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TOILING IN THE *LEMON* GROVES: PRELUDE TO THE ENDORSEMENT TEST

William M. Janssen[*]

"[L]ines," the Supreme Court announced solemnly in June 1971, "must be drawn."[1]

With that flourish, Chief Justice Warren E. Burger and his colleagues closed the lead opinion in *Lemon v. Kurtzman*,[2] striking down laws in Pennsylvania and Rhode Island that had proposed to help fund secular instruction delivered by church-related schools. The ruling was not, the Court reassured its readers, to "disparage" church-related schools; to the contrary, "[t]heir contribution has been and is enormous."[3] Nor did the ruling intend to ignore blithely the "economic plight" of those schools in the then-prevailing rough financial period; to the contrary, the Court accepted that "[t]axpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely through the gifts of faithful adherents."[4] Nonetheless, the formidable contribution

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1. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

2. *Id.* at 602.

3. *Id.* at 625.

4. *Id.* Just two Terms later, the Supreme Court would expressly accept, as an entirely lawful *and secular* governmental purpose, a legislature's desire to ensure the continued good health and vitality of its non-public (that is, religious) school system. *See* Committee for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 765 (1973) (quoting from the State's legislative findings in support of its funding statute: "any 'precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs,' an increase that would 'aggravate an already serious fiscal crises in public education' and would 'seriously jeopardize quality education for all children.'"); *see also id.* at 773 ("Nor do we hesitate to acknowledge the reality of [the State's] concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools

of these schools was "not the issue," explained the Court.[5] "The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses."[6]

I. PRELUDE

"Squaring" with the Religion Clauses was, in 1971, still a relatively recent endeavor. Although the original Constitution included no broad guarantee of religious liberty, the Religion Clauses (along with the remainder of the Bill of Rights) formally amended the Constitution upon Virginia's ratification on December 15, 1791.[7] Nonetheless, the Religion Clauses remained largely dormant in constitutional jurisprudence for most of the next 150 years.[8] Incorporating the Clauses against the States had only occurred in 1940,[9] and the Court's first expansive

in favor of the public schools.").

5. *Lemon*, 403 U.S. at 625.

6. *Id.*

7. *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 217 (1955). The Religion Clauses encompass two constitutional principles—the "Establishment Clause," *see* U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion …"); and the "Free Exercise Clause," *see id.* ("… or prohibiting the free exercise thereof …"). The Court has explained their separate operations: "The first of the two Clauses … commands a separation of church and state. The second … requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people. While the two Clauses express complementary values, they often exert conflicting pressures." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

8. *See* District of Columbia v. Heller, 554 U.S. 570, 625–26 (2008) (noting how provisions in the Bill of Rights "remained unilluminated for lengthy periods," and that "it was not until after World War II that we held a law invalid under the Establishment Clause.") (citation omitted); *see generally* Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 338 (1986) ("Aside from a few polygamy cases, the religion clauses have been the subject of Supreme Court attention for only about forty years, or approximately one-fifth of the total time that the Court has been deciding cases and controversies.") (footnotes omitted).

9. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as

discussion of the Establishment Clause would not come until seven years later, in 1947, with Justice Hugo Black's list of thou-shalt-not's.[10] Even thereafter, the Court's Religion Clause jurisprudence was slow to emerge. For example, the Justices noted, in late May 1961, that Establishment Clause disputes reaching the high court remained "few in number."[11]

So, while it would be inaccurate to describe the Religion Clauses (and, especially the Establishment Clause) as *tabula rasa* in June 1971, when *Lemon v. Kurtzman* was decided, it is not at all unfair to characterize the writing that then existed as sparse and still drying. Onto this stage strode Chief Justice Burger and his *Lemon* colleagues.

Performing the task of "squaring" government conduct with the Establishment Clause would prove none too easy. Preliminarily, explained the Chief Justice, "[t]he language of the Religion Clauses of the First Amendment is at best opaque," and the constitutional proscription is not just against laws of religious establishment, but also against laws "respecting" such an establishment.[12] That, in turn, would add a further analytical complication:

> A law "respecting" the . . . establishment of religion is not always easily identifiable as one violative of the Clause. A

incompetent as Congress to enact such laws.") (footnote omitted); *see also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (confirming that the First Amendment was made applicable to the States by the Fourteenth Amendment).

10. *See* Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'").

11. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

12. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

> given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.[13]

Inspecting for such as-yet-unrealized-but-heading-towards establishments would prove even harder still. In a moment of unusual frankness, the Court admitted that "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"[14] that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[15]

Nonetheless, it remains the duty of America's Court of Last Resort to journey resolutely onward, and so it did in *Lemon*. "In the absence of precisely stated constitutional prohibitions," the Court resigned, "we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[16] To make that examination, the Court continued, requires "consideration of the cumulative criteria developed by the Court over many years," three of which "may be gleaned from our cases[:] First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] finally, the statute must not foster 'an excessive government entanglement with religion.'"[17] Thereupon, the *Lemon* three-part "test" was born.

Perhaps "test" is the wrong term. In *Lemon* itself, Chief Justice Burger announced that he had found not one, but three "tests" gleaning back at him from the scant existing case law.[18] Yet, the very same day he announced his *Lemon* ruling, the Chief Justice would also admonish that "[c]onstitutional adjudication does not lend itself to the absolutes of physical sciences and

13. *Id*.
14. *Id*.
15. *Id*. at 614.
16. *Id*. at 612 (quoting Walz v. Tax Cmm'n, 397 U.S. 664, 668 (1970)).
17. *Id*. (citation omitted).
18. *Id*.

mathematics," and, for that reason, the three-part *Lemon* criteria should not be viewed as "'tests' in any limiting sense of that term," but instead only "as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."[19]

But, maybe "test" is the right description after all. Eleven years later, in 1982, the Chief Justice would recount how the Court had "consistently held" that *Lemon*'s three criteria must be satisfied to escape invalidation under the Establishment Clause.[20] Such unqualified instruction of obligation sure sounds like a "test."

Then again, on a bit further reflection, "test" might not only be imprecise, but entirely misleading. Just a year later, in a spirited 1983 Establishment Clause decision over the State of Nebraska's legislative session prayer, the Chief Justice's only mention of *Lemon* and his tripartite criteria was in summarizing the reasoning of the lower court (which had, quite unsurprisingly, applied dutifully the "consistently" obligatory *Lemon* "test"); yet, when the time came for the Supreme Court to actually rule in the appeal, *Lemon* and its three criteria were nowhere to be found among the paragraphs of the Chief Justice's decision. A year later, the Chief Justice would go even further, flatly resisting the view that the *Lemon* "test" (his quotes) inflexibly cabined the Establishment Clause inquiry,[21] and the

19. Tilton v. Richardson, 403 U.S. 672, 678 (1971) (Burger, C.J., for the Court); *see also id.* at 677 ("Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors [namely, 'sponsorship, financial support, and active involvement of the sovereign in religious activity'] are present or absent.").

20. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982) (Burger, C.J., for the Court).

21. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . . In two cases, the Court did not even apply the *Lemon* 'test'" (citing Marsh v. Chambers, 463 U.S. 783 (1983); Larsen v. Valente, 456 U.S. 228 (1982)). Chief Justice Burger was not the only member of the Court to have inserted quotation marks around the term "tests" in describing *Lemon*'s three criteria. *See* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989) (Blackmun, J., for the Court) ("In *Lemon v. Kurtzman*, [] the Court sought to refine these principles by focusing on three 'tests' for determining whether a government practice violates the Establishment

year after that, the Chief Justice would twice rail against his colleagues' "obsession with the criteria identified in *Lemon v. Kurtzman*"[22] and their "naïve preoccupation with an easy, bright-line approach for addressing constitutional issues."[23]

By 1985, the Chief Justice and his invention had found something of a rapprochement, and he was back referring to *Lemon* as "guidance."[24]

Why would Chief Justice Burger, during his remaining years on the Court, seem so personally and hopelessly schizophrenic in his sometimes-embrace—sometimes-disavowal of his own *Lemon* creation? Perhaps his colleague, Potter Stewart, provided the

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Clause.").

22. Aguilar v. Felton, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997). With an emphasis quite unlike the tone he had used 14 years earlier in writing the *Lemon* majority, the Chief Justice decried:

> Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction [of establishing a state religion]. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, transportation to and from school, and school nursing services.
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> . . . .
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> The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

Id. at 419–20 (internal citations omitted). Indeed, this was far from the Chief Justice's first exasperated rejection of what he perceived as his colleagues' errant application of his "test." *Cf.* Meek v. Pittenger, 421 U.S. 349, 387 (1975) (Burger, C.J., dissenting) ("One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, … and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.").

23. Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, J., dissenting) ("We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts;' and "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.").

24. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (Burger, C.J., for the Court).

most fitting answer: the tripartite *Lemon* test, though "clearly stated," is "not easily applied."[25]

The first of the three *Lemon* criteria asks whether a challenged government action has a secular purpose.[26] To this requirement, the Free Exercise Clause itself stood as an early analytical predicament. By its very terms, that second Clause affords religion and the citizens who practice it special constitutional protection—government may not, on pain of constitutional violation, "prohibit[] the free exercise" of religion.[27] So commanding was this prohibition that no lesser an authority than Chief Justice Burger himself once explained: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[28] Undeniably, the Framers singled out religion and religious beliefs for special, cherished constitutional protection. How, then, can it be fairly said that marshalling the full authority of the federal government as vanguard to defend religious believers' uninhibited ability to practice their faiths is anything other than a religious purpose? Does *Lemon*'s first prong prove that the Constitution itself is unconstitutional? And what of laws against murder, theft, and fraud which, to some, trace their actual historical lineage back to a certain revelation given to Moses on Mount Sinai?[29]

To adjust the *Lemon* inquiry to accommodate for just such incongruities, the Chief Justice later clarified that invalidations under *Lemon*'s first criteria were appropriate "only when [the Court] concluded there was no question that the statute or activity was motivated wholly by religious considerations."[30] But,

25. Meek v. Pittenger, 421 U.S. 349, 358 (1975).

26. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

27. U.S. CONST. amend. 1.

28. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

29. *Cf.* McGowan v. Maryland, 366 U.S. 420, 442 (1961) (explaining that, "for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.") (citations omitted).

30. Lynch v. Donnelly, 465 U.S. 668, 680 1984).

the Court has also taught, that seemingly forgiving inquiry is a bit more than what it first appears. Incontestably secular justifications for government action will nonetheless fail the first *Lemon* inquiry if the Court finds them to be a "sham."[31] However, as the case law makes uncomfortably clear, what may appear a "sham" to some Justices may be found an entirely defensible purpose by other Justices. The Court in *Epperson v. Arkansas*,[32] a case in point, discerned an unconstitutional purpose behind a State's law barring the teaching of evolution in its public school classrooms. The Majority there reasoned that the State's unconstitutional legislative purpose was plain: "[T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."[33] In a fascinating turn, Justice Hugo Black (author of the pioneering 1947 *Everson* decision that had ushered in the modern Establishment Clause jurisprudence) disagreed with precisely that reasoning:

> Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.[34]

As his retirement from the Court approached, the Chief Justice was even less measured in his tone, chastising the

31. *See* Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

32. 393 U.S. 97 (1968). Concededly, *Epperson* was decided several Terms before Chief Justice Burger penned his *Lemon* test, but it rested its conclusion on what would later become *Lemon*'s first criteria—a secular purpose—and, thus, serves well to illustrate the point.

33. *Id*. at 107.

34. *Id*. at 113 (Black, J., concurring).

Court's invalidation of Alabama's moment-of-silence statute as a "ridiculous" application of his *Lemon* formula, and gravitating towards "the 'callous indifference' that the Court has consistently held the Establishment Clause does not require."[35]

The second of the *Lemon* criteria inquires whether the principal or primary effect of the contested government action is to advance or inhibit religion.[36] This criterion suffered from a gorge-like definitional uncertainty. Was *Lemon* offended by the "effect" of a municipally-funded fire department extinguishing a synagogue fire or a municipally-funded EMS team resuscitating a collapsing pastor? In both cases, the "effect" of the governmental action is unquestionably religion-preserving. Moreover, in both instances, the availability of municipally-funded emergency services saved the impacted religious institutions from the need to divert their donor treasury from religious purposes to fire prevention or medical ones. Of course not, wrote the Court five years after *Lemon* was decided; such an interpretation would be religiously "discriminate[ing]."[37] Once again, Chief Justice Burger offered a clarification: "The Court has made it abundantly clear . . . that 'not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'"[38]

But what compass will guide the assessment of whether a religiously advancing or inhibiting "effect" is unconstitutional under *Lemon*'s second prong, or merely "indirect," "remote," or "incidental"? Here, the Court's instruction founders. In one of the least illuminating explanations ever offered by the Court on the meaning of its second *Lemon* inquiry, the Chief Justice

35. Wallace v. Jaffre, 472 U.S. 38, 90 (1985) (Burger, C.J., dissenting).

36. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

37. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (noting that the Court's precedents have "put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity. The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.").

38. Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (quoting Committee for Pub. Educ. & Rel. Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

reasoned why a municipally-displayed crèche at Christmas was not an invalidly religiously-advancing "effect":

> [T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education v. Allen*; expenditure of public funds for transportation of students to church-sponsored schools, *Everson v. Board of Education*; federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton v. Richardson*; noncategorical grants to church-sponsored colleges and universities, *Roemer v. Board of Public Works*; and the tax exemptions for church properties sanctioned in *Walz v. Tax Comm'n*. It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland*; the release time program for religious training in *Zorach v. Clauson*; and the legislative prayers upheld in *Marsh v. Chambers*.
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> We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.[39]

The Court could hardly have been less clear had it explained that a lemon is not an apple but only so long as it is more like a blueberry, an apricot, or a peach.[40] If the Chief Justice's crèche methodology identifies the true, proper divining rod for the *Lemon* effect inquiry, there is little "abundantly clear" about it.

The third and final of the *Lemon* criteria examines whether the challenged government action would foster an excessive entanglement with religion.[41] It was against this last element that the Rhode Island and Pennsylvania school funding programs failed. The Chief Justice had explained why. Religious schools

39. *Id*. at 681–82 (citations and footnotes omitted).

40. Subtly, the Chief Justice agreed as much. *See id*. at 681 ("Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make.").

41. *Lemon*, 403 U.S. at 612.

are "powerful" instruments for inculcating faith beliefs, and they do so with children of impressionable age.[42] Accordingly, the Rhode Island and Pennsylvania legislatures put in place a program of controls to ensure that only secular instruction is governmentally funded.[43] But the pervasively religious character of this education may defeat such controls, albeit accidentally or involuntarily: "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals."[44] Accordingly, reasoned the Chief Justice, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[45] Thus emerges the "entanglement" between government and religion that is, for constitutional purposes, "excessive."

Within four short years, however, even the Chief Justice himself was retreating from this "surveillance" paradigm as a sound constitutional barometer. In *Meek v. Pittenger*,[46] a majority of the Court had found a governmental program that "loaned" textbooks to religious schools constitutional, but ruled that a companion program of "auxiliary services" to assist in educating "exceptional children," "remedial students," and "the educationally disadvantaged" was unconstitutional. The Majority cited Justice Black's broad command from 1947's *Everson* decision that "[n]o tax in any amount, large or small, can be levied to support" religious education, but then pronounced it "clear" that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution," and, finally, concluded that "[t]he problem, like many problems in constitutional law, is one of degree."[47] The "auxiliary services" program, decided the Court, was a degree too

42. *Id*. at 616.
43. *Id*.
44. *Id*. at 618–19.
45. *Id*. at 619.
46. 421 U.S. 359 (1975).
47. *Id*. (citations omitted).

far. From this, Chief Justice Burger angrily dissented, decrying that the Majority "does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads."[48] Notwithstanding that the Majority had applied the Chief Justice's own "surveillance" invention to support its conclusion, his turbulent dissent was unmoved:

> If the consequence of the Court's holding operated only to penalize *institutions* with a religious affiliation, the result would be grievous enough; nothing in the Religion Clauses of the First Amendment permits governmental power to discriminate *against* or affirmatively stifle religions or religious activity. But this holding does more: it penalizes *children*—children who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise. . . .
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> . . . One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, . . . and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.[49]

The line dividing constitutionally sufferable "entanglements" from unconstitutional ones was never too clear.[50] Justice White dissented in *Lemon*, wholly unconvinced that this entanglement inquiry was ever sound.[51] A quarter century later, the Court had

48. *Id*. at 386–87 (Burger, C.J., dissenting).

49. *Id*.

50. Though the Court had made it plainly certain that not all entanglements are insufferable ones. *See* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.") (citations omitted).

51. *See* Lemon v. Kurtzman, 403 U.S. 602, 668 (1971) (White, J., dissenting) ("The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that

come around to his view, officially abandoning both the notion that secular teaching in religious schools would lead irresistibly (though, perhaps, accidentally and unintentionally) to inculcation,[52] as well as the notion that a system of aggressive government surveillance was necessary to root out this expected misbehavior.[53] Indeed, the Court would ultimately banish the excessive entanglement inquiry from its place as a third, freestanding *Lemon* prong, relegating it instead to merely one of several criteria for "effects" testing.[54]

Within the first two decades after its invention, the verdict on *Lemon* was largely in.[55] It was "possibly the most maligned

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religion not be so taught—a promise the school and its teachers are quite willing and, on this record, able, to give—and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.")*; see also* Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 768 (1976) (White, J., dissenting) ("I am no more reconciled now to *Lemon* … than I was when it was decided. … I have never understood the constitutional foundation for this added element [of excessive entanglement]; it is at once both insolubly paradoxical, and—as the Court has conceded from the outset—a 'blurred, indistinct, and variable barrier.' It is not clear that the 'weight and contours of entanglement as a separate constitutional criterion,' are any more settled now than when they first surfaced.") (citations omitted).

52. *See* Agostini v. Felton, 521 U.S. 203, 223–25 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12–13 (1993).

53. *Agostini*, at 232–34; *see also id.* at 234 ("Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.").

54. *Id.* at 233–34; *see also* Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (confirming the "recast[ing]" of "*Lemons*'s entanglement inquiry").

55. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., dissenting) ("I am no more reconciled now to *Lemon* . . . than I was when it was decided. The threefold test … imposes unnecessary, and … superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes.") (citations omitted); Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("Despite its initial promise, the *Lemon* test has proved problematic."); *id.* at 112 (Rehnquist, J., dissenting) ("It is not surprising … that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test. Although the test initially provided helpful assistance, we soon began describing the test as only a 'guideline,' and lately we have described it as 'no more than [a] useful

constitutional standard the Court has ever produced."[56] It unleashed "great incoherence" that left in its wake "a conceptual disaster area"[57] and a "strange Establishment Clause geometry of crooked lines and wavering shapes."[58] Soon-to-be Chief Justice Burger's successor, Justice Rehnquist captured the embarrassing incoherence in an opinion in 1985:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and

signpos[t].'") (citations omitted); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Persuasive criticism of *Lemon* has emerged"); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.") (citation omitted); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring) ("the slide away from *Lemon*'s unitary approach is well under way"); Cutter v. Wilkinson, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (describing *Lemon* as a "discredited test").

56. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468 [hereinafter Gey, *Religious Coercion*]

57. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 503 (2002) [hereinafter Choper, *The Endorsement Test*].

58. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., dissenting).

> state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[59]

Criticisms of the Court's *Lemon* test arose from all camps in the campaign, and often shifted from frustration to outright derision. "Perhaps no area of the law is more unstable, less connected to consistently applied principle, or more in need of serious revision."[60] "[A] more confused and often counter-productive mode of interpreting the First Amendment would have been difficult to devise."[61] "[T]he Supreme Court would not recognize an establishment of religion if it took life and bit the Justices."[62] "[T]he death of *Lemon* is an occasion for dancing in the streets."[63]

In the end, one of the most insightful critiques of *Lemon* came from one of its most consistently ardent opponents, Justice Scalia. In 1993, he offered this explanation:

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a

59. Wallace v. Jaffree, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (footnotes and citations omitted).

60. Jay Alan Sekulow, *Posting the Ten Commandments Is a "Law Respecting An Establishment of Religion"?: How* McCreary Cnty. v. ACLU *Illustrates the Need to Reexamine the* Lemon *Test and Its Purpose Prong*, 23 T.M. COOLEY L. REV. 25, 76 (2006).

61. Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115, 115 (1992) (referring, broadly, to the Religion Clause jurisprudence of the Warren and Burger Courts).

62. *Id.* (quoting LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986)).

63. Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 799 (1993).

> somnolent state; one never knows when one might need him.[64]

The problem was clear. *Lemon* was not working. Whatever promise it once held had long since dissipated as the Justices struggled to apply it. But if *Lemon* were (or should be) dead, with what would the Court replace it?

II. ADVENT

By her own description, Justice Sandra Day O'Connor was "new to the struggle" in 1984, and perhaps for that reason was "not ready to abandon all aspects of the *Lemon* test."[65] But she readily detected the problem:

> We must strive to do more than erect a constitutional "signpost," to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.'[66]

The endorsement test was her proposed solution.

Her endorsement test is best understood by examining its constituent parts. First, the test begins with her identification of an ultimate principled destination—what is the Establishment Clause intended to achieve within our constitutional framework? Second, the test adopts a structure for judicial inquiry—what is tested and how? Third, the test creates an analytical lens to be used in performing the constitutional inspection—through whose eyes must the contested governmental conduct be tested? Each part is now discussed in turn.

A. The Endorsement Test's *Destination*

Tests are easy to create. What has often confounded the Supreme Court is not an inability to create Establishment Clause

64. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., dissenting) (citations omitted).

65. Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring).

66. *Id.* at 68 (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332–33 (1963)).

tests,[67] but rather its own indecisiveness in agreeing on what core, foundational principles the Establishment Clause enshrines. That, to Justice O'Connor's mind, was how *Lemon* became mired in the first place. "It has never been entirely clear . . . how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause."[68] This, then, was to be her first order of business—what are those enshrined principles?

In Justice O'Connor's view, the Establishment Clause was intended to foreclose the ordaining of political "insiders" and "outsiders" on religious grounds. "The Establishment Clause," she explained, "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[69] The Clause thus ought to do more than merely proscribe "coercive" religious practices or "overt efforts at government proselytization."[70] Limiting the Establishment Clause bar to only coercive religious practices would, in her view, "make the Free Exercise Clause a redundancy."[71] Limiting the Clause's prohibition to overt State proselytization would fail to "adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community" by neglecting "to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or

67. One of the most highly regarded and impressively published scholars of the Religion Clauses, the late Professor Steven G. Gey, catalogued ten different tests and analytical approaches championed over the years by various Justices of the Supreme Court to test for Establishment Clause constitutionality. *See* STEVEN G. GEY, RELIGION AND THE STATE 219–94 (2d ed. 2006). And it may be that even Gey's daunting catalogue does not capture them all. *See* William M. Janssen, *Led Blindly: One Circuit's Struggle to Faithfully Apply the U.S. Supreme Court's Religious Symbols Constitutional Analysis*, 116 W. VA. L. REV. __ (2013) (identifying nineteen potential tests and approaches adopted by the Justices).

68. Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring).

69. *Id*. at 687; *see also* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) ("As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'") (citation omitted).

70. *Cnty. of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring).

71. *Id*. at 628.

convey a message of disapproval to others."[72] Instead, the endorsement test should endeavor to vindicate a construction of the Establishment Clause that guards against religiously-based segmentation of the political community, because such segmentation "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."[73] Avoiding those ends clearly in mind, Justice O'Connor turned to testing structure.

B. The Endorsement Test's *Structure*

Rather than assembling an entirely new testing paradigm, Justice O'Connor attempted a repair of *Lemon*. Unwilling to "abandon" it, she turned to the task of "reexamin[ing] and refin[ing the three *Lemon* criteria] in order to make them more useful in achieving the underlying purpose of the First Amendment."[74] Each of the three *Lemon* prongs would appear in her refinement, though they would be repositioned and recasted.

Government could violate her prohibition on making religion politically relevant in two ways, Justice O'Connor reasoned. First, the government could excessively entangle itself with religious institutions in a manner that "may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[75] Second, the government could, more directly, endorse or disapprove of

72. *Id*. at 627–28; *see also id*. at 627 ("We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.").

73. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see also Cnty. of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring).

74. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

75. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

religion. An endorsing or disapproving message, Justice O'Connor expanded, could be sent intentionally (because that was the government's actual purpose) or unintentionally (because, irrespective of actual purpose, that was the resulting effect).[76] "The purpose and effect prongs of the *Lemon* test represent these two aspects," she added, and thus, "[a]n affirmative answer to either question should render the challenged practice invalid."[77] Thus reconfigured as a "[f]ocus[] on institutional entanglement and on endorsement or disapproval of religion," the new approach "clarifies the *Lemon* test as an analytical device."[78]

Justice O'Connor further unpacked her endorsement/disapproval model's refined purpose and effect inquiries. As to purpose, she explained that the meaning of a government's statement hinges both on the speaker's intention and on the statement's objective meaning to the community.[79] Both must be examined because:

> Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them, the message actually conveyed may be something not actually intended. 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.[80]

As to effect, Justice O'Connor clarified that government practices should not be unconstitutional just because they "in fact cause[], even as a primary effect, advancement or inhibition of religion."[81] Nor are such practices unconstitutional simply

76. *Id*. at 690.
77. *Id*.
78. *Id*. at 689.
79. *Id*.
80. *Id*. at 690.
81. *Id*. at 691–92.

because they incorporate "inarguably religious" (and, even, sect-specific) symbolism,[82] or that they do so when lesser-religious or non-religious substitutes could have been employed instead.[83] Rather, governmental practices should be invalid only if, "whether intentionally or unintentionally, th[ey] make religion relevant, in reality or public perception, to status in the political community."[84] That proper inquiry "is not a question of simple historical fact."[85] More precisely, "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."[86] In conducting that inquiry, context will drive the examination.[87] Thus, assessed in the context of a broader Christmastime holiday display, a constitutional challenge to the City of Pawtucket's crèche display must be rejected:

> Although the religious and indeed sectarian significance of the crèche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.[88]

82. *Id*.

83. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 636 (1989) (O'Connor, J., concurring).

84. Lynch, 465 U.S. at 692.

85. *Id*. at 693.

86. *Id*. at 694.

87. *Cnty. of Allegheny*, 492 U.S. at 624–25 (O'Connor, J., concurring).

88. *Lynch*, 465 U.S. at 692. *Cf. Cnty. of Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring) ("I agree that the crèche displayed on the Grand

Like legislative prayers, the federal Thanksgiving holiday, the national motto inscribed on coinage, and the invocation used to open court sessions, the crèche was not a religious endorsement but a permissible governmental "acknowledgement" of religion.[89]

Justice O'Connor assigned no independent testing value to either the presence or absence of political divisiveness accompanying a challenged government action.[90] Such a consideration, she weighed, was "simply too speculative an enterprise, in part because the existence of the litigation . . . itself may affect the political response to the government practice."[91] While such divisiveness "may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion," she insisted that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."[92]

C. The Endorsement Test's *Lens*

From what vantage point is this endorsement/disapproval inquiry to be judged? Justice O'Connor supplied that lens with

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Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community. In contrast to the crèche in *Lynch*, … this crèche stands alone in the county courthouse.").

89. *Id*. at 693 ("Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose—celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion.").

90. *Id*. at 689 ("In my view, political divisiveness along religious lines should not be an independent test of constitutionality.").

91. *Id*.

92. *Id; see also id*. at 693 ("It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years.").

"the perception of a reasonable, informed observer."[93] That person is not an actual observer who personally encountered (and objected to) the challenged government action,[94] nor is it a "casual passerby"[95] or just anyone who might feel offended.[96] "A State has not made religion relevant to standing in the political community simply because a particular viewer of a [challenged government action] might feel uncomfortable."[97] Instead, Justice O'Connor borrowed her lens from tort law's "reasonable person" principles—the inspecting eyes belong not to "'any ordinary individual, who might occasionally do unreasonable things,' but [to] . . . 'a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[98] Such a person is "deemed aware of the history and context of the community and forum in which the religious display appears."[99] Ultimately, such inspections require "a delicate task" involving "case-specific examinations."[100]

On several occasions, Justice O'Connor demonstrated how she viewed this lens' function within the proper application of her endorsement test. For example, the "reasonable, informed observer" of the Christmas crèche in the Pawtucket public park would not sense an endorsement of religion, she explained, because "[t]he evident purpose of including the crèche in the larger [public park, Christmastime] display was not promotion of the religious content of the crèche but celebration of the public

93. Capitol Square Rev. & Adv. Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring).

94. *Id*. at 779 ("[T]he endorsement test should [not] focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof.").

95. *Id*. at 779.

96. *Id*. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.").

97. *Id*.

98. *Id*. at 779–80 (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

99. *Id*. at 780.

100. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring).

holiday through its traditional symbols."[101] Likewise, no religious endorsement would be detected by the "reasonable, informed observer" in displaying together a secular symbol of the Christmas season (a Christmas tree), a printed message saluting liberty, and a menorah, because such a collection "conveyed a message of pluralism and freedom of belief during the holiday season."[102] And the "reasonable, informed observer" of a Klu Klux Klan's disclaimer-affixed placement of a Latin cross in a public space which was used by numerous other speakers would perceive only the government's tolerance of private speech, not official religious endorsement.[103] Conversely, the "reasonable, informed observer" would interpret an endorsement of religion in a crèche displayed alone in an especially prominent location within a county's courthouse.[104]

III. REFLECTIONS

To many, solving *Lemon* meant replacing the Court's ipse dixit jurisprudence with predictable, reliable, clear, coherent, and principled decisionmaking.[105] In 1989, Justice O'Connor thought she had discovered, in her endorsement test, the long-sought, long-elusive fix for what ailed the Court's Establishment Clause precedent. "I . . . remain convinced," she wrote back then, "that

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

102. *Cnty. of Allegheny*, 492 U.S. at 635 (O'Connor, J., concurring).

103. *Capitol Square Rev. & Adv. Bd*, 515 U.S. at 782-83 (O'Connor, J., concurring).

104. *Cnty of Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring).

105. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) ("[A]nother danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*."); *see also* McCreary Cnty. v. ACLU, 544 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."); Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.") (citations omitted).

the endorsement test is capable of consistent application."[106] She had good cause for encouragement; the early lower court decisions seemed to reach outcomes that aligned with one another, and the early scholarly commentary had "found merit in the approach."[107]

Alas, the honeymoon period was short-lived. Judicial criticism from her colleagues on the Supreme Court mounted. Justice Rehnquist found "[n]othing in the Establishment Clause of the First Amendment, properly understood, [which] prohibits any . . . generalized 'endorsement' of prayer."[108] Justice Scalia bemoaned the "embarrassment" of an Establishment Clause jurisprudence that "requir[es] scrutiny more commonly associated with interior decorators than with the judiciary."[109] Justice Kennedy dismissed it as a "most unwelcome . . . addition to our tangled Establishment Clause jurisprudence," "flawed in its fundamentals and unworkable in practice."[110] Justice Thomas mocked that "[s]ince the inception of the endorsement test, we have learned that a crèche displayed on government grounds violates the Establishment Clause, except when it doesn't," that "a menorah displayed on government property violates the Establishment Clause, except when it doesn't," that a "Ten Commandments [monument] on government property also violates the Establishment Clause, except when it doesn't," and that "a cross displayed on government property violates the Establishment Clause, . . . except when it doesn't."[111] Justice Alito considered the endorsement test, and then wrote that "[t]he Court's Establishment Clause jurisprudence is undoubtedly in need of clarity."[112] The lower federal judiciary[113] and comment-

106. *Cnty. of Allegheny*, 492 U.S. at 629.

107. *Id.* at 628–29.

108. Wallace v. Jaffree, 472 U.S. 38, 113–14 (1985) (Rehnquist, J., dissenting).

109. Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (quoting American Jewish Congress v. Chicago, 827 F. 2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).

110. *Cnty. of Allegheny*, 492 U.S. at 668–69 (Kennedy, J., concurring in part and dissenting in part).

111. Utah Highway Patrol Ass'n v. American Atheists, Inc., 565 U.S. ___, ___, 132 S. Ct. 12, 18–19 (2011) (Thomas, J., dissenting from denial of certiorari).

112. Mount Soledad Memorial Ass'n v. Trunk, 132 S. Ct. 2535, 2535 (2012)

ators[114] have only piled on.

Justice O'Connor's endorsement test critics—Court colleagues, lower court judges, and commentators alike—have staked their ground, and their support, disagreement, praise, and disappointment are all now well documented and exhaustively debated. Whether those opinions are well taken or not is largely left to the individual readers, and their respective legal judgments.

Largely, with one exception.

Alito, J., issuing statement).

113. *See, e.g.,* American Atheists, Inc. v. Duncan, 637 F.3d 1095, 1119 (10th Cir. 2010) ("While the reasonable observer 'is presumed to know far more than most actual members of a given community,' 'we do not treat the reasonable observer as omniscient.' (citing Green v. Haskell Cnty. Bd. of Com'rs, 568 F.3d 784, 800 (10th Cir.2009)); *see also* Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004) ('How much information we will impute to a reasonable observer is unclear.'); ACLU v. Cnty. of Allegheny, 842 F.2d 655, 669 (3d Cir. 1988) (Weis, J., dissenting) ("I have found no indication that the Pawtucket display survived constitutional scrutiny because … it closely resembled a miniature golf course with candy-striped poles, talking wishing wells, and cut-out elephants."), *aff'd in part and rev'd in part*, 492 U.S. 573 (1989); ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting) ("[A] city can get by with displaying a crèche if it throws in a sleigh full of toys and a Santa Claus, too. The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?").

114. *See, e.g.,* Paula Abrams, *Who is the Reasonable Person? The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 Lewis & Clark L. Rev. 1537, 1537 (2010) ("[T]he reasonable observer standard, which bypasses the role of faith in perception, undermines the protection of a core Establishment Clause value—inclusion."); Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 Mich. St. L. Rev. 667, 668 ("[T]he Endorsement Test, as currently applied, does no independent work; instead, it is used to rationalize results reached independently and to impugn the judgment or knowledge of those who reach a different conclusion regarding the offensiveness of a religious practice."); Choper, *The Endorsement Test*, *supra* note 57 at 499 ("While the endorsement test has many attractive features, … it provides neither a workable nor a wise judicial standard."); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 331 (1987) ("[A]doption of the 'no endorsement' test would simply initiate another era of chaotic results—and ensuing accusations of disingenuousness and doctrinal manipulation. While establishment doctrine undoubtedly needs reexamination, the 'no endorsement' test is not the solution.").

Justice O'Connor had endeavored to repair *Lemon* by solving the yawning consistency gap that had long bedeviled its application. That was her stated hope, for sure. And she has been taken roundly and often to the woodshed for having failed to meet that goal. But that criticism is perhaps the least fair of all, and it may well be unfair to judge her test against her own aspirant standard.

The late Professor Steven G. Gey once aptly wrote: "[T]he problem is not that the terms of *Lemon* mean too little; the problem is that the terms of *Lemon* mean too much. An honest application of the *Lemon* test would require a far more rigorous separation of church and state than a majority of the current Supreme Court is willing to enforce . . . . The ambivalence about *Lemon* remains because the majority has not yet come to terms with what the separation principle entails and, in particular, with how much separation the principle requires."[115] Of course, Professor Gey is right.

Consider an example for illustration. Can public schools in America take their students on a class visit to the National Archives and view the Declaration of Independence? Careful. Dim and fading, the document still retains Thomas Jefferson's immortal justification for the Colonies' right to separate from the motherland, namely, the self-evident truth that the King's subjects were "endowed by their Creator with certain unalienable Rights" that the Crown had transgressed. Can impressionable school children be exposed to such things? Assume, for argument's sake, that the Declaration of Independence is not unconstitutional. How far can that argument be tolerated? Can public school children be taught that Thomas Jefferson *wrote* that we are endowed by our Creator with inalienable rights? Can

115. Gey, *Religious* Coercion, *supra* note 56, at 470, 472. More recently, Professor Michael C. Dorf offered a similar retort to Justice Thomas' critique of the endorsement test: "[N]o legal test will convert this difficult question into an easy one, unless that test were to ignore one or more of the very factors that make the question difficult in the first place. In the end, Justice Thomas's criticism of the Lemon/endorsement test is unfair because it demands the impossible: a clear, simple test in an inherently conflicted area of law." Michael C. Dorf, *Justice Thomas Takes Aim at the Court's Church-State Jurisprudence But Hits the Constitution Instead*, VERDICT BLOG (Nov. 9, 2011, 9:17 AM), http://verdict.justia.com/2011/11/09/justice-thomas-takes-aim-at-the-courts-church-state-jurisprudence-but-hits-the-constitution-instead.

they be taught (assuming the historians would agree) that Jefferson *believed* that we are so endowed? That his fellow Framers *believed* it? That they autographed the Declaration *because* they believed it? Can public school children be taught that, in point of fact, we *are*, as our forefathers swore a blood oath to announce, so endowed? If so, if teaching the existence of and gifts from the Creator is permissible, why the big fight over the Lord's Prayer in Abington, the Pledge of Allegiance in Elk Grove, crèches in Pawtucket, menorahs in Pittsburgh, Latin crosses in Columbus, Ten Commandments in Austin, coin inscriptions, and myriad other religious artifacts? The answers to these questions may well be plain to each Justice, but they also ought to be principled if they are to be useful precedent.

Justice O'Connor's endorsement test didn't fix the Establishment Clause consistency dilemma because no test could. The persisting, perplexing problem at the Supreme Court isn't finding the right test, it's finding agreement on the content of the principles for which the test is to be built. Until that goal is achieved, judges and commentators may praise or fault Justice O'Connor's endorsement approach to their hearts' content. But indicting her failure to fix consistency is just plain unfair.