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Matthew A. Russell

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To sell, or not to sell? That was the question before the Salt Lake City government in the spring of 1999 and again in the winter of 2002 when the Church of Jesus Christ of Latter-Day Saints ("LDS Church") offered to buy a portion of land in the heart of the city's downtown. While the actual property transactions contemplated involved little more than a two-block piece of property, the effects of those transactions fractionalized the city and brought to the surface an ongoing rift between city residents regarding the extent to which the LDS Church should influence and participate in the city's political process.

As the following article will reveal, the Salt Lake City government ("the City") decided to sell. What resulted was a series of legal battles involving the LDS church, the City and the residents of Salt Lake City. The two legal battles, *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*[1] and *Utah Gospel Mission v. Salt Lake City Corp.*,[2] involved allegations made by other religious institutions and members of the community that the sale of the land to the LDS church, and the subsequent sale of an easement retained by the City on that land, violated the First Amendment to the United States Constitution. This article will focus on the second round of litigation in which multiple plaintiffs alleged an Establishment Clause violation on the part of the City for relinquishing an easement to the LDS Church.[3] More specifically,

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* Juris Doctor Candidate, University of North Carolina School of Law, 2006.

1. 308 F.3d 1114 (10th Cir. 2002).

2. 316 F. Supp. 2d 1201 (D. Utah 2004), *appeal docketed*, No. 04-4113 (10th Cir. May 27, 2004).

3. The second round of litigation is the *Utah Gospel Mission v. Salt Lake City Corp.* case and will be referred to as *Main Street II* throughout this article. The first round of litigation, the disposition of which led to the actions that

this article will analyze the Establishment Clause analysis employed by the district court in that case and show that, for a myriad of reasons, the analysis was flawed under current – albeit confusing – Establishment Clause jurisprudence. This analysis led to an improper dismissal of the claim challenging the City's sale of the easement to the LDS Church.[4] In evaluating the motion to dismiss the plaintiffs' Establishment Clause claim, the court in *Main Street II* should have more closely addressed evidence of collusion between church and government in the time leading up to the transaction in this case and examined the particular context of a governmental action that indicated a preference for – or an endorsement of – one particular religion.

Part I of this article will give a detailed background of the interesting dynamic in Salt Lake City and the dispute leading up to *Main Street II.* Part II will outline the current state of Establishment Clause jurisprudence in order to provide a backdrop for the litigation analyzed herein. Part III will describe in detail the holding and rationale of the District Court in *Main Street II.* Part IV will analyze the District Court's decision in light of Establishment Clause precedent. Part V will then serve the dual role of (1) considering the implications that would result were the Tenth Circuit to uphold the District Court's decision on appeal and (2) providing a suggested analytical framework for this case and similar litigation in order to assure that underlying First Amendment principles endure.

I. BACKGROUND

Before one can fully appreciate the issues that follow, it is

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spurred the suit in *Main Street II*, was *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.* and will be referred to as *Main Street I* throughout this article. The *Main Street II* case is currently on appeal in the Tenth Circuit Court of Appeals, and oral argument is scheduled for May 4, 2005.

4. *See Main Street II*, 316 F. Supp. 2d at 1206. The Establishment Clause claim in this case was dismissed on a Rule 12(b)(6) motion. Therefore the district court held that no Establishment Clause claim could be made based on the facts of this case.

important to understand the relationship between the LDS Church[5] and Salt Lake City. Salt Lake City, Utah serves as the international headquarters for the LDS Church. Of the 11,985,254 worldwide members of the LDS Church, approximately one-seventh reside in Utah.[6] More tellingly, approximately 45 percent of Salt Lake's population is Mormon. As a result, the city government has traditionally felt the significant presence and influence of the LDS Church.[7] It is within this dynamic that the dispute which is the subject of this recent development arose.

Not only does the litigation's underlying dispute position citizens on opposing sides of the street with regard to the disagreement between the City and the LDS Church, but this impasse literally divides the geography of downtown Salt Lake City. The property at issue in these lawsuits is a two-block portion of Main Street in the heart of downtown Salt Lake City. The LDS Church owns property on two city blocks on the east and west sides of this portion of Main Street,[8] upon which it maintains a number of important buildings and worship facilities that constitute the Church's international headquarters.[9] On the west side of Main Street is "Temple Square," which contains the Salt Lake Temple and the Mormon Tabernacle, a magnificent building and tourist attraction[10]; the east side of the street holds the LDS Church's

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5. The Church of Jesus Christ of Latter-day Saints (LDS Church) is also commonly referred to as the Mormon Church. These two terms are interchangeable for purposes of this article.

6. Church of Jesus Christ of Latter-Day Saints Official Homepage, *at* http://www.lds.org/newsroom/page/0,15606,4034-1—-10-168,00.html (last visited Feb. 7, 2005) (on file with the First Amendment Law Review). Across the globe, there are 26,237 LDS churches, and 5,503,192 LDS members live in the United States. *Id.* The Book of Mormon is available in 104 different languages, and 120, 175, 500 copies have been published since 1830. *Id.*

7. *See, e.g.*, Heather May, *Council Might Bypass Mayor*, SALT LAKE TRIB., Oct. 12, 2002, at B1 (Five of the seven members of the city council at the time of the initial sale were members of the LDS Church; six of the seven members of the city council at the time of the sale of the easement were members of the LDS Church).

8. *Main Street I*, 308 F.3d at 1117.

9. *See Main Street II*, F. Supp. 2d at 1206.

10. *See Main Street I*, 308 F.3d at 1117.

administration buildings.[11] Main Street, a typical public street with unrestricted sidewalks,[12] intersects the two properties. It is an important thoroughfare to shopping centers in the City[13] and has historically served as a site for public demonstration against the LDS Church.[14]

In 1998, the LDS Church expressed interest in purchasing the section of Main Street dividing the LDS property in order to unify their properties and create an "open-space pedestrian plaza."[15] In April 1999, the City decided to sell the section to the LDS Church, but it reserved a "Pedestrian Easement."[16] The retention of the easement by the City was a condition to the sale, and the easement was to be "planned and improved so as to

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11. *Id.* The Mormon Tabernacle is an extremely important historical location in the history of the LDS Church. In 1847, after the first LDS pioneers arrived, Brigham Young chose a plot of land as the spot for a temple that would become their most sacred place of worship. Church of Jesus Christ of Latter-day Saints Official Homepage, *available at* http://www.lds.org/newsroom/showpackage/0,15367,3899-1—-2-119,00.html (last visited Feb. 7, 2005) (on file with the First Amendment Law Review). The temple was central to the faith of the pioneers; unlike other LDS meetinghouses, where anyone may attend Sunday services and other meetings, temples are open only to faithful LDS Church members for "the performance of their highest, most sacred rites." *Id.* The temple was finally completed in 1893, more than forty years after construction officially began, and it remains an important symbol of the LDS Church and a tourist attraction. *Id.*

12. *See Main Street II*, 316 F. Supp. 2d at 1206.

13. *Main Street I*, 308 F.3d at 1119 (noting that the LDS Church described the area as "a funnel to the Crossroads and ZCMI Center shopping malls as well as the remainder of the downtown business district," (citing Aplt. App. vol. IV at 1584-89)).

14. *See* Heather May, *Street Preachers Lose Another Round*, SALT LAKE TRIB., Dec. 22, 2004, at B2 (describing the most recent wave of protesters at the Plaza and a district court ruling against their challenge of the City's limits on the places where they can stand). *See also,* Lara Updike, *Protestors to Church Doctrine Grow*, BYU NEWSNET, Oct. 7, 2002, *at* http://newsnet.byu.edu/story.cfm/40183 (describing the trip made by numerous protestors from all over the country to protest the Mormon religion at their General Conference each April and October).

15. *Main Street I*, 308 F.3d at 1117-18.

16. *Id.* at 1118.

maintain, encourage, and invite public use."[17] According to members of the city council and the Mayor, retention of this easement for public use of the land was an *essential* term to the deal in the initial sale.[18] The easement guaranteed a right of way for the public, but effectively granted all other control and authority over the property to the LDS Church, including control of expressive activity on the plaza.[19]

Subsequent to the sale, the LDS Church banned actions it considered offensive, including smoking, sunbathing and "any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct," and reserved the right to ban anyone who violated these rules.[20] The LDS Church also altered the physical character of the property by removing the portion of Main Street and the sidewalks, thereby redirecting vehicle traffic around the property and creating a brick pedestrian walkway.[21]

Heated public controversy followed this sale and the subsequent restrictions placed upon the property by the LDS Church, with many members of the public and community leaders accusing the LDS Church and the City administration of misleading the Salt Lake City Council as to the limited scope of the easement.[22] In June 2000, the First Unitarian Church of Salt Lake City, the American Civil Liberties Union (ACLU) and others sued the City, alleging violations of the First Amendment to the United States Constitution.[23] The District Court entered summary judgment in favor of the City and the LDS Church, but the United States Court of Appeals for the Tenth Circuit reversed the decision, holding that the easement retained by the City constituted a public forum for First Amendment purposes.[24] The court held that easements are

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17. *Id.* (citing Aplt. App. vol. III at 1220) (emphasis added).

18. *Main Street II*, 316 F. Supp. 2d 1201, 1211 (D. Utah 2004) (Mayor Rocky Anderson wrote an open letter to the public stating, "That easement was crucial to the city at the time of the initial deal.").

19. *Main Street I*, 308 F.3d at 1119-20.

20. *Id.*

21. *Main Street II*, 316 F. Supp. 2d at 1206.

22. *Id.* at 1207.

23. *See Main Street I*, 308 F.3d at 1114. The LDS Church intervened as a party defendant to protect its property rights. *Id.* at 1117-18.

24. *See id.* at 1115.

"constitutionally cognizable property interests" sufficient to be "subject to forum analysis," and therefore the City could neither prohibit protected speech on the easement nor grant the right to prohibit protected speech to the LDS Church.[25] The City was therefore responsible for regulating and upholding the rights granted under the First Amendment, subject to reasonable time, place and manner regulations.[26]

Following this decision, there was a dispute between the LDS Church and the City over the status of the easement.[27] The LDS Church took the position that the easement was void, because an unrestricted public easement was not what the parties intended.[28] The City argued that the pedestrian easement remained after the decision, but the regulation of expression and assembly by the LDS Church was found unconstitutional, and therefore control over regulation reverted back to the City.[29] Consequently, the Mayor of Salt Lake City, Rocky Anderson, spoke publicly about the need to protect the public's interest in the Plaza in the face of pressure from the LDS Church to convey the easement, which would effectively remove any First Amendment protection in the area.[30]

Further disputes occurred between the members of the Salt Lake City Council and the Mayor after the council took steps to determine whether it had the authority to rewrite the terms of the original deed and relinquish the easement to the LDS Church on its

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25. *Id.* at 1122-23. A traditional public forum is defined as "public property that has by long tradition – as opposed to governmental designation – been used by the public for assembly and expression, such as a public street, public sidewalk, or public park." BLACK'S LAW DICTIONARY 1244 (7th ed. 1999). Once an area is deemed a public forum, First Amendment rights must be upheld therein; the government may impose time, place, or manner restrictions, but such restrictions must be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.*

26. *Main Street I*, 308 F.3d at 1132-33.

27. *Main Street II*, 316 F. Supp. 2d at 1209.

28. *Id.*

29. *Id.*

30. *Id. See also* Michael Janofsky, *Plaza Dispute in Salt Lake City Roils Citizens Over Religion*, N.Y. TIMES, Nov. 16, 2002, at A12.

own accord, without the Mayor's approval.[31] The council subsequently authorized funds and hired its own attorney for this purpose.[32] The ensuing quarrel included charges by both the Mayor and the city council of religious bias and conflicts of interests.[33]

On December 6, 2002, Mayor Anderson released a proposal for regulating speech on the Plaza, which narrowly defined the easement and designated areas for demonstrating as far away from the LDS Temple as possible.[34] This proposal was rejected by the Church.[35] The Mayor then altered his approach and offered a compromise, proposing a settlement whereby the city-held easement would be completely extinguished in exchange for 2.125 acres of property currently owned by the LDS Church and $5 million.[36] The easement was appraised at $500,000, and the property given by the LDS Church was appraised at $275,000.[37] The extinguishment of the easement meant that the public would have no rights to access or pass across the Plaza, and the LDS Church would determine when, if ever, the public would be allowed on the property.[38] The plaintiffs[39] challenged the transaction in *Main Street II*, calling the Mayor's proposal "an eleventh hour

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31. *Main Street II*, 316 F. Supp. 2d at 1210-11.
32. *Id.* at 1211.
33. *Id.*
34. *Id.* at 1212.
35. *Id.*
36. *Id.*
37. *Id.* at 1214.
38. *Id.* By selling the easement to the LDS Church, the City relinquished any property rights, giving the property in fee to the LDS Church and therefore allowing the Church to determine if and when to allow the public on the Plaza. *Id.* Because the property became privately owned, the public forum analysis no longer applied, and the First Amendment does not reach actions taken by the LDS Church. *Id.* at 1225 (citing Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (stating that "[g]enerally, free speech rights do not apply to private property," and "[i]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government")).
39. The full list of the plaintiffs in *Main Street II* includes a number of non-LDS religious institutions and other organizations: Utah Gospel Mission, First Unitarian Church of Salt Lake City, Shundahai Network, Utah National Organization for Women, and Lee J. Siegel.

decision to change horses and relinquish the easement."[40]

II. LEGAL PRECEDENT – ESTABLISHMENT CLAUSE JURISPRUDENCE

Before directly addressing the specific alleged Establishment Clause violation, it is important to understand the appropriate legal framework under the First Amendment, which states that "Congress shall make no law respecting an establishment of religion."[41] From the adoption of the Bill of Rights, there has been dispute regarding the true reach of the religion clauses of the First Amendment. Chief Justice Burger once stated, "[c]andor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."[42] This statement is still applicable to contemporary Establishment Clause doctrines, as the United States Supreme Court has had a difficult time articulating how this clause should be interpreted and defining the boundaries it places on government activity.[43]

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40. *Main Street II*, 316 F. Supp. 2d at 1212.

41. U.S. CONST. amend. I.

42. Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, 2001 BYU EDUC. & L.J. 271, 271 (2001) (citing Tilton v. Richardson, 403 U.S. 672, 678 (1971)).

43. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1159 (2d ed. 2002) (discussing the fact that the *Lemon* test has not been expressly overruled or discarded and has been invoked in recent years, but that many justices on the current Court have expressed dissatisfaction with the test, and at least three recent Establishment Clause cases have been decided without reference to it). For example, when the language "under God" in the Pledge of Allegiance was challenged, the Court's decision demonstrated the varying analytical approaches of its members, as well as the disagreement among them. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). The majority dismissed the case for lack of standing. In concurrence with the result, Chief Justice Rehnquist employed the coercion test as enunciated in *Lee v. Weisman*, 505 U.S. 577 (1992). *Elk Grove*, 124 S. Ct. at 2319. He distinguished the case from *Lee*, in which a constitutional violation was found. Justice O'Connor preferred the use of an endorsement test to reach the same result, but noted that had she applied the coercion test, she would have come to the same conclusion. Justice Thomas felt that true

The Establishment Clause was incorporated and applied to the state governments through the Due Process Clause of the Fourteenth Amendment in *Everson v. Board of Education*[44] in 1947. The majority in *Everson* attempted to establish an analytical framework for Establishment Clause cases, promoting a "wall of separation" between church and state.[45] Subsequent Establishment Clause jurisprudence has been far less clear, producing three different tests – the "Lemon test,"[46] the "endorsement test,"[47] and the "coercion test."[48]

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adherence to *Lee* would require the Court to find the Pledge of Allegiance language unconstitutional, but he called for overturning *Lee* (and the coercion test used therein) as wrongly decided and advocated reading the Establishment Clause as a federalism provision, designed to protect states from federal interference but not protecting any individual right. *Id.* at 2330-31. *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (wherein the majority applied the *Lemon* test and concluded that the Establishment Clause was not violated, and where Justice Scalia concurred in the judgment but called for overruling the *Lemon* test); *Supreme Court Cases, 1996 Term: Leading Cases*, 111 HARV. L. REV. 279 (1997) ("Decisions under the Establishment Clause of the First Amendment reflect the Supreme Court's failure to transform the Clause's underlying principles into the stuff of manageable standards, and thus are notoriously inconsistent."); Robert M. O'Neill, *Who Says You Can't Pray?*, 3 VA. J. SOC. POL'Y & L. 347, 349 (1996) ("The boundaries of permissible activity under the Establishment Clause remain elusive in many important areas."); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 838 (1995) (describing the Court's Free Exercise and Establishment Clause precedent as "jurisprudence of complex, conflicting, and often undulating principles"); *id.* at 848 (describing Free Exercise and Establishment Clause precedent as a "body of jurisprudence of perhaps unparalleled contradiction and confusion").

44. 330 U.S. 1, 18 (1947) (upholding the constitutionality of a New Jersey statute that authorized local authorities to reimburse parents for transportation costs incurred by busing their children to public or parochial schools).

45. *Id.*

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

47. Lynch v. Donnelly, 465 U.S. 668 (1984). *See also* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989).

48. Lee v. Weisman, 505 U.S. 577 (1992). The Coercion Test is the most recent Establishment Clause test promulgated by the Court and was not employed by the court in this litigation and thus is not discussed further

A. Lemon *Test*

The initial struggle to find a standard for applying the Establishment Clause culminated in the Court's decision in *Lemon v. Kurtzman*.[49] The Court combined earlier precedent and held that a governmental act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state.[50] This test illustrates the purposes of the Establishment Clause and the relevant considerations. It reflects the separationist viewpoint of the Court, which warns against "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[51]

The first prong of the *Lemon* test requires that there be a secular purpose for the law. Case law under this prong seems to indicate that as long as there is any secular purpose for the governmental action, this prong will be satisfied, even if there are other, possibly religious purposes.[52]

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herein. The test was first stated by Justice Kennedy in *County of Allegheny*, 492 U.S. at 659 (Kennedy, J. concurring in part and dissenting in part):

> 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.' These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion.

Id. (quoting *Lynch*, 465 U.S. at 678). Under the Coercion Test, an Establishment Clause violation arises when a governmental action "coerces" an individual to espouse a belief in a particular doctrine. *Id.*

49. *Lemon*, 403 U.S. at 612-13.

50. *Id.*

51. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

52. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (holding a law that

The second prong of the test requires that the principal or primary effect of a law must be one that neither advances nor inhibits religion. This prong has been used to find a First Amendment violation when a "statute goes beyond having an incidental or remote effect of advancing religion," and where "[t]he statute has a primary effect that impermissibly advances a particular religious practice."[53] Another attempt at defining the scope of this prong stated that "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[54]

The third prong forbids government actions that cause excessive entanglement with religion. The Court in *Lemon* said that a law violates the establishment clause when it requires a "comprehensive, discriminating, and continuing state surveillance."[55] The Court has also said that "apart from any specific entanglement of the State in particular religious programs, assistance [to nonpublic educational institutions] carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[56] The entanglement prong has been regarded in the past as arguably the most important, but has been criticized for lacking concreteness.[57]

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authorized public school teachers to hold a one-minute period of silence for meditation or voluntary prayer unconstitutional because it "was not motivated by any clearly secular purpose – indeed, the statute had *no* secular purpose"). *See also* McGowan v. Maryland, 366 U.S. 420, 433 (1961) (acknowledging "the strongly religious origin of these laws" requiring businesses to close on Sunday, but found the laws permissible because there were some viable secular purposes—for example, giving citizens a uniform day of rest).

53. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985).

54. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

55. *Lemon*, 403 U.S. at 619.

56. Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973). *See also infra* text accompanying note 136.

57. 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, 1392 (1981):

> 'Entanglement' is 'such a blurred, indistinct, and

The *Lemon* Test has come under attack in recent decisions. Justice Scalia likened the test to "[a] ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ." He continued,

> [i]t is there to scare us . . . when we wish it to do so, but we can command it to return it to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.[58]

Typically, the Justices favoring strict separation between the government and religion favor the *Lemon* test, or at least its purpose and rationale; those in favor of a more accommodationist approach are opposed to the test.[59] The *Lemon* test is technically still good law; courts, including the district court in *Main Street II*, have employed it in recent years.

B. Endorsement Test

Skepticism regarding the *Lemon* test led to an alteration of the analysis of Establishment Clause claims. In a concurring opinion in *Lynch v. Donnelly*,[60] Justice O'Connor first articulated the "endorsement test."[61] Justice O'Connor "effectively collapsed the first two prongs of the *Lemon* Test into one consolidated inquiry: Does the governmental action symbolically endorse or

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> variable' term that it is useless as an analytical tool. Sometimes it seems to mean contact, or the opposite of separation; it has also been used interchangeably with 'involvement' and 'relationship.' Sometimes it seems to mean anything that might violate the religion clauses.

Id. (citations omitted).

58. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (internal citations omitted) (Scalia, J., concurring).

59. CHEMERINSKY, *supra* note 43, at 1159.

60. 465 U.S. 668 (1984).

61. *Id.* at 687-94 (1984) (O'Conner, J., concurring).

disapprove of religion?"[62] Under this test, the government is acting impermissibly if its conduct has "either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred."[63]

Through application of this test, the U.S. Supreme Court has given some guidance as to what constitutes endorsement of religion. "Endorsement" has been defined as sending "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."[64] The standard articulated by the Justice O'Connor in her concurrence in *Wallace v. Jaffree*[65] is: "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the government action] as a state endorsement of [religion]."[66] The endorsement test is ultimately concerned with "enforcing governmental neutrality toward religion and preventing the estrangement and alienation of religious dissidents or nonadherents from the political community by a governmental endorsement of religion that sends a message that 'they are outsiders, not full members of the political community.'"[67] This neutrality principle has been used recently by the Court in Establishment Clause cases.[68]

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62. Charles G. Warren, Comment, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669, 1681 (2003).

63. Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir. 1997). *See* Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). *See also* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (holding that a "preference" for particular beliefs constitutes an endorsement of religion); Sch. Dist. of Abbington Township v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (holding that the "[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion . . .").

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

65. 472 U.S. 38 (1985).

66. *Id.* at 76.

67. Warren, *supra* note 62, at 1682 (citing *Wallace*, 472 U.S. at 60; *Lynch*, 465 U.S. at 688).

68. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 839 (1995). *See*

Currently, all three tests are still good law, but there is uncertainty as to which test will be applied by the courts in a given Establishment Clause case.[69] More confusingly, hybrid tests combining various elements of the above tests have also been employed by courts in analyzing alleged violations of the Establishment Clause.[70] The failure of courts to clearly identify an optimal test has led to both dispute among the members of the U.S. Supreme Court[71] and to inconsistent decisions in the lower courts.[72] This lack of clear Establishment Clause precedent proves problematic to courts both in properly selecting a test under which to analyze Establishment Clause claims and also in properly conducting the relevant Establishment Clause analysis under the

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also Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (stating that "a principle at the heart of the Establishment Clause" is that "government should not prefer one religion to another, or religion to irreligion"); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 21 (2000) (stating that "formal neutrality has become the dominant theme in the Supreme Court's doctrine").

69. *See supra* note 43. *See also* McCarthy, *supra* note 42, at 271 ("It appears that the Court is heading down two divergent paths in interpreting Establishment Clause restrictions on government action.").

70. *See, e.g.*, *Main Street II*, 316 F. Supp. 2d 1201, 1235-36 (D. Utah 2004).

71. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). In *Capitol Square*, Justice O'Connor used a "symbolic endorsement" test "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share," and was joined by Justices Souter and Breyer. *Id.* at 780. Justices Stevens and Ginsberg dissented, preferring instead a symbolic endorsement test applied from the perspective of a reasonable passerby. Justice Scalia, writing for the plurality, rejected the use of the endorsement test at all under these facts. *See also* CHEMERINSKY, *supra* note 43, at 1149-55 (describing the three major competing approaches – strict separation, neutrality, and accommodation/equality – and the use of each by various justices in various cases).

72. *Compare* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated*, 515 U.S. 1154 (1995) (holding that student-led prayer violated the secular purpose prong of *Lemon*) *with* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (holding that student-led prayer at graduation had the secular purpose of "solemnization" of the occasion).

test ultimately chosen. This was precisely the problem that plagued the court in *Main Street II*.

III. *MAIN STREET II*

The plaintiffs alleged that the City's sale of the pedestrian easement did not result from an arms-length negotiation – rather, the sale was due to the excessive involvement, pressure and bias brought by the LDS Church upon the city government and the Mayor and therefore violated the Establishment Clause of the First Amendment.[73] The plaintiffs charged that

> the City acquiesced to the LDS Church's demands that the City abandon the easement, and thus it created an exclusive and uniquely powerful platform for the Church to promulgate its message on a range of social, political, and religious issues, while prohibiting Plaintiffs and others from sharing their own messages on the same issues in the same place and in the same manner.[74]

Specifically, plaintiffs alleged that

> the City's actions violate the Establishment Clause because those actions (a) have the purpose and effect of promoting religion, and, in this case, a particular religion; (b) impermissibly entangle church and state by giving the Church authority over an open-space pedestrian plaza in the heart of downtown Salt Lake City; and (c) impermissibly endorse religion by conveying a message to those who are not LDS that they are outsiders who are not full members of their political community.[75]

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73. *Main Street II*, 316 F. Supp. 2d at 1205.

74. *Id.* at 1219.

75. *Id.* The district court first held that the public forum had indeed been relinquished, and that the ability to control First Amendment expression and assembly was valid, as the property was private, not public property. *Id.* at 1235. This result is questionable under public forum analysis, but not subject

In analyzing the Establishment Clause claims brought by the plaintiffs, the district court began its analysis by citing Tenth Circuit precedent, which says the *Lemon* test "remains the starting point for the court's Establishment Clause analysis."[76] However, the court supplemented the *Lemon* analysis starting point with parts of O'Connor's endorsement test, so that the ultimate test used by the district court was a hybrid one, employing "both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*."[77] Therefore, the final test used by the court asked three separate questions: did the sale by the City have either (1) the purpose, or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred, and (3) did the sale create excessive entanglement between the City and the LDS Church?[78] The district court eventually held that the City's sale of the easement (1) did not have the purpose of advancing religion, (2) did not have the primary effect of advancing or endorsing religion, and (3) did not constitute entanglement.[79]

The court first analyzed the purpose prong of the endorsement test and held that there were sufficient secular

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to discussion herein. *See, e.g.*, Venetian Casino Resort, LLC v. Local Joint Exec. Bd., 257 F.3d 937 (9th Cir. 2001) (holding that a public forum is created when the *private* property owner is performing the public function of maintaining public sidewalks, and the property is no longer truly private). The Venetian Casino, in Las Vegas, NV, was located on Las Vegas Boulevard (the "Strip"), and a road-widening project would require that the public sidewalk be removed, and Venetian's land was needed for the sidewalk. *Id.* The Venetian negotiated to enter an easement agreement with the State to grant an easement for public use. *Id.* Demonstrations ensued, and the Venetian tried to restrict the demonstrators; it then sought a declaratory judgment that the sidewalk was not a public forum. *Id.* The court held that it was a public forum, and the Venetian – despite it being private property – could not restrict access or First Amendment rights. *Id.*

76. *Main Street II*, 316 F. Supp. 2d at 1235-36 (quoting Summum v. City of Ogden, 297 F.3d 995, 1010 (10th Cir. 2002)).

77. *Id. See also* Bauchman v. W. High Sch., 132 F.3d 542, 552 (10th Cir. 1997) (employing a hybrid test similar to that used in *Main Street II*).

78. *Main Street II*, 316 F. Supp. 2d at 1235-36.

79. *Id.* at 1235-45. The court therefore granted the defendants' motion to dismiss the Establishment Clause claim. *Id.*

purposes in this case to satisfy this "fairly low hurdle."[80] In evaluating the government's purpose, the court's inquiry "should be deferential and limited" where the government has articulated a reasonable secular purpose.[81] The court in this case listed many purposes, which were set forth in a 2003 Ordinance by the City Council that showed there was a valid secular purpose for the sale.[82] Further, the City received a substantial amount of money for the property, meaning that even if the other purposes did not suffice, the economic advantage was itself a secular purpose sufficient to satisfy this prong.[83]

The court next analyzed the effect prong of the endorsement test.[84] The court held as a matter of law, "the sale of the Easement did not constitute City 'sponsorship,' 'financial support,' or 'active involvement' in LDS Church affairs, and no reasonable observer aware of the circumstances of the sale . . . could conclude that the sale of the Easement constituted City endorsement of the LDS Church."[85] Important to the court's decision was that the City had not given anything away to the Church, but instead received a substantial amount of money and a

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80. *Id.* at 1236-37 (citing Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995)).

81. *Bauchman*, 132 F.3d at 554 (quoting Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring)).

82. *Main Street II*, 316 F. Supp. 2d at 1238. Secular purposes included

> (1) resolving the legal dispute over the Pedestrian Easement between the City and the Church and bringing an end to the divisiveness in the community; (2) eliminating the City's unintended responsibility created by the Tenth Circuit's decision to regulate protected expressive activities on the Main Street Plaza, with the attendant risk of litigation; (3) enabling the City to construct new and expanded facilities on the Glendale Property that would provide significant benefits to the community; and (4) promoting tourism and economic development.

Id.

83. *Id.* (noting that "the City obtained nearly $5.4 million in value for giving up an Easement appraised at $500,000").

84. *Id.* at 1240.

85. *Id.* at 1241.

plot of land in exchange for the easement and that the sale ended a potentially expensive legal dispute between the City and the LDS Church.[86] The Church had also altered the physical appearance of the Main Street property, creating a plaza with street lights, garbage cans, large plants and stone structures at the entrances, and distinctive pavement and landscaping.[87] Because of these alterations, the court reasoned that a member of the public would not reasonably conclude that the Plaza is government property.[88]

The court then examined the issue of entanglement between the LDS Church and the City. The court limited its discussion of this aspect to one short paragraph,[89] stating that the "sale of the Easement actually eliminated the likelihood of excessive entanglement between the Church and the City," and that "[s]elling the Pedestrian Easement to the Church eliminated the need for coordination between the Church and the City in the management of the Plaza."[90]

The court thus held that the plaintiffs did not state a claim under the Establishment Clause and granted the LDS Church's and the City's motions to dismiss.[91]

IV. ANALYSIS – *MAIN STREET II*

The most troublesome aspect of the court's decision in *Main Street II* is the court's failure to adequately analyze and give proper weight to the evidence of collusion between the LDS Church and the City. The principles of Establishment Clause jurisprudence listed below should dictate that this evidence is worthy of further consideration by the court. This lack of weight given to evidence of collusion manifested itself in two aspects of the decision: 1) the analysis of the primary effect of the sale of the easement based on the perception of the public, and 2) the analysis of the level of

86. *Id.* at 1241-42.
87. *Id.* at 1242-43.
88. *Id.* at 1242.
89. *Id.* at 1244-45.
90. *Id.*
91. *Id.* at 1247.

entanglement between the City and the Church.

A. PRIMARY EFFECT Prong of the Endorsement Test

In examining the primary effect of the sale of the easement to the LDS Church, the court relied heavily on the physical appearance of the plaza and placed relatively little weight on the public's impressions resulting from the sale.[92] The court stated its test as an objective one, "not an inquiry into whether particular individuals might be offended by the City's actions or consider them to endorse religion."[93] As the court stated, this test "should evaluate whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval."[94] Furthermore, "the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough,"[95] and "the *mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by

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92. *See id.* at 1240-46.

93. *Id.* at 1241 (citing Bauchman v. W. High Sch., 132 F.3d 542, 552 (1997)).

94. *Main Street II*, 316 F. Supp. 2d at 1241 (quoting *Bauchman*, 132 F.3d at 551-52 (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778-81 (1995) (O'Connor, J., concurring))). This appears to be the more stringent of the possible standards – the Court of Appeals for the Seventh Circuit has held that "when we find that a reasonable person *could perceive* that a government action conveys the message that religion or a particular religious belief is favored or preferred, the Establishment Clause has been violated." Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 493 (2000) (citing *Capitol Square*, 515 U.S. at 778 (O'Connor, J., concurring) (emphasis added)); s*ee also supra* notes 6-7 and accompanying text (describing the unique dynamic and context in which this litigation arose). The court's analysis is particularly troubling, given that a reasonable observer, armed with the knowledge of this dynamic in Salt Lake City, would be more likely to see the sale of the easement as a communication of government endorsement of the LDS Church or at least continued complacency with the dominating hand of the LDS Church in the City government. The court does not directly address this "history and context of the community."

95. Friedman v. Bd. of County Comm'rs, 781 F.2d. 777, 781 (1985) (citing Larkin v. Grendel's Den, 459 U.S. 116, 125 (1982)).

reason of the power conferred."[96]

When evaluating the effect of the relinquishment of the easement, the court analyzed the "circumstances of the sale," but restricted its analysis to those circumstances other than the message sent to the public.[97] The court did not touch upon the evidence of public opinion and perception of the relinquishment of the easement.[98] After listing these limited circumstances, the court reached the conclusion that "[t]he primary effect of the transaction was neither to promote nor endorse religion."[99] If the true inquiry is how a "'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval,"[100] the court needed to take into account *all* history and context of the community and the controversy, which includes the prior litigation, the public outcry, and the actions of the City Council and Mayor of Salt Lake City.[101]

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96. *Larkin*, 459 U.S. at 125-26 (emphasis added).

97. *See Main Street II*, 316 F. Supp. 2d at 1241. The court lists as circumstances of the sale

> the potential for another legal battle over the validity of the Pedestrian Easement after the Tenth Circuit's decision in *Main Street I*, the unintended responsibility imposed on the City after *Main Street I*, the Tenth Circuit's suggestion that the City resolve this issue by extinguishing the Easement, the historic presence of LDS Church property in the center of the City, the fact that Main Street Plaza is surrounded on both the east and the west sides by LDS Church-owned property, the change in appearance of the Plaza as compared to the public sidewalks, and the need for improvements on the City's west side.

Id.

98. *See id.*

99. *Id.* at 1242.

100. Bauchman v. W. High Sch., 132 F.3d 542, 551-52 (1997) (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778-81 (1995) (O'Connor, J., concurring)).

101. *See generally* Janofsky, *supra* note 30 (discussing public reaction to both the initial sale of the property and the prospect of the Mayor relinquishing the public easement and thereby giving up public access to the

Following the Tenth Circuit's decision in *Main Street I*, Mayor Rocky Anderson entered into a dispute with the LDS Church that he felt "threatened to tear the City apart along religious lines."[102] The Mayor was wholeheartedly in favor of retaining the easement for the City following the decision in *Main Street I*: "My job is to do the right thing. To ask me to convey that easement from the city to the LDS Church would be a huge betrayal to the people in this community."[103]

The Mayor even addressed the issue of public perception when he stated, "[i]f [a candidate for Mayor] promised to return [the easement to the Church,] they would get 5% of the vote. Even LDS Church members would see through that – No. 1 as pandering, and No. 2 as being completely unethical."[104] The Mayor took the initial stance that the city had a commitment to community to create time, place and manner restrictions over the easement regarding expression and conduct, as opposed to relinquishing it, and therefore rejected an LDS Church's proposal to abandon the Easement.[105]

After the Mayor declared this position, the City Council took steps to determine if it could bypass the Mayor and make its own decision.[106] This led to a highly-publicized dispute between the Mayor and the City Council, prompting the Mayor to accuse the City Council of religious bias.[107] The Mayor also stated that it was "'very clear to this community' that the Council would not have taken such steps to deprive the community of the right of access to the Plaza if it was owned by someone other than the LDS Church," and that the LDS Church used "unfair 'pressure to bear' on the all-

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plaza).

102. *Main Street II*, 316 F. Supp. 2d at 1209.

103. Janofsky, *supra* note 30.

104. *Main Street II*, 316 F. Supp. 2d at 1209.

105. *Id.* at 1210.

106. *Id.* at 1210-11. *See also supra* text accompanying notes 32-34; Heather May, *Council Might Bypass Mayor*, SALT LAKE TRIB., Oct. 12, 2002, at B1.

107. *Main Street II*, 316 F. Supp. 2d at 1211 ("Mayor Anderson often repeated his allegations of bias and defended his position as the more 'objective voice in the dispute because the seven-member all-LDS City Council has vast conflicts of interests.'").

LDS Council."[108] Further, the Mayor wrote an open letter to the public, saying "[t]hat easement was crucial to the city at the time of the initial deal. . . . I am being criticized by the officials of The Church of Jesus Christ and [former Mayor] Deedee Corradini for refusing to significantly alter a contract negotiated, drafted, and signed by them."[109] The Mayor further notes in the letter that the parties agreed that in the instance that the restrictions were found unconstitutional, the easement would remain in the hands of the City.[110]

All of this information has direct relevance to the public perception of religious endorsement as a result of the sale, and all was summarily left out of the analysis of the district court.[111] The Mayor was strongly – and publicly – opposed to the relinquishment of the easement; therefore, a reversal of this position certainly had the potential to raise questions in the public mind as to both the influence of the LDS Church on the Mayor and the perception of the City government's endorsement of the LDS Church.

As for public opinion, following the Tenth Circuit's decision in *Main Street I*, a poll of Salt Lake City citizens showed that almost half of residents wanted First Amendment freedom on the Main Street Plaza (as opposed to relinquishment of the easement), while thirty-nine percent said control should remain in the hands of the plaza's owner (the LDS Church).[112] More importantly, approximately 70 percent of those who identified themselves as non-LDS were in favor of free expression "on sidewalks of the plaza that was a Main Street thoroughfare three years ago," while nearly two-thirds of members of the LDS Church were in favor of allowing the Church to restrict expression.[113] Only 17 percent of non-LDS members said they would cede the right to restrict expression to the Church.[114]

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108. *Id.* at 1211.

109. *Id.* at 1211-12.

110. *Id.* at 1212.

111. *See id.* at 1240-44.

112. *Tribune Poll: Half of Salt Lake City Says Keep Plaza Free*, SALT LAKE TRIB., Oct. 16, 2002, at A1.

113. *Id.*

114. *Id.*

Letters to the Editor of the Salt Lake City Tribune were even more revealing. One Salt Lake resident wrote:

> After living in Utah the past five years, I should be acclimated to the fact that the LDS Church likes to run our lives, but I continue to be amazed. . . . When are the people of Utah going to wake up and acknowledge that there is a reason for separation of church and state? When will politicians realize that businesses and individuals may not want to come to Utah because the LDS Church tries to impose its religious beliefs on all the people?[115]

Another unnamed resident described the sequence of events from his viewpoint, clearly indicating that this transaction between the City and the LDS Church emitted the perception of coercion between the two parties and a government that was favoring the LDS Church.

> What of the rights that most Salt Lakers thought they were retaining in the sale? The church, in its presentations to the city Planning Commission and to the public, had represented that the plaza would be open to the public like a park. But when the Planning Commission's conditions on the sale were presented to the City Council for adoption, that guarantee had been replaced by the easement and its restrictions, which were negotiated by church and city attorneys virtually on the eve of their adoption. . . . It also explains why many Salt Lakers will rightfully feel twice betrayed if Anderson agrees to give away the public easement and the constitutional rights that go with it.[116]

Further, the purpose of the initial retention of the land was

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115. Vicki Boyer, Editorial, *LDS Control*, SALT LAKE TRIB., Oct. 16, 2002, at A8.

116. *Plaza's Web of Grievances*, SALT LAKE TRIB., Oct. 16, 2002, at A8.

to benefit Salt Lake City and the public:

> The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area to the north of the plaza and the business areas to the south . . . The easement has particular public importance for the City because of the role the City envisioned the easement playing in the character and development of downtown Salt Lake City. While the City wanted to close down the street to automobile traffic, it simultaneously wanted to preserve and indeed encourage pedestrian traffic. The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown. . . . As the City itself asserts, *the easement was a necessary means of accomplishing these public purposes even as it sold the underlying property to the LDS Church.*[117]

If the overall purpose of the project was to improve the public space and the downtown by encouraging pedestrian traffic, the relinquishment of the easement undermines the purpose of the initial sale. The LDS Church now possesses all rights to exclude from their property whomever they so choose.[118] While the public is generally allowed to walk through the property owned by the Church,[119] the Church is not required to maintain that access. With

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117. *Main Street I*, 308 F.3d 1114, 1126 (10th Cir. 2002) (emphasis added).

118. *Main Street II*, 316 F. Supp. 2d 1201, 1216-17 (D. Utah 2004).

119. *See* Brady Snyder, *Judge to Rule on Plaza Suit: ACLU Says Site Still Functions as if It Were a Public Park*, DESERET MORNING NEWS, Jan. 27, 2004, at B1:

the knowledge that the entire purpose of this overall project was to benefit the public and provide public space,[120] relinquishment of this essential easement surely raises a question as to whether the LDS Church has been shown preferential treatment. Taking all of this evidence into account, there appears to be strong public opinion that the easement should not have been relinquished, and that doing so was for the benefit of the LDS Church. These actions communicate to a "'reasonable observer,' aware of the history and context of the community in which the conduct occurs," a message of government endorsement or approval.[121] The relevant facts of this case seem to be at odds with the court's decision that, *as a matter of law*, the circumstances of the sale did not have the effect of endorsing religion.

B. ENTANGLEMENT Prong of the Lemon *Test*

Addressing the issue of entanglement, the Court made only a very brief statement, holding that

> the sale of the Easement actually eliminated the likelihood of excessive entanglement between the Church and the City. Following the Tenth Circuit's decision in *Main Street I*, the City was in the constitutionally awkward position of having to regulate a public forum in the middle of LDS Church's Main Street Plaza. Selling the Pedestrian Easement to the Church

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> [The] Church's own estimates show 30 million people use the plaza yearly to eat lunch, cut across an otherwise closed block or to access Temple Square. Few, if any, get church permission before entering the Main Street Plaza. [The ACLU attorney] said, the plaza functions just like it did before the city traded its public access easement on the plaza to the [LDS Church].

Id.

120. *Main Street I*, 308 F.3d at 1126.

121. *See* Bauchman v. W. High Sch., 132 F.3d 542, 551-52 (1997) (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778-81 (1995) (O'Connor, J., concurring)).

> eliminated the need for coordination between the Church and the City in the management of the Plaza. Thus entanglement is not an issue.[122]

This analysis appears incomplete given the precedent regarding the Entanglement doctrine, the purposes for which it was created and the particular facts of this case.

The entanglement prong of the *Lemon* test involves both administrative and political entanglement sections.[123] The court in *Main Street II* (as seen in the paragraph above) limited its analysis solely to the likelihood of administrative entanglement, declining to analyze the issue of political entanglement.[124] While the Court's analysis of the administrative entanglement between the LDS Church and the City may be incomplete under the facts of the case,[125] for the purposes of this recent development, the analysis of

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122. *Main Street II*, 316 F. Supp. 2d at 1244-45.

123. Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). *See generally* David R. Scheidemantle, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 FORDHAM L. REV. 1209 (1984) (advocating the use of the political entanglement aspect of the *Lemon* test be treated as the other parts and be an independent test for a constitutional violation).

124. *Main Street II*, F. Supp. 2d at 1244-45.

125. In discussing administrative entanglement, the United States Supreme Court has held

> the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' That is, to assess entanglement, we have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'

Agostini v. Felton, 521 U.S. 203, 232 (1997) (citing *Lemon*, 403 U.S. at 615 (1971)).

The *Main Street II* court claimed that the relinquishment of the easement to the Church would decrease the level of interaction between the LDS Church and the City, but there is evidence that this factual conclusion may be incorrect. Following the City's decision to sell the public easement to the LDS Church, protesters (who had routinely come to protest outside of the LDS Church prior to the sale) became determined to test the Plaza rules and the

the relevance of the political entanglement prong of the test is the more salient inquiry.

As a second part of the entanglement prong, the political entanglement test examines whether the challenged governmental action has the potential for dividing members of the voting public or the legislature according to their religious differences.[126] Upon inception of the doctrine, the Court wrote that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[127] According to one commentator, "[t]he political and administrative entanglement tests seek to prevent a 'fusion of governmental and religious functions.'"[128] The political strand of the entanglement inquiry

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authority of the LDS Church by "evangeliz[ing] outside Temple Square [during the Church's General Conference], possibly on the plaza itself." Brandon Griggs, *Preachers Plan to Test Plaza Rules at Conference*, SALT LAKE TRIB., Oct. 4, 2003, at B6. Protesters, also deemed "street preachers," did indeed venture to the Plaza during the Conference, and the result was at least one altercation with attendees of the Conference. "Street preachers waved women's religious garments and shouted insults at LDS General Conferencegoers on Sunday, angering at least two attendees, who were arrested when they tried to take the clothing away from the protesters." Rhina Guidos, *Two Conference Goers Arrested in Run-ins*, SALT LAKE TRIB., Oct. 6, 2003, at D2.

This course of events led the City to take action, by adopting "speech rules limiting the places where preachers can stand and sermonize during the church's twice-annual worldwide conferences." These free speech zones were challenged and upheld by a U.S. district court judge. Heather May, *Street Preachers Lose Another Round*, SALT LAKE TRIB., Dec. 22, 2004, at B2. For purposes of analyzing administrative entanglement, it does not appear as though the court's assertion in *Main Street II* is entirely accurate. This decision has necessitated City involvement in the administration of the LDS Church's semi-annual Conference and furthered restrictions on speech by non-LDS members. It also has required use of the resources of a court to resolve this issue. Therefore, the *Main Street II* court's treatment of this issue appears to have increased the involvement of the two parties. This result at minimum calls into question the brevity used by the court in *Main Street II* regarding this issue.

126. *Lemon*, 403 U.S. at 622-24.

127. *Id.* at 622 (citing Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

128. *See* Scheidemantle, *supra* note 123, at 1218 (citing Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982)).

"guards against religious institutions' interference with the political process,"[129] and the Court has based the test "on the premise that political division along religious lines results in dangerous interference by religion with the affairs of government."[130] This religious influence is seen as dangerous because "such interference allows religious groups constituting a majority or those with superior resources to exert excessive influence over the political process."[131]

While this is an important part of the entanglement analysis, the Supreme Court has never invalidated a statute solely because it violated the political entanglement test.[132] In more recent years, the political entanglement doctrine has been relatively disregarded and unused,[133] but the danger it sought to avoid still remains an important consideration when analyzing both entanglement and the primary effect of governmental action.[134] This prong of the test has also been used as a means to garner stricter scrutiny under the other three tests of *Lemon*.[135]

Despite the trend toward the extinction of the political entanglement doctrine, the facts of *Main Street II* present a

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129. *Id.* at 1219 (citing *Lemon*, 403 U.S. at 623).

130. *Id.*

131. *Id.* at 1221 (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963); Engel v. Vitale, 370 U.S. 421, 429 (1962); Zorach v. Clauson, 343 U.S. 306, 319 (1952) (Black, J., dissenting); Everson v. Bd. of Educ., 330 U.S. 1, 53-54 (1947) (Rutledge, J., dissenting)).

132. *Id.* at 1210-11.

133. *See* Mitchell v. Helms, 530 U.S. 793, 825 (2000) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded.").

134. *See* Scheidemantle, *supra* note 123, at 1211 ("[S]uch [political] division [along religious lines] is not only a danger in its own right, but a symptom of a greater danger: the fusion of governmental and religious functions.").

135. *See* Meek v. Pittenger, 421 U.S. 349, 365 n.15 (1975) ("While the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored.") (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973)). *See also* Scheidemantle, *supra* note 123, at 1211 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 866 (1978)).

compelling case for utilizing at least the underlying principle behind the Court's decision, especially since the district court chose to include the entanglement prong as part of its standard. The principle that a church should not be so involved in a governmental action as to foster political division along religious lines or to effectuate a "fusion" of functions is also consistent with much of the rationale behind the Endorsement Test and the neutrality principles discussed above – that government should not send a message of a preference for a particular religion.[136] Therefore, the foregoing discussion could be couched in terms of "political entanglement" or as further evidence of a preference for a religion as proscribed by the Endorsement Test.

The dispute over the City's sale of the property and of their later decision to relinquish the easement should have been taken into account when examining the entanglement between the City and the LDS Church. Beyond the opinion of the general public as cited above, the sale of the easement had a further effect on other members of the community.[137] The bishop of the Episcopal Diocese of Utah said,

> [i]t's not that we feel inferior, but periodically, we do feel powerless, like we don't have a voice. Decisions are made you have no part of. Their power is always there, in your face, and every time a power situation comes up, emotions run high and the situation becomes volatile.[138]

Referring to the perceived influence of the Church on the city government, a minister at the First Unitarian Church of Salt Lake City[139] stated, "It's a sad reality. It's exactly how the town votes on things, along religious lines. Here, voting Democrat or

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136. *See supra* section IIB and text accompanying notes 60-68.

137. *See, e.g.*, Janofsky, *supra* note 30 (reporting that the "the plaza conflict has driven a wedge through city government and adding to a common perception that Utah's largest religious organization wields excessive influence over every aspect of life").

138. *Id.*

139. The First Unitarian Church was a plaintiff in the initial lawsuit, *Main Street I*. *See Main Street I*, 308 F.3d 1114 (10th Cir. 2002).

Republican is superfluous. People vote by Mormon or non-Mormon."[140] This sort of religious line-drawing is precisely the danger that is sought to be prevented by the political entanglement doctrine,[141] and it is a particular concern given the unique setting of Salt Lake City and the relationship between the LDS Church and the City.[142]

In light of the large population of LDS Church members and the other facts of this case, the sale of both the Main Street property and the easement are governmental actions that caused political line-drawing and sent the message that a particular religion is favored.[143] The most glaring evidence of this effect is the precise danger which is targeted by the political entanglement doctrine – a split in governmental voting along religious lines. In voting on the proposal for the initial sale of the Main Street property in 1999, the City Council voted in favor of the sale by a five-to-two vote. The five "yes" votes came from members of the LDS Church; the two "no" votes were from non-Mormons.[144] After the controversy that led up to the decision to sell the easement in 2003, the Council voted in favor of the sale by a vote of six to one – the makeup of the council had changed, and the six council members voting in favor were also members of the LDS Church; the one opponent was not.[145]

There is further evidence of entanglement from the statements or actions of other parties. Former City Councilwoman Deeda Seed, a Council member when the first transaction was

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140. Janofsky, *supra* note 30.

141. Scheidemantle, *supra* note 123, at 1219-21 ("[R]eligious interference with the political process is dangerous because it threatens the rights of the members of religious groups lacking political power. The danger arises not because religious interference is in and of itself evil, but because such interference allows religious groups constituting a majority or those with superior resources to exert excessive influence over the political process.") (citations omitted).

142. *See supra* text accompanying notes 6-7.

143. *Id.*

144. Janofsky, *supra* note 30.

145. *Id.*

made in 1999, felt that the deal was made unfairly.[146] Mayor Anderson addressed the City Council's attempt to bypass him after he announced that he would be retaining the easement by stating,

> The City Council and I have disagreed on a number of things in the past three years, but they have never taken such extraordinary steps to somehow go around me on administrative matters. Why would active, participating members of the LDS Church do this when the matter directly involves the church? I think the answer is obvious.[147]

Another city councilman, who was affiliated with the Church, said he often heard assertions that council members were swayed by their religious views and did not deny that it could not be a factor in issues involving the Church: "You belong to your religion; it forms your core beliefs. It's hard not to have your life reflect those beliefs. Are we puppets? No. But our general attitude, certainly, is that we are not against the Church."[148]

There is further evidence, as seen above, that the Mayor made a very late change in his stance on the relinquishment of the easement, which would indicate an external influence on his decision.[149] The court in this case even noted that immediately after the Tenth Circuit's decision in *Main Street I*, "Mayor Anderson and the LDS Church engaged in a vitriolic and widely reported dispute that, according to the Mayor, threatened to tear the City apart along religious lines."[150] As mentioned above, this type of religious line-drawing is the concern to be addressed by use of the political entanglement doctrine.[151]

Of particular concern in this case are the allegations of

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146. Heather May, *Rocky: Give Church Plaza*, SALT LAKE TRIB., Oct. 15, 2002, at A1 ("In March of 1999, the church agreed the plaza would be as unrestricted as a public park. A month later, when the city council approved the deal, the free speech restrictions had been mysteriously added.").

147. Janofsky, *supra* note 30.

148. *Id.*

149. *See Main Street II*, 316 F. Supp. 2d 1201, 1211-12 (D. Utah 2004).

150. *Id.* at 1209.

151. *See supra* text accompanying notes 126-30.

political collusion between the LDS Church and the City, specifically the powerful political influence of the former over the latter.[152] While the court in *Main Street II* takes note of a number of relevant circumstances while reciting the facts,[153] it fails to account for possible political collusion in its analyses of both the primary effect prong of the endorsement test and the entanglement prong of their test.[154] By excluding these facts in its later analysis, the court omitted the central issue in this case from meaningful analysis – whether the interaction between the LDS Church and the city government before the sale, as well as the resulting transaction, constituted political entanglement or altered the effect of the transaction in the public eye.

Despite the fact that there was a clear secular purpose and a benefit to the city, the easement was critical to the negotiations for the initial sale of the land, and it was in the public's best interest to have a right of way down its Main Street. As it now stands, the LDS Church has the legal authority to restrict access to anyone it chooses and to promote its own religious beliefs on the Plaza. This has given them an inherently public area of the City, and while this sale could ultimately be determined valid, the court's analysis does not account for the evidence of political influence of the LDS Church over the City.

V. IMPLICATIONS AND ANALYTICAL SUGGESTION FOR THE COURT

There are two levels of criticism posed by this article. I argue first that the hybrid test used by the court was misapplied. The court should have more closely addressed evidence of collusion between the LDS Church and the City in the time leading up to the

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152. *Main Street II*, 316 F. Supp. 2d at 1212 ("Plaintiffs characterize this change of heart as an 'eleventh hour decision to change horses and relinquish the easement' and occurring 'under the most unusual circumstances,' i.e., surrendering to the significant pressure brought to bear on him by the LDS Church.").

153. *See id.* at 1209-13.

154. *See id.* at 1240-46.

transaction in this case. The court should have also examined the particular context of a governmental action that indicated a preference for, or an endorsement of, one particular religion. There was a large amount of evidence that indicated a significant level of collusion between the LDS Church and the City and that this collusion sent a message of endorsement.

The purposes for the political entanglement doctrine and Endorsement test outlined above are important in analyzing the implications of the court's failure to inquire further into the level of collusion between the LDS Church and the City in this case. The real danger that can arise from a powerful church holding persuasive authority over a government stems not only from the potential divisiveness of a governmental action, but also from the idea that this action could represent "a fusion of governmental and religious functions," which threatens governmental autonomy and independent decision-making.[155] There is also support for the notion that "political division, along religious lines, when not manufactured by the parties to a lawsuit, may serve as evidence that political and religious functions have fused."[156] Further, when "battles divide legislators along religious lines, the religious institutions with the most political power are likely to receive the largest appropriations, to the detriment of less powerful groups."[157] These principles are also in accord with those promoted by the Endorsement Test – that one religion is not to be granted preference or promotion. Whether couched in terms of "primary effect" or "neutrality," the facts of *Main Street II* merit an inquiry

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155. Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963):

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.

Id.

156. Scheidemantle, *supra* note 123, at 1212.

157. *Id.*

into the true nature of this transaction.

The decision in *Main Street II* seems to suggest that the level of collusion between a church and a local government carries very little importance in an Establishment Clause case, and that there is some uncertainty in the lower federal courts regarding the appropriate standard for this type of case and how to uniformly apply it. Such a decision contradicts the purposes of the political entanglement doctrine and the endorsement test, as well as the Establishment Clause that the tests are meant to help define.[158] If the Tenth Circuit upholds the decision in *Main Street II*,[159] it is unlikely that any case to come before the court where there is a high level of collusion (but where perhaps there *is* a secular purpose, an arguable primary effect of non-endorsement, and no administrative entanglement) will be found in violation of the First Amendment. In this unique social context, with a very large population of an influential religion, it is even more important to safeguard against political influence by the Church. The above evidence should have been at least sufficient to survive a 12(b)(6) motion to dismiss. However, while the hybrid test chosen by the court was perhaps misapplied, that is not the end of the problem.

Even more troubling than the misguided analysis by the district court in *Main Street II* is *why* the court's analysis went awry. The district court's analysis is indicative of a much larger problem with contemporary Establishment Clause jurisprudence. The existence of three separate Establishment Clause tests, not to mention the various hybrid tests, has created a state of confusion in this area of law, in what has already been a very uncertain area. As such, it seems as if a complete overhaul of this important area of the First Amendment might be long overdue.

In penning one of the most famous metaphors in American

158. *See* Scheidemantle, *supra* note 123, at 1213 (arguing that the political entanglement issue is important enough to be capable on its own of striking down legislation, even if it passes scrutiny under the other prongs). While this is not the view expressed by this essay, the inquiry initially required by the political entanglement prong of the *Lemon* test has demonstrable signifigance.

159. At time of publication, the oral argument before the Tenth Circuit was scheduled on May 4, 2005.

law, Thomas Jefferson wrote, "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State."[160] From the period of this early recitation and the adoption of the Bill of Rights, there has been dispute regarding the true reach of the religion clauses of the First Amendment.

"Indeed, many believe the Court's modern Establishment Clause jurisprudence is in 'hopeless disarray.'"[161] Establishment Clause jurisprudence has been described as having "produced only consistent unpredictability"[162] and characterized as "embarrassing"[163] – hardly a ringing endorsement of the state of the law. In recent years, the Supreme Court has had trouble defining the standard by which claims of establishment of religion should be adjudicated.[164] As a result, there is tremendous uncertainty in this area of law[165] and little guidance as to the proper approach for analyzing alleged Establishment Clause violations. In *Main Street II*, the District Court for the District of Utah rendered a decision that demonstrates this state of uncertainty.

In light of all of the circumstances described above, it seems

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160. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting the then President Jeffersons's letter to the Danbury Baptist Association dated Jan. 1, 1802). *See also* Alberto B. Lopez, *Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 168-71 (2003) (noting that the metaphor, which has become "enshrined in the pantheon of legal prose," demonstrates the politicization of religious faith).

161. Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir. 1997) (quoting Rosenberger v. Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring)).

162. Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

163. Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

164. *See supra* note 43.

165. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (commenting that "substantial revision of our Establishment Clause doctrine may be in order"). *See also* Aguilar v. Felton, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (criticizing *Lemon* test as being too formalistic).

necessary for the court to reevaluate the importance of evidence of collusion between church and government in the time leading up to a transaction. The Tenth Circuit Court of Appeals should caution using a definitive test, as the state of the Establishment Clause is uncertain. Instead, the court needs to consider the particular facts of this case and the potential for collusion and the public perception that may follow. Such collusion conveys a message of preference for a particular religion to the public, particularly in this sociological setting. It remains quite possible that the transaction in this case was valid, as there were legitimate secular purposes for the transfer of the easement. But the Tenth Circuit Court of Appeals needs to take caution under these circumstances and require that the district court acknowledge and examine the issue of collusion between the LDS Church and the City, either in terms of entanglement or endorsement.