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## A Controversial Twist of *Lemon*: The Endorsement Test as the New Establishment Clause Standard

The Supreme Court's 1989 decisions concerning flag-burning<sup>1</sup> and abortion<sup>2</sup> produced a cloud of controversy which overshadowed other significant developments in first amendment jurisprudence. In *Texas Monthly v. Bullock*<sup>3</sup> and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,<sup>4</sup> an unusual majority of the Court<sup>5</sup> confirmed that the three-pronged *Lemon* test, used to analyze establishment clause cases since 1971,<sup>6</sup> has been revised.<sup>7</sup> The revised test reflects greater concern for governmental "endorsement" of religion and has gradually become the deciding factor in establishment clause cases. The entire Court has recognized the importance of endorsement analysis and has begun to refine its terms. The issue before the Court is no longer whether to use the endorsement test, but how and in what terms to use it.

This Note addresses the emergence of the endorsement test, its impact on the Court's decisions during the 1988 term, problems with the test's current formulations, and suggested improvements. Part I reviews the development of establishment clause jurisprudence and the emergence of the endorsement test. Part II analyzes the *Texas Monthly* and *Allegheny County* decisions and the impact of the endorsement test on

1 *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (flag-burning upheld as a form of free speech).

2 *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (Missouri abortion laws upheld against privacy right challenge).

3 109 S. Ct. 890 (1989).

4 109 S. Ct. 3086 (1989) [hereinafter *Allegheny County*].

5 The core majority in these cases included Justices Brennan, Marshall, Stevens, Blackmun, and O'Connor. This voting block is strikingly different from the "conservative" block, which united to decide twenty cases during the 1988 term by a 5-4 majority, including Justices Rehnquist, White, Scalia, Kennedy, and O'Connor. The key vote on this issue is obviously Justice O'Connor, who abandoned the Chief Justice's group for that of Justice Brennan.

6 The test originated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *infra* notes 20-22 and accompanying text.

The establishment clause, the first clause in the first amendment, provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court held that this clause applied to the states through the due process clause of the fourteenth amendment. As illustrated in the case law discussed *infra*, notes 9-22 and accompanying text, the application of the establishment clause to actual instances of alleged governmental support of religion has revealed sharp philosophical divisions among the Justices. Since its conception, the *Lemon* test has been at the center of this continual controversy.

7 The endorsement "revision" began with Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984). It is now widely used among the circuit courts of appeals. See *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990); *Kaplan v. Burlington*, 891 F.2d 1024 (2nd Cir. 1989); *Clayton v. Place*, 889 F.2d 192 (8th Cir. 1989); *Foremaster v. St. George*, 882 F.2d 1485 (10th Cir. 1989); *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 109 S. Ct. 2431 (1989); *ACLU, Greater Pittsburgh Chapter v. County of Allegheny*, 842 F.2d 655 (3rd Cir. 1988), *aff'd in part and rev'd in part*, 109 S. Ct. 3086 (1989); *United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152 (D.C. Cir. 1987); *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987); *Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987), *aff'd*, 109 S. Ct. 2136 (1989); *Christian Science Reading Room Jointly Maintained v. City of San Francisco*, 784 F.2d 1010 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987); *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985), *aff'd*, 482 U.S. 578 (1987).

those decisions. Part III examines the problem of perspective in judging endorsement. Part IV considers other alternatives to and refinements of the *Lemon* framework.

## I. The Evolution of the *Lemon* Test and the Emergence of Endorsement Analysis

Given the surplus of establishment clause surveys, it is unnecessary to review in detail the history of Supreme Court interpretation of the establishment clause.<sup>8</sup> By way of setting the stage for the endorsement test, this Part reviews the prominent features of the establishment clause landscape. Three principal cases illustrate the emergence of the endorsement test.

### A. *Pre-Endorsement Establishment Clause Analysis*

In 1947, the Court, in *Everson v. Board of Education*,<sup>9</sup> laid down the "strict separationist" view of the establishment clause. *Everson* set the tone for the Warren Court's "wall of separation" between church and state.<sup>10</sup> However, the historical underpinnings of the "wall" metaphor proved to be contentious<sup>11</sup> and its application unpredictable. The Warren Court upheld public transportation for parochial students,<sup>12</sup> struck down optional religious instruction in public schools,<sup>13</sup> upheld the release of students from public school classes to attend private religious classes elsewhere,<sup>14</sup> and struck down the recitation of government sponsored prayers in public schools.<sup>15</sup> Not only were the decisions hard to reconcile, they contained no consistent analytical framework. The Court based its reasoning on varying interpretations of precedent and an ever-changing description of the "wall" between church and state.

8 For a more complete review of establishment clause history, see *Allegheny County*, 109 S. Ct. at 3099-3101; *Wallace v. Jaffree*, 472 U.S. 38, 48-56 (1984); *McGowen v. Maryland*, 366 U.S. 420, 429-45 (1961); *Everson v. Board of Education*, 330 U.S. 1, 8-16 (1947); Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 152-59 (1987); Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113 (1988); Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U.L. REV. 395 (1989); Smith, *Symbols, Perceptions, and Doctrinal Illusion: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 268-76 (1987).

9 330 U.S. 1 (1947). "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization and *vice versa*." *Id.* at 16.

10 *Id.*

11 Several Justices have assailed the historical validity of strict separation and the validity of the wall metaphor. See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("The metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); *Wallace v. Jaffree*, 472 U.S. 38, 106-07 (1985) ("There is simply no historical foundation for the proposition that the framers intended to build the 'wall of separation' that was constitutionalized in *Everson*. . . . The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.")

12 *Everson*, 330 U.S. 1.

13 *McCullum v. Board of Education*, 333 U.S. 203 (1948).

14 *Zorach v. Clauson*, 343 U.S. 306 (1952).

15 *Engel v. Vitale*, 370 U.S. 421 (1962).

In 1963, the first structured establishment clause analysis emerged from the Court.<sup>16</sup> The Court adopted a two-step test which required that a government practice have (1) "a secular legislative purpose" and (2) "a primary effect that neither advances nor inhibits religion."<sup>17</sup> This two-step test gave substance to the vision of strict separation, and provided an analytical framework for establishment clause analysis.

The Court expanded this two-step test in 1970 by adding a third requirement: there must not be "excessive government entanglement with religion."<sup>18</sup> The Court explained that, although some interaction between church and state will occur, it is necessary to avoid situations where the government is overly involved with religion, such as when "official and continuing surveillance" is required.<sup>19</sup>

The Court synthesized these three requirements in 1971 in *Lemon v. Kurtzman*,<sup>20</sup> which a generation of lawyers has regarded as the benchmark establishment clause case. There the Court set forth the three-pronged *Lemon* test, the reigning analytical tool in establishment clause cases. In order to withstand scrutiny under this test, a government action must (1) have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion.<sup>21</sup> The aesthetic simplicity of a three-part test, combined with the sanction of a unanimous Court in *Lemon*, have contributed to the virtual enshrinement of the *Lemon* test as the medium of establishment clause analysis.<sup>22</sup>

### B. *The Development of the Endorsement Test*

The membership of the Court has changed considerably since *Lemon*.<sup>23</sup> Of the newer Justices, none has had a greater impact on establishment clause jurisprudence than Justice O'Connor. Her concern with governmental "endorsement" of religion has led to a substantial revision of the purpose and effect prongs of the *Lemon* test. The transition from

16 *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963).

17 The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

*Id.* at 222. The Court utilized this test in *Schempp* to strike down a Pennsylvania law requiring public school teachers to read Bible passages each morning.

18 *Walz v. Tax Comm'n*, 397 U.S. 664, 667 (1970).

19 *Id.* at 675. On this basis, the Court upheld a property tax exemption for religious organizations because it entangles government and religion less than would "tax valuations, tax liens, tax foreclosures" and related procedures. *Id.* at 674.

20 403 U.S. 602 (1971).

21 *Id.* at 612-13.

22 A potential fourth prong, whether the governmental act causes "political divisiveness," arose in *Mueller v. Allen*, 463 U.S. 388, 403-404 (1983). However, the Court made it clear in *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984), that generally it is not necessary to inquire into political divisiveness.

23 Between 1970 and 1984, four members of the Court retired and were replaced. Justice Powell replaced Justice Black and Justice Rehnquist replaced Justice Harlan in 1971; Justice Stevens replaced Justice Douglas in 1975; and Justice O'Connor replaced Justice Stewart in 1981.

the traditional *Lemon* test to the endorsement-modified test occurred in three principal cases.

1. *Lynch v. Donnelly*:<sup>24</sup> The First Suggestion of Endorsement

In 1984, the Court considered the constitutionality of a Christmas display erected by the city of Pawtucket, Rhode Island, in a private park within the city's shopping district. The display included a Santa Claus house, reindeer pulling a sleigh, a Christmas tree, a talking wishing well, several hundred colored lights, and a creche.<sup>25</sup> Of the five Justices remaining from the *Lemon* court, three found that displaying the creche failed the three-pronged test,<sup>26</sup> while two believed the creche was acceptable in its secular surroundings.<sup>27</sup> The new Justices were also divided. Justice O'Connor provided the swing vote in favor of upholding the creche; she joined the majority opinion, but also wrote a separate concurrence.<sup>28</sup>

In *Lynch*, the majority utilized the *Lemon* test in a straightforward manner, but emphasized that it did not see itself bound by the *Lemon* Court's "strict separationist" philosophy.<sup>29</sup> Instead, the Court hinted at a more permissive stance toward governmental action in religious matters. Perhaps to distance herself from this philosophical turn, Justice O'Connor wrote separately to "suggest a clarification in our Establishment Clause doctrine."<sup>30</sup>

Her suggestion was to revise the purpose and effect prongs of the *Lemon* test so as to "clarify" the relationship between the test and "the principles enshrined in the Establishment Clause."<sup>31</sup> Justice O'Connor revealed that she was motivated to suggest this revision because of her growing concern for the feelings of religious minorities.

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . [Governmental 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>32</sup>

From this perspective, Justice O'Connor suggested a shift in the focus of the purpose and effect inquiry toward detecting governmental "endorse-

24 465 U.S. 668 (1984).

25 *Id.* at 671.

26 Justices Brennan, Marshall, and Blackmun.

27 Chief Justice Burger and Justice White.

28 Justice O'Connor's role as a "swing vote" is further illustrated in *Texas Monthly* and *Allegheny County*, where she joined the four Justices who dissented in *Lynch*. See *supra* note 3.

29 [The wall] metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. . . . "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." Nor does the Constitution require complete separation of church and state . . . .

*Lynch*, 465 U.S. at 673 (quoting *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973)).

30 *Id.* at 687.

31 *Id.* at 688-89.

32 *Id.* at 687-88.

ment" of religion.<sup>33</sup> Justice O'Connor left the entanglement prong of the *Lemon* test undisturbed.<sup>34</sup> Under the revised test, she concluded that the *Lynch* creche did not violate the establishment clause.<sup>35</sup>

Three Justices joined Justice Brennan in dissent. Justice Brennan echoed Justice O'Connor's concern with the impact of government action upon a person's sense of belonging in the political community.<sup>36</sup> The dissent did not explicitly adopt the suggested revision of the *Lemon* test, but Justices Brennan and Blackmun have frequently cited this opinion as precedent in later opinions in which they use the endorsement test.

## 2. *Wallace v. Jaffree*:<sup>37</sup> Endorsement Language First Appears in a Majority Opinion

In 1985, after *Lynch*, the Court considered an Alabama statute that provided for a moment of silence "for meditation or voluntary prayer."<sup>38</sup> Two members of the *Lynch* majority, Justices Powell and O'Connor, joined the four dissenters in *Lynch* to strike down the statute under the establishment clause. For the first time, a majority of the court referred to endorsement in applying the *Lemon* test. Justice O'Connor did not join in the majority opinion, but provided a careful endorsement analysis in a separate concurring opinion.<sup>39</sup>

Writing for the majority, Justice Stevens began his analysis with the three-pronged approach suggested in *Lemon*. Focusing first on the purpose prong, he began with a reference to Justice O'Connor's concurring opinion in *Lynch*: "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" <sup>40</sup> Justice Stevens concluded that the answer to this question

<sup>33</sup> Justice O'Connor stated her revised approach as follows:

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

*Id.* at 690. For the original statement of the *Lemon* test, see *supra* note 21 and accompanying text.

<sup>34</sup> *Lynch*, 465 U.S. at 689.

<sup>35</sup> "I cannot say that the particular creche display at issue in this case was intended to endorse or had the effect of endorsing Christianity." *Id.* at 694.

<sup>36</sup> The 'primary effect' of including a nativity scene in the city's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the city's decision to include the creche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the creche . . . . The effect on minority religious groups, as well on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.

*Id.* at 701 (citation omitted).

<sup>37</sup> 472 U.S. 38 (1985).

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *Id.* at 67.

<sup>40</sup> *Id.* at 56 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

was dispositive, and framed the conclusion of the Court in the language of the endorsement test.<sup>41</sup>

In concurrence, Justice O'Connor referred extensively to her "suggested refinement of the *Lemon* test" in *Lynch*.<sup>42</sup> Again, she stressed her concern with the impact of the statute on members of religious minorities, who may feel they are not full members of the political community.<sup>43</sup> From this perspective, she re-framed the issue in *Wallace*: "The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer."<sup>44</sup>

In addressing the "purpose" of the statute, Justice O'Connor insisted that it was necessary "to examine [its] history, language, and administration."<sup>45</sup> This inquiry should be "deferential and limited," as the Court "has no license to psychoanalyze the legislators."<sup>46</sup> Even within this limited scope of review, Justice O'Connor concluded that the statute at issue "was intended to convey a message of state encouragement and endorsement of religion," and therefore violated the establishment clause.<sup>47</sup>

Justice O'Connor also looked at the Alabama statute in light of the "effect" prong of the *Lemon* test. She reemphasized endorsement analysis and the revision she suggested in *Lynch*: "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>48</sup> The idea that the "effect of endorsement" should be judged by an "objective observer" altered the endorsement test in a troubling way.<sup>49</sup>

In the second portion of her concurrence in *Wallace*, Justice O'Connor hinted at the reason she sided with the *Lynch* dissenters. She addressed Justice Rehnquist's lengthy dissent, in which he suggested that the Court completely abandon the *Lemon* test. Justice O'Connor here perceived Justice Rehnquist as "urg[ing] the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause."<sup>50</sup> By thus contrasting her position with that of Justice Rehnquist on this issue, Justice O'Connor gave insight into what otherwise seemed to be an aberration in the voting patterns of the Court.

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41 The legislature enacted [the statute] . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

*Id.* at 60 (emphasis added).

42 *Id.* at 69, 76.

43 *Id.* at 69.

44 *Id.* at 73.

45 *Id.* at 74.

46 *Id.*

47 *Id.* at 78.

48 *Id.* at 76.

49 See *infra* notes 124-32 and accompanying text.

50 *Wallace*, 472 U.S. at 79.

### 3. *School District v. Ball*:<sup>51</sup> Endorsement Analysis Evolves

After *Wallace*, the most significant use of the endorsement test occurred in *School District v. Ball*, a 1985 case involving public school instruction at private schools.<sup>52</sup> Decided only a month after *Wallace*, this case gave Justice Brennan his first opportunity, as author of a majority opinion, to utilize the endorsement test to invalidate a government action. Justice O'Connor wrote another separate opinion, this time concurring in part and dissenting in part.<sup>53</sup>

The issue in *Ball* was the constitutionality of two programs run by the Grand Rapids School District. Each program involved public school employees teaching "remedial" and "enrichment" courses at parochial schools. Since the lower courts had agreed that the "purpose" of these programs was "manifestly secular," Justice Brennan's majority opinion focused on their "effect."<sup>54</sup>

Here, Justice Brennan cited Justice O'Connor's concurrence in *Lynch* to support his view that the programs "provide a crucial symbolic link

51 473 U.S. 373 (1985).

52 The Court used endorsement analysis, to a lesser extent than in *Ball*, in six other cases decided after *Wallace* and before *Texas Monthly* and *Allegheny County*.

In *Bowen v. Kendrick*, 108 S. Ct. 2562, 2570-79 (1988), Chief Justice Rehnquist, who has also spoken in disparaging terms about *Lemon*, applied strict *Lemon* test analysis in upholding the Adolescent Family Life Act, which authorizes federal grants to organizations for services and research in the area of adolescent sexual relations. Again, Justice O'Connor concurred, but this time made only passing reference to the endorsement test. *Id.* at 2581-82. Four dissenters, led by Justice Blackmun, would have struck down the statute because it "without a doubt, endorses religion." *Id.* at 2597.

In *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-40 (1987), Justice White, who concurred in *Lemon* but has since disavowed its approach, wrote for the majority in upholding a statute along straightforward *Lemon* lines. Justice O'Connor once again concurred and "clarified" the majority's analysis and use of the endorsement test. *Id.* at 346-49.

In *Edwards v. Aguillard*, 482 U.S. 578, 580-97 (1987), Justice Brennan led the majority in holding Louisiana's "Creation Science Act" to be an unconstitutional endorsement of religion. Justice Scalia provided a lengthy dissent in which he objected not only to the endorsement analysis, but to the entire *Lemon* approach. *Id.* at 610-40.

In *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 482-90 (1986), Justice Marshall, acknowledging endorsement analysis in writing for the majority, upheld state funding for sectarian rehabilitation services. Once again, Justice O'Connor wrote a concurring opinion and expanded upon the endorsement analysis. *Id.* at 493.

In *Aguilar v. Fenton*, 473 U.S. 402, 404-14 (1985), which was decided the same day as *Ball*, Justice Brennan led the same majority to a similar conclusion with respect to a New York law, but stressed the entanglement prong and avoided any endorsement analysis. Significantly, Justice O'Connor argued in a dissenting opinion that the statute should be upheld under an endorsement analysis. *Id.* at 421-31.

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 704-11 (1985), Justice O'Connor joined an eight-Justice majority which struck down a state statute using the *Lemon* test without any endorsement analysis. However, Justice O'Connor wrote a separate concurrence in which she came to the same conclusion using the endorsement test through the eyes of "an objective observer." *Id.* at 711.

53 In the wake of *Wallace* and *Ball*, commentators noted the emergence of endorsement analysis. See Beschle, *supra* note 8; Hurt, *The Use of Endorsement in Establishment Clause Analysis—The Key to a New Consensus*, 8 MISS. C. L. REV. 1 (1987); Loewy, *Rethinking Government Neutrality Toward Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986); Smith, *supra* note 8; Note, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465; Note, *Wallace v. Jaffree: The Lemon Test Sweetened*, 22 HOUS. L. REV. 1273 (1985).

54 *Ball*, 473 U.S. at 383. The Court found a secular purpose because the subjects being taught were strictly secular. They included "Arts and Crafts, Home Economics, Spanish, Gymnastics, Year-book Production, Christmas Arts and Crafts, Drama, Newspaper, Chess, Model Building, and Nature Appreciation." *Id.* at 376-77.



between government and religion.”<sup>55</sup> He then framed the issue as a blend of his “symbolic link” and Justice O’Connor’s endorsement concepts.<sup>56</sup> Justice Brennan referred to the physical proximity of the public and parochial instruction as a “powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same [classrooms] at some other time in the day.”<sup>57</sup> Based upon this, and other more straightforward *Lemon* violations, Justice Brennan concluded that both of the programs under scrutiny violated the establishment clause by having “the effect of promoting religion.”<sup>58</sup>

Justice O’Connor wrote a brief separate opinion, concurring in part and dissenting in part. Although she focused on Justice Brennan’s “effect” analysis, she did not refer to the question of endorsement anywhere in her opinion.<sup>59</sup>

*Lynch*, *Wallace*, and *Ball* illustrate that changes in the composition of the Court have triggered changes in establishment clause analysis. Justice O’Connor’s sensitivity to the feelings of religious minorities motivated her to propose a revision of the purpose and effect prongs of the *Lemon* test which would focus the analysis on endorsement. Writing separately in concurrence, Justice O’Connor has struggled to define the endorsement test and persuade a majority of the Court to adopt it. The following two cases, handed down in the 1988 term, reveal that she has achieved that goal: Justices Blackmun, Brennan, Marshall, and Stevens have joined Justice O’Connor in formally adopting the endorsement test as the current method of establishment clause analysis.

## II. *Texas Monthly*<sup>60</sup> and *Allegheny County*:<sup>61</sup> “Endorsement” of the Endorsement Test

In the October 1988 term, these two cases, although divergent in subject matter, established for the first time that Justice O’Connor’s endorsement analysis has gained a firm foothold in the Court’s jurisprudence. The *Lemon* test underwent a metamorphosis, and the sheer number of opinions and pages of text in these cases indicates that the development of establishment clause analysis has reached a new plateau. Although the adoption of a new analytical approach seemed to catch

<sup>55</sup> *Id.* at 385.

Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

*Id.* at 389.

<sup>56</sup> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

*Id.* at 390. Justice Brennan also emphasized the impact this might have on an audience of young, impressionable school children. *Id.*

<sup>57</sup> *Id.* at 392.

<sup>58</sup> *Id.* at 397.

<sup>59</sup> *Id.* at 388-400.

<sup>60</sup> 109 S. Ct. 890 (1989).

<sup>61</sup> 109 S. Ct. 3086 (1989).

some Justices by surprise,<sup>62</sup> any future attempt to deal with the somewhat muddled area of establishment clause jurisprudence must necessarily involve the endorsement test.

### A. *Texas Monthly*

The appellant, *Texas Monthly, Inc.*, published a general interest magazine. Under a prior statute, Texas had exempted magazine subscriptions from its state sales tax.<sup>63</sup> During this time, Texas also had explicitly exempted religious periodicals from this tax.<sup>64</sup> However, during a three year period from 1984-1987, Texas eliminated the sales tax exemption for magazines in general while maintaining the exemption for religious periodicals. *Texas Monthly* paid nearly \$150,000 in sales tax under protest and sued to recover the payments on establishment clause and free press clause grounds.<sup>65</sup>

The state trial court found that the religious exemption violated both the establishment clause and the free press clause and struck down the tax as applied to nonreligious periodicals.<sup>66</sup> The Texas Court of Appeals applied the *Lemon* test and reversed the judgment of the trial court.<sup>67</sup>

In the United States Supreme Court, this case produced four different opinions containing four different modes of analysis. Justice Brennan, joined by Justices Marshall and Stevens, announced the judgment of the Court. Justice Brennan's plurality opinion relied heavily upon both his own dissent and Justice O'Connor's concurrence in *Lynch*.<sup>68</sup> Justice White concurred in the judgment and based his decision on free press clause grounds.<sup>69</sup> Justice Blackmun, joined by Justice O'Connor, also concurred in the judgment but would have decided the case on a more narrow basis.<sup>70</sup> Justice Scalia, joined by the Chief Justice and Justice Kennedy, dissented citing overriding free exercise values.<sup>71</sup>

#### 1. The Plurality

The plurality decided that the trial court had properly concluded that the religious exemption violated the establishment clause.<sup>72</sup> Justice Brennan noted that, in examining a challenged statute:

62 *Id.* at 3141 (Kennedy, J., dissenting) ("[T]he majority's opinion in this case suggests that this novel theory is fast becoming a permanent accretion to the law.")

63 TEX. TAX CODE ANN. § 151.320 (Vernon 1982).

64 Texas exempted "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." TEX. TAX CODE ANN. § 151.312 (Vernon 1982).

65 *Texas Monthly*, 109 S. Ct. at 894-95.

66 *Id.* at 895. The trial court held that its only course of action was to strike down the tax as applied to nonreligious periodicals because it was "without power to rewrite the statute to make religious periodicals subject to tax."

67 *Id.* The Court of Appeals also rejected *Texas Monthly's* free press claim.

68 *Id.* at 894.

69 *Id.* at 905.

70 *Id.*

71 *Id.* at 907.

72 *Id.* at 894. The plurality chose not to address the free press clause claim. *Id.*

[it] is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.<sup>73</sup>

The footnote following this quotation indicated that Justice Brennan was, in fact, applying endorsement analysis in reaching his decision.<sup>74</sup>

The plurality opinion then discusses the necessity of a secular aim or neutrality as a requirement in such a statute. Recognizing that government activities can permissibly benefit religion, Justice Brennan maintained that such benefits may only accrue as the result of a policy that supports a broad secular objective and only incidentally benefits religious groups.<sup>75</sup> Justice Brennan cited *Widmar v. Vincent*<sup>76</sup> and *Walz v. Tax Commission*<sup>77</sup> for the proposition that, in determining the constitutional validity of such statutes, it is crucial that "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well."<sup>78</sup> It was on this basis that the plurality distinguished *Walz*, which was the case most nearly on point.<sup>79</sup>

The plurality then tied this requirement of a neutral secular aim to the endorsement framework. The fact that a government action benefits religious groups does not affect its constitutionality if it also benefits a large number of nonsectarian groups and has a legitimate secular end. But when government directly subsidizes religious groups exclusively, "it 'provides unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."<sup>80</sup> Therefore, under the plurality approach, any statute that directly benefits religious groups but is not part of a broader

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73 *Id.* at 896. Justice Brennan footnoted this passage and cited with approval Justice O'Connor's concurrence in *Wallace*. "[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Id.* at 896 n.1 (quoting *Wallace*, 472 U.S. at 69 (1985)).

74 *Texas Monthly*, 109 S. Ct. at 896 n.1. Stating that Justice O'Connor's *Wallace* concurrence "properly emphasized" this point, Justice Brennan noted, "*Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Id.*

75 *Id.* at 897.

76 454 U.S. 263 (1981) (The Court held that a state university which allows students to use its facilities may not deny access to students who wish to use the areas for religious worship or discussion). Justice Brennan referred to *Widmar* to support this point: "Although religious groups benefit from access to university facilities, a state university may not discriminate against them based on the content of their speech, and the university need not ban all student group meetings on campus in order to avoid providing any assistance to religion." *Texas Monthly*, 109 S. Ct. at 897.

77 397 U.S. 664 (1970).

78 *Texas Monthly*, 109 S. Ct. at 897.

79 In *Walz*, the Court upheld a New York property tax exemption which applied to certain non-profit organizations, including religious properties. The plurality in *Texas Monthly* maintained that this decision was based on the fact the exemption furthered legitimate secular goals and only incidentally benefited religious groups. *Texas Monthly*, 109 S. Ct. at 898-99. But the dissenters disagree with this view of *Walz*. See *infra* notes 88-89 and accompanying text.

80 *Texas Monthly*, 109 S. Ct. at 899-900 (quoting *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)).

government policy with a secular purpose is a *per se* violation of the establishment clause. Since such a statute would provide unjustifiable awards to religious organizations, the community would automatically perceive that the government was endorsing religion.

Next, the plurality addressed the issue of whether the free exercise clause or the establishment clause *required* the exemption for religious periodicals. They held that neither clause required the state to make such an exemption.

## 2. The Concurring Opinions

Justice White added a short concurrence in this case.<sup>81</sup> He felt that the free press clause was dispositive. Citing *Arkansas Writer's Project v. Ragland*,<sup>82</sup> the Justice noted that the "[a]ppellant is subject to the tax, but other publications are not because of the message they carry. This is plainly forbidden by the Press Clause of the First Amendment."<sup>83</sup>

Justice Blackmun, joined by Justice O'Connor, also concurred in the judgment.<sup>84</sup> He had more difficulty reconciling the establishment clause and free exercise clause values. "The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden."<sup>85</sup> The Justice suggested that it is possible for a state to write a statute consistent with both values. But, this suggestion sounds very similar to the plurality's notion that the breadth of the statute is the determinative factor.<sup>86</sup>

Finally, Justice Blackmun decided to leave the free exercise issue for another day, and concluded that a tax exemption "limited to the sale of religious literature by a religious organization" violates the establishment clause.<sup>87</sup> In keeping with this view, Justice Blackmun indicated that if, as appellees suggested at oral argument, the exemption would apply to atheistic literature distributed by an atheist group, then the statute would be valid. However, the Justice rejected this construction and found the statute unconstitutional.

81 See *supra* note 69 and accompanying text.

82 481 U.S. 221 (1987). *Arkansas Writer's Project* involved an Arkansas sales tax statute which exempted newspapers, and religious, professional, trade and sports journals. Appellants published a general interest magazine which the state courts had determined could not take advantage of the exemption. The Court, per Justice Marshall, held that the statute distinguished between periodicals based solely upon their content and that "[r]egulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment." *Id.* at 229-30 (citation omitted).

83 *Texas Monthly*, 109 S. Ct. at 905.

84 See *supra* note 70 and accompanying text.

85 *Texas Monthly*, 109 S. Ct. at 906.

86 It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.

*Id.*

87 *Id.* at 907.

### 3. The Dissent

In a scathing dissent, Justice Scalia, joined by the Chief Justice and Justice Kennedy, accused the majority of demolishing prior precedent and leaving state tax laws in disarray.<sup>88</sup> He felt that *Walz* was directly on point and that the plurality's interpretation was implausible at best. Justice Scalia argued that the decision in *Walz* was not based upon the fact that the exemption was broadly drawn and covered the property of non-religious as well as religious organizations, but upon the idea that an exemption for religious groups is a valid way to guard against the " 'latent dangers' of government hostility towards religion 'inherent in the imposition of property taxes.' " <sup>89</sup>

The dissent went on to note that there is conceptual space between the establishment clause and free exercise clause. Therefore, accommodations of religion that are not required under the free exercise clause may still be permitted under the establishment clause. Justice Scalia felt that the Texas tax exemption was arguably required under the free exercise clause, and, if not, then it was certainly close enough to being required that it fell into the gray area between the clauses.

#### B. *Allegheny County*

This controversy arose when the ACLU challenged two holiday displays in Pittsburgh as violations of the establishment clause. The first display was a creche located on the grand staircase of the county courthouse. The second was a Chanukah menorah erected outside the city-county building. The district court, relying on *Lynch*,<sup>90</sup> held that both the creche and the menorah were merely parts of larger holiday displays and, as such, were constitutional. On appeal, a divided panel of the Third Circuit reversed. The panel distinguished *Lynch*, and held that the displays were unconstitutional endorsements of religion. The court based this holding on the effects prong of the *Lemon* test and did not consider whether either display had an improper purpose or fostered impermissible entanglement between government and religion.<sup>91</sup>

The multitude of opinions in this case shows just how divided the Court is on this issue. Despite this division, a majority of the Court explicitly adopted the endorsement analysis, as presented in the concurring and dissenting opinions of *Lynch*, as the appropriate constitutional standard.

#### 1. Justice Blackmun's Majority/Plurality Opinion

In the first two parts of his opinion, Justice Blackmun, joined by Justices O'Connor and Stevens, put forth the facts of the case and a rather significant history of the development of Chanukah and its traditions in Jewish-American culture. Drawing from the record and a wide variety of secondary sources, the Justice painted a picture of Chanukah in America

<sup>88</sup> See *supra* note 71 and accompanying text.

<sup>89</sup> *Texas Monthly*, 109 S. Ct. at 911 (quoting *Walz*, 397 U.S. at 673).

<sup>90</sup> See *supra* notes 24-36 and accompanying text.

<sup>91</sup> *Allegheny County*, 109 S. Ct. at 3098.

as "only a minor festival"<sup>92</sup> which had taken on far greater secular significance due to its proximity to Christmas. This secular nature of the Chanukah festival was of enormous importance in the Justice's final determination of the case.

Then, Justice Blackmun, delivering the opinion for a majority of the Court,<sup>93</sup> recognized the muddled history of the establishment clause and reaffirmed the three-pronged *Lemon* test. In the process, however, the Court set aside any doubts remaining after *Texas Monthly*, that *Lemon* had been revised in accordance with the concurring and dissenting opinions in *Lynch*. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"<sup>94</sup> Here, for the first time, a majority of the Court explicitly adopted the language of "endorsement," as Justice O'Connor stated it, as the definitive interpretation of the *Lemon* test.

If there was any doubt of Justice Blackmun's intent to adopt endorsement analysis, he clearly put it to rest later in his opinion. He criticized the *Lynch* majority for providing no guidance for future establishment clause challenges of government action. Instead, he looked to the concurrence of Justice O'Connor and the dissent in *Lynch* for an analytical framework.

Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in *Lynch* agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. . . . Since *Lynch*, the Court has made it clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices."<sup>95</sup>

By using the language of the endorsement analysis and specifically referring to *Lynch*, Justice Blackmun unquestionably indicated that a present majority of the Court views this analytical tool as the proper way to unravel establishment clause riddles.

Recognizing endorsement analysis as its measuring stick, the Court applied it to the creche display. The creche scene was the central focus of the interior decorations of the county courthouse. It was located on the grand staircase which was the "'main' and 'most beautiful part' of the building."<sup>96</sup> The creche consisted of the traditional nativity scene topped by an angel with a banner proclaiming "Gloria in Excelsis

92 *Id.* at 3097.

93 *Id.* at 3099. (In Part III-A, Justice Blackmun was joined by Justices Brennan, Marshall, Stevens and O'Connor.)

94 *Id.* at 3101 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

95 *Id.* at 3103 (quoting *School Dist. v. Ball*, 473 U.S. 373, 390 (1985)).

96 *Id.* at 3104.

Deo.”<sup>97</sup> In addition, there were no other symbols of the holiday season in the area except for a “floral frame” of poinsettias and other seasonal greens.

With this setting in mind, the majority concluded that, despite the fact that the county government could celebrate Christmas in some secular manner, “[h]ere, Allegheny County has transgressed [the] line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.”<sup>98</sup> Since, in the view of the majority, the creche in its particular setting sent a message of endorsement to adherents of Christianity and a message of disapproval to nonadherents, the display violated the first amendment and was permanently enjoined.

Finally, Justice Blackmun delivered an opinion on the menorah display. The dissenters and Justice O'Connor concurred in the result.<sup>99</sup> The menorah was part of an outdoor display in front of the city-county building in Pittsburgh. The center of the display was a 45-foot Christmas tree with the 18-foot menorah on the right and a sign from the mayor which was entitled “Salute to Liberty” on the left.<sup>100</sup>

Justice Blackmun phrased the issue as, “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 holiday season, which has attained a secular status in our society.”<sup>101</sup> Examining the menorah in its context, as the endorsement test requires, the majority found credence in the latter interpretation. The government is permitted to celebrate the secular aspects of Christmas, and the Christmas tree is a constitutionally permissible symbol of the secular nature of the holiday. Therefore, Justice Blackmun concluded, the secular Christmas tree and the secular salute to liberty lend this characteristic to the admittedly religious symbol of the menorah.<sup>102</sup>

The significance of Justice Blackmun's opinion lies primarily in its precedential impact. The indications in *Texas Monthly* that the Court had adopted the endorsement test were confirmed. The Court had revised the purpose and effect prongs of the *Lemon* test in keeping with Justice O'Connor's concurring opinions over the last several years.

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97 *Id.* at 3094.

98 *Id.* at 3105.

99 *Id.* at 3111.

100 *Id.* at 3094-95.

101 *Id.* at 3113.

102 “In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.” *Id.* at 3114. Note that Justice Blackmun based his decision entirely upon the effects prong:

The conclusion here that, in this particular context, the menorah's display does not have the effect of endorsing religious faith does not foreclose the possibility that the display of the menorah might violate either the ‘purpose’ or ‘entanglement’ prong of the *Lemon* analysis. These issues were not addressed by the Court of Appeals and may be considered by that court on remand.

*Id.* at 3115.

## 2. The *Allegheny County* Concurring Opinions

The first concurring opinion was that of Justice O'Connor, who concurred in part and concurred in the judgment. Although she joined Justice Blackmun in his opinion almost entirely, she disagreed with his application of the endorsement test to the menorah display.

After emphasizing the fact that the circumstances of the particular governmental activity are of vital importance in endorsement test analysis,<sup>103</sup> Justice O'Connor went on to apply this totality of circumstances standard to the menorah. She saw Justice Blackmun's treatment of the issue as the creation of a new standard where "an inference of endorsement arises every time government uses a symbol with religious meaning if a 'more secular alternative' is available."<sup>104</sup> She further viewed his subsequent finding, that the use of a more religious symbol in this circumstance was justified, as an exception to the new rule.

According to Justice O'Connor, the endorsement analysis should not be bound by such arbitrary constructions as the "more secular alternative" test.<sup>105</sup> Analytical tools, such as the "more secular alternative" test, were not part of endorsement analysis when it first appeared in *Lynch*, and are an unwelcome addition.

In her own application of endorsement analysis to the menorah display, Justice O'Connor first looked to the purpose prong of *Lemon*. Focusing on the sign which purported to salute liberty,<sup>106</sup> she concluded that the government's purpose was not to endorse religion.<sup>107</sup>

Turning to the effects prong and applying the endorsement analysis, the Justice again concluded that the display was constitutional.

Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer<sup>108</sup> would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens.<sup>109</sup>

<sup>103</sup> *Id.* at 3118.

<sup>104</sup> *Id.* at 3124.

<sup>105</sup> My conclusion does not depend upon whether or not the city had 'a more secular alternative symbol' of Chanukah . . . just as the Court's decision in *Lynch* clearly did not turn on whether the city of Pawtucket could have conveyed its tribute to the Christmas holiday season by using a 'less religious' alternative to the creche symbol in its display of traditional holiday symbols.

*Id.* at 3124.

<sup>106</sup> The sign read, "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 3123.

<sup>107</sup> "This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom." *Id.*

<sup>108</sup> Use of the language "reasonable observer" differs from earlier language used by Justice O'Connor. See *infra* notes 130-32 and accompanying text.

<sup>109</sup> *Allegheny County*, 109 S. Ct. at 3123.



In effect, the secular nature of the Christmas tree and the sign saluting liberty are the circumstances surrounding the display of the menorah. Taken in combination, and applying the totality of circumstances test, Justice O'Connor's view was that the menorah did not have the unconstitutional effect of endorsing religion. In other words, it did not make Jews feel like insiders or non-Jews feel that they were not full members of the political community.

Justice Brennan also wrote a separate opinion, concurring in part and dissenting in part. He was joined by Justices Marshall and Stevens. Justice Brennan agreed with the majority's handling of the creche display, but took issue with the Court's conclusion that the menorah was constitutional.

Although conceding that the Christmas tree can be considered a secular symbol,<sup>110</sup> Justice Brennan was quick to point out that even a Christmas tree, when surrounded by or decorated with other religious symbols, can take on religious significance. In Justice Brennan's view, both Justice Blackmun and Justice O'Connor abandoned the contextual inquiry required under endorsement analysis in their discussion of the menorah display.<sup>111</sup> The Justice reasoned that it was the decidedly religious nature of the menorah which gave context to the entire display.

Like Justice Brennan, Justice Stevens disagreed with the Court's decision with respect to the menorah.<sup>112</sup> After discussing the historical background of the actual text of the establishment clause,<sup>113</sup> Justice Stevens turned to the issue at hand. He added yet another analytical chip into the endorsement pot: "In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."<sup>114</sup> According to Justice Stevens, the same device that is used in the free press and free speech areas should have a place in endorsement analysis. Rather than an outright ban on religious displays of any kind, which may indicate some hostility to religion, a presumption against the use of religious symbols by government would "give due regard to religious and nonreligious members of the society."<sup>115</sup>

In employing his presumption against religious symbols, Justice Stevens acknowledged that the menorah display may have conveyed a message of pluralism or of freedom to choose one's own beliefs. However, the message was not sufficiently clear to overcome the presumption.<sup>116</sup>

The final opinion was that of Justice Kennedy, concurring in the judgment in part and dissenting in part. He was joined by the Chief Justice, and Justices White and Scalia. Justice Kennedy concurred in the

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110 *Id.* at 3125.

111 *Id.* at 3126.

112 See *supra* notes 110-11 and accompanying text.

113 *Allegheny County*, 109 S. Ct. at 3129.

114 *Id.* at 3131.

115 *Id.* at 3132-33.

116 *Id.* at 3133-34.

judgment with respect to the menorah and dissented with respect to the creche.

Justice Kennedy began his opinion by expressing his distaste for the *Lemon* test. Although he felt constrained by the *Lemon* framework, he did "not wish to be seen as advocating, let alone adopting, that test as [the] primary guide."<sup>117</sup> Instead, Justice Kennedy proposed his own interpretation of the effects prong of the *Lemon* test. He focused on coercion. Under this alternative analysis, two important factors come into play:

[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."<sup>118</sup>

Justice Kennedy defined coercion rather broadly to include indirect as well as direct coercion. For example, he indicates that the permanent erection of a cross on top of a government building could constitute coercion.<sup>119</sup> Justice Kennedy argued that this method of analysis is consistent with the majority opinion in *Lynch* and the rest of establishment clause jurisprudence. In addition, the Justice suggested that the majority's handling of this case overruled *Lynch* sub silentio.<sup>120</sup> Applying his coercion standard, Justice Kennedy concluded that the government had not used its power to coerce belief in the tenets of Christianity or Judaism. The government had not required citizens to participate in religious ceremonies, nor had it used tax money to support one religious faith. Finally, he concluded that the creche and the menorah are "purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."<sup>121</sup> Therefore, government may use nearly any religious symbol that it wishes, within certain parameters.<sup>122</sup>

Justice Kennedy then criticized the adoption of the endorsement test. In his view, the majority's endorsement analysis is out of step with establishment clause precedent. He argued that consistent application of endorsement analysis would invalidate many practices which have become a part of our tradition and culture. Although Justice O'Connor would argue that practices such as legislative prayer, Thanksgiving proclamations and "In God we trust" as the national motto would be safe under the endorsement test,<sup>123</sup> Justice Kennedy feared that these and similar practices will be found unconstitutional.

The disagreement among the Justices in this area is truly astounding. *Texas Monthly* and *Allegheny County* produced nine opinions, various

117 *Id.* at 3134.

118 *Id.* at 3136 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

119 *Id.* at 3137. He adds that when the government's act is symbolic or passive "any intangible benefit to religion is unlikely to present a realistic risk of establishment." *Id.*

120 *Id.* at 3140.

121 *Id.* at 3139.

122 See *infra* notes 148-56 and accompanying text.

123 *Allegheny County*, 109 S. Ct. at 3121.

methods of analysis, several proposed analytical tools, and page after page of often acerbic rhetoric. The establishment clause has seen considerable scrutiny since 1947, yet the Court has not reached anything close to a consensus. The division is not merely philosophical. There is disagreement even as to the proper method of analyzing establishment clause issues. Furthermore, among the majority of Justices who do agree that the endorsement test should be used, there is no consistency in application. The Justices have even failed to agree on the definition of essential terms.

### III. A Closer Look at Current Establishment Clause Analysis: The Problem of Perspective

While the endorsement test has the benefit of increased sensitivity to the feelings of religious minorities, it also has some analytical problems. One of the most intriguing of these problems stems from the revised "effects" prong of the *Lemon* test, which now asks whether the statute or governmental action is *perceived* as an endorsement of religion. The problem is the difficulty in finding an appropriate perspective from which to make this determination. It calls for a sensitivity to the feeling of exclusion which makes the suggested "objective observer" seem impossible or irrelevant, whereas the alternative "reasonable observer" is too indefinite.<sup>124</sup>

#### A. *The Problem With Objectivity*

One perspective the Court suggested was that of an "objective observer." However, the motivating force behind the entire endorsement analysis purports to be a new sensitivity to whether adherents of a particular religion or of religion in general feel favored, or non-adherents feel left out.<sup>125</sup> Given this emphasis on feeling, it seems appropriate to question not only (1) whether "objectivity" is possible, but also (2) whether it is desirable.

Consider two potential types of objective observers. First, the objective observer as simply any person, including each of the sitting Justices, who imagines herself putting on a cloak of objectivity. The problem with this observer is that one's judgment is so closely linked with personal experience and values that objectivity, in any meaningful sense, is impossible. To some extent, people can set aside personal biases, be "value-neutral," and consider a problem from what one understands to be another person's perspective. But the observer is limited by her experience and understanding of other people, as well as her ability to let go of deeply held convictions. After a person considers as many perspectives as he can imagine, he ultimately judges in a way that is consistent with his own perspective.

If it were possible for people to simply abandon their biases and judge objectively, opinions would converge. In a relatively homogenous

<sup>124</sup> For an alternative criticism of the perspective problem in judging endorsement, and in particular the "objective observer" problem, see Smith, *supra* note 8, at 291-95.

<sup>125</sup> See *supra* notes 32-33 and accompanying text and *infra* notes 131-32 and accompanying text.

group such as the Supreme Court, there should be a good chance of agreement between nine "objective observers." The fractioning of the Court in recent establishment clause cases demonstrates that objectivity is not so easily achieved.<sup>126</sup> Disagreement among the Justices, as well as everyday experience, indicates that it is impossible to judge objectively simply by cloaking values.

A second potential objective observer is a hypothetical construct, abstracted from the perspective of any one person. The problem with a hypothetical person, however, is that the persuasive power of personal experience is lost in the process of abstraction from real to ideal. Real persons, who cannot identify with an ideal, value-neutral person, will not be persuaded to adopt its judgments.<sup>127</sup> Real people ask: "Why should we, who have values, personal experience, and perspective, adopt the judgments of a fictional character who does not?"<sup>128</sup> If the hypothetical perspective is one that real people cannot achieve, real people will not be persuaded to adopt the view it reveals.

Thus, both attempts at objectivity fail to produce the desired result. The conclusion drawn is that objectivity is an unrealistic attribute of the endorsement observer. Rather than attempting to construct ideal viewpoints, we must accept the perspectives that we have. But even if this conclusion is false, and some form of objective observer is available, it is not clear that it would be the most desirable perspective from which to perceive endorsement.

Initially, Justice O'Connor suggested that objectivity was necessary to evaluate the effect of a government act. In her initial characterization of the relevant observer in *Lynch v. Donnelly*, O'Connor singled out objective observers as the target of her concern. Because part of the audience of a government action may not have access to the contextual indicators of the intent behind the law or practice, Justice O'Connor reasoned, they may "receive a message determined by the 'objective' content of the statement."<sup>129</sup> Even if the government does not intend to endorse religion by its action, that part of the audience which receives only the "objective content" may still feel the "effect" of endorsement. This is the rationale for having an effects prong in addition to a purpose prong: actions done with permissible intent may still have impermissible effects upon those unaware of the intent.

Justice O'Connor altered this initial formulation of the objective observer in *Wallace v. Jaffree*: "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 [reli-

126 There were four opinions written in the 5-4 *Lynch* decision, six opinions written in the 6-3 *Wallace* decision, four opinions written in the 6-3 *Texas Monthly* decision, and five opinions written in the 5-4 *Allegheny County* decision. Opinion might diverge even further if the Court included members of non-Christian religions.

127 Such was the case when John Rawls attempted to utilize a hypothetical group of "objective" persons to come to a consensus on the best principles upon which to found a democratic government. See J. RAWLS, *A THEORY OF JUSTICE* (1971).

128 This critique is more fully developed in two essays collected by Norman Daniels. See Nagel, *Rawls on Justice*, and Dworkin, *The Original Position* in *READING RAWLS* 1, 16 (N. Daniels, ed. 1975).

129 *Lynch*, 465 U.S. at 690 (emphasis added).

gion]."<sup>130</sup> This characterization involves an observer who has significantly more information about the statute or practice in question than did the observer defined in *Lynch*. Indeed, the new characteristics clash with the old: whereas the original objective observer was ignorant of contextual indicators of intent, the new objective observer is aware of the context. In either case, Justice O'Connor is consistent in her suggestion that the endorsement observer be objective.

However, both formulations conflict with the underlying purpose of the endorsement test: shifting the focus of analysis from the "advancement or inhibition of religion"<sup>131</sup> to the feelings of individual members of religious minority groups. As Justice O'Connor has repeatedly expressed, we have to be aware of government actions which make people feel they are excluded from full participation in the political community.<sup>132</sup> Rather than calling for a detached, "objective" perspective, this seems to call for a more empathetic, subjective viewpoint.

This is why objectivity is not the most desirable characteristic for an endorsement observer. The concept of objectivity is vague, but if it means anything, it means a detachment from any individual perspective and detachment from emotion. An objective observer, whether or not he is acquainted with the legislative history or text of a statute, would not be in a position to feel the effect of endorsement or disapproval. Instead, those persons who are most strongly aligned with or against the endorsed religion are more likely to feel the effect.

In summary, the ideal of objectivity is of little use in the endorsement test. It may not be possible to be objective, and even if it is possible, it may not be desirable to be objective in determining whether or not a government act has the effect of an endorsement. Perhaps it is for this reason that the Court, in recent discussions of the endorsement test, has referred to a "reasonable observer" as the relevant judge of endorsement.

### B. More "Reasonable" Alternatives

Justice Blackmun, writing for the majority in *Allegheny County*, used the phrase "reasonable observer" rather than "objective observer" to describe the relevant perspective for determining whether a government action has the effect of endorsement.<sup>133</sup> An initial question raised by this is whether the phrase "reasonable observer" is meant to be a synonym for "objective observer," or is rather meant to denote a different perspective altogether. A second, more penetrating issue is whether "rea-

130 *Wallace*, 472 U.S. at 76. Justice O'Connor repeated this characterization of the relevant perspective in a later opinion: "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." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987).

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

132 See *supra* note 32 and accompanying text. This quotation from *Lynch* was cited by Justice O'Connor in *Wallace*, 472 U.S. at 69 and by Justice Brennan in *Texas Monthly v. Bullock*, 109 S. Ct. 890, 896-97 (1989).

133 "[T]he Constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'" *Allegheny County*, 109 S. Ct. at 3115 (quoting *Witters v. Washington Dep't of Serv-*

sonable" is any more useful than "objective" in identifying an appropriate perspective.

At one point in his concurring opinion in *Allegheny County*, Justice Kennedy uses "reasonable observer" and "objective observer" interchangeably, implying that the two phrases are synonymous.<sup>134</sup> However, neither Justice Blackmun nor Justice O'Connor use the phrase "objective observer" anywhere in their opinions in this case. Furthermore, both Justice Blackmun and Justice O'Connor cite to Professor Tribe's discussion of the endorsement test, where he suggests that a "reasonable non-adherent" should make the endorsement determination and that reasonableness is essential to this task in order to avoid the problem of hypersensitivity.<sup>135</sup> Thus, evidence suggests that in this context, the Court intends reasonableness to be an improvement upon objectivity, rather than a synonym.

But the Court's use of the term has thus far been ambiguous—it is not clear whether *any* reasonable observer can make the endorsement determination, or whether one type of reasonable observer is more ideal than another. To illustrate this ambiguity, compare the use of reasonableness in this context with its use in other areas of the law. In some instances, reasonable describes a quality of expected behavior.<sup>136</sup> In others, reasonable measures a quantity of evidence or behavior.<sup>137</sup> It is

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ices for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment) (emphasis added)).

This change was echoed by Justice O'Connor and Justice Kennedy:

"The question under endorsement analysis, in short, is whether a *reasonable observer* would view such longstanding practices as a disapproval of their religious choices . . ." *Id.* at 3121 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added).

"The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a '*reasonable observer*' may 'fairly understand' government action to . . ." *Id.* at 3141 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added).

134 "[T]he very nature of the endorsement test, with its emphasis on the feelings of the *objective observer*, easily lends itself to this type of inquiry. If there be such a person as the '*reasonable observer*,' I am quite certain that he or she will take away a salient message . . ." *Id.* at 3145 (emphasis added).

135 L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-15 (2d ed. 1988).

136 In negligence suits, for example, courts adopted reasonableness to avoid having to make allowance for individual weaknesses such as poor judgment or carelessness. Schwab, *The Quest for the Reasonable Man*, 45 Tex. B. J. 178 (1982). This began in *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837), where a farm worker argued that he used his best judgment in constructing a hayrack which spontaneously ignited. The plaintiff, a neighbor whose house burned down as a result of the fire, convinced the court that the farm worker should be held to a higher standard of care, i.e., that of the reasonable person.

137 In criminal law, reasonableness is part of the standard of proof for conviction: "It is a basic policy of Anglo-American criminal law that, in view of the serious consequences which follow conviction of crime, the prosecution has the burden of proving beyond a reasonable doubt all the facts necessary to establish the defendant's guilt." W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 48 (1986).

It also describes the level of evidence which a police officer needs in order to arrest, or to stop and question a suspect. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (under the fourth amendment's proscription of unreasonable searches and seizures, an officer must have reasonable grounds to suspect a present danger before he can stop and question an individual); *Draper v. United States*, 358 U.S. 307, 310 (1959) (officer must have reasonable grounds to believe that the suspect has committed a crime before arrest).

Reasonableness is also the key to determining whether there was sufficient provocation to reduce a murder charge to manslaughter. See Rauf, *The Reasonable Man Test in the Defence of Provocation*, 30 CRIM. L. Q. 73 (1987).

also used to embody an interpretive perspective.<sup>138</sup> In each of these contexts, reasonableness *standardizes* judgment; it is a characteristic which every person is expected to possess, or a quantity everyone can estimate intuitively. No matter what values or convictions a person may have, he is expected to make reasonable judgments.

Such standardization is valuable in determining whether a defendant should be liable for negligence. It is fundamental in tort law that if a person has acted unreasonably, even though unintentionally, she is liable for the damage she causes.<sup>139</sup> Similarly in criminal law, we expect a person who has been provoked to respond reasonably. If he responds with unreasonable force or after a reasonable period of cooling off, then the fact that he has been provoked loses its potential to mitigate.<sup>140</sup> Further, in contract law, if a person is unreasonable in relying upon the promises of another, she cannot expect the court to estop that other party from asserting a lack of consideration.<sup>141</sup> As a society, we expect everyone to live up to a universal standard of reasonableness.

However, it is not so easy to standardize judgment in the realm of religion.<sup>142</sup> For example, a Protestant would likely find it reasonable to be sensitive to a reading of the "Hail Mary," or to statues of Mary, as signs of a Catholic community. Catholics, on the other hand, are likely to be sensitive to the serving of meat on Good Friday. A Jew may find it reasonable to be sensitive to any public creche or cross. A Jehovah's Witness may find it proper to be sensitive to the Pledge of Allegiance. An Atheist may find it entirely reasonable to be sensitive to the phrase "In God We Trust" on currency. There is no universal standard for reasonableness: a reasonable Jew will have a different perspective than a reasonable Protestant or a reasonable Muslim, and a reasonable Atheist will have a different perspective than any Theist.

The conclusion to be drawn from this is that reasonableness alone does not go very far in isolating the relevant perspective for perceiving endorsement. No one reasonable observer exists in this realm. Whereas reasonable people of different religions may agree upon the standard of

138 In contract law, reasonableness is used to judge the "objective meaning" of contract language. *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 760-61 (2d Cir. 1946)(Frank, J., concurring) (We should view manifestations of intent from the standpoint of a reasonable man in the position of the other party).

It is also used to judge whether or not one party's reliance upon the promise of another was justified. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . ." *RESTATEMENT (SECOND) CONTRACTS* § 90 (1981).

For other examples of the ubiquitous reasonableness standard, see 36 *WORDS AND PHRASES* 405-664 (1962).

139 *PROSSER AND KEETON ON THE LAW OF TORTS* § 31-32 (W. Keeton 5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* § 282 (1985).

140 W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 7.10(b),(d) (1986); 10 *UNIFORM LAWS ANNOTATED, Model Penal Code* § 210.3 (1974).

141 J. CALAMARI & J. PERILLO, *CONTRACTS* § 6-1 (3d ed. 1987); *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981).

142 Professor Tribe suggests that the Court should use reasonableness to emphasize that the endorsement judgment must be made with the proper level of sensitivity. L. TRIBE, *supra* note 135, § 14-15, at 1293. But this begs the question. People with different religious views are likely to disagree on the "proper" level of sensitivity.

care in building a hayrack, they are likely to disagree on what constitutes an endorsement of religion.

The solution to this problem is to allow *any* reasonable observer's genuine objection to signal an establishment clause violation.<sup>143</sup> 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.<sup>144</sup> This approach gives more weight to the feelings of religious minorities.<sup>145</sup>

Arguably, however, this again begs the question. On what basis are courts to determine whether an observer is reasonable or not? Some Christians may find Hindus and Muslims unreasonable per se, especially those who take offense at Christmas trees. Given the Christian bias of the Court, it may be impossible for the present Justices to tell the difference between the amicus brief of a reasonable Hindu and that of an unreasonable Hindu.<sup>146</sup> The most obvious way of making this determination is to study the beliefs and customs of each group and consider what impact the governmental action might have on members of that group.

For example, consider the display upheld in *Allegheny County*, which consisted of a Christmas tree, a menorah, and a "Salute to Liberty" sign. Under the "any reasonable observer" formulation, the effects prong of the endorsement test asks whether any reasonable observer could genuinely perceive this as an endorsement of religion. Justice Brennan argued in dissent that observers who are neither Jewish nor Christian

143 Justice Brennan hints at this approach in his discussion of the menorah at issue in *Allegheny County*:

I would not, however, presume to say that my interpretation of the tree's significance is the "correct" one . . . . 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. Both are reasonable interpretations of the scene the city presented and thus both, I think, should satisfy Justice Blackmun's requirement that the display "be judged according to the standard of a 'reasonable observer.'" I shudder to think that the only "reasonable observer" is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

*Allegheny County*, 109 S. Ct. at 3127 (citations omitted).

144 The inquiry into genuineness could be similar to that which occurs in free exercise cases. See *United States v. Seeger*, 380 U.S. 163, 185 (1965) (sincerity of beliefs held by conscientious objector found to be a threshold question); *Thomas v. Review Board*, 450 U.S. 707 (1981) (whether plaintiff terminated his job because of an honest conviction that his religion forbade it held to be a primary issue on review).

145 Professor Tribe suggests that the relevant perspective from which to judge endorsement is that of "a reasonable non-adherent." L. TRIBE, *supra* note 135, at 1293. This is illuminating insofar as it highlights the deficiency in asking a reasonable Christian whether or not a crèche in the courthouse is an endorsement of Christianity. Inasmuch as adherents are not as likely to find a government endorsement of their religion to be objectionable, this amounts to the same thing as consulting "any reasonable observer."

146 Ideally, the membership of the Court would represent the religious diversity of the nation.



perceived the display as an endorsement of those two religions: a weak attempt by the Christian majority to express religious pluralism.<sup>147</sup> One can imagine that a reasonable Atheist might genuinely perceive this as a governmental endorsement of religion over non-religion. If such objections were genuinely raised, then the governmental act in question certainly does have the effect of endorsing religion, at least from the perspective of the objecting parties.

Thus, the problem of perspective reveals that neither "an objective observer" nor "a reasonable observer" identifies a suitable perspective for perceiving the effect of endorsement. Objectivity is either impossible or undesirable, and reasonableness has little power to standardize religious judgment. If the Court seeks to formulate a test that is consistent with Justice O'Connor's sensitivity toward the feeling of exclusion from the political community, it should abandon the idea of seeking "objectivity" and instead modify the "reasonable" standard to allow for the genuine objection of any reasonable observer to constitute a *prima facie* establishment clause violation.

#### IV. Other Alternatives for Establishment Clause Analysis

Other than modifying the terms of the endorsement test, alternative suggestions for improving establishment clause analysis have arisen in recent Supreme Court opinions. In particular, two suggestions come from *Allegheny County*: Justice Kennedy's "coercion test" and Justice Stevens' "presumption of invalidity."

##### A. Justice Kennedy's "Coercion" Test as an Alternative to Lemon

In his opinion in *Allegheny County*, Justice Kennedy found certain limiting principles in the history of the Union and establishment clause precedent. The function of the religion clauses is to prevent the government from coercing support of or participation in religion. In addition, the government is prohibited from interfering with or oppressing worship. In Justice Kennedy's view, "[b]arring all attempts to aid religion through government coercion goes far toward attainment of this object."<sup>148</sup>

This "coercion test," of course, depends upon the definition of "coercion." Although Justice Kennedy conceded that recent Supreme Court cases had rejected the view that coercion is required for an establishment clause violation,<sup>149</sup> he distinguished these holdings by explaining that he is using a broader definition of the term. "[C]oercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case."<sup>150</sup> Justice Kennedy thereby strips the word "coercion" of the connotation of

147 *Allegheny County*, 109 S. Ct. at 3128-29.

148 *Id.* at 3136. See also *supra* note 118-20 and accompanying text.

149 See Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

150 *Allegheny County*, 109 S. Ct. at 3137.

force or compulsion usually associated with it.<sup>151</sup> Under this broader view of "coercion," certain symbolic speech by the government can be considered coercive.

This formulation raises another concern, however. Under Justice Kennedy's broader definition, all forms of government speech or action can qualify as coercion. Every law, every criminal sentence, every speech by a public official, and every court opinion is designed to enforce some particular view of public policy.<sup>152</sup> Whether the government act is designed to coerce the public not to commit murder, to follow the speed limit, or to hold certain beliefs, the government's only method of effectively speaking on a subject is by taking some sort of "coercive" action.

Perhaps Justice Kennedy does not intend the term "coercion" to describe such action, but one could not be sure given his incomplete definition of the word. Consider the two examples of indirect coercion which Justice Kennedy suggested would constitute establishment clause violations.

First, it would be coercive to erect a Latin cross on the roof of a government building. The obtrusive nature of such a year-round display, in Justice Kennedy's view, "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."<sup>153</sup> But this is indistinguishable from the creche in the Allegheny County courthouse. A display of the birth of Christ placed at the main and most beautiful area of the courthouse is an equally obvious effort to proselytize. A cross on top of a building might easily be passed day after day without being noticed by many visitors to the building. But no visitor could miss the message of "Gloria in Excelsis Deo" on display in that Allegheny County courthouse.<sup>154</sup> Communicating a religious message is necessary for proselytization, and it would seem that placing a religious symbol in a prominent place during a particularly religious time of the year would be as effective a way, if not more so, to deliver such a message.

The second example Justice Kennedy offers where the government could violate his test by using religious symbols is if the government were to recognize all significant Christian holidays with a display but fail to recognize holidays of any other faith.<sup>155</sup> But this assertion dooms the coercion test to the status of a "jurisprudence of minutiae"—a label

<sup>151</sup> Webster's Dictionary defines "coerce" as:

1: to restrain, control, or dominate, nullifying individual will or desire, 2: to compel an act or choice by force, threat, or other pressure.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 439 (1976). The same word is defined by Black's Law Dictionary as:

compelled to compliance; constrained to obedience, or submission in a vigorous or forcible manner.

BLACK'S LAW DICTIONARY 234 (5th ed. 1979).

<sup>152</sup> A case in point is the recent decision by Congress to restrict funding to the National Endowment for the Arts after the NEA funded an exhibition which several members of Congress found objectionable. Congress used its coercive power to enforce its view of what is and what is not art.

<sup>153</sup> *Allegheny County*, 109 S. Ct. at 3137.

<sup>154</sup> See *supra* notes 96-98 and accompanying text.

<sup>155</sup> *Allegheny County*, 109 S. Ct. at 3139.

which Justice Kennedy affixes to the endorsement test.<sup>156</sup> If the display of a creche on one holiday is permissible and a display on every holiday is not, one wonders where to draw the line: recognizing two Christian and two Jewish holidays? Three Christian, one Jewish, and an Islamic? Justice Kennedy offers little in the way of standards or criteria for defining the threshold of coercion. Just as much as, if not more than the endorsement test, the coercion test requires some degree of subjective, policy-laden line-drawing.

B. *Presumption of Invalidity as Suggested by Justice Stevens*

Justice Stevens, in his opinion in *Allegheny County*,<sup>157</sup> suggested a further clarification of endorsement analysis. "In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."<sup>158</sup> The Court has employed similar presumptions in free speech and free press clause cases. In support of this suggestion, Justice Stevens argued that religious displays tend to emphasize differences among individuals rather than to achieve their intended ecumenical goals.

Under this approach, a presumption against the public use of religious symbols would only prohibit a display if, "evaluated in the context in which it was presented, [the display] is nonsecular."<sup>159</sup> This analytical tool is clearly intended to modify the endorsement test. While the endorsement test considers the context of each governmental display, Justice Stevens' presumption adds a powerful new consequence to the determination that a symbol is nonsecular. Given the arduous character of establishment clause litigation, such a clear-cut rule would certainly simplify the evaluation of religious symbols. A presumption which is strict, yet sensitive to the context of government activity, provides a workable tool to aid in making these difficult decisions.

Critics might label this style of analysis as "bordering on latent hostility toward religion."<sup>160</sup> However, this moniker is undeserved. The presumption could easily be rebutted if surrounding circumstances warranted. Justice Stevens gives the example of a carving of Moses and the ten commandments on the wall in the Supreme Court. Although, in isolation, the presumption would work against such a display, when the surrounding carvings of Caesar Augustus, John Marshall, William Blackstone and others are taken into consideration, the presumption is rebutted.<sup>161</sup> Portraying Moses with the ten commandments in these cir-

<sup>156</sup> *Id.* at 3144.

<sup>157</sup> See *supra* notes 112-16 and accompanying text.

<sup>158</sup> *Allegheny County*, 109 S. Ct. at 3131.

<sup>159</sup> *Id.* at 3132.

<sup>160</sup> *Id.* at 3135. The phrase "latent hostility toward religion" is used somewhat carelessly here. The common meaning of hostile is "of or relating to an enemy; marked by malevolence and a desire to injure." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1094 (1976). If anything, the majority is displaying concern for those of the religious minority rather than overt antagonism toward religion in general.

<sup>161</sup> Justice Stevens notes that all of these great leaders appear in friezes on the Supreme Court walls. *Allegheny County*, 109 S. Ct. at 3132.

cumstances is not a governmental endorsement of religion, but rather an historical display of the great lawgivers in the history of mankind.

Although Justice Stevens' suggestion pertained only to those cases where the government has chosen to employ a religious symbol, courts could easily use this device in other establishment clause cases. Such a construction could be adapted to cases such as *Texas Monthly* by having the presumption arise whenever a government uses religion as a distinguishing factor among its citizens. A showing that, under the circumstances, the distinction did not have the purpose or effect of endorsing religion would, of course, rebut the presumption.

In sum, employing a presumption against the government's use of religious symbols or distinctions would be a valuable analytical tool for the courts. With the foundation established, the analysis would then turn to the endorsement test, where the courts would determine if the challenged action had the purpose or effect of endorsing religion. If not, the presumption would be rebutted.

## V. Conclusion

Justice O'Connor's concern with the perception of an endorsement of religion has permanently modified the *Lemon* test. The purpose prong of that test now asks whether government's actual purpose is to endorse or disapprove of religion.<sup>162</sup> The effects prong of that test asks whether, taking into consideration the context of the governmental act, it is sufficiently likely that a reasonable observer would perceive the act as an endorsement or disapproval of their individual religious choices.<sup>163</sup> The entanglement prong remains as it was stated in *Lemon*: whether the act fosters an excessive entanglement between government and religion.<sup>164</sup>

This change in establishment clause analysis parallels a deeper change in the thinking of the Court. The minority in *Lynch*,<sup>165</sup> with the addition of Justice O'Connor, is the new majority in establishment clause cases. This shift in power is reflected in the way in which *Texas Monthly* departs from *Walz*, and *Allegheny County* from *Lynch*. The new majority, using the endorsement test, is more likely to strike down governmental use of religious symbols or distinctions as establishment clause violations. The remaining Justices<sup>166</sup> represent a loosely aligned minority which has expressed misgivings about the whole *Lemon* framework<sup>167</sup> and would allow government more leeway in using religious symbols and religious distinctions.

Justice Kennedy suggests that the focus should be on whether the government is trying to coerce observers to adopt certain religious be-

162 *Edwards v. Aguillard* 482 U.S. 578, 585 (1987) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690).

163 *Allegheny County*, 109 S. Ct. at 3115.

164 *Lemon*, 403 U.S. at 613.

165 Justices Brennan, Marshall, Stevens, and Blackmun.

166 Justices Rehnquist, White, Kennedy and Scalia.

167 See *Allegheny County*, 109 S. Ct. at 3134 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1984) (Rehnquist, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment).

liefs. But as indicated above, the coercion approach causes more problems than it solves.<sup>168</sup> Its adoption would replace one analytical framework, which has been criticized as being inconsistent and unpredictable, with another which is no better. Difficult line-drawing, which seems to be inherent in establishment clause analysis, would not be avoided by adopting the coercion test.

Nevertheless, both *Texas Monthly* and *Allegheny County* indicate that the *Lemon* test, as modified by endorsement, is alive and well. The debate now turns to the specifics of endorsement analysis.

Justice Stevens has suggested that there should be a strong presumption against government display of religious symbols. This device could be an extraordinarily useful tool in all establishment clause cases if expanded to apply to any governmental distinction based on religion. Use of this presumption is consistent with the majority's view of the importance of governmental neutrality in religious affairs.

The Court must also determine the perspective from which to judge the effect of endorsement. The better reasoned view is implied by Justice Brennan: a genuine objection by any reasonable observer should signal a violation of the effects prong. This could be combined with the adoption and expansion of Justice Stevens' presumption of invalidity to simplify establishment clause litigation by allowing for the following procedure.

Once it is established that the government has used a religious symbol or distinction, a presumption would arise that the establishment clause had been violated. The government could then rebut this presumption by establishing that: (1) the purpose of the action was not to endorse or disapprove of any religion or religion in general; (2) no reasonable observer would perceive the action as an endorsement of religion which makes her feel less than a full member of the political community; and (3) the action does not foster an excessive entanglement between government and religion. This procedural shift would result in a greater burden upon government, but this burden would be outweighed by greater consistency and predictability in establishment clause litigation. In addition, the government would only face this burden if it insisted upon using religious symbols or distinguishing between its citizens on the basis of religion. Some may view this formulation as latently hostile to religion; however, in practice, it would allow both the government and religious groups to function more independently in their respective spheres.

James M. Lewis  
Michael L. Vild

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168 See *supra* notes 148-56 and accompanying text.