

## The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test

### I. Introduction

The Endorsement test is one of the tests currently used by the United States Supreme Court to determine whether a particular state practice implicating religion passes constitutional muster and has been described as the test to make that determination. While commentators have noted that the current test is difficult for lower courts to apply and is likely to result in relevantly similar cases being decided dissimilarly, too little attention has been paid to the ways that the test itself has evolved. The Court's 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a message far different from the one previously communicated, and the former difficulties surrounding the test have been replaced by new, related difficulties.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 often is not used to protect minority religious viewpoints; on the contrary, it is not only being used to validate practices that would seem to violate the express terms of the test, but is also rejecting the reasonableness of those feeling offended when their religious views or practices are either ignored or undermined. A test that had at least appeared to have so much promise now seems more likely to be used to oppress than to promote respect for the religious or non-religious.

Part II of the 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> and then discussing its further elaboration in subsequent cases. Part III discusses the adoption of the 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 the test was adopted as a constitutional standard. Part IV discusses post-Allegheny attempts by members of the Court to clarify or modify the test, suggesting that the Justices do not seem to understand or appreciate the difficulties posed by their own or others' formulations of that test. The article concludes that the Endorsement test, as currently applied, does no independent work; instead, it is used to rationalize results reached independently

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<sup>1</sup> 465 U.S. 668 (1984).

<sup>2</sup> 492 U.S. 573 (1989).

and to impugn the judgment or knowledge of those who reach a different conclusion about a practice's religious offensiveness.

## II. The Everchanging 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 particular state law or practice violates Establishment Clause guarantees. The best 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

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<sup>3</sup> 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 the “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 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.”).

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

<sup>5</sup> 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 -226 (2007-2008) (“many of the Justices have embraced the “endorsement test,” which was originally proposed by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*).

<sup>6</sup> 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)

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.

<sup>7</sup> See *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding starting legislative sessions with prayer after 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. 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.”).

<sup>8</sup> See *Mellen v. Bunting*, 327 F.3d 355, 370 (4<sup>th</sup> Cir. 2003) (“Because 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

about which test or how many tests to use in particular situations.<sup>9</sup> Yet, it should not be thought that the tests themselves have remained static, and that the only relevant question has been which test is ascendant.<sup>10</sup> Indeed, it has been 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 initially offering that test.

#### A. Lemon

When considering the evolution of the Endorsement test, it is helpful to consider the Lemon test, if only because Justice O'Connor offered her 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. Looking at past cases, the Court discussed the “cumulative criteria developed by the Court over many years.”<sup>13</sup>

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inconsistency, confusion, and apparent subjectivity in the Supreme Court and lower court cases dealing with public displays of religious symbolism”).

<sup>9</sup> See, for example, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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, endorsement, 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).

<sup>10</sup> Cf. Anthony 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 (“several 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.”).

<sup>11</sup> 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.”).

<sup>12</sup> 403 U.S. 602 (1971).

<sup>13</sup> Id. at 612.

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion,<sup>14</sup> finally, the statute must not foster ‘an excessive government entanglement with religion.’<sup>15</sup>

The Court has used the Lemon test to strike down a number of statutes and programs.<sup>16</sup> As recently as 2005, the Court suggested that the Ten Commandments display in courthouses in two different Kentucky counties<sup>17</sup> violated the Lemon purpose prong.<sup>18</sup> That said, however, it would be inaccurate to suggest 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>19</sup> the Court modified the Lemon test by incorporating the entanglement prong into the effect prong,<sup>20</sup> at least insofar as aid to public schools is concerned.<sup>21</sup> Second, modifications notwithstanding, the Court has been inconsistent with respect to when the Lemon test should be applied<sup>22</sup> and, further, several members of the Court have at differing times expressed dissatisfaction with the test.<sup>23</sup>

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<sup>14</sup> citing Board of Education v. Allen, 392 U.S. 236, 243 (1968)

<sup>15</sup> Lemon, 403 U.S. at 612-13 (citing Walz v. Tax Commission of the City of New York, 397 U.S. 664, 674 (1970)).

<sup>16</sup> McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005) (striking down Ten Commandments display because it violated Lemon purpose prong); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (striking down tax exemption solely for religious publications as violating Lemon purpose prong); Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down Louisiana law regarding teaching of creation science as violating Lemon purpose prong); School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985) (overruled by Agostini v. Felton, 521 U.S. 203 1997) (striking down school program as violation of Lemon); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (striking down requirement that employees not be forced to work on their religious Sabbath as violating Lemon effect prong because it impermissibly advanced religion); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking statute involving time for prayer in school as violating Lemon purpose prong).

<sup>17</sup> 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.”).

<sup>18</sup> Id. at 860.

<sup>19</sup> 521 U.S. 203 (1997).

<sup>20</sup> Id. at 233 (“it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect”).

<sup>21</sup> See Mitchell v. Helms, 530 U.S. 793, 807-808 (2000) (“in Agostini we modified Lemon for purposes of evaluating aid to schools and examined only the first and second factors”).

<sup>22</sup> Compare McCreary County v. ACLU, 545 U.S. 844 (2005) (striking down Ten Commandments display as a violation of Lemon) with Van Orden v. Perry, 545 U.S. 677 (2005) (upholding constitutionality of Ten Commandments display and suggesting that the Lemon test was not applicable to this kind of case).

<sup>23</sup> 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.”).

Perhaps as a way of making the Lemon test more acceptable,<sup>24</sup> Justice O'Connor offered the Endorsement test in her concurrence in Lynch v. Donnelly,<sup>25</sup> where she noted that state endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."<sup>26</sup> By offering such a test, she seemed to be suggesting 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 the legislature.<sup>27</sup> Of course, such a test requires further elaboration, for example, whether the fact that an individual sincerely reports that a religious display makes her feel like an outsider should suffice to establish that Establishment Clause guarantees have been violated.<sup>28</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 either the purpose or the effect prong of Lemon 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

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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)")

<sup>24</sup> 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.")

<sup>25</sup> 465 U.S. 668 (1984).

<sup>26</sup> Id. at 688 (1984) (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.")

<sup>27</sup> 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 Rezaei, Note, County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis, 40 **Am. U. L. Rev.** 503, 538 (1990) ("in most circumstances government responds to the desires of the majority")

<sup>28</sup> Cf. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 34-35 (2004) (O'Connor, J., 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.") (citing Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)).

endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>29</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 be held to violate the Establishment Clause. However, in the very opinion in which she 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>30</sup> To analyze whether there had been improper endorsement, it was necessary to consider both the message the town had intended to convey and the message the town had actually conveyed.<sup>31</sup> Justice O'Connor commented: "The purpose and effect prongs of the Lemon test represent these two aspects of the meaning of the City's action,"<sup>32</sup> i.e., presumably, that the message the town had 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 "meaning." She started out by suggesting that the "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>33</sup> Here, the reader assumes that she is contrasting what the speaker intends to say with the "objective" message received, as if she were contrasting the purpose and effect prongs. Were this the correct interpretation, 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 (i.e., intended) meaning, listeners can consider a variety of factors. 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>34</sup> whereas others will have to rely solely on the text of the statement itself.<sup>35</sup> At this point, Justice O'Connor seemed to be restricting her discussion to the purpose prong—some

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<sup>29</sup> Lynch, 465 U.S. at 690 (O'Connor, J., concurring).

<sup>30</sup> Id. at 670-71 (O'Connor, J., concurring).

<sup>31</sup> Id. at 690 (O'Connor, J. concurring).

<sup>32</sup> Id. (O'Connor, J. concurring).

<sup>33</sup> Id. (O'Connor, J. concurring).

<sup>34</sup> Id. (O'Connor, J. concurring).

<sup>35</sup> Id. (O'Connor, J. concurring).

who are trying 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 thus far seems perfectly clear. There are two different 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 to questions will have to make a somewhat less informed judgment about the speaker's purpose by letting the words speak for themselves.

Yet, the purpose and effect prongs suddenly get 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>36</sup> The whole previous discussion had not been about what was actually conveyed but, instead, about what had actually been intended. Now the discussion has shifted away from correct or incorrect inferences about speaker intention to what was conveyed rather than what was intended to be conveyed.

A number of points might be made about this (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 might 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.

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 is misleading those who wish to understand the Endorsement test. Assuming that the 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, instead of contrasting those with more knowledge of the relevant factors with those who only have access to the words themselves by saying that the former are more likely than the latter to correctly infer intent, Justice O'Connor contrasted these two by suggesting that the former

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<sup>36</sup> Lynch, 465 U.S. at 690 (O'Connor, J. concurring).

may be more likely to capture “subjective” intent while the latter will have access to what was actually conveyed even if not actually intended. But the Endorsement 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>37</sup> If, indeed, 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 they hear 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 of 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. They would have access to relevant information to which members of Group 2 simply would not have access. Nonetheless, members of Group Two would be able to talk about the message conveyed to them by the practice, even if they would not have access to information that would help them make a more reliable assessment of the state’s purpose in engaging in the practice.

While this scenario involving Groups One and Two might seem to capture what Justice O’Connor is envisioning, there is reason to think that she also had other kinds of scenarios in mind. She noted, “If 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>38</sup> But this means that even when an audience has access to both context and speaker clarification, some will correctly ascertain the state’s intent and message while

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<sup>37</sup> Lynch, 465 U.S. at 690 (O’Connor, J. concurring) (emphasis added).

<sup>38</sup> Id. (O’Connor, J. concurring).

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, i.e., those who only have access to the text will make the same inferences about intent and meaning as will those who in addition have access to much more information. However, where those meanings do not coincide, that lack of coincidence need not be because only some have access to relevant information. Rather, it could be for a multitude of other reasons involving the matters upon which different audience members focus, the differing beliefs and histories of different members of the audience, etcetera.<sup>39</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 questions for purpose prong purposes 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, but says nothing about how to determine who has accurately described what message the state intends to convey, even though that 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, e.g., because of misleading answers.<sup>40</sup> In such a case, those who knew about the practice but did not in addition 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>41</sup> and thus it is unfair to criticize the Endorsement test for failing to solve problems that may be insoluble.<sup>42</sup> Yet, the law requires

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<sup>39</sup> 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.").

<sup>40</sup> A separate question is whether a secret purpose to promote religion is barred by the Establishment Clause. See McCreary County, 545 U.S. at 863 ("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.").

<sup>41</sup> 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").

<sup>42</sup> See Ellen P. Aprill & Nancy Staudt, Theories of Statutory Interpretation (and Their Limits), 38 **Loy. L.A. L. Rev.** 1899, 1906-07 (2005) ("in reality it is virtually impossible to discern actual intent given the collective nature of the legislative process").

that judgments be made about intent in a variety of areas,<sup>43</sup> and it is not at all clear that discerning intent is as impossible as is sometimes claimed.<sup>44</sup> Further, the point here is that 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. Thus, while the statement, "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval,"<sup>45</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>46</sup> Rather, she suggested, what is "crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."<sup>47</sup> Yet, this means that the Endorsement test does not require invalidation of state practices secretly promoting religion, because no message of endorsement is thereby communicated. Thus, on Justice O'Connor's apparent view, government promotion of religion hidden from view is protected not merely because, as a practical matter, no one knows to challenge it, but is actually permissible because not communicating a message of endorsement.

Justice O'Connor seemed to complicate the test further when suggesting 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>48</sup> She offered no accompanying explanation regarding whether an actual message of endorsement of course affects status in the community and thus nothing in addition to endorsement needs

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<sup>43</sup> 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.").

<sup>44</sup> See Daniel B. Rodriguez & Barry R. Weingast, The Paradox of Expansionist Statutory Interpretations, 101 **Nw. U. L. Rev.** 1207, 1228 (2007) ("we argue that the idea of legislative intent is sound and not an oxymoron").

<sup>45</sup> Lynch, 465 U.S. at 690 (O'Connor, J., concurring).

<sup>46</sup> Id. at 691-92 (O'Connor, J., concurring).

<sup>47</sup> Id. at 692 (O'Connor, J., concurring).

<sup>48</sup> Id. (O'Connor, J., concurring).

to be shown<sup>49</sup> or whether, instead, this status-in-the-community criterion creates an additional hurdle, e.g., one must show that one's ability to participate politically has somehow been affected.<sup>50</sup> If nothing in addition to the fact of 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, then it is unclear what that would be. Obstacles to voting that had been put into place?<sup>51</sup> Difficulty in forging alliances with groups having intersecting interests?<sup>52</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's having non-majoritarian religious beliefs?

Justice O'Connor's mentioning status in the political community 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

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<sup>49</sup> For the suggestion that no additional element is added, see Feigenson, *supra* note 39, at 78 (“under 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)

She [Justice O'Connor] explained, “What 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 denomination, or religion generally, could not withstand Establishment Clause scrutiny.

<sup>50</sup> 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) (“what 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) (“the 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”).

<sup>51</sup> 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.

<sup>52</sup> 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”).

that what must be rectified is the creation of roadblocks for minority political participation.<sup>53</sup> If those roadblocks have been created, then they must be removed; if they have not, then no reason has been offered to believe endorsement constitutionally objectionable. If the state's endorsing 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 was her statement, "Examination 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>54</sup> Given that a state practice will not pass muster if either the purpose or the effect prong has been violated, 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 assure that that action does not have a forbidden meaning, i.e., passes constitutional muster. Thus, if the purpose prong is violated because the subjective intent is to endorse religion, then no more needs to be examined to establish that the practice is unconstitutional. By the same token, if the effect prong is violated because the state conveys a message of endorsement of religion, then no more needs to be examined to establish that the practice does not pass muster. It is only when analysis under one of the prongs does not reveal a violation that analysis under the other prong is required.

Perhaps Justice O'Connor had merely made a somewhat infelicitous choice of words when talking about 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>55</sup> However, before one concludes that the Endorsement test described in Justice O'Connor's Lynch concurrence is indeed protective of minority religious rights,<sup>56</sup> it might be helpful to see how she applied those guarantees to the case at hand.

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<sup>53</sup> 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).

<sup>54</sup> Lynch, 465 U.S. at 690 (O'Connor, J. concurring).

<sup>55</sup> See id. (O'Connor, J. concurring).

<sup>56</sup> Cf. James M. Lewis & Michael L. Vid, A Controversial Twist of Lemon: The Endorsement Test as the 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

a. 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>57</sup> After pointing out that the celebration of public holidays having both religious and cultural significance can be motivated by secular purposes,<sup>58</sup> she reasoned that Pawtucket had not intended to endorse Christianity or convey a message of disapproval of any other religion.<sup>59</sup> Indeed, she concluded that the "evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols."<sup>60</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 had such an illicit intention. However, examination of the Lynch district court opinion<sup>61</sup> puts Justice O'Connor's concurrence in a much different light, and alerts readers that her Endorsement test offers much less protection than might first have been thought.

The district court had heard testimony that individuals seeing the crèche viewed it as state endorsement.<sup>62</sup> Further, many citizens had objected to the suit because they believed that Pawtucket could and should support the religious views of the majority of the local populace.<sup>63</sup> The mayor had held a press

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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 53, 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.

<sup>57</sup> Lynch, 465 U.S. at 691 (O'Connor, J., concurring).

<sup>58</sup> See id. (O'Connor, J., concurring).

<sup>59</sup> Id. (O'Connor, J., concurring).

<sup>60</sup> Id. (O'Connor, J., concurring).

<sup>61</sup> See Donnelly v. Lynch, 525 F. Supp. 1150 (D. R.I. 1981), rev'd, Lynch v. Donnelly, 465 U.S. 668 (1984).

<sup>62</sup> Id. at 1157 ("they view the City's erection of the creche as demonstrating the City's support for the Christian religion").

<sup>63</sup> See id. at 1158.

conference after the lawsuit had been filed in which he had vowed to “fight vigorously the ACLU's attempt to take Christ out of Christmas.”<sup>64</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>65</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>66</sup>

While Pawtucket had claimed that the holiday display was to promote downtown business, the court had heard testimony that removal of the nativity scene from the display would not adversely affect business.<sup>67</sup> The district court had considered the city’s claim that the purpose of the display was cultural or traditional,<sup>68</sup> but had 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>69</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>70</sup>

Presumably, the district court had 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>71</sup> the Court had struck down a school policy involving recitation of the Lord’s Prayer,<sup>72</sup> notwithstanding the

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<sup>64</sup> Donnelly, 525 F. Supp. at 1159.

<sup>65</sup> Id. at 1161.

<sup>66</sup> Id.

<sup>67</sup> Id. at 1159.

<sup>68</sup> Id. at 1170.

<sup>69</sup> Id.

<sup>70</sup> Id. at 1171.

<sup>71</sup> 374 U.S. 203 (1963).

<sup>72</sup> See id. at 223.

Court's recognition that "religion has been closely identified with our history and government."<sup>73</sup> While a public display is not the equivalent of required recitation in the schools, the point remains that 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>74</sup> neither culture nor tradition should be permitted to immunize that inclusion from Establishment Clause review.

Justice O'Connor's conclusion that the purpose behind inclusion of the nativity scene was not to promote the religious content of the holiday was not supported by the evidence, given the articulated desire to keep Christ in Christmas.<sup>75</sup> Even had more testimony been offered at trial about how inclusion of the crèche was for a secular purpose, however, that might well not have sufficed to establish that the "evident" purpose of including the crèche was secular.<sup>76</sup> Much, much more evidence of the secular purpose and much, much 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>77</sup>

It might be argued that the evidence presented did not speak to why the crèche was originally included but only spoke to why it was being retained in the display. Even were that true, the retention for religious reasons would presumably have been enough to violate Establishment Clause guarantees.<sup>78</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, e.g., by displaying a notice of non-endorsement.<sup>79</sup> Second, only the religious heritage and traditions of the Christian majority had been part of the city's ceremonies and displays,<sup>80</sup> which cast doubt

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<sup>73</sup> Schempp, 374 U.S. at 212.

<sup>74</sup> Donnelly, 525 F. Supp. at 1167.

<sup>75</sup> See notes 63-66 and accompanying text supra.

<sup>76</sup> See Lynch, 465 U.S. at 691 (O'Connor, J., concurring).

<sup>77</sup> Id. (O'Connor, J., concurring).

<sup>78</sup> See Books v. City of Elkhart, Indiana, 235 F.3d 292, 315-16 (7<sup>th</sup> Cir. 2000) ("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.") (citing Bridenbaugh v. O'Bannon, 185 F.3d 796, 799 (7<sup>th</sup> Cir. 1999)).

<sup>79</sup> 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.").

<sup>80</sup> Id.

on the claimed neutral purpose behind city practices.<sup>81</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 had argued, "If government could celebrate 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>82</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>83</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. While the evidence was strong, it might be thought that a different court could have reached a different conclusion. But even if the evidence did not compel the district court finding, i.e., even if the evidence regarding intent was sufficiently ambiguous that it would have supported a contrary finding, that would not have been enough to justify reversal. Justice O'Connor's conclusion that the district court finding was clearly erroneous, i.e., 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, which suggests at the very least that the Endorsement test she described is not to be interpreted literally.

#### b. The Effects Prong

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<sup>81</sup> Donnelly, 525 F. Supp. at 1172.

<sup>82</sup> Id. at 1172-73.

<sup>83</sup> Id. at 1173.

While a finding of religious purpose would have sufficed to invalidate inclusion of the crèche,<sup>84</sup> the district court had also found that the primary effect of including the nativity scene was to promote religion.<sup>85</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 was her analysis of the purpose prong under the Endorsement test.

The district court had examined the display, noting that the practically life-sized nativity scene<sup>86</sup> did not play an insignificant part in the setting<sup>87</sup> and was in an especially prominent place.<sup>88</sup> The court discussed the "viewers' reasonable inference that the creche is there because the City supports that message and wishes to promulgate it,"<sup>89</sup> and noted that the City had done nothing to undercut such an inference.<sup>90</sup> The district court concluded that the display's effect was to create the appearance of an official imprimatur on Christian beliefs.<sup>91</sup>

When Justice O'Connor rejected the district court 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>92</sup> However, her analysis of why that was so was quite telling.

Justice O'Connor noted that the district court had found that the "government was understood to place its imprimatur on the religious content of the crèche."<sup>93</sup> Rather than offer 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>94</sup> On the contrary, the

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<sup>84</sup> Lynch, 465 U.S. at 690 (O'Connor, J., concurring) ("An affirmative answer to either question should render the challenged practice invalid.").

<sup>85</sup> See Donnelly, 525 F. Supp. at 1180 (noting the court's finding of "impermissible effect").

<sup>86</sup> Id. at 1176.

<sup>87</sup> See id.

<sup>88</sup> Id.

<sup>89</sup> Id. at 1177-78.

<sup>90</sup> Id. at 1178.

<sup>91</sup> Id. at 1177.

<sup>92</sup> Lynch, 465 U.S. at 693 (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.

<sup>93</sup> Id. (O'Connor, J., concurring).

<sup>94</sup> Id. (O'Connor, J., concurring).

analysis is “in large part a legal question to be answered on the basis of judicial interpretation of social facts.”<sup>95</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>96</sup> the district court finding was wrong as a “matter of law,”<sup>97</sup> even if the court was correct that the “practice under review in fact convey[ed] a message of endorsement,”<sup>98</sup> i.e., was understood by members of both majority and minority religions to be sending that message.

While Justice O’Connor’s initial discussion of the Endorsement test implied that the test would prevent religious minorities from feeling like second-class citizens,<sup>99</sup> her application of that test suggested that it was far less protective than might originally have been supposed. That said, 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>100</sup>

#### B. The Other Lynch Understanding of the Endorsement Test

When commentators discuss the Endorsement test offered in Lynch, they often focus on the test offered by Justice O’Connor.<sup>101</sup> However, the Lynch majority also discussed endorsement,<sup>102</sup> although that

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<sup>95</sup> Lynch, 465 U.S. at 694 (O’Connor, J., concurring).

<sup>96</sup> Id. at 693 (O’Connor, J., concurring).

<sup>97</sup> Id. at 694 (O’Connor, J., concurring).

<sup>98</sup> Id. at 690 (O’Connor, J., concurring).

<sup>99</sup> See Budd, supra note 26, 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.

<sup>100</sup> But see notes 215-21 and accompanying text infra (suggesting that the two tests may be less far apart than is commonly suggested).

<sup>101</sup> See, for example, 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) ( discussing the “endorsement test, another proposed modification to Lemon, was offered by Justice O’Connor in her concurring opinion in Lynch v. Donnelly in 1984.”); Modak-Truran, supra note 5, at 225-26 (“many of the Justices have embraced the ‘endorsement test,’ which was originally proposed by Justice O’Connor in her concurring opinion in Lynch v. Donnelly”); 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

opinion seemed to involve a kind of 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. Thus, the Lynch majority opinion<sup>103</sup> rejected the district court finding that the primary effect of including the creche was to advance religion,<sup>104</sup> reasoning that:

to 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;<sup>105</sup> expenditure of public funds for transportation of students to church-sponsored schools;<sup>106</sup> federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education;<sup>107</sup> noncategorical grants to church-sponsored colleges and universities;<sup>108</sup> and the tax exemptions for church properties sanctioned in Walz.<sup>109</sup> 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, 366 U.S. 420 (1961); the release time program for religious training in Zorach;<sup>110</sup> and the legislative prayers upheld in Marsh.<sup>111</sup>

Here, the Court suggested that the relevant constitutional issue was not whether there was an endorsement of religion but, instead, how much of an endorsement. The alleged endorsement at issue in

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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 51, at 600 (“The endorsement test made its formal debut in Justice O’Connor’s concurrence in Lynch v. Donnelly.”)

<sup>102</sup> Wilson, *supra* note 24, 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.’”).

<sup>103</sup> 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.

<sup>104</sup> See Lynch, 465 U.S. at 671.

<sup>105</sup> Board of Education v. Allen, 392 U.S. 236 (1968).

<sup>106</sup> citing Everson v. Board of Education, 330 U.S. 1 (1947).

<sup>107</sup> citing Tilton v. Richardson, 403 U.S. 672 (1971)

<sup>108</sup> citing Roemer v. Board of Public Works, 426 U.S. 736 (1976).

<sup>109</sup> citing Walz v. Tax Commission, 397 U.S. 664 (1970)

<sup>110</sup> citing Zorach v. Clauson, 343 U.S. 396 (1952)

<sup>111</sup> Lynch, 465 U.S. at 681-82 (emphasis added) (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

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 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 but was merely not being disadvantaged. Thus, in Board of Education v. Allen, the Court upheld the lending of textbooks to parochial schools.<sup>112</sup> After noting that “each book loaned must be approved by the public school authorities; only secular books may receive approval,”<sup>113</sup> the Court implied that the statute at issue was merely affording secular benefits neutrally among students.<sup>114</sup> By the same token, 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>115</sup> The Everson Court suggested that the legislation at issue “does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”<sup>116</sup>

The same point might be made about Tilton v. Richardson, in which the Court upheld the Higher Education Facilities Act<sup>117</sup> authorizing federal grants and loans for construction by colleges and universities.<sup>118</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>119</sup> Thus, although federal funds were being used to finance construction of buildings on the campuses of religiously affiliated universities,<sup>120</sup> the Court suggested that the buildings at issue were

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<sup>112</sup> See 392 U.S. 236, 238 (1968) (“We hold that the law is not in violation of the Constitution.”)

<sup>113</sup> Id. at 244-45.

<sup>114</sup> 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.”)

<sup>115</sup> 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.”).

<sup>116</sup> Id. at 18.

<sup>117</sup> 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).”).

<sup>118</sup> See Tilton, 403 U.S. at 674.

<sup>119</sup> Id. at 679-80.

<sup>120</sup> The universities whose buildings were at issue were Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College. See id. at 676.

“indistinguishable from a typical state university facility.”<sup>121</sup> Further, the Court found that these institutions’ “predominant higher education mission [was] to provide their students with a secular education.”<sup>122</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>123</sup>

In Roemer v. Board of Public Works of Maryland,<sup>124</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>125</sup> Those institutions of higher learning that primarily awarded theological or seminary degrees were not eligible to receive grants.<sup>126</sup> Those institutions still eligible for funding had to include an affidavit that the funds would not be used for religious purposes.<sup>127</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>128</sup> as if refusing to permit sectarian schools to have access to these grants would make the state less than neutral.<sup>129</sup>

So, too, the Court discussed the importance of neutrality in Walz v. Tax Commission of the City of New York,<sup>130</sup> where the Court explained, “The 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>131</sup> At issue in Walz was New York City’s grant of a property tax exemption to religious organizations,<sup>132</sup> and 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

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<sup>121</sup> Tilton, 403 U.S. at 680.

<sup>122</sup> Id. at 687.

<sup>123</sup> Id. at 688.

<sup>124</sup> 426 U.S. 736 (1976).

<sup>125</sup> Id. at 739.

<sup>126</sup> Id. at 741-42.

<sup>127</sup> 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”).

<sup>128</sup> Id. at 746.

<sup>129</sup> See id. at 747 (“Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity.”).

<sup>130</sup> 397 U.S. 664 (1970).

<sup>131</sup> Walz, 397 U.S. at 669.

<sup>132</sup> See id. at 666.

so.”<sup>133</sup> The Court found that the tax exemption neither established nor interfered with religious beliefs and practices, implying instead that the City was merely adhering to a policy of neutrality by affording this exemption.<sup>134</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>135</sup> He 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>136</sup> Precisely because such a range of organizations were afforded this tax benefit, it could not be claimed that the state was picking out religious organizations for special favoritism.<sup>137</sup>

Maryland’s Sunday Closing Laws were challenged, *inter alia*, as a violation of the Religion Clauses in McGowan v. Maryland.<sup>138</sup> The Court admitted that those laws were originally passed to aid

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<sup>133</sup> Walz, 397 U.S. at 669.

<sup>134</sup> See id. at 669-70.

<sup>135</sup> Id. at 687 (Brennan, J., concurring).

<sup>136</sup> See id. at 688 (Brennan, J., concurring)

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. [citing Washington Ethical Society v. District of Columbia, 249 F.2d 127, 129 (1957).] 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.’

The Court, however, refused to rely on this reasoning. See id. at 674

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.

<sup>137</sup> Walz, 397 U.S. at 688 (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 (opinion of Harlan, J.)

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.

<sup>138</sup> McGowan v. Maryland, 366 U.S. 420, 422 (1961) (“The questions presented are whether . . . the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.”)

religion,<sup>139</sup> but then sought to determine whether such laws had retained their religious character.<sup>140</sup> The Court found that the current statutes were to promote secular objectives,<sup>141</sup> for example, to provide one day during the week when family and friends could do things together.<sup>142</sup>

In the previous cases discussed, the Court appealed to religious neutrality to uphold programs benefiting religious groups among others. On first glance, such a rationale might seem ill-suited to uphold the program at issue in Zorach v. Clauson,<sup>143</sup> since what was challenged there was a New York program permitting students to be released from school so that they could receive off-site religious instruction.<sup>144</sup> However, the Court noted that the release time program neither involved “religious instruction in public school classrooms nor the expenditure of public funds,”<sup>145</sup> and suggested that holding that the Constitution prohibited this kind of program “would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.”<sup>146</sup>

Thus, in most of the cases cited by the Lynch majority, the Court had implied that the programs at issue were not endorsing religion but were instead permissible under a theory of neutrality.<sup>147</sup> The possible exception to this rule was Marsh v. Chambers,<sup>148</sup> which involved a challenge to the Nebraska Legislature practice of beginning each session with a prayer offered by a state-paid chaplain.<sup>149</sup> Rather than discuss

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<sup>139</sup> See McGowan, 366 U.S. at 431 (suggesting that there was “no dispute that the original laws which dealt with Sunday labor were motivated by religious forces”).

<sup>140</sup> Id. (“But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.”)

<sup>141</sup> 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.

<sup>142</sup> 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.”)

<sup>143</sup> 343 U.S. 306 (1952).

<sup>144</sup> Id. at 308.

<sup>145</sup> Id. at 308-09.

<sup>146</sup> Id. at 314.

<sup>147</sup> See Mark Strasser, Thou Shalt Not? 6 U. Md. L. J. Race, Relig., 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.”).

<sup>148</sup> 463 U.S. 783 (1983).

<sup>149</sup> See id. at 784-85.

whether this practice promoted religion, the Court noted that the long historical pedigree of the practice.<sup>150</sup> That said, however, 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>151</sup> Bracketing the plausibility of suggesting that offering a prayer should be thought the equivalent of an acknowledgment of widely held beliefs,<sup>152</sup> the Marsh Court was implying that even legislative prayer did not involve an endorsement of religion.

Misrepresentation of the past jurisprudence notwithstanding, the Lynch Court did offer an implicit theory of endorsement and, thus, it might be said that in Lynch two theories of endorsement were offered—comparative endorsement in the opinion written by Chief Justice Burger and endorsement (simpliciter) in the concurring opinion written by Justice O’Connor. In subsequent opinions employing the Endorsement test,<sup>153</sup> Justice O’Connor’s concurring opinion was the basis for the analysis of what would constitute state endorsement.

### C. Clarifications/Modifications of the O’Connor Endorsement Test

Justice O’Connor’s Lynch concurrence raised many questions, and she attempted to clarify her position in subsequent concurring opinions. It is a matter of some debate whether these subsequent explanations modified the test originally conceived<sup>154</sup> or, instead, simply clarified what she was initially proposing.<sup>155</sup>

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<sup>150</sup> 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”).

<sup>151</sup> Id. at 792.

<sup>152</sup> 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”).

<sup>153</sup> See, for example, County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

<sup>154</sup> See, for example, 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) (discussing “O’Connor’s slight modification of it [the Endorsement test] in Wallace v. Jaffree. In Jaffree, O’Connor modified the secular purpose portion of her test to emphasize that the message communicated by a particular state action would be assessed by an ‘objective observer,’ rather than by an actual person.”).

<sup>155</sup> 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.”).

In Wallace v. Jaffree,<sup>156</sup> the Court addressed an Alabama statute that authorized a one-minute period of silence in the schools for “meditation or voluntary prayer,”<sup>157</sup> despite the prior existence of a statute requiring public schools to have a one-minute period of silence for “meditation.”<sup>158</sup> The Court struck down the statute at issue because the Court could discern “no secular purpose”<sup>159</sup> for its passage.

In her concurrence in the judgment, Justice O’Connor suggested that the statute at issue violated both the purpose and the effect prongs of the Endorsement test,<sup>160</sup> which “preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”<sup>161</sup> She was not thereby suggesting that the Alabama statute was constitutionally infirm merely because it authorized a moment of silence. After all, a moment of silence need not be used to pray,<sup>162</sup> and for that very reason the state’s mandating that there be a moment of silence need not be endorsing the view that the time be used for prayer rather than reflection.<sup>163</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 pupils to pray during that silent time.<sup>164</sup> Indeed, in many if not most cases, a number of factors would have to be considered before a conclusive judgment could be made about a practice’s constitutionality. Precisely because the ultimate conclusion regarding endorsement is so context- and factor-dependent, the “question cannot be answered in the abstract.”<sup>165</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, the court had to “examine the history,

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<sup>156</sup> 472 U.S. 38 (1985).

<sup>157</sup> Id. at 40.

<sup>158</sup> See id.

<sup>159</sup> Id. at 56.

<sup>160</sup> Id. at 67 (O’Connor, J., concurring in the judgment) (“in light of the findings of the courts below and the history of its [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”).

<sup>161</sup> Id. at 70 (O’Connor, J., concurring in the judgment).

<sup>162</sup> Id. at 72 (O’Connor, J., concurring in the judgment) (“a moment of silence is not inherently religious”).

<sup>163</sup> Id. at 73 (O’Connor, J., concurring in the judgment) (“By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period.”).

<sup>164</sup> Id. (O’Connor, J., concurring in the judgment) (“the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray”).

<sup>165</sup> Id. at 74 (O’Connor, J., concurring in the judgment).

language, and administration of . . . [the] statute to determine whether it operate[d] as an endorsement of religion.”<sup>166</sup>

Yet, telling courts to consider history and context will not suffice—they 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 helpful pointers, at least with respect to a moment-of-silence law. For example, she suggested that the inquiry into the legislative should be “deferential and limited,”<sup>167</sup> and that courts should not attempt to psychoanalyze the members of the legislature.<sup>168</sup> Indeed, she indicated that if a “plausible secular purpose” were 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 courts should accept the stated purpose.<sup>169</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 mean that the Court would have 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--the Court would not need to examine whether the statute was likely to achieve the secular purpose but would merely need to see that some secular purpose had been offered. This latter deferential meaning seemed to capture her view, as was illustrated by a colloquy that she had with then-Justice Rehnquist about the purpose prong.

In his Wallace dissent, Justice Rehnquist commented that if the purpose prong was merely intended to preclude legislatures from stating that they were aiming 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 would seem to do little work if so construed.<sup>171</sup>

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<sup>166</sup> Wallace, 472 U.S. at 74 (O’Connor, J., concurring in the judgment).

<sup>167</sup> Id. (O’Connor, J., concurring in the judgment)

<sup>168</sup> Id. (O’Connor, J., concurring in the judgment) (citing McGowan, 366 U.S. at 466 (opinion of Frankfurter, J.))

<sup>169</sup> Id. at 74-75 (O’Connor, J., concurring in the judgment) (“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.”).

<sup>170</sup> Id. at 108 (Rehnquist, J., dissenting).

Rather than suggest that Justice Rehnquist had misunderstood the weak requirements imposed by the Endorsement test as she understood it, Justice O'Connor responded that requiring the government to articulate a secular purpose and to omit any statements about its 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>

Such a reading of that prong hardly makes it very robust, if only because members of a legislature should have little difficulty in 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 admitted the possibility that legislators would claim to have a secular purpose without in fact having one,<sup>173</sup> although she expressed confidence that courts could spot a sham secular purpose.<sup>174</sup>

Notwithstanding her expression of confidence in the ability of courts to spot false assertions of secular purposes, 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 her invoking an objective observer (rather than reactions by actual people) involved a change of position.<sup>177</sup> Yet, a few points might be made about the test

<sup>171</sup> See Wallace, 472 U.S. at 108 (Rehnquist, J., dissenting). ("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.")

<sup>172</sup> Id. at 75 (O'Connor, J., concurring in the judgment).

<sup>173</sup> Id. (O'Connor, J., concurring in the judgment) ("It is of course possible that a legislature will enunciate a sham secular purpose for a statute.")

<sup>174</sup> Id. (O'Connor, J., concurring in the judgment) ("I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one.")

<sup>175</sup> See id. at 75 (O'Connor, J., concurring in the judgment) ("the secular purpose requirement alone may rarely be determinative in striking down a statute")

<sup>176</sup> See id. at 76 (O'Connor, J., concurring in the judgment) (emphasis added)

<sup>177</sup> See Smith, *supra* note 53, at 272

contrary 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 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.;

described in Wallace. First, Justice O'Connor made clear in her Lynch concurrence that she was not interested in actual public perceptions, describing those 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> Yet, commentators fail to emphasize that Justice O'Connor was not simply saying that as long as the judge is an informed, objective observer, one must let the chips fall where they may and accept the judge's considered judgment about whether a state practice communicated a message of religious endorsement. Justice O'Connor noted that a "moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without

Detroy, supra note 51, at 601-02

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)

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...." Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). 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.

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)

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. Id. 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." Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

<sup>178</sup> Lynch, 465 U.S. at 693 (O'Connor, J., concurring).

<sup>179</sup> 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).

endorsing one alternative over the others, should pass this test.<sup>180</sup> Here, she is not merely telling the informed objective observer to make the best judgment that he can; on the contrary, Justice O'Connor is telling that judge what he 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. Basically, Justice O'Connor believed that even the objective observer standard was too open-ended, and that only certain "objective, knowledgeable" judgments would be allowed to stand.

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 had 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> Yet, a number of points might militate against such a finding by a knowledgeable court. For example, the objective observer would know that the Court had 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, perhaps, it might be thought

<sup>180</sup> See Wallace, 472 U.S. at 76 (O'Connor, J., concurring in the judgment) (emphasis added).

<sup>181</sup> 472 U.S. 703 (1985).

<sup>182</sup> See Thornton, 472 U.S. 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.").

<sup>183</sup> See id. at 710-11.

<sup>184</sup> 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.").

<sup>185</sup> See id. at 711 (O'Connor, J., concurring).

<sup>186</sup> McGowan, 366 U.S. at 431.

<sup>187</sup> Id. at 434.

that an objective observer would not find the Connecticut law an endorsement, given that the Sunday Closing Law was not.

The objective observer would also know that the Court in Braunfeld v. Brown<sup>188</sup> had upheld a statute<sup>189</sup> that prohibited selling certain commodities on Sundays,<sup>190</sup> even for those sellers who in addition could not sell those commodities on another day of the week because of their religious beliefs.<sup>191</sup> Such laws would at least seem to favor those whose Sabbath was Sunday and, 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 create an exception for those who observe Sabbath on a day other than Sunday to be exempted from such a law.<sup>192</sup> While the Connecticut law was not on all fours with the law suggested by Justice Brennan, it might have been thought close enough to escape the charge of religious endorsement.

Further, the objective observer would know that the Court in Sherbert v. Verner<sup>193</sup> had 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 or in fact conveying endorsement of the Sabbath but was merely either trying to protect the public fisc or, perhaps, attempting to

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<sup>188</sup> 366 U.S. 599 (1961).

<sup>189</sup> Id. at 609 (“we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied”).

<sup>190</sup> 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.”).

<sup>191</sup> 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.”).

<sup>192</sup> See id. at 614-15 (Brennan, J., concurring and dissenting). See also the dissent in Gallagher v. Crown Koshers Super Market of Massachusetts, 366 U.S. 617 (1961). Gallagher upheld 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.”)

<sup>193</sup> 374 U.S. 398 (1963).

<sup>194</sup> 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.

afford to individuals who did not celebrate Sabbath on Sunday the same benefits that could be afforded to those who did celebrate Sabbath on Sunday.<sup>195</sup>

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

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>

Bracketing whether an objective observer would view Title VII as endorsing religion, 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 were the objective observer to reject 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 the state's citing fiscal concerns springing from Sherbert<sup>198</sup> would have been enough to establish secular motivation and the

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<sup>195</sup> See Sherbert, 374 U.S. 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 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.

<sup>196</sup> Thornton, 472 U.S. at 712 (O'Connor, J., concurring).

<sup>197</sup> Cf. id. (O'Connor, J., concurring) ("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 Corporation 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. [Wallace, 472 U.S. at 76 (O'Connor, J., concurring)]. 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." Lynch v. Donnelly, 465 U.S. at 693-694 (O'Connor, J., concurring)

<sup>198</sup> 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,

absence of an attempt to convey religious endorsement. 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 prevent an increase in the number of individuals who were unemployed and receiving compensation would seem to implicate secular concerns. Justice O'Connor had suggested in Wallace that in most cases the articulation of a secular purpose would suffice to avoid the charge that the state was trying to endorse religion, and so her Wallace concurrence would suggest that the statute at issue in Thornton might not be constitutionally offensive.

Connecticut might be thought to have been communicating the message that individuals should not be denied employment merely because of their religious practices. Even were that so, however, that would not suffice to establish impermissible purpose or effect. While the state would be acknowledging that it was 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>199</sup> and in her Lynch concurrence that "[f]ocusing on the evil of government endorsement or disapproval of religion makes 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>200</sup> Thus, Justice O'Connor seems to have created enough room for states to consider and acknowledge religion in a variety of ways without violating Endorsement guarantees.

One of the difficulties pointed to here is that one infers from Justice O'Connor's Wallace concurrence that objective observers, even when informed of all relevant information, will find impermissible purpose relatively rarely.<sup>201</sup> But, presumably, the objective observer is relatively unlikely to find an impermissible effect (i.e., a communication of a message of endorsement) in those instances in which there is no finding of an impermissible purpose to endorse,<sup>202</sup> e.g., because the awareness of history

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221 (2007) (noting that Sherbert might have implications for Caldor which did not seem to have been taken into account).

<sup>199</sup> Wallace, 472 U.S. 70 (O'Connor, J., concurring)

<sup>200</sup> Lynch, 465 U.S. at 691-92 (O'Connor, J., concurring)

<sup>201</sup> See Wallace, 472 U.S. 75 (O'Connor, J., concurring)

<sup>202</sup> 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 this [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.").

and legislative purpose militating against a finding of impermissible purpose would also seem to militate against a finding of the conveyance of an impermissible message. But if this is so, one would have expected Justice O'Connor to say 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. But the explanations of it offered by Justice O'Connor seem to contradict either its express language<sup>203</sup> or the gloss on it that she herself had previously offered.<sup>204</sup> One would have expected the result to be the opposite of what Justice O'Connor said in both Lynch and Thornton, which suggests that the Endorsement test may not be doing any independent work but instead is being invoked to rationalize a results that has been reached some other way.

### III. The Court Adopts the Endorsement Test

Lynch and its progeny suggest that the Endorsement test as stated does not reflect how it was being applied. What would have seemed to violate the express language was interpreted to be permissible, while what might have been thought in light of context, history, etcetera, not to have been an endorsement was nonetheless described as impermissible. Confusing history notwithstanding, the Court adopted the Endorsement test as a constitutional standard to determine whether the Establishment Clause had been violated.

#### A. The Endorsement Test as a Constitutional Standard to Determine whether the Establishment Clause Has Been Violated

In County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,<sup>205</sup> 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 the Endorsement test might be used in ways that would ignore or disparage sincerely held religious beliefs.

<sup>203</sup> See notes 61-83 and accompanying text supra (discussing why Justice O'Connor was offering an untenable position when suggesting that the Lynch district court opinion was clearly erroneous).

<sup>204</sup> See notes 184-202 and accompanying text supra (discussing how the objective observer might well not have found in Thornton that the state was either attempting to convey or actually conveying an endorsement of religion).

<sup>205</sup> 492 U.S. 573 (1989).

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>206</sup> Before the Court could determine whether either display violated Establishment Clause guarantees, the Court had to reach some 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>207</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>208</sup> Justice O’Connor’s Lynch concurrence was singled out for special praise, because it provided a “sound analytical framework for evaluating governmental use of religious symbols.”<sup>209</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>210</sup> Here, the Court was contrasting Justice O’Connor’s view with the Lynch majority view of comparative endorsement that distinguished between “permissible and impermissible endorsements.”<sup>211</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>212</sup> namely, examining the message conveyed by the government practice,<sup>213</sup> which of course is heavily depended upon the context in which the practice occurs.<sup>214</sup> Yet, context might include a variety of factors including, for example, the legal background in light of which the statute was written. Depending upon how context is spelled out, the difference emphasized by the Allegheny Court<sup>215</sup> between the Lynch majority (comparative endorsement) and the Lynch concurrence (endorsement simpliciter)<sup>216</sup> may hardly be worth mentioning.

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<sup>206</sup> Allegheny, 492 U.S. at 578.

<sup>207</sup> See id. at 593 (“Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same.”)

<sup>208</sup> Id. at 592

<sup>209</sup> Id. at 595.

<sup>210</sup> Id.

<sup>211</sup> Id. at 594.

<sup>212</sup> Id. at 595.

<sup>213</sup> See id.

<sup>214</sup> See id.

<sup>215</sup> See notes 210-11 and accompanying text supra.

<sup>216</sup> See text preceding note 153 supra (distinguishing between these two different ways of viewing endorsement).

The Lynch majority suggested that a practice would violate the effect prong of the Establishment Clause only if it involved more of an endorsement of religion than had previous practices whose constitutionality against an Establishment Clause Challenge had already been upheld.<sup>217</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 the one hand and neutrality on the other. After all, in each of the opinions cited by the Lynch majority, the Court had claimed to be upholding neutrality or, perhaps, an attempt to avoid hostility to religion.<sup>218</sup>

But, it might be argued, the Lynch Court had explicitly discussed how much state endorsement of religion had occurred rather than whether there had been state endorsement of religion.<sup>219</sup> Yet, even that point is not dispositive. The Lynch majority might have been differentiating between (1) whether those aware of the state practice had inferred a message of endorsement and (2) whether as a legal matter there had been endorsement. Unless there had been legal endorsement, i.e., unless the Court had struck down the practice as a violation of the Establishment Clause, the inferred message of endorsement might be called permissible endorsement or, perhaps, endorsement as a matter of historical fact.<sup>220</sup> On this understanding of the Lynch majority opinion, the difference between that opinion and Justice O'Connor's Lynch concurrence looks more like a difference in terminology than a difference in 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>221</sup>

Perhaps the Lynch majority and concurrence would reach different results in different cases. However, that difference in result need not be because of the tests themselves but, rather, the differing intuitions regarding which kinds of endorsements should be found to violate 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 in time and as a religious endorsement at a different point in time, it is rather

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<sup>217</sup> See Lynch, 465 U.S. at 481.

<sup>218</sup> See notes 112-52 and accompanying text supra.

<sup>219</sup> See Lynch, 465 U.S. at 481.

<sup>220</sup> See notes 93-98 and accompanying text supra (discussing Justice O'Connor's dismissal of the actual inferences of state religious endorsement as simple historical fact).

<sup>221</sup> See notes 94-95 and accompanying text supra.

surprising that the Allegheny Court was convinced that the Lynch concurring opinion provided a “sound analytical framework”<sup>222</sup> for determining whether the Establishment Clause had been violated.

### B. Application of the Test

Nonetheless, 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>223</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>224</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>225</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>226</sup> She explained that because of the great diversity of religious traditions flourishing in the United States,<sup>227</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>228</sup> She thus seemed to be employing 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 then 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 was 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>229</sup> However, her examples of practices that do not convey endorsement seemed to conflate the question of whether particular religious beliefs were endorsed with whether religious rather than secular beliefs were endorsed. She wrote:

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<sup>222</sup> Allegheny, 492 U.S. at 595.

<sup>223</sup> See id. at 597.

<sup>224</sup> See id. at 602.

<sup>225</sup> See id. at 620.

<sup>226</sup> Id. at 627 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>227</sup> See id. (O’Connor, J., concurring in part and concurring in the judgment).

<sup>228</sup> Id. (O’Connor, J., concurring in part and concurring in the judgment).

<sup>229</sup> Id. at 630 (O’Connor, J., concurring in part and concurring in the judgment).

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>230</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>231</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>232</sup>

Yet, it is rather difficult to accept Justice O’Connor’s suggestion that:

- (1) Thanksgiving,
- (2) the opening of Court sessions with “God save the United States and this honorable Court,” and
- (3) beginning legislative sessions with a prayer,

are analogous. Justice O’Connor is likely correct that some view Thanksgiving as secular rather than religious, although a separate issue is whether a reasonable person might think it either.<sup>233</sup>

While some might think the opening of Court sessions as merely solemnizing,<sup>234</sup> it would be unsurprising were a committed atheist to feel excluded if witnessing this practice.<sup>235</sup> So, too, an

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<sup>230</sup> Allegheny, 492 U.S. at 630-31 (O’Connor, J., concurring in part and concurring in the judgment) (emphasis added).

<sup>231</sup> Id. at 631 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>232</sup> Id. (O’Connor, J., concurring in part and concurring in the judgment)

<sup>233</sup> 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).

<sup>234</sup> See notes 295-99 and accompanying text infra (discussing practices that are both solemnizing and religious).

<sup>235</sup> 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”).

individual witnessing the opening of legislative sessions with prayer might well feel excluded if the prayers involved an understanding of God that she did not share.<sup>236</sup>

While the language involved in the opening of the 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. The same might be said of legislative prayers. If, indeed, the Establishment Clause requires not only neutrality among religions but also neutrality between religion and nonreligion,<sup>237</sup> it is difficult to see how Justice O'Connor's observer could be thought both objective and informed when concluding that none of these practices privileged some religions over others.

Justice O'Connor suggested that the menorah, Christmas tree, and sign passed muster. First, she noted that the Christmas tree was not viewed as a religious symbol.<sup>238</sup> Yet, the natural question following such an assertion might be, "By whom?" It would be unsurprising if devout members of other faiths disagreed with her assessment.<sup>239</sup>

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<sup>236</sup> See *Allegheny*, 492 U.S. at 673-74 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("it 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").

<sup>237</sup> See *id.* at 644 (Brennan, J., concurring in part and dissenting in part).

<sup>238</sup> See *id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>239</sup> 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.

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 'laïcité'*, *International Herald Trib.* 3, 12/20/05, 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."

Noting that the Christmas tree was “widely viewed as a secular symbol of the holiday,”<sup>240</sup> Justice O’Connor rejected that the placement of such a tree in front of City Hall could fairly be understood as state endorsement of Christianity.<sup>241</sup> Yet, one is forced to wonder what would be said were something analogous to what had occurred in Lynch to have occurred in the context of a Christmas tree display in front of City Hall.<sup>242</sup> Suppose that 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 secular, notwithstanding the annual debate in newspaper Letter to the Editor pages about precisely this question.<sup>243</sup> The next question might involve how the 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>244</sup> Justice O’Connor disagreed, announcing that the menorah was “the religious symbol of a religious holiday.”<sup>245</sup>

Such an announcement suggests two distinct problems. First, it undercut the tenor of the analysis of the Christmas tree. Justice O’Connor had suggested that “the Christmas tree, whatever its origins, is not regarded today as a religious symbol,”<sup>246</sup> implying that the Christmas tree had once been religious, was probably both religious and secular for some period, and then had become predominantly secular in

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<sup>240</sup> See Allegheny, 492 U.S. at 633 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>241</sup> See Allegheny, 492 U.S. at 633 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>242</sup> See notes 63-66 and accompanying text supra (describing circumstances in Lynch when the ACLU challenged the inclusion of the crèche in the display).

<sup>243</sup> Compare, for example, Letters, **Phila. Inq.** 1/1/08, at B02, 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** 12/26/07, at A20, 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.”)

<sup>244</sup> 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.”).

<sup>245</sup> See id. at 634 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>246</sup> See id. at 633 (O’Connor, J., concurring in part and concurring in the judgment).

nature.<sup>247</sup> But 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 religious to partly religious and partly secular. Rather than point to reasons to think that the Christmas tree was secular and the menorah religious, she simply announced what the objective observer would think. Yet, presumably, what the objective observer would think might depend, for example, on whether many communities paired a Christmas tree with a menorah and, perhaps, 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>248</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, it 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, notwithstanding the hypothesized change in public perception.

By the same token, courts may cite Allegheny for the proposition that the menorah is religious,<sup>249</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

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<sup>247</sup> See id. (O'Connor, J., concurring in part and concurring in the judgment) ("the Christmas tree is a predominantly secular symbol").

<sup>248</sup> See, for example, Adland v. Russ, 307 F.3d 471, 488 (6<sup>th</sup> 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. See 492 U.S. at 616, (Blackmun, J.); id. at 633 (O'Connor, J., concurring)."); Lubavitch Chabad House, Inc. v. City of Chicago 917 F.2d 341, 343 (7<sup>th</sup> 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." Allegheny, 109 S.Ct. at 3113. Justice O'Connor agreed "that the Christmas tree, whatever its origins, is not regarded today as a religious symbol." Id. at 3122.

<sup>249</sup> See American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 481 (6<sup>th</sup> 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 Independent School Dist., 240 F.3d 462, 486 (5<sup>th</sup> 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.").

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>250</sup> One issue is whether the tree secularizes the menorah or whether, instead, the menorah makes the tree religious.<sup>251</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 representing Christianity in some way or other,<sup>252</sup> the menorah as representing Judaism in some way or other, and the sign as suggesting that the liberty to choose between those religions was protected.<sup>253</sup> Or, perhaps, the display would be viewed as connecting religious liberty with the Judeo-Christian heritage, which some but not others might view as privileging some religions over others.<sup>254</sup>

When one considers the discussions of the Endorsement test in Allegheny, it is simply unclear whether there has been yet another modification to the Endorsement test and, if so, what that modification is.<sup>255</sup> For example, it is unclear whether the test has reverted to how some read Lynch—something that is

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<sup>250</sup> See Allegheny, 492 U.S. at 634 (O’Connor, J., concurring in part and concurring in the judgment) the 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.

<sup>251</sup> Cf. id. at 642-43 (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.”).

<sup>252</sup> See Jacobs, supra note 239, 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.”).

<sup>253</sup> 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

the 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.

<sup>254</sup> 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”).

<sup>255</sup> 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 notes 61-99 and accompanying text supra, which

widely perceived as secular is secular for endorsement purposes.<sup>256</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. Yet, announcing that it is widely perceived in a particular way without offering any supporting evidence for that proposition 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 those 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 of the holiday,<sup>257</sup> she may have been offering a distinction that some individuals of non-Christian faiths might fail to make—at least some individuals of other faiths might view both as representing a religious holiday.<sup>258</sup> While she might (and did) assert that such a view is incorrect, there seems to be 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>259</sup>

Perhaps Allegheny is suggesting that the reasonable observer should consider widely held perceptions as evidence of whether a practice constitutes an endorsement<sup>260</sup> rather than simply dismiss such perceptions as mere historical facts. Yet, protestations by the Allegheny Court to the contrary

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may well mean that the majority and concurrence understood that very test somewhat differently. See note 155 supra (suggesting that members of the Court have very different understandings of Justice O'Connor's Endorsement test).

<sup>256</sup> Cf. Matthew J. Astle, An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure, 38 Fam. L.Q. 733, 747 (2004) (“endorsement test considers the government's intent as well as the law's actual effect on the perceptions of the public”).

<sup>257</sup> Allegheny, 492 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment) (“the Christmas tree is widely viewed as a secular symbol of the holiday, in contrast to the crèche which depicts the holiday's religious dimensions.”)

<sup>258</sup> See Lubavitch Chabad House, 917 F.2d at 343 (“Lubavitch in asserting that a Christmas tree standing alone represents Christianity or the religious aspect of Christmas.”)

<sup>259</sup> See id. (“Lubavitch's argument borders on the frivolous in view of current case law.”)

<sup>260</sup> For the suggestion that the Endorsement test should make use of such perceptions, see Diamond & Koppelman, supra note 56, 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.”).

notwithstanding,<sup>261</sup> this is not the view that Justice O'Connor suggested in her Lynch concurrence, where she was relatively uninterested in actual perceptions.<sup>262</sup> Indeed, the more that the Endorsement test relies on the judgment of the informed, reasonable or objective observer, the less helpful will appeals to widely held perceptions be, unless there is some way to assure that the people with those perceptions were not mis- or under-informed. Without such assurances, the widely held perceptions might simply mislead rather than illuminate.<sup>263</sup>

Some of the difficulties in using the Endorsement test were illustrated in the very opinion in which that test was adopted as a constitutional standard. The members of the Court could not agree about which symbols were religious and which secular. Nor could they agree about how to determine whether a religious message was secularized by a secular message. One of the telling aspects of the opinion was that different Justices offered differing accounts of what the reasonable observer would say, implying that the reasonable observer could have only one reaction to the symbols at issue,<sup>264</sup> even though the Justices themselves illustrated that different (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.

#### IV. 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 used. For example, use of an objective observer standard leaves open the

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<sup>261</sup> See notes 209-14 and accompanying text supra (discussing the Allegheny Court's lauding of Justice O'Connor's Lynch concurrence).

<sup>262</sup> See notes 94-98 and accompanying text supra (discussing Justice's O'Connor's dismissal of actual perceptions as mere historical fact).

<sup>263</sup> Cf. Raskin, supra note 43, 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.

<sup>264</sup> But see Allegheny, 492 U.S. at 642 (Brennan, J., dissenting) (suggesting that reasonable observers might have very different reactions to the displays at issue).

role that actual perceptions should play when analyzing whether a message of endorsement had been conveyed. Subsequent opinions attempted to clarify or, perhaps, modify the Endorsement test.

#### A. The Pinette Spins on Endorsement

Members of the Court offered additional ways to understand the Endorsement test in Capitol Square Review and Advisory Bd. v. Pinette.<sup>265</sup> At issue was whether the Ohio Ku Klux Klan could place a cross on Capital Square, a plaza surrounding the statehouse in Columbus, Ohio.<sup>266</sup> In holding that the state could not assert Establishment Clause grounds to justify its denying the Klan the right to erect the cross, the plurality held: “Religious 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>267</sup> Basically, the plurality dismissed the worry that individuals might wrongly infer state endorsement, suggesting that “given an open forum and private sponsorship, erroneous conclusions do not count.”<sup>268</sup>

In her concurrence, Justice O’Connor rejected the plurality’s limitations on 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>269</sup> For example, she suggested that endorsement might be inferred in a case involving private religious speech in a public forum unless, for example, there were a “sign disclaiming government sponsorship or endorsement.”<sup>270</sup>

Yet, her 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>271</sup> Suppose, for example, that the entire grounds had been 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 had 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 had been candidates for exhibition?

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<sup>265</sup> 515 U.S. 753 (1995).

<sup>266</sup> See *id.* at 757-58.

<sup>267</sup> *Id.* at 770.

<sup>268</sup> *Id.* at 765.

<sup>269</sup> *Id.* at 774 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>270</sup> *Id.* at 776 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>271</sup> *Id.* at 777 (O’Connor, J., concurring in part and concurring in the judgment).

One of the difficulties in Endorsement analysis is that members of the Court disagree about how much knowledge the reasonable observer can or must have.<sup>272</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>273</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>274</sup> Yet, the Establishment Clause does not require that a display be removed merely because one individual might feel uncomfortable were she to see the display.<sup>275</sup>

While it seems fair to suggest that the feelings of discomfort of one misinformed individual should not suffice to invalidate a display,<sup>276</sup> such a point hardly establishes that actual perceptions should not be 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>277</sup>

It may well be, for example, that virtually any display might be offensive to some individual.<sup>278</sup> Yet, Justice O'Connor's point about the individual with a particular quantum of knowledge does must less

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<sup>272</sup> Capitol Square, 515 U.S. at 778-79 (O'Connor, J., concurring in part and concurring in the 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." [Allegheny, 492 U.S. ] at 630 (O'Connor, J., concurring in part and concurring in judgment). 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.

<sup>273</sup> Capitol Square, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>274</sup> Id. (O'Connor, J., concurring in part and concurring in the judgment).

<sup>275</sup> Id. (O'Connor, J., concurring in part and concurring in the judgment) ("A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.").

<sup>276</sup> Diamond & Koppelman, supra note 56, 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 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.'").

<sup>277</sup> Cf. Diamond & Koppelman, supra note 56, 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 text following note 279 infra (suggesting that there may be relatively few displays that only offend one person's religious sensibilities).

<sup>278</sup> See note 274 and accompanying text supra.

work than might initially be supposed. Given the great diversity of religious belief in this country,<sup>279</sup> it would be unsurprising were almost any display involving religious matters to offend several groups of citizens. It may well be that in almost all, if not all, of the cases in which Justice O'Connor's hypothetical individual would object, there would be at least a few groups of individual objecting. While her point that one individual should not be able to cause the invalidation of a display is well-taken, it may well turn out that it would be a very rare case indeed in which only one person would find that a particular display conveyed a message of religious endorsement or disapproval.

The appeal of the suggestion that one mis-or under-informed individual's reactions should not be enough to invalidate a display is in part based on the appealing intuition that if only one person is offended the reaction may be so idiosyncratic that it should not be given weight, especially when, for example, 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 someone 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's 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 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. See post, at 2461-2462 (Souter, J., concurring in part and concurring in judgment); post, at 2469 (Stevens, J., dissenting). 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>280</sup>

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<sup>279</sup> See Newdow, 542 U.S. at 34-35 (O'Connor, J., concurring in the judgment) (discussing the "dizzying religious heterogeneity of our Nation").

<sup>280</sup> Capitol Square, 515 U.S. at 780-81 (O'Connor, J., concurring in part and concurring in the judgment).

But once Justice O'Connor ups the ante with respect to how knowledgeable the reasonable observer must be, her disagreement with the Pinette plurality becomes more complicated. Basically, the question might be whether an individual who understood that particular speech was private and was in a public forum open to all on equal terms would ever nonetheless impute a message of endorsement to the state. The rule offered by Justice Scalia in the plurality, namely, that private religious expression in a public forum could not be viewed as state endorsement, could be cashed out in terms of Justice O'Connor's hypothetical, reasonable, informed observer by saying that such an observer would not view private expression in a public forum open equally to all as an endorsement by the state.

Justice Souter wrote a concurrence in Capitol Square, joined by Justice O'Connor,<sup>281</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>282</sup> Certainly, the point that such misunderstandings might occur is accurate.<sup>283</sup> The important question, though, is whether that misunderstanding should be taken into account when examining the constitutionality of a display for Establishment Clause purposes.<sup>284</sup> For example, the absence of a (sufficiently large) disclaimer might as a practical matter induce someone to wrongly infer government endorsement.<sup>285</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 grounds was not supported by the state might nonetheless wrongly infer state endorsement.

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<sup>281</sup> See Capitol Square, 515 U.S. at 783 (Justice Souter, with whom Justice O'Connor and Justice Breyer join, concurring in part and concurring in the judgment).

<sup>282</sup> Id. (Souter, J., concurring in part and concurring in the judgment) (emphasis added).

<sup>283</sup> See id. at 786 (Souter, J., concurring in part and concurring in the judgment) ("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.")

<sup>284</sup> See id. (Souter, J., concurring in part and concurring in the judgment) ("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 53, 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.")

<sup>285</sup> 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").

Justice Stevens suggested in his dissent that the views of the reasonable nonadherent should determine whether a particular display violates the Endorsement test.<sup>286</sup> However, he realized that even such a standard would be indeterminate, because reasonable nonadherents might disagree about whether a particular display constituted religious endorsement—one reasonable nonadherent might believe a display to be an endorsement while another might not. Justice Stevens argued that in such a case one would have to find that the display constituted an endorsement.<sup>287</sup>

Justice Stevens's point that two equally informed individuals of differing faiths might well react differently to the same display is well-taken, although it is less dispositive than might originally be thought. Consider, for example, how two individuals might view a Christmas tree outside of City Hall, one a Reform and the other an Orthodox Jew.<sup>288</sup> They might react very differently to whether this is state endorsement, especially, for example, if the Reform Jew gets a Christmas tree in his home every December. Thus, even individuals not of the faith connected to a display might disagree about whether a

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<sup>286</sup> See Capitol Square, 515 U.S. 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 39, 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. & Relig.** 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.’”) 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)

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.

<sup>287</sup> See Capitol Square, 515 U.S. at 799 (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.”)

<sup>288</sup> See 220 N.Y. Jewish Wk.; Manhattan ed. 26, 12/21/07, 2007 WLNR 25835657

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."

religious message is being communicated, and so of course might disagree about whether a particular display constitutes state endorsement of religion.<sup>289</sup>

Justice Stevens suggests that for a “religious display to violate the Establishment Clause, I think it is enough that some reasonable observers would attribute a religious message to the State.”<sup>290</sup> Thus, for example, Justice Stevens would suggest 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 were his suggestion adopted, there would still be difficulties in applying the test, precisely because the Endorsement test is not grounded in the actual reactions of reasonable observers. Would some reasonable, nonadherent 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?

Assume for purposes here that no reasonable nonadherent 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 would know that the state was not endorsing a private message appearing in

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<sup>289</sup> Cf. Jacobs, supra note 239, 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.’”).

<sup>290</sup> See Capitol Square, 515 U.S. at 807 (Stevens, J., dissenting) See also Lewis & Vid, supra note 56, 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.

a public forum,<sup>291</sup> then it should not matter that the state had failed to 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. Presumably, 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 as either under- or mis-informed. Regrettably, the slipperiness and variability of the Endorsement test's knowledge requirement was again illustrated in subsequent opinions.

#### B. What Kind of Knowledge Can be Imputed to an Observer?

Implicit in Santa Fe Independent School Dist. v. Doe<sup>292</sup> was the issue of what kind of knowledge should be imputed to the objective observer, although no Justice directly addressed the question. At issue in Doe was a school policy permitting students to participate in two elections: The first election would determine whether there would be an invocation at football games<sup>293</sup> and, if so, the second would determine who would deliver the invocation.<sup>294</sup>

The school did not say that the speaker could introduce the game in any way that 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 are ‘to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.’”<sup>295</sup>

The Doe Court noted that a “religious message is the most obvious method of solemnizing an event.”<sup>296</sup> Further, this religious message would be delivered over the school’s public address system<sup>297</sup>

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<sup>291</sup> But see Budd, supra note 26, at 220-21 (“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”).

<sup>292</sup> 530 U.S. 290 (2000).

<sup>293</sup> Id. at 297.

<sup>294</sup> Id.

<sup>295</sup> Id. at 306.

<sup>296</sup> Id.

<sup>297</sup> Id. at 307.

prior to the game, where the school's name would be written on banners and flags and where people attending would wear clothing bearing the school's name.<sup>298</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>299</sup> The opinion was joined in full by Justice O'Connor.<sup>300</sup>

The opinion is somewhat surprising in light of the past endorsement jurisprudence. For example, while individuals attending a football game might infer school endorsement if they did not know that the orator was selected by the student body rather than the school, they might be less confident 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>301</sup>

The Court's implicit claim that a solemnizing religious message would violate both the purpose and effect prong is somewhat surprising, given that solemnification of an occasion is viewed as a secular goal.<sup>302</sup> Indeed, given the deference that the objective observer is supposed to give to state assertions of secular purpose, 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. In any event, one would not have expected Justice O'Connor to have signed onto an opinion that seemed so contrary to her understanding of the Endorsement test<sup>303</sup> and to what must be shown in order for the state to be found to have intended to convey or to have actually conveyed a message of endorsement of religion.

Basically, the message of Doe seems to be that an objective observer will infer endorsement of religion if she knows that a government program will foreseeably and actually promote religion. But if that is so, 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 but for the program. Yet, in Zelman v. Simmons-Harris,<sup>304</sup> the Court reached the

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<sup>298</sup> Doe, 530 U.S. at 308.

<sup>299</sup> Id.

<sup>300</sup> See id. at 292.

<sup>301</sup> See id. at 324 (Rehnquist, C. J., dissenting) ("if there were speech at issue here, it would be private speech").

<sup>302</sup> See id. at 322 (Rehnquist, C. J., dissenting) (discussing the "the secular purpose of solemnization").

<sup>303</sup> See note 314 and accompanying text infra (discussing Justice O'Connor's contrasting solemnification with the conveyance of a religious message).

<sup>304</sup> 536 U.S. 639 (2002).

opposite conclusion, i.e., the Court held that a reasonable observer would not infer religious endorsement merely because a school voucher program would result in many students receiving a religious education who otherwise would not have received such an 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>305</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 endorsement in another and, even more surprising, the Court consistently suggests that no reasonable observer could disagree with the Court’s ultimate conclusion. The Endorsement test has become a vehicle by which to call those who disagree “unreasonable” or, perhaps, “uninformed,” rather than a useful tool for determining violations of the Establishment Clause.

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

In her concurrence in the judgment in Elk Grove Unified School Dist. v. Newdow,<sup>306</sup> Justice O’Connor sought to clarify the Endorsement test. She reaffirmed that it assumes the “viewpoint of a reasonable observer,”<sup>307</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>308</sup> After all, she noted, “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.”<sup>309</sup>

<sup>305</sup> Zelman, 536 U.S. at 655 (emphasis on “no” added).

<sup>306</sup> 542 U.S. 1 (2004).

<sup>307</sup> Id. at 34 (O’Connor, J., concurring in the judgment).

<sup>308</sup> Id. at 34-35 (O’Connor, J., concurring in the judgment).

<sup>309</sup> Id. at 35 (2004) (O’Connor, J., concurring in the judgment) (citing Pinette, 515 U.S., at 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.

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>310</sup> Here, instead, an individual is reporting 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 nonadherents might feel offense at a variety of displays.<sup>311</sup> If such a test is too robust because it excludes too much, then the test itself should not be used.<sup>312</sup> But (1) there is no warrant for disparaging the individual who with relevant knowledge nonetheless discerns government endorsement of religion, and (2) a view that a test is too robust suggests that one has a theory of how much should be excludable in light of history, current demographics, etcetera. Regrettably, neither commentators nor members of the Court have offered a plausible and noncontroversial way to know when too much is being excluded.

Justice O'Connor explains that because the reasonable observer employs "a community ideal of social judgment, as well as rational judgment,"<sup>313</sup> such an observer would never consider a practice in isolation but would also consider the origins and context of the practice, including a consideration of its place in "our Nation's cultural landscape."<sup>314</sup> Yet, 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

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<sup>310</sup> See, for example, Owen M. Fiss, What Is the Federalist Society? 15 **Harv. J.L. & Pub. Pol'y** 5, 5 (1992) (discussing "the hecklers who denied him [William Shockley] the right to speak"); David P. Currie, The Constitution in the Supreme Court: 1946-1953, 37 **Emory L.J.** 249, 265 (.1988) ("the 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]").

<sup>311</sup> Cf. Brady, supra note 155, at 1149 ("in the hands of separationists and others who interpret the test strictly, the endorsement approach has moved very close to separationism").

<sup>312</sup> 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 53, at 313 ("Ultimately, a degree of alienation must be acknowledged as an inevitable cost of maintaining government in a pluralistic culture.").

<sup>313</sup> Newdow, 542 U.S. at 35 (O'Connor, J., concurring in the judgment).

<sup>314</sup> Id. (O'Connor, J., concurring in the judgment) (citing Pinette, 515 U.S., at 781 (O'Connor, J., concurring in part and concurring in the judgment)).

solemnize an occasion instead of to invoke divine provenance.”<sup>315</sup> Yet, even if such pronouncements can solemnize an occasion, that hardly means that in an individual instance they do solemnize. Further, even if they are solemnizing, that does not mean that they are not in addition invoking Divine Provenance or, in any event, endorsing religion. Doe was predicated on the notion that a statement meant to solemnize might also be religious,<sup>316</sup> so it should hardly be thought that the announced purpose of solemnizing would somehow immunize a practice from Establishment Clause review.

Justice O’Connor suggests that the state can refer to and acknowledge God without offending constitutional guarantees,<sup>317</sup> notwithstanding that those who do not believe that God exists or who believe that many gods exist would reasonably feel excluded if their fundamental perceptions about the world were frequently contradicted by the State. Basically, Justice O’Connor asserts that a particular category of statements—those involving “ceremonial deism,”<sup>318</sup> are immunized from review, but nowhere explains why those aware of the religious heritage of this country would be wrong to feel excluded when statements falling into this category are made. Further, she does not explain why individuals would be wrong to infer that statements falling into this category at the very least endorse religion over nonreligion.<sup>319</sup>

Justice O’Connor’s Newdow concurrence reiterates some of the positions she has taken in the past regarding endorsement, but also repudiates the position articulated in Doe, her having stated no reservations in Doe notwithstanding. Rather than clarify the test, her Newdow concurrence reinforces the view that although different Justices refer to the Endorsement test, there is no single Endorsement test. Rather, different Justices have varying ideas about what the test is, what kind of actual or imagined observer should apply that test and, ultimately, what results such a test will yield.

## V. Conclusion

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<sup>315</sup> Newdow, 542 U.S. at 36 (O’Connor, J., concurring in the judgment).

<sup>316</sup> See notes 296-99 and accompanying text supra.

<sup>317</sup> Newdow, 542 U.S. at 37 (O’Connor, J., concurring in the judgment) (“government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution”).

<sup>318</sup> Id. (O’Connor, J., concurring in the judgment).

<sup>319</sup> See id. at 36 (O’Connor, J., concurring in the judgment) (“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.”).

Some commentators criticize the Endorsement test for failing to make clear whether the reasonable observer is of a majority or minority religion,<sup>320</sup> noting that those of a majority religion might not feel offended by a religious display celebrating their religion.<sup>321</sup> Yet, at least as initially proposed, the issue was not merely whether individuals were offended by a state practice--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 well be that in a variety of cases both majority and nonmajority adherents would agree that a message of religious endorsement was being 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>322</sup>

Under some circumstances, the reasonable nonadherent would infer a religious message whereas the reasonable adherent would not.<sup>323</sup> Further, on some occasions, reasonable nonadherents would disagree about whether a religious message was being communicated.<sup>324</sup> Justice Stevens would suggest that under all of these circumstances, the state practice would violate the Establishment Clause, because some reasonable nonadherents would find the display offensive.<sup>325</sup>

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<sup>320</sup> Benjamin I. Sachs, Whose Reasonableness Counts? *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), 107 *Yale L.J.* 1523, 1525 -1526 (1998)

the 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.'

<sup>321</sup> See Sakaria, supra note 285, 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 reasonable 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) ("the majority bias critique is the most persuasive criticism of the endorsement test"); Hill, supra note 8, at 522 ("the 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.").

<sup>322</sup> See notes 63-65 and accompanying text supra.

<sup>323</sup> 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.").

<sup>324</sup> See notes 286-89 and accompanying text supra.

<sup>325</sup> See note 290 and accompanying text supra.

Justice Stevens’s approach might seem best for Establishment purposes,<sup>326</sup> because the removal of a religiously offensive message would presumably be welcomed by the offended, and the removal of a secular message should not be religiously offensive to those who happened to approve of the message. Yet, it may well not be that simple, since the removal itself might be viewed a hostile to religion, even if the initial message was not viewed as religious. Thus, Justice Thomas discusses “the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith.”<sup>327</sup>

Regrettably, Justice Thomas does not explore what the “reasonable observer” would infer were a display removed. Would such an observer view the desire not to offend as itself 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 Allegheny concurring and dissenting opinion.<sup>328</sup>

Suppose that out of deference to the sensibilities of nonadherents, Allegheny County had never put up any winter display having religious overtones. That would not violate any guarantees.<sup>329</sup> Thus, the County could create a display containing a snowman, ice skaters, and hot chocolate. Suppose, however, that after having been assured that the Christmas tree was secular, the County decided to include such a tree in the display without in addition including a crèche, menorah, or other religious object. Surely, it might be thought, the reasonable observer would not find such a practice to be constitutionally objectionable. Yet, Justice Kennedy even cast doubt on that proposition in his concurring and dissenting Allegheny opinion, writing:

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<sup>326</sup> See Sakaria, *supra* note 285, at 502 (“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 27, 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.”).

<sup>327</sup> Van Orden, 545 U.S. at 697 (Thomas, J., concurring). But cf. *Lee v. Weisman*, 505 U.S. 577, 629 (1992) (Souter, J., concurring) (“Religious students cannot complain 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.”)

<sup>328</sup> Allegheny, 492 U.S. at 655 (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*, 403 U.S. 602, 612-613 (1971). This view of the Establishment Clause reflects an unjustified hostility toward religion.

<sup>329</sup> See *id.* at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part) (“The Religion Clauses do not require government to acknowledge these holidays.”).

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>330</sup>

If the failure to erect a crèche in a winter display containing a Christmas tree out of a desire not to make non-Christians feel like second-class citizens can be characterized as a violation of the Endorsement test, then it seems clear that the Endorsement test is not likely 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>331</sup> Indeed, some on 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>332</sup> But at issue here is not, for example, whether individuals will be permitted to engage in their own religious practices, but whether the government should itself be permitted to speak in ways which support those beliefs and practices.

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<sup>330</sup> See Allegheny, 492 U.S. at 663-64 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>331</sup> 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.”).

<sup>332</sup> 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.

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>333</sup> is clear: “This State endorses the divine code of the ‘Judeo-Christian’ God.”<sup>334</sup> One of the questions at hand is whether that should be enough to establish under the Endorsement test that the display is impermissible, given that many in this country do not accept the Judeo-Christian tradition.

Cases involving the Endorsement test have yielded a set of rulings that is internally inconsistent<sup>335</sup> and impossible to apply.<sup>336</sup> This lack of consistency is unsurprising, given that there may be no one Endorsement test and that the Justices have been unwilling to apply the very standards that they claimed to be applying.

Some commentators have suggested that the Endorsement test really should be understood as reducible to the question whether a majority of the Court believes that a particular statement or display violates Establishment Clause guarantees.<sup>337</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 the basis used by another, and it is not even clear that individual Justices are using the same test over time.

The Endorsement test is itself too easily used in a way that will result in religious offense. Justice O’Connor’s analogizing the religiously offended to hecklers hardly seems respectful. By the same token Justice Thomas’s suggestion that the offended may be too sensitive does not seem respectful,<sup>338</sup> especially

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<sup>333</sup> 545 U.S. 677 (2005).

<sup>334</sup> Id. at 707 (Stevens, J., dissenting).

<sup>335</sup> 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.”).

<sup>336</sup> See Van Orden, 545 U.S. at 697 (Thomas, J., concurring) (“the 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 53, at 301 (“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.”).

<sup>337</sup> Choper, supra note 10, at 519 (suggesting that the current Endorsement test “effectively converts the reasonable observer into a majority of the Supreme Court”).

<sup>338</sup> 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”).

given his suggestion that the displeasure caused by taking down religious displays is constitutionally cognizable.<sup>339</sup> By suggesting that majority nonadherents are being too sensitive when feeling offense at state-sponsored religious displays but that majority adherents reasonably feel offense when such displays are taken down, Justice Thomas does not seem to be manifesting the neutrality towards differing religious views allegedly embodied in the Establishment Clause. In any event, in too many of the cases, the nonadherent who is sincerely offended is implicitly or explicitly being told either she would not be offended were she better informed or, perhaps, more reasonable.<sup>340</sup> Yet, surely, the test used to determine whether the Establishment Clause has been violated should not itself be conveying disparaging messages to and about those sincerely offended.

Some criticisms of the Endorsement test do not seem well-founded, e.g., that permitting judges to make decisions about offensiveness will simply reinforce majority views because most judges belong to majority religions.<sup>341</sup> While there is some evidence that majority and minority religious judges will reach different conclusions about endorsement,<sup>342</sup> one nonetheless might expect that in many cases such judges would be able to discern what would constitute an impermissible endorsement, e.g., in light of expert

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<sup>339</sup> See *id.* at 697 (Thomas, J., concurring).

<sup>340</sup> See Diamond & Koppelman, *supra* note 56, 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!”).

<sup>341</sup> See Wexler, *supra* note 321, 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 51, 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.”).

<sup>342</sup> See, for example, 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.”).

testimony, were the Endorsement jurisprudence itself much clearer with respect to what knowledge and attitudes the observer should have.<sup>343</sup>

That said, it may simply be impossible to get a clearer picture of what the Endorsement test requires, permits, and prohibits, because the Justices do not themselves have a clear picture of what the test is supposed to do nor even a clear picture of what the observer is supposed to be like. It goes without saying that there simply is no consensus about these matters. But given this lack of clarity and consensus, use of the Endorsement test will inevitably result in some number of Justices announcing how the reasonable observer would react, notwithstanding 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 the 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 no one 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 thus must be abandoned as undermining the goals that it was allegedly adopted to serve.

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<sup>343</sup> 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”).