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## The Lawless Rule of the Norm in the Government Religious Speech Cases

Kyle Langvardt

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# The Lawless Rule of the Norm in the Government Religious Speech Cases

Kyle Langvardt\*

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The Supreme Court first heard an Establishment Clause challenge to the practice of legislative prayer over three decades ago in *Marsh v. Chambers*.<sup>1</sup> It has heard a second challenge this Term in *Town of Greece v.*

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1. See *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) (upholding the Nebraska Legislature’s practice of opening each legislative day with a prayer by a chaplain paid by the State).

*Galloway*,<sup>2</sup> but has not yet rendered a decision at the time of this publication.

Between *Marsh* and *Galloway*, the Court has decided several cases concerning other types of religious speech by government. This religious speech includes nativity scenes and “Ten Commandments” shrines in town halls and courthouses,<sup>3</sup> the words “Under God” in the Pledge of Allegiance,<sup>4</sup> the printing of “In God We Trust” on money,<sup>5</sup> and so on.

The controversies surrounding this speech are highly charged. Yet the actual litigation resulting from them puts relatively little at stake. The religious-minority plaintiffs urge that they have been made to feel like “outsiders in the political community.”<sup>6</sup> This kind of stigmatic harm, however genuine, rarely carries much independent weight in other areas of the law.<sup>7</sup> On the other hand, the government defendants cite what Justice Scalia would call “the interest of the overwhelming majority of

2. See generally *Town of Greece, N.Y. v. Galloway*, 133 S. Ct. 2388 (2013) (granting certiorari).

3. See generally *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch.*, 492 U.S. 573 (1989); see also *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

4. See generally *Elk Grove Unified Sch. Dist. v. Newdow*, 541 U.S. 1 (2004).

5. See generally *O’Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

6. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“[G]overnment endorsement or disapproval of religion . . . sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”); see also *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch.*, 492 U.S. 573, 595 (quoting *Lynch*); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch*, 465 U.S. at 688); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 155–56 (1996) (discussing how the experience of religious minorities as political outsiders can be compared to the experiences of groups such as feminists and racial minorities).

7. With limited exceptions, for instance, the law traditionally does not allow collection for emotional distress in negligence suits without some showing of a physical impact. See 38 AM. JUR. 2D *Fright, Shock, Etc.* § 12 (2013). When emotional distress is inflicted intentionally, a plaintiff must demonstrate that the distress was “severe” and that the behavior was “extreme and outrageous.” See 43 AM. JUR. 2D *Proof of Facts* 1 (1985). Similarly, sexual harassment claims premised on a hostile work environment theory rest on mental distress, but require a showing that the harassment was severe. See 78 A.L.R. Fed. 252 (1986). Mental suffering is rarely considered as an element of damages in contract law. See 22 AM. JUR. 2D *Damages* § 49 (2013). Also see *infra* at n. 200 (discussing failure of equal protection claims based on emotional distress resulting from incorporation of Confederate battle flag into official state insignia).

religious believers in being able to give God thanks and supplication *as a people*.<sup>8</sup> But even if we grant that giving God thanks and supplication *as a people* feels different from giving thanks or supplication *as a church* or *as a family* or *as another private organization*, that feeling is surely an “interest” at least as abstract as the interest in “not feeling excluded,”<sup>9</sup> and also of the sort disfavored elsewhere in the law.<sup>10</sup>

The overall character of these cases is indeed so abstract that it tends to boil down to a story of my indignation versus your indignation. The important question—namely, whose indignation is more justified under the circumstances—depends on what Justice O’Connor referred to as the “judicial interpretation of social facts.”<sup>11</sup> These “social facts” are left out of the hands of juries and are reviewable *de novo* on appeal.<sup>12</sup> They concern, among other things, what sort of message a town sends to an “objective observer” when it installs a Ten Commandments monument

8. *McCreary Cnty.*, 545 U.S. at 900 (2005) (Scalia, J., dissenting) (emphasis in original).

9. *Id.* (internal quotation omitted).

10. See Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1119 (2006). Professor Colby eloquently critiques Justice Scalia’s majoritarian logic by substituting race for religion:

Imagine if this reasoning had been employed in *Brown v. Board of Education*:

In the context of segregation in public schools there are legitimate competing interests: On the one hand, the interest of that minority in not feeling “inferior;” but on the other, the interest of the overwhelming majority of Kansans in being able to educate their children in the presence of members of their own race alone. Our national tradition has resolved that conflict in favor of the majority.

What a sad Constitution that would be.

*Id.* at 1119.

11. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring).

12. See *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 136 (2005) (“The reason for this allocation of power is not evident from the nature of the test. Roughly speaking, the query is whether a reasonable observer would think that the government sent a message favoring religion over non-religion. Context matters, including the community setting. Juries regularly answer questions like this. Negligence cases call for somewhat similar judgment. Even better, juries may determine whether speech is so offensive to community standards that it qualifies as obscenity.”); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion) (asking as an aside whether it should be juries who decide these questions).

outside a Courthouse;<sup>13</sup> whether a menorah is a religious or a secular symbol;<sup>14</sup> and how a nonobservant high schooler would feel during an official prayer at a football game.<sup>15</sup>

The power of this fact finding to shape the outcome of a case almost irrespective of the legal standard being applied stands as the one constant in an area of law notorious for its caprice.<sup>16</sup> The various theoretical constructs advanced by the Justices—the government should not “endorse” religion; should not “coerce” religious compliance; should act “neutrally”—give little real guidance to lawyers. If the point of the law is to predict what the judge will do with your case, as Holmes believed,<sup>17</sup> then where the Justices make real law is in their findings of social fact: a nativity scene impermissibly endorses religion when it is placed in the “most beautiful” part of a courthouse,<sup>18</sup> but not if it is surrounded by reindeer;<sup>19</sup> prayers at

13. See *McCreary Cnty.*, 545 U.S. 844, 862–63 (finding that there was a predominantly religious purpose behind the Ten Commandments display); see also *Van Orden*, 545 U.S. 677, 691–92 (2005) (finding that the placement of a Ten Commandments monument on the Texas State Capitol grounds was “far more passive” than its usage in other cases and that the monument had a “dual significance” in being grouped with other historical, non-religious monuments).

14. See *Cnty. of Allegheny*, 492 U.S. at 613–21.

15. See *Doe*, 530 U.S. 290.

16. See, e.g., Jesse H. Choper, *The Unpredictability of the Supreme Court's Doctrine in Establishment Clause Cases*, 43 WAYNE L. REV. 1439 (1997) (arguing that the Supreme Court “has failed to adopt coherent principles of law governing the Establishment Clause”).

17. See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173 (1920) (describing the law as “[t]he prophecies of what the courts will do in fact, and nothing more pretentious. . .”).

18. See *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch.*, 492 U.S. 573, 579–81, 594–602 (1989).

19. See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (approvingly describing a nativity scene’s surroundings: “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads ‘SEASONS GREETINGS,’ and the crèche at issue here”); see *id.* at 692–93 (O’Connor, J., concurring) (explaining that the nativity scene’s “features combine to make the government’s display of the crèche in this particular physical setting no more an endorsement of religion than such governmental ‘acknowledgments’ of religion as legislative prayers . . .”); Joshua D. Zarrow, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 495 (1986) (describing *Lynch* as establishing a “two plastic reindeer rule”); *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987) (invalidating a nativity scene under *Lynch* because “[i]n this case, . . . therefore, unlike *Lynch*, the secularized decorations in the vicinity of the nativity scene were not clearly part of the same display”).

graduation ceremonies coerce graduating students into participating;<sup>20</sup> the phrase “In God We Trust” has lost its religious meaning through rote repetition.<sup>21</sup> Analogy to these factual findings offers practitioners and policymakers a far more reliable guide than any application of the Court’s “tests.”

In this article, I discuss the Court’s attempts between *Marsh* and *Galloway* to apply its tests to questions of governmental religious speech. I begin in Part I with *Marsh*, which avoided tests altogether. Instead, *Marsh* upheld legislative prayer based on its historical pedigree and its continuing widespread practice.<sup>22</sup>

*Marsh* is in this respect an anomaly among the government religious speech cases; later opinions, though they disagree on which test to apply, at least purport to apply *some* test or another based on a larger understanding of the Establishment Clause’s purposes. I discuss these tests in Part II. Yet I argue that these tests have proven so pliable in the hands of Justices willing to interpret the social facts creatively that *Marsh*, in its lawlessness, emerges as less of an exception than it would appear.

In Part III I discuss *Galloway*, the upcoming legislative prayer case. *Galloway*’s impact could easily be limited to the law of legislative prayer, as the Court has for years treated legislative prayer, and *Marsh*, as a jurisprudential island. But *Galloway*’s municipal defendants seem to have angled for something larger—namely, a confrontation between test-free *Marsh* and the “endorsement test,” which the courts currently consult to decide most matters involving the constitutionality of government religious speech. The “endorsement test,” which I explain below, is vulnerable on the current Supreme Court, which may well take *Galloway* as an invitation to bring it down. But more interestingly, *Galloway* may set the stage for a

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20. See *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (“The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

21. See *Newdow*, 542 U.S. at 41 (2004) (O’Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting), for the suggestion that the reference to God in the Pledge has “lost through rote repetition any significant religious content,” concluding that “[a]ny religious freight the words may have been meant to carry originally has long since been lost”).

22. See *Marsh*, 463 U.S. at 783–95 (upholding the Nebraska Legislature’s practice of opening legislative sessions with a prayer by a chaplain paid by the State).

reassessment of *Marsh*'s exceptional status and an expansion of the case's permissive, test-free approach beyond legislative prayer.

### I. The *Marsh* "Rule"

The Supreme Court's Establishment Clause jurisprudence is neither clear nor predictable.<sup>23</sup> Yet it has remained under the nominal control of the same leading case for the last four decades. *Lemon v. Kurtzman*<sup>24</sup> set forth a three-pronged standard that the Court continues to apply today, though somewhat grudgingly, and with frequent exceptions:<sup>25</sup>

1. First, the statute must have a secular legislative purpose;
2. Second, its principal or primary effect must be one that neither advances nor inhibits<sup>26</sup> religion;
3. Finally, the statute must not foster 'an excessive government entanglement with religion.'<sup>27</sup>

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23. See *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (explaining Justice Alito's sentiment that the "Court's Establishment Clause jurisprudence is undoubtedly in need of clarity"); see also *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) (decrying "an Establishment Clause jurisprudence in shambles").

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

25. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., dissenting) (comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will."); see also Marcia S. Alembik, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1184–85 (2006) (discussing the declining use of the Lemon test amid competing constructs).

26. Cf. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1381, 1384 (1981). "The 'inhibits' language is at odds with the constitutional text and with the Court's own statements of the origins and purposes of [the] clause. Government support for religion in an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim. Regulation that burdens religion, enacted because of the government's general interest in regulation, is simply not establishment."

27. *Lemon*, 403 U.S. at 613. *Lemon*'s test has probably survived partially because its terms are so malleable that they tend to avoid direct contradiction with countervailing frameworks, and partially because there is no alternative framework robust enough to command widespread support. Its banality inspires criticism. Yet banality may operate as a survival mechanism in an area of law where tempers run high and clear standards are so hard to articulate. Compare the proposed "actual legal coercion" standard of Justices Scalia and

The *Lemon* test's first two prongs carry over from a standard articulated in *School District of Abington Township v. Schempp*,<sup>28</sup> a case about Bible readings in public schools. There, the Court held that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>29</sup> The Court held that the fundamentally "religious character of the exercise"<sup>30</sup> trumped the School District's assertion of "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"<sup>31</sup> as secular purposes and effects promoted by the Bible readings.

The *Lemon* test, as informed by *Schempp*, should have struck down the legislative chaplaincy challenged in *Marsh v. Chambers*. For eighteen years, Nebraska had retained Presbyterian minister Robert Palmer (not the singer<sup>32</sup>) as chaplain for the legislature at a salary of \$319.75 per month.<sup>33</sup> Rev. Palmer offered a daily prayer at the outset of every legislative session. For years, Rev. Palmer's prayers had been explicitly Christian; but at the request of a Jewish legislator, Rev. Palmer had altered the prayers to have a

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Thomas. *See Newdow*, 542 U.S. 1 at 53 (Thomas, J., concurring) ("It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments."); *see also Lee*, 505 U.S. at 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*") (emphasis in original). The test, though capable of misapplication, provides an unusual clarity in this area, but its results simply go too far politically.

28. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963) ("The test may be stated as follows: *what are the purpose and the primary effect* of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*") (emphasis added); *see also* STEPHEN D. SOLOMON, *ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION AND SPARKED THE BATTLE OVER SCHOOL PRAYER* 326 (2010) ("The first two prongs of the test had been set in Justice Clark's opinion in *Schempp*; the third, "entanglement" prong was added in *Lemon*.")

29. *Schempp*, 374 U.S. at 222.

30. *Id.* at 224.

31. *Id.* at 223.

32. If you are inclined to enter YouTube URLs manually into the address bar on your browser, you can see the other Robert Palmer perform "Addicted to Love" here: "Robert Palmer – Addicted to Love," <http://www.youtube.com/watch?v=XcATvu5f9vE>. It really holds up surprisingly well.

33. *Marsh*, 463 U.S. at 785.

“Judeo-Christian”<sup>34</sup> flavor. The state published these prayers along with the rest of the legislative record.

*Lemon* requires a secular purpose, a secular effect, and no excessive entanglement. A secular purpose-and-effect for the prayer program can be contrived fairly easily – namely, the prayers’ role in “solemnizing” the occasion.<sup>35</sup> Yet the undeniably “religious character of the exercise” should have trumped the interest in solemnization, just as it had trumped the secular purposes offered in *Schempp* to justify a Bible reading.<sup>36</sup> Moreover, the salary paid to Rev. Palmer, as well as the controversy wrought by the prayers, would seem to offend the “entanglement” prong of the *Lemon* test.<sup>37</sup> Under *Lemon*, it is hard to see how legislative prayer survives.

But the majority of Chief Justice Burger’s Court apparently found this result unacceptable.<sup>38</sup> We are left to ask why. Some of the opposition to striking down legislative prayer was probably ideological; in the years since the Warren Court decided *Schempp* 8-1 against the Bible readings, seven of the Warren Court’s nine seats, including six of the *Schempp* majority, had been replaced. Only Justice White voted to invalidate the Bible readings in *Schempp* and to uphold Nebraska’s legislative chaplaincy in *Marsh*; he may have had concerns about the Court’s image.<sup>39</sup> But whatever the majority’s

34. *Id.* at 793. If “Judeo-Christian tradition” refers merely to the incorporation of Jewish texts into Christianity, then it is worth asking why we do not hear more about a pan-Abrahamic “Judeo-Christian-Muslim-Baha’i tradition.” The answer is that anti-Semitism is in postwar America taboo to a degree that anti-Islam and anti-Baha’i are not. “Judeo-Christian” gives Christian conservatives a way to subordinate religious minorities while avoiding the appearance of anti-Semitism. The notion of a “Judeo-Christian tradition” nevertheless comes across as vaguely patronizing toward Jews whose faith does not incorporate specifically Christian theology; the implication seems to be that Judaism itself is a now-superseded step toward the development of Christianity. For an account of the origins of “Judeo-Christian” theology that appears to have its origins in American postwar politics, see Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 277, 283–84 (2007).

35. See *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring) (“[L]egislative prayers . . . [and other] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”).

36. *Marsh*, 463 U.S. at 797–98 (Brennan, J., dissenting).

37. *Id.* at 798–800.

38. *Id.* at 783.

39. While *Schempp* had aroused little controversy, it was largely because the Court had already broached the issue of school prayer several years earlier in *Engel v. Vitale*. Invalidating Nebraska’s chaplaincy in *Marsh* would have opened a new front in a perceived

ideological or pragmatic motivations for upholding the chaplaincy, it could not do so without either sidestepping or mangling *Lemon* and *Schempp* as a matter of doctrine. Nor could the Court plausibly reconcile the chaplaincy with either of the broader Establishment Clause models articulated in previous cases—namely, a model of a “strict separation” between church and state<sup>40</sup> or, more liberally, a model requiring “neutrality”<sup>41</sup> between religion and non-religion. It may not even be possible to *devise* a “test” that could accommodate the Establishment Clause to a practice that so closely resembles a state-financed church service.

The majority opinion for *Marsh* therefore did not refer to *Lemon*, to the neutrality doctrine, or to the doctrine of strict separation. Instead, it upheld Nebraska’s chaplaincy “in the Judeo-Christian tradition” based entirely on a long history—a revisionist one at that<sup>42</sup>—of legislative chaplains past.<sup>43</sup> The Chief Justice found evidence of legislative prayer in Congress at the time of the First Amendment’s ratification to be particularly persuasive evidence that the Founders could not have intended legislative prayer to be unconstitutional.<sup>44</sup> Yet the Chief Justice did not seem to make

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judicial “war on religion,” just as *Engel* had some years before. See, Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*. FIRST AMENDMENT STORIES 193 (Richard W. Garnett and Andrew Koppelman eds., 2011); Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 959 (2011).

40. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

41. See *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) (“The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force.”).

42. See Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

43. The Chief Justice purported to rely on history as evidence of the drafters’ intent rather than as a justification in itself for a long-standing practice: “Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.’” *Marsh*, 463 U.S. at 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

44. *Id.* at 787–88 (“[T]hree days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. . . . Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains

an argument based entirely on the Framers' intent, as he seems to argue that the continuation of legislative prayer over the centuries has contributed to the practice's constitutionality: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer *has become* part of the fabric of our society."<sup>45</sup> It is seemingly the *normalcy*, the *ordinariness* of legislative prayer that justifies the practice rather than adherence to existing Establishment Clause principles.

And though competing principles of anti-proselytization and anti-sectarianism would later be drawn from the opinion,<sup>46</sup> *Marsh*, taken on its own, reads as a deliberate attempt to avoid applying a test.<sup>47</sup> In that the *Lynch* majority relies on it openly, the case represents the highwater mark of the test-free, analogy-based approach.

#### *Marsh in Lynch*

Under thin doctrinal cover, Chief Justice Burger expanded the *Marsh* approach in *Lynch v. Donnelly*, the first major nativity-scene case. In *Lynch*, the City of Pawtucket, Rhode Island set up a lighted Christmas display on a private space in a downtown shopping district. The display contained a "talking" wishing well, a sit-on-Santa's-lap setup, a miniature "village" of houses and a church, some lighted stars, a sleigh and reindeer, some garland, a "SEASON'S GREETINGS" sign, various cutouts including a clown, a dancing elephant, a robot, and finally, a nativity scene. Daniel Donnelly, the plaintiff, objected to what he saw as an alarming mixture of church and state.<sup>48</sup>

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and opening prayers as a violation of that Amendment").

45. *Id.* at 792 (emphasis added).

46. *See* Cnty. of Allegheny, 492 U.S. at 603–05 (the anti-sectarianism principle); *id.* at 659–60 (Kennedy, J., concurring in the judgment and dissenting in part) (the anti-proselytization principle). *See also* *Marsh*, 463 U.S. at 794–95 ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

47. Avoiding tests seems to be a defense mechanism that kicked in when Chief Justice felt doctrinally cornered. *See, e.g.*, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), a free-speech case in which the Chief Justice avoids referring to a fairly recently-decided controlling opinion, and instead offers an ad hoc analysis in order to reach a result the controlling test would not have reached.

48. *Lynch*, 465 U.S. at 670–72.

*Lynch*, unlike *Marsh*, at least *purported* to apply a test, namely that of *Lemon*.<sup>49</sup> Yet in *Lynch*'s application of *Lemon*, the Chief Justice created something even *more* freewheeling than *Marsh*. In answering *Lemon*'s question whether the nativity scene's "principal or primary effect is to advance or inhibit religion,"<sup>50</sup> the Chief Justice simply catalogued a broad range of government religious speech practices and asserted that the "effect" of Pawtucket's nativity scene surely could not be any worse than the "effects" of any of those:

[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored colleges and universities, and the tax exemptions for church properties. . . .<sup>51</sup>

As in *Marsh*, the analysis is long on analogical reasoning that serves only to move the process of justification offstage. But in *Marsh*, the Chief Justice at least drew from the history of the particular practice under challenge, namely legislative prayer. In *Lynch*, on the other hand, he drew from a diffuse anthology of church-state comminglings none of which closely resembled *Lynch*.<sup>52</sup> Indeed, the Chief Justice failed to make any "suggestion that publicly financed and supported displays of Christmas crèches are supported by a record of widespread, undeviating acceptance that extends throughout our history."<sup>53</sup>

The Chief Justice made only a nominal effort to address the remaining two elements of *Lynch*: he found legitimate secular purposes for a Christian nativity scene in the city's desire to "celebrate the Holiday and to depict the origins of that Holiday."<sup>54</sup> He also cited the low market value of the

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49. *Id.* at 679.

50. *Id.*

51. *Lynch*, 465 U.S. at 681–82 (citations omitted).

52. *Id.*

53. *Id.* at 725 (Brennan, J., dissenting).

54. *Id.* at 681.

nativity scene and the lack of governmental “contact with church authorities” as evidence that church-state entanglement was minimal.<sup>55</sup>

### *Normalcy Checking*

The Burger approach in *Marsh* and *Lynch* is what I call a “normalcy check.” To determine whether a governmental practice offends the establishment clause, a normalcy check asks, “Is this governmental practice really any different from putting ‘In God We Trust’ on the money?” “Is this governmental practice really any different paying a minister from state funds to perform a benediction at the opening of every session of the legislature, day in and day out?” More broadly, “Is this governmental practice a normal thing for the government to do, or not?” Such questions, of course, are designed to avoid the direct application of actual legal principles to the practice under consideration. This makes normalcy checks easy to disparage. Yet it also makes them hard to quit, as the post-*Lynch* case law shows.

To be fair, “normalcy checking” is my epithet, not a name that Chief Justice Burger chose to describe his own doctrine. Then again, *Marsh v. Chambers* does not articulate any *other* doctrine. The opinion says so little about its methods that the reader is left to reverse-engineer its operative principle. And that principle appears to be that an apparent normalcy ratifies a governmental practice—at least in the area of governmental speech on religion. If the practice is widespread, that helps. If the practice is old, that helps. If examples of the practice date to the founding era, even better.

Such reasoning is more likely to appeal to a member of the religious majority than to a member of a religious minority. For the simple fact is that acts of government religious speech will more likely reflect the preferences of the *voting* majority, and generally speaking, membership in the *voting* majority is more likely than not to consist mainly of members of the *religious* majority. And if the religious majority adds up to a supermajority, then members of the religious majority will almost always constitute a majority of the voting majority.<sup>56</sup> For instance, Christians

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55. *Id.* at 684.

56. Granted, this rule weakens in three-way races in which no candidate receives a majority. I also assume, perhaps imperfectly, that the voting population reflects the religious population demographically.

constituted eighty-two percent of Nebraskans in 2008.<sup>57</sup> (This does not include any of the sixteen percent who describe themselves as unaffiliated,<sup>58</sup> the large majority of whom probably come from a background more Christian than any alternative faith.) If everyone in the state voted in an election, and if every non-Christian in the state voted for a candidate who won with just over fifty percent of the vote, then Christians would still make up sixty-eight percent of that candidate's voting base.

To the extent that religious background determines an observer's instincts about church-state propriety, then, it is little wonder that there exists such a long tradition of Christian ministry in the Nebraska legislature—after all, there has never existed any non-Christian majority voting bloc, and there is therefore little political will to take on this relatively minor annoyance.<sup>59</sup> An unchallenged practice, over time, grows into a “long tradition,” establishing a political baseline that the majority of Nebraskans feel comfortable with and regard as normal. But this comfort level reflects the size of the Christian majority, not the satisfaction of the non-Christian minority.

By adopting normalcy as the *de facto* index of legitimacy, the Chief Justice simply weighs legislative prayer against the long-standing religious majority's sense of propriety. To be fair, the Chief Justice, in *Lynch* at least, cited a lack of past “controversy” regarding the long tradition as evidence of support among some broad consensus, presumably including members of the non-Christian minority.<sup>60</sup> Perhaps in *Marsh* he would have taken into account failed legislative challenges to these practices had they occurred. But no one should take it as a surprise that this is not an area where the non-Christians of Nebraska would waste their scarce political

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57. THE PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 100 (2008).

58. *Id.*

59. *Cf.* Lund, *supra* note 42.

60. *Lynch*, 465 U.S. at 684. Justice Breyer, as well, emphasized a lack of controversy surrounding a long-standing Ten Commandments installation in *Van Orden v. Perry*, 545 U.S. 677, 679 (2005) (Breyer, J., concurring) (controlling opinion) (“The determinative factor here, however, is that 40 years passed in which the monument's presence, legally speaking, went unchallenged. . . . Those 40 years suggest . . . that few individuals, whatever their belief systems, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to establish religion.”). Compare *Salazar v. Buono*, 130 S.Ct 1803, 1817 (2010) (discussing cross meant to commemorate World War I) (“Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness.”).

resources. Nor should anyone discount the possibility of serious indignation on the part of religious minorities—after all, litigation threats to governmental religious speech reliably produce a huge political outcry from members of the Christian religious majority that supports them, and incumbent politicians reliably take these controversies as can't-be-missed opportunities to pander to the faithful.<sup>61</sup> If the numbers justified it, members of “other religions” would speak every bit as loudly on these issues. The fact is that the normalcy checking simply does not attempt to account for minority religious adherents’ sense of what is normal.

The Court would later apply various more formal analyses to the problem of state religious speech. Few later Justices would perform an

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61. In *Freedom From Religion Foundation v. City of Warren*, 707 F.3d 686 (6th Cir. 2013), for instance, an atheist organization petitioned the mayor of a Detroit suburb for the removal of a nativity scene from a “Winter Welcome” display in the city’s civic center. The mayor refused the petition, and the atheist organization instead sued, unsuccessfully, for the right to place its own atheist display alongside the nativity scene. *Id.* at 690. The Mayor made political hay of the issue with a public letter to the atheist organization: “[O]ur country was founded upon basic religious beliefs. The President takes the oath of office on the Holy Bible. . . . We have a whole host of other religious traditions in government situations at all levels. . . . Everyone has a right to believe or not believe in a particular belief system, but no organization has the right to disparage the beliefs of many Warren and U.S. citizens because of their beliefs. . . . Your non-religion is not a recognized religion. Please don’t hide behind the cloak of non-religion as an excuse to abuse other recognized religions.” *Id.* at 691. The Mayor also took the message to the airwaves: “Everyone has a right to freedom of religion, but I do not believe our Founding Fathers felt there should be a right to attack religion or a freedom from religion.” See Jeff T. Wattrick, *Warren Mayor Jim Fouts, Freedom from Religion Coalition’s [sic] Fight over Nativity Display is a Holiday Buzzkill*, MLIVE.COM (Dec. 21, 2011, 2:16 PM), [http://www.mlive.com/news/detroit/index.ssf/2011/12/warren\\_mayor\\_jim\\_fouts\\_freedom.html](http://www.mlive.com/news/detroit/index.ssf/2011/12/warren_mayor_jim_fouts_freedom.html). In Texas, to take another example, Governor Rick Perry recently signed into law the protection of the salutation “Merry Christmas,” despite any realistic threat of litigation over the phrase. See *Texas Gov. Perry signs ‘Merry Christmas’ bill into law*, FOXNEWS.COM (June 14, 2013), <http://www.foxnews.com/politics/2013/06/14/perry-signs-merry-christmas-bill-into-law/>. And then, of course, there is the story of Judge Roy Moore of Alabama, who, as a Circuit Judge, displayed the Ten Commandments behind the bench and opened court sessions with prayer. He vowed to defy a judicial order to remove the plaque, and received much media attention. Conservative groups “drafted” Moore to run for election to the Alabama Supreme Court. Moore ran and won. There, Moore commissioned a two-and-a-half ton Ten Commandments monument for the Supreme Court’s rotunda. The Eleventh Circuit ordered the monument removed, *Glassroth v. Moore*, 335 F.3d 1282 (2003). Moore defied the order and was removed from office. See Jannell McGrew, *Moore Suspended*, MONTGOMERY ADVERTISER (Aug. 23, 2003). Moore then spun the controversy into two unsuccessful runs for Alabama’s governorship, and was finally re-elected Chief Justice of the state’s Supreme Court in 2012. Kim Chandler, *‘10 Commandments judge’ Roy Moore wins his old job back*, THE WASHINGTON POST (Nov. 8, 2012), [http://articles.washingtonpost.com/2012-11-08/national/35505358\\_1\\_republican-moore-roy-moore-chief-justice](http://articles.washingtonpost.com/2012-11-08/national/35505358_1_republican-moore-roy-moore-chief-justice).

analysis as testless as Chief Justice Burger's in *Marsh* or *Lynch*. Yet in many ways, the normalcy checks of *Marsh* and *Lynch* express the spirit of the case law better than any of the ostensibly more principled analyses that have followed them. Justice O'Connor's "endorsement test," discussed below, offers judges—or at least judges not bound by the Supreme Court's past constitutional factfinding—near-total discretion to find facts. But its chief competitor, Justice Kennedy's anti-coercion doctrine, is sufficiently malleable to accommodate essentially whatever outcome a judge prefers.

## II. The Endorsement Era

### *Endorsement's Origin*

Justice O'Connor's concurring opinion in *Lynch* attempted to supply a bit of the particularity that the Chief Justice Burger's analysis lacked. To this end, Justice O'Connor focused the antiestablishment question on whether Pawtucket had "endorsed Christianity by its display of the crèche."<sup>62</sup> Endorsement of religion, she explained, "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>63</sup> As such, endorsements of religion violate the Establishment Clause's prohibition against "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>64</sup> She then adapted the first two prongs of *Lemon*—secular legislative purpose, effect of the action—to this question of endorsement. To pass constitutional challenge, the government's actual purpose must not be "to endorse or disapprove of religion," and the effect must not be "in fact [to] convey[] a message of endorsement or disapproval."<sup>65</sup> This *Lemon* test modified by the endorsement test went on to dominate future litigation over public displays of religious symbols.

Whatever the theoretical shortcomings of an analysis that places so much constitutional weight on purely emotional harms, Justice O'Connor's adaptation of *Lemon* did promise the Court's unlawful jurisprudence a bit

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62. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

63. *Id.* at 688.

64. *Id.* at 687.

65. *Id.* at 690.

of badly-needed structure. It also promised a compassionate attitude toward the experience of minority religious groups.

Yet Justice O'Connor's application of her own endorsement test, even in its debut, disappoints on both counts. In determining whether Pawtucket's actual purpose was to endorse religion, for instance, Justice O'Connor wrote that "[t]he evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols"<sup>66</sup>—a watery word salad that if anything has *less* coherence than the Chief Justice's similar reasoning that "to celebrate the Holiday and to depict the origins of that Holiday"<sup>67</sup> somehow constitute "legitimate secular purposes."<sup>68</sup>

Justice O'Connor's argument assumes that the "religious content of the crèche"<sup>69</sup> can be filtered from its non-religious "content" and, with the trial court, that Christmas can be divided into a secular holiday and a religious holiday. Under this division, the religious Christmas consists of everything involving the baby Jesus, his associates, and his environs, and the secular Christmas consists of the remainder, including garland, candy canes, gift giving, and all aspects of the Santa Claus phenomenon.<sup>70</sup> But even if we accept this division (there is reason to doubt, for instance, that Santa Claus is a wholly secular symbol<sup>71</sup>), surely everyone can agree that the *nativity scene*, at least, counts as a religious rather than a secular

66. *Id.* at 691 (O'Connor, J., concurring).

67. *Id.* at 681 (majority opinion).

68. *Id.*

69. *Id.* at 691 (O'Connor, J., concurring).

70. The trial court wrote that "the courts . . . have recognized the obvious fact that Christmas, as celebrated in 20th century America, has a decidedly secular dimension. This is the Christmas whose central figure is Santa Claus and whose themes are the nontheological ones of goodwill, generosity, peace, and less exaltedly, commercialism. Yet it is equally obvious that for the many 20th century Americans who practice Christianity, there is another Christmas. This is the "original" Christmas whose central figure is Christ, the Son of God, and whose themes are the essentially theological ones of salvation and spiritual peace, renewal, and fulfillment." *Lynch v. Donnelly*, 525 F. Supp. 1150, 1163 (aff'd, 691 F.2d 1029 (1st Cir. 1982) (rev'd 460 U.S. 1080 (1983))). In this, the court agreed with the plaintiff Donnelly, who "stated that he does not consider Santa Claus and the Christmas tree to be religious symbols because, unlike the nativity scene, they are not referred to or described in religious documents such as the Bible . . . . He distinguished it from the other decorations on grounds that the crèche 'attempted to tell a complete story in itself—the story of the birth of Christ.'" *Id.* at 1156.

71. *See infra* n. 112.

symbol. The intuitive conclusion is the one that the trial court reached: namely, that the public display of a nativity scene, a core religious symbol, has to offend the *Lemon* test.<sup>72</sup>

Not for Justice O'Connor. For her, the nativity scene was included to not to promote the "religious content of the crèche" but to further the "celebration of a public holiday through its traditional symbols."<sup>73</sup> But what is meant by "traditional symbols"? Presumably, by "traditional symbols," Justice O'Connor meant all of the symbols on display. Yet it is not clear how the inclusion of the crèche assists any "traditional symbol" besides the crèche. A nativity scene does not enhance the celebratory effect of an inflatable Santa, for instance. It would seem, then, that the purpose of the crèche is to further the celebration of a public holiday through the crèche. This is just a circular way of expressing Chief Justice Burger's *ipse dixit* that "[t]he display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The District Court's inference, drawn from the religious nature of the crèche, that the City has no secular purpose was, on this record, clearly erroneous."<sup>74</sup>

As for the second prong of the endorsement test, namely, whether the symbol "in fact conveys a message of endorsement or disapproval,"<sup>75</sup> Justice O'Connor again resorted to a normalcy check. Although the crèche had "religious and indeed sectarian significance," wrote Justice O'Connor, "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."<sup>76</sup> The crèche, Justice O'Connor wrote, should not be considered in isolation, but in context. The question, in context, is "what viewers may fairly understand to be the purpose of the display." Justice O'Connor's answer—that the nativity scene is not offered as an endorsement of Christianity but as an enhancement of a secular

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72. The First Circuit affirmed but applied a strict scrutiny standard borrowed from *Larson v. Valente*, 456 U.S. 228 (1982), which had come down since the trial court disposed of the case. *Lynch*, 691 F.2d at 1094.

73. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) ("The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols.").

74. *Id.* at 681 (majority opinion).

75. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

76. *Id.* at 692.

holiday celebration—does not come from the ample evidence of what Pawtucket residents *did* understand to be the purpose of the display: namely, to “keep Christ in Christmas.”<sup>77</sup> Instead, the answer is supplied by a normalcy check:

“[T]he government’s display of the crèche in this particular setting [is] no more an endorsement of religion than such governmental ‘acknowledgements’ of religion as legislative prayers of the type approved in *Marsh v. Chambers*, governmental declaration of Thanksgiving as a public holiday, printing of “In God We Trust” on coins, and opening court sessions with ‘God save the United States and this honorable court.’ Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood [by whom?] as conveying government approval of particular religious beliefs.”<sup>78</sup>

Peer through the hazy, pretextual “secular” public purposes, and it becomes clear that the real question in *Lynch*, for Justice O’Connor just as much as for the Chief Justice, was this: is this particular governmental invocation of religious symbolism – namely, the nativity scene - worse than anything we already do? Worse than “In God We Trust” on money? Is this normal?<sup>79</sup>

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77. The trial court, *Donnelly*, 525 F. Supp. at 1161, discussed letters to this effect that were addressed to the mayor’s office: “Although about 10% of the letters expressed the view that the nativity scene represented simply the general moral and ethical aspirations of goodwill, peace, and love, the clear majority of writers regarded the dispute over the nativity scene as implicating religious beliefs and values. The Mayor’s insistence on preserving the crèche was lauded by many as a determination to “keep Christ in Christmas” and, more broadly, to keep God in American life. Several letters decrying the loss of a City “tradition” indicated that their writers viewed the crèche’s central role as portraying the religious aspect of Christmas. Some writers perceived the lawsuit as a confrontation between believers, whose right to express their faith was being threatened, and nonbelievers. In several letters, the writer expressed abhorrence for “the minority’s” attempt to dictate to the “majority” what symbols could be displayed and revered. Some advocated allowing taxpayers or voters to decide how the City should spend their money. A few vigorously contested the desirability or even the possibility, of separating the religious and political spheres.” *Id.*

78. *Id.* at 693 (O’Connor, J., concurring).

79. *Cf. Engel v. Vitale*, 370 U.S. at 421, 437 (Douglas, J. concurring) (“The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.”).

*Endorsement in Maturity*

By the next time that the court heard a nativity scene case in *Allegheny County v. ACLU*, a majority of the Court had at least acknowledged Justice O'Connor's endorsement test.<sup>80</sup> The Endorsement test reached its mature form outside the school setting in *County of Allegheny v. ACLU*,<sup>81</sup> *Van Orden v. Perry*,<sup>82</sup> and *McCreary County v. ACLU*.<sup>83</sup> *Allegheny County*, a second nativity-scene case, offered a counterpoint to Justice O'Connor's endorsement analysis in *Lynch*. Unlike in *Lynch*, where the nativity scene was accompanied by all sorts of dazzling distractions such as candy canes and elephants, the nativity scene in *Allegheny* stood alone on the courthouse steps, allegedly the "most beautiful" part of the courthouse, and was said to signify a more explicit, and therefore unconstitutional, endorsement of the Christian story.<sup>84</sup> Meanwhile, the *Allegheny County* Court upheld the display of a giant menorah; because it was accompanied by a Christmas tree, Justice Blackmun, writing for the Court, held that the menorah in context served as just one component in a display with the secular purpose of celebrating pluralism and, to borrow the County's impossibly corny phrase, "saluting liberty."<sup>85</sup>

*Van Orden* and *McCreary County*, companion cases decided sixteen years later, together make a similar point in the decidedly silly "Ten

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80. In *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), Justice Brennan's majority opinion held that a labor-sharing program between public and parochial schools had the impermissible effect of endorsing religion. In *Witters v. Washington Dep't. of Services for the Blind*, 474 U.S. 481 (1986), an aid-to-parochial schools case, Justice Marshall upheld the program, discussing endorsement as one of a few potential Establishment Clause pitfalls that the state of Washington had avoided. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), Justice Brennan's majority opinion found an impermissible purpose "to endorse a particular religious doctrine" in a Louisiana statute requiring any public-school instruction on the theory of evolution to be accompanied by a discussion of the pseudo-scientific, pseudo-religious theory of "creation science," and Justice Scalia's dissent did not take issue with the use of endorsement as a criterion for determining advancement and legislative purpose. The endorsement test played a fairly small role in these cases, though, which could have been decided the same way under the pre-endorsement, pre-*Lemon* school prayer decisions of *Engel* and *Schempp*, as well as the post-*Lemon* school religious display case of *Stone v. Graham*, 449 U.S. 39 (1980) and various other aid-to-school cases applying a confused but unmodified *Lemon* test.

81. 492 U.S. 573 (1989).

82. 545 U.S. 677 (2005).

83. 545 U.S. 844 (2005).

84. *Allegheny County*, 492 U.S. at 573.

85. *Id.* at 613–21.

Commandments” context.<sup>86</sup> In each case, a municipality had installed a Ten Commandments plaque outside a courthouse. In *McCreary County*, the plaque stood more or less alone in a position of prominence not unlike that of the nativity scene in *Allegheny County*.<sup>87</sup> The County itself had rolled out the monument to great fanfare,<sup>88</sup> and after initially running into litigation trouble, had supplemented the Ten Commandments a “Foundations of American Law and Government” display: a fig leaf meant to suggest, absurdly,<sup>89</sup> that the Ten Commandments were being honored

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86. Ten Commandments installations have been placed at courthouses for decades. Many of the monuments originated in the 1940’s when E.J. Ruegamer, a Minnesota juvenile court judge, sought to post paper copies of the Ten Commandments in juvenile courts throughout the country as a source of guidance for youths in trouble. The Fraternal Order of Eagles (“FOE”) worked with “representatives of Judaism, Protestantism, and Catholicism” to reach what they believed was a nonsectarian version of the Decalogue. Cecil B. DeMille, director of the film “The Ten Commandments,” took an interest in FOE’s project and suggested that, instead of paper, FOE distribute Decalogues engraved on bronze plaques. FOE revised the proposal to granite, and local chapters began donating the plaques to their communities. *Books v. City of Elkhart*, 235 F.3d 292, 295 (7th Cir. 2000). The flurry of litigation surrounding them is relatively recent. Activist groups have found two lines of attack in these cases. First they have argued that the installation of the monuments amounts to a governmental establishment of religion in violation of the establishment clause. Second, they have argued that the installations violate Free Speech Clause case law: by permitting private speakers to install the Decalogues, the argument goes, the state created a forum that must be opened to competing points of view. See Blake R. Bertagna, *The Government’s Ten Commandments: Pleasant Grove City v. Summum and the Government Speech Doctrine*, 58 DRAKE L. REV. 1 (2009).

87. See *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. at 851–52.

88. *Id.*

89. It bears noting how little merit there is to the claim that the Ten Commandments are foundational legal documents. The First Amendment prevents the first two commandments – “thou shalt have not other gods before me” and “thou shalt not make to thyself any graven images” – from becoming law because they are establishments of religion. As for “thou shalt not take the lord’s name in vain,” that is also bad law. “Honor thy father and mother” is bad law. “Thou shalt not covet” is bad law, though to be fair, the subject matter cannot be legislated. So four of the commandments have no analogue in American law. There are two commandments that the American law observes fairly strictly – “thou shalt not kill” and “thou shalt not steal.” A third – thou shalt not bear false witness – is enforced in some contexts (perjury, defamation) but not others (teaching of false doctrine). But these three prohibitions are preconditions for the possibility of civilized life. They are too universal and obvious to have “originated” with any particular source or group of sources. It is not as if God laid down the rule against perpetuities. This leaves two commandments – “remember the Sabbath day” and “thou shalt not commit adultery.” Each of these propositions receives some limited recognition at law, yet it is possible to imagine a society that did not follow them at all. Perhaps – perhaps – Sabbath laws and adultery laws can fairly be described as Moses’ bequest to American law. But to call them a “Foundation

not for their religious significance, but for their centrality to American legal culture.<sup>90</sup> If anything, though, this revision cemented further the message that Christianity and American law function as a unit. The Court held that the display unconstitutionally endorsed religion.<sup>91</sup>

In *Van Orden*, on the other hand, the Ten Commandments plaque was presented with various displays commemorating the traditions of founding settlers in the area. As with the *Allegheny County* menorah, the Court held the plaque's religious significance had been offset by an historical message.<sup>92</sup>

These three opinions - the majority opinions in *Allegheny County* and *McCreary County* and Justice Breyer's controlling opinion in *Van Orden*<sup>93</sup> - set the style of the endorsement era. There is, first of all, an obsession with aesthetics, semiotics, and "context." These themes appeared only dimly in Justice O'Connor's *Lynch* concurrence, in which she offhandedly compared the Pawtucket holiday display and its nativity scene to a government-funded "museum setting" containing a single work of religiously-themed art,<sup>94</sup> the exposition in *Allegheny County*, *McCreary County*, and *Van Orden*, for better or more likely for worse, is far more elaborate.

Second, the post-*Lynch* endorsement opinions filter these aesthetic considerations through various reasonable-person analyses. The Justices dispute this reasonable person's perceptions bitterly. Indeed, the Justices treat the reasonable person so territorially that the construct comes across less as a guide for judicial discretion than as a customizable avatar of judicial notice.

Meanwhile, dissenting opinions and disgruntled concurrences fall into two broad furrows. In the first are Justices who favor an endorsement test that would do more to advance the interests of nonadherents. Justices

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of American Law and Government" is generous.

90. *Id.* at 870–71.

91. *Id.* at 881.

92. Judge Posner praises Justice Breyer's work in *McCreary/Van Orden* as pragmatically concerned with the politics of judicial intervention. While in *Van Orden* the Ten Commandments plaque had stood for decades without prior conflict, the *McCreary* display was a recent provocation. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 99–102 (2005). Perhaps a status quo rule concerned with deterring aggressors in the wars of church and state would be best. Indeed, by denying talking points to religious fanatics, such a rule may in some sense serve the stated ends of the endorsement test better than the endorsement test itself would.

93. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment).

94. *Lynch*, 465 U.S. at 692 (1984) (O'Connor, J., concurring).

Stevens and Brennan, when they were still on the Court, wrote from this angle fairly reliably. Justice Stevens, in particular, seemed to use the endorsement test as a vehicle for the separationist model of religious freedom that has mostly gone by the wayside in the past three decades.<sup>95</sup>

Judges in the opposite camp urge the rejection of the *Lemon*/endorsement framework. Nearly everyone in this camp has written on the subject: Kennedy, White, Rehnquist, Scalia, Thomas, Alito. With substantial justification, these Justices deride the endorsement test for its general lack of clarity. They also express some justified skepticism that constitutional doctrine should rest so heavily on personal offense. And with less justification, they take opportunities to question the validity of that offense.

Yet in search of a purpose behind all of these controversial public displays, the accommodationist Justices conjure up policy interests every bit as vague and emotionally-based as those of the endorsement test. The government's decision between adopting religious imagery is typically portrayed as a choice between "acknowledgement" of religion, on the one hand, and "hostility" toward religion, on the other. A religiously-themed display, the argument goes, reflects only an "acknowledgment" of religion, which – who can deny it? – has always played a prominent role in American history. Given the importance of religion to so many people, a judicial "extirpation" of religion in government<sup>96</sup> would send a message of "hostility"<sup>97</sup> or "callous indifference"<sup>98</sup> toward religion. This concern with

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95. See Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 Nw. U.L. REV. 587 (2012). It is not clear who on the present Court might pick up Stevens' cause following his retirement. Justices Breyer, Ginsburg, and Sotomayor have signed on to Justice Stevens' opinions in these cases before. Justice Breyer has rejected strict separationism. *Van Orden*, 545 U.S. at 699 ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."). Justice Kagan has not yet weighed in on these issues.

96. See *Schempp*, 374 U.S. at 316 (Stewart, J., dissenting) ("[T]he Constitution does not require extirpation of all expression of religious belief."); *Allegheny County*, 492 U.S. at 657 (Kennedy, J., dissenting) ("Taken to its logical extreme, some of the language [in earlier Court opinions] would require a relentless extirpation of all contact between government and religion.").

97. See, e.g., *Van Orden*, 545 U.S. at 683–84 ("This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the

distressed sensibilities, of course, calls to mind the endorsement test's strained attribution of Constitutional weight to emotional harms.

In short, the case law of governmental religious speech contains more complexity than it did under *Marsh*. Yet its major contours of a) context analysis, b) reasonableness analysis, and c) the supposed dilemma of acknowledgment versus hostility do nothing to tame the role of normalcy checking. They simply obscure it. The case law of the past three decades has not replaced Chief Justice Burger's normalcy check so much as broken it up into smaller pieces and reassembled it into a more jagged form.

### *The Role of Secular Context Objects*

Aside from *Marsh*, which relies entirely on "history and tradition," all of the case law in the government religious speech cases rests on the truism that a symbol's meaning varies with its context. And context *does* matter, even if its ability to dilute the meaning of potent religious imagery is frequently overstated.<sup>99</sup> Nonetheless, the question of context is so fact-specific that there is almost always a plausible argument that a given traditionally religious symbol has either retained its religious meaning or

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government from in some ways recognizing our religious heritage"). *See also* *Zorach v. Claiborn*, 343 U.S. 306, 313–314 (1952) (Warning that the Constitution does not contain "a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845–846 (1995) (there is a "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").

98. *See, e.g., Jaffree*, 472 U.S. at 90 (Burger, J., dissenting) ("If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require."); *Allegheny County*, 492 U.S. at 658 (1989) (Kennedy, J., dissenting) (quoting *Zorach*, 343 U.S. at 313).

99. Even a cross is capable of being presented detachedly or ironically in art. But it takes a strong, unambiguous cue to remove the message of endorsement that is attached to it. Presenting one of these marks in a museum or a textbook is perhaps the surest means of detaching the presenter from the mark's ordinary meaning of endorsement. Thus, Justice O'Connor in *Lynch* and *Allegheny County*, voting to uphold public nativity scenes, compared the towns' holiday displays to museums. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *Allegheny County*, 492 U.S. at 624 (O'Connor, J., concurring). I think that comparison is a stretch. *But see* *Capitol Square Review Bd. v. Pinette* 515 U.S. 753, 770–72 (Thomas, J., concurring) (offering that a cross under the care of the Ku Klux Klan loses its religious meaning).

taken on a secular one in light of its placement relative to context objects that are said to be unquestionably secular. This is especially true in cases involving physical objects, where judges microanalyze in writing the positioning and size of these symbols relative to each other. Courts have squabbled notoriously considerations such as the placement of a nativity scene in the “most beautiful” part of a courthouse<sup>100</sup> and about the likelihood that a viewer in a speeding car would have time to apprehend that a cross by the side of the road was a memorial for a state trooper.<sup>101</sup> Judge Easterbrook once remarked that this sort of analysis was better cut out for interior designers: “all a judge can do is announce his gestalt.”<sup>102</sup>

But there is a similar dynamic in cases that do not involve the placement of tangible objects. In *Elk Grove United School Dist. v. Newdow*,<sup>103</sup> the Ninth Circuit had held that the words “under God” in the Pledge of Allegiance,<sup>104</sup> recited by schoolchildren in public schools, impermissibly endorsed religion.<sup>105</sup> Such a conclusion is hard to avoid. Congress inserted the words into the previously existing Pledge in 1954; the bill’s sponsor in declared that the phrase’s purpose was “to contrast this country’s belief in God with the Soviet Union’s embrace of atheism.”<sup>106</sup> After granting *certiorari*, the Supreme Court avoided the Establishment

100. *Allegheny County*, 492 U.S. at 579–81, 594–602.

101. See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 20 (2011) (Thomas, J., dissenting from denial of certiorari), in which Justice Thomas sums up the a dispute among judges of the lower court in *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (*cert. denied*, *Utah Highway Patrol Ass’n.*, 132 S. Ct. at 12): “According to the panel, because the observer would be ‘driving by one of the memorial crosses at 55-plus miles per hour,’ he would not see the fallen officer’s biographical information, but he would see that the ‘cross conspicuously bears the imprimatur of a state entity . . . and is found primarily on public land.’ According to the dissenters, on the other hand, if the traveling observer could see the police insignia on the cross, he should also see the much larger name, rank, and badge number of the fallen officer emblazoned above it. The dissenters would also have employed an observer who was able to pull over and view the crosses more thoroughly and would have allowed their observer to view four of the memorials located on side-streets with lower speed limits.” *Id.* (citations omitted).

102. *Am. Jewish Cong.*, 827 F.2d at 126.

103. 542 U.S. 1 (2004).

104. “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.” J. BAER, *THE PLEDGE OF ALLEGIANCE: A CENTENNIAL HISTORY, 1892–1992*, p. 3 (1992) (internal quotation marks omitted).

105. *Newdow v. U.S. Congress*, 328 F. 3d 466, 490 (9th Cir. 2003) (rev’d sub nom. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 5 (2004)).

106. 100 Cong. Rec. 1700 (1954).

Clause issue by deciding the case on standing grounds.<sup>107</sup> But Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas all wrote concurrences in the judgment that would have upheld the "under God" language on the merits. Both the Rehnquist and O'Connor opinions express variations on the theme that proximity to "patriotic" language neutralizes the ordinarily religious significance of the "one Nation under God" phrase.<sup>108</sup>

Aside from the question of proximity is the question of whether the context objects are themselves secular. This question precedes analytically the question of whether the relationship between the secular object and the religious object dilutes the religious object's ordinary meaning, and the opportunity it presents for factfinding is less noticeable.<sup>109</sup> In both *Lynch* and *Allegheny County*, for instance, the Court agreed unanimously that certain components of the Christmas display were, at least if they stood alone,<sup>110</sup> secular symbols. Everyone on the Court reasoned that neither Christmas trees nor candy canes nor Santa Claus had more than a tenuous relationship with the Christmas holiday's biblical origins. These became the secular context objects, and the nativity scenes' meanings depended on their association with them.

Yet an adherent to a non-Christian faith likely would not have seen things the same way as the entirely Christian *Lynch* and *Allegheny* courts; notably, *Lynch* and *Allegheny* were decided at a time when no Jewish justices sat on the Supreme Court's bench.<sup>111</sup> Identifying Santa and

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107. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

108. See *id.* at 18 (Rehnquist, C.J., concurring in the judgment); see also *id.* at 33 (O'Connor, J., concurring in the judgment).

109. The point of a secular reference object is that no one would dispute its secularity because the object is so *obviously* secular. Yet precisely *because* secular reference objects are thought by the Justices to be obviously secular, the Justices seem not to take seriously the possibility that someone else might find the objects to have a religious significance.

110. In *Allegheny*, Justices Stevens and Brennan both held that the Christmas tree was *sometimes* secular, but was lent religious meaning by an accompanying menorah. See *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Ch.*, 492 U.S. 573, 638–43 (1989) (Brennan, J., concurring in part and dissenting in part); see also *id.* at 654 (Stevens, J., concurring in part and dissenting in part). Interestingly, though, both Stevens and Brennan held that the menorah was *always* religious. *Id.* at 643–44 (Brennan, J., concurring); *id.* at 654 (Stevens, J., concurring in part and dissenting in part).

111. When Justice Fortas vacated what was widely perceived as the "Jewish seat" on the Court, President Nixon replaced him with Justice Blackmun, a Protestant, leaving the Court entirely Christian for the first time since the appointment of Justice Brandeis by President Wilson in 1916. The Court lacked Jewish representation until President Clinton's appointment of Justice Ginsburg in 1993. See Christine L. Nemacheck, *Have Faith in Your Nominee? The Role of Candidate Religious Beliefs in Supreme Court Selection Politics*, 56

Christmas trees as secular makes some intuitive sense from a Christian perspective, as the lack of theological content in the Santa myth means that the least religious Christians, or perhaps former Christians who no longer believe in Christ, might completely take the Christ out of their own personal Christmas while leaving the Santa in place. In a community without any other religious group besides Christians, chances are that even the least religious people in the community tell their children about Santa. But in a community with a substantial minority-religious population, for instance, many of the *most* observant people will refuse to participate in Santa culture precisely *because* of their religion.<sup>112</sup> The Court is correct that many non-Christians find ways to participate in Christmas,<sup>113</sup> but even so, Santa culture still tracks religious identification too closely to be cleaved so neatly from religion itself.<sup>114</sup>

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DRAKE L. REV. 705, 715–16 (2008).

112. For accounts of varied and often awkward experiences of Jews during the Christmas season, see Jennifer Steinhauer, *At One Jewish Home, Making Room for Santa*, N.Y. TIMES, Dec. 20, 2006, available at <http://www.nytimes.com/2006/12/20/us/20santa.html> (describing the controversy surrounding a family's Christmas-themed display in a largely Orthodox Jewish neighborhood).

113. See Rabbi Michael Leo Samuel, *Book Review: A Kosher Christmas: 'Tis the Season to Be Jewish*, TEMPLE BETH SHALOM, available at <http://www.bethshalomtemple.com/book-review-a-kosher-christmas-tis-the-season-to-be-jewish/> (last visited Nov. 15, 2013) (describing complicatedness of being Jewish at Christmastime) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

114. In the following discussion, Justice Blackmun attempts to holiday of Chanukah into its secular and religious components. Readers from Christian backgrounds (included) may see more easily in this passage than in writings about Christmas the awkwardness of characterizing a holiday as partially secular by reference to a dichotomy between “religious” and “cultural” tokens. “The cultural significance of Chanukah varies with the setting in which the holiday is celebrated. . . . In this country, the tradition of giving Chanukah gelt has taken on greater importance because of the temporal proximity of Chanukah to Christmas. Indeed, some have suggested that the proximity of Christmas accounts for the social prominence of Chanukah in this country. Whatever the reason, Chanukah is observed by American Jews to an extent greater than its religious importance would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance. This socially heightened status of Chanukah reflects its cultural or secular dimension.” *Cnty. of Allegheny*, 492 U.S. at 585–87. But all of this begs the question: if Christmas could be celebrated as a secular winter holiday, then why would American Jews have needed to elevate Chanukah's status so that it could serve as a Jewish alternative? The truth is that even the allegedly “secular dimensions” of Christmas are still sectarian enough that when Justice Kagan was able to make a good joke about it during her confirmation hearing. When asked where she was on Christmas Day, 2009, she responded that “like all Jews, [she] was probably in a Chinese restaurant.” Warren Richey, *Elena Kagan Shows off Sense of Humor in Confirmation Hearings*, CHRISTIAN SCI. MONITOR, June 20, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0630/Elena-Kagan-shows-off-sense-of->

There is a similar majoritarian bias at work in the assumption that praise in the tradition of an ecumenical “civil religion” can at some point become a secular practice through rote repetition.<sup>115</sup> These instances of “ceremonial deism” become, in a broad sense, the stock secular reference objects for government religious speech generally. Language such as “under God” is considered broadly inclusive, notwithstanding the population of Americans who practice polytheistic religions, nontheistic religions, or no religion. And though I do not mean to suggest with this observation that the Supreme Court’s unanimously Judeo-Christian religious background absolutely determines its jurisprudence of government religious speech—surely judges are just as capable as anyone else of seeing things from someone else’s point of view—I also do not wish to downplay the influence of religious and cultural experience on ideology. Indeed, research suggests that even on the almost entirely Judeo-Christian federal bench, judges from more majoritarian religious backgrounds (Protestant, Catholic) are likelier to defer to the government in religious liberty cases than judges from relatively minoritarian religious backgrounds (Jewish, unconventional Christian faith).<sup>116</sup> It is hard to imagine that a hypothetical judiciary composed mainly of atheists would take government defendants’ sham assertions of secular purpose—for instance, that a prayer before a football game is necessary to solemnize the occasion<sup>117</sup>—nearly as frequently as our more religiously-mainstream Supreme Court does.

#### *The Role of the Reasonableness Inquiry*

The endorsement test asks whether an instance of government religious speech would make the nonadherent observer feel like an outsider in the political community, and whether the viewer would see the government’s purpose as the endorsement of religion. Such questions can

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humor-in-confirmation-hearings. The notion that Christmas is in any easy sense a secular holiday, makes much more sense in a homogeneously Christian community than in a diverse one.

115. See *Lynch v. Donnelly*, 465 U.S. 668, 716 (Brennan, J., dissenting) (suggesting that the “one Nation under God” language in the Pledge of Allegiance has “lost through rote repetition any significant religious content”).

116. See Gregory C. Sisk et. al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

117. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000).

only be answered at the highest possible level of generalization: namely, a reasonable-person test.

This is not necessarily a problem. The law frequently devises boundary concepts – “reasonableness,” “good faith,” “best efforts,” to regulate questions the law must decide even though it cannot possibly articulate a clear standard.<sup>118</sup> The law could scarcely operate without this final backstop of reasonableness.<sup>119</sup> Yet reasonable person standards pose problems in cases that revolve in one way or another around political, socioeconomic, or demographic categories—race, gender, class, and so on. If the question is how a reasonable person would interpret the word “airplane,” for instance, it probably makes little difference whether you ask a reasonable man or a reasonable woman. If the question is what a reasonable person would perceive to be a hostile work environment in a sexual harassment case, on the other hand, the gender of the reasonable person makes a lot of difference.<sup>120</sup> The government religious speech cases raise similar issues because of the rough correspondence between ideology and religious background.<sup>121</sup>

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118. As I observed above, the reasonable person inquiry regulates mixed questions of law and fact that do not lend themselves to clearly-articulable standards. Among these, the questions implicated in the government religious speech cases have such a strong political character that they do not seem to lend themselves well to any sort of legal analysis.

119. For instance, the law cannot possibly enumerate every possible instance of negligence in advance. The reasonable person—the highest possible level of generalization—is the only standard capable of discerning which acts fall below the standard of care and which do not. To take another instance, there must be a consistent way to interpret contracts. Yet even if it were possible for some sort of code to give highly specific rules for interpretation, the interpretation of the interpretive code would itself call for the application of a metainterpretive code, and so on *ad infinitum* until someone ended the misery, asking, “could we just ask what a reasonable person would say about this?”

120. If the question is whether a reasonable observer would find probable cause in the fact that a teenager ran in the opposite direction when the police showed up, for instance, the socioeconomic background of the reasonable observer makes a lot of difference. See Adam B. Wolf, *The Adversity of Race and Place: Fourth Amendment Jurisprudence in Illinois v. Wardlow*, 528 S. Ct. 673 (2000), 5 MICH. J. RACE & L. 711, 715–22 (2000). Similarly, if the question is what constitutes a hostile work environment, the gender of the reasonable observer makes a lot of difference. The Ninth Circuit has analyzed such cases under a “reasonable woman” standard since 1991. See e.g., *Ellison v. Brady*, 924 F.2d 872, 879–80 (9th Cir. 1991). See generally Elizabeth Schoenfeld, Allison Maue & JoAnn Nelson, *Reasonable Person Versus Reasonable Woman: Does It Matter?* 10 AM. U. J. GENDER SOC. POL’Y & L. 633, 651–54 (2002); Jacqueline M. Jordan, Note, *Little Red Reasonable Woman and the Big Bad Bully: Expansion of Title VII and the Larger Problem of Workplace Abuse*, 13 WM. & MARY J. WOMEN & L. 621 (2007).

121. See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul*

In *Lynch*, Justice O'Connor was concerned with the possibility that the state might "send a message to nonadherents that they are outsiders, not full members of the political community."<sup>122</sup> This concern for nonadherents might suggest that the endorsement test's author would be conscious of reasonableness inquiries' potential for reinforcing majority biases. Yet Justice O'Connor never framed her reasonableness inquiry in terms of the "reasonable nonadherent," despite urgings from colleagues and commentators that she should.<sup>123</sup> Instead, she grappled with justices who favored a more scrutinizing endorsement analysis over the weight that should be given to existence of an offended "casual passerby."<sup>124</sup>

Indeed, it has not been entirely clear over the course of the endorsement test's history whether even the reasonable *adherent's* viewpoint should be taken into account when a "misperception" occurs. In *Capitol Square Review Bd. v. Pinette*, seven members of the court held that actual perceptions of reasonable people do not matter if they are either misinformed or not unusually well-informed. In *Pinette*, the Ku Klux Klan petitioned the state of Ohio for the right to display a large Roman cross outside the Ohio statehouse. The area was designated by state law as a public forum "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose."<sup>125</sup> The case law holds, roughly, that when a government opens government property to "free

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*of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L. J. 491, 502 (2004) ("Jewish judges along with judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch that either refused to accommodate religious dissenters or provided an official imprimatur upon a religious practice or symbol . . .").

122. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).

123. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799–800 (1995) (Stevens, J., dissenting) ("It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe."); see also Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1542–43 (2010) ("If inclusion is a 'paramount' Establishment Clause value, the critical perspective must certainly be that of the nonadherent.").

124. *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in the judgment).

125. Ohio Admin. Code Ann. § 128-4-02(A) (1994).

discussion,” it forfeits the right to exercise content-based editorial discretion over the speech that occurs there; instead, any content-based regulation of the speech occurring in the forum must pass strict scrutiny.<sup>126</sup> Yet the Board’s counsel advised it that allowing the Klan to display the cross would create a reasonable perception that Ohio was endorsing Christianity. The Board therefore denied the Klan’s application, reasoning that “compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.”<sup>127</sup>

But the Supreme Court held that displaying the cross did not present any actual danger of conflict with antiestablishment principles, given that the state had not sponsored the cross, but rather had been forced to accept it for legal reasons. From here, the seven-justice majority split into two pluralities. Justice Scalia, writing for Justices Rehnquist, Kennedy, and Thomas, wrote that even if the reasonable observer *perceived* an endorsement of religion in the Klan’s display of the cross on public property, that perception should not count if it was in fact a *misperception*. Justice O’Connor disputed this point—even misperceptions of endorsement should invalidate a law, she insisted, if the misperceptions are reasonable<sup>128</sup>—while straining to maintain that the reasonable observer would not have perceived an endorsement of religion in the display of a giant white cross in front of the Ohio State House. “[T]he reasonable observer in the endorsement inquiry,” she wrote, “must be deemed aware of the history and context of the community and forum in which the religious display appears . . . [T]he reasonable observer would view the Klan’s cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct.”<sup>129</sup> Justices Ginsburg and Stevens, by comparison, would have regarded the inference of a religious message “normal.”<sup>130</sup>

126. See *Pinette*, 515 U.S. at 761.

127. *Id.* at 761–62.

128. See *id.* at 776–77 (O’Connor, J., concurring in part and concurring in the judgment) (“[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid”) (citations omitted).

129. *Id.* at 780, 782.

130. See *id.* at 802 (Stevens, J., dissenting) (“That the State may have granted a variety of groups permission to engage in uncensored expressive activities in front of the capitol building does not, in my opinion, qualify or contradict the normal inference of endorsement that the reasonable observer would draw from the unattended, freestanding sign or symbol.”); see also *id.* at 817 (Ginsburg, J., dissenting) (“We confront here, as Justices O’CONNOR and SOUTER point out, a large Latin cross that stood alone and unattended in

Justice Scalia disfavors the endorsement test as a measure of establishment clause validity, and his interpretation of the endorsement test in *Pinette* is best understood as an attempt to define it away. If, as Justice Scalia contends, a misperception by the reasonable observer should short-circuit the application of the endorsement test, then the endorsement test's jurisdiction is narrow. Whether an observer has accurately perceived or instead has misperceived an endorsement of religion on the part of the government boils down to the question of whether government has *in fact* endorsed religion, which, as I have argued above, is ultimately a question of judicial "gestalt."<sup>131</sup> A judge determined to uphold an instance of government religious speech, or perhaps determined simply not to apply the endorsement test, can always find a "misperception," even if a lower court has not.

Justice O'Connor's concurring opinion in *Pinette*, like her concurrence in *Lynch*, puts very little actual distance on the opinion it concurs with. In Justice O'Connor's view, the endorsement test still applies whether or not the reasonable observer has perceived endorsement accurately or not. Yet her reasonable person must be so well-informed that it is hard to see how the misperception could have occurred in the first place. In real terms, the "misinformed" observer loses under either the Scalia or the O'Connor view; the difference merely being that Justice O'Connor would have called the result a result of the endorsement test, and Justice Scalia would not. Read uncharitably, Justice O'Connor's *Pinette* concurrence appears more concerned with the maintaining the endorsement test's leading position in the field than with any actual difference the test might make in any particular case.

The endorsement test's detractors—given more space below—have run with the possibilities created by *Pinette*. In *Good News Club v. Milford Central Schools*,<sup>132</sup> a religious club sought to hold meetings on the grounds of a public school after hours. The school was placed in roughly the same

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close proximity to Ohio's Statehouse. Near the stationary cross were the government's flags and the government's statues. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message. If the aim of the Establishment Clause is genuinely to uncouple government from church a State may not permit, and a court may not order, a display of this character.") (citations omitted).

131. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987).

132. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

dilemma faced by the state of Ohio in *Pinette*: it could risk violating the speech rights of the group by denying it access, or it could risk creating a perception of endorsement by extending support to the group. The school chose to deny the group access. The Supreme Court denied the school summary judgment: “We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club’s religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”<sup>133</sup>

### *The Etiquette of Acknowledgment and Hostility*

Throughout the Court’s Establishment Clause jurisprudence, the Justices fret over the possibility that the government might, by not “acknowledging” religion, express a message of “hostility” toward it.<sup>134</sup> This theme predates the era of endorsement. In *Schempp*, for instance, while voting to strike down Bible readings in a public school, Justice Goldberg, concurring, writes that:

[U]ntutored devotion to the concept of neutrality [toward religion] can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.<sup>135</sup>

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133. *Id.* at 119.

134. *See e.g.*, *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

135. *Id.* at 306. The “brooding and pervasive devotion to the secular” line is quoted frequently by Justices who would uphold various government religious practices.

In *Wallace v. Jaffree*,<sup>136</sup> Chief Justice Burger expressed similar concerns. An Alabama statute had allowed a daily moment of silence in schools for “meditation.” The Alabama legislature amended the state to permit “meditation *or prayer*.” The Supreme Court invalidated the amendment.<sup>137</sup> The Chief Justice responded in dissent that “[t]o suggest that a moment-of-silence statute that includes the word ‘prayer’ unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion.”<sup>138</sup> Incredibly, Chief Justice Burger seems to argue not only that adding the word “prayer” to the statute was permissible, but that *removing* the word “prayer” from the statute would be unconstitutional! “[S]uch hostility,” he wrote in *Lynch*, would bring us into “war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.”<sup>139</sup>

Justice Kennedy speaks a good deal more carefully than the Chief Justice, but in a concur/dissent in the *Allegheny County* holiday-display case, he cautions that:

[r]ather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in *recognizing and accommodating* the central role religion plays in our society. Any approach less sensitive to our heritage would *border on latent hostility toward religion*, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.<sup>140</sup>

It is ironic that Justices so concerned with messages of “hostility” and an image of “callous indifference” toward religion do not show more

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136. See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

137. See *id.* The majority held that the “or prayer” amendment had no secular purpose and was thus invalid under *Lemon*. See *id.* at 67. Justice O’Connor concurred in the judgment, offering that the case should have been decided under the endorsement test. She would have held that “the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools.” (O’Connor, J., concurring).

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

139. *Lynch v. Donnelly*, 465 U.S. 668, 673 (citation omitted).

140. *Allegheny Cnty.*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

enthusiasm for the endorsement test. After all, the endorsement test prohibits not only governmental messages endorsing religion, but those sending messages of *disapproval* as well. The “disapproval” half of the endorsement formula seems to answer some of the Justices’ concerns about “hostility.” The test could just as easily have been called the “endorsement or disapproval” test. Of course, governmental action that sends a message outrightly *disapproving* of religion is a rarer thing than governmental action that sends a message of endorsement, so it is no wonder that most of the litigation concerns the “endorsement” half of the “endorsement or disapproval” formula. One could almost imagine the Court refusing to order the removal of some religious icon from a public place on grounds that the Court would *itself* violate the “endorsement or disapproval” test by issuing an injunction.

Yet it is easy to see why Justices upholding government religious speech do not rely on the endorsement test in doing so. It would be redundant. A judge who wants to uphold a practice under an Establishment Clause challenge only needs to show that the practice being challenged does not itself violate the Establishment Clause. Arguing at the meta-level that the *judge* risked committing an Establishment Clause violation would add nothing to the analysis. And in the process, it would enhance the position of the endorsement test, which is all downside for judges who are inclined to uphold government religious speech.

And of course, partaking fully in the endorsement test would mean affirming the endorsement test’s uncertain premise that the Constitution is sensitive to emotional offense. That idea, as I have written above, runs against the grain of much of the common law, and its weakness tends to embarrass arguments against government religious speech. On this front, the supporters of government religious speech have the high ground against their opponents, and they have no reason to give it up. Thus Justice Kennedy, on the rare occasions that he has voted to invalidate government religious speech, has bent over backwards to avoid writing an endorsement test analysis. An endorsement theory would seem the most natural rationale to invalidate prayer at public high school graduations and football games, for instance. Yet in *Lee v. Weisman*,<sup>141</sup> Justice Kennedy invalidated those practices based on a relatively hard-to-sell theory that social pressures rendered the prayers coercive,<sup>142</sup> and in *Santa Fe Independent School*

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141. 505 U.S. 577 (1992).

142. *Id.* at 591–99.

*District v. Doe*,<sup>143</sup> he signed on to an opinion advancing the same theory under a still-more tenuous set of circumstances.

Justices inclined to uphold government religious speech have little to gain from exploiting the endorsement test's stated prohibition on "disapproval of religion." Therefore they have not adopted a "disapproval" test explicitly, and they are unlikely to do so. Yet they dabble in the rhetoric of "hostility," "callous indifference," and "acknowledgement" of religion in order to attach a policy backing to an otherwise ambivalent-sounding legal argument.

The word "acknowledgement" has served as a particularly useful tool for accommodationists. It can mean two things. At the weak extreme, it means acknowledging the fact that there are people in the world who practice religion. At the strong extreme, it means "acknowledging" the verity of religious claims. The Justices indulge the strong sense of "acknowledgment" more often than they should. Justices O'Connor and Rehnquist both would have held in *Newdow*, for instance, that the words "one Nation under God" in the Pledge of Allegiance are not religious but "merely descriptive."<sup>144</sup>

More commonly, though, the Justices exploit the word's vagueness, inviting the reader to interpret the term as referring to the *social* reality of religion while leveraging the term in support of practices that endorse the *theological* reality of religion.<sup>145</sup> There is a *reductio ad absurdum*: "your proposed rule (whatever it may be) implies that the government cannot even acknowledge religion." And sure enough, it would indeed be absurd to hold that government cannot even admit that people practice religion. But that sort of practice—Justice O'Connor's "museum setting"<sup>146</sup> comes to mind—is never under challenge. Instead, the Court hears cases involving

143. 530 U.S. 290 (2000).

144. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O'Connor, J., concurring). See also *Van Orden*, 125 S. Ct. at 2861 (plurality opinion) ("Recognition of the role of God in our Nation's heritage has also been reflected in our decisions.").

145. See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 99 (2005). Posner stated:

Whether God has actually played a role in the nation's history is a theological question, the answer to which depends first on whether there is a God and, if so, whether He intervenes in the life of nations. It is odd for the Supreme Court to offer answers to these questions. But perhaps all that the Chief Justice meant by 'God' was invocations of God and all that he meant by 'heritage' was the national culture.

146. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

strong-sense “acknowledgements”—prayers, for instance—the kind of thing you are less likely to hear in Justice O’Connor’s “museum setting” than in church.

Ultimately, the question of what is “hostile” to religion and what “acknowledges” religion is subject to the same majoritarian “normalcy check” analysis as the other big questions. Long-held practices favorable to the religious majority set the baseline. Reinforcement of the baseline is “acknowledgment;” withdrawal from the baseline is “hostility.”

The perennial “war on Christmas” debate captures this fairly well: in communities traditionally composed almost entirely of Christians, “Merry Christmas” is the traditional wintertime greeting. Because it departs from “normalcy,” the lexical shift toward the “happy holidays” greeting has inspired paranoia about governmental hostility – indeed, a state of “war” – against Christianity. The state of Texas was recently moved to protect the endangered “Merry Christmas” greeting by statute, despite an utter absence of litigation or governmental action against the phrase.<sup>147</sup>

The bar for “hostility” against minority religions, meanwhile, appears considerably higher. In *Lyng v. Northwest Indian Cemetery Protective Ass’n*,<sup>148</sup> for instance, a majority of the Supreme Court upheld against Free Exercise challenge the United States Forest Service’s plan to build a road through and remove timber from Native American sacred lands, despite the Ninth Circuit’s finding “that the proposed government operations would *virtually destroy the . . . Indians’ ability to practice their religion.*”<sup>149</sup> Indeed, the court held it was unnecessary for the government to demonstrate a compelling purpose, as the “governmental action [would not] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.”<sup>150</sup>

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147. See *Texas Gov. Perry signs ‘Merry Christmas’ bill into law*, FOXNEWS.COM (June 14, 2013), <http://www.foxnews.com/politics/2013/06/14/perry-signs-merry-christmas-bill-into-law/>.

148. 485 U.S. 439 (1988).

149. *Id.* at 464 (quoting *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986) *rev’d sub nom.* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (emphasis added)).

150. *Id.* at 449.

*The Coercion Test and the Prospects for Town of Greece v. Galloway*

Despite its controversial status, the endorsement test has dominated the government religious speech cases since *Allegheny County*. From *Allegheny County* until Justice O'Connor's retirement in 2005, the test enjoyed the support of five justices: Justice O'Connor plus whichever four justices comprised the Court's "left wing." When Justice O'Connor retired in 2005, most court-watchers assumed that the endorsement test had met its end. The right-leaning Justice Alito had taken her seat, and Justice Kennedy replaced her as the Court's ideological fulcrum.

Justice Kennedy has disdained the endorsement test as overly "hostile" since *Allegheny County*. He wrote:

Taken to its logical extreme, some of the [endorsement test] language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.<sup>151</sup>

As an alternative, Justice Kennedy has advanced a more modest limit on governmental "accommodation" of religion:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."<sup>152</sup>

Under his analysis:

The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech. There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.<sup>153</sup>

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151. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part).

152. *Id.* at 659 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

153. *Id.* at 664 (footnote omitted).

The “coercion test,” stated as such, would seem to permit all government religious speech. But Justice Kennedy’s discipline falters even in the *Allegheny County* opinion, where he concedes that “the permanent erection of a large Latin cross on the roof of city hall” could violate the establishment clause under a coercion analysis.<sup>154</sup> “This is not because government speech about religion is *per se* suspect,” he says, “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.”<sup>155</sup> But this is hard to reconcile with Justice Kennedy’s defense of the nativity scene and menorah to the effect that passersby are “free to ignore [the displays], or even turn their backs.”<sup>156</sup> Surely they could turn their backs on the large Latin cross, permanent or not.<sup>157</sup> The Latin cross hypothetical does not so much come across as an application of the coercion principle as an application of Justice Holmes’ “puke test:” an act of government “violates the Constitution if and only if it makes you want to throw up.”<sup>158</sup> Rather than refine the coercion principle, it seems to create an exception to it.

But the Latin cross hypothetical has proved prophetic, as the one time that the Court has actually decided a case under the coercion principle, it has used the coercion principle to invalidate government religious speech in circumstances that are at least arguably *less* coercive than in the Latin cross hypothetical. The case is *Lee v. Weisman*,<sup>159</sup> in which a public school district hired a rabbi to conduct an allegedly “nondenominational” prayer at a high school graduation. Justice Kennedy, writing for the majority, urged that the prayer would have put “psychological coercion” onto attending students that was tantamount to coerced religious practice. Here, too, Justice Kennedy held that psychological pressures created a coercive atmosphere. And without drafting an opinion, Justice Kennedy signed on to Justice Stevens’ endorsement analysis in the similar *Santa Fe Independent School Dist. v. Doe*,<sup>160</sup> which invalidated student-led invocations at football games.

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154. *Id.* at 661.

155. *Id.*

156. *Id.* at 651.

157. See Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 431–32 (2009).

158. See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 2 (1996).

159. 505 U.S. 577 (1992).

160. 530 U.S. 290 (2000).

On their plain terms, the endorsement test and the coercion test offer radically different approaches to the problem of government religious speech. One would expect that all government religious speech would survive under a coercion approach, and sure enough, it does in the opinions of the Court's "right wing."<sup>161</sup> Justice Thomas, in particular, has argued for an "actual legal coercion" standard that would ignore mere psychological pressures.<sup>162</sup> One would also expect a great deal of government religious speech to be invalidated under an endorsement approach, and sure enough, the Court's "left wing" has written opinions that would do so.<sup>163</sup> But Justices O'Connor and Kennedy have presented visions of endorsement and coercion that, while opposed in principle, can hardly be distinguished. If unspoken peer pressure is grist for the coercion mill and "One Nation Under God" is not a religious endorsement (but rather "merely descriptive"), then there is little difference between a coercion test and an endorsement test. Each is occasionally concerned with feelings of exclusion and marginalization but ultimately with normalcy. It takes work to stretch the coercion test to cover the same area as the endorsement test, and it takes work to squeeze the endorsement test into the same small space the coercion test would intuitively occupy. But the work can be done at the expense of some credibility, as Justices O'Connor and Kennedy have demonstrated. Each test is pliable enough to accommodate a wide range of outcomes.

This is not to suggest that tests are completely irrelevant; it is harder to justify government religious speech under endorsement than under coercion, and harder to justify invalidating government religious speech under coercion than endorsement. A judge forced to decide a case under anticoercion principles is likely to reach a different result than under antiendorsement principles. But no one on the Supreme Court is *forced* to apply one test or the other. There is no possibility of review, and the grip of *stare decisis*, especially in this conflicted area of the law, is tenuous. Supreme Court Justices do not appear so much to apply principles in the government religious speech cases as vote for outcomes, and they adopt the

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161. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); *Van Orden*, 545 U.S. 677 (plurality opinion).

162. See James A. Campbell, *Newdow Calls for A New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541 (2006) (emphasis added).

163. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 737 (2005) (Souter, J., dissenting); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

theoretical framework that will embarrass their voting record least over the long run.

The endorsement test governed as long as Justice O'Connor sat at the center because four Justices to her left could be counted on to support a more stringent form of the test. Similarly, Justice Kennedy since 2005 can count on four Justices to his left to support a more stringent form of the coercion test one that does not count psychological pressures as coercive. Yet from 2005 until now, the Court has not decided any government religious speech case on its Establishment Clause merits.<sup>164</sup>

### III. *Galloway*

At the time of publication, the Court has not announced an opinion in *Town of Greece v. Galloway*, its second legislative prayer case, and the Justices' remarks at oral argument offered few clues as to what they might do.<sup>165</sup>

Since 1999, the Town of Greece has held a prayer at the opening of each Town Board meeting. These prayers have been led on a rotating "chaplain of the month" basis. Though the town has no formal policy controlling eligibility for chaplaincy or the content of prayers, and though the candidates for the chaplaincy were at least initially drawn randomly from a list of faith leaders in the community, the vast majority of "chaplains of the month" have been Christians. All of the chaplains between 1999 and 2007, in fact, were Christians invited by the Town to perform the service. Though the Town insists that non-Christians and even atheists may request a chaplaincy, it was only in 2008, after the plaintiffs in *Galloway* began to complain of discrimination against non-Christians, that the Town invited the first non-Christian chaplains to lead the prayer.<sup>166</sup> It is this, the

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164. In *Newdow*, 542 U.S. 1, 5 (2004), the Court disposed of the plaintiff's claim on a standing theory. In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), the Court decided the case under the Free Speech Clause.

165. Transcript of Oral Argument at 1, *Town of Greece v. Galloway*, \_\_\_ S.Ct. \_\_\_ (2013) (No. 12-696) [hereinafter *Galloway* Transcript].

166. *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012), *cert. granted*, 133 S.Ct. 2388 (U.S. May 20, 2013) (No. 12-696). The Court stated:

A Wiccan priestess and the chairman of the local Baha'i congregation each delivered one of these prayers, and a lay Jewish man delivered the remaining two. The town invited the Wiccan priestess and the lay Jewish man after they inquired about delivering prayers; it appears that the town invited the Baha'i

overwhelmingly Christian nature of the prayers, that distinguishes prayers in *Galloway* from the “Judeo-Christian” *Marsh* prayers.<sup>167</sup> “Roughly two-thirds” of the prayers “contained references to ‘Jesus Christ,’ ‘Jesus,’ ‘Your Son,’ or the ‘Holy Spirit.’”<sup>168</sup>

*Marsh* approves at least some “Judeo-Christian” legislative chaplaincies. But it is not clear how much further *Marsh* goes. The history-and-tradition rationale—at least assuming that we accept *Marsh*’s history—would seem to suggest that almost anything goes. But Chief Justice Burger clouds this with his remark in *Marsh* that “[t]he content of the prayer is not of concern to judges *where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.*”<sup>169</sup> That careless aside shapes *Marsh*’s entire holding without bothering to explain itself. Assume that we can say what it would mean for a “prayer opportunity” to “proselytize.” Then what is meant by “advance,” as distinguished from “proselytize?” Does it mean the same thing as “advance” in the *Lemon* formula with its prohibition against impermissibly “advanc[ing] [or] inhibit[ing]”<sup>170</sup> religion? Or is “advance” offered as the opposite of “disparage?” And what is the significance of the word “exploited?” Does it imply that *Marsh* is concerned with illicit proselytizing purposes, but not proselytizing effects?<sup>171</sup>

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chairman without receiving such an inquiry. However, between January 2009 and June 2010, when the record closed, all the prayer-givers were once again invited Christian clergy.

167. The plaintiffs initially argued that the Town had intentionally discriminated against non-Christians, but abandoned that argument after the trial court dismissed a claim based on it.

168. *Galloway*, 681 F.3d at 24.

169. *Marsh v. Chambers*, 463 U.S. 783, 793–95 (1983) (emphasis added).

170. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citations omitted).

171. And as an aside, assuming that exploitation of the prayer opportunity *does* occur, what happens next? Chief Justice Burger’s language implies that there may be a second stage of the analysis. To expand the quotation, he wrote, “[t]he content of the prayer is not of concern to judges *where, as here, there is no indication that the prayer opportunity has been exploited . . . . That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.*” *Marsh*, 463 U.S. at 794–95 (emphasis added). Does this imply that if a court does detect “exploitation,” it may then move on to a second stage of the analysis involving a “sensitive evaluation” and a “content-parsing?” I cannot imagine that the Chief Justice intended something so needlessly complex; nonetheless, the fact that the text even allows this interpretive possibility is testimony to *Marsh*’s surprisingly unworkmanlike drafting.

*Allegheny County* interpreted the Chief Justice's language to mean that "[h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."<sup>172</sup> The Court in *Allegheny County* reasoned that the *Marsh* prayers had satisfied the Establishment Clause only "because the particular chaplain had 'removed all references to Christ.'"<sup>173</sup> A number of circuits have taken *Marsh* by way of *Allegheny County* to imply a requirement that legislative prayer be "nonsectarian." But the concept only makes so much sense. Robert Palmer's "Judeo-Christian" prayers may not have favored Judaism over Christianity or vice versa, but they nonetheless seem to have favored both Judaism and Christianity over other faiths. And, at any rate, as the Supreme Court has noted elsewhere, it creates a sort of an establishment of religion for a government to permit nondenominational prayers without permitting denominational ones. On this basis, neither the district court nor the Second Circuit in *Galloway* agreed with plaintiffs that the "removed all references to Christ" passage in *Allegheny County* imported a requirement that legislative prayer be nonsectarian.<sup>174</sup>

Instead, both courts attempted to reckon with *Marsh's* and *Allegheny County's* language as directly as possible, broadly holding that a prayer, even if sectarian, must not be "exploited to advance or disparage a belief, or to associate the government with a particular religion."<sup>175</sup> But at this point the courts part. The District Court deferred to the Town, holding that the "rotating" nature of the chaplaincy made any affiliation with any one religion impossible.<sup>176</sup> The Second Circuit held that "[w]here the overwhelming predominance of prayers offered are associated, often in an explicitly sectarian way, with a particular creed, and where the town takes

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172. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) (footnote omitted).

173. *Id.* (quoting *Marsh*, 463 U.S. at 793 n. 14).

174. *Galloway v. Town of Greece*, 681 F.3d 20, 29 (2d Cir. 2012) ("A state-imposed requirement that all legislative prayers be nondenominational, the Court reasoned, begins to sound like the establishment of 'an official or civic religion.'" (quoting *Lee*, 505 U.S. at 590); *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 242 (W.D.N.Y. 2010), *rev'd* 681 F.3d 20 (2d Cir. 2012).

175. *Galloway*, 732 F. Supp. 2d at 242.

176. *Id.* ("Where, as here, a legislature permits a variety of clergy to give invocations, there is arguably less likelihood that the government could be viewed as advancing a particular religion, and therefore less concern over the sectarian nature of particular prayers.").

no steps to avoid the identification, but rather conveys the impression that town officials themselves identify with the sectarian prayers and that residents in attendance are expected to participate in them, a reasonable objective observer would perceive such an affiliation.”<sup>177</sup>

Neither the Second Circuit nor the District Court seems to rely on the endorsement test to decide the case. The District Court, though, steered clearer of it, avoiding the words “endorsement,” “observer,” and “outsider” altogether. One senses that the District Court did so deliberately.

Judge Calabresi, writing for the Second Circuit on appeal, does not make a similar effort. He never invokes an “endorsement test” or an “endorsement analysis,” and there is no citation to Justice O’Connor’s concurrence in *Lynch*, for instance. But a few notes nonetheless ring of the endorsement test. If Judge Calabresi never refers to an “endorsement test,” he does nonetheless use the word “endorsement:” “We conclude, on the record before us, that the town’s prayer practice must be viewed as an *endorsement* of a particular religious viewpoint.”<sup>178</sup> The “objective observer” makes an appearance: “We conclude that an *objective, reasonable person* would believe that the town’s prayer practice had the effect of affiliating the town with Christianity.”<sup>179</sup> Still more reminiscent of the endorsement test is the Judge’s reference to the feelings of being an outsider: “People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others *feel like outsiders*.”<sup>180</sup>

As presented by the Second Circuit, moreover, the case revives the *Pinette* problem: What should be done if a reasonable, objective observer would perceive illicit governmental motives that do not, in fact, exist? The *Galloway* plaintiffs initially argued that the Town had actively sought out Christian chaplains and avoided recruiting non-Christian chaplains. The plaintiffs dropped this claim after failing to prove it in court. The Second Circuit therefore assumes (I think charitably) that the Town had the “best of intentions,”<sup>181</sup> and no interest at all in affiliating itself with Christianity.<sup>182</sup> Having presented the facts in this austere form, the Second Circuit’s

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177. *Galloway*, 681 F.3d at 34.

178. *Id.* at 30 (emphasis added).

179. *Id.* at 33 (emphasis added).

180. *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012) (emphasis added).

181. *Id.*

182. *Id.*

argument closely resembles an argument that Justice Scalia's plurality in *Pinette* rejected outright and that Justice O'Connor's concurrence-in-the-judgment embraced only in principle: namely, that observers' perceptions can trump policymakers' intent where religious endorsements are concerned. Only Justices Stevens and Ginsburg would have given force to that argument in *Pinette*.<sup>183</sup> To right-leaning critics of the endorsement test—and among these I would include Justices Scalia, Kennedy, Thomas, Alito, and almost certainly Roberts (but not myself)—the prospect that a misperceiving observer might trip the Establishment Clause represents the anti-endorsement concept in its worst excess, disrupting completely innocent designs in order to protect the fragile sensibilities of a religious-minority observer who is not only hypersensitive but misinformed as well. The Second Circuit, without specifically applying the endorsement test, invites a rebuke to the endorsement test from the Supreme Court's right wing. Counsel for the Town explicitly urged the Supreme Court to take this invitation at the very outset of oral arguments.<sup>184</sup>

Doing so would require a bit of activism, though, because the Second Circuit's opinion does not clearly place the endorsement test at issue. The opinion is ultimately an attempt to apply Justice Burger's caveat in *Marsh*, which in some ways itself anticipates the endorsement analysis. This much is true even if *Allegheny County*'s gloss on Burger's language is ignored. Burger in *Marsh* is concerned with "disparagement,"<sup>185</sup> and stresses that the delegates to the Continental Congress in the founding era did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view."<sup>186</sup> There is not much difference between Judge Calabresi's use of the word "endorsement" and Chief Justice Burger's use of the phrase "seal of approval."

Nor does it say much that Judge Calabresi would ask a "reasonable, objective person" whether the seal of approval had been placed. The law

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183. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 129 (2001).

184. "MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court: The court of appeals correctly held that the legislative prayers at issue in this case were not offensive in the way identified as problematic in *Marsh*, but the court then committed legal error by engrafting the endorsement test onto *Marsh* as a new barrier to the practice of legislative prayer."

Galloway Transcript at 1.

185. *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

186. *Id.* at 792.

always looks to the reasonable person when it is necessary to interpret a message.<sup>187</sup> And as for the “feel like outsiders” language, which does seem to draw from the endorsement opinions, it only appears in dicta at the end of the opinion.

The case is therefore decidable under *Marsh*. The Second Circuit, whether or not it interpreted *Marsh* “correctly,” decided the case under *Marsh*. The Supreme Court can decide the case under *Marsh*. There is no need to reach endorsement. If the Supreme Court does take on the endorsement test in *Galloway*, it will do so purposefully. Any rejection of the endorsement test in *Galloway*, even if only in the field of legislative prayer, can fairly be read as a death warrant on the endorsement test generally. Yet this much is unremarkable, as the endorsement test has been a dead man walking for some time. As I have argued above, the government religious speech cases that reach the Supreme Court are decided on a voting model. Endorsement has not had the votes since Justice O’Connor retired in 2005.

More interesting than the fate of endorsement is the future of *Marsh* and the test-free approach. Crudely, I see three scenarios, or four, for the sake of completeness:

#### *Scenario 1: Removal*

This scenario represents the negligible likelihood that the Supreme Court will overrule *Marsh* and invalidate legislative prayer generally. In this scenario, the Supreme Court will invalidate the practice of opening legislative sessions with daily benedictions by religious leaders who may or may not be on the government’s payroll. Remarkably, this outcome is simply not a possibility.

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187. Moreover, Judge Calabresi says this “reasonable person” must not only be reasonable, but “objective.” This word, in the past, was used by Justice O’Connor in *Pinette* to distinguish the “reasonable person” from any actual person in the community—and especially from those persons who may be nonadherents. To the extent the “objective, reasonable person” belongs to the endorsement test, it only belongs to the endorsement test at its weakest ebb. *Pinette*, 515 U.S. at 779 (O’Connor, concurring in part and concurring in the judgment) (“[T]he endorsement test should [not] focus on the actual perception of individual observers . . . . Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. In my view, however, the endorsement test . . . gauge[s] ‘the ‘objective’ meaning of the [government’s] statement in the community.’”).

*Scenario 2: Containment*

This is the boring scenario in which *Marsh* remains an exception to the rule in the government speech cases. An exception to *which* rule is hard to say with any specificity. We can at least say, though, that *Marsh* is an exception to the “rule” that some sort of “test” should be applied besides a history-and-tradition analysis.

In the “containment” scenario, the Court will have to clarify the meaning of Chief Justice Burger’s remark to the effect that “[t]he content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”<sup>188</sup> The Court will also have to take on *Allegheny County*’s argument that the *Marsh* prayers had satisfied the Establishment Clause only “because the particular chaplain had ‘removed all references to Christ.’”<sup>189</sup> does it mean prayers must be “nonsectarian?” And if so, what does “nonsectarian” mean if Judeo-Christian prayers are permitted?<sup>190</sup> The Court will either wave its hand at this objection or, more likely, reject the requirement of nonsectarianism altogether. These questions seem to me impossible to avoid in *Galloway*; even ignoring the questions would say a great deal.

In oral argument, Justices Alito and Scalia mockingly challenged plaintiffs’ counsel to give examples of prayers sufficiently “nonsectarian” to appeal to polytheists, atheists, and “devil worshippers,” and counsel admitted that no such prayer can possibly exist.<sup>191</sup> Chief Justice Roberts and Justice Kennedy, meanwhile, expressed concern that official guidelines for the content of prayer would create undesirable governmental entanglements with religion<sup>192</sup>-- a concern that Justice Kennedy first aired

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188. *Marsh*, 463 U.S. at 794–95.

189. *Id.* at 793, n. 14.

190. Justice Scalia would reconcile this tension by privileging monotheism over other religious orientations: “[T]he Establishment Clause,” he says, “permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational—but it was monotheistic. In *Marsh v. Chambers*, we said that the fact the particular prayers offered in the Nebraska Legislature were in the Judeo-Christian tradition, posed no additional problem . . . .” *McCreary Cnty.*, 545 U.S. at 893–94. See also Colby, *supra* note 10.

191. *Galloway* Transcript at 31–34.

192. *Id.* at 34–35. Counsel for plaintiff had an effective if impatient answer to Justice Kennedy’s concerns near the end of his time:

years ago in *Lee v. Weisman*.<sup>193</sup> These comments, together with past history, suggest that a majority of the Court does not see a nonsectarianism requirement in *Marsh*.

More avoidable than the sectarianism point is the question of *why* legislative prayer should be treated differently from other government religious speech. But assuming that there is a “why” probably gives *Marsh* too much credit. My own take is that the *Marsh* “exception” has no principled basis whatsoever. The case is “unique” because the Court’s majority wanted to reach a certain result and the controlling case law made that result difficult to reach. *Marsh* was an uninspired, ham-handed strategy to cope with the problem. And to make things worse, the opinion’s sloppy drafting added unintended complexity—the “exploitation” remark, for instance<sup>194</sup>—that we must today honor as purposeful nuance.

All of this being said, the Court may take *Galloway* as an opportunity to give *Marsh*’s exceptional status some sort of a theoretical backing. But there is no need for it to do so.

### *Scenario 3: Incorporation*

The easiest and most formal way for the Court to distinguish the school-prayer cases of *Engel*, *Schempp*, *Lee*, and *Doe* is by resort to *Marsh*

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JUSTICE KENNEDY: I mean, I'm serious about this. This involves government very heavily in religion.

MR. LAYCOCK: Well, government became very heavily involved in religion when we decided there could be prayers to open legislative sessions. *Marsh* is the source of government involvement in religion. And now the question is how to manage the problems that arise from that.

*Id.* at 54.

193.

“Principal Lee provided Rabbi Gutterman with a copy of the ‘Guidelines for Civic Occasions,’ and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State’s displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government, and that is what the school officials attempted to do.”

*Lee*, 505 U.S. at 588 (citation omitted).

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

and the “exceptional” status of legislative prayer—see Scenario 1. But Justice Kennedy, in *Doe*, made a more substantive distinction, arguing that school prayer is coercive in a way that legislative prayer, or some forms of legislative prayer, are not.<sup>195</sup> *Marsh* itself made this point,<sup>196</sup> and counsel for the Town stressed it heavily in oral argument.<sup>197</sup>

If a majority of the Court is interested in advancing the anti-coercion rationale as a grand unified theory of the Establishment Clause, it can easily explain *Marsh* as a decision resting on anti-coercion principles. This is possible under either variant of coercion theory: Justice Kennedy’s, which considers certain psychological pressures to be impermissibly coercive,<sup>198</sup> as well as Justices Scalia’s and Thomas’s, which would not.<sup>199</sup>

At oral argument, Plaintiffs’ counsel argued with some force that the Town had violated at least Justice Kennedy’s broad version of the coercion test: “there’s no doubt that before you stand up to ask for relief from a governing body, you don’t want to offend that body. Adults are subject to coercion here. And --and no competent attorney would tell his client, it doesn’t matter whether you visibly dissent from the prayer or not. You try to have your client make a good impression.”<sup>200</sup> The argument for unconstitutional coercion in *Galloway* seems at least as strong as in, say, *Doe*, which found coercion in a student-led prayer at a football game.<sup>201</sup> If plaintiffs win in *Galloway*, it is far more likely to be on coercion than sectarianism grounds. A victory for plaintiffs therefore almost certainly means that the Court has subordinated *Marsh* to the coercion test.

#### *Scenario 4: Expansion*

In this scenario, the Court decides *Galloway* under *Marsh* while dropping hints that the history-and-tradition rationale is in some form a sound approach to Establishment Clause problems unrelated to legislative prayer. Recall that in *Lynch v. Donnelly*, Chief Justice Burger seemed poised to expand *Marsh*’s history-and-tradition rationale beyond *Marsh*. The Chief Justice’s majority opinion devoted a section of the analysis to

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195. *Lee v. Weisman*, 505 U.S. 577, 596–97 (1992).

196. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

197. *Galloway* Argument at 10, 23–4.

198. *Lee*, 505 U.S. at 577.

199. *See id.* at 636–44 (Scalia, J., dissenting).

200. *Galloway* Transcript at 47.

201. *Doe*, 530 U.S. 290.

*Marsh*, concluding that “it would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers” than legislative prayer.<sup>202</sup> This discussion laid the groundwork for the “normalcy checking” I criticize above, in which all “acknowledgements” of religion less extreme than legislative prayer must be permissible under the establishment clause.<sup>203</sup> I have explained above that I believe a great deal of this normalcy checking goes on under the guise of the endorsement test and so on. But as a formal matter, *Marsh* has been thought of for some time as limited to its facts rather than as offering an all-purpose approach.

Things could easily have been different, though, under a Court as conservatively composed as the one we have today. After all, the effort to contain *Marsh* has always come from the Court’s left. It was Justice Brennan, recall, whose dissent in *Marsh* first characterized it as a narrowly written opinion.<sup>204</sup> Justice Brennan objected bitterly in *Lynch* to Chief Justice Burger’s attempt to expand *Marsh* beyond the boundary Justice Brennan had drawn for it in his *Marsh* dissent.<sup>205</sup> The five-vote hegemony of the endorsement test from *Allegheny County* until Justice O’Connor’s retirement may well be all that prevented *Marsh* from flourishing—metastasizing is probably a better word—into a landmark case.

There is an appetite to expand the *Marsh* analysis. Critics of endorsement have put a lot of weight on *Marsh*-like “history and tradition” arguments over the years.<sup>206</sup> Justice Kennedy, for instance, dissenting in *Allegheny County* and citing *Marsh*,<sup>207</sup> urged that “[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion... A test for implementing the protections of the Establishment

202. *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984).

203. *See supra* note 56.

204. Nothing to see here, Justice Brennan seems to say: “The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its ‘unique history,’ is generally exempted from the First Amendment’s prohibition against ‘the establishment of religion.’ The Court’s opinion is consistent with dictum in at least one of our prior decisions, and its limited rationale should pose little threat to the overall fate of the Establishment Clause.” *Marsh*, 463 U.S. at 795 (Brennan, J., dissenting).

205. *Lynch*, 465 U.S. at 715–26 (Brennan, J., dissenting).

206. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 686–90 (2005) (detailing the “unbroken history” of religious “acknowledgments” in government).

207. *Cnty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).

Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”

Outside the Court, as well, and sometimes even outside the Establishment Clause context, litigants have tried to turn *Marsh*'s normalcy-check logic to their advantage.<sup>208</sup> Defenders of the Defense of Marriage Act (DOMA),<sup>209</sup> for instance, quoted *Marsh* in their brief before the Supreme Court: “In enacting DOMA and [denying Federal recognition to state-sanctioned same-sex marriages], Congress recognized that the institution of marriage as between a man and a woman is, to borrow this Court's words from [*Marsh*], ‘deeply embedded in the history and tradition of this country’ and ‘has become part of the fabric of our society.’”<sup>210</sup> The analogy makes sense. DOMA, much like the Town of Greece's prayer time, is a mean and irrational policy enacted only to pander at the expense of an historically and traditionally disfavored minority. Such policies can always find comfort and inspiration in *Marsh*.

### Conclusion

In this Article, I have spent a good deal of space detailing the various ways that Supreme Court Justices avoid acknowledging the “normalcy checks” that govern so much of the case law of religiously-themed public displays. I have focused most, but not all, of my criticism on Justice O'Connor's endorsement test. It is an obvious target for a couple of reasons. First, in the hands of a swing-vote Justice such as O'Connor, the endorsement test can be manipulated to produce almost any outcome (which, of course, is true of Justice Kennedy's “coercion test” as well).

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208. Petition of Elk Grove Unified School Dist. for cert. at 15, *Newdow*, 542 U.S. 1 (“[T]he reference to God in the Pledge is interwoven into the ‘fabric of our society.’ Thus, utilizing a flexible test such as *Marsh*, when considered in conjunction with historical references to God and the affirmations of this Court, the Pledge does not violate the Establishment Clause.”) (citing *Marsh*, 463 U.S. at 792); Brief Amicus Curiae of the National Legal Foundation in support of Petitioners at 2, *Salazar v. Buono*, 559 U.S. 700 (2010) (“[T]he longstanding use of Latin crosses as memorials to the dead . . . protects the use of such crosses from constitutional attack. When a memorial, such as the Cross, is ‘deeply embedded in the history and tradition of this country’ and has ‘become part of the fabric of our society,’ it should be afforded great deference as to its constitutionality.”) *Marsh*, 463 U.S. at 792.

209. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

210. Brief of Respondent at 41, *United States of America v. Windsor*, 133 S.Ct. 2675 (2013).

Second, the rationale for the endorsement test depends on what at least *sounds* like an unusually soft harm: namely, a feeling of exclusion. Not a religious oath or a special tax, but just a sense of insult. But the law rarely recognizes claims based entirely on this kind of harm.<sup>211</sup> Particularly telling is the failure of the “Confederate flag” litigation, in which black plaintiffs challenged on Equal Protection grounds the continuing incorporation of the Confederate battle flag into official state insignia.<sup>212</sup> The theory behind such a challenge has much in common with the theory behind, for instance, a Ten Commandments challenge.<sup>213</sup> Yet if anything, one would expect the Confederate flag plaintiffs to have a much *stronger* case than the Ten Commandments plaintiffs. After all, it is hard to imagine how a state could possibly send a minority group a more stigmatizing message.

The endorsement test, in sum, has serious weaknesses. The same can be said for the coercion test. But we should not be surprised that the Court’s efforts to answer the question of government religious speech are so awkward. For these controversies are political matters. They do not lend themselves well to legal reasoning. It is the Court’s unhappy lot under the First Amendment to hear these questions and attempt to resolve them through something resembling a legal analysis. The endorsement test and the coercion test fail, but they represent an attempt. *Marsh*, on the other hand, does not even try. If only for that reason, *Marsh* must not grow from the exception to the rule. It is the work of a court so exasperated with the concerns of a religious-minority claimant that it cannot be bothered to cite the rules before jumping its preferred outcome. The Establishment Clause, however mysterious, must at least require better than that.

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211. The law of negligence traditionally requires a physical impact if the plaintiff is to recover emotional distress damages. Intentional tort claims for emotional distress damages tend to require something “extra,” generally some sort of malice, and the emotional harms must be extreme. Contract law does not formally award compensation for emotional distress. 22 AM. JUR. 2D *Damages* § 49 (2013).

212. See *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997) (rehearing and suggestion for rehearing en banc denied 127 F.3d 42) (cert. denied 523 U.S. 1011); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990).

213. See James Forman Jr., *Driving Dixie Down: Removing the Confederate Flag From Southern State Capitols*, 101 YALE L.J. 505 (1991); L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State As Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521 (2001); I. Bennett Capers, *Flags*, 48 HOW. L.J. 121 (2004).