

The Endorsement Test: Its Status and Desirability

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I. INTRODUCTION

The Court has implicitly abandoned the *Lemon* test¹ for the validity of enactments under the Establishment Clause,² and has instead adopted an approach championed by Justice O'Connor – the “endorsement” test. Initially articulated in the mid-1980s, this approach would find an Establishment Clause violation whenever a reasonable observer would conclude that government “endorses religion,” thus sending “a message to non-adherents 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.”³ This precept seeks to ensure equal standing within the “political community” for persons of all (or no) religious faiths.⁴ While the endorsement test has many attractive features, its application raises a number of troublesome questions. This Article explores both the strengths and the pitfalls of the endorsement approach, ultimately concluding that despite its advantages, it provides neither a workable nor a wise judicial standard.

II. THE DEMISE OF LEMON AND THE RISE OF ENDORSEMENT

A. *The Lemon Test's Many Failings*

While never formally overruled, the *Lemon* test, adopted in 1971, has been thoroughly discredited as a workable Establishment Clause standard. It provides that in order to pass constitutional muster, government action (1) must have a secular purpose, (2) may not

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

² See *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and in the judgment and dissenting in part).

³ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

⁴ *Id.* at 687-88.

have the principal or primary effect of advancing or inhibiting religion, and (3) may not involve "excessive entanglement" between government and religion.⁵ At both the conceptual and doctrinal levels, the *Lemon* test has proven fatally flawed. In *County of Allegheny v. ACLU*,⁶ Justice Kennedy observed that "[p]ersuasive criticism of *Lemon* has emerged."⁷ Four years later, concurring in *Lamb's Chapel v. Center Moriches Union Free School District*,⁸ Justice Scalia, joined by Justice Thomas, likened the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."⁹ He noted that six of the then sitting members of the Court had disagreed with *Lemon* – Chief Justice Rehnquist, and Justices White, O'Connor and Kennedy, in addition to Justice Thomas and himself:¹⁰ "For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."¹¹ For our purposes, only a brief sketch of the most significant criticisms is needed.

⁵ See *Lemon*, 403 U.S. at 612-13.

⁶ 492 U.S. 573 (1989).

⁷ *Id.* at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (citing *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment)).

⁸ 508 U.S. 384, 398 (1993).

⁹ *Id.* (Scalia, J., concurring in judgment).

¹⁰ *Id.* at 398-99 (citing *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting); *County of Allegheny*, 492 U.S. at 655-57 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting); *New York v. Cathedral Acad.*, 434 U.S. 125, 134-35 (1977) (White, J., dissenting); *Roemer v. Bd. of Pub. Works*, 426 U.S. at 768 (1976) (White, J., concurring in judgment); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting)).

¹¹ *Id.* at 399 (Scalia, J., concurring in judgment) (citing Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CAL. L. REV. 5 (1987); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980)).

First, *Lemon*'s emphasis on "secular purpose" poses serious difficulties with respect to reconciling the seeming antipathy between the Establishment and Free Exercise Clauses. Because this part of the test flatly prohibits any government action that has a purely religious purpose, it seemingly makes virtually all exemptions from onerous obligations for religion unconstitutional. Since the goal of such accommodations is to avoid burdening religious activity, it is ordinarily difficult to deny that their purpose is to assist religion.¹² Thus, taken literally, the "secular purpose" requirement of the *Lemon* test would, for example, forbid excusing only religious conscientious objectors from military service¹³ and Amish school children from compulsory education laws.¹⁴ The Court's interpretation of the Religion Clauses, however, has rejected these implications of the *Lemon* test. Indeed, the Court for some time had mandated religious dispensations under the Free Exercise Clause,¹⁵ and has regularly indicated its approval of a number of government concessions for religion that were not constitutionally required.¹⁶ For similar

¹² It is possible to imagine certain instances in which government may choose to relieve those who object to a regulation on religious (or perhaps other conscientious) grounds even though the lawmakers have no sympathy whatever for their ideological views. For example, an exemption from wartime military service may be grounded exclusively in the belief that compelled participation of these pacifists would undermine effective defense efforts.

¹³ *But see* Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918).

¹⁴ *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972).

¹⁵ More recently, however, the Court has abandoned the requirement of "special" exemptions for religion under the Free Exercise Clause from generally applicable rules. The shift came in *Employment Division, Department of Resources v. Smith*, 494 U.S. 872 (1990), involving a Free Exercise challenge to Oregon's denial of unemployment compensation to two drug rehabilitation counselors who were fired when, in violation of their agreement not to use drugs, they had ingested peyote, a controlled substance in Oregon, for sacramental purposes at a Native American Church ceremony. The basis for the state agency's decision that the drug counselors were ineligible for benefits was that they had been discharged for work-related "misconduct." *Id.* at 874. Justice Scalia, writing for a majority of five, rejected the Free Exercise challenge, and expressly appealed to a theme of neutrality, which has also been invoked for other issues under the Religion Clauses. *See infra* notes 34-35. He noted, *inter alia*, that "[a]ny society" that required special exemptions for those objecting to generally applicable government regulations on religious grounds would be "courting anarchy" because of the practically unlimited range of regulations that could be subjected to religious challenges. 494 U.S. at 888.

¹⁶ *See, e.g., Smith*, 494 U.S. at 890 (noting that it would be "permitted, or even . . . desirable" if states "made an exception to their drug laws for sacramental peyote use"); *Gillette v. United States*, 401 U.S. 437, 461 n.23 (1971) (draft exemption); *Arlans Dep't Store, Inc. v. Kentucky*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal testing the constitutionality of a Sabbatarian exemption from a Sunday Closing Law); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (noting that while exemption from a Sunday Closing law for Orthodox Jews is not constitutionally required, such treatment "may well be the wiser solution

reasons, the "advance or inhibit" prong proves troublesome. It seems clear that in any common-sense meaning of the term, government actions that accommodate religious interests often have the "primary effect" of "advancing" those interests.¹⁷

Second, the "entanglement" prong of the test also suffers from serious conceptual flaws. In my view, non-entanglement is not a value the judiciary can or should secure through the Establishment Clause.¹⁸ A major fear of those concerned with entanglement is that government involvement, especially in connection with grants of public aid, will impair the ability of religious groups to pursue their mission. The Court, however, has long allowed states to regulate religious institutions;¹⁹ the curricula of parochial schools is only one example. Moreover, the propriety of such regulation should not be significantly affected by the presence or absence of concurrent financial aid.²⁰ Government scrutiny of religious activities is indeed an extremely sensitive task, but the Constitution explicitly demands that religion be given such treatment under certain circumstances – for example, when it must be determined whether an organization's activity subsidized by government funds is "religious." As for the argument that entanglement is dangerous because it provokes "political strife along religious lines," one need only recognize that this kind of political battle often occurs, even on what are ordinarily regarded as secular issues such as abortion, prostitution, gambling, obscenity, and so on. The mere fact that opponents and proponents

to the problem"); *Zorach v. Claiborn*, 343 U.S. 306 (1952) (holding use of released time program in public schools constitutional); *cf. Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that a sales tax exemption for religious periodicals violated the Establishment Clause); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (holding that a statute that provided Sabbath observers with an absolute and unqualified right not to work on their Sabbath violated the Establishment Clause).

¹⁷ See *supra* note 12 and accompanying text.

¹⁸ See Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-85 (1980).

¹⁹ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that, although states may not require that all children be educated in public schools, they may prescribe reasonable educational standards).

²⁰ For discussion of the extent to which public financial assistance may affect the autonomy of beneficiary religious groups, see Jesse H. Choper, *Federal Constitutional Issues, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 235, 255-59 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

of a law line up according to their religious beliefs cannot make the law itself unconstitutional.²¹

Lastly, on the doctrinal level, application of the *Lemon* test generated ad hoc judgments incapable of being reconciled on any principled basis. For example, therapeutic health services provided by public employees to parochial school students were invalid when offered in the school,²² but not when offered in a mobile unit adjacent to the school;²³ states were allowed to lend textbooks to parochial school pupils because they can be screened for religious content,²⁴ but other seemingly “self-policing” items like tape recorders, films, movie projectors, laboratory equipment, and maps were prohibited.²⁵ States were permitted to pay the cost of bus transportation to parochial schools,²⁶ but were forbidden to pay for field trip transportation “to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students.”²⁷ In 1980, even the Court forthrightly conceded that its approach under the *Lemon* test “sacrifices clarity and predictability for flexibility.”²⁸

In sum, the *Lemon* test produced great incoherence – a situation that I have described as “a conceptual disaster area.”²⁹ While the

²¹ In addition, avoiding conflict in one way may provoke it in another. For example, if religious parents cannot obtain state support of parochial schools, they may oppose increased funding of public schools as an alternative. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 273 (1968); see also *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

²² See *Meek v. Pittenger*, 421 U.S. 352 at n. 2, 367-68, 370-72 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

²³ See *Wolman v. Walter*, 433 U.S. 229, 247 (1977), *overruled by Mitchell*, 530 U.S. 793.

²⁴ See *Bd. of Educ. v. Allen*, 392 U.S. 236, 244-45 (1968).

²⁵ See *Meek*, 421 U.S. at 363-66. Compare *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (holding that government tax benefits to parents whose children attended nonpublic and predominantly parochial schools violated the Establishment Clause because the effect was to advance religion in the schools since there was no limitation on the purpose for which the funds might be used), with *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding the constitutionality of a state income tax deduction to all taxpayers for expenses of tuition, transportation, textbooks, instructional materials, and other school supplies in public and nonpublic schools since the purpose and primary effect of the facially neutral law was secular, despite the fact that the great bulk of deductions could be taken only by parents of children in parochial schools).

²⁶ See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

²⁷ *Wolman*, 433 U.S. at 252.

²⁸ *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980).

²⁹ See Choper, *supra* note 20, at 237.

need for a new approach to Establishment Clause questions has long been recognized, it only recently became apparent that Justice O'Connor's endorsement test would win the replacement contest.

B. The Development of Alternative Approaches

While, as described below, Justice O'Connor's measure has garnered the approval of a majority of the Court, it has not been without rivals. The standard that first competed for about a half-dozen years to replace the *Lemon* test was Justice Kennedy's "coercion" approach. The choice of the word "coercion" as a title is probably unfortunate because Justice Kennedy defined the term much more broadly than is usually done, allowing that the coercion required for an Establishment Clause violation may take a variety of "more or less subtle" forms, including "taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing."³⁰ Of the present members of the Court, Chief Justice Rehnquist and Justice Scalia joined in Justice Kennedy's dissenting opinion in *County of Allegheny v. ACLU*,³¹ which contains the fullest exposition of the "coercion" test,³² and Justice Thomas has since subscribed to its core principle.³³ These same four justices have most recently emphasized the "neutrality" approach, not only describing it as "a significant factor in upholding governmental programs in the face of Establishment Clause attack,"³⁴ but also flatly declaring that "it is no violation for government to enact neutral policies that happen to benefit religion."³⁵

Despite the success of the coercion and neutrality benchmarks, it is the endorsement test that has succeeded in gaining the support of a majority of the Court. Justice O'Connor first advanced this

³⁰ *County of Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring in part and dissenting in part).

³¹ *Id.* at 655-679 (Kennedy, J., concurring in part and dissenting in part).

³² See also *Bd. of Educ. v. Mergens*, 496 U.S. 226, 258-62 (1990) (Kennedy, J., concurring).

³³ See *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting, joined, *inter alios*, by Thomas, J.). For discussion of how Justice Kennedy's criterion failed to be installed as the operative standard despite its support at one time by a majority of the Court, see Jesse H. Choper, *Benchmarks*, 79 A.B.A.J. 78, 80 (Nov. 1993).

³⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

³⁵ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995). See also *Mitchell*, 530 U.S. at 809-10.

approach in her concurrence in *Lynch v. Donnelly*,³⁶ positioning it as a re-reading of the purpose and effect prongs of *Lemon*. Beginning with the premise that “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community,” she explained that government action directly infringes this command if it either purposefully or unintentionally has “the effect of communicating a message of government endorsement or disapproval of religion.”³⁷ “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”³⁸ In her concurrence in *Wallace v. Jaffree*,³⁹ Justice O’Connor further elaborated on the operation of the test, explaining that “[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement” of religion.⁴⁰ It should also be assumed, she noted, that the objective observer “is acquainted with the Free Exercise Clause and the values it promotes.”⁴¹

In *County of Allegheny v. ACLU*,⁴² the Court, Justice Blackmun writing for the majority, invoked Justice O’Connor’s *Lynch* concurrence with approval: “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.’”⁴³ The Court explained:

In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of

³⁶ 465 U.S. 668, 687-94 (1984) (O’Connor, J., concurring).

³⁷ *Id.* at 687, 692.

³⁸ *Id.* at 688.

³⁹ 472 U.S. 38, 67-84 (1985) (O’Connor, J., concurring in judgment).

⁴⁰ *Id.* at 76 (O’Connor, J., concurring in judgment).

⁴¹ *Id.* at 83 (O’Connor, J., concurring in judgment). See *infra* text accompanying note 170.

⁴² 492 U.S. at 594.

⁴³ *Id.* at 593-94 (citing *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring)).

“endorsing” religion, a concern that has long had a place in our Establishment Clause jurisprudence. Thus, in *Wallace v. Jaffree*, the Court held unconstitutional Alabama’s moment-of-silence statute because it was “enacted . . . for the sole purpose of expressing the State’s endorsement of prayer activities.”⁴⁴ The Court similarly invalidated Louisiana’s “Creationism Act” because it “endorses religion” in its purpose.⁴⁵ And the educational program in *School Dist. of Grand Rapids v. Ball*,⁴⁶ was held to violate the Establishment Clause because of its “endorsement” effect.⁴⁷

Applying the endorsement test to the facts of the case, the Court determined that “no viewer could reasonably think” that a challenged crèche display which sat on the Grand Staircase in the Allegheny County Courthouse – “the ‘main’ and ‘most beautiful part’ of the building that is the seat of county government” – occupied this location “without the support and approval of the government,” and thus enjoined its further display.⁴⁸ A Chanukah Menorah, which stood in front of the City-County building aside a Christmas tree and a sign saluting liberty, fared better. Justices Blackmun, O’Connor, Stevens, Brennan, and Marshall each applied the endorsement test, with the first two concluding that the combined display did *not* constitute an endorsement of religion, and the last three finding that it *did*.⁴⁹

In addition to the Court’s seeming adoption of the endorsement test in the 1989 *Allegheny* decision,⁵⁰ at varying times since *Lynch* a majority of the current justices has approved it. Justice Stevens,

⁴⁴ 472 U.S. at 60.

⁴⁵ *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

⁴⁶ 473 U.S. 373, 389-92 (1985).

⁴⁷ *Allegheny*, 492 U.S. at 592-93 (internal citations omitted).

⁴⁸ *Id.* at 599-600.

⁴⁹ Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, agreed that the menorah display did not violate the Establishment Clause, albeit on no-coercion rather than no-endorsement grounds. For detailed discussion, see *infra* text accompanying notes 87-94.

⁵⁰ As indicated *supra* in text accompanying note 44, the Court may be seen as having subscribed to the endorsement approach as early as 1985, at least as an alternative to *Lemon*. See *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985).

joining Justice Blackmun in Part III-B of the *Allegheny* opinion, expressly signed on to Justice O'Connor's approach, calling it a "sound analytical framework for evaluating governmental use of religious symbols,"⁵¹ and stating 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."⁵² Justice Stevens initially utilized Justice O'Connor's *Lynch* concurrence in his majority opinion in *Wallace v. Jaffree*,⁵³ and applied the endorsement test in his dissent in *Capitol Square Review & Advisory Board v. Pinette*.⁵⁴

In *Lee v. Weisman*, Justice Souter, joined by Justices Stevens and O'Connor, recognized that the principle against endorsement has become a "foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community,"⁵⁵ and found that the inclusion of invocation and benediction prayers by a member of the clergy in graduation ceremonies at public schools had the impermissible effect of endorsing or promoting religion. Justice Souter also explicitly adopted and applied the endorsement test in his concurrence in *Capitol Square*.⁵⁶

Justice Breyer, too, has subscribed to the endorsement test. He joined the concurrences of Justices O'Connor and Souter in *Capitol Square*,⁵⁷ both of which explicitly adhered to the test, and joined Justice O'Connor's concurrence in *Mitchell v. Helms*,⁵⁸ one of whose major purposes was to invoke the endorsement test in contrast to the neutrality approach. While Justice Ginsburg has not specifically embraced the endorsement standard, she employed it in her dissent in *Capitol Square*.⁵⁹

⁵¹ 492 U.S. at 595.

⁵² *Id.* at 597 (citing 473 U.S. at 390).

⁵³ See *supra* note 50.

⁵⁴ 515 U.S. 753, 799-800 (1995) (Stevens, J., dissenting).

⁵⁵ 505 U.S. 577, 627 (1992) (Souter, J., concurring).

⁵⁶ 515 U.S. at 783-94 (Souter, J., concurring in part and concurring in judgment).

⁵⁷ *Id.* at 772-783, 783-796.

⁵⁸ 530 U.S. 793, 842-43 (2000) (O'Connor, J., concurring in judgment).

⁵⁹ 515 U.S. at 817-818 (Ginsburg, J., dissenting).

In sum, Justices O'Connor, Stevens, Souter, Breyer, and Ginsburg have each at some point expressed approval of the endorsement test. Even Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas have not been unwilling to concede its applicability, at least where the challenged conduct involves "expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity."⁶⁰ It seems then, that if the present Court decides to expressly overrule the defunct *Lemon* test, the endorsement standard is well poised to replace it.⁶¹

III. ENDORSEMENT'S COMMENDABLE FEATURES

In light of the *Lemon* test's conceptual incoherence, Justice O'Connor's attempt to steer the Court in a new direction is a welcome development. Although I ultimately conclude that the endorsement test is not a satisfactory judicial standard, there is much to commend Justice O'Connor's admirable efforts to account for the multiple (and sometimes conflicting) values at play in the Religion Clauses and to solve their puzzle.

At an operational level, the endorsement criterion avoids one of the major flaws of both the *Lemon* test and a "strict" neutrality approach⁶² by clearly permitting some government accommodations for both minority and mainstream religions. It reasons that relieving burdens that generally applicable regulations impose on members of some faiths neither "endorses" those religions, nor makes

⁶⁰ See *Capitol Square*, 515 U.S. at 764 (internal citations omitted).

⁶¹ While some lower courts treat endorsement as part of the *Lemon* inquiry and others as a stand-alone test, many generally recognize it as controlling. See *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1485-86 (3d Cir. 1996); *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995); *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 286 (5th Cir. 1999); *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir. 2000); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000); *ACLU v. City of Florissant*, 186 F.3d 1095, 1097-98 (8th Cir. 1999); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir. 1996); *Bauchman v. West High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997); but see *DeStefano v. Emergency Housing Group*, 247 F.3d 397, 410 (2d Cir. 2001) (recognizing endorsement as "a viable test of constitutionality" only "in certain unique and discrete circumstances").

⁶² See JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY* 19-24, 97 (1995) (evaluating strict neutrality approach). As indicated *supra* note 15, those justices who presently sponsor a neutrality approach do not seem to adopt its "strict" version, i.e., not only allowing evenhanded programs that happen to include religion, but also forbidding any classification that singles out religion for special benefits. See PHILIP B. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* (1962).

nonbelievers nor members of the non-benefited religions feel they have been disparaged because of their faith.⁶³ In her concurrence in *Allegheny*, Justice O'Connor explained:

In cases involving the lifting of government burdens on the free exercise of religion, a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement. By building on the concerns at the core of nonestablishment doctrine and recognizing the role of accommodations in furthering free exercise, the endorsement test provides a standard capable of consistent application and avoids the criticism leveled against the *Lemon* test.⁶⁴

While, in my view, the endorsement test may, on the one hand, misjudge the feelings of those who do not obtain the advantage of being exempted from a generally applicable law,⁶⁵ and does not, on the other hand, go *far enough* in permitting legislative accommodations of religious interests,⁶⁶ its solicitude for free exercise values is clearly a step forward from *Lemon*'s conflicting signals and from the ban on any preference for religion that follows from strict adherence to the neutrality approach.

Further, the endorsement test's disapproval of government acting in ways that offend or alienate citizens by making them feel like outsiders appeals to our humane instincts. As urged by those who advocate an "expressive" approach to law,⁶⁷ it feels legally and morally "right" that government actions that communicate disparaging messages about one's faith should be held invalid. As one scholar observes, the test is "well suited to preventing successful government attempts, whether subtle or overt, to impose a 'badge of

⁶³ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring).

⁶⁴ 492 U.S. at 632 (O'Connor, J., concurring) (internal quotations and citation omitted).

⁶⁵ See *infra* text accompanying notes 164-167.

⁶⁶ See *infra* text accompanying notes 158-164.

⁶⁷ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); compare Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

inferiority' on our religious minorities. Checking such government proclivities has long been the hallmark of our Nation."⁶⁸

Moreover, the endorsement test corresponds to my own approach to Religion Clauses questions by forbidding discrimination against persons because of their religious beliefs, condemning coercive government action that threatens religious liberty, and ensuring that "subtle coercion" does not escape constitutional invalidation.⁶⁹

IV. ENDORSEMENT'S SHORTCOMINGS

Despite its positive attributes, the endorsement test raises important, troublesome questions. One issue that has received significant attention concerns how to define the "reasonable (or objective) observer," the hypothetical person who plays a key role in the process. Without clear Supreme Court guidance respecting critical details surrounding the definition, lower courts, struggling to give it content, have succeeded only in producing ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion. In my view, this is problematic for several reasons. First, I do not believe that mere feelings of offense should rise to the level of a judicially redressable harm under the Establishment Clause, absent any real threat to religious liberty. Second, since its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable as a desirable constitutional criterion. Finally, fair application of the test is unduly restrictive of government authority and may permit abridgement of core values sought to be secured by the Religion Clauses.

A. Defining the Reasonable Observer

Because the endorsement test produces an Establishment Clause violation whenever a "reasonable observer" would conclude that official activity sends a message of government endorsement of religion, describing the qualities and characteristics of the

⁶⁸ Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1069 (1986).

⁶⁹ See CHOPER, *supra* note 62.

"reasonable observer" is crucial. Unfortunately, the Court has provided insufficient guidance in this area, ultimately leaving us with the uncomfortable inclination that this "purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive."⁷⁰

This lack of clarity may be born as much of necessity as of neglect, for attempts to embody the reasonable observer present difficult questions, such as whose perceptions ought to count. For example, is the reasonable observer a member of one of the regnant faiths, a minority adherent, or an atheist? On the one hand, if this individual is a member of the religious (or political) mainstream, there is too great a risk that the perspective "will be inadequately sensitive to the impact of government actions on religious minorities, thereby in effect basing the protection of religious minorities on the judgment of the very majority that is accused of infringing the minority's religious autonomy."⁷¹ On the other hand, if the perspective that determines the validity of government action turns on "the message received by the minority or nonadherent,"⁷² this would grant something that I find too close to a self-interested veto for the minority and too restrictive of government accommodations that seek to satisfy deep-felt religious needs.⁷³

Another issue of substantial ambiguity concerns the proper level of knowledge attributable to the reasonable observer. In *Capitol Square*,⁷⁴ Justice O'Connor explained that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears," likening this judicial construct to the "reasonable person" in tort law. Justice Stevens complained:

[Justice O'Connor's] reasonable observer is a legal fiction, a personification of a community ideal of

⁷⁰ Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 292 (1987).

⁷¹ Note, *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987).

⁷² *Id.*

⁷³ See *id.* at 1650. See also Marshall, *supra* note 11, at 537 ("Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominant religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?").

⁷⁴ 515 U.S. at 780 (O'Connor, J., concurring).

reasonable behavior determined by the collective social judgment. The ideal human Justice O'Connor describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "ideal" standard.⁷⁵

"Instead of protecting only the 'ideal' observer," Justice Stevens would "extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement."⁷⁶

In the face of this disagreement, appellate courts have felt free to adopt the standard they find most appropriate. In *ACLU of New Jersey v. Schundler*, the Third Circuit took Justice Stevens's approach, holding unconstitutional Jersey City's annual crèche and menorah display in front of City Hall, part of the city's year-round celebration of different cultures and religions:

⁷⁵ *Id.* at 800 n.5 (Stevens, J., dissenting) (internal quotation and citation omitted).

⁷⁶ *Id.* An illustration of the subjective quality involved in applying this level-of-knowledge element may be found in Justice O'Connor's belief in *Mitchell v. Helms* that

the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement. In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students, who, in turn, decide to use the aid at the same religious schools.

530 U.S. at 842-43 (O'Connor, J., concurring) (internal citations omitted). Perhaps so, but such a distinction strikes me as amounting to form over substance. If reasonable observers were as sophisticated as Justice O'Connor suggests, I would assume they would recognize this. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 317 (1968) ("[A] government condition that a tuition subsidy be transferred to some school of the parent's choice (including a parochial school) is analytically identical to a state payment to any voluntary association that a recipient joins (including his church or synagogue)."). See generally *id.* at 313-18.

[W]e cannot agree that an observer of the display who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display, is somehow less “reasonable” an observer than the Christian or Jewish observer who has lived in Jersey City for twenty years.⁷⁷

In *Brooks v. City of Oak Ridge*, by contrast, the Sixth Circuit, in deciding that a Japanese “Friendship Bell” erected in a public park did not endorse the Buddhist religion, assumed

[t]hat the reasonable observer would know about the bell casting ceremony, as well as about the history of the bell’s adoption as a celebratory display for Oak Ridge’s fiftieth birthday and the city’s official statement of secular purpose to commemorate Oak Ridge’s historic connection to Japan and to express a desire for international peace and friendship.⁷⁸

In *Alvarado v. City of San Jose*, the Ninth Circuit appears to have split the difference, finding that a reasonable observer would be aware that the challenged serpent statue “represents an ancient Aztec deity, as publicized by the City, and that the City-sponsored dedication ceremony included a performance by a Native American Aztec dance group,” but would not be aware of the statue’s connection to New Age and Mormon religions, as “[t]he reasonable observer is not an expert on esoteric religions.”⁷⁹

The lack of any clear consensus as yet on either the reasonable observer’s religious convictions or that individual’s knowledge level has generated a host of inconsistent rulings. With very little limitation, “[t]he outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by

⁷⁷ 104 F.3d 1435, 1448 (3d Cir. 1997) (a reasonable observer of the display would *not* see a “time lapse photograph” of Jersey City’s different cultural and religious celebrations).

⁷⁸ 222 F.3d 259, 266 (6th Cir. 2000).

⁷⁹ 94 F.3d 1223, 1232 (9th Cir. 1996). See also *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d at 496 n.2 (7th Cir. 2000) (noting the “unresolved dispute which exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer”).

simply altering the characteristics of the observer.”⁸⁰ The “ad hoc, fact-based analysis of Establishment Clause problems”⁸¹ produced by the endorsement test as currently articulated thus fails to afford government officials with the degree of predictability needed to craft legislation that will withstand constitutional scrutiny.⁸²

A brief review of the Court’s major cases in this area discloses that disagreements fomented by application of the endorsement test plague not only the lower courts, but the justices as well. *Lynch*⁸³ itself provides the first example. It involved a challenge to the City of Pawtucket’s inclusion of a crèche in its annual holiday display, along with, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, and carolers.⁸⁴ Justice O’Connor found no endorsement of the Christian religion:

Pawtucket’s display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday

⁸⁰ Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 478-79. See also *Allegheny*, 492 U.S. at 675-76 (Kennedy, J., dissenting) (“Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.”).

The lack of clarity appears to be unavoidable given the nature of the task:

[T]he test attempts to objectify that which avoids objectification. [It] incorrectly assumes that the symbolic inquiry is reducible to a rational construct, while the interpretation of symbols, and perhaps religion itself, is inherently irrational. Objectifying the inquiry in this manner is, as the idiom suggests, to place a square peg in a round hole.

Marshall, *supra* note 11, at 536.

⁸¹ Gey, *supra* note 80, at 481.

⁸² In *Capitol Square*, 515 U.S. at 768 n.3, Justice Scalia argued:

[E]ven when one achieves agreement upon [the question of who the hypothetical beholder is], it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation’s legislators walk this minefield.

⁸³ 465 U.S. 668 (1984).

⁸⁴ See *id.* at 671.

setting changes what viewers may fairly understand to be the purpose of the display⁸⁵

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, believed otherwise:

For many, the City's decision to include the crèche 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 crèche, thereby providing 'a significant symbolic benefit to religion. . . .' The effect on minority religious groups, as well as 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.⁸⁶

In *Allegheny*,⁸⁷ a challenge of a holiday display including a menorah, Christmas tree, and sign saluting liberty likewise generated conflicting endorsement judgments. Justice Blackmun believed that the menorah and Christmas tree did not constitute an endorsement of Judaism or Christianity. While in his view the Christmas tree generally serves as a secular symbol of the winter-holiday season, he conceded that "the tree might be seen as representing Christian religion when displayed next to an object associated with Jewish religion," and that therefore the tree and menorah together might be viewed as a joint endorsement of the Christian and Jewish faiths.⁸⁸ He concluded, however, that given the configuration of the display – the 45-foot tree stood in the central position with the 18-foot menorah positioned to one side – "it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa."⁸⁹ "In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only

⁸⁵ *Id.* at 692 (O'Connor, J., concurring).

⁸⁶ *Id.* at 701 (Brennan, J., dissenting) (internal citation omitted).

⁸⁷ 492 U.S. 573 (1989).

⁸⁸ *Id.* at 617 n.66.

⁸⁹ *Id.* at 617.

traditional way of observing the winter-holiday season.”⁹⁰ Therefore, rather than communicating a simultaneous endorsement of both the Christian and Jewish faiths, he found that “the city’s overall display must be understood as conveying the city’s secular recognition of different traditions for celebrating the winter-holiday season.”⁹¹ Justice O’Connor also determined that no endorsement existed, but disagreed with the proposition that the positioning of the Christmas tree (which she agreed is not regarded today as a religious symbol) somehow neutralized the religious significance of the menorah. While in her view the menorah retained its religious meaning, she found the display constitutional because the message it sent was one of “pluralism and freedom,” rather than endorsement of the Jewish faith.⁹² Justice Brennan, by contrast, thought the display *did* operate impermissibly to endorse religion. He felt that “even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to . . . [t]he menorah [which] is indisputably a religious symbol, used ritually in a celebration that has deep religious significance.”⁹³ He criticized the attempts to dilute the religious import of the Christmas tree and Chanukah menorah, and noted that “the city’s erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying ‘the city’s secular recognition of the different traditions for celebrating the winter-holiday season,’ or ‘a message of pluralism and freedom of belief,’ has the effect of promoting a Christianized version of Judaism.”⁹⁴ Justice Stevens similarly found that the display conveyed a message of “governmental approval of the Jewish and Christian religions.”⁹⁵

*Capitol Square*⁹⁶ also produced a fractured endorsement determination. It concerned the erection of a privately funded Latin

⁹⁰ *Id.*

⁹¹ *Id.* at 620.

⁹² *Id.* at 635 (O’Connor, J., concurring).

⁹³ *Id.* at 641, 643.

⁹⁴ *Id.* at 645 (Brennan, J., concurring in part and dissenting in part). Justice Brennan also remarked: “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.” *Id.* at 642-43.

⁹⁵ *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

⁹⁶ 515 U.S. 753 (1995).

cross in a plaza next to the state capitol. Justice O'Connor again found no endorsement: "Under the circumstances at issue here, allowing the [Ku Klux] Klan cross, along with an adequate disclaimer, to be displayed on Capitol Square presents no danger [of endorsement]." ⁹⁷ Justice Stevens, again, disagreed: "A reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself." ⁹⁸ Justice Ginsburg also found impermissible endorsement: "Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message." ⁹⁹

Given the Court's own inability to reach consensus on the message conveyed to the "reasonable observer" by government action, it is no wonder that lower courts have floundered at the task. ¹⁰⁰ Faced with

⁹⁷ *Id.* at 783 (O'Connor, J., concurring in part and concurring in the judgment).

⁹⁸ *Id.* at 806 (Stevens, J., dissenting).

⁹⁹ *Id.* at 817 (Ginsburg, J., dissenting). See also Smith, *supra* note 70, at 301:

[E]vidence of the test's indeterminate character appears in [Loewy, *supra* note 68.] Loewy likes the "no endorsement" test. In applying that test to particular controversies, however, he concludes that Pawtucket's sponsorship of a nativity scene violated the establishment clause, that Alabama's "moment of silence" law probably did *not* violate the clause, and that ceremonial invocation of deity, such as those occurring in the Pledge of Allegiance or the opening of a Supreme Court session, *do* violate the "no endorsement" test. In each instance, Justice O'Connor would disagree. Thus, Professor Loewy and Justice O'Connor, while purporting to apply the same test, would regularly reach precisely opposite conclusions in a wide range of controversies. Such disparate conclusions underscore the analytical deficiencies which destroy the test's usefulness as a practical doctrinal tool. *Id.*

¹⁰⁰ See, e.g., *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (majority and dissent disagree on whether ordinance forbidding exclusion of religious uses of property from any zoning area constitutes an endorsement); *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (majority and dissent disagree on message conveyed by holiday display to reasonable observer); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (majority and dissent disagree on whether "minute of silence" statute endorses religion); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (majority and dissent disagree on whether school board policy permitting non-students to disseminate religious materials one day a year endorses religion); *Doe v. Beaumont Indep. School Dist.*, 173 F.3d 274 (5th Cir. 1999) (majority and dissent disagree on whether "clergy in schools" volunteer counseling program endorses religion); *ACLU v. Capitol Square Review and*

the difficult job of finding guidance in the Court's splintered opinions, appellate courts have not been shy about expressing their frustration.¹⁰¹

Advisory Board, 243 F.3d 289 (6th Cir. 2001) (majority and dissent disagree on whether state motto, "with God, all things are possible," endorses religion); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (majority and dissent disagree on whether recognizing government holiday which coincides with Good Friday endorses religion); *Chadhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997) (majority and dissent disagree on whether reasonable observer would view college prayer policy as endorsement); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (majority and dissent disagree on whether reasonable observer would view Ten Commandments monument on lawn of government building as an endorsement of religion); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001) (same); *Stark v. Independent School Dist.*, 123 F.3d 1068 (8th Cir. 1997) (majority and dissent disagree on whether a reasonable observer would view the opening of a school that primarily serves children of a particular religious sect as an endorsement of religion); *Ceniceros v. San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (majority and dissent disagree on whether lunch-time student meetings of religious clubs at school constitutes an endorsement of religion).

¹⁰¹ See e.g. *ACLU of New Jersey v. Schundler*, 168 F.3d 92, 109 (3d Cir. 1999) (Nygaard, J., dissenting):

[A]lthough the majority cites the applicable Supreme Court case law to reach its conclusion that the this display is constitutional, parsing the same case law and applying it to these facts leads me to the opposite conclusion. There is, I readily acknowledge, much confusion and plenty of room for jurisprudential disagreement in this area. No bright lines of demarcation have been drawn between religious "establishment" and simple display, and perhaps none of us is capable of accurately drawing such a line given the state of the case-law. I am afraid that the shifting majorities and fact-specific opinions of the Supreme Court in *Lynch* and *Allegheny* provide only a precarious analytical framework for both the public and inferior federal courts to apply in determining the exact location of the line of demarcation.

Id.

American Jewish Congress v. City of Chicago, 827 F.2d 122, 129 (7th Cir. 1987) (Easterbrook, J., dissenting):

It is discomfoting to think that our fundamental charter of government distinguishes between painted and white figures – a subject the parties have debated – and governs the interaction of elements of a display, thus requiring scrutiny more commonly associated with interior decorators than with the judiciary. When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.

Id.

Bauchman v. West High School, 132 F.3d 542, 565 (10th Cir. 1997) (Murphy, J., concurring in part and dissenting in part) ("Unfortunately, the task of parsing the Supreme Court's recent Establishment Clause cases is nothing short of Herculean."); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 627 (9th Cir. 1996) (O'Scannlain, J., concurring in judgment) ("As judges of the inferior courts of the federal system, we do our best to resolve

Even if the serious problem of ambiguities in Justice O'Connor's thesis were remedied, however, its adoption remains unwise. Problems of definition of the kind just discussed are not peculiar to any one approach,¹⁰² including my own.¹⁰³ Nor are they usually insoluble, especially if something short of a perfect answer is admissible. An effective solution here might be to entrust this "perspective-dependent"¹⁰⁴ inquiry to an independent judiciary whose great obligation is to secure the constitutional rights of those unable to rely on the political process. Although justices of the Supreme Court "cannot become someone else,"¹⁰⁵ they could, with their own solicitude for the values of religious liberty, either assume the view of a reasonable member of the political community who is faithful to the Constitution's protection of individual rights, or ask whether a *reasonable minority observer*, who would be "acquainted with the text, legislative history, and implementation of the [challenged state action],"¹⁰⁶ *should feel* less than a full member of the political community.¹⁰⁷ It must be clear, however, that adoption of this definition would make explicit what is now implicit: it effectively converts the reasonable observer into a majority of the Supreme Court:

Whether an observer would "perceive" an accommodation [of religion] as "endorsement of a particular religious belief" depends entirely on the observer's view of the proper relation between church and state An objective observer holding separationist views of the First Amendment might be

cases in the light of Supreme Court guidance. Alas, its instructions on implementation of the Establishment Clause are not always clear, consistent or coherent.").

¹⁰² Compare the opinions of Justices Kennedy and O'Connor on the scope of the endorsement test in *Allegheny*, 492 U.S. at 629, 675-76.

¹⁰³ For an effort to provide more substantive content to what comprises a "meaningful (realistic) danger to religious liberty" – a key in my analysis of the Establishment Clause – see *infra* text accompanying note 127.

¹⁰⁴ Note, 100 HARV. L. REV. at 1647.

¹⁰⁵ Mark Tushnet, "Of Church and State and the Supreme Court": *Kirland Revisited*, 1989 SUP. CT. REV. 373, 400.

¹⁰⁶ *Jaffee*, 472 U.S. at 76 (O'Connor, J., concurring).

¹⁰⁷ Although this process is basically normative rather than empirical, the Court's judgment should obviously be influenced by the perception (if fairly discernible) of "average" members of minority religious faiths and should be more strongly affected if their response is very widely shared.

quick to perceive government's contact with religion as endorsement; one following [an accommodationist approach] might have a different reaction. Looking to an "objective observer" cannot substitute for a constitutional standard. Such a formulation serves merely to avoid stating what considerations inform the judgment that a statute is constitutional or unconstitutional. If Justice O'Connor's "objective observer" standard were adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided.¹⁰⁸

So even apart from its present definitional uncertainties, at a more fundamental level the endorsement test provides an inadequate judicial standard. Admittedly, in translating the "broad philosophy" and "major premise" of the Religion Clauses into sensible and workable canons that reflect desirable policy in our religiously diverse nation, the justices must exercise substantial authority of a legislative nature – "normative" rather than "objective" judgment, or (as characterized by Kant) "reflective" rather than "determinant" decision making¹⁰⁹ – that will inevitably be shaped by their personal backgrounds, values, and perspectives, rather than by cold logical analysis. Even assuming that their discretion will be meaningfully bounded by some attachment to the constitutional text or history, and that "judgment always operates within an institutionally defined structure of opportunities and possibilities,"¹¹⁰ there will often be such basic disagreements among judges as to produce widely different rules.

Still, whether because the process of constitutional exegesis is legitimated by the fact that its "authority lies in its character as law"¹¹¹ or by its ultimately being equated with the "consent of the

¹⁰⁸ Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48. See also Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 151 (1992) ("A finding of 'endorsement' serves only to mask reliance on untutored intuition.").

¹⁰⁹ IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 15-16 (J.H. Bernhard trans., Hafner Publishing 1966) (1790).

¹¹⁰ RONALD BEINER, *POLITICAL JUDGMENT* 148 (1983).

¹¹¹ Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19 (1990).

governed,"¹¹² in my view, an overarching goal in generating intellectually coherent legal principles should be to produce standards that, in application, will work as forcefully as attainable to constrain judges from inserting their own ideological beliefs into case-by-case constitutional decisionmaking in ad hoc, unreasoned ways.¹¹³ This ideal – endorsed by constitutional theorists ranging from John Rawls to Antonin Scalia¹¹⁴ – is especially important under my conception of the appropriate role of an independent judiciary in regard to the ambiguity and judgment inherent in constitutional interpretation. For reasons to be discussed, however, the endorsement test fails to meet this requirement.

B. Relying on Individual Sensibilities

Under the endorsement approach, reasonable perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population – and nothing more – trigger a holding of unconstitutionality. While this may indeed be an attractive feature of the test insofar as it appeals to our compassionate instincts,¹¹⁵ I believe that absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as well as improperly authorize official injury to religious liberty.

¹¹² *Id.* at 21 (quoting former Attorney General Edwin Meese III).

¹¹³ One way to characterize my approach in regard to this matter is acknowledging the inevitability of the justices' "legislating wholesale" when fashioning broad principles, but still seeking to avoid their "legislating retail" in day-to-day administration of these rules.

¹¹⁴ Compare JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U.CHI. L. REV. 1175 (1989). See also, e.g., Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 149-55, 231-32 (1991); with Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737-66 (1976); Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977) (book review); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1988).

¹¹⁵ See *supra* text accompanying notes 167-168.

1. Judicially Cognizable Harm

It is, of course, iniquitous for government to intentionally deprecate a religious group without compelling justification. Realistically, in virtually all of the rare instances when this may occur, it will fail a challenge under the Free Exercise Clause.¹¹⁶ Theoretically, however, in my view, it should not rise to the level of a judicially enforceable constitutional violation of the Establishment Clause in the highly unlikely case in which there are no adverse consequences beyond distressed sensibilities affecting the religious minorities or nonbelievers.

This is not to say that there is no role for expressive harms, in contrast to material ones, in law generally or in constitutional law particularly.¹¹⁷ For example, lawmakers may quite properly enact policy choices for the purpose of communicating their esteem (endorsement) or disapprobation of certain values, regardless of whether this causes any immediate quantitative effects.¹¹⁸ But such legislative regulation is much different than judicial invalidation simply because of a law's expressive qualities. It does not diminish the reprehensibility of government actions that convey disrespect or heap indignities on undeserving persons to conserve scarce judicial

¹¹⁶ See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a city ordinance prohibiting ritual animal sacrifice, enacted in response to a zoning application to establish a church of the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion, violates the Free Exercise Clause).

¹¹⁷ See *supra* note 67.

¹¹⁸ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U.CHI. L. REV. 1, 66 (1990) ("Both the material consequences and the expressive consequences of policy choices are appropriate concerns for policymakers."); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 823 (1994):

A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might protect endangered species partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action after one person has taken the life of another.

Id.

See also Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965), reprinted in JOEL FEINBERG, *DOING AND DESERVING* 98 (1970) ("[P]unishment is a conventional device for the expression of attitudes of resentment and indignation. . . ."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

resources for those occasions when they are more urgently needed.¹¹⁹ This husbanding of capital is especially appropriate when the opposite rule would substantially disable state attempts to respond to felt needs of adherents of mainstream religious groups and to relieve legally imposed burdens that prevent members of minority faiths from pursuing their religious duties.¹²⁰

Most government action that alienates or offends people because it is seen as approving or endorsing religion is not the product of a deliberate government effort to be pejorative toward those who are aggrieved. Rather, it results from the adoption of well meaning, legitimate, and sometimes even successful attempts to improve the conditions of society. In our pluralistic culture, "not all beliefs can achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"¹²¹ It is clear that the Constitution cannot generally provide relief when this occurs, as, for example, when the state declines to subsidize quality (equal) medical care for those who cannot afford it.

The question then is whether the Religion Clauses ought to spark judicial intervention when the alienated person contends that the offensive government action has not been employed to achieve concededly secular ends, but has been undertaken for the purpose of favoring religious interests. To put the argument in favor of a rule of unconstitutionality most forcefully, laws that endorse (or approve, or embrace, or prefer) some religion, or religion generally, do more

¹¹⁹ See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 49, 169-70 (1980).

¹²⁰ The significance of expressive harms under the Equal Protection Clause, especially with respect to racial classifications, involves a variety of distinguishable issues and may well call for different results. See generally Anderson & Pildes, *supra* note 67, at 1534-45; Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994). Although the subject is beyond the scope of this Article, some considerations that are worth mentioning include (1) the distinct doctrinal problems raised by the tension between the two Religion Clauses, see Choper, *supra* note 18, (2) the easier identification of racial versus religious persons or groups that are the objects of communications of disrespect and, (3) the more powerful consequences of systematic racial stigmatization and subordination, see Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994), than of periodic endorsements of religion (e.g., racially segregated facilities as compared to religious symbols). See generally Adler, *supra* note 67, at 1428-36, and citations at 1370-71 n.32.

¹²¹ Smith, *supra* note 70, at 313; see also Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986): "[N]onadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics."

than constitute an important symbol in the relationship between the state and its citizens. They confront a set of specific constitutional provisions that bear on the matter. As a consequence, the argument continues, these government regulations are vulnerable on grounds of legitimacy, if not automatically void; they should certainly be invalid if they also produce the untoward feelings described.

Although I do not find this position unpersuasive, I do ultimately reject it. In my view, attempts by government to accommodate *either minority or mainstream* religions are often (indeed, usually) benign, genuine, and sometimes even important to the larger society.¹²² These efforts should be upheld even though they may fairly be seen as endorsing or approving religion and even though they may cause reasonable people to feel offended or alienated. It is surely regrettable when state policies that address issues of faith produce a sense of subordination or resentment in a segment of the populace. But this alone should not suffice for a judicial holding of unconstitutionality.

I agree that "policy and law ought to be concerned with . . . state action . . . when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences,"¹²³ just as I would urge that officials should be wary of effecting "excessive entanglement" between church and state or "political fragmentation and divisiveness on religious lines."¹²⁴ Still, I do not believe that any of these factors should themselves be an independent ground for an Establishment Clause violation.¹²⁵ Rather, I would require a combination of (1) a government purpose, which is either intentionally undertaken or reasonably understood to

¹²² See Smith, *supra* note 70, at 277.

Without indicating any view either as to religion's truthfulness or as to its value to society generally, government might acknowledge that many individual citizens care deeply about religion and that the religious concerns of such citizens merit respect and accommodation by government. This limited form of implicit approval or support might be described as 'accommodation endorsement.'

Id.

¹²³ Anderson & Pildes, *supra* note 67, at 1531. I further support an approach that "treats certain effects as of constitutional concern only when they are caused by a law already found objectionable on expressive grounds." *Id.* at 1547.

¹²⁴ *Lemon*, 403 U.S. at 623.

¹²⁵ See *supra* text accompanying notes 16-21.

provide advantage to religion,¹²⁶ with (2) an effect that poses a significant threat of tangible danger to religious liberty. I would find the second condition when government actions have the effect of (a) coercing or significantly influencing people either to violate their existing religious tenets, or to engage in religious activities or adopt religious beliefs when they would not otherwise do so, or (b) compelling people to afford financial support either to their own religion or to that of others.¹²⁷ The Court's inquiry for determining these issues should be empirically based but ultimately normative, centering on the reaction of an "average" or "reasonable" person in the relevant segment of the population. Since in most instances the surrounding circumstances would be essentially similar throughout the country, the Court should ordinarily apply a nationwide standard. But if it is shown that special sensitivities exist in a particular community, I urge that those factors should govern the question of whether there is a meaningful threat to religious liberty.

While my approach culminates in a normative determination of how a reasonable person would respond to government action, I do not believe that this inquiry suffers from the same ambiguity and subjectivity as the endorsement test. Whether official action coerces or significantly influences individuals to violate their religious tenets or to adopt religious beliefs has substantial empirical grounding which examines *conduct* engaged in by persons – studies regarding the *demonstrable effects* of group pressure on school-age children, for example, are well documented.¹²⁸ Justice O'Connor's approach, which, by contrast, looks to *thoughts, instincts* and *attitudes* apart from

¹²⁶ For discussion of the situation in which there should be an Establishment Clause violation in the case of government regulations that have a *nonreligious* purpose, see CHOPER, *supra* note 62, at ch. 5.

Similar issues arise under the Equal Protection Clause, especially with respect to affirmative action programs, concerning the significance of a racial purpose for official action in determining whether a constitutional violation has occurred. See, e.g., Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 32 (1977) ("[R]acial preferences aimed at integrating government . . . differ in the most dramatic way from the purposeful infliction of stigmatic harm."). See generally *supra* note 120.

¹²⁷ I have described these forbidden effects elsewhere as "coercing, compromising, or influencing religious beliefs." Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980). See also Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 330 (1963). For further discussion of the relationship between tax support and violation of religious liberty, see CHOPER, *supra* note 62, at 16-19; *infra* note 176.

¹²⁸ See CHOPER, *supra* note 62 at 140-145 and accompanying notes.

any psychological trauma or status harm that they cause,¹²⁹ appears to be essentially incommensurable and *purely* normative. A person's feeling of offense may not readily be compared to any empirical baseline.¹³⁰

It may well be that recognizing this sort of "expressive injury" asks courts to act no differently than they do in several other contexts: emotional distress in tort law and reasonable expectations of privacy under the Fourth Amendment. I believe, however, that constitutional adjudication under the Establishment Clause is distinguishable.

The Restatement (Second) of Torts recognizes a cause of action for emotional distress even though the plaintiff is not required to show tangible injury.¹³¹ Thus, courts evaluate and redress purely emotional harms, in a manner not unlike their course under the endorsement test. Still, this stands as a halting exception in the common law: "It is certainly true that on the whole, courts have been extremely cautious in allowing claims for stand-alone emotional harm."¹³² Due to this judicial hesitancy, the required burden is very stringent. The plaintiff must demonstrate: (1) that the defendant caused *severe* emotional distress; (2) *intentionally or recklessly*; (3) by *extreme and outrageous* conduct.¹³³ To be deemed outrageous, the misconduct must be "utterly intolerable,"¹³⁴ going "beyond all bounds of civilized society."¹³⁵ To meet the severity requirement it is often said that "the distress must be so severe that no reasonable person should be expected to endure it."¹³⁶

Under these criteria, even highly unsavory defendants who have intentionally inflicted offense or humiliation will often escape

¹²⁹ See generally Anderson & Pildes, *supra* note 67, at 1545.

¹³⁰ See *supra* note 80. The distinction between the tort law's "reasonably prudent person" and the endorsement test's "reasonable observer" may be similarly understood, the former focusing on *conduct*, the latter on *feelings*. See DAN B. DOBBS, *THE LAW OF TORTS* 275 (2000) ("State of mind, including knowledge and belief, may motivate or shape conduct, but it is not in itself an actionable tort. The legal concept of negligence as unduly risky conduct distinct from state of mind reflects the law's strong commitment to an objective standard of behavior."); see also *supra* text accompanying notes 74-75.

¹³¹ See RESTATEMENT (SECOND) OF TORTS § 46.

¹³² DOBBS, *supra* note 130, at 822.

¹³³ See RESTATEMENT (SECOND) OF TORTS § 46.

¹³⁴ DOBBS, *supra* note 130, at 827.

¹³⁵ *Id.*

¹³⁶ *Id.* at 832.

liability. In sharp contrast, the endorsement test would render unconstitutional considered action by politically responsible officials that is designed not to offend, and that is plainly not deemed to be outrageous according to societal standards. Instead, it is usually undertaken to accommodate the felt religious needs of the majority of people within the community, and is based not on the complainants' showing of extreme psychic pain, but rather only on reasonable feelings of "offense" or "alienation." The traditional judicial reluctance to recognize emotional distress torts, along with the exacting criteria that have developed to contain them, counsels against the wisdom of the endorsement test.

The Fourth Amendment's "reasonable expectation of privacy" criterion, announced in *Katz v. United States*,¹³⁷ probably presents a more relevant parallel to the endorsement test because of their shared constitutional nature. Justice O'Connor's approach speaks to a reasonable observer's feelings of offense and alienation from the political community, and the *Katz* test addresses reasonable expectations of privacy; both turn legal consequences on people's attitudes or mental states.

The *Katz* standard is not, however, governed merely by defendants' reasonable feelings. Rather, it involves a normative determination by the Court as to what sort of intrusions our society ought to tolerate: "[T]he ultimate question under *Katz* 'is a value judgment,' namely, 'whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.'" ¹³⁸

Even though the task of considering whether a reasonable observer would perceive government endorsement of religion (and as a consequence feel offended and alienated) strikes me as less bounded than the *Katz* inquiry;¹³⁹ still it, too, involves a similar

¹³⁷ 389 U.S. 347 (1967) (holding that defendant had a reasonable expectation that his conversation in a public telephone booth would be private, and that therefore the FBI's electronic eavesdropping amounted to a search within the meaning of the Fourth Amendment).

¹³⁸ WAYNE R. LAFAYE, JEROLD H. ISRAEL, AND NANCY J. KING, *CRIMINAL PROCEDURE* 135 (2000) (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)). See also *Kyllo v. United States*, 533 U.S. 27 (2001).

¹³⁹ The "reasonable expectation of privacy" conclusion requires the Court to assess prevailing cultural norms (as does the emotional distress tort's rule about what sort of

judgment by the Court as to what it believes citizens ought to expect from their government. In the search and seizure context, however, there are *actual consequences* that follow from the government's violations of a person's expectations – e.g., the authorities invade your home, collect evidence against you, and send you to jail. In the endorsement context, by contrast, there are *no* repercussions beyond distressed sensibilities.

It is true that the endorsement test might be justified as a prophylactic rule designed to protect against precisely those types of injurious consequences that I believe should give rise to an Establishment Clause violation.¹⁴⁰ “Symbolic acts that seem inconsequential might, cumulatively or over time, foster an atmosphere of public discourse in which adherence to religion does make a difference.”¹⁴¹ Justice O'Connor does not seriously advance this rationale; however, instead taking the view that government actions that send messages of endorsement are inherently unconstitutional, irrespective of their “cultural impact,” i.e., coercive effect.¹⁴² In any event, although the endorsement test does well to

“extreme” conduct causes “severe” distress), while the endorsement inquiry is more complex and difficult, because it raises the question of the reasonableness of *counter-cultural* emotional reactions to government action.

¹⁴⁰ See Neal R. Feigenson, *Political Standing and Government Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DE PAUL L. REV. 53, 63 (1990):

The explanation might proceed as follows: By making religion relevant to a person's standing in the political community, government threatens to coerce or compromise that person's religious beliefs. Especially if the person is made to feel like an “outsider,” she may be led to change religious affiliation so as to become an “insider,” realizing that her beliefs now “cost” her something in terms of her standing in the secular community. In preventing this indirect coercion, the establishment clause thus becomes a “prophylactic” against more direct infringements of religious liberty.

Id.

¹⁴¹ *Id.* at 81. See also Timothy Bakken, *Religious Conversion and Social Evolution Clarified: Similarities Between Traditional and Alternative Groups*, 16 SMALL GROUP BEHAVIOR 157 (1985) (arguing that conversion is caused by psychological pressures rather than rational selection from a marketplace of ideas).

¹⁴² See Anderson & Pildes, *supra* note 67, at 1546-47 (“[The endorsement approach] prohibits state infliction of purely expressive harms, even when unaccompanied by differential causal impact between adherents and nonadherents of a religion.”). Occasionally, however, Justice O'Connor has made gestures in the other direction, as in *Wallace v. Jaffree*. “[E]ndorsement infringes the religious liberty of the nonadherent, for ‘when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially

capture instances of “subtle coercion” that in my view *should* be deemed unconstitutional,¹⁴³ where the incremental coercion is intangible and immeasurable, I do not believe that the judiciary should prohibit governmental attempts to accommodate religious interests. In such cases, the response of a portion of the citizenry may be to feel like “outsiders,”¹⁴⁴ but “such endorsements do not appear to alter anyone’s actual political standing in any realistic sense; no one loses the right to vote, the freedom to speak, or any other state or federal right if he or she does not happen to share the religious ideas that such practices appear to approve.”¹⁴⁵ The same simply cannot be said in the Fourth Amendment context.

Furthermore, finding an Establishment Clause violation on feelings of alienation or offense alone usually makes a decision to protect the distressed sensibilities of the religious minority (or nonbelievers) and to ignore those of the religious majority:

If public institutions employ religious symbols, persons who do not adhere to the predominant religion may feel like “outsiders.” But if religious symbols are banned from such contexts, some religious people will feel that their most central values and concerns – and thus, in an important sense, they themselves – have been excluded from a public culture devoted purely to secular concerns.¹⁴⁶

In the absence of any tangible threat to religious liberty, it is not at all apparent that the minorities’ feelings ought to prevail. Indeed, where equal perceptions of subordination exist, a strong case can be made to favor majority preference.

I do not contend that Article III’s “concrete injury” requirement¹⁴⁷ precludes judicial enforcement of Justice O’Connor’s approach to interpreting the Establishment Clause. Indeed, constitutional decisions have invalidated laws solely because of their expressive

approved religion is plain.” 472 U.S. at 70 (O’Connor, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

¹⁴³ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁴⁴ See *infra* Sec. 2.

¹⁴⁵ Smith, *supra* note 70, at 307.

¹⁴⁶ *Id.* at 310-11.

¹⁴⁷ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

harm, *i.e.*, their communication of “negative or inappropriate attitudes”¹⁴⁸ toward persons or groups,¹⁴⁹ and have approved nominal damages to remedy constitutional violations where actual injury cannot be shown.¹⁵⁰ Nonetheless, this feature of the endorsement test does run counter to the general precept that the awesome power of judicial review should not readily be invoked to remedy harm no greater than “indignation,”¹⁵¹ “offense,”¹⁵² or the “psychological consequence presumably produced by observation of conduct with which one disagrees.”¹⁵³ This hesitant use of judicial authority recognizes that it is one thing for government to require or forbid a religious practice and another simply to permit or criticize it. Thus, under my approach, even without characterizing such customs as acts of “ceremonial deism,”¹⁵⁴ or as aspects of America’s “civil religion,”¹⁵⁵ Congress’s making “In God We Trust” our national motto, or a city’s using a Latin cross on its official seal,¹⁵⁶ would probably pass muster even though they express “an unambiguous choice”¹⁵⁷ in favor of theism and Christianity, respectively.

¹⁴⁸ Anderson & Pildes, *supra* note 67, at 1527.

¹⁴⁹ See *id.* at 1533-64.

¹⁵⁰ *E.g.*, *Memphis C'mty School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11 (1986).

¹⁵¹ *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991).

¹⁵² *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

¹⁵³ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). See also *Freedom from Religion Found. v. Zielke*, 845 F.2d 1463, 1467-68 (7th Cir. 1988) (“psychological harm” not adequate injury). In *DeStefano v. Emergency Housing Group, Inc.*, the Second Circuit rejected an Establishment Clause challenge to the state’s licensing of a private alcoholic treatment facility that used the religiously imbued Alcoholics Anonymous program as part of the service it offered. The court noted that plaintiff

might claim that he was harmed by the implicit message of religious “endorsement” conveyed by the . . . approval of the . . . licensing documents – a diffuse and abstract injury in the State’s nonobservance of the Constitution. This claim amounts to little more than an attempt to employ a federal court as a forum in which to air generalized grievances about the conduct of the government, and consequently does not constitute the “injury in fact” necessary to confer standing.

247 F.3d 397, 422 (2d Cir. 2001) (internal quotations and citations omitted).

¹⁵⁴ *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting).

¹⁵⁵ See *CHOPER*, *supra* note 62, at 108-112.

¹⁵⁶ *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991).

¹⁵⁷ *Id.* at 1412.

2. *Undue Limit on Government Authority*

By finding a constitutional violation on mere feelings of indignity or offense, the endorsement test proves too restrictive of governmental attempts to acknowledge religious interests. As Professor Michael McConnell points out:

[The endorsement test] perpetuates some of the implicit biases of the *Lemon* test. The endorsement test casts suspicion on government actions that convey a message that religion is worthy of particular protection – as any accommodation of religion necessarily does There is no way to distinguish between government action that treats a religious belief as worthy of protection, and government action that treats a religious belief as intrinsically valuable. . . . Justice O'Connor's endorsement test is therefore in tension with her accommodationist interpretation of the Free Exercise Clause.¹⁵⁸

Several examples, covering a range of contexts, should indicate that the endorsement approach, fairly applied, unduly restricts official efforts.

When the state includes religious groups within a category receiving a government benefit, even a very modest one such as the right of student organizations to meet in public school classrooms during non-instructional time, this may reasonably be viewed as government endorsement, as when a student religious club is permitted to use the premises to pray and to inculcate the tenets of the faith.¹⁵⁹ Despite the fact that the category may be large and open-ended, such as any group that contributes to the “intellectual, physical or social development of the students,”¹⁶⁰ and even though school officials may be committed to a course of impartiality,¹⁶¹ it is

¹⁵⁸ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 151 (1992).

¹⁵⁹ See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

¹⁶⁰ *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 548 (3d Cir. 1984) (quoting statement by school official), *vacated by*, 475 U.S. 534 (1986).

¹⁶¹ But see Michael L. Commons & Joseph A. Rodriguez, “Equal Access” without “Establishing” Religion: *The Necessity for Assessing Social Perspective-Taking Skills and Institutional Atmosphere*, 10

clear that there are some student groups (say, those committed to experimentation with drugs, or the study of erotica, or the rejection of parental authority) that will not be approved. Although some persons may fairly perceive the school's allowing the religious use as no more than indifference or neutrality on the part of school authorities in respect to "nonharmful" activities,¹⁶² other equally credible observers may plausibly find it "inevitable that a public high school 'endorses' a religious club, in a common-sense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extra-curricular setting."¹⁶³

When the state exempts a minority religion from a generally applicable prohibition, such as permitting members of Native American religious groups to use peyote as part of their rituals,¹⁶⁴ this also may reasonably be viewed as government endorsement of religion.¹⁶⁵ It may be a particularly fair perception by nonadherents who are criminally prosecuted for using peyote; they may justifiably feel alienated, offended, and placed outside the core of the political community when told that the defense for Native American religionists is not available to them. The distress is probably even more understandable when the legislative exception favors a mainstream religion, for example, excusing church-operated schools from the obligation of collective bargaining with unions representing

DEVELOP. REV. 323, 334 (1990) (presenting empirical data that cast doubt on the ability of secondary school administrators to treat all student groups equally).

¹⁶² See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 14-20 (1986).

¹⁶³ *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring).

¹⁶⁴ See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

¹⁶⁵ See Tushnet, *supra* note 105, at 394-5 n.73. Tushnet points out that accommodations of the kind being discussed

use religion as a basis for government classification, and they do so in the strongest sense of intentionally, that is, precisely in order to confer a benefit on some religions that does not flow either to nonbelievers or to all religions. The relevant question would then appear to be, what is the signal . . . sent by these accommodations? It is difficult to avoid the conclusion that permissible accommodations, with their necessarily disparate impact, indicate some degree of government approval of the practices that benefit from the accommodations.

Id.

lay faculty members.¹⁶⁶ An equally dramatic reaction of this kind might be expected from employees of a religious organization who, after being dismissed from their weekday secretarial or janitorial jobs for failing to be sufficiently devout on Sunday, learn that the church is exempt from the national bar against religious discrimination in employment and that they are therefore remediless.¹⁶⁷ Along with many other "reasonable observers," these persons may appropriately sense that they are less than full-fledged beneficiaries of the government system.

Finally, it seems clear that no stigmatizing of any person's beliefs is intended by government action, pursuant to the sentiments of America's mainstream religions, proclaiming a national day of thanksgiving to God.¹⁶⁸ (Indeed, this might be even be called a *holiday*.) But it seems equally plain that the criteria for unconstitutionality under the endorsement approach are met.

I believe that the government actions described above ought to survive constitutional scrutiny, and that, consequently, the endorsement approach is over-inclusive. That Justice O'Connor herself would not employ it to invalidate such accommodations indicates either that the test is unfaithfully applied,¹⁶⁹ or that the standard is so imprecise as to permit multiple determinations.

Justice O'Connor has attempted to avoid this problem by urging that, in assessing the validity of a government accommodation, "courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption."¹⁷⁰ A major difficulty with this rationale is that in permitting only religious exemptions that are "strongly supported" by the Free Exercise Clause, it does not authorize voluntary legislative actions in furtherance of religious interests that are genuine but, for sundry doctrinal reasons, do not rise to (or come close to) the level

¹⁶⁶ See *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979).

¹⁶⁷ See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

¹⁶⁸ "A favorable statement about one class is not necessarily a correlative pejorative remark about another class." William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 365 (1991).

¹⁶⁹ See *Loewy*, *supra* note 68; *Gey*, *supra* note 80, at 481.

¹⁷⁰ *Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring).

of being constitutionally compelled. Obvious illustrations in this category include the already mentioned presidential proclamation of a national day of thanksgiving to God and congressional designation of "In God We Trust" as the country's motto. Less apparent examples of government responses to mainstream religious values without any serious Free Exercise Clause underpinnings may be found in *Edwards v. Aguillard*,¹⁷¹ which involved a Louisiana statute forbidding teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science," and that part of *Allegheny* which concerned the private placement of a Christmas season Nativity scene on the Grand Staircase of the county courthouse¹⁷² – Justice O'Connor subscribing to the Court's invalidations in both cases even though neither activity posed "a significant threat of tangible danger to religious liberty."¹⁷³ Of course, this aspect of the endorsement theory's approval of religious accommodations loses almost all of its force under the current rule that there are virtually no exemptions "strongly supported" by the Free Exercise Clause.¹⁷⁴

3. *Improper Authorization of Injury to Religious Liberty*

To the extent that the endorsement approach is the sole test for Establishment Clause invalidation, it is also under-inclusive. Because the constitutionality of government policy turns on a reasonable observer's perception of no-endorsement, the test might well permit activities that I believe should be held to violate the Establishment Clause, including government funding (directly or indirectly) of exclusively religious activity. For example, suppose the state funded new structures to house all voluntary associations, including religious organizations. If the "reasonable observer" were to believe that including sectarian groups as part of the larger class of eligible recipients does not constitute an "endorsement" of religion, the law would pass constitutional muster,¹⁷⁵ even though I would find such action contrary to a core value of the Establishment Clause.¹⁷⁶

¹⁷¹ 482 U.S. 578 (1987).

¹⁷² 492 U.S. at 598.

¹⁷³ See *supra* text accompanying note 126.

¹⁷⁴ See *Smith*, 494 U.S. 872; CHOPER, *supra* note 62, at 54-57.

¹⁷⁵ See also *supra* note 76.

¹⁷⁶ See CHOPER, *supra* note 62, at 17-18:

Similarly, although Justice O'Connor's approach supports the Court's rulings in *Marsh v. Chambers*¹⁷⁷ and *Witters v. Washington Dep't of Services for the Blind*,¹⁷⁸ both programs would be found invalid under my analysis.¹⁷⁹

V. CONCLUSION

While features of Justice O'Connor's endorsement approach represent significant improvements over the discredited *Lemon* test, it suffers from several serious difficulties. At the operational level, it fails to provide a judicial standard capable of principled application. A test that invites such broad judicial discretion is, in my view, incompatible with the proper task of constitutional interpretation. On a theoretical level, the test also carries substantial problems. Because government action that may be reasonably perceived as endorsing or approving religion should be neither sufficient nor necessary for an Establishment Clause violation, the approach is both over- and under- inclusive with respect to major values of religious freedom. By finding an Establishment Clause violation on feelings of certain kinds (offense, indignity, subordination, stigmatization, alienation), the endorsement test runs counter to usual understandings of the degree of injury needed to justify constitutional invalidation by the judicial branch. Finally, the endorsement approach threatens to invalidate governmental accommodations of religion that benefit society, as well as permit

Although public subsidy of religion may not directly influence people's beliefs or practices, it plainly coerces taxpayers either to contribute indirectly to their religions or, even worse, to support sectarian doctrines and causes that are antithetical to their own convictions. As a matter of both historical design and present constitutional policy, the Religion Clauses – particularly the Establishment Clause – should, in my view, forbid so basic an infringement of religious liberty.

¹⁷⁷ 463 U.S. 783 (1983).

¹⁷⁸ 474 U.S. 481 (1986).

¹⁷⁹ See CHOPER, *supra* note 62, at 153 (in *Marsh*, Nebraska's paying a chaplain \$320 per month to begin each day that the legislature was in session with a prayer "deliberately favored religion, and since there was a meaningful expenditure of tax-raised funds, . . . [abridged] religious liberty"); *id.* at 172 (in *Witters*, a state program provided vocational education assistance to the visually handicapped and was used by one recipient at a Christian college "in order to equip himself for a career as a pastor, missionary or youth director").

forms of aid that subvert historical and contemporary aims of the Establishment Clause.