, J., concurring in the judgment in part and dissenting in part) (“If there be such a person as the ‘reasonable observer,’ I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be [consigned] to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.”).

337. 545 U.S. 677 (2005).

338. *Id.* at 707 (Stevens, J., dissenting).

339. Choper, *supra* note 10, at 513 (“The lack of any clear consensus as yet on either the reasonable observer’s religious convictions or that individual’s knowledge level has generated a host of inconsistent rulings.”).

340. See *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring) (“[T]he very ‘flexibility’ of this Court’s Establishment Clause precedent leaves it incapable of consistent application.”); Choper, *supra* note 10, at 517 (“Given the Court’s own inability to reach consensus on the message conveyed to the ‘reasonable observer’ by government action, it is no wonder that lower courts have floundered at the task.”); Smith, *supra* note 54, at 300 (“Because the test is composed of unmanageable or fatally ambiguous concepts, it cannot provide the needed predictability or guidance for lower courts and other government officials.”).

tions of the Endorsement Test and the Justices have been unwilling to apply the very standards that they claimed to be applying.<sup>341</sup> Some commentators have suggested that the Endorsement Test really is reducible to whether a majority of the Court believes that a particular statement or display violates Establishment Clause guarantees.<sup>342</sup> That is accurate, at least in the sense that the invocation of the test signals that a majority of the Court has reached a conclusion about whether the Clause had been violated based on some *unarticulated* test or intuition. Indeed, while members of the Court presumably believe that a display violates or does not violate constitutional guarantees based on *something*, the basis used by one Justice often differs significantly from that used by another. It is not even clear that individual Justices are using the same test over time.

The Endorsement Test is applied in a manner that will often result in religious offense. Justice O'Connor's analogy, which compared the religiously offended to hecklers, is unfortunate. Similarly, Justice Thomas's suggestion that the offended may be too sensitive does not seem respectful,<sup>343</sup> especially given his suggestion that the displeasure caused by taking down religious displays is constitutionally cognizable.<sup>344</sup> By suggesting that majority non-adherents are too sensitive when taking offense to state-sponsored religious displays but that majority adherents are justifiably offended when such displays are removed, Justice Thomas fails to apply neutrality towards the different religious views allegedly embodied in the Establishment Clause.

In too many of the cases, the nonadherent who is sincerely offended is implicitly or explicitly being told that she would not be offended were she either better informed or more reasonable.<sup>345</sup> Yet, surely, the test used to determine whether the Establishment Clause has been violated should not itself convey disparaging messages to those who are sincerely offended.

Some criticisms of the Endorsement Test do not seem well-founded, for example, that permitting judges to make decisions about offensiveness will simply reinforce majority views because most judges belong to major-

341. See *supra* notes 62-104 and accompanying text (discussing Justice O'Connor's application of the Endorsement Test in *Lynch*).

342. Choper, *supra* note 10, at 519 (suggesting that the current Endorsement Test "effectively converts the reasonable observer into a majority of the Supreme Court").

343. Cf. *Van Orden*, 545 U.S. at 696-97 (Thomas, J., concurring) (discussing "the nonadherent, who may well be more sensitive than the hypothetical 'reasonable observer,' or who may not know all the facts").

344. See *id.* at 697.

345. See Diamond & Koppelman, *supra* note 61, at 724 ("Jews may be offended by a state-sponsored nativity display, but at least the display does not subject them to a lecture, as some of Justice O'Connor's opinions do, expressing why they are unreasonable to feel offended!").

ity religions.<sup>346</sup> While there is some evidence that majority and minority religious judges will reach different conclusions about endorsement,<sup>347</sup> one nonetheless might expect such judges to be able to discern what constitutes impermissible endorsement in light of expert testimony. However, expert testimony would be helpful only if the Endorsement jurisprudence were itself much clearer with respect to what knowledge and attitudes the informed, reasonable observer should have.<sup>348</sup>

Regrettably, it may simply be impossible to get a clearer picture of what the Endorsement Test requires, permits, and prohibits. Part of the difficulty is that the Supreme Court Justices do not, themselves, have a clear understanding of what the test is supposed to accomplish. Nor is there any consensus on the characteristics of an objective observer. However, given this lack of clarity and consensus, use of the Endorsement Test will inevitably result in some Justices announcing how the reasonable observer would react, despite reactions to the contrary by numerous religious and non-religious citizens.

While the Endorsement Test may initially have been formulated to import a kind of tolerance and respect into Establishment Clause jurisprudence, it is now used in ways that will result in both offense and insult. The application of the current test undermines not only respect for the religious and the non-religious, but also for the integrity of the Court—a result that none should favor. If past decisions are any guide, the application of the Endorsement Test is much more likely to add insult to injury than to yield a sensible jurisprudence, and it must be abandoned as undermining the goals that it was allegedly adopted to serve.

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346. See Wexler, *supra* note 325, at 303 (“As it currently stands, the endorsement test entrusts judges who are generally members of majority religious traditions with the responsibility of deciding whether a state-sponsored display or symbol sends a message to outsiders that they are not political equals. While it certainly is not impossible for such a judge to make this determination in a reasonable fashion, the task is a highly difficult one. After all, the test, by its very terms, requires judges to get inside the heads of members of the minority tradition to attempt to understand how that person would perceive the message. Of course, it is far easier for someone deeply acquainted with a minority tradition to understand how a government sponsored message would be perceived by a member of that tradition.”); Detroy, *supra* note 52, at 608 (noting that “some have argued that the ‘objective observer’ standard is inappropriate not only because it fails to take into account perceptions of the religious outsider, but also because it gives courts a veritable ‘blank slate’ upon which to create the standard according to their own substantive proclivities”).

347. See, e.g., Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 502 (2004) (“In evaluating judicial resolution of challenges to governmental interaction with religion under the Establishment Clause of the First Amendment, Jewish judges were significantly more likely to conclude that governmental interaction with religion breached the figurative wall of separation between church and state.”).

348. Cf. *id.* at 500 (discussing “the Supreme Court’s inability to achieve consensus and its promulgation of malleable balancing tests or open-ended exceptions to rules”).