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Making "Lemon-Aid" From the Supreme Court's Lemon: Why Current Establishment Clause Jurisprudence Should be Replaced by a Modified Coercion Test

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Making “Lemon-Aid” from the Supreme Court’s *Lemon*: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*

TABLE OF CONTENTS

I.	INTRODUCTION	352
	A. <i>The Lemon Test</i>	352
	1. <i>Arguments Supporting Use of the Lemon Test</i>	354
	2. <i>Arguments Against Use of the Lemon Test</i>	356
	B. <i>The Endorsement Test</i>	364
	1. <i>Arguments Supporting Use of the Endorsement Test</i>	364
	2. <i>Arguments Against Use of the Endorsement Test</i>	365
II.	APPLICATION OF THE <i>LEMON</i> AND ENDORSEMENT TESTS	369
	A. <i>Holiday Display Cases</i>	369
	B. <i>Ten Commandments Cases</i>	379
III.	A MODIFIED COERCION TEST.....	386
	A. <i>Original Intent</i>	388
	B. <i>Historical Tradition</i>	392
	C. <i>Formulation of the Modified Coercion Test</i>	394

* J.D. Candidate, 2005, University of San Diego School of Law; B.A. 2002, Boston College. I would first like to thank Professor Steven D. Smith for his continual assistance as faculty advisor throughout my writing and editing process. His willingness to think through and discuss issues helped develop this Comment and his contributions and advice were invaluable. I would also like to thank Jae Park, my comment advisor, who gave me the confidence and desire to make this project the best that it could be. Thanks also to my colleagues at the *San Diego Law Review* for their hard work in preparing this Comment for publication. Finally, I want to thank my family for their unlimited love and support and Allison Cahill for her graciousness in agreeing to read every draft of everything I write.

IV.	APPLICATION OF THE MODIFIED COERCION TEST	397
V.	CONCLUSION	403

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹

A decade ago, Justice Scalia made prophetic statements regarding the First Amendment. He said that because the Pledge of Allegiance includes the phrase “under God,” recital of the Pledge appears to raise an Establishment Clause issue.² He went on to say,

In *Barnette* [the Supreme Court] held that a public school student could not be compelled to *recite* the Pledge; [the Supreme Court] did not even hint that she could not be compelled to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court’s bulldozer.³

These statements were prophetic because the Ninth Circuit Court of Appeals recently held that the words “under God” in the Pledge violate the Establishment Clause.⁴ The Ninth Circuit reached this conclusion despite the fact that the United States Supreme Court has consistently distinguished the use of the phrase “under God” in the Pledge and other similar invocations as not violating the Establishment Clause from other practices, such as holiday displays and displays of religious referents like the Ten Commandments on government grounds, that do violate the Establishment Clause.⁵

1. U.S. CONST. amend. I.

2. *Lee v. Weisman*, 505 U.S. 577, 639 (1992) (Scalia, J., dissenting).

3. *Id.*

4. *Newdow v. United States Cong.*, 292 F.3d 597, 612 (9th Cir. 2002), *cert. granted in part*, *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945, 945 (2003), *rev’d*, 124 S. Ct. 2301 (2004), *reh’g denied*, 125 S. Ct. 21 (2004). Certiorari was limited to:

(1) Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance; and (2) Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words ‘under God,’ violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

The Supreme Court did not decide the case on its merits (question two from above), as it decided that Mr. Newdow did not have standing to bring this suit. *Newdow*, 124 S. Ct. at 2305. Despite no decision on the merits, there are interesting concurring opinions that will be discussed *infra* note 52.

5. See *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (“[T]here is an obvious distinction between crèche displays and references to God in the motto and the pledge.”); *Marsh v. Chambers*, 463 U.S. 783, 788–92 (1983) (discussing the constitutionality of Nebraska’s legislature opening with a prayer by a state-employed clergyman, the Court states, “[t]o invoke Divine guidance on a public body entrusted with making laws

This type of inconsistency in results is the norm, not the exception, in Establishment Clause cases.⁶ In order to eliminate inconsistent results and promote predictability in litigation, a more uniform test should be developed and applied in Establishment Clause cases. Equally important reasons for establishing a more uniform test include resolving inherent problems in the current tests employed by the Supreme Court and reassuring religious believers that religion has a proper place in society. The Establishment Clause is an issue that has been commented on for decades, but a decision as to which test is appropriate to employ in these cases needs to be made now to prevent the consequence of religion being removed from the public arena entirely.

Part I of this Comment will delineate the inherent problems with the two main tests currently utilized by the Supreme Court in Establishment Clause cases: the *Lemon*⁷ test and the endorsement test.⁸ Part II will further highlight the flaws of the *Lemon* and endorsement tests by

is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”); *Freethought Soc’y v. Chester County*, 334 F.3d 247, 264 (3d Cir. 2003) (“Of course, we agree that [O’Connor’s] examples of ‘ceremonial deism’ are not violations of the Establishment Clause, e.g., the opening of court with the introduction ‘God save the United States and this Honorable Court’ (used in this very Court), or the inscription ‘In God We Trust’ on U.S. coins.”).

6. The *Lemon* and endorsement tests are applied in a wide variety of Establishment Clause cases. Compare *Marsh*, 463 U.S. at 784–86 (holding that the Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State does not violate the Establishment Clause), with *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1152 (4th Cir. 1991) (concluding that courtroom prayer violates the Establishment Clause); compare *Murray v. City of Austin*, 947 F.2d 147, 149, 156 (5th Cir. 1991) (concluding that the City’s insignia, containing a Latin cross and used on police cars, letterhead, uniforms of city employees, etc. does not violate the Establishment Clause), with *Harris v. City of Zion*, 927 F.2d 1401, 1413–14 (7th Cir. 1991) (holding that Zion’s seal, incorporating a shield draped with a ribbon reading “God Reigns” and a Latin cross, violates the Establishment Clause); compare *Freethought*, 334 F.3d at 270 (concluding that the Ten Commandments plaque affixed to the Chester County Courthouse does not violate the Establishment Clause), with *Glassroth v. Moore*, 335 F.3d 1282, 1285, 1297 (11th Cir. 2003) (holding that the placement of the Ten Commandments monument in the courthouse rotunda violates the Establishment Clause), cert. denied, 540 U.S. 1000 (2003). But see Shannon P. Duffy, *Two Tablets Cause a Big Headache*, 228 LEGAL INTELLIGENCER 1 (July 7, 2003), available at WL 7/7/2003 TLI 1 (suggesting that the factual differences between the plaque in *Freethought* and the monument in *Glassroth* do not result in inconsistent holdings between the two circuits).

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

8. See *id.* at 612–13; *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

examining their application to “holiday display” cases⁹ and the recent “Ten Commandments”¹⁰ cases. Part III will argue that applying a modified coercion test is the best means for achieving the most consistent results, even though it too has its limitations. Part IV will compare the practical application of the modified coercion test to the holiday display¹¹ cases, the recent Ten Commandments¹² cases, and the “Pledge of Allegiance” case.¹³ Part V will conclude that keeping Church and State separate does not require the complete bifurcation of all things religious from the rest of society, and that the modified coercion test is best suited for achieving the goal of appreciation of and tolerance for divergent points of view in the United States.

I. INTRODUCTION

In its refusal to “be confined to any single test or criterion” in Establishment Clause cases, the Supreme Court has employed various tests over the last fifty years: the child benefit theory, the neutrality theory, the *Lemon* test, the traditions test, the denominational preference theory, the endorsement test, and the coercion test.¹⁴ Of these, the *Lemon* test and the endorsement test have been used most often.¹⁵

A. *The Lemon Test*

The *Lemon* test consists of three prongs. Any given statute, act, or display must: (1) have a secular legislative purpose, (2) have a principal

9. *Allegheny*, 492 U.S. at 578; *Lynch*, 465 U.S. at 670–71.

10. *Freethought*, 334 F.3d at 249–50; *Glassroth*, 335 F.3d at 1284.

11. *Allegheny*, 492 U.S. at 578; *Lynch*, 465 U.S. at 670–71.

12. *Freethought*, 334 F.3d at 249–50; *Glassroth*, 335 F.3d at 1284.

13. *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002), *cert. granted in part*, *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945, 945 (2003), *rev'd*, 124 S. Ct. 2301 (2004), *reh'g denied*, 125 S. Ct. 21 (2004).

14. See *Lynch*, 465 U.S. at 679; see also Jon Veen, Note, *Where Do We Go From Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 RUTGERS L. REV. 1195, 1200–17 & nn.42, 49, & 164–66 (2000) (“The term child benefit theory is one term used by scholars to discuss the Court’s analysis in *Everson* [although the Court itself did not employ this term in *Everson*]. . . . The Court formulated the neutrality theory [in *Abington Sch. Dist. v. Schempp*] The Supreme Court created the *Lemon* test in [*Lemon*]. . . . [T]he traditions test [was used in *Walz* and *Marsh*] *Larson v. Valente* was one of the few cases in which the Supreme Court used the denominational preference theory Justice O’Connor first articulated the endorsement test in *Lynch*. . . . [And t]he coercion test actually has its roots in *Engel v. Vitale*. . . . [But, t]he landmark case involving the coercion test is *Lee v. Weisman*. . . .”).

15. See *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (“The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*.”); see also *Allegheny*, 492 U.S. at 597 n.47 (“The Court . . . proceeds to apply the controlling endorsement inquiry . . .”).

or primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.¹⁶ This test was first formulated in *Lemon v. Kurtzman* in 1971, as an attempt to draw lines consistent with the primary evils that the Establishment Clause sought to avoid.¹⁷ Those evils consisted of the government’s “sponsorship, financial support, and active involvement” in religious activity.¹⁸ The Court did not discuss why these prongs are particularly important or helpful in deciding Establishment Clause cases, but simply accumulated these criteria from prior decisions.¹⁹ There is one unifying theme, however, connecting these prior cases: government neutrality.²⁰

16. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). In *Lemon*, the Court applied this three-pronged test and struck down two statutes that provided for reimbursing for the cost of teachers’ salaries, textbooks, and instructional materials at nonpublic schools. Under each statute, aid was given to church-related schools, which the Court found to be unconstitutional. *Id.* at 607.

17. *Id.* at 612.

18. *Id.*

19. *Id.* The Court simply stated:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”

Id. at 612–13 (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)) (citations omitted).

20. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 214–15 (1963) (“Judge Alphonso Taft . . . in an unpublished opinion stated the ideal of our people as to religious freedom as one of ‘absolute equality before the law, of all religious opinions and sects’ ‘The government is neutral, and, while protecting all, it prefers none, and it *disparages* none.’”); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (“[The] first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”); *McGowan v. Maryland*, 366 U.S. 420, 441–42 (1961) (“But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*.”); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (“There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.”); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948) (rejecting the arguments that the First Amendment was only intended to prohibit governmental preference of one religion over another and that the Fourteenth Amendment did not make the First Amendment applicable to the States); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First

The Court finds government neutrality to be the proper goal because of the problems that the fusion of government and religion can cause.²¹ To achieve government neutrality, the Court noted that, in considering the Establishment Clause eight times in the previous one hundred years, it consistently held that Congress was to have no power regarding religious belief or its expression.²²

1. Arguments Supporting Use of the Lemon Test

Supporters of the *Lemon* test have argued that the test provides the proper framework for Establishment Clause cases insofar as it fosters the separationist philosophy that Church and state should remain separate.²³ Proponents of the *Lemon* test maintain that its separationist philosophy is sound because it respects religious and irreligious beliefs, safeguards the political community from the damaging effects of religious and irreligious exclusions, and protects religion's role in society.²⁴ Because citizens can suffer from governmental actions that attack their religious or irreligious beliefs, the government should respect these beliefs.²⁵ The *Lemon* test furthers this goal by prohibiting the government from taking action that disrespects the religious or irreligious beliefs of individual citizens.²⁶

Proponents of the *Lemon* test also argue that the test assists in maintaining a religiously inclusive political community.²⁷ Because the government communicates to its citizens that some people are "insiders" while others are "outsiders" whenever it disrespects religious or irreligious beliefs, the *Lemon* test aims to protect citizens from negative

Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

21. *Schempp*, 374 U.S. at 222 (stating that neutrality must be the goal because "powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies" and the Establishment Clause prohibits this).

22. *Id.* Rather, the Court has consistently held that the [Establishment] clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

Id.

23. Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1172 (1988).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1176.

feelings associated with exclusion.²⁸ Thus, because the *Lemon* test protects individual citizens, proponents of the test assert that it also protects the corresponding interests of the entire political community.²⁹ Those who support the *Lemon* test also contend that it protects religion’s role in society.³⁰ This argument relies on the fact that governmental support of religion is often unhelpful, if not counterproductive, to “genuine religion.”³¹

Another argument in support of the *Lemon* test is that rigorous application of the test is the best means of providing adequate protection against impermissible government involvement with religion.³² Proponents have argued that this is especially true in light of the Court’s decisions in *Lynch v. Donnelly* and *Marsh v. Chambers*, where the Court primarily focused on the historical nature of a particular religious activity in determining its constitutionality.³³ This is because a historical inquiry approach threatens consistency in Establishment Clause jurisprudence as well as the First Amendment protections that application of the *Lemon* test has secured.³⁴

The *Lemon* test is also defended on the grounds that there are not any real defects with the test itself, but that the problems instead stem from the Court’s “nonapplication, malapplication, and misapplication” of it.³⁵

28. *Id.* at 1176–78.

29. *Id.* at 1176.

30. *Id.* at 1179–80.

31. *Id.* at 1180. Conkle gives three reasons as to why governmental action designed to benefit religion does not, in fact, actually benefit religion. First, democracy operates according to secular arguments and political bargaining, neither of which is well-suited for religious considerations. *Id.* Second, because there are widespread differences regarding religion, even among mainstream religions, any governmental action designed to support religion will be so general that the “religion” supported will be mild at best, but will most likely be meaningless. *Id.* at 1181. Finally, governmental “support” for religion is not really “support” at all. Rather than strengthening religion, governmental support tends to “degrade and cheapen religion.” *Id.* Conkle also defines “genuine religion” as religion that is intrinsically sound, or at least perceived to be intrinsically sound, by religious believers. *Id.* at 1180.

32. Kenneth Mitchell Cox, *The Lemon Test Sour: The Supreme Court’s New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1201–03 (1984).

33. *Id.* at 1201–02.

34. *Id.* at 1202.

35. Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 634 (1995). Interestingly, however, Kagan proposes a modified *Lemon* test. *Id.* at 645. She advocates that the first prong, that there be a secular purpose, is not difficult to apply, so it should be retained in Establishment Clause analysis. *Id.* Kagan also says that the second prong, that the primary effect neither advance nor inhibit religion, should also be closely examined, but that governmental action as a whole should be reviewed. She states that a statute or state

Therefore, proponents of the *Lemon* test argue that it should not be discarded for two reasons: (1) it reinforces the proper goal of government neutrality; and (2) it is unclear as to which test should replace the *Lemon* test.³⁶

2. Arguments Against Use of the *Lemon* Test

Despite these arguments in favor of the *Lemon* test, there are some inherent difficulties with the test. Some of these difficulties are highlighted by judicial dissatisfaction with the test. For example, the test's usefulness in providing concrete answers in Establishment Clause cases is questioned by Justice Kennedy as he notes that Supreme Court cases simply refer to the test as a "helpful signpost" or "guideline."³⁷ One main difficulty with the *Lemon* test, and one reason why justices are dissatisfied with it, is that it requires a determination of subjective legislative intent.

There are several roadblocks to determining legislative intent, which is necessary under the first prong of the *Lemon* test. The first obvious hurdle is the fact that Congress is made up of many individuals who support various pieces of legislation for vastly different reasons.³⁸ Can it

program "should not be gauged solely by its effect on religious institutions, but in light of the goals of the program *in toto*." *Id.* at 646. Finally, Kagan discusses the dilemma that the entanglement prong can pose. She notes that a government entity seeking to distance itself from a religious institution or message may monitor that institution or message too closely in ensuring that government and religion are not entangled. Thus, in an effort to not entangle itself with religion, the government will still be excessively entangled with religion by virtue of its efforts to prevent such entanglement. *Id.* at 647–48. To avoid this problem, Kagan proposes that the entanglement prong be narrowed so that excessive entanglement is only found when the government's involvement is not "content neutral." *Id.* at 648. This would result in the government not being able to inquire into a religious institution's messages simply to make sure that the state is not sponsoring a religious message, but would allow the government to inquire into religious institutions on the basis of some other factor, such as health and safety or tax monitoring. *Id.* Kagan says that this would not constitute excessive entanglement because "the inquiry is based upon neutral factors applied to all bodies equally, rather than upon the religious message conveyed." *Id.* The formulation of a modified test seems to contradict Kagan's assertion that "the Court's difficulty with the test lies not in any defect or want of reasoning in the test . . ." *Id.* at 634.

36. *Id.* at 644–45.

37. *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy expresses further distaste for the test when he states, "[I] do not wish to be seen as advocating, let alone adopting, [this] test as our primary guide in this difficult area." *Id.* at 655.

38. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1929–1930). In discussing discovering legislative intent when a statute is ambiguous, Radin states:

That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinate, are infinitesimally small. The chance is still smaller that a given determinate,

really be said that a group of people, with different motives and objectives, enacted a given piece of legislation for one single purpose?³⁹ Ascertaining legislative intent would remain difficult even if there were only one legislator representing a legislature.⁴⁰

Another problem is that inquiring into legislative intent gives legislators an incentive to lie.⁴¹ If legislators who voted to pass legislation on account of their religious beliefs knew that the legislation would be struck down as a violation of the Establishment Clause if their religious motives became known, these legislators would have reason to lie. To ensure

the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed. In an extreme case, it might be that we could learn all that was in the mind of the draftsman, or of a committee of half a dozen men who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or five hundred approvers?

Id. at 869–70. This discussion represents the most obvious difficulty with ascertaining legislative intent: the relationship between the intent of a collective legislature and the intentions of the individual legislators.

39. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 284 (1987).

40. GERALD C. MACCALLUM, JR., LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 5 (Marcus G. Singer & Rex Martin eds., 1993). MacCallum states:

The fundamental question “what was the legislator’s intent” subsumes a number of more specific questions:

1. Was his intent to enact a statute—i.e., was the “enacting” performance not, perchance, done accidentally, inadvertently or by mistake?
2. Was his intent to enact *this* statute—i.e., was this the *document* (the draft) he thought he was endorsing?
3. Was his intent to enact *this* statute—i.e., are the *words* in this document precisely those he supposed to be there when he enacted it as a statute?
4. Was his intent to enact *this* statute—i.e., do these words *mean* precisely what he supposed them to mean when he endorsed their use in the statute?
5. How did *he* intend these words to be understood?
6. What was his intent in enacting the statute—i.e., what did he intend the enactment of the statute to achieve?
7. What was his intent in enacting the statute—i.e., what did he intend the enactment of the statute to achieve *in terms of his own career*?

Id.

41. See Smith, *supra* note 39, at 284; see also Jeffrey S. Theuer, Comment, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061, 1072–73 (1988) (“The emphasis of the ‘purpose’ prong on individual intent appears to present a test too difficult to apply. The sources which reveal such intent can be ‘contrived and sanitized, favorable media coverage orchestrated, and post-enactment recollections conveniently distorted.’”) (footnotes omitted).

that the legislation would survive an Establishment Clause attack, legislators would claim to support the legislation for every reason other than religious ones. Because ascertaining legislative intent is a near impossible task, and because it is not necessarily accurate even when it is determined, it is not a helpful factor in deciding Establishment Clause cases.⁴²

Subjective legislative intent is also not a useful inquiry because the Supreme Court has often refused to engage in intent questions.⁴³ This is because a practical difficulty exists in determining legislative intent based upon inadequate or incomplete legislative records.⁴⁴ Further, examining legislative intent is problematic because the issue of whose intent counts is disputed.⁴⁵ For example, the Court has looked to legislative history and statements of purpose made by a statute's sponsor to ascertain intent.⁴⁶ One cannot assume, however, that all members voting for a particular piece of legislation agree with a statement made by one particular legislator regarding the purpose of the legislation.⁴⁷ Even if these statements or legislative history properly explain the purpose of a statute, a problem with the "purpose" prong remains:⁴⁸ the

42. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Justice Scalia notes that in prior cases, the Supreme Court has held that the government may not act with the purpose of advancing religion, except ("now and then") when the Free Exercise Clause says that it must. *Id.* The government can also act with the purpose of advancing religion when it seeks to eliminate existing government hostility ("which exists sometimes") toward religion. *Id.* Finally, the government can act with the purpose of advancing religion when it is merely accommodating religious practices. *Id.* Yet, at some point in accommodating religion (although "it is unclear where"), intentional accommodation is equivalent to fostering religion, which is obviously unconstitutional. *Id.* Therefore, according to Justice Scalia, these "cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." *Id.*

43. Theuer, *supra* note 41, at 1070. Theuer notes that in *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968), Chief Justice Warren gave three reasons for rejecting a judicial standard based on legislative intent. *Id.* First, what certain people say about a given piece of legislation that they were involved in passing is not indicative of what the entire legislative body intended the legislation to mean or accomplish. *Id.* Second, if a piece of legislation were struck down because of illicit motives, the legislature could simply state new reasons for enacting a new law at a later time. *Id.* Third, taking motive into account could hinder the lawmaking process by allowing good laws with bad motives to be struck down. *Id.*

44. Hal Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915, 917.

45. William B. Petersen, "A Picture Held Us Captive": *Conceptual Confusion and the Lemon Test*, 137 U. PA. L. REV. 1827, 1835 (1989).

46. *Id.* at 1836.

47. *Id.* at 1838.

48. *Id.* Petersen argues that there would still be problems with ascertaining which statements accurately express legislative purpose and then assessing the truth of these statements. *Id.* Petersen questions whether or not courts should assume that legislatures are acting in good faith when they state what the "official" purpose of a given statute is. *Id.*

assumption that the existence of a religious purpose behind a statute necessarily leads to a religious effect of the statute.⁴⁹ These criticisms highlight the fact that legislative intent is difficult to ascertain, and not necessarily meaningful when it is determined, because religious purpose does not always translate into religious effect.

The second prong of the *Lemon* test requires that the primary or principal effect of a statute, act, or display neither advance nor inhibit religion. This requirement is problematic because it is often difficult to determine the primary or principal effect of any given statute, act, or display. For example, in *Wallace v. Jaffree*,⁵⁰ the Supreme Court dealt with the constitutionality of a statute that authorized a period of silence for meditation or voluntary prayer. The Court found that the legislative

49. *Id.* at 1842. “[T]he Court often incorrectly assumes a causal relationship between the first two parts of the *Lemon* test, and concludes that a religious purpose necessarily leads to a religious effect.” *Id.* Some might object to this, however, stating that the existence of a religious purpose alone should be enough to invalidate a practice as unconstitutional. Indeed, the Court itself has construed the *Lemon* test in this way. See *Edwards v. Aguillard*, 482 U.S. 578, 582–83 (1986) (“The Establishment Clause forbids the enactment of any law ‘respecting an establishment of religion.’ The Court has applied a three-pronged test [the *Lemon* test] to determine whether legislation comports with the Establishment Clause. . . . State action violates the Establishment Clause if it fails to satisfy any of these prongs.” (footnote omitted)). One prong of the *Lemon* test is that the legislature must have adopted the law with a secular purpose. *Id.* at 583. Thus, laws that do not have a secular purpose can be invalidated solely on this ground. In *Edwards*, the Court struck down a Louisiana statute that prohibited the teaching of evolution in public schools unless creation science was also taught. *Id.* at 593–94. The statute was deemed unconstitutional because the appellants failed to identify a clear secular purpose for the statute. *Id.* at 585; see also *Stone v. Graham*, 449 U.S. 39, 39, 41 (1980) (holding that a Kentucky statute that required the posting of the Ten Commandments on the wall of each public classroom in the state was unconstitutional because it had no secular legislative purpose). It is not clear, however, why the presence of a religious purpose alone should invalidate a statute or practice if the statute or practice does not promulgate a religious effect. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56–57 (1985) (stating that the statute authorizing a one-minute moment of silence for meditation or voluntary prayer was unconstitutional because the “State did not present evidence of *any* secular purpose”). In *Wallace*, there was no discussion regarding the statute’s advancement of religion independent of the Court’s analysis of legislative intent. *Id.* at 60. Thus, nothing in the opinion indicated that the practical effect of this statute (that voluntary prayer was one acceptable activity to engage in during the moment of silence) resulted in prayer occurring more frequently than prayer occurred before the statute was enacted (where only meditation was referred to). If the statute has the same effect regardless of whether or not it was motivated solely by religious purposes, it is not necessary to deem it unconstitutional when motivated by religious purposes. See also *infra* notes 52–56 and accompanying text.

50. 472 U.S. at 41–42.

intent of the sponsor of the statute was clear in that case.⁵¹ The majority noted that there was only one significant textual difference—the addition of the words “or voluntary prayer”—between an earlier version of the statute and the statute at issue in the case.⁵² To the majority, this indicated that the State intended to characterize prayer as a favored practice.⁵³ Chief Justice Burger, however, disagreed with the majority regarding the effect of the statute.⁵⁴ He said that Alabama did not endorse prayer simply because it enacted a statute stating that voluntary prayer was *one* of several authorized activities during a moment of silence.⁵⁵ Thus, for the majority, the primary effect of the statute was an endorsement of prayer as a favored practice, but for Justice Burger, the primary effect of the statute was to clarify what activities are authorized during a moment of silence.

51. *Id.* at 56–57. The Court said legislative intent was clear because “[t]he sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an ‘effort to return voluntary prayer’ to the public schools.” *Id.*

52. *Id.* at 59. The earlier version of the statute, § 16-1-20, stated, “a period of silence, not to exceed one minute in duration, shall be observed for meditation.” *Id.* at 40 n.1. The statute at issue in this case, § 16-1-20.1, stated, “a period of silence not to exceed one minute in duration shall be observed for meditation *or voluntary prayer*.” *Id.* at 40 n.2 (emphasis added). Interestingly, in *Elk Grove Unified School District v. Newdow*, there was only one significant textual difference between the Pledge of Allegiance as originally written in 1892 and the Pledge of Allegiance as amended in 1954: the addition of the words “under God” in 1954. 124 S. Ct. 2301, 2305–06 (2004), *reh’g denied*, 125 S. Ct. 21 (2004). There was a minor amendment made to the Pledge in the 1920s, where “my Flag” was changed to “the flag of the United States of America.” *Id.* at 2305. In 1892, the Pledge was written as follows: “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.” In 1954, the words “under God” were added to the Pledge so that it read: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” *Id.* at 2306. Based on the Court’s rationale in *Wallace v. Jaffree*, one might expect the Supreme Court in *Elk Grove Unified School District v. Newdow* to have concluded that the addition of the words “under God” to the Pledge in 1954 indicated treatment of Christian religions as favored religions in the United States. The majority in *Newdow*, however, never reached the merits of the case. *Id.* at 2305. In contrast, Chief Justice Rehnquist and Justice O’Connor wrote concurring opinions discussing the constitutionality of the Pledge of Allegiance. *Id.* at 2316–27. Both Justices concluded that the Pledge of Allegiance, which includes the words “under God,” does not violate the Establishment Clause. *Id.* at 2312, 2323. Chief Justice Rehnquist reasoned that “[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” *Id.* at 2320 (citing H.R. REP. NO. 1693, 83d Cong., 2d Sess., 2 (1954)). Similarly, Justice O’Connor concluded that the words “under God” are mere “ceremonial deism,” *see supra* note 5, based on four factors: history and ubiquity, absence of worship or prayer, absence of reference to particular religion, and minimal religious content. *Id.* at 2323–27.

53. *Wallace*, 472 U.S. at 60.

54. *Id.* at 85 (Burger, C.J., dissenting).

55. *Id.*

Which effect is truly primary makes an enormous difference because it affects the determination of whether or not the statute violates the Establishment Clause. Under the majority’s view, the statute violated the Establishment Clause, but under Burger’s view, the statute would not violate the Establishment Clause.⁵⁶ It is not helpful to employ a test whose results hinge on a subjective factor that is difficult to ascertain, such as the primary or principal effect of a statute. If reasonable minds differ as to the primary or principal effect of a given statute, act, or display, can it really be said that the statute, act, or display has a primary or principal effect at all? The primary or principal effect thus seems to depend upon the perception of the majority of people, or at least the majority of Supreme Court Justices. This is further problematic because a main goal of the Establishment Clause is to protect the beliefs of those in the religious minority from those in the religious majority.⁵⁷

Finally, the *Lemon* test requires that the statute, act, or display must not foster excessive government entanglement with religion. The primary problem with this prong is ascertaining the definition of “excessive.”⁵⁸

56. *Id.* at 61.

57. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring). Whose perceptions, then, should count in this type of inquiry? There are two options, better seen in the context of the endorsement test, which will be taken up in the next section. *See infra* notes 82–91 and accompanying text. For now, it is enough to say that it is inherently contradictory to proclaim that a statute, act, or display has a certain principal or primary effect when not everyone examining the statute, act, or display perceives the same principal or primary effect.

58. The Court has discussed what should be examined to determine whether or not a particular practice is “excessive,” but has not discussed what degree of governmental involvement with religion qualifies as “excessive.” For example, in *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970), the Court noted that “the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.” Further, in *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971), the Court stated, “[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Finally, in *Lynch*, the Court said, “[e]ntanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court’s finding on the absence of administrative entanglement.” 465 U.S. at 684. This is because there was no evidence that the city contacted church authorities regarding the content and design of the display, no maintenance expenses were necessary, and “[i]n many respects the display require[d] far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.” *Id.* These explanations of whether or not a particular practice constitutes excessive government entanglement with religion seem to cast the definition of “excessive” in the light of “I’ll know it when I see it,” as opposed to describing factors or guidelines indicating what degree of involvement is in fact “excessive.”

Is the government required to set itself outside of religious affairs altogether (a complete “hands-off” approach)? May it acknowledge religion? May it make accommodations for religious practices? A complete hands-off approach is an impossible goal when the Free Exercise Clause prevents Congress from prohibiting the free exercise of religion.⁵⁹ If the government must protect the religious freedoms of its individual citizens, it cannot remain completely outside of religious affairs.⁶⁰ It thus appears that it is at least acceptable for government to acknowledge religion, but may government also make accommodations for it?

The distinction between acknowledgment and accommodation, however, may not always be substantial enough to distinguish between excessive and nonexcessive government involvement. For example, if the government provides that employees can be excused from work on their religious days of Sabbath, is this an acknowledgment that some people are religious and believe that certain days of the week are holy and should therefore be devoted to God, not work?⁶¹ Or, is this an accommodation of the religious beliefs of these citizens? If we say that government may acknowledge religion, but may not accommodate it, how would the government proceed in the above example? Even if we assume that excusing employees from work is a mere acknowledgment of religion (which, no doubt, many people would disagree with), is it so obvious that the government would still not be excessively entangled with religion? That is, in the government’s earnestness to ensure that it is only acknowledging religion, it might closely monitor workplace practices to make sure that acknowledgment of religion is not rising to the level of religious accommodation. Would not, then, this close monitoring be considered excessive entanglement?⁶² Thus, the government has the dilemma of not being able to exempt itself from religious involvement, while also running the risk that mere acknowledgment of religion could

59. U.S. CONST. amend. I.

60. See Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947–48 (1986):

On the one hand, the Court has read the establishment clause as saying that if a law’s purpose is to aid religion, it is unconstitutional. On the other hand, the Court has read the free exercise clause as saying that, under certain circumstances, the state must aid religion. Logically, the two theses are irreconcilable.

61. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 146 (1987) (holding that Florida’s refusal to provide appellant with unemployment benefits violated the Free Exercise Clause because “the State may not force an employee ‘to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work’”) (quoting *Sherbert v. Verner* 374 U.S. 398, 404 (1963)).

62. E.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768–69 (1976) (White, J., concurring) (saying the entanglement prong is “insolubly paradoxical”).

simultaneously be excessive entanglement with religion.

As demonstrated above, all three prongs of the *Lemon* test contain inherent flaws that prevent the test from being practically workable in a satisfactory manner. Application of the *Lemon* test in actual cases has also failed. For example, in *Aguilar v. Felton*,⁶³ use of the *Lemon* test completely failed in its goal of providing government neutrality with respect to religion.⁶⁴ Although the *Lemon* analysis does not require that all three prongs be violated for a practice to be deemed unconstitutional, this is precisely one of the problems with the *Lemon* test, and is especially evident in *Aguilar*.⁶⁵ Application of the *Lemon* test to the facts of *Aguilar* resulted in the disturbing conclusion that government aid to underprivileged children violated the First Amendment, although it was never established that the purpose of the aid was religious in nature or that the aid itself had the effect of advancing religion. Indeed, the program was deemed unconstitutional because of the government’s desire to assure that the program was not associated with religion.⁶⁶ For these reasons, the *Lemon* test ought to be abandoned.

63. 473 U.S. 402 (1985).

64. In *Aguilar*, the Court struck down a New York program authorizing the Secretary of Education to provide financial assistance to local schools, including parochial schools, to meet the needs of educationally deprived children from low-income families. *Id.* at 404, 414. Public school personnel volunteered to run the program, and were told to “avoid involvement with religious activities . . . conducted within the private schools and to bar religious materials in their classrooms.” *Id.* at 406–07. The program was nevertheless held unconstitutional because it fostered excessive government entanglement with religion, even though there was no discussion that the program was exclusively motivated by nonsecular purposes or that it had the effect of advancing religion. *Id.* at 409.

65. In *Aguilar*, there was no evidence that the program was inspired by religious motives or that the program had the effect of advancing religion. In fact, the program was held unconstitutional because the state surveillance needed to ensure that religion did not pervade the program would have been “excessive.” *Id.* at 413. Chief Justice Burger addressed this issue, stating, “[w]hat is disconcerting about the result reached today is that . . . the Court does not even attempt to identify any threat to religious liberty . . .” *Id.* at 419 (Burger, C.J., dissenting). Chief Justice Burger went on to say that the Court’s duty is not to mechanically apply formulas, but rather is to “determine whether the statute or practice at issue is a step toward establishing a state religion. Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction.” *Id.*

66. This is anomalous and undesirable, but is not the only example of the failure of the *Lemon* test in practical application. Additional cases in which employing the *Lemon* test has failed will be discussed *infra* Part II.

B. The Endorsement Test

The endorsement test focuses primarily on the first and second prongs of the *Lemon* test. This test asks what the government's actual purpose was in passing a particular statute, erecting a certain display, or engaging in a specific act, and then asks what the effect of the statute, display, or act is, regardless of the government's actual purpose.⁶⁷ This test was set forth in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.⁶⁸ O'Connor suggested this test as a clarification of current Establishment Clause jurisprudence because it was unclear to her how the *Lemon* test protected the principle of prohibiting impermissible government interaction with religion guaranteed by the First Amendment.⁶⁹ O'Connor stated that to determine whether or not there has been unconstitutional government action with respect to religion, one must examine what the government intended to communicate, as well as what message was actually conveyed.⁷⁰ This inquiry forms the two-pronged analysis that is the endorsement test.

1. Arguments Supporting Use of the Endorsement Test

One positive aspect of this test is that it emphasizes that the government should not communicate that anyone is either an "insider" or an "outsider" on account of his or her religious beliefs.⁷¹ In connection with prohibiting the government from placing a badge of inferiority on some of its citizens, the endorsement test also seeks to assure government neutrality toward all religions in a culturally diverse society.⁷² This neutrality that the endorsement test seeks is consistent with the mandates of the First Amendment because it requires respect for different beliefs.⁷³

67. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). O'Connor formulates the endorsement test as follows:

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

Id.

68. *Id.* at 687.

69. *Id.* at 687–89.

70. *Id.* at 690.

71. See 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, 1051 (1986).

72. *Id.*

73. Christopher S. Nesbit, Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590, 611 (1990) (stating that, at a minimum, the Establishment Clause requires that the government not prefer one religious sect or creed over another because "the first amendment has always required

The endorsement test is also commendable because it allows the government to make certain accommodations for both minority and mainstream religions.⁷⁴ Additionally, the endorsement test’s rejection of government acts communicating that certain citizens are outsiders appeals to humane instincts.⁷⁵ Finally, the Supreme Court has adopted the endorsement test as “a sound analytical framework.”⁷⁶ In *County of Allegheny v. ACLU*, the Court formally adopted the endorsement test, even though the *Lemon* test (as applied in *Lynch v. Donnelly* regarding a holiday display) was controlling law at the time.⁷⁷

2. Arguments Against Use of the Endorsement Test

Despite this support, there are three main flaws inherent in the endorsement test. First, what type of endorsement does the test refer to?

complete respect for religious diversity in society”). Respect for religious diversity is not achieved when the government does not act neutrally toward religion because the government “cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.” *Id.*

74. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501, 508 (2002). Governmental accommodations of religion are not permitted under the *Lemon* test because the goal of accommodations is to avoid burdening religious activity, making it difficult to say that assisting religion is not the purpose of these accommodations. *Id.* at 501. Yet, the Court has required religious exemptions under the Free Exercise Clause and has even approved of some accommodations that are not constitutionally required. *Id.* For example, the Court has held that religious conscientious objectors can be excused from military service, *see* *Selective Draft Law Cases*, 245 U.S. 366, 389–90 (1918), that Amish schoolchildren can be excused from compulsory education laws, *see* *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972), and that while exemption from a Sunday Closing law for Orthodox Jews is not constitutionally required, such treatment is permissible, *see* *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961). *Id.* Choper contends that these accommodations should be constitutional because “[i]t reasons that relieving burdens that generally applicable regulations impose on members of some faiths neither ‘endorses’ those religions, nor makes nonbelievers nor members of the non-benefited religions feel they have been disparaged because of their faith.” *Id.* at 508–09.

75. *Id.* at 509.

76. *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

77. *Id.* at 597 (“Since *Lynch*, the Court has made clear that . . . 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.’”) (quoting *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985)); *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (holding that “the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government”).

Second, how do we ascertain government intent? Finally, whose views count in the perception that government has endorsed or disapproved of religion?⁷⁸

The first difficulty with the endorsement test is determining the prohibited types of endorsement. The government can engage in exclusive preferment endorsement, endorsement of truthfulness, endorsement of value, or accommodation endorsement.⁷⁹ While it may seem intuitive that exclusive preferment endorsement by the government should always be prohibited by the Establishment Clause, it is less clear whether or not endorsements of value or accommodation endorsements should be violations.⁸⁰ If we cannot even distinguish which type of endorsement is appropriate from which type of endorsement is inappropriate, how is the “endorsement” test supposed to work? This inherent flaw eliminates the usefulness of the endorsement test in and of itself, but there are still other problems with the test.

78. Smith, *supra* note 39, at 291. Determining what type of endorsement the endorsement test refers to is difficult because endorsement connotes approval, but approval may take various forms. *Id.* at 276. Deciding whose perceptions count in the perception that the government has either endorsed or disapproved of religion is also difficult because we do not know whether it is the perceptions of real human beings or the perceptions of the hypothetical “objective observer” that count. *Id.* at 291–92.

79. *Id.* at 276–77. Exclusive preferment endorsement refers to the notion that believers of different religious faiths assume that not all religions can be correct because they differ in their doctrines, practices, and claims to divine authority. *Id.* Thus, there have been disputes over which religion is *the* true religion. *Id.* at 277. If the government indicated that it accepted one particular religion as *the* true religion, it would be engaging in exclusive preferment endorsement. *Id.* Endorsement of truthfulness refers to the notion that the government could express that certain religious doctrines are true without saying that a particular religion is *the* true religion. *Id.* Endorsement of value reflects the idea that the government can express that religion is generally valuable because it instills qualities of good citizenship or helps maintain civil peace. *Id.* Finally, accommodation endorsement refers to the concept that the government can acknowledge that many citizens care deeply about religion and that these religious concerns merit respect and accommodation by the government. *Id.*

80. *Id.* at 278–83. Steven Smith posits several ways in which the concept of endorsement can be made clearer, but concludes that none of the modifications is very fulfilling. *Id.* For example, the government could prohibit all types of the aforementioned variants of endorsement, but refusing to accommodate religious beliefs may lead to disapproval of religion when the government often acknowledges and accommodates various citizen interests, and this would be a violation of the Establishment Clause. *Id.* at 278. The government could only permit accommodation endorsements, but “the line separating accommodation endorsements from endorsements of truthfulness or value is so thin as to be virtually invisible.” *Id.* at 279. The government could permit accommodation endorsements and endorsements of value, but then there are difficulties in allowing the government to say that religion is “good,” but not that it is “true” because there is no reliable way of determining whether or not school prayer, publicly sponsored nativity scenes, etc. indicate that the religious ideas they represent are “good” or “true.” *Id.* at 282. Finally, the government could engage in accommodation endorsements, value endorsements, and truthfulness endorsements, but not engage in exclusive preferment endorsement. *Id.* at 282–83. The problem with this alternative is that these endorsements would prohibit too little, and thus would not be appealing to proponents of a no endorsement test. *Id.* at 283.

A second difficulty with the endorsement test is the requirement of ascertaining subjective legislative intent. This is the same difficulty that appears under the *Lemon* test. The prior discussion regarding the problems with subjective legislative intent also applies here to demonstrate why discerning the intent of legislators is difficult, and not all that meaningful even when it is determined.⁸¹

The final impediment to applying the endorsement test to Establishment Clause cases is the problem of determining whose views count in the perception that the government has either endorsed or disapproved of religion. One possibility is to use a “real” person’s perception—that is, if a real person would perceive that the government has endorsed or disapproved of religion, then the act would violate the Establishment Clause.⁸² Or, perhaps the perceptions of a “hypothetical objective observer” should be used to determine whether the government has endorsed or disapproved of religion.⁸³ Should the perceptions of real people or the hypothetical objective observer matter? Both options have inherent problems.

If the perceptions of real people are to be protected under the endorsement test, there are so many differing religions and religious beliefs in the United States that practically anything the government does could be seen by someone to be an endorsement or disapproval of religion.⁸⁴ This is a problem because allowing one person’s perceptions of governmental endorsement or disapproval of religion to invalidate an

81. See *supra* notes 38–49 and accompanying text. It is not necessary to reiterate the same intent problems under this test that appear in the *Lemon* test, except to say that the intent problem is still present in the endorsement test, working against the test’s usefulness for deciding Establishment Clause cases.

82. Justice O’Connor emphasizes the fact that “[e]ndorsement 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.” *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring). This would lead one to believe that the effect of endorsement upon “real” people is the primary concern of the endorsement test.

83. Although Justice O’Connor stressed how governmental endorsement of religion affects “real” people in *Lynch*, she stated in *Wallace v. Jaffree* that “[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement” *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring). From O’Connor’s contradictory statements, it is not easy to discern whether the endorsement test is actually concerned with the “hypothetical objective observer” or whether it focuses on “real” people.

84. Smith, *supra* note 39, at 291.

action would result in governmental paralysis.⁸⁵ The First Amendment is designed to protect the rights of all citizens and therefore cannot logically stand for the proposition that if one person finds an action offensive, the action must be invalidated.

On the other hand, it may be that only the perceptions of the “hypothetical objective observer” are relevant. Adopting this view, however, results in an inconsistency in the reasoning behind adopting the endorsement test in the first place. The endorsement test was developed to prevent the government from sending messages to nonbelievers that they are outsiders.⁸⁶ Yet, an objective observer would be familiar with the text, legislative history, and implementation of the practice under review.⁸⁷ Because he or she would thus possess the tools to know exactly what the legislators intended, he or she will only perceive endorsement when legislators intend to endorse.⁸⁸

The same is not true of real people. Real people may perceive endorsement where legislators did not intend to endorse, and real people may not always perceive endorsement where legislators did intend to endorse.⁸⁹ The objective observer does not protect against making citizens feel like outsiders in either of these situations. If real people do not perceive endorsement where the legislature intended to endorse, then they will not feel like outsiders (even though the objective observer perceives an intent to endorse).⁹⁰ In cases where “real” people perceive an intent to endorse where no such legislative intent to endorse exists, the “objective observer” would not protect these interests because the “objective observer” would know that the legislators are not intending to endorse; thus, the “objective observer” would not perceive endorsement.⁹¹

Determining which type of endorsement is prohibited under the endorsement test is difficult, and ascertaining legislative intent is virtually impossible. Furthermore, deciding whose perceptions count leads to problems whether or not the perceptions of “real” people or the “hypothetical objective observer” are adopted. For these reasons, the endorsement test should not be utilized in Establishment Clause cases.

85. *Id.* Indeed, Justice O’Connor herself realizes this problem, noting: “Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the [endorsement] test to an absurdity.” *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321 (2004), *reh’g denied*, 125 S. Ct. (2004).

86. *Lynch*, 465 U.S. at 688.

87. *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring).

88. Smith, *supra* note 39, at 293–94.

89. *Id.*

90. *Id.* at 294–95.

91. *Id.* at 294.

II. APPLICATION OF THE *LEMON* AND ENDORSEMENT TESTS

One of the most obvious ways in which the flaws of the *Lemon* and endorsement tests can be seen is in their application to actual cases. Even without the substantive criticisms outlined in Part I of this Comment, simply looking at the holdings and reasoning of the cases themselves shows the inadequacies of these tests. There are several areas in which application of these tests yields inconsistent, and often incoherent, results.⁹² Two primary examples are the holiday display cases and the recent Ten Commandments cases.⁹³ The results of these cases are wildly inconsistent, demonstrating the inherent flaws of the *Lemon* and endorsement tests.

A. *Holiday Display Cases*

In *Lynch v. Donnelly*, the Supreme Court held that the holiday display of a crèche did not violate the Establishment Clause.⁹⁴ In arriving at this conclusion, the Supreme Court began by acknowledging that church and state are not totally separable and that some relationship between the two is inevitable.⁹⁵

The Court then discussed that its interpretation of the Establishment Clause is at least partially molded by “what history reveals was the

92. See *supra* note 6 and accompanying text.

93. The holiday display cases include *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Ten Commandments cases are composed of *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003), and *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003).

94. *Lynch*, 465 U.S. at 687. The city of Pawtucket, Rhode Island, erected a Christmas display each year as part of its observance of the Christmas season. *Id.* at 671. The display was erected in a park owned by a non-profit organization, located in the heart of the shopping district, and was comprised of a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, colored lights, a banner that read “Season’s Greetings,” and a crèche. *Id.* The crèche consisted of figures of the Infant Jesus, Mary, Joseph, angels, shepherds, kings, and animals, that ranged in height from five inches to five feet. *Id.* These detailed facts must be included in the discussion because “the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. . . . [T]he Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.” *Id.* at 678. In other words, the Court takes an ad hoc approach with respect to Establishment Clause issues; each case is decided according to its particular facts. Therefore, these specific facts must be included in the analysis of the Establishment Clause issue because the outcome of the case turns on these details.

95. *Id.* at 672.

contemporaneous understanding of its guarantees.”⁹⁶ The Court pointed to an act of the First Congress as indicative of what the Establishment Clause was understood to mean when it was first written. The Court noted that Congress approved the Establishment Clause and enacted legislation providing for paid Chaplains for the House and Senate in the same week.⁹⁷ Thus, it was clear that neither the Framers nor the Congress of 1789 viewed the employment of congressional Chaplains to give daily prayers in Congress as an establishment problem.⁹⁸

Moreover, all three branches of government have officially acknowledged the role of religion in American life, from recognizing holidays with religious significance, to the statutorily prescribed motto “In God We Trust,” to “One Nation Under God” as part of the Pledge of Allegiance, to art galleries supported by public revenues that display religious paintings predominantly inspired by one religious faith.⁹⁹

Acknowledging that some interaction between government and religion must exist, the Court decided that the focus of its inquiry into whether or not the crèche violated the Establishment Clause must be on the crèche in the context of the Christmas season.¹⁰⁰ This is because focusing exclusively on the religious component of an activity would lead to its invalidation under the Establishment Clause.¹⁰¹ In examining the crèche in the context of the Christmas season, the Supreme Court seemed to simply assume that the crèche was not equivalent to governmental advocacy of religion. The Court stated that the city’s use of the crèche was merely an act of acknowledging a significant historical religious event that has long been celebrated in the western world.¹⁰² The Court maintained that celebrating and depicting the origins of this holiday were legitimate secular purposes.¹⁰³ Thus, the Court concluded that the first prong of the *Lemon* test (that the statute, act, or display has a secular legislative purpose) was met without much discussion.

The same is true regarding the Court’s analysis of the second prong of the *Lemon* test (that the display’s principal or primary effect neither advance nor inhibit religion). The Court said that this prong would not be met unless display of the crèche were to be viewed as more of an endorsement of religion than spending public money on textbooks for

96. *Id.* at 673. In other words, at least in this instance, the Supreme Court considered, and perhaps gave greater weight to, the original intent of the Framers regarding the First Amendment when deciding an Establishment Clause issue.

97. *Id.* at 674.

98. *Id.*

99. *Id.* at 674, 676.

100. *Id.* at 679.

101. *Id.* at 680.

102. *Id.*

103. *Id.* at 681.

students attending church-sponsored schools, spending public money to transport children to church-sponsored schools, or giving tax exemptions to church properties.¹⁰⁴

The Court concluded that whatever benefit a religion, or all religions, received from displaying the crèche was merely indirect, remote, and incidental.¹⁰⁵ The Court arrived at this conclusion by finding that display of the crèche did not advance or endorse religion any more than the federal government's recognition of Christmas or the exhibition of religious paintings in governmentally supported museums.¹⁰⁶ With this conclusion, the Court drew a line between constitutional and unconstitutional practices, but acknowledged that there is not necessarily one correct spot at which this line should be drawn. This seemingly arbitrary line-drawing is seen in the Court's reluctance to hold that the display of the crèche violated the First Amendment.¹⁰⁷

The Court seems to convey that display of the crèche cannot be unconstitutional because, if it were, a lot of other practices would have to be declared unconstitutional; the Court was simply not willing to arrive at this result. The Court did not really discuss why display of the crèche in and of itself did not advance religion. It simply said that display of the crèche, in relation to other constitutionally valid practices, must also be constitutionally acceptable.¹⁰⁸

104. *Id.* at 681–82. The Court apparently shifted the inquiry from whether or not the crèche advances or inhibits religion to whether or not display of the crèche confers a more substantial benefit to religion than other practices that the Court has upheld. The Court, however, was honest about what it was doing. The majority acknowledged the dissent's argument that some observers might observe the crèche as the city aligning itself with the Christian faith, but responded that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. . . . '[N]ot every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Id.* at 683 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

105. *Id.* at 683.

106. *Id.*

107. *Id.* at 685.

108. *Id.* at 681–82; *see* *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947) (holding that New Jersey's practice of utilizing tax-raised funds to reimburse parents for the cost of sending their children to parochial school, when New Jersey also reimbursed parents who sent their children to public and other schools, did not violate the First Amendment). This case has never been overruled, but has been criticized as "out of line with the First Amendment." *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring); *see also* *Zorach v. Clauson*, 343 U.S. 306, 308, 312 (1952) (upholding a New York City program that allowed public schools to release students during the school day so that they could go to religious centers to receive religious instruction). This case has not been overruled either, but it too has been criticized. Justice Harlan said that

With respect to the third prong (that the display not foster excessive government entanglement with religion), the Court noted that there was no evidence that the city ever contacted church authorities regarding the content or design of the display, the city did not have to spend money to maintain the crèche, and the city itself owned the crèche.¹⁰⁹ There was nothing in the case resembling the “comprehensive, discriminating, and continuing state surveillance . . . present in *Lemon*.”¹¹⁰ Therefore, the Court held that display of the crèche did not foster excessive government entanglement between religion and government.¹¹¹

Although the Supreme Court upheld the display of the holiday crèche in *Lynch*, it reached a conflicting result five years later in *County of Allegheny v. ACLU*. The Court held that the display of a holiday crèche in the Allegheny County Courthouse violated the Establishment Clause, but that the display of a holiday menorah did not.¹¹² The Supreme Court

Zorach is unsound to the extent that it permits the government to shape its secular programs to accommodate the beliefs of religious groups because “legislation must, at the very least, be neutral” to conform to the requirements of the First Amendment. *Welsh v. United States*, 398 U.S. 333, 360–61 (1970) (Harlan, J., concurring). The Court essentially said that the crèche in *Lynch* must be constitutional because the practices in *Everson* and *Zorach* were constitutional. *Lynch*, 465 U.S. at 681–82. Yet, because *Everson* and *Zorach* had been criticized before the Court ruled on the display in *Lynch*, the Court should have addressed the continuing propriety of these practices in its opinion.

109. *Lynch*, 465 U.S. at 684.

110. *Id.* *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971), involved a Pennsylvania statute that provided financial support to nonpublic elementary and secondary schools by reimbursing these schools for the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects and a Rhode Island statute under which the State paid directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. The Rhode Island statute further required that “any teacher applying for a salary supplement . . . first agree in writing ‘not to teach a course in religion for so long as or during such time as he or she receives any salary supplements.’” *Id.* at 608. The Court recognized, however, that ensuring that teachers at parochial schools who received state supplements to their salaries did not incorporate religious instruction in their classrooms would require “[a] comprehensive, discriminating, and continuing state surveillance . . . to ensure that these restrictions are obeyed and the First Amendment otherwise respected.” *Id.* at 619. The same type of continuing surveillance would apply with respect to the Pennsylvania statute as the Pennsylvania statute “provide[d] state aid to church-related schools for teachers’ salaries.” *Id.* at 620.

111. *Lynch*, 465 U.S. at 685.

112. *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989). The crèche was displayed on the Grand Staircase of the Allegheny County Courthouse during the Christmas holiday season each year since 1981 by the Holy Name Society, a Roman Catholic group. *Id.* at 579. The crèche included figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, and also included an angel bearing a banner that proclaimed “Gloria in Excelsis Deo!” *Id.* at 580. The display also contained a plaque indicating it was donated by the Holy Name Society. *Id.* The county placed red and white poinsettia plants around the fence, together with a small evergreen tree decorated with a red bow, but no figures of Santa Claus or other decorations were included. *Id.* at 580–81. The Court recognized that the effect of a crèche display turns on its setting, thus the particular facts and details surrounding the crèche are of particular

concluded that the crèche display was a violation of the Establishment Clause because it demonstrated the county's endorsement of Christianity.¹¹³

The Court began its analysis by recognizing that a crèche is capable of communicating a religious message.¹¹⁴ Yet, the Court distinguished the crèche in this case from the crèche in *Lynch* by saying that nothing in the context of the display in this case detracted from the crèche's religious message, while such items as Santa's house and reindeer drew attention away from the crèche itself in *Lynch*.¹¹⁵ The notion that either the presence of figurines of Santa Claus or other decorations elsewhere in the courthouse or the presence of flowers surrounding the crèche detracted from the crèche's religious message was rejected in *Allegheny*.¹¹⁶ The Court emphasized the fact that the crèche was located on the Grand Staircase, "the 'main' and 'most beautiful' part of the building that is the seat of county government."¹¹⁷ According to the Court, no viewer would reasonably think that the crèche would be placed in such a location without the support and approval of the government, despite the fact that a sign appeared next to the crèche indicating that a Roman Catholic organization owned the crèche.¹¹⁸ Instead of viewing the sign as an announcement that the display was sponsored by a religious organization, the Court saw the sign as a governmental endorsement of the religious organization's message.¹¹⁹

The Court distinguished *Allegheny* from *Lynch* on the facts.¹²⁰ The factual differences, however, are not necessarily persuasive. First, the Court said that nothing detracted from the religious message of the

importance and must be included in any analysis of the constitutionality of such a display. *Id.* at 597.

113. *Id.* at 612–13.

114. *Id.* at 598.

115. *Id.*

116. *Id.* at 598–99.

117. *Id.* at 599.

118. *Id.* at 599–600.

119. *Id.* at 600.

120. The Court stated that *Lynch* stands for the proposition that the government may celebrate Christmas, but not in a way that endorses Christianity. *Id.* at 601. The Court then stated that Allegheny County crossed the boundaries delineated in *Lynch* by celebrating "Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ." *Id.* With this statement, the Court acknowledged that the holdings of *Lynch* and *Allegheny* were different, but that there was a valid reason for this difference; the display in *Lynch* was within the bounds of the First Amendment, but the display in *Allegheny* fell outside the permissible practices of the First Amendment. *Id.*

crèche in *Allegheny*, while secular decorations drew attention away from the crèche's religious symbolism in *Lynch*.¹²¹ The problem with this purported factual distinction between the two cases is that nothing in the *Lynch* opinion referred to secular objects detracting from the crèche's religious message as a factor in declaring the crèche to be constitutional.¹²² Rather, the Court stated that it was not seeking to explain away the religious nature of the crèche, nor was it equating the crèche with a Santa's house or reindeer.¹²³ Second, the Court emphasized the location

121. See *supra* notes 94 & 112 and accompanying text.

122. *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in part and dissenting in part):

Crucial to the Court's conclusion was not the number, prominence, or type of secular items contained in the holiday display but the simple fact that, when displayed by government during the Christmas season, a crèche presents no realistic danger of moving government down the forbidden road toward an establishment of religion.

Some might argue that *Lynch* never addressed these secular objects because the Court utilized the *Lemon* test and found that display of the crèche did not advance religion. The argument would continue by saying that this is not the same inquiry that took place in *Allegheny*. The Court focused on governmental endorsement of religion in *Allegheny*, as opposed to advancement of religion, making examination of secular objects necessary to determine how the presence of secular objects would affect a perception of governmental endorsement of religion. A response to this argument is that application of either test should lead to the same result. See, e.g., Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 874 (1993) (stating that "[t]he endorsement language of Justice O'Connor . . . is fully consistent with the essence of *Lemon*"). Thus, if the two tests are consistent with one another, one might assume that they strive to achieve the same underlying goals and should therefore provide consistent results in practice. Some might, however, argue that while it would be desirable for application of either test to lead to consistent results, Justice O'Connor did not necessarily intend for application of the endorsement test to always achieve the same results that application of the *Lemon* test would achieve. See *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring). O'Connor recognized:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions The second and more direct infringement is government endorsement or disapproval of religion. . . .

Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman* as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause.

Id. (citations omitted). This statement seems to indicate that the endorsement test is necessary because the *Lemon* test may not adequately protect Establishment Clause principles. Accordingly, application of the endorsement test might produce different results than would application of the *Lemon* test, but, according to O'Connor, this would be desirable. Also, O'Connor states that her suggested approach "leads to the same result in *this case*" as does application of the *Lemon* test. *Lynch*, 465 U.S. at 687 (emphasis added). This implies that her endorsement analysis might not always lead to the same conclusions that application of the *Lemon* analysis would.

123. *Lynch*, 465 U.S. at 685 n.12.

of the crèche.¹²⁴ The location of the crèche, just like the secular objects accompanying the display, is not mentioned anywhere in the *Lynch* opinion.¹²⁵ In *Lynch*, the Court simply emphasized that the crèche had to be viewed in the context of the Christmas season.¹²⁶ Finally, the entity that owned the crèche was another distinguishing factor that the Court focused on in *Allegheny*.¹²⁷ If this distinction were truly factually relevant, it would seem to cut in favor of the crèche in *Allegheny* being declared constitutional, as opposed to unconstitutional.¹²⁸

Another difference between *Allegheny* and *Lynch* is that the Supreme Court applied the endorsement test in *Allegheny*, but applied the *Lemon* test in *Lynch*.¹²⁹ Applying two different tests may have led to the two different results in *Allegheny* and *Lynch*. It is unclear, however, whether the results would have been different had the Court applied the same test.

What is clear is that it would be most desirable to be able to employ either test and still achieve the same results.¹³⁰ This is true for at least

124. See *supra* notes 94 & 112 and accompanying text.

125. *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in part and dissenting in part).

126. *Lynch*, 465 U.S. at 680; see also *Allegheny*, 492 U.S. at 665–66 (Kennedy, J., concurring in part and dissenting in part).

127. See *supra* notes 94 & 112 and accompanying text.

128. This is because the crèche in *Lynch* was owned by the city of Pawtucket, while the crèche in *Allegheny* was owned by a Roman Catholic organization. See *Allegheny*, 492 U.S. at 667 (Kennedy, J., concurring in part and dissenting in part) (“Nor can I comprehend why it should be that placement of a government-owned crèche on private land is lawful while placement of a privately-owned crèche on public land is not.”).

129. The language of *Allegheny* demonstrates this difference. The majority opinion concluded that the crèche demonstrated that the county endorsed Christianity. The majority was quite clear about employing the endorsement test as opposed to the *Lemon* test when it stated, “our present task is to determine whether the display of the crèche and the menorah, in their respective ‘particular physical settings,’ has the effect of endorsing or disapproving religious beliefs.” *Id.* at 597. The majority was less clear, however, about why it used the endorsement test as opposed to the *Lemon* test. The majority mentioned that the general principles espoused by the five Justices in concurrence and dissent in *Lynch* “are sound, and have been adopted by the Court in subsequent cases.” *Id.* Thus, while it is clear that the Supreme Court has utilized the endorsement test since O’Connor first proposed it in her concurring opinion in *Lynch*, and it is clear that the Supreme Court decided to use the endorsement test in *Allegheny*, it is not entirely clear why the Supreme Court chose to employ the endorsement test in this case and whether or not it will exclusively rely on the endorsement test in future cases.

130. One purpose of court decisions is to state what is acceptable behavior in certain areas so that people may act accordingly. If court decisions are inconsistent or do not clearly differentiate between what is acceptable and unacceptable behavior, people will not understand how to conduct themselves in particular situations and litigation will

three reasons. First, both the *Lemon* and endorsement tests are good law and can be used at any time in current Establishment Clause cases. Second, the Supreme Court did not indicate in *Allegheny* that it was undergoing a shift in policy or goals, or that it viewed Establishment Clause issues differently than it did when *Lynch* was decided, requiring use of the endorsement test to achieve objectives that it could not meet with the *Lemon* test. Finally, the notion of “endorsement” has largely been absorbed into *Lemon*’s second prong.¹³¹ If endorsement is seen as one way in which the government advances religion, it would seem that application of the endorsement test *should* lead to the same result as if the *Lemon* test were employed.

Perhaps even more compelling than these inconsistencies and contradictions *between* cases, however, are the inconsistencies and contradictions *within* cases. Such was the situation in *Allegheny*, as the display of a crèche was held to be a violation of the Establishment Clause, but the display of a menorah was not.¹³²

The Court began its discussion of the constitutionality of the menorah by noting that it was the “primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.”¹³³ The Court then noted that the tree was clearly the predominant element in the city’s display.¹³⁴ It was at this point that the logic of the Court’s opinion began to falter. The Court declared that the tree dominated the display and that Christmas trees, unlike menorahs, are not inherently religious symbols

continue indefinitely until a clearer framework is provided. For the sake of consistency and predictability, it would not be good public policy for the Supreme Court to employ multiple tests that could result in drastically different holdings.

131. See *Allegheny*, 492 U.S. at 592. The Court noted that the *Lemon* test has been regularly applied in Establishment Clause cases, but that recent decisions “have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion” *Id.*

132. *Id.* at 621. About one block from the courthouse, a display consisted of a forty-five-foot Christmas tree, an eighteen-foot menorah, and a sign that read “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.” *Id.* at 582, 587. The menorah was owned by a Jewish group, but was stored, set up, and taken down by the city every year. *Id.* at 587.

133. *Id.* at 613–14.

134. *Id.* at 617. The problem with this statement is that the Court assumes that simply because the tree is forty-five feet high, while the menorah is only eighteen feet high, the tree must be the predominant element in the display. This is not necessarily the case. As Justice Brennan notes, it is entirely possible that the sight of an eighteen-foot menorah would be “far more eye catching than that of a rather conventionally sized Christmas tree. It also seems to me likely that the symbol with the more singular message [in this case the menorah] will predominate over one lacking such a clear meaning.” *Id.* at 642 (Brennan, J., dissenting).

because they typify the secular celebration of Christmas.¹³⁵ From these statements, the Court reached the conclusion that the display communicated a secular celebration of Christmas and portrayed Chanukah as an alternative tradition.¹³⁶

This quasi-syllogism is, however, flawed. The Court basically operated under the major premise that the Christmas tree was the dominant element of the display. The minor premise was that the Christmas tree was a secular symbol. The conclusion was that because the dominant element was a secular one, the entire display must have been secular in nature. This logic is severely impaired. It is not reasonable to say that the display should be interpreted in light of the Christmas tree simply because the Christmas tree was the largest symbol.¹³⁷ The Court recognized that a menorah is a religious symbol, but found it implausible to perceive the display of the tree, sign, and menorah as an endorsement of Judaism alone.¹³⁸

135. *Id.* at 616.

136. *Id.* at 618.

137. *See supra* note 134.

138. *Allegheny*, 492 U.S. at 616 n.64. The Court’s reasoning as to why this interpretation is “distinctly implausible” is puzzling. The Court noted that during the time of the litigation, only 45,000 of Pittsburgh’s 387,000 people were Jewish. *Id.* Whether or not a display violates the Establishment Clause, however, is not related to the percentage of the population who subscribe to a particular faith. That is, Pittsburgh could violate the Establishment Clause by endorsing Judaism, and not Christianity, regardless of the number of Jewish people in the city. The Court acknowledged this much by saying that Pittsburgh might endorse a minority faith by displaying a menorah alone. *Id.* The mention of the Jewish population is, therefore, irrelevant and confusing. What is more confusing, though, is the Court’s statement that “[w]hen a city like Pittsburgh places a symbol of Chanukah next to a symbol of Christmas, the result may be a simultaneous endorsement of Christianity and Judaism But the city’s addition of a visual representation of Chanukah to its pre-existing Christmas display cannot reasonably be understood as an endorsement of Jewish—yet not Christian—belief.” *Id.* This is an odd statement considering the fact that the Court states that Christmas trees are secular symbols of the Christmas holiday. *Id.* at 616–17. If a Christmas display simply acknowledges the secular aspects of the holiday by including a secular symbol (in this case, the Christmas tree), it is reasonable that the addition of a menorah could result in the display being understood as an endorsement of Jewish belief, but not as an endorsement of Christian belief. Even more troubling is the Court’s assertion that the respective sizes of the tree and menorah cause the menorah’s meaning to depend upon the meaning of the Christmas tree. Size of the symbols alone, however, need not be the determining factor. *See supra* note 134. Furthermore, one can easily think of a display where a forty-five-foot Christmas tree is surrounded by many smaller, yet highly religious, symbols. In such a case, it would not be so simple to say that because the tree remains the largest element in the display, then naturally the whole display must be secular in nature.

The Court also seemed to assume, without much discussion, that a Christmas tree is an entirely secular symbol.¹³⁹ Although it may be true that Christmas trees have lost some of their religious significance over the years, especially when coupled with the notions of gift-giving and Santa Claus in contemporary life, this does not mean that Christmas trees are always secular and are not capable of being religious symbols.¹⁴⁰ Also, given the religious symbolism of the menorah, it is reasonable that an observer might believe that the government is promoting both the Christian and Jewish religions.¹⁴¹ Yet, the Court rejected this possibility by saying that a predominantly secular symbol of Chanukah does not exist, so including a menorah is the city's only real option.¹⁴² The Court came to this conclusion because it said that an eighteen-foot dreidel would look out of place in a holiday display and might be interpreted as mocking Chanukah.¹⁴³ It is unclear why use of an eighteen-foot dreidel would certainly be inappropriate, while use of an eighteen-foot menorah is permissible.¹⁴⁴

The factual distinctions that the Court said existed between the crèches in *Lynch* and *Allegheny*, as well as the distinctions between the crèche and the menorah within *Allegheny* are not too compelling. The contrary holdings of *Lynch* and *Allegheny*, therefore, reflect inherent problems in both tests because application of either the endorsement test or the *Lemon* test should lead to the same result. Thus, the endorsement and *Lemon* tests should be abandoned.

139. "Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. . . . Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs . . ." *Id.* at 616–17.

140. In fact, if one were to "[c]onsider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna . . . [there could] be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol." *Id.* at 641 (Brennan, J., dissenting).

141. The majority acknowledged that the city used a religious symbol, the menorah, as its representation of Chanukah. The majority also acknowledged that the city did not have reasonable alternatives that were less religious in nature. *Id.* at 618.

142. *Id.* at 613–14. The Court stated that "the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions." *Id.*

143. *Id.* at 618.

144. The Court completely dismissed the possible use of the dreidel, a more secular symbol of Chanukah, by saying that some people might interpret an eighteen-foot dreidel as mocking the celebration of Chanukah. *Id.* Although this might be true, there is no discussion as to who would perceive an eighteen-foot dreidel in this manner or why the dreidel might be perceived in such a way. It is not unreasonable that some people might indeed perceive an eighteen-foot menorah as mocking the celebration of Chanukah. It is problematic for the Court to reach such conclusions without more discussion on the matter.

B. Ten Commandments Cases

The same inconsistency that is present in the holiday display cases also exists in the recent Ten Commandments cases.¹⁴⁵ At first glance, there is a circuit split regarding whether or not display of the Ten Commandments on public land violates the Establishment Clause, as the Third Circuit recently held that a plaque of the Ten Commandments above a courthouse entrance did not violate the Establishment Clause, but the Eleventh Circuit found that display of a monument of the Ten Commandments in a courthouse rotunda did violate the Establishment Clause.¹⁴⁶

There may not, however, be a circuit split at all.¹⁴⁷ Because the factual surroundings of each display are of prime importance in determining Establishment Clause cases, it is possible that some displays would be violations of the Establishment Clause while other displays would not. Since each display is considered on an ad hoc basis, the specific circumstances surrounding each display could lead to different results.¹⁴⁸ However, an examination of the facts suggests that the application of the *Lemon* and endorsement tests, not the factual differences surrounding the displays of the Ten Commandments, is the cause of the inconsistent

145. Although the issue of whether or not plaques of the Ten Commandments can be placed on public grounds is not itself recent, this comment focuses on two recent cases: *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003) and *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003). For older cases regarding this issue, see *Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that “Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional”) and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973) (holding that a monument of the Ten Commandments on courthouse grounds does not violate the Establishment Clause).

146. Compare *Freethought*, 334 F.3d at 270 (holding that a plaque of the Ten Commandments displayed at an old entrance to the courthouse does not violate the Establishment Clause), with *Glassroth*, 335 F.3d at 1285, 1297 (holding that display of a monument of the Ten Commandments in the courthouse rotunda violates the Establishment Clause), *Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 768–69, 772 (7th Cir. 2001) (holding that display of a monument of the Ten Commandments together with the Bill of Rights and the Indiana Constitution Preamble on state government property impermissibly endorses religion), and *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (holding that display of a monument containing the Ten Commandments on Capitol grounds violates the Establishment Clause), *reh’g en banc denied*, 2002 U.S. App. LEXIS 25524 (6th Cir. Nov. 22, 2002), *cert. denied*, 583 U.S. 999 (2003).

147. See Duffy, *supra* note 6.

148. See *supra* notes 94 & 112 and accompanying text.

results.

In *Freethought Society v. Chester County*,¹⁴⁹ the Court of Appeals for the Third Circuit decided that a plaque above an old entrance to the Chester County Courthouse displaying the Ten Commandments was constitutional.¹⁵⁰ The court began by determining the proper Establishment Clause framework, and recognized that it must either apply the *Lemon* test or the subsequent endorsement test which modifies and explains it.¹⁵¹ The court chose to apply the endorsement test, apparently because this is what recent Supreme Court decisions had done.¹⁵²

In applying the endorsement test, the court considered the effect of the display on the reasonable observer, rather than the County's purpose in erecting the display.¹⁵³ With respect to the reasonable observer, the

149. 334 F.3d at 247.

150. *Id.* at 270. The Chester County Courthouse accepted a plaque displaying the Ten Commandments from a religious group in 1920. *Id.* at 249. The plaque was placed near the entrance to the Courthouse and remained in that location for over eighty years. *Id.* at 249–50. During that time, the County never did anything to draw attention to, celebrate, or maintain the plaque, but visitors to the Courthouse did pass the plaque on their way into the Courthouse. *Id.* at 250. That entrance has since been closed and visitors now enter the Courthouse via a new entrance, approximately seventy feet north of the plaque. *Id.* Visitors to the courthouse can see the title of the plaque, “The Commandments,” when walking on the sidewalk near the old entrance, but cannot see the text of the plaque unless they explicitly walk up to the old entrance. *Id.*

151. *Id.* at 256. The court noted that the *Lemon* test has been criticized by Supreme Court Justices. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in part and dissenting in part); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671–72 (1980) (Stevens, J., dissenting); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). Despite these criticisms, *Lemon* has never been overruled.

152. *Freethought*, 334 F.3d at 258. “Recent Supreme Court decisions . . . have not applied the *Lemon* test. Instead . . . the Court has applied the endorsement test developed by Justice O’Connor, which dispenses with the ‘entanglement’ prong of the *Lemon* test and collapses its ‘purpose’ and ‘effect’ prongs into a single inquiry.” *Id.* (quoting *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 174 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003)). It is unclear as to whether there were any compelling reasons for the court to choose to apply the endorsement test over the *Lemon* test, other than recent criticism of the *Lemon* test. See *supra* notes 130–31 and accompanying text, discussing that application of both tests should lead to the same result, thus application of one test over the other should not be viewed as a “better” course of action. See *also supra* Part I (outlining the inherent problems of both the *Lemon* and endorsement tests, resulting in the conclusion that neither formulation should be applied, in its current form, to Establishment Clause analysis).

153. *Freethought*, 334 F.3d at 261. This is problematic for a couple of reasons. First, the endorsement test is a two-part test inquiring into the government’s actual purpose in passing a particular statute, erecting a certain display, or engaging in a specific act, as well as inquiring into the effect of the statute, display, or act, regardless of the government’s actual purpose. Therefore, on the face of the endorsement test, ascertaining legislative intent is necessary. However, see *supra* Part I.A.2 regarding the difficulty of determining legislative intent and questioning the usefulness of doing so in the first place. Second, the court’s action of ignoring the County’s purpose highlights

court adopted Justice O’Connor’s view that reasonable observers are presumed to have an understanding of the general history of the display and the community in which it is displayed.¹⁵⁴

Within this framework, the court acknowledged that it could not “ignore the inherently religious message of the Ten Commandments.”¹⁵⁵ Despite the religious content of the plaque, the court said that the context surrounding the religious display could make it so that the overall display does not endorse religion.¹⁵⁶ In *Freethought*, the court said that the age and history of the Ten Commandments plaque, not the objects surrounding it, changed the meaning such that an ordinarily religious plaque did not endorse religion in this instance.¹⁵⁷ The court therefore decided that while a reasonable observer, in the abstract, might perceive the plaque as endorsing religion, the reasonable observer in this case would view the plaque as a reminder of the history of Chester County.¹⁵⁸

The court said that, based on the age of the plaque, the reasonable observer views the Ten Commandments plaque as merely a longstanding historic plaque, and does not really view it as an endorsement of

another problem with the endorsement test. By ignoring governmental purpose, the constitutionality of the act depends upon the perceptions of reasonable observers. Thus, who the reasonable observers are becomes very important. See *supra* Part I.B.2 (discussing the problems with using either “real” people or “hypothetical objective observers” under this prong of the endorsement test).

154. *Id.* at 259. If this is truly the case, the court should have analyzed the effect of the display according to both what the intention of displaying the plaque was originally in 1920, as well as the intent behind the County’s refusal to remove the plaque in 2001. The court acknowledged that this analysis would be relevant to an inquiry regarding the County’s purpose under the *Lemon* test, but did not think it applied to considering the effect of the display. *Id.* at 261–62.

155. *Id.* at 262.

156. *Id.* at 264; see also *King v. Richmond County*, 331 F.3d 1271, 1274, 1284 (11th Cir. 2003) (holding that a county seal containing the words “Superior Court Richmond County, GA” as well as a sword and two tablets designed to resemble the text of the Ten Commandments did not violate the Establishment Clause because the presence of the sword made it reasonable that observers would understand the depiction of the Ten Commandments as a symbol of the secular legal system), *reh’g en banc denied*, 2003 U.S. App. LEXIS 21307 (Aug. 6, 2003).

157. *Freethought*, 334 F.3d at 264. There were other plaques and monuments near the Ten Commandments plaque, including a no-smoking sign, plaques concerning Courthouse hours and building access, and a no-skateboarding sign, but the court did not believe that these signs changed the effect of the Ten Commandments plaque on the reasonable observer. *Id.* at 254, 264. Age and history, however, changed the effect of the plaque because a reasonable observer is presumed to be aware of the history of the plaque. *Id.* at 264. As such, the reasonable observer in this case would know that the plaque had been displayed on the courthouse for eighty years. *Id.* at 264–65.

158. *Id.* at 265.

religion.¹⁵⁹ This contradicts the court’s acknowledgment that “history by itself may not be sufficient to change an otherwise religious display into something that is not perceived by the reasonable observer as an endorsement of religion.”¹⁶⁰ The court recognized that historical acceptance of a practice does not make the practice constitutional, but then failed to take into account the entire historical context surrounding the erection of the plaque.¹⁶¹

If the reasonable observer is presumed to know the history of the display, the observer presumably knows the *entire* history, including the circumstances surrounding the initial display of the plaque.¹⁶² Recognizing the observer’s knowledge of why the plaque was displayed in the first place could make an enormous difference in *Freethought*. Had the court framed the reasonable observer as knowing that the plaque was donated by a religious organization and erected following a religious dedication ceremony, the court could have likely concluded that a reasonable observer would view the initial erection of the plaque as a religious act and also view the County’s refusal to remove the plaque as religiously motivated.¹⁶³ The court, however, did not engage in such analysis and reached the conclusion that display of the Ten Commandments plaque did not violate the Establishment Clause.¹⁶⁴

The Court of Appeals for the Eleventh Circuit, however, decided in *Glassroth v. Moore*¹⁶⁵ that a display of the Ten Commandments in a

159. *Id.* The court noted that a reasonable person would perceive a decision to leave a Ten Commandments plaque that was erected many years ago in place as a desire to preserve a longstanding plaque. *Id.* In contrast, a reasonable person would perceive a current decision to erect a Ten Commandments plaque as more likely motivated by religious considerations. *Id.*

160. *Id.* at 266.

161. In its conclusion that historical context suggests that the County was attempting to preserve a longstanding plaque rather than endorse religion, the court noted that the County had not taken any action involving the plaque since it was first erected (there had not been ceremonies celebrating any anniversaries of the plaque, the plaque was not relocated when the old entrance was closed, etc.), but never referred to the fact that the plaque was donated by the Religious Education Council and was affixed to the Courthouse after a dedication ceremony presided over by a Protestant Minister. *Id.* at 251, 266.

162. It is a somewhat unfair analysis, therefore, for the court to rely on the reasonable observer’s knowledge of the County’s conduct following the erection of the plaque, but to then ignore the observer’s knowledge of why the plaque was initially displayed on the Courthouse.

163. This is just one possibility, however. The court could still rely more heavily on the fact that the County has done nothing to draw attention to the plaque since its erection, arriving at the conclusion that the County is primarily motivated by its desire to preserve a historical plaque. Even if the court were to still conclude the case this way, fairness dictates that the court consider the circumstances surrounding the initial placement of the plaque and the possible affect it could have on reasonable observers.

164. *Freethought*, 334 F.3d at 270.

165. 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003).

courthouse rotunda was a violation of the Establishment Clause.¹⁶⁶ The court, applying the *Lemon* test, found that the display of the Ten Commandments monument violated the Establishment Clause because the evidence showed that the primary purpose of the monument was to endorse or promote religion.¹⁶⁷

The court, however, did not stop its analysis at this point. In the interest of completeness, the court also reviewed whether or not the monument had the primary effect of advancing religion.¹⁶⁸ After saying that it would review whether or not the monument had the primary effect of advancing religion, the court immediately stated, “[t]he effect prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer.”¹⁶⁹ The formulation of this inquiry into the effect of the monument was important because the legislative intent behind erecting the display was so clear.¹⁷⁰

166. *Id.* at 1285, 1297. In *Glassroth*, the Chief Justice of the Alabama Supreme Court erected a two-and-one-half ton monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building. *Id.* at 1284. The Chief Justice installed the monument without first discussing the matter with any of the other eight justices of the Alabama Supreme Court and did not use any government funds with respect to the creation or installation of the monument. *Id.* at 1285. The monument weighed 5280 pounds, was approximately three feet wide by three feet deep by four feet tall, and was located in such a position that people had to pass by the monument to gain access to the elevator, stairs, restrooms, and law library. *Id.* These specific facts are included because, again, “Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts.” *Id.* at 1288 (citing *King v. Richmond County*, 331 F.3d 1271, 1275–76 (11th Cir. 2003)).

167. *Id.* at 1297. This is a unique case because the motive for displaying the monument was unequivocal and easy to ascertain. The Chief Justice stated that he installed the monument “to remind all Alabama citizens of . . . his belief in the sovereignty of the Judeo-Christian God over both the state and the church.” *Id.* at 1284. Furthermore, in a speech commemorating the installation of the monument, the Chief Justice explained that “this monument will serve to remind the appellate courts and judges . . . that in order to establish justice, we must invoke ‘the favor and guidance of Almighty God.’” *Id.* at 1286.

168. *Id.* at 1297.

169. *Id.* (quoting *King*, 331 F.3d at 1279). This is actually the second prong of the endorsement test, not the *Lemon* test. See *supra* note 131 and accompanying text (discussing how the notion of endorsement has been largely absorbed into the second prong of the *Lemon* test).

170. *Id.* at 1287. The Chief Justice was frank about why he installed the Ten Commandments monument. During trial, he testified as follows:

Q [W]as your purpose in putting the Ten Commandments monument in the Supreme Court rotunda to acknowledge GOD’s law and GOD’s sovereignty?

A Yes.

Q . . . Do you agree that the monument, the Ten Commandments monument,

Application of the endorsement test in *Freethought* and the *Lemon* test in *Glassroth*, not the factual distinctions between the cases, led to the different results. The explanation for this is that the legislative purpose prong can be virtually ignored when applying the endorsement test, but not when applying the *Lemon* test.¹⁷¹ The Third Circuit, utilizing the endorsement test, did not examine the original purpose behind displaying the plaque in *Freethought*, but the facts of the case suggest the existence of religious motivations.¹⁷² Thus, had the Third Circuit applied the *Lemon* test and seriously looked at Chester County's purpose in erecting the plaque in the first place, it is not so clear that the display would have been deemed constitutional.¹⁷³

The Eleventh Circuit did apply the *Lemon* test and therefore was required to inquire into the purpose behind the erection of the monument.¹⁷⁴ Accordingly, because the court found that Justice Moore's installation of the monument was clearly intended to advance religion, the display was deemed unconstitutional.¹⁷⁵ Had both Circuits employed the *Lemon* test, they likely would have come to the same conclusion with respect to the purpose prong and the cases would not be inconsistent.¹⁷⁶

Some might argue, however, that the two cases would still reach different results because they are factually different. For example, one

-
- reflects the sovereignty of GOD over the affairs of men?
A Yes.
Q And the monument is also intended to acknowledge GOD's overruling power over the affairs of men, would that be correct? . . .
A Yes.
Q . . . [W]hen you say "GOD" you mean GOD of the Holy Scripture?
A Yes.

Id.

171. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). *Lemon's* purpose prong asks whether the government acted with the purpose of endorsing or disapproving of religion. *Id.* "The effect prong asks whether, *irrespective of [the] government's actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval." *Id.* (emphasis added). The challenged practice will be deemed unconstitutional if there is an affirmative answer to either question. *Id.*

172. See *supra* note 161 and accompanying text.

173. That the plaque was donated by a religious group and was installed after a dedication ceremony presided over by a minister are sufficient to raise a question as to whether or not Chester County possessed a valid secular purpose in displaying the Ten Commandments plaque.

174. "The *Lemon* test requires that the challenged practice have a valid secular purpose . . ." *Glassroth*, 335 F.3d at 1295.

175. *Id.* at 1296–97. Chief Justice Moore stated that his purpose in installing the monument "was to acknowledge the law and sovereignty of the God of the Holy Scriptures. . . ." *Id.* at 1296. Further, Justice Moore "refused a request to give a famous speech equal position and prominence because, he said, placing 'a speech of any man alongside the revealed law of God would tend to diminish the very purpose of the Ten Commandments monument.'" *Id.* (quoting *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1297 (M.D. Ala. 2002)).

176. See *supra* note 173.

major factual distinction between *Freethought* and *Glassroth* is that, in *Freethought*, the county merely accepted the plaque to be displayed, but, in *Glassroth*, Justice Moore affirmatively acted to install the monument.¹⁷⁷ One might argue, however, that the actions of an entire county are more representative of government’s sentiment than are the acts of one individual.¹⁷⁸ This is not true, however, when the individual acts on behalf of the government.¹⁷⁹ Thus, this purported factual difference does not really exist.

Factual distinctions, such as size, shape, and weight, do exist between the Ten Commandments plaque in *Freethought* and the Ten Commandments monument in *Glassroth*. These differences, however, should not form the crux of Establishment Clause analysis.¹⁸⁰ The factual circumstances

177. It is not necessarily the case, however, that mere acceptance of a religious display would not be seen as an endorsement of religion.

178. This might be especially true in *Glassroth* because even though Justice Moore acknowledged that he wanted the monument installed to advance religion, because he acted alone and campaigned as the “Ten Commandments” judge, the citizens may not have felt that the government was endorsing religion. *Glassroth*, 335 F.3d at 1284–85. One could argue that although Justice Moore’s acts indicated that he endorsed religion, his acting alone and failure to spend government funds in installing the monument could insulate the government from appearing to endorse religion. See Dustin Zander, Comment, *Thou Shalt Not Post the Ten Commandments on the Courtroom Wall: Judge Roy Moore and the Constitution*, 9 KAN. J.L. & PUB. POL’Y 371, 382 (1999) (stating that Justice Moore can express his beliefs so long as he is not speaking for the government when he does so).

179. While people may agree that Justice Moore should be able to express his religious beliefs, they might also argue that he should not be able to express these beliefs when speaking or acting on behalf of the government. This notion finds support in case law. See *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991) (stating that a judge opening his courtroom with a prayer is a violation of the Establishment Clause). This is because:

When a judge sits on the bench, says “Let us pause for a moment of prayer,” and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion. “Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.” [*Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).] Judge Constangy argues that the prayer he delivers is his personal prayer and thus it does not result in government endorsement of religion. We find Judge Constangy’s argument wholly unpersuasive. A judge wearing a robe and speaking from the bench is obviously engaging in official conduct.

Id.

180. *County of Allegheny v. ACLU*, 492 U.S. 573, 675–76 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that it is problematic to look at each individual item in a holiday display because this would only be useful “after [the] Court has decided a long series of holiday display cases, using little more than intuition and a tape measure”). Justice Kennedy went on to say: “It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts

of each display should only be relevant insofar as they indicate an infringement upon personal religious liberty as a result of government action on behalf of religion in general or a specific religious group in particular.

III. A MODIFIED COERCION TEST

Because the *Lemon* and endorsement tests have been insufficient in resolving Establishment Clause cases in a consistent, reliable manner, the Supreme Court should adopt a more workable test. There are several alternatives to the *Lemon* and endorsement tests.¹⁸¹ Despite these

testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane.” *Id.* (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting)).

181. The following is not an exhaustive list, but rather suggests a few alternative possibilities. First, we could have a test that deems an act, display, or statute unconstitutional if it offends even one person. This is impractical in today’s pluralistic society because it is likely that at least one person will find fault with or be offended by almost any act, display, or statute that may be in existence. *See Smith, supra* note 39, at 291. Another potential problem with this test is that it would allow almost any practice to be deemed a violation of the Establishment Clause. *See, e.g.,* Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 109 (1990) (suggesting that a person might complain that the National Gallery of Art, a federally funded and managed institution, promotes religion when it displays “works of art featuring Madonnas and other sectarian subjects” because the presence of these images indicates that “Christianity plays a more important part in the national heritage than do other religions or sects”); *see also, e.g.,* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 & nn.38–39 (1986) (arguing that “[a] little bit of government support for religion may only be a little bit of establishment, but it is still an establishment”). Laycock contends:

The government should not . . . name a city or a naval vessel for the Body of Christ [Corpus Christi, the name of a major city in Texas, is a Latin phrase meaning “Body of Christ”] or the Queen of Angels [The original Spanish name of Los Angeles was *El Pueblo de Nuestra Señora la Reyna de los Angeles de Porciuncula*—“The Town of Our Lady the Queen of the Angels of Porciuncula.” . . . The name of the city has since been shortened to *El Pueblo de la Reyna de los Angeles*—“The Town of the Queen of Angels.”] Either version names the city with an honorific title for Mary, a religious figure significant only to Christians.

Id. If religious art and names of cities could be held to be violations of the Establishment Clause, what practice would not be subject to being held unconstitutional under this test?

A second possibility for an alternative test would be that an act, display, or statute is not a violation of the Establishment Clause unless it establishes a national religion. Under this formulation, almost no practice would violate the Establishment Clause. This is a problem because Americans’ First Amendment rights could be infringed without the government going so far as to actually establish a national religion. For example, a city might not officially declare an official religion, but the city might choose “to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths.” *Allegheny*, 492 U.S. at 664 n.3 (Kennedy, J., concurring in part and dissenting in part). The First Amendment rights of non-Christians would be violated in

alternatives, the original intent of the Framers and the history of the United States indicate that a modified coercion test is the most appropriate for deciding Establishment Clause cases.¹⁸²

this instance because it would be difficult for the city to maintain that it is not engaging in the “unmistakable and continual preference for one faith” over another that the First Amendment prohibits. *Id.* The First Amendment does not permit one religion to be favored over other religions, for religion to be favored over non-religion, or for non-religion to be favored over religion. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)); see also *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that the Constitution does not require that the government show “callous indifference” to religion or religious groups).

Another option would be to strictly apply the *Lemon* and endorsement tests. See *Loewy*, *supra* note 71, at 1069–70 (advocating serious application of the endorsement test to all practices, including the Supreme Court’s invocation of “God save the United States and this Honorable Court” in opening its sessions and the phrase “under God” in the Pledge of Allegiance, as well as school prayer and holiday displays). This would result in invalidation of the Court’s invocation and the current terminology of the Pledge. These practical consequences of *Loewy*’s proposal closely resemble the practical consequences of the first alternative test proposed (that most things the government does relating to religion would violate the Establishment Clause). This is unacceptable because it stifles appreciation for religious diversity and risks separating government and religion to such a degree that the government might be seen as being hostile toward religion. Government hostility toward religion, however, is not required by the First Amendment. See *Allegheny*, 492 U.S. at 663–64 (Kennedy, J., concurring in part and dissenting in part) (providing the example that “[i]f government is to participate in its citizens’ celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require”).

As opposed to devising a new test to replace the *Lemon* and endorsement tests, another alternative might be to prevent the Supreme Court from deciding Establishment Clause cases at all. The Constitution provides,

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2. This provision seemingly supports the notion that Congress can take away the Supreme Court’s power to review Establishment Clause issues when those cases do not fall under the Court’s original jurisdiction. See generally *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (holding that Congress has the power to make exceptions to the Supreme Court’s appellate jurisdiction and, if Congress removes an aspect of the Court’s appellate jurisdiction, the Court no longer has jurisdiction over the case).

182. See Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION 13, 17 (Jack N. Rakove ed., 1990) (noting that original intent jurisprudence is not difficult to describe). Meese states that the specific language of the Constitution must be obeyed, and that where “there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed as well.” *Id.* Finally, Meese notes that “[w]here there is ambiguity as to the precise meaning or reach of a constitutional provision, it should

A. *Original Intent*

On June 8, 1789, James Madison proposed a series of amendments for House approval.¹⁸³ The amendment regarding establishment of religion read: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”¹⁸⁴ This proposed amendment was given to a select committee of the House for consideration and was changed to: “[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.”¹⁸⁵

Although the committee did not include any explanation for these changes, a condensed version of the debates illuminates some of the concerns surrounding the amendment.¹⁸⁶ Commentary from some of the individuals present at the debates suggests that a primary motivating factor behind the amendment was the prevention of a national establishment of religion.¹⁸⁷ The proposed amendment that the committee adopted

be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.” *Id.* *But see* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 322, 324 (1988) (“Acceptance of original intent as the foundation of constitutional interpretation is unrealistic beyond belief. . . . A frozen or sclerotic Constitution would lose its character as a document intended to serve for ages to come.”). Inquiry into original intent as a guidepost for how to proceed today, and slavish adherence to the thoughts and beliefs of individuals who lived two hundred years ago are, however, two completely different concepts. This Comment does not advocate laboring over the precise ideas and circumstances that surrounded the Framers and then mindlessly applying what is discovered to current Establishment Clause cases. Rather, this Comment supports examining the Framers’ original intent to act as one factor in shaping a framework that applies to society’s current situation without sacrificing historical context. This position is reflective of Meese’s comment that “[t]he Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.” Meese, *supra*, at 15. Ascertaining the original intent of the First Amendment does not contradict Part I of this Comment, where the legislative intent prong of the *Lemon* test is criticized. This is because discerning the objective meaning or purpose of an amendment or a statute is a different task from determining subjective legislative intent. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (“[W]hile it is possible to discern the objective ‘purpose’ of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.”).

183. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 94 (2d ed., rev. 1994).

184. *Id.* at 95.

185. *Id.* at 96.

186. *Id.*

187. *Id.* at 96–99. For example:

Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction

read: “Congress shall make no laws touching religion, or infringing the rights of conscience,” but again, no reason was given for these changes.¹⁸⁸ Still another change occurred when the entire House voted on the proposed amendment clause by clause; “Fisher Ames of Massachusetts moved that the amendment read: ‘Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.’”¹⁸⁹

The House adopted Ames’s motion, but made a stylistic change to the

different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

.....
Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments

.....
Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

.....
Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

.....
Mr. Gerry did not like the term national [The] antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one

Mr. Madison withdrew his motion, but observed that the words “no national religion shall be established by law,” did not imply that the Government was a national one.

Id.

188. *Id.* at 101.

189. *Id.*

phraseology before submitting it to the Senate.¹⁹⁰ The proposed amendment then read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”¹⁹¹

The Senate further changed the wording so that the amendment read: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”¹⁹² The House rejected this proposal because it was not satisfied with a simple ban prohibiting the preference of one sect or religion over others.¹⁹³ On September 24, 1789, the House reported to the Senate that it would accept the Senate’s version of other amendments provided that the amendment on religion read: “Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁹⁴ The Senate accepted this condition on September 25, 1789, and Congress thus passed the Establishment Clause.¹⁹⁵

One piece of information that can be gleaned from the progression of the wording of the Establishment Clause is that the House did not intend to draft an amendment that only prohibited Congress from supporting one sect, church, denomination, or religion.¹⁹⁶ Nevertheless, some people advocate the position that the federal government may not favor one sect, church, denomination, or religion over another, but that the government may aid and support religion in general or all denominations without discrimination.¹⁹⁷

190. *Id.* at 101–02.

191. *Id.* at 102.

192. *Id.* This language resulted after three motions of special interest were proposed and denied. The first proposal would have had the text of the amendment read: “Congress shall make no law establishing one religious sect or society in preference to others.” *Id.* The second motion would have the amendment read: “Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.” *Id.* The final motion would have changed the language of the amendment to: “Congress shall make no law establishing any particular denomination of religion in preference to another.” *Id.*

193. *Id.* at 103–04.

194. *Id.* at 104.

195. *Id.*

196. *Id.* In other words, the House was not only concerned with preventing a nationwide preference for one religious denomination over others.

197. *Id.* at 105. However, Levy argues that such a reading is impermissible because this position leads to

the impossible conclusion that the First Amendment added to Congress’s power. Nothing supports such a conclusion. Every bit of evidence goes to prove that the First Amendment, like the others, was intended to restrict Congress to its enumerated powers. Because Congress possessed no power under the Constitution to legislate on matters concerning religion, Congress has no such power even in the absence of the First Amendment.

Id.

The Supreme Court, however, has not accepted this argument.¹⁹⁸ The Court has viewed the Establishment Clause as erecting a "wall of separation" between church and state, as well as protecting individuals' freedom of conscience in religious worship.¹⁹⁹ Therefore, it can be said that the Establishment Clause guarantees more protection than simply preventing the government from establishing a national religion or preferring one religious group over another.²⁰⁰ But, how far does the

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

199. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878). When the Constitution was being drafted, Thomas Jefferson was not in attendance. *Id.* at 163. Yet, when he saw a draft of the document, he was disappointed that it did not contain a provision ensuring the freedom of religion. *Id.* Several states proposed amendments regarding religious freedom and would not ratify the Constitution until these amendments were considered. *Id.* at 164. Accordingly, James Madison proposed a religious freedom amendment that was adopted because it addressed the concerns of the advocates of religious freedom. *Id.* Thomas Jefferson spoke to the Danbury Baptist Association regarding the amendment and stated:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. The Court went on to say that this statement could be accepted "almost as an authoritative declaration of the scope and effect of the amendment" because it was made by an acknowledged leader of the advocates of the amendment. *Id.* Further, the Court, in *Davis v. Beason* stated that "religion" refers to one's perception of his relationship to his Creator. 133 U.S. 333, 342 (1890). The Court also stated that although "religion" is often confused with "the *cultus* or form of worship of a particular sect," it is in fact distinguishable from a particular form of worship. *Id.* The use of "religion" in the First Amendment, according to the Court, was intended to allow each person to define his or her relationship with his or her Maker and to demonstrate this worship as he or she deemed appropriate. *Id.* Finally, the First Amendment's use of "religion" was intended to "prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." *Id.*

200. See LEVY, *supra* note 182, at 174. "An uncontested and incontestable fact that stands out from the establishment clause is that the United States cannot constitutionally enact any law preferring one church over others in any way whatever." *Id.*; see also Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 860 (1986) ("The intended direction of the first amendment was the enhancement of individual freedom. . . . [T]he objectives were to establish an equality among persons, so that each individual could choose without interference how to commune with his god, and to avoid the havoc that religious conflicts had imposed on

protection of the Establishment Clause extend, considering that the legislative history of the First Amendment does not indicate what the Framers meant by “an establishment of religion?”²⁰¹ Because there is no clear answer to this question, it is best to view the protections of the Establishment Clause in terms of what it was meant to accomplish, rather than attempting to draw bright lines regarding its scope.

B. Historical Tradition

Because the Framers’ original intent only indicates that, at a minimum, the federal government may not establish a national religion or favor one religious group over another, examining the history of the United States is also useful in determining what the Establishment Clause was designed to achieve. Many of the early settlers of America left Europe to escape laws that compelled them to support and attend government-favored churches.²⁰² Nevertheless, these practices continued in America because the English Crown granted charters authorizing individuals and companies to build religious establishments.²⁰³ The charters further provided that all people, whether religious believers or not, would be required to support and attend the established churches.²⁰⁴ This resulted in the persecution of those who were in the religious minority and the requirement that religious minorities pay tithes and taxes to support government-sponsored churches.²⁰⁵ In response, the Virginia Assembly enacted the Virginia Bill for Religious Liberty, which promoted

mankind throughout history.”).

201. LEVY, *supra* note 183, at 105; see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936–37 (1986) (arguing that in examining Madison’s comments to the First Congress regarding his proposals for the religion amendment, “compulsion is not just an element, it is the essence of an establishment”). With respect to what the Framers meant by “an establishment of religion,” see Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (suggesting that the Framers “understood the term ‘establishment’ in a very technical sense”). Smith asserts, “‘Establishing’ a religion was essentially equivalent to granting a special corporate charter to a particular religious denomination. . . . Accordingly, in prohibiting Congress from issuing any laws respecting an ‘establishment’ of religion, the founders sought to prohibit the federal government from passing laws relating to such corporate charters.” *Id.* at 240. States, not the federal government, could grant these corporate charters, so the Establishment Clause functioned to define the roles of federal and state governments with respect to religious establishments. *Id.* As such, the clause made clear that the federal government could not grant corporate charters, and therefore could not establish a national religion. “Thus, the clause embodied the more general belief of the time that the federal government lacked authority in matters pertaining to corporations, whether secular or ecclesiastical.” *Id.* at 241.

202. *Everson*, 330 U.S. at 8.

203. *Id.* at 9.

204. *Id.*

205. *Id.* at 10.

religious tolerance.²⁰⁶

Despite the problems associated with the union of government and religion, our government has historically recognized the role that religion plays in the lives of its citizens in a number of ways.²⁰⁷ Even the Supreme Court itself has recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being."²⁰⁸ Accordingly, the government respects differences in religious belief and allows all of its citizens to express the different beliefs and creeds that they hold.²⁰⁹ This governmental recognition of religion seems inconsistent with modern establishment clause theories that advocate complete separation of government and religion. However, governmental recognition of religion is consistent with Establishment Clause jurisprudence if one acknowledges that the Establishment Clause was directed at prohibiting religious coercion.²¹⁰

206. *Id.* at 12. The bill stated, "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened [sic] in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." *Id.* at 13.

207. See *Lynch v. Donnelly*, 465 U.S. 668, 675–77 (1984). The Court noted:

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God.

. . . .

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We trust," which Congress and the President mandated for our currency

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith.

. . . [Finally,] Congress has directed the President to proclaim a National Day of Prayer each year.

Id.

208. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

209. See *Kurland*, *supra* note 200, at 860 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

210. *McConnell*, *supra* note 201, at 939. *McConnell* notes:

In the debates in the First Congress concerning the wording of the first amendment, James Madison, the principal draftsman and proponent, said of the committee draft that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." Upon further questioning by those who feared that the proposed amendment "might be taken in such latitude as to be extremely hurtful to the

C. Formulation of the Modified Coercion Test

The original formulation of the coercion test is not the proper test for Establishment Clause issues because it is difficult to apply. The Court's coercion analysis in *Lee v. Weisman*²¹¹ has been interpreted as finding a practice unconstitutional when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."²¹² Under this formulation, it is not easy to define what constitutes a "formal religious exercise."²¹³ Further, to find that the Establishment Clause has been violated, these criteria are sufficient, but not necessary.²¹⁴

A modified coercion test is therefore a better alternative to applying the original formulation of the coercion test for two reasons. First, it takes into account Framers' intent that not only should the government be prohibited from establishing a national religion, but also that freedom of conscience regarding religion should be closely guarded.²¹⁵ Second, it also recognizes that historical practice in the United States demonstrates that religion is an important part of society.²¹⁶ In this regard, the proper test should hold that violation of the First Amendment occurs when the government consistently exposes observers to an obtrusive religious

cause of religion." Madison clarified the point. He stated that he "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." Is compulsion an element of an establishment clause violation? If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment.

Id. at 936–37 (emphasis added) (footnotes omitted).

211. 505 U.S. 577 (1992).

212. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992).

213. "Formal religious exercise" connotes an event, such as the invocation of prayer or the performance of a religious service. Yet, the government could risk establishing a national religion or infringing upon individuals' freedom of conscience regarding religion without directing such a "formal religious exercise."

214. That is, while the Establishment Clause is violated when these elements exist, violations can still occur in the absence of these requirements.

215. *Everson v. Bd. of Educ.*, 330 U.S. 1, 12–13 (1947). The Preamble to the Virginia Bill for Religious Liberty stated:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by *coercions* on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.

Id. (emphasis added).

216. *See supra* note 207.

symbol. There are three elements that can be distilled from this test: there must be government action, an obtrusive religious symbol, and consistent exposure to the religious symbol.²¹⁷

For a violation to occur, the government must be acting. This is because the First Amendment prohibits *Congress*, not private citizens, from making laws respecting an establishment of religion.²¹⁸ Government action exists when a government entity or representative is the catalyst that brings a particular statute, regulation, or display into existence.²¹⁹

There must also be an obtrusive religious symbol to which observers are consistently exposed for the Establishment Clause to be violated.²²⁰ This is because the presence of a prominent religious symbol displayed continually throughout the year indicates that the government is proselytizing on behalf of religion generally or one religion in particular.²²¹

217. For purposes of this proposed test, "symbol" is applied expansively, including both physical objects and words, for increased application of this test to various Establishment Clause cases. Nevertheless, despite the desire to be able to apply the test to as many Establishment Clause scenarios as possible, certain cases will likely arise wherein application of this test might be ill-suited.

218. U.S. CONST. amend. I.

219. Thus, private action will not be sufficient to violate the Establishment Clause. *See, e.g.,* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (holding that the Capitol Square Review Board's act of permitting the Ku Klux Klan to erect a cross on the statehouse plaza during the Christmas season did not violate the Establishment Clause because "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms").

220. "Obtrusive" is meant to get at the notion of the prominence of the religious symbol in any display or practice and is therefore defined as follows: "Characterized by forcibly thrusting (oneself, one's opinions, etc.) into notice or prominence." 10 OXFORD ENGLISH DICTIONARY 671 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Accordingly, size and placement of the symbol will be relevant factors, but not the primary focus, so as to avoid the problem of the Court deciding cases with "little more than intuition and a tape measure." *County of Allegheny v. ACLU*, 492 U.S. 573, 675 (1989) (Kennedy, J., concurring in part and dissenting in part).

221. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy noted that symbolic recognition of religious faith could violate the Establishment Clause. As an example, Justice Kennedy stated that the Establishment Clause would prohibit a city from permanently erecting a large Latin cross on the roof of city hall. *Id.* Justice Kennedy said that this is the case "not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*; *see also* *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985) (stating that a county seal containing a Latin cross and the phrase "With This We Conquer" might not always violate the Establishment Clause). The court noted that some uses of the seal might not indicate an impermissible union of church and state. *Id.* For example, the court said that

“Proselytizing” suggests that the government is improperly running the risk of establishing a national religion or curbing individual freedom in religious matters.²²²

This modified coercion test is, therefore, consistent with the principles underlying the First Amendment: that the government may not establish a national religion, and that individuals’ freedom of conscience must be respected.²²³ This test is also proper because it acknowledges that passive acknowledgment of religion, without coercion, does not pose a great risk of establishing religion or infringing upon religious liberty.²²⁴ Finally, the test is useful because it focuses on the actor, the action taking place, and the result of this action.

The use of a coercion test to resolve Establishment Clause cases has, however, been criticized. One criticism is that coercion tests require “a *de minimis* threshold of impermissible religious content. If there is not a sufficiently religious component to the message, then the . . . test does not apply; the difficulty is in defining *de minimis*”²²⁵ The proposed

using the seal as a notary seal or only depicting the seal in one color (where it is difficult to detect the cross) might not violate the Establishment Clause. *Id.* The seal at issue in *Friedman*, however, was distinguished from the crèche in *Lynch* and deemed unconstitutional because it

pervade[d] the daily lives of county residents. It [wa]s not displayed once a year for a brief period on a single parcel of government land. Rather it appear[ed] on all county paper work, on all county vehicles, even on county sheriff’s uniforms. Further, Bernalillo County residents d[id] not view the cross and motto in the context of a generally secular commercial display, as Pawtucket, Rhode Island, residents d[id] the crèche. The context of the cross and motto [wa]s quite different. The cross [wa]s the only visual element on the seal that [wa]s surrounded by rays of light. The motto may be fairly regarded as promoting the religion the cross represents. Indeed, that religion seems to be embraced as the instrument by which the county “conquers.”

Id. at 782.

222. See 12 OXFORD ENGLISH DICTIONARY 664 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining “proselyte” as follows: “[T]o cause to come over or turn from one opinion, belief, creed, or party to another; *esp.* to convert from one religious faith or sect to another”). Government proselytization undermines the principles embodied by the First Amendment insofar as government action that attempts to cause individuals to modify their religious beliefs does not respect freedom of conscience regarding religion.

223. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Justice Jackson stated, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Id.*; see also *County of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part) (noting that “[t]he freedom to worship as one pleases without government interference or oppression is the great object of . . . the Establishment [Clause]”).

224. *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

225. Matthew A. Peterson, Note, *The Supreme Court’s Coercion Test: Insufficient Constitutional Protection for America’s Religious Minorities*, 11 CORNELL J.L. & PUB. POL’Y 245, 255 (2001).

modified coercion test avoids this problem by defining what constitutes improper government action more clearly than did previous formulations of the coercion test.²²⁶ Another criticism is that coercion standards allow the government to engage in religious approval or disapproval, so long as dissenters are free to ignore the approval or disapproval.²²⁷ The modified coercion test, however, does not require that an act, statute, or display be deemed constitutional so long as objectors are free to ignore the religious content.²²⁸ In this regard, the modified coercion test seeks to be sensitive to religious minorities and to strike a balance between promoting religious diversity and restricting government action to the confines of the First Amendment.

IV. APPLICATION OF THE MODIFIED COERCION TEST

The benefits of the modified coercion test can best be seen in applying it to the facts of actual cases. The holiday display, Ten Commandments, and Pledge of Allegiance cases previously analyzed under the *Lemon* and endorsement tests also provide good opportunities for examining the implications of the modified coercion test.

Applying the modified coercion test to the facts of *Lynch* would result in the display of the crèche being deemed constitutional because observers were not consistently exposed to an obtrusive religious symbol. Although the government was arguably acting in *Lynch*, as it undertook the task of displaying the crèche on its own and paying for the set-up and take-down costs each year,²²⁹ whether or not display of the crèche constitutes an obtrusive religious symbol is unclear from the facts of *Lynch*.²³⁰ Nevertheless, to properly consider the concerns of religious minorities, we can assume that the crèche was in fact an obtrusive religious symbol. Despite these facts, the crèche was only displayed in the limited context

226. See *supra* note 213 discussing the difficulties with defining the “formal religious exercise” requirement of the coercion test formulated in *Lee*.

227. Peterson, *supra* note 225, at 256.

228. See *infra* pp. 400–01 for further discussion as to how the display of a Ten Commandments monument violates the Establishment Clause despite the fact that observers are free to ignore the display.

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

230. See *supra* note 94. The facts of the case state that figures of Jesus, Mary, and Joseph were included in the display together with secular symbols of Christmas such as Santa Claus, reindeer, and candy canes. These facts do not indicate the prominence of the religious symbols in relation to the secular ones. Therefore, it is difficult to say with certainty whether or not the crèche was an obtrusive religious symbol.

of the holiday season. Therefore, display of the crèche does not satisfy all elements of the modified coercion test and should be deemed a constitutional display.

It is undoubted that one principal objection to this analysis is that when the government acts to display an obtrusive religious symbol, the display should be deemed unconstitutional whether it is permanent or not.²³¹ Under an endorsement analysis, this objection might prove fatal to the assertion that, to be unconstitutional, the government action should be permanent instead of temporary. This is because, under an endorsement approach, *any* appearance of governmental alliance with religion is viewed as inappropriate. This is not the case under a coercion analysis. The primary concerns of the modified coercion test, the prevention of an establishment of a national religion and the protection of individual religious liberty, are kept intact unless the government acts to repeatedly proselytize on behalf of religion.

Display of the religious symbols in *Allegheny* would also be constitutional under the modified coercion test. It is debatable as to whether the government was acting in *Allegheny* because, unlike *Lynch* where the city itself owned the display, in this case a Roman Catholic group owned the crèche and a Jewish group owned the menorah.²³² In this regard, the government was not undertaking the task of exhibiting the displays strictly of its own accord. To be deferential to religious minorities, however, it will be assumed that the government acted by displaying the religious symbols in *Allegheny*.²³³ It will also be assumed that both displays contained obtrusive religious symbols because the crèche display did not contain any secular symbols, and the Court's analysis of the secular nature of the menorah display contained logical flaws.²³⁴ Even if one were to assume that the government was acting

231. See *County of Allegheny v. ACLU*, 492 U.S. 573, 608 n.56 (1989) (noting that “[i]n describing what would violate his ‘proselytization’ test, Justice Kennedy uses the adjectives ‘permanent,’ ‘year-round,’ and ‘continual,’ as if to suggest that temporary acts of favoritism for a particular sect do not violate the Establishment Clause”) (citation omitted).

232. See *supra* note 112.

233. See *infra* note 237 and accompanying text.

234. See *supra* notes 133–44 and accompanying text. The fact that the presence of secular symbols was not as strong in *Allegheny* as it was in *Lynch* does not mean to suggest that holiday displays must contain symbols of every religious holiday and common secular symbols, such as Santa Clauses and candy canes, to be constitutional. In fact, some scholars have named this very notion the “three plastic animals rule.” See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126–27 (1992). McConnell notes:

[A] plurality of the Court permitted the menorah in *County of Allegheny v. ACLU* because it was next to a forty-five-foot tall Christmas tree, and a majority permitted the nativity scene in *Lynch v. Donnelly* because it was surrounded by a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers,

and that the displays contained obtrusive religious symbols, the crèche and menorah displays would be deemed constitutional under the modified coercion test because they too were displayed in the limited context of the holiday season.²³⁵

Applying the modified coercion test to the facts of *Freethought*, the display of the Ten Commandments plaque would be found constitutional. Whether or not there was government action in this case is questionable. The county did not initiate the display of the Ten Commandments plaque on its own, but rather displayed it after receiving it from a religious group.²³⁶ It could be argued that accepting a religious display is as though the government itself were acting because the government’s act of accepting the display indicates its support and approval of the religious ideals embodied within the display. To be considerate to religious minorities, it will be assumed for purposes of this hypothetical that mere governmental acceptance of a religious display will meet the necessary governmental action required under the modified coercion test.²³⁷ Even if it is assumed that the government affirmatively acted in displaying the plaque, however, the plaque still does not violate the Establishment Clause.

cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a banner stating “Season’s Greetings,” and a talking wishing well. In contrast, the Court held unconstitutional the nativity scene in *Allegheny*, which was tastefully displayed with a backdrop of greenery and poinsettias, but unaccompanied by secular signs of the season. Practitioners have dubbed the holdings in *Lynch* and *Allegheny* “the three-plastic animals rule.”

Id. (footnotes omitted).

235. See *supra* note 231 and accompanying text.

236. See *supra* note 150.

237. The assumption that governmental acceptance of a display is the equivalent of governmental action to create a display is used for this hypothetical but is not necessarily true for real-life applications. That is, it is not clear that mere governmental acceptance should be treated the same way that governmental action is treated. Although the county accepted the plaque from a religious organization and placed it at the entrance to the courthouse, this is not the type of action directed by the government in *Lynch*, where the city owned the religious object and erected and dismantled the display each year. *Freethought Soc’y v. Chester County*, 334 F.3d 247, 249–50 (3d Cir. 2003). The county accepted the plaque and placed it at the entrance to the courthouse, but left the plaque in that location without drawing attention to, maintaining, or celebrating it. Yet, some might argue that the county’s act of accepting the plaque for display at all constitutes sufficient government action to meet the first prong of the proposed coercion test. More facts of the case must be known before this argument can be proven true. If the county refused to accept plaques from other organizations, religious or nonreligious, or accepted all plaques but only displayed the plaque of the Ten Commandments, this argument may be well-founded. However, the act of accepting, in and of itself cannot necessarily be deemed the acceptor’s endorsement of the object accepted.

The plaque in *Freethought* does not violate the Establishment Clause because it is not an obtrusive religious symbol. Although the plaque is certainly a religious symbol as it contains the text of the Ten Commandments, it is not obtrusive because it is one plaque displayed among many.²³⁸ This is not to say that a religious monument must be surrounded by secular signs and plaques to be constitutional or that all religious monuments that are surrounded by secular plaques are constitutional.²³⁹ Under the facts of this case, however, the Ten Commandments plaque was not prominent or obtrusive in light of the facts that there were secular/ministerial plaques surrounding it and that the county never did anything to draw attention to or celebrate the plaque.²⁴⁰ Because the plaque is not an obtrusive symbol, the requirements of the modified coercion test are not met and the plaque does not violate the Establishment Clause.²⁴¹

Applying the modified coercion test to the facts of *Glassroth* would result in the display of the Ten Commandments monument being held unconstitutional. It can be said that the government acted to install the monument, as Chief Justice Moore was acting in his official capacity as a government official when he erected the monument.²⁴² Secondly, the monument was obtrusive as it was prominently placed in the center of

238. The Ten Commandments plaque was fifty inches tall and thirty-nine inches wide, surrounded by other plaques, such as a no-smoking sign that was twenty-four inches tall and seventeen inches wide, three plaques regarding courthouse hours that were fifty-three inches tall and twenty-six inches wide altogether, a small plaque stating that the courthouse had been placed on the National Register of Historic Places, and a no-skateboarding sign that was twenty-four inches tall and seventeen inches wide. *Id.* at 253–54.

239. The circumstances surrounding any given plaque are relevant in determining the plaque's overall prominence in the display. Thus, it is not the absolute size of the religious plaque that is relevant (i.e., it is not the case that all plaques smaller than five-feet by five-feet are constitutional, whereas all displays larger than these dimensions are unconstitutional), but rather the factual surroundings of the display as a whole. *See supra* notes 220–21 and accompanying text.

240. In fact, when the entrance to the courthouse was moved in 2001, the Ten Commandments plaque was not relocated to the new entrance. *Freethought*, 334 F.3d at 253.

241. This is the case even if display of the plaque is consistent, since all elements must be met for an Establishment Clause violation to occur. Nevertheless, whether or not display of the plaque is consistent is questionable. The plaque was consistently displayed for eighty years above the entrance, but the plaque was not relocated to the new entrance in 2001. *Id.* at 253–54. Observers are not consistently exposed to this religious plaque currently, as they would have to go out of their way to proceed to the old entrance to view the plaque. *Id.*

242. *Glassroth v. Moore*, 335 F.3d 1282, 1285 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003). Justice Moore, as Chief Justice, has final authority over the decoration of the rotunda and whether to put any displays in the building. *Id.* Further, after Justice Moore was elected Chief Justice, he fulfilled his campaign promise to “restore the moral foundation of law” by installing the Ten Commandments monument. *Id.*

the courthouse rotunda.²⁴³ Another indication of the monument’s prominence is the fact that Justice Moore rejected a request to display a historically significant speech in the same area.²⁴⁴ Unlike the plaque in *Freethought* that was displayed among many other plaques, the monument here was displayed by itself in the center of the courthouse rotunda, while requests for other texts to be displayed were rejected.²⁴⁵

The monument in *Glassroth* was the product of government action, was obtrusive, and observers were consistently exposed to it. Observers were subjected to consistent exposure to the display because the monument was a permanent display within the courthouse, as opposed to being displayed during a limited season like the displays in both *Lynch* and *Allegheny*. These facts indicate that the government was acting to elevate religion’s status above secular status. Therefore, application of the modified coercion test would find the display to violate the Establishment Clause.

Finally, application of the proposed modified coercion test to *Newdow v. United States Congress*, the Pledge of Allegiance case, would result in deeming the phrase “under God” unconstitutional. First, the Pledge itself is the product of government action as the government created the Pledge and added the phrase “under God” to it in 1954.²⁴⁶ More

243. *Id.* at 1284. The monument was displayed in the center of the rotunda so that “[n]o one who enter[ed] the building through the main entrance [could] miss the monument.” *Id.* at 1285.

244. *Id.* at 1284.

245. The plaques in *Freethought* were all similar in size, and both religious and secular plaques were displayed alongside one another above an old entrance to the courthouse. *Freethought*, 334 F.3d at 254. This is a stark contrast from one large religious monument (here the monument weighed 5280 pounds and was three feet wide by three feet deep by four feet tall) displayed by itself in the center of the courthouse rotunda. *Glassroth*, 335 F.3d at 1285.

246. Loewy, *supra* note 71, at 1070; see also Brief Amici Curiae of Christian Legal Society et al. at 5–6, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 1191 (2004) (No. 02-1624) (discussing the addition of the phrase “under God” to the Pledge). The Christian Legal Society noted that, by adding the phrase “under God” to the Pledge, Congress wished to emphasize a distinction between the United States and Russia: that the United States was a theistic nation but that Russia was not. The brief states that the conference report makes this distinction clear.

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our

specifically, the facts of *Newdow* indicate that the government acted by virtue of a school district policy that mandates that teachers lead willing students in reciting the Pledge each morning.²⁴⁷ Because the school district policy requires that the Pledge be recited each morning, students are consistently exposed to it.²⁴⁸ Requiring students to attend school and then requiring the recitation of the Pledge each morning puts objectors in “the dilemma of participating, with all that implies, or protesting.”²⁴⁹ This is precisely the type of infringement upon freedom of conscience with respect to religious liberty that the Establishment Clause was designed to prohibit.

The only issue that remains, therefore, is whether or not the words “under God” constitute an obtrusive religious symbol. Because “symbol” under the proposed modified coercion test is defined expansively to include both objects and words, the phrase “under God” itself can be considered a religious symbol. This is because the phrase represents the notion of a Christian God who created humans and a God upon whom humans depend for rights and moral direction.²⁵⁰ This phrase, furthermore, is an obtrusive religious symbol because it improperly ties citizens’ patriotism as Americans to an expressed belief in God.²⁵¹ By including the phrase “under God” in the Pledge, the government effectively communicates

Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

Id.

247. *Newdow v. United States Cong.*, 328 F.3d 466, 482–83 (9th Cir. 2002), *cert. granted in part*, *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945 (2003), *rev’d*, 124 S. Ct. 2301 (2004), *reh’g denied*, 125 S. Ct. 21 (2004). *Elk Grove Unified School District* requires that teachers lead their students in reciting the Pledge at the beginning of each school day. *Id.* at 482. This policy stems from the fact that the California Education Code mandates that public school days begin with “appropriate patriotic exercises.” *Id.* The Education Code also states that recitation of the Pledge qualifies as an appropriate patriotic exercise. *Id.* Accordingly, *Elk Grove Unified School District* “has promulgated a policy that states, in pertinent part: ‘Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.’” *Id.* at 483.

248. One response to this assertion is that, in actuality, only those children who wish to be exposed to the Pledge in fact encounter its content on a regular basis because those students who object to reciting the Pledge are not required to participate. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (holding that public school students cannot be required to recite the Pledge). This is not a valid objection because children can only avoid the content of and consistent exposure to the Pledge by choosing, each and every day of the school year, to refrain from reciting it.

249. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

250. *See supra* note 246.

251. *See* Brief of Amicus Curiae American Atheists at 21–23, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 1191 (2004) (No. 02-1624). The brief discusses why addition of the phrase “under God” is an unnecessary part of an otherwise patriotic exercise. Specifically, the brief refutes the notion that the phrase is needed to solemnify public occasions and express hope in the future (as Justice O’Connor suggested that these words function in her concurring opinion in *Lynch v. Donnelly*).

to Americans that they must profess a belief in God to be patriotic American citizens. This certainly crosses the line that the government, under the First Amendment, is prohibited from curbing individuals’ freedom of conscience with respect to religious matters. Thus, including the words “under God” in the Pledge violates the Establishment Clause under the proposed modified coercion test.

The modified coercion test is by no means perfect and will likely be met with much criticism. Yet, honest application of the test will provide a framework that will furnish more consistent results, while taking into account the purposes behind the Establishment Clause and religion’s role in modern society.

V. CONCLUSION

The *Lemon* and endorsement tests each contain inherent flaws and lead to inconsistent and incoherent results when applied to the facts of actual cases. Furthermore, the holdings of Establishment Clause cases in which the Court employed these tests communicate to adherents of “majority” religions that their beliefs have little or no place in modern society.²⁵² This is unacceptable when the government is to respect individuals’ religious liberty. The *Lemon* and endorsement tests should therefore be abandoned.

The original intent of the Framers with respect to the First Amendment, as well as the historical tradition of religion’s role in the United States, demonstrates that a modified coercion test should emerge in place of the *Lemon* and endorsement tests. This modified coercion test finds that a violation of the First Amendment occurs when the government consistently

252. See *County of Allegheny v. ACLU*, 492 U.S. 573, 677 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy states:

Although Justice O’Connor disavows Justice Blackmun’s suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement, the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry. If there be such a person as the “reasonable observer,” I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.

Id.

exposes observers to an obtrusive religious symbol. This formulation ensures that the government will not establish a national religion or restrain individuals' freedom of conscience in religious matters, without underestimating the importance of religious diversity and tolerance for differing beliefs.²⁵³

Accordingly, the modified coercion test provides a more consistent Establishment Clause framework by invalidating only those actions in which the government is engaged in that could lead to an establishment of religion or which work to curtail individual freedom. A more consistent framework is achieved because the modified coercion test requires invalidating all actions where governmental activity undermines the principles behind the First Amendment, including practices that the Supreme Court has always upheld as constitutional.

This reinforces the notion that although church and state should undoubtedly be kept separate, religion does not have to be completely removed from society.²⁵⁴ There is a place for religion in modern society, and the modified coercion test permits this.

LISA M. KAHLE

253. There are too many diverse groups in the United States for every person to agree with every act that occurs, every display that is erected, etc. Allowing practices to be deemed unconstitutional because some people disfavor them hinders tolerance for diversity and runs the risk of eliminating religion from the public sphere altogether. *See, e.g.*, Charles J. Russo, *Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?*, 1999 BYU EDUC. & L.J. 1, 20 (commenting on tolerance generally, but specifically with respect to prayer in public schools, that the government should encourage maintaining respect for various religious viewpoints). Russo asserts that it will be somewhat hypocritical for educators to attempt to foster appreciation for diversity generally if students are not permitted to be exposed to divergent religious viewpoints. *Id.* Even more important, Russo contends that it is dangerous to limit conversation on controversial issues if the United States is to grow as a nation. *Id.*

254. *Stone v. Graham*, 449 U.S. 39, 45–46 (1980) (Rehnquist, J., dissenting) (“The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.”); *see also* Michael J. Himes, *Public Theology in Service to a National Conversation* (2003) (unpublished paper, on file with author) (discussing a national conversation regarding religion’s place in the public arena). Himes notes:

Whether one applauds or deplores the fact, being a religious believer will, consciously or unconsciously, affect the way one votes, the kinds of public policies one endorses, and the kinds of social and economic commitments one makes. The issue is not whether one’s theology influences one’s involvement in public life—it does, unless one is a thoroughly disintegrated human being—but rather whether we acknowledge and deal with the fact.

Id. at 10; *see also* Laurie Messerly, Note, *Reviving Religious Liberty in America*, 8 NEXUS 151, 164 (2003) (arguing that removing religion from public life has not only harmed America, but also would have been incomprehensible to the Framers because they believed that government could not survive without religion as a moral influence).