Essay:
The Ohio Motto Survives the Establishment Clause

THE HONORABLE RICHARD F. SUHRHEINRICH*
T. MELINDAH BUSH**

Federal courts have grown increasingly confused and divided by the Supreme Court's contradictory and bewildering body of precedent involving the application of the Establishment Clause to those government references to religion often designated as "civic piety" or "ceremonial deism." This confusion has permitted groups adverse to religion in general to drive out any mention or use of God by government, even generic references that are part of this country's history and tradition. One example of this effort to stamp out generic references to religion by government, and the confusion and division such an effort has created in the federal courts, is the Ohio Motto case, in which the plaintiffs sought to strike down the Ohio state motto, "With God All Things Are Possible," as an unconstitutional endorsement of Christianity. The authors propose that, when properly applied, the endorsement test reconciles the country's Constitutional commitment to religious tolerance and pluralism with the nation's religious heritage and its government's generic references to religion, like the Ohio state motto.

I. INTRODUCTION

On September 11, 2001, a great tragedy occurred and Americans throughout the land immediately turned to their God for help and consolation. Not since World War II has this country sang "God Bless America" with such fervor and frequency. Indeed, on September 11, when the U.S. Congress was evacuated, members gathered on the steps of the Capitol and sang "God Bless America."[1] The Presidential Proclamation, declaring a National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11, 2001, explicitly referred to the New Testament: "Blessed are those who mourn for they shall be comforted."[2] The memorial service hosted by the City of New York in Yankee Stadium featured Christian, Jewish, Muslim, Sikh, Hindu, and Buddhist religious leaders, among others. Similarly, during the memorial

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* Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit.

** Associate with Kaye Scholer LLP, Washington, D.C. and former law clerk to Honorable Richard F. Suhrheinrich, 1999–2000. My thanks to my loving husband, Nathan Bush, whose support and thoughtful input have been invaluable in this and all my endeavors.

[1] Tellingly, these members of Congress selected "God Bless America" over the National Anthem, which does not prominently refer to God. The national anthem does, however, include the phrase "In God is our trust" in a later, lesser-known verse.

[2] Proclamation No. 7462, 66 Fed. Reg. 47,947 (Sept. 14, 2001) ("They have prayed for comfort in a time of grief...."), *available at* http://www.nationaldayofprayer.org/media/president.cfm (Nov. 27, 2001). The biblical quotation, like Ohio's motto, can be found in the *Book of Matthew* at 5:4.

at the National Cathedral in Washington, D.C., religious leaders from diverse faiths offered prayers before an audience of the country's political leaders. As these and other recent events demonstrate, Americans frequently invoke their Creator's help in times of national crisis.

Yet this religious tradition, which dates back to the Revolutionary War and the beginning of our country, has been increasingly under attack. Recently, government invocations of religion borne from this traditional recognition of religion by government have been struck down, surprisingly, as an unconstitutional endorsement of Christianity. One such challenged phrase was the Ohio state motto, which reads, "With God All Things Are Possible."[3]

Although seemingly no different from other permitted invocations of religion by government, such as the national motto "In God We Trust,"[4] Ohio's state motto was attacked as an attempt by the Ohio Legislature to "establish" religion by endorsing Christianity. Although the Sixth Circuit ultimately concluded that the saying is not an impermissible establishment of religion, the case divided the en banc court and engendered numerous disagreements as to the proper test of what constitutes an endorsement of religion. The nature of this debate stems from Supreme Court decisions in this area, which have created a contradictory and bewildering body of precedent that is easily manipulated. In the authors' view, this confusing body of case law has allowed groups adverse to religion to drive out any mention or use of God, even a generic one. *ACLU v. Capitol Square Review & Advisory Board*,[5] (hereinafter the "Ohio motto case"), with its numerous separate decisions, is a perfect illustration of the confusion caused by the Supreme Court's inconsistent view of the Establishment Clause and the need to reconcile these tests into a more cohesive analysis.[6]

This essay will examine the various opinions issued in the Ohio motto case, as set against the framework of the foregoing Supreme Court precedent. Finally, we will propose that, when properly applied, the endorsement test integrates our national heritage as a religious nation with our Constitutional commitment to religious tolerance and pluralism, which is often referred to as "civic piety" or "ceremonial deism."[7]

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[3] OHIO REV. CODE ANN. § 5.06 (Anderson 2001).

[4] *See* 36 U.S.C. § 302 (2000); 31 U.S.C. § 5114 (2000) (placing "In God We Trust" on coins).

[5] 243 F.3d 289 (6th Cir. 2001) (en banc).

[6] The Establishment Clause provides "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. Under the Fourteenth Amendment, the First Amendment is fully applicable to the States. *See* Lee v. Weisman, 505 U.S. 577, 580 (1992).

[7] The Supreme Court recognized the concept and permissibility of "ceremonial deism" in *Marsh v. Chambers*, 463 U.S. 783 (1983). "Ceremonial deism" is a term coined by Yale Law School Professor Eugene Rostow to describe this country's deeply entrenched tradition of civic piety. *See* Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G.

II. THE ESTABLISHMENT CLAUSE TESTS

Before addressing the confusion evident in the Ohio motto case, it is important to review the various tests the Supreme Court has created to evaluate challenges to the Establishment Clause. Over the last three decades, the Supreme Court has used several tests to analyze alleged violations of the Establishment Clause: the three-prong test set forth in *Lemon v. Kurtzman*[8]; the "coercion" test, first used by the Supreme Court in *Lee v. Weisman*[9]; the endorsement test, first articulated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*[10]; and the "ceremonial deism" test recognized in *Marsh v. Chambers*.[11]

The *Lemon* test has three parts: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.' "[12] The "coercion test" establishes that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' "[13] It prohibits government from either directly or indirectly coercing anyone "to support or participate in religion or its exercise."[14]

The third and fourth tests form the basis for much of the confusion engendered in the Ohio motto case: the concept of "ceremonial deism" and the "endorsement test."[15] The Supreme Court recognized the concept and permissibility of "ceremonial

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KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963)). Other examples of "ceremonial deism," including the national motto "In God We Trust," have been explicitly upheld by other courts and implicitly approved by the Supreme Court. *See* County of Allegheny v. ACLU, 492 U.S. 573, 602–03 (1989) ("Our previous opinions have considered in dicta the [national] motto and the pledge [of allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.").

[8] 403 U.S. 602 (1971).

[9] 505 U.S. 577 (1992).

[10] 465 U.S. 668 (1984) (O'Connor, J., concurring).

[11] 463 U.S. 783 (1983).

[12] *Lemon*, 403 U.S. at 612–13 (internal citation omitted).

[13] *Lee*, 505 U.S. at 587 (citing *Lynch*, 465 U.S. at 678).

[14] *Id.* at 587.

[15] The Ohio motto case did not extensively employ the other two tests, so this article will not discuss them in detail. However, in a recent decision, the Sixth Circuit explained its position on the various tests as follows: "While we have recognized that individual Supreme Court justices have expressed reservations regarding the *Lemon* test, *see American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 & n.15 (6th Cir. 2001) (collecting opinions), we are an intermediate federal court and are bound to follow this test until the Supreme Court explicitly overrules or abandons it." Adland v. Russ, 307 F.3d 417, 479 (6th Cir. 2002). The Court added that it treats the endorsement test as a refinement of the second *Lemon* prong. *Id.*

deism" in *Marsh v. Chambers*. Examples of ceremonial deism include various deeply entrenched traditions of civic piety, including legislative prayers, which were upheld by the Supreme Court in *Marsh*. Other examples of ceremonial deism, including the national motto "In God We Trust," have been explicitly upheld by other courts and implicitly approved by the Supreme Court.[16]

Ceremonial deism, then, considers the country's traditional invocations of religion to determine whether the challenged government action falls within that permitted tradition.[17] By contrast, under the endorsement test, government conduct is unconstitutional if, at the very least, a "reasonable observer" would view it as endorsing one religion over another.[18]

Justice O'Connor introduced the endorsement test in a concurring opinion in *Lynch v. Donnelly*[19] as a new approach to the "purpose" and "effect" elements of the *Lemon*[20] test. Justice O'Connor described this part of the *Lemon* test as asking whether "the practice under review in fact conveys a message of *endorsement* or disapproval."[21] If so, that practice would be invalid.

Justice O'Connor refined this "endorsement" approach the following year in a concurring opinion in *Wallace v. Jaffree*, in which the endorsement test was described as not forbidding government from acknowledging religion:[22]

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[23]

The endorsement test has since been accepted by a majority of Supreme Court Justices and is routinely applied by lower courts.[24] Although the endorsement test is

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[16] *See supra* note 7.

[17] *See supra* note 7 and accompanying text.

[18] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (introducing the endorsement test); County of Allegheny v. ACLU, 492 U.S. 573, 630–31 (1989) (O'Connor, J. concurring) (establishing the "reasonable observer" standard).

[19] *See Lynch*, 465 U.S. at 687.

[20] *See supra* note 12.

[21] *Lynch*, 465 U.S. at 690 (emphasis added).

[22] *See* Wallace v. Jaffree, 472 U.S. 38, 70 (1985).

[23] *Id.* (internal citations omitted).

[24] *See* County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (stating that Justice O'Connor's concurrence "provides a sound analytical framework for evaluating governmental use of religious symbols").

an accepted Establishment Clause analysis, the Justices have not yet reached a consensus over the knowledge to be attributed to that observer. Justice O'Connor and Justice Stevens advocate competing views of the level of knowledge attributable to that reasonable observer in *Capitol Square Review & Advisory Board v. Pinette*.[25] For Justice O'Connor, the "relevant issue" in the endorsement test is "whether an objective observer, *acquainted with the text, legislative history, and implementation of the statute,* would perceive it as a state endorsement."[26] By definition, Justice O'Connor's reasonable observer is charged with more knowledge than that of the average person, who would likely be unaware of the text and legislative history of the government's challenged conduct.

Justice Stevens, however, would charge the reasonable observer with a lesser degree of knowledge and experience akin to that of the average passer-by. To Justice Stevens, the reasonable observer would simply be objectively reasonable, relying on no additional knowledge beyond that which "meets the eye." [27] Indeed, Justice Stevens has argued that the endorsement test is violated if any reasonable person could perceive a message of endorsement. To Justice Stevens, this would include tourists, travelling salesmen, and school children.[28] Justice Stevens has rejected Justice O'Connor's reasonable observer, whom he describes as a "well-schooled jurist," and has argued that such an "ideal observer" would "strip" the constitutional protections of "every reasonable person whose knowledge happens to fall below" that "ideal standard."[29] This use of an " 'ultrareasonable observer'," according to Justice Stevens, is inappropriate because that observer would understand "the vagaries of this Court's First Amendment jurisprudence," when the Justices and courts currently do not.[30]

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[25] 515 U.S. 753, 779–80 (1995).

> I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. 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 creates a more collective standard to gauge "the 'objective' meaning of the [government's] statement in the community." In this respect, the applicable observer is similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."

Id. at 779–80 (internal citations omitted) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment). The Capitol Square Review & Advisory Board in *Pinette* is the same Board involved in the Ohio motto case.

[26] *Wallace*, 472 U.S. at 76 (emphasis added).

[27] *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting).

[28] *Id.* at 799–800 & n.5, 808 n.14 (Stevens, J., dissenting).

[29] *Id.* at 800 n.5 (Stevens, J., dissenting).

[30] *Id.* at 807 (Stevens, J., dissenting).

Because the endorsement test depends upon the perspective of the reasonable observer, the knowledge attributed to that observer can affect the outcome of the analysis. This uncertainty leaves room for courts to predetermine the outcome of the endorsement test by manipulating the knowledge imputed to the reasonable observer to strike down otherwise appropriate government references to religion. One recent example of this manipulation borne of confusion is found in the Ohio motto case, in which the Sixth Circuit Court of Appeals was divided, in part because of a disagreement concerning the knowledge attributed to the reasonable observer.

III. THE OHIO MOTTO CASE

A. *Facts of the Case*

On October 1, 1959, three years after Congress adopted "In God We Trust" as the national motto,[31] Ohio's General Assembly adopted the phrase "With God All Things Are Possible" as the state's official motto.[32] Although there is no official history of this legislation, most agree the Ohio motto was first suggested by a Cincinnati boy who was concerned that Ohio was one of only two states that then lacked an official motto.[33] With the assistance of then-Secretary of State Ted W. Brown, the twelve-year-old made several trips to Columbus to lobby for his proposal. A press release issued at that time by Secretary Brown indicated the motto had been drawn from "a verse in the New Testament, Matthew 19:26."[34] After the Ohio General Assembly adopted the motto, it was codified in a chapter of the Ohio Revised Code captioned "State Insignia; Seals; Holidays," alongside designations of official emblems ranging from the state flag and seal to the state bird, flower, and "invertebrate fossil."[35]

Soon thereafter, Secretary Brown approved a design incorporating the Ohio motto on a ribbon-like banner curled beneath the state seal, which is a circular emblem featuring a sheaf of wheat, and other non-religious images.[36] This new design later appeared on state letterhead and other official documents, such as state tax forms.[37]

Ohio's motto went unchallenged until 1996 when then-Governor George Voinovich recommended to the Capitol Square Review and Advisory Board

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[31] In 1956, the U.S. Congress enacted legislation making "In God We Trust" the nation's official motto. *See* 36 U.S.C. § 302 (2000).

[32] OHIO REV. CODE ANN. § 5.06 (Anderson 2001).

[33] *See* ACLU v. Capitol Square Review & Advisory Bd., 20 F. Supp. 2d 1176, 1178 (S.D. Ohio 1998) ("*ACLU I*").

[34] *Id.*

[35] *See* OHIO REV. CODE ANN. § 5.071 (Anderson 2001).

[36] *See* OHIO REV. CODE ANN. § 5.04 (Anderson 2001).

[37] *See ACLU I*, 20 F. Supp. 2d at 1178.

("Board") that the motto be inscribed above the main entrance to the Ohio statehouse. The governor was reportedly inspired with the idea during a trip to India where he saw the motto "Government Work Is God's Work" inscribed on a public building there.[38] The Board subsequently agreed to engrave the state seal and motto on a granite plaza at the west entrance of the Ohio statehouse.

The American Civil Liberties Union of Ohio ("ACLU"), along with a Presbyterian minister, quickly filed suit against the Board, Governor Voinovich, and other state officials challenging the motto's constitutionality and seeking to permanently enjoin the motto's display in any official capacity. The ACLU argued that the motto unconstitutionally endorsed Christianity because it was a saying attributed to Jesus in the New Testament. The plaintiffs pointed to Secretary Brown's 1959 press release and contemporary state pamphlets relating the motto's history and biblical origins to establish that the motto was taken from the New Testament in the gospel of *Matthew*, Chapter 19, verse 26.[39] That chapter relates an episode in which a wealthy young man who has observed the commandments asks Jesus what else he must do to attain "eternal life."[40] Jesus responds by instructing the wealthy man to sell his possessions, give what he has to the poor, and, in some translations, to "follow" Jesus.[41] When the disheartened young man retreats, Jesus explains "it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of

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[38] *Id.* By statute, Ohio's Governor has the authority to approve all uses of the official state seal of Ohio. *See* OHIO REV. CODE ANN. § 5.10 (Anderson 2001). Likewise, the Board is required to regulate any and all uses of the Capitol Square and has the authority to approve all improvements and additions to the statehouse and statehouse grounds. *See* OHIO REV. CODE ANN. § 105.41 (Anderson 2001).

[39] The relevant biblical text recounts a dialogue between Jesus and a rich young man:

> Jesus said unto him, if thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven; and come and follow me.
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> But then the young man heard that saying, he went away sorrowful; for he had great possessions.
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> Then said Jesus unto his disciples, Verily I say unto you, That a rich man shall hardly enter into the kingdom of heaven.
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> And again I say unto you, It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of heaven.
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> When his disciples heard it, they were exceedingly amazed, saying, Who then can be saved?
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> But Jesus beheld them, and said unto them, With men this is impossible; but with God all things are possible.

Matthew 19:21–:26 (King James).

[40] *Id.* 19:16.

[41] *Id.* 19:21.

God."[42] When his disciples ask who, if not this wealthy and pious man, can be "saved," Jesus assures them that "with men this is impossible, but with God all things are possible."[43]

The ACLU maintained this passage concerned the path to salvation, which it viewed as a uniquely Christian principle. Several witnesses for both the plaintiffs and defendants agreed that, when viewed in its biblical context, one possible interpretation of the phrase "With God All Things Are Possible" was that with God it is possible to attain salvation even if such salvation would otherwise be impossible.[44] The plaintiffs then concluded that the Ohio motto impermissibly endorsed Christianity because it quoted Jesus' discussion of the uniquely Christian concept of salvation.

The State of Ohio countered that its motto, like the national motto, was merely a generic reference to God meant to inspire hope in its citizenry without endorsing any particular religion. As such, the state contended that its motto was an appropriate expression of "ceremonial deism."[45] The defendants also presented evidence that similar phrases appear in several non-Christian religious and literary texts, and that the average individual could not recognize the motto as a passage from the Bible. For these reasons, the state argued its motto did not endorse Christianity and was constitutional.[46]

B. *The District Court's Opinion ("*ACLU I*")*

The district court found the proposed inscription of the motto on the statehouse grounds to be constitutional because a reasonable observer would not view it as endorsing Christianity. The district court's observer more closely resembled Justice Stevens's reasonable observer than Justice O'Connor's. First, the district court noted that the statute codifying the motto, like the proposed statehouse plaza display, contained no references to Jesus or the New Testament.[47] The district court also

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[42] *Id.* 19:24.

[43] *Id.* 19:26.

[44] Two of plaintiffs' witnesses, including Ronald Stone, a professor of Christian Ethics at Pittsburgh Theological Seminary, and plaintiff Matthew Peterson, an associate pastor of a Presbyterian Church in Columbus, Ohio, testified that the phrase discussed the concept of salvation. Two of the defendants' witnesses also admitted that the phrase could be interpreted as a discussion regarding salvation, but then added that this was one of many different interpretations of the passage. The defendants' witnesses included Thomas D. Kasulis, a professor and chair of the Division of Comparative Studies at Ohio State University, and Dr. David Belcastro, an associate professor of Religious Studies at Capital University. *See* ACLU v. Capitol Square Review & Advisory Bd., 210 F.3d 703, 707–10 (6th Cir. 2000) ("*ACLU II*").

[45] *See supra* note 7.

[46] *See ACLU II*, 210 F.3d at 711–12.

[47] *ACLU I*, 20 F. Supp. 2d 1176, 1179 (S.D. Ohio 1998).

found that the words of the motto, when "[r]emoved from their Christian New Testament context," did not "suggest a denominational preference."[48] Rather, the motto "could be classified as generically theistic" and was "certainly compatible with all three of the world's major monotheistic religions: Judaism, Christianity, and Islam."[49] The district court further noted similar phrases in Hebrew scripture[50] and the Islamic holy book, the Qur'an.[51] Moreover, the district court found there was "no evidence that a reasonable person who reads the words of the motto would recognize them as the words of Jesus or understand them as suggesting a denominational preference."[52]

Although the district court did not describe the knowledge it attributed to this reasonable observer, its observer, like the average passerby, apparently lacked sufficient knowledge to identify the biblical origins of the motto as it appeared to the public. Indeed, evidence before the court revealed that even religious scholars were unable to recognize the biblical origins of the motto. The district court noted the testimony of a senior rabbi who admitted that while the motto struck him as "vaguely familiar," he did not recognize its source.[53] The district court also noted testimony that an average college student would not know its source.[54] Relying on this evidence, the court found that even "an objective and reasonably informed observer would not perceive the motto as sectarian."[55]

Because the reasonable observer would not view the motto as sectarian, the district court found it to be constitutional under the endorsement test. As such, it was like "In God We Trust," which was derived from the Old Testament and was also viewed as nonsectarian.[56] The district court also found the Ohio motto did not violate the *Lemon* test because mottos like Ohio's are part of a long tradition of government acknowledgments of religion.[57] This tradition dated back to the first U.S. Congress at the time when the First Amendment was adopted, which the district court found to be strong evidence that such religious acknowledgments were indeed constitutional.

The district court, however, qualified its approval of the motto by permanently enjoining the state "from attributing the words of the motto to the text of the Christian

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[48] *Id.*

[49] *Id.*

[50] *See Genesis* 18:14 ("Is anything too hard for the Lord?"); *Job* 42:2 ("I know that thou canst do everything."); *Jeremiah* 32:17 ("Ah Lord God! Behold, thou hast made the heaven and the earth by thy great power and out-stretched arm, and there is nothing too hard for thee.").

[51] *See, e.g.*, THE HOLY QUR-AN, *Sura* 2:148 (Abdullah Yusuf Ali trans., 1978) ("Wheresoever ye are, God will bring you Together. For God Hath power over all things.").

[52] *ACLU I*, 20 F. Supp. 2d at 1179.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See id.*

[57] *See id.* at 1182.

New Testament."[58] As long as the motto was presented to the public devoid of its biblical surroundings, it was nonsectarian and did not endorse Christianity in the eyes of the reasonable observer, who would otherwise be unaware of its biblical origin. Thus, while the district court allowed Ohio to retain its motto and display it on the statehouse grounds as planned, it could no longer reveal that Jimmy Mastronado found the phrase in the New Testament.[59]

C. *Sixth Circuit Original Panel Opinion ("ACLU II")*

The ACLU appealed the district court's ruling to the Sixth Circuit Court of Appeals.[60] A divided three-judge panel reversed, with each of the three judges writing separately. Although the majority opinion, written by Judge Cohn,[61] acknowledged that the phrase invited many interpretations even within its biblical context, the two-judge majority found that "With God All Things Are Possible" ultimately concerned salvation, which it viewed as a uniquely Christian concept.[62] To the majority, Jesus used the phrase to articulate the necessity of faith in God to enter heaven and achieve salvation, which was "a uniquely Christian thought not shared by Jews and Moslems."[63]

"While the words of the motto may not overtly favor Christianity, as the words of Jesus they, at a minimum, demonstrate a particular affinity toward Christianity in the eyes and ears of a reasonable observer—a person knowledgeable about the Christian Bible and particularly the New Testament."[64] Thus, using a reasonable observer who was "knowledgeable about the Christian Bible and particularly the New Testament," the majority concluded that the Ohio motto endorsed Christianity and was thus unconstitutional.[65]

However, Judge Cohn acknowledged that the motto, when removed from its biblical context, simply conveyed, "the notion that Ohio has a bright future . . . [and]

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[58] *ACLU I*, 20 F. Supp. 2d 1176, 1185 (S.D. Ohio 1998).

[59] This conclusion is consistent with the district court's view of the reasonable observer's level of knowledge because the "average" observer would not recognize the motto as a biblical quotation without the benefit of an express citation to the Bible.

[60] *See ACLU II*, 210 F.3d 703 (6th Cir. 2000). The state of Ohio, however, did not appeal the district court's order enjoining it from attributing the source of the motto to the New Testament. As a result, the case on appeal was more straightforward than the case below because the only issue on appeal was whether the motto itself, presented without any references to its biblical origins, endorsed Christianity.

[61] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[62] *See ACLU II*, 210 F.3d at 725.

[63] *Id.*

[64] *Id.* at 727.

[65] *Id.*

that people ought to be optimistic and hopeful about the future."[66] The majority also recognized that this secular meaning differed from the motto's meaning "to a reader of the New Testament acquainted with its text" and to "persons engaged in biblical discourse or debating a point of scripture."[67] Nevertheless, the majority found the motto unconstitutional by concluding that a state motto quoting Jesus' sayings in the New Testament impermissibly endorsed Christianity.

Judge Cohn also rejected the state's argument that the motto merely expressed "ceremonial deism." Declining to question the line of cases upholding the constitutionality of the national motto and the Pledge of Allegiance,[68] the majority summarily concluded that Ohio's motto was unlike these "various forms of ceremonial deisms" upheld in the past.[69]

Judge Merritt's concurring opinion reads more like a theological discourse than a legal analysis. Judge Merritt first described the "most obvious primary" religious meaning of Ohio's motto to be a description of a "personal, all-knowing, all-powerful God [who] intervenes in the daily affairs of individuals and through this miracle of supernatural intervention makes 'all things possible.' "[70] He then described the secondary meaning of Ohio's motto, in its biblical context, to be the concept of salvation. Based on either of these interpretations, Judge Merritt agreed that the Ohio motto is unconstitutional because many non-Christian religions did not believe in either interpretation of the phrase: an almighty and intervening God, or the concept of salvation.[71]

Moreover, the concurrence found that unlike Ohio's motto, the national motto "does not specify a personal, all-powerful, all-knowing God which makes 'all things

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[66] *Id.* at 724 (quoting defendant's oral argument).

[67] *Id.*

[68] *See* Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996) (holding that statutes requiring that the inscription "In God We Trust" appear on all United States currency and coins, and those declaring the same as to the national motto of the United States, do not violate the Establishment Clause); O'Hair v. Blumenthal, 588 F.2d 1144 (5th Cir. 1979) (per curiam) (holding the same and affirming on the basis of the district court opinion at 462 F. Supp. 19 (W.D. Tex. 1978)); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (holding the same); *see also* Lynch v. Donnelly, 465 U.S. 668, 692–93 (1984) (adopting the same view in dicta); Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (adopting the same view in dicta); Sch. Dist. of Abington Twshp., Pennsylvania v. Schempp, 374 U.S. 203, 303–04 (1963) (Brennan, J., concurring) (adopting the same view in dicta); Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (adopting the same view in dicta).

On the other hand, a panel of the Ninth Circuit recently declared the Pledge of Allegiance unconstitutional in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir.), *judgment stayed* (June 27, 2002). *See infra* notes 130–33 and accompanying text.

[69] *ACLU II*, 210 F.3d at 725.

[70] *Id.* at 728.

[71] *See id.* at 728–29.

possible' by intervening in daily affairs."[72] Instead, the God in the national motto could be one of any number of gods, and, unlike Ohio's motto, does not refer to "the God of particular Christian religious groups."[73] Thus, compared to the more general interpretation of the national motto, Judge Merritt agreed that the Ohio motto endorsed Christianity and was unconstitutional.

Judge Nelson dissented. He found Ohio's motto to be no different from the national motto and, thus, was constitutional. The dissent rejected the majority's notion of a reasonable observer who could recognize and identify the biblical origins of Ohio's motto. Instead, the dissent's reasonable observer was, as Justice O'Connor described, " 'an informed member of the community' . . . who is 'aware of the history and context of the community and forum in which the challenged expression appears."[74] Although this reasonable observer was better informed than the general public, that observer "should not be presumed to have an encyclopedic knowledge of the Old and New Testaments."[75] Implicitly, the dissent's reasonable observer, like the district court's, would view the phrase in its civic context without the religious gloss of *Matthew* 19:26, because that observer would not recognize it as a particular biblical quotation. Rather, this observer would view the Ohio motto as "remarkably similar" to the national motto, which is constitutional.[76] Thus, like the district court, the dissent concluded that the reasonable observer would not view the motto as endorsing Christianity.

The primary disagreement between the dissent and the majority and concurring opinions was whether the reasonable observer would view the Ohio motto as a distinctly Christian phrase, or whether he would view the Ohio motto as a traditionally acceptable government reference to God like other forms of ceremonial deism, such as "In God We Trust." The majority and concurrence focused on the biblical meaning of the phrase because the reasonable observer was described as having a particular knowledge of Christianity and the New Testament. Consequently, that observer was able to identify the Ohio motto as a specific phrase from the Bible, despite the fact that the motto was no longer accompanied by any citation noting its biblical origins. This observer's exceptional knowledge of the New Testament necessarily required it to view the Ohio motto as an unconstitutional endorsement of Christianity.

By contrast, the dissent, like the district court, found that the reasonable observer would not view the motto as an endorsement of Christianity because that observer would not realize the phrase could be found in the Christian Bible. Rather, the dissent's observer, like Justice O'Connor's observer, would understand the civic

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[72] *Id.* at 729.

[73] *Id.*

[74] *Id.* at 730 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780–81 (1995) (O'Connor, J., concurring)).

[75] *ACLU II*, 210 F.3d 703, 730 (6th Cir. 2000).

[76] *Id.*

history and context of the Ohio motto. In addition to this civic knowledge, the dissent's observer also recognized the concept of ceremonial deism and was able to compare the challenged conduct to that tradition to determine whether the motto was appropriate. With this greater civic, rather than religious knowledge, the dissent's observer would simply view Ohio's motto as being no different than other forms of ceremonial deism, like the national motto, and would thus find the motto constitutional.

The majority opinion implicitly adopted a modified version of Justice O'Connor's more knowledgeable reasonable observer. Like Justice O'Connor, the majority attributed a greater degree of knowledge to its reasonable observer, but then charged its observer with an extraordinary degree of religious and theological knowledge, rather than legal or historical knowledge. Even more surprising was the fact that this reasonable observer's extraordinarily religious knowledge was limited to an understanding of the New Testament and Christian doctrine and did not extend to other religions.

To reach this outcome, the majority viewed the reasonable observer as having an exceptional level of knowledge of Christianity without having similar knowledge of other religions or an understanding of ceremonial deism. Unlike Justice O'Connor's well-informed observer, the majority's observer was "a person knowledgeable about the Christian Bible and particularly the New Testament."[77] Because of this specialized Christian knowledge, this observer recognized the motto as a phrase from the New Testament, even when presented to the public in a civic context with no reference to its biblical origin. Consequently, the Court's majority found that the motto impermissibly endorsed Christianity and was, thus, unconstitutional.

D. *Sixth Circuit En Banc Opinion ("ACLU III")*

The Sixth Circuit sitting en banc vacated the original panel's decision and affirmed the district court's initial ruling upholding the constitutionality of the Ohio motto.[78] Like the original panel, the en banc panel was deeply divided and included a majority opinion, a separate concurring opinion, and two dissents.[79] These conflicting opinions used different versions of the reasonable observer with each opinion attributing a different type or scope of knowledge to that observer.

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[77] *See id.* at 727.

[78] *See* ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289 (6th Cir. 2001) (en banc) ("*ACLU III*").

[79] Judge Nelson delivered the opinion of the court, in which Judges Boggs, Norris, Suhrheinrich, Siler, Batchelder, Cole, and Gilman, joined. Judge Clay delivered a separate concurring opinion. Chief Judge Martin and Judge Merritt delivered separate dissenting opinions, with Judge Martin, Judge Daughtrey, and Judge Moore joining in Judge Merritt's dissent. *See id.* at 291.

Judge Nelson, the original dissenting judge, wrote for the majority. His opinion began with a summary of the original intent of the Establishment Clause, which was merely to forbid the government establishment of churches and not a prohibition of general government references to religion.[80] Given the country's tradition of government references to religion dating back to the founding of the nation, the majority found that Ohio's motto was an acceptable form of ceremonial deism under *Marsh*.[81] These governmental acknowledgments of religion are acceptable as long as they do not "assert a preference for one religious denomination or sect over others."[82] Under this interpretation of the Establishment Clause, and in light of this long tradition of ceremonial deism, the Ohio motto was clearly constitutional.[83]

Next, the majority turned to the endorsement test and used two different versions of the reasonable observer. The first was modeled after Justice Stevens's observer. This average observer would be "relatively unschooled in the more esoteric reaches of theology, philosophy, and biblical exegesis."[84] Likewise, the average observer was not likely "to have an encyclopedic knowledge of press releases issued more than 40 years ago by the late Secretary of State Ted W. Brown."[85] Indeed, the majority noted that, "most Ohio citizens credited with being aware of 'the history and context' of their community are unlikely to have even the vaguest notion of the source from which Ohio's motto was drawn."[86] Rather, this average observer would find Ohio's motto to be no more problematic than "In God We Trust" because "both mottoes would appear to have been cut from the same bolt of cloth."[87] Thus, the average reasonable observer would not recognize the motto's biblical origins and would not view it as an endorsement of Christianity.[88]

The majority then viewed the motto through the eyes of Justice O'Connor's observer. This observer was "an objective observer, acquainted with the text, legislative history, and implementation of the statute . . . ."[89] As such, this well-informed observer was:

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[80] *Id.* at 293–99.

[81] *Id.* at 299–301.

[82] *Id.* at 299.

[83] *Id.* at 293–99.

[84] *ACLU III*, 243 F.3d 289, 302 (6th Cir. 2001).

[85] *Id.*

[86] *Id.* The majority also noted that a poll conducted in 1997 using questions framed by the ACLU revealed that "only about two percent of randomly selected citizens of Summit County, Ohio, could come reasonably close to recalling the *content* of Ohio's motto, to say nothing of its *source*." *Id.* at 303 n.13.

[87] *Id.* at 302.

[88] *Id.* at 299–301. The court noted that: "If our 'reasonable observer' is to bear any reasonable resemblance to ordinary people, ignorance alone would doubtless provide a sufficient guaranty that such an observer would not see Ohio's motto as an endorsement of Christianity." *Id.* at 303.

[89] *Id.* at 302 (quoting Wallace v. Jaffree, 473 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

> [D]eemed to know about Secretary Brown's press releases and other official literature identifying the source of the motto, as well as being credited with detailed knowledge of the text of the New Testament, plus some familiarity with the religious and philosophical traditions of the various peoples, ancient and modern, who have contributed to the religious, cultural and philosophical heritage of the State of Ohio.[90]

Consequently, this second observer was able to recognize that the Ohio motto was part of a long tradition of ceremonial deism and, likewise, was a phrase common to several different religions rather than focusing on the Christian meaning of the phrase.

The majority found it "most unlikely that an observer as well informed as this could discern an endorsement of Christianity in the words of Ohio's motto" because the motto is similar to other forms of ceremonial deism and can be found in a variety of non-Christian texts, including the works of Homer, Sophocles, Plutarch, and Calimachus.[91] The majority observed that the concept of an all-powerful God, which had been described below as a Christian concept,[92] was not unique to Christianity, pointing to an affidavit submitted by Professor Thomas P. Kasulis, "whose area of specialization is the comparative philosophy of religion."[93] Professor Kasulis quoted "passages from the Hindu *Upanishads* and the Egyptian *Akhenaten's Hymn to Aten* (the latter written almost a millennium and a half before the Christian era) to demonstrate that the idea of an all-powerful God was not confined to Semitic religions such as Judaism, Christianity, and Islam."[94] Thus, neither the phrase nor its meaning were unique to Christianity and, consequently, could not be seen as an endorsement of that religion.

In short, because the majority's well-informed reasonable observer recognized the Ohio motto as a generic religious phrase used in a variety of Christian and non-Christian texts and was similar to other forms of ceremonial deism, it concluded that "no well informed observer could reasonably take Ohio's motto to be an official endorsement of the Christian religion."[95] It was clear that the majority's opinion was

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[90] *ACLU III*, 243 F.3d 289, 303 (6th Cir. 2001).

[91] *Id.* at 303–05. Dr. David Belcastro, "an expert in biblical hermeneutics," and Professor Thomas Kasulis, a specialist in the "comparative philosophy of religion," identified non-Christian antecedents for the motto. *Id.* at 303–04. The en banc majority viewed their testimony as "that of a reasonable observer who speaks with some authority on a subject in which he happens to be exceptionally well versed." *Id.* at 305. This, in turn, led the en banc majority to find that such a well-informed observer would not view Ohio's motto as an endorsement of Christianity. *See id.*

[92] *See ACLU II*, 210 F.3d 703, 728–30 (6th Cir. 2000); *ACLU I*, 20 F. Supp. 2d 1176, 1178 (S.D. Ohio 1998).

[93] *ACLU III*, 243 F.3d at 304.

[94] *Id.*

[95] *Id.* at 305. For this reason, the en banc majority's well-informed observer would have upheld the constitutionality of the Ohio motto even if the district court had not enjoined the state's occasional reference to the motto's biblical history in pamphlets and booklets. The original panel had criticized the district court's decision to enjoin the state from attributing the motto to the New

based in large part on its endorsement analysis because it went on to find that the Ohio motto was also constitutional under the *Lemon* test for largely the same reasons and without much further analysis.[96]

There were two dissenting opinions, the first written by Chief Judge Boyce Martin, Jr. and the second by Judge Gilbert Merritt. Judge Martin expressed a general opposition to "state-sponsored religious imagery" because it detracted from "true religion."[97] Judge Martin's dissent, however, did not quarrel with the majority's characterization of the reasonable observer. Moreover, instead of focusing on the effect of state-sponsored references to religion on individuals using the endorsement test, the first dissent focused on the effect of such state activities on religion itself and rejected the majority's characterization of the original intent of the Establishment Clause.[98]

As he did in his concurring opinion in the original panel, Judge Merritt in his dissent attempted to distinguish the "God" in the national motto from the "God" in the Ohio motto:[99]

> While the phrase "In God We Trust" refers broadly to a shared human yearning for the spiritual, the Ohio motto conveys a sectarian view of God as interventionist, active and omnipotent. The national motto does not specify a personal, all-powerful, all-knowing God who makes "all things possible" by intervening in daily affairs. The God in whom we trust could be the god of Jefferson's deism or even the laws of science or the cosmology of Newton or Einstein. It does not define the god of any religion. The god of the silver coin and the dollar bill—"In Whom We Trust"—may be drawn from any of the gods of the world's vast pantheon of divinity that has accumulated from Greek times to the present.[100]

Judge Merritt then discussed the application of the endorsement test by focusing on the meaning of the Ohio motto in its biblical context. Like the original panel's

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Testament, even though that issue was not before the court because the state of Ohio had not appealed that ruling. There was also no evidence that any attempt was ever made or planned by the state to present the motto to the public with a citation to the New Testament, rather than confining its biblical references to a few pamphlets summarizing the history of the motto. However, even if the well-informed observer were aware of the fact that the motto was originally drawn from the New Testament, that observer would nevertheless understand the motto was not an endorsement of Christianity because the same or similar phrases could be found in a variety of non-Christian and even pre-Christian texts.

[96] *See id.* at 306–08.

[97] *Id.* at 312.

[98] *See id.*

[99] The second dissent also contested the majority's interpretation of the original intent of the Establishment Clause and was not willing to concede that the national motto passes the non-endorsement test of the Establishment Clause. *See ACLU III*, 243 F.3d 289, 313–15 (6th Cir. 2001).

[100] *Id.* at 315.

majority opinion, Judge Merritt again found the phrase was a recitation of Jesus' words describing salvation using an observer charged with extraordinary biblical knowledge.[101] Because the motto was a recitation of Jesus' words describing an all-powerful and intervening God and the concept of salvation, Judge Merritt found it to be a distinctly Christian message. As a result, Judge Merritt viewed the majority's approval of the Ohio motto as an "encroachment on religious freedom" that created "establishment [of religion] by increments."[102]

Judge Eric Clay filed a separate concurrence. He disputed Judge Merritt's argument that the Ohio motto, "With God All Things Are Possible" could be distinguished from the national motto, "In God We Trust." First, Judge Clay noted both mottos "may reasonably be understood to refer to 'God' as an omnipotent one who intervenes in human affairs . . . or as one who does not intervene in human affairs but is looked to for spiritual comfort."[103] Second, Judge Clay noted both mottos could also be traced to the Bible because phrases similar to the national motto could be found both in the Old and New Testaments.[104] Thus, the concurrence disputed the second dissent's attempt to distinguish the national motto, the constitutionality of which was not disputed, from the Ohio motto.

Like the original panel opinions, the division amongst the en banc judges was based in large part on a fundamental disagreement over the knowledge to be attributed to the reasonable observer when applying the endorsement test. Those judges who found the Ohio motto to be unconstitutional attributed a highly particularized knowledge about Christianity to the reasonable observer who was then able to identify the motto as a phrase in the New Testament. By contrast, the judges who found the motto to be constitutional attributed a more generalized knowledge to the reasonable observer. Either that generalized observer, like Justice Stevens's average passerby, was too ill-informed to recognize the motto as a biblical quotation, or was well enough informed, similar to Justice O'Connor's observer, to realize the motto could be found in a variety of non-Christian texts. Implicit in both these observers, however, was the fact that both needed to understand and accept ceremonial deism: the average observer simply analogized the challenged phrase to other accepted practices, while the well-informed observer was smart enough to know that similar forms of ceremonial deism date back hundreds of years and are part of this nation's history.

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[101] *See id.* at 315–16.

[102] *Id.* at 318. The second dissent also criticized the district court's injunction preventing the state of Ohio from attributing the state motto to the New Testament, describing the injunction as "tantamount to an admission of unconstitutionality" and "a tacit recognition of the Christian nature of the phrase." *Id.* at 315. However, as noted above, the validity of the district court's injunction against the state of Ohio was not on appeal. *See supra* note 88.

[103] *ACLU III*, 243 F.3d at 311.

[104] *See id.*

IV. ANALYSIS OF CEREMONIAL DEISM AND THE REASONABLE OBSERVER

The Ohio motto case demonstrates the potential manipulation of the endorsement test's reasonable observer to strike down long-accepted traditions of civic piety and ceremonial deism. Federal courts have often upheld different forms of ceremonial deism, including legislative prayers,[105] Christmas holiday decorations,[106] and "In God We Trust."[107] When properly applied, the endorsement test plays the valuable role of reconciling our heritage of civic piety with our Constitutional commitments to religious tolerance and pluralism. Through the eyes of a reasonable observer familiar with America's religious diversity and ceremonial deism traditions, like the en banc majority's observer, courts can readily distinguish permissible embodiments of ceremonial deism from impermissible endorsements of religion.

A. *The Tradition of Government References to God and Religion*

Religion has always been important in American government. In his Farewell Address to the nation, George Washington noted that religion, as a source of morality, is "a necessary spring of popular government."[108] Even the famed Frenchman Alexis de Tocqueville observed that Americans hold religion "to be indispensable to the maintenance of republican institutions."[109] The Supreme Court, too, has acknowledged that Americans "are a religious people whose institutions presuppose a Supreme Being."[110] Consequently, federal courts, including the Supreme Court, have repeatedly upheld government use of religious references and symbolism as constitutionally permissible forms of "ceremonial deism."[111] This American tradition

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[105] *See* Marsh v. Chambers, 463 U.S. 783 (1983).

[106] *See* Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

[107] *See* Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); O'Hair v. Murray, 588 F.2d 1144 (5th Cir.), *cert. denied*, O'Hair v. Blumenthal, 442 U.S. 930 (1979); Gaylor v. United States, 74 F.3d 214 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996).

[108] GEORGE WASHINGTON, FAREWELL ADDRESS (1796), *reprinted in* 100 KEY DOCUMENTS IN AMERICAN DEMOCRACY 67, 71 (Peter B. Levy ed., 1994); *see also* Library of Congress, Religion and the Founding of the American Republic: Religion and the Federal Government, *The Farewell Address*, *available at* http://lcweb.loc.gov/exhibits/religion/rel06.html (last updated June 3, 1998). President Washington's Farewell Address is considered an important document in American history because it made several recommendations regarding foreign affairs and governance, which had a strong influence on American politicians.

[109] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 232 (Henry Reeve trans., Sauders & Otley 1835).

[110] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[111] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 792 (1983) (upholding constitutionality of legislative prayers and a publicly funded chaplain for the legislature).

of ceremonial deism remains firmly entrenched in contemporary American life and dates back as far as the Revolutionary War itself.

There is also no doubt that religion was a powerful influence during the Revolutionary War. References to God were commonly found on battle flags, including one emblazoned with the declaration: "Resistance To Tyrants Is Obedience To God."[112] The historic Liberty Bell in Philadelphia is inscribed with a quotation from the Old Testament: "Proclaim liberty throughout all the land unto all inhabitants thereof."[113] The fledgling government also paid chaplains to minister to the revolutionary troops, a tradition that continues today in America's armed forces.[114] Even the Treaty of Paris, which was signed in 1783 and formally ended the American Revolution, explicitly referred to "Divine Providence."[115] Presumably, under the original panel's view of the First Amendment and the endorsement test, neither the Liberty Bell nor the revolutionary battle flag could be displayed by the government because both would be viewed by the well-informed Christian observer as an endorsement of Christianity. Likewise, the existence of military chaplains, which would clearly be constitutional under *Marsh*, and any reference to a divine power in historical documents, like the Treaty of Paris, would also be exorcised from government.

Government references to religious imagery and concepts also flourished in the early days of the Republic. The Articles of Confederation, signed in 1778, explicitly referred to the "Great Governor of the World."[116] The Continental-Confederation Congress, which existed from 1774 to 1789, began the tradition of appointing chaplains from different denominations to lead legislative prayers. The first Congress convened under the U.S. Constitution voted on April 15, 1789, to continue this practice.[117] This tradition of legislative prayers led by clergy paid for by the

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[112] *See* Religion and the Founding of the American Republic: Religion and the American Revolution, *Gostelowe Standard, c. 1776*, *at* http://lcweb.loc.gov/exhibits/religion/rel03.html (last updated June 3, 1998); *see also* EDWARD. W. RICHARDSON, STANDARDS AND COLORS OF THE AMERICAN REVOLUTION 49 (1982).

[113] *Leviticus* 25:10 (King James).

[114] *See* Library of Congress, Religion and the Congress of the Confederation, 1774–89: Religion and the American Revolution, *Congressional Resolution Paying Military Personnel* (Apr. 22, 1782), *at* http://lcweb.loc.gov/exhibits/religion/rel04.html (last updated June 3, 1998).

[115] SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 442 (1962), *available at* http://www.freedomshrine.com/documents/paris.html (last visited Feb. 23, 2003).

[116] ART. OF CONFED. art. XIII, *reprinted in* AMERICAN CONSTITUTIONS: COMPRISING THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, AND THE STATE CONSTITUTIONS 17 (George A. Glynn compiler, 1894), *available at* http://www.usconstitution.net/articles.html (last visited Feb. 23, 2003).

[117] *See* 1 ANNALS OF CONG. 19 (Joseph Gales ed., 1834).

government continues today in the U.S. Congress and many state legislatures, and has been expressly upheld in *Marsh*.[118]

The Framers of the Constitution intended the Establishment Clause to permit government references to God and religious symbols. Thomas Jefferson himself, who first articulated the notion of a "wall of separation between church and state," famously invoked God in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[119] Jefferson also referred to God in the preamble to the Virginia Bill For Establishing Religious Freedom: "Whereas Almighty God Hath created the mind free." The Bill condemns coercion of religious belief as "a departure from the plan of the Holy author of our religion, who being Lord both of body and mind . . . chose not to propagate it by coercions on either, as was in his Almighty power to do."[120] As such, Jefferson acknowledged that it was God's will that religious freedom be protected and that the people were "endowed with certain unalienable rights," rather than reflecting a desire for a total separation of government and religion. Indeed, Jefferson went so far as to propose that the Seal of the United States include a biblical image of the "Children of Israel in the Wilderness, led by a Cloud by day, and a Pillar of Fire by night."[121]

Likewise, the first House of Representatives proposed the First Amendment on one day, and the very next day proposed a presidential proclamation of "Thanksgiving and Prayer." That same legislative body also allowed for the appointment of a chaplain for the military. President Jefferson, in an 1803 treaty with the Kaskaskia Indians, provided money for a church and religious needs for that tribe. Similarly, President Monroe in a treaty with the Wyandotte Indians, granted U.S. land

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[118] *See* Marsh v. Chambers, 463 U.S. 783 (1983).

[119] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[120] THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (June 12, 1779) *reprinted in* 5 FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987). Thomas Jefferson wrote of a "wall of separation" between church and state, which some construe as a requirement for the strict separation between the government and religion, in a letter to the Danbury Baptists in 1802 more than a decade after the First Amendment was ratified by the states. *ACLU I*, 20 F. Supp. 2d 1176, 1183 n.14 (S.D. Ohio 1998) (citations omitted). Although Jefferson wrote the letter and authored the Declaration of Independence, he had nothing to do with the drafting of the First Amendment because he was in France at the time. *See id.* at 1183.

[121] *See* RICHARD S. PATTERSON & RICHARDSON DOUGALL, THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SEAL OF THE UNITED STATES 16–17 (1976); *see also* Library of Congress, Religion and the Congress of the Confederation, 1774–89: Religion and the American Revolution, *Proposed Great Seal of the United States: "Rebellion to Tyrants Is Obedience to God."*, drawing by Benson Lossing, for HARPER'S NEW MONTHLY MAG. (July 1856), *at* http://lcweb.loc.gov/exhibits/religion/rel04.html (last updated June 3, 1998). The image depicts the Exodus of the Children of Israel from Egypt in *Exodus* 13:21 (King James).

to the Catholic Church of St. Anne of Detroit because of the tribe's attachment to that church.[122]

Early American laws and treaties also evidenced the importance of religion. The Northwest Ordinance, which expanded the country west of the Ohio River when it was signed in 1787, expressly noted that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[123] Likewise, the Emancipation Proclamation invokes the "gracious favor of Almighty God" in liberating slaves and putting an end to the scourge of slavery.[124]

Even today, references to God and religious symbols adorn many prominent federal buildings in Washington D.C. The inner dome in the U.S. Capitol Building, for example, features an ornate fresco, "The Apotheosis of Washington," which depicts George Washington ascending to the heavens surrounded by, among other things, angels and cherubs. The halls of the U.S. Capitol and Supreme Court buildings also display images of historical figures who contributed to the underlying principles of American law. Among them are Moses, who is credited with receiving the Ten Commandments, and Mohammed, credited with receiving the Islamic holy book, al-Qur'an.

Government references to a generic God are also commonplace. The reverse side of the Great Seal of the United States, which is printed on every dollar bill, contains the "Eye of Providence" above a pyramid with the phrase "Annuit Coeptis," which translates as "God has favored our undertaking." The Supreme Court and other federal courts, which are charged with interpreting the Establishment Clause, open their proceedings with the familiar cry "God save the United States and this Honorable Court." Judges, elected officials, military officers, and other public servants take an oath of office that ends with the familiar pledge, "[s]o help me God."[125] Immigrants becoming naturalized citizens and witnesses who take the stand

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[122] *See* Library of Congress, Religion and the Founding of the American Republic: Religion and the Congress of the Confederation, 1774–89, *Congressional Resolution Paying Military Personnel*, at http://lcweb.loc.gov/exhibits/religion/rel04.html ("Congress appointed chaplains for itself and the armed forces, sponsored the publication of a Bible, imposed Christian morality on the armed forces, and granted public lands to promote Christianity among the Indians."). See also http://lcweb.loc.gov/exhibits/religion/vc006495.jpg for an image of the Congressional resolution authorizing the payment of military personnel, including military chaplains.

[123] NORTHWEST ORDINANCE, art. III (July 13, 1787), *reprinted in* EQUAL PROTECTION AND THE AFRICAN AMERICAN CONSTITUTIONAL EXPERIENCE: A DOCUMENTARY HISTORY 30 (Robert P. Green ed., 2000), *available at* http://www.freedomshrine.com/documents/northwest.html (last visited Feb. 23, 2003).

[124] ABRAHAM LINCOLN, THE EMANCIPATION PROCLAMATION (Jan. 1, 1863), *reprinted in* 100 KEY DOCUMENTS IN AMERICAN DEMOCRACY, *supra* note 101, at 164, *available at* http://www.archives.gov/exhibit_hall/featured_documents/emancipation_proclamation/transcript.html (last visited Feb. 23, 2003).

[125] 28 U.S.C. § 453 (2000).

in most state and federal courts also take an oath ending in the same pledge, "so help me God."

The federal government even observes numerous religious traditions. The White House hosts celebrations of Christmas, Chanukah, and the Muslim holy month of Ramadan. Every president since Harry Truman has officially declared a National Day of Prayer as an annual, nationwide event.[126] The federal government, like most cities and states, also erects holiday displays celebrating Chanukah and Christmas, in addition to declaring Sunday to be a day of rest. And the tradition continues today, as the events after September 11 demonstrate.

The federal government is not alone in its traditional references to God.[127] Almost every state constitution refers to "God" or some divine power or authority.[128] Ohio's own constitution begins, "We, the People of the State of Ohio, grateful to Almighty God for our freedom . . . ."[129] In addition to Ohio, there are several other state mottos that expressly refer to a divine power. For example, the Arizona state motto reads "Ditat Deus" (God enriches); the Colorado motto reads "Nil Sine Numine" (Nothing without Providence); Connecticut's motto reads "Qui Transtulit Sustinet" (He who transplanted, still sustains); and South Dakota's motto is simply "Under God the people rule."[130]

Likewise, religious symbols grace many state government buildings. The Nebraska Supreme Court building includes a symbolic light fixture depicting the Ten Commandments. A painting of Moses receiving the Ten Commandments hangs above the bench in the Minnesota Supreme Court.[131] Similarly, the Pennsylvania Supreme Court building includes two murals. One, "The Decalogue," includes an image of Moses receiving the Ten Commandments, while the second, "The

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[126] *See* National Day of Prayer, Pub. L. No. 82-324, 66 Stat. 64 (1952) (codified as amended at 36 U.S.C. § 119 (2000)) ("That the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups , and as individuals.").

[127] Government references to a single "God" are also not unique to American government and can even be found in more polytheistic countries. That fact was clearly apparent in the Ohio motto case because the decision to place Ohio's motto on the statehouse was inspired by a religious phrase placed on a government building in India. Governor Voinovich was inspired to inscribe Ohio's motto on the statehouse after viewing the motto "God's work is government work" on a public building in India. India has a polytheistic Hindu majority and a large Muslim minority as well as substantial Buddhist, Sikh, Jain, and other religious minorities. *ACLU III*, 243 F.3d 289, 292 (6th Cir. 2001).

[128] *See id.* at 296 n.6.

[129] *See* OHIO CONST. pmbl. ("We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.").

[130] *See* BRIAN BURRELL, THE WORDS WE LIVE BY 300–01 (1997).

[131] Minnesota Court Information Office, Minnesota Supreme Court 12, *available at* www.courts.state.mn.us/cio/scourt.doc (last visited Feb. 23, 2003).

Beatitudes," contains an image of Jesus teaching his disciples.[132] The West Virginia Supreme Court includes a quotation from Abraham Lincoln that reads, "Firmness in the right as God gives us to see the right."[133]

In many of these examples, the "God" could be Muslim as easily as it could be Christian or Jewish. These examples also illustrate the United States' longstanding traditions of ceremonial deism and public acceptance of civic piety. The public is accustomed to such generic references to God in official oaths, mottos, and public artwork, and expects its leaders to observe symbolically the holidays celebrated by America's many faiths.[134]

Indeed, any genuinely religious significance of these symbols has long since been replaced by a generic civic meaning that endorses no specific religion.[135] For example, the official memorials for the victims of the September 11 terrorist attacks, though led by various religious leaders, were viewed as civic ceremonies solemnizing a national catastrophe. The Ohio motto's generic reference to "God," as shorthand for faith in general, fits squarely within this constitutional tradition of ceremonial deism and civic piety. For this reason, it is important for courts to attribute to the endorsement test's reasonable observer a general knowledge and understanding of ceremonial deism, rather than cabining that observer's knowledge to any single religion at the expense of history, culture, and tradition.

B. *The Original Panel Majority's Unacceptable "Christian Scholar"*[136]

Significantly, the original panel majority avoided challenging the constitutionality of many forms of ceremonial deism that have survived judicial scrutiny in the past. In fact, the majority implicitly accepted the premise that generic references to religion by

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[132] THE SUPREME COURT OF PENNSYLVANIA 10 (1999) (on file with the Pennsylvania Historical and Museum Commission), *available at* http://www.courts.state.pa.us/Index/Supreme/photogallery9.asp (last visited Feb. 23, 2003).

[133] SUPREME COURT OF APPEALS INFO. SERVS., THE SUPREME COURT OF APPEALS OF WEST VIRGINIA 16 (Michelle T. Mensore ed., 2002), *available at* http://www.state.wv.us/wvsca/chambers.html (last visited Feb. 23, 2003).

[134] Consider, for example, the strong public outcry over the Town of Kensington, Maryland's decision to ban Santa Claus, a generic symbol of the holidays, from its holiday parade due to complaints from two families who said they did not celebrate Christmas. *See Town Meeting*, TOWN KENSINGTON J. (Maryland), Nov. 2001, http://www.tok.org.tokjournal.html. Not surprisingly, that decision was quickly reversed and Santa was allowed to make his traditional appearance.

[135] For example, "God" is a term used loosely in everyday phrases such as "God Bless you" to excuse a sneeze, or "God Forbid," which is a phrase found in the Old Testament.

[136] For another article critiquing the original panel's decision, see Theologos Verginis, Note, ACLU v. Capitol Square Review and Advisory Board*: Is There Salvation for the Establishment Clause? "With God All Things Are Possible"*, 34 AKRON L. REV. 741 (2001).

government, like the national motto, are constitutional.[137] Rather than confront the obvious similarities between the Ohio motto and other established forms of ceremonial deism, the majority manipulated the endorsement test to strike down the motto as an endorsement of Christianity without addressing its status as an expression of ceremonial deism.

In order to strike down the Ohio motto under the endorsement test, the majority first had to conclude that a reasonable observer would view the motto as endorsing Christianity. To reach this result, the majority engineered a "reasonable observer" akin to a "Christian Scholar."[138] This Christian Scholar was not an average reasonable person like Justice Stevens's observer, or even a well-informed observer similar to Justice O'Connor's observer. Rather, this Christian Scholar version of a reasonable observer had a highly specialized and extraordinary knowledge of biblical texts and Christian theology, yet lacked any such knowledge of any other religious faiths or civic traditions. This strange imbalance necessarily dictated the outcome of the endorsement test and condemned the Ohio motto from the beginning.

Employing this "Christian Scholar" to guide the endorsement test was unprecedented and untenable. First, the majority cited no authority for weighting the reasonable observer with concentrated knowledge of Christianity or any other single faith. Even Justice O'Connor's rather well-informed observer was aware of the legal history and civic context of the challenged government action, rather than purporting to be an expert in any single religion to the exclusion of others. The Establishment Clause itself does not differentiate between religions and simply bars the establishment of "religion" generally.[139]

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[137] *See ACLU II*, 210 F.3d 703, 726 (6th Cir. 2000) ("In sum, fairly read and understood, the State of Ohio has adopted a motto which crosses the line from evenhandedness toward all religions, to a preference for Christianity, in the form of Christian text. Thus, it is an endorsement of Christianity by the State of Ohio.").

[138] This observer charged with knowledge about Christianity and the New Testament in particular is deemed a "Christian Scholar" to differentiate it from the concept of a "Christian" observer. Some have argued that a Christian observer would bias the endorsement test against non-Christian religions because a Christian would not perceive an endorsement of its own religion as offensive or unconstitutional. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–15, at 1292–94 (2d ed. 1988) (arguing the reasonable observer should view the challenged conduct from the perspective of a non-adherent because "actions that reasonably offend non-adherents may seem so natural and proper to adherents as to blur into the background noise of society"). By contrast, a Christian Scholar is not necessarily a Christian who is not offended by his own religion, but is an objective scholar who is able to recognize the Christian significance of religious references when others likely would not.

[139] Indeed, many argue persuasively that the Establishment Clause merely forbids the establishment of a national or federal church similar to that of the Church of England. *See, e.g.*, *ACLU III*, 243 F.3d 289, 293 (6th Cir. 2001):

> Whatever else may have been understood to be prohibited with the adoption of the First Amendment's Establishment Clause, it is clear that the principal thrust of the prohibition was

Second, the original panel's "Christian Scholar" approach is inconsistent with the settled constitutionality of ceremonial deism. Although the majority's opinion skirted the issue of ceremonial deism, its methodology directly conflicts with prior rulings upholding legislative prayer, the national motto, and other embodiments of ceremonial deism. Because the original panel's Christian Scholar could trace the Ohio motto to the New Testament, he necessarily viewed the motto as an endorsement of Christianity—the motto's secular and non-Christian meanings notwithstanding. This same observer would also recognize the biblical origin of the national motto, disregard its civic heritage, and find official proclamations such as "In God We Trust" unconstitutional. Nothing in our First Amendment jurisprudence commands this result, however. While the Supreme Court has debated the depth of the reasonable observer's knowledge, no justice has ever suggested that the observer's expertise be concentrated in Christianity or any other religion.

Third, the original panel's use of the "Christian Scholar" was simply unreasonable because that observer was surprisingly well-versed in Christian text and doctrine, and yet was strikingly ignorant of the Ohio motto's antecedents in other literary, religious, and civic traditions. A true theologian would understand that many core Christian principles predate Christianity and are not unique to Christianity. Indeed, the Ohio motto has its roots in a variety of historical non-Christian texts, many of which pre-date Christianity. For example, Homer's *Odyssey*, which predates the New Testament by roughly 800 years, contains the phrase, "with the Gods, all things are possible."[140] Callimachus wrote a similar phrase in the third century B.C., which read, "If thou knowest God, thou knowest that everything is possible for God to do."[141] Nearly 500 years before the birth of Christ, Sophocles also wrote, "When a god works, all is possible."[142] Likewise, the Old Testament includes many similar passages, such as "I know that thou canst do every thing."[143] Finally, the Islamic holy book, al-Qur'an, includes an oft-repeated refrain, "For God Hath power over all things."[144]

Quite simply, a truly reasonable observer with the expertise to recognize the Ohio motto as a biblical quotation would also recognize that "With God All Things Are Possible" is common to diverse religious traditions. Moreover, a truly reasonable observer would recognize a motto's generic reference to God for what it is: an

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to prevent any establishment by the national government of an official religion, including an established church such as that which existed in England at the time the American colonies won their independence from the Crown.

Id.

[140] HOMER, ODYSSEY 367 (A.T. Murray trans., Harvard Univ. Press 1960).

[141] Callimachus, *Fragmenta Incertae, No. 27, quoted in*, BURTON STEVENSON, THE HOME BOOK OF QUOTATIONS 784 (10th ed. 1967).

[142] *ACLU III*, 243 F.3d at 303.

[143] *Job* 42:2 (King James).

[144] *Sura* 2:148.

embodiment of a long tradition of ceremonial deism that cannot be reasonably construed to endorse any single faith. While the well-informed observer would appreciate the Ohio motto's diverse antecedents and civic role, a reasonable, average passerby would casually dismiss the motto as a generic form of ceremonial deism like the national motto. The original panel's Christian Scholar did neither.

Fourth, the Christian Scholar approach inescapably biases the endorsement test against Christianity. Obviously, because the Christian Scholar is more likely to recognize Christian texts or symbols, Christian symbolism is particularly vulnerable to constitutional attack. More troubling, the Christian Scholar tilts the endorsement test against symbols and ideas embraced by Christians and non-Christians alike. Because the Christian Scholar recognizes "Christian" connotations while ignoring other religious and secular meanings, expressions that unite diverse faiths and traditions may be struck down as endorsing Christianity. Ironically, that same observer would also be less likely to recognize actual government endorsement of a single non-Christian religion. In essence, this "Christian Scholar" approach creates an endorsement test that itself endorses non-Christian views over Christianity.

Fifth, the Christian Scholar approach improperly shifts the endorsement test from assessing official use of religious imagery in a civic context to interpreting religious imagery in a specific religious context. Under Supreme Court and Sixth Circuit precedent,[145] the endorsement test assesses government use of religious symbolism in the civic context created by the government rather than any specific religious context from which the symbolism may arguably derive. For example, in *Brooks v City of Oak Ridge*,[146] the Sixth Circuit considered whether a bronze Friendship Bell given by Japan to the City of Oak Ridge, Tennessee unconstitutionally endorsed Buddhism. The court found the bell to be a Buddhist religious symbol. Indeed, the bell's casting ceremony conducted by monks in Japan was intended to impart a "soul" to the bell.[147] Despite the clear Buddhist symbolism, the Sixth Circuit found "the reasonable observer would not understand the Friendship Bell display, in context, to convey the message that the government of Oak Ridge endorses Buddhism," even assuming such an observer was aware of the Buddhist casting ceremony.[148] Instead, the Friendship Bell was found to endorse "peace and friendship with Japan," which was noted on a plaque that accompanied the Friendship Bell.[149] As *Brooks* suggests, a truly reasonable observer evaluating an otherwise religious symbol in a civic context

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[145] *See* County of Allegheny v. ACLU, 492 U.S. 573, 599–600 (1989) (discussing constitutionality of a crèche as it appeared as a display on the grand staircase of a courthouse); Lynch v. Donnelly, 465 U.S. 668, 682 (1984) (viewing crèche display as part of a business district Christmas display); Brooks v. City of Oak Ridge, 222 F.3d 259 (6th Cir. 2000).

[146] 222 F.3d 259 (6th Cir. 2000).

[147] *See id.* at 263.

[148] *Id.* at 266.

[149] *Id.*

created by the state can distinguish the symbol's non-religious meaning in its civic context from other meanings that might arise in explicitly religious contexts.

The Christian Scholar approach, however, mistakenly imports the Christian religious context into the civic context, rather than considering the historical and civic context as described by Justice O'Connor. Because the Christian Scholar recognizes the Christian origins of ideas and images to the exclusion of non-Christian and secular sources, the Christian Scholar necessarily focuses on the biblical meaning of the motto. Yet, what Jesus may or may not have meant two millennia ago is not relevant to the endorsement test today. What is truly relevant is the reasonable observer's perception of the motto in its civic context created by the state of Ohio, a context necessarily drawn from our traditions of ceremonial deism. By charging the reasonable observer with the lopsided expertise of a Christian Scholar, the original panel majority was led to focus on the specifically Christian context of the motto. Consequently, the original panel's opinions striking down the Ohio motto read more like a theological dispute concerning what Jesus meant, rather than a legal question concerning the reasonable observer's perspective.

Finally, the Christian Scholar approach risks discrediting the endorsement test with the bench and the general public. Public reaction to the original panel's decision to strike down the Ohio motto was negative because most people understood the motto to be a generic and acceptable reference to religion, like the national motto and other forms of ceremonial deism. After the original panel struck down the Ohio motto as unconstitutional, the U.S. House of Representatives passed a resolution by a vote of 333 to 27 urging the U.S. Supreme Court to reverse the opinion and rule the Ohio motto constitutional.[150] In fact, the Ohio Poll, sponsored by the University of Cincinnati, found that an overwhelming majority (88 percent) of Ohioans who were aware of the original panel decision disagreed with it.[151] Public opposition to the original panel's ruling was in no way limited to Christians. The Council on American-Islamic Relations issued a press release stating that the Ohio motto does not endorse a single religion and is common to most religions, including Islam.[152] Because Americans value and accept our traditions of civic piety and ceremonial deism, they will distrust freshly created judicial doctrines that threaten these cherished traditions.

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[150] *See* H.R. Res. 494, 106th Cong., 2d Sess., 148 CONG. REC. H2606 (daily ed. May 4, 2000).

[151] *See* Press Release, Institute for Policy Research (Univ. of Cincinnati), Ohioans Offer Opinions on State Motto Controversy (July 16, 2000) (available from the University of Cincinnati, Institute for Policy Research); *see also* Associated Press, *Poll Finds Motto Ruling Unpopular*, CINCINNATI ENQUIRER, July 16, 2000, http://enquirer.com/editions/2000/07/16/loc_poll_finds_motto.html.

[152] *See Muslim Group Defends Ohio's God-Centered Motto*, CATHOLIC WORLD NEWS, *at* www.cwnews.com/browse/2000/05/12870.htm (May 5, 2000).

The en banc majority opinion, by contrast, is more consistent with the traditional use of general religious references and imagery that date back to the founding of this nation, while taking into consideration the dangers of allowing government inappropriately to endorse one religion over another. The en banc majority struck this delicate balance by using a reasonable observer charged with more common sense than biblical expertise. This observer was intelligent enough to view the Ohio motto in the context of government's traditional use of ceremonial deism, but was not given the extraordinary ability to recognize the phrase as a quotation from the New Testament when displayed in its civic, rather than biblical, context. Consequently, the en banc majority's reasonable observer stood in the shoes of citizens who, when viewing the Ohio motto engraved on the walkway to the Ohio statehouse, would not perceive the motto as impermissibly endorsing Christianity. Rather, that observer simply concluded that the phrase was essentially no different than other mottos and government references to religion, which also refer to a seemingly generic "God."

C. *The Growing Confusion in the Federal Courts*

The Sixth Circuit is not the only circuit struggling with proper application of the several Establishment Clause tests created by the Supreme Court. This confusion over which test to apply continues today throughout the federal courts and has led to several highly-contentious cases, including the recent Ninth Circuit case that struck down as unconstitutional the phrase "under God," in the Pledge of Allegiance. Not surprisingly, Congress, the President, and the vast majority of Americans of all faiths were quick to condemn the Ninth Circuit's opinion, particularly in light of the long line of federal cases that either expressly or implicitly upheld the constitutionality of that Pledge.[153]

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[153] Like the Ohio motto case, the U.S. Congress immediately condemned the Ninth Circuit's opinion striking down the phrase "under God" in the Pledge of Allegiance by passing resolutions condemning that judicial opinion. *See* S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 27, 2002) (a resolution expressing support for the Pledge of Allegiance and passed by a vote of 99-0); H.R. Res. 459, 107th Cong., 148 CONG. REC. H4130 (daily ed. June 28, 2002) (expressing the sense of the House of Representatives that *Newdow v. U.S. Congress* was erroneously decided, and for other purposes). Indeed, Congress is even considering various legislation proposing a Constitutional Amendment declaring the phrase "under God" in the Pledge of Allegiance constitutional. *See, e.g.*, H.R.J. Res. 103, 107th Cong., 148 CONG. REC. H4325 (daily ed. June 28, 2002) (proposing an amendment to the Constitution of the United States with respect to the Pledge of Allegiance); H.R.J. Res. 104, 107th Cong., 148 CONG. REC. H4325 (daily ed. June 28, 2002) (proposing an amendment to the Constitution of the United States to protect the Pledge of Allegiance); H.R.J. Res. 108, 107th Cong., 148 CONG. REC. H5790 (daily ed. July 25, 2002 pt. II) (proposing an amendment to the Constitution of the United States to guarantee the right to use and recite the Pledge of Allegiance to the Flag and the national motto).

In *Newdow v. U.S. Congress*,[154] the father of a young girl challenged a policy adopted by the girl's school district that required teachers to lead their students in reciting the Pledge of Allegiance.[155] Although the students were not required to recite the Pledge, the father argued that his daughter was harmed when she was forced to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.' "[156] The Ninth Circuit majority applied the endorsement test to determine the constitutionality of the phrase "under God," in addition to applying other Establishment Clause tests.[157] Although the Ninth Circuit did not conclude that the phrase unconstitutionally endorsed Christianity, it did conclude that the phrase endorsed monotheism and, thus, impermissibly endorsed religion in general.[158] Such a generic reference to a God, the court reasoned, would make atheists in this country uncomfortable and feel like "outsiders, not full members of the political community."[159] Thus, it was found to unconstitutionally endorse religion.

Surprisingly, the Ninth Circuit failed to discuss the perspective of the reasonable observer. Rather, the Ninth Circuit implicitly used an observer who was, in effect, an atheist viewing the pledge. To an atheist, the reference to God would be a reference to divine power that did not, in their mind, exist. Consequently, to an atheist who is highly sensitive to any official reference to the concept of religion in general, whether Christian or Satanic, would be offensive.

Once again, the court confused the application of the endorsement test by failing to attribute to the reasonable observer any knowledge or understanding of ceremonial deism and its historical role in American political discourse. Consequently, the Ninth Circuit's reasonable observer would find unconstitutional all forms of ceremonial deism, from the God referred to on American coins to the "Divine power" and "Creator" referred to in the Declaration of Independence. To avoid such an unthinkable outcome where judges, who themselves invoke the name of God when swearing an oath to uphold the Constitution of the United States, would seek to rewrite America's history and traditions once thought to be unassailable. This God is the same God used by the Founding Fathers to justify the unalienable right of Americans to the pursuit of "life, liberty and the pursuit of happiness," and the same Almighty used to put an end to slavery.

Like the Ohio motto case, the Ninth Circuit's divided panel opinion and subsequent actions evinces the growing confusion in the federal courts over how to apply the endorsement test by failing to attribute to the reasonable observer a basic

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[154] 292 F.3d 597 (9th Cir. 2002).

[155] *Id.* at 600.

[156] *Id.* at 601.

[157] *See id.* at 605–11.

[158] *Id.* at 609.

[159] *Id.* at 608 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

knowledge and understanding of ceremonial deism as a protected, government tradition that is far from the unconstitutional establishment of religion.[160] For this reason, the Supreme Court needs to step forward to define more clearly the endorsement test's reasonable observer before the federal courts implicitly overrule the Supreme Court's decision in *Marsh* and destroy the history and tradition that helped form, and now sustain this nation.

V. CONCLUSION

The Ohio motto case should have been a simple case if for no other reason than the fact that the Sixth Circuit had previously upheld the constitutionality of a nearly identical phrase that was part of a university commencement prayer. Like the Ohio motto, the commencement prayer in *Chaudhuri v. State of Tennessee*,[161] included the statement, "we're so grateful, O Heavenly Father, that you've allowed us to come to this occasion, so that we might be able to understand *in God all things are possible*."[162] The Sixth Circuit found that this graduation prayer, "lacking any explicit or implicit reference to Jesus Christ," was not "overtly Christian."[163] Instead, the prayer was "no more than a 'tolerable acknowledgment of beliefs widely held among the people of this country.' "[164] If that prayer was constitutional, and the national motto is constitutional, then it is difficult to see how the Ohio motto could be unconstitutional in the eyes of an observer who is aware of these American traditions. Nevertheless, the original panel majority found otherwise, using a reasonable observer who had no such knowledge of these American traditions, while possessing an extraordinarily rare understanding of Christian texts and doctrine.

The Supreme Court has acknowledged the constitutionality of ceremonial deism; through the endorsement test, the Supreme Court has also found that government actions that a reasonable observer would view as endorsing one faith over others are unconstitutional. To reconcile these results, the endorsement test must be applied in a manner consistent with the constitutionality of ceremonial deism. The endorsement

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[160] Unlike the Ohio motto case in the Sixth Circuit, the Pledge of Allegiance case in the Ninth Circuit will not be reviewed en banc. Newdow v. U.S. Congress, 321 F.3d 772 (9th Cir. 2003) (denying rehearing and rehearing en banc).

However, the Ninth Circuit has ordered a 90-day stay, permitting students in the circuit to continue to say the pledge in their schools. Henry Weinstein, *Ban on Reference to God Delayed; Stay Gives the High Court Time to Decide Whether to Review the Pledge of Allegiance Case*, L.A. TIMES, Mar. 5, 2003, pt. 2, at 1, LEXIS, News Library, News Group File—Major Newspapers; Edward E. Plowman, *Allegiance to the Constitution*, WORLD MAG., Mar. 15, 2003, LEXIS, News Library, News Group File—Magazine Stories, Combined.

[161] 103 F.3d 232 (6th Cir. 1997).

[162] *Id.* at 234 (emphasis added).

[163] *Id.* at 236.

[164] *Id.* at 237 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

test hinges on whether the reasonable observer would perceive a government reference to religion as an impermissible endorsement of one religion over others. This perception, in turn, depends upon the knowledge attributed to the reasonable observer. Consequently, the "reasonable observer" must be presumed, at the very least, to appreciate the American tradition of ceremonial deism and civic piety. If the reasonable observer perceives government references to God as endorsements of religion rather than as forms of ceremonial deism, then the national motto, the images on our currency and monuments, and other cherished traditions will be struck down as unconstitutional. Among those traditions will be the very documents that created this country, including the Declaration of Independence and various forms of ceremonial deism that were established and encouraged by the Framers of the Constitution themselves.

Instead, courts must attribute to the reasonable observer the same basic knowledge of ceremonial deism of which most grade school children are aware, such as the traditional acceptance of the phrase "under God" in the Pledge of Allegiance and government mottos that refer to a "God." This observer would be better able to reconcile the endorsement test's goal of preventing government endorsement of religion with the protection of ceremonial deism traditions like those discussed in *Marsh*. In this way, the two tests would work in tandem, rather than being viewed as mutually exclusive and often contradictory analyses.