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## MAKING THE ESTABLISHMENT CLAUSE IN REASONABLE OBSERVER CASES MORE REASONABLE

Tension between religious freedom and government policy is not a recent development in the United States, nor is it unique to the twentieth century.<sup>1</sup> The Framers of the United States Constitution drafted within the First Amendment the complementary Establishment and Free Exercise Clauses<sup>2</sup> in an attempt to minimize this tension and secure individual religious liberty.<sup>3</sup> While other clauses address relations between church and state,<sup>4</sup> the Establishment and Free Exercise Clauses have fueled the most debate.<sup>5</sup> Arguably, these two clauses, collectively known as “the reli-

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<sup>1</sup> See Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 911-17 (1987). The disestablishment of churches in the states came after much highly charged political debate. *Id.* at 911-14. Not until 1833, when Massachusetts disestablished its state church, did the states’ “constitutionally or statutorily mandated establishment of religion end[ ] in America.” *Id.* at 911.

<sup>2</sup> U.S. CONST. amend. I. The First Amendment provides, in pertinent part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” *Id.*

<sup>3</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (De Capo Press ed., 1970) (stating object of amendment was to eliminate means of religious persecution); Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN’S L. REV. 245, 245 (1991) (asserting intent of two clauses as whole was to protect religious freedom); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158-60 (2d ed. 1988) (discussing three schools of thought influenced drafters: desire to protect church from state; desire to protect state from church; and desire to protect each from other). See generally MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978) (analyzing of debates in first Congress as evidence of intent of framers).

<sup>4</sup> See, e.g., U.S. CONST. art. VI. This Article provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” *Id.*

<sup>5</sup> See James E. Wood, Jr., *Introduction to THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS* 1, 3 (James E. Wood, Jr. ed., 1980); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986). “In 1789, then, when Madison was called on to draft the religious freedom provisions of the first amendment . . . the most troublesome problem of establishment, the test oath, already had been taken care of by article VI of the Constitution.” *Id.* at 853.

gion clauses,"<sup>6</sup> have provided "as complex a connection as exists in Constitutional law."<sup>7</sup>

The debate concerning the Establishment Clause initially erupted after *Everson v. Board of Education*,<sup>8</sup> in which the Supreme Court upheld a New Jersey statute providing reimbursement to parents for their children's transportation expenses to nonpublic schools.<sup>9</sup> Since *Everson*, there have been numerous cases,<sup>10</sup> which have frequently divided courts<sup>11</sup> and generated an

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<sup>6</sup> See Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1609 (1987).

<sup>7</sup> Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990). Brownstein attributes the difficulty in defining the relationship, in part, to the dual commands of the First Amendment, and in part, to the central role which religion often takes in both societal and individual experiences. *Id.*; see TRIBE, *supra* note 3, § 14-2, at 1155-57 (noting that serious tension has arisen between two clauses); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1157 (4th ed. 1991) ("There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice.").

<sup>8</sup> 330 U.S. 1 (1947). See James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 688 (1990) (noting that Establishment Clause has been widely scrutinized since 1947). Many scholars consider *Everson* to be the first case of recent import to extensively analyze the meaning of the Establishment Clause. ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* xiii (1982). Before *Everson*, only two major Supreme Court cases involved interpretation of the clause. *Id.* at 103. One was *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which the Court upheld federal monetary assistance to a Catholic Church-operated hospital for building construction and for the care of indigent patients. *Id.* In the second case, *Quick Bear v. Leupp*, 210 U.S. 50, 65 (1908), the Court again upheld the federal appropriation of money used for the Catholic school tuition of Sioux Indians. *Id.* at 104.

<sup>9</sup> *Fuerson*, 330 U.S. at 1. A portion of the allocated funds were used to reimburse parents whose children attended Catholic schools. *Id.* In holding that the statute did not violate the Establishment Clause of the First Amendment, the Court nevertheless adopted a separationist's view concerning church and state relations. *Id.* at 18. The Court stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.*

<sup>10</sup> See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (ruling that equal access policy allowing religious clubs in public schools did not violate Establishment Clause); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding tuition reimbursement program for parents of children attending nonpublic schools unconstitutional); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (declaring Bible reading in classrooms unconstitutional); *Zorach v. Clauson*, 343 U.S. 306 (1952) (finding New York law which permitted absence from school for religious instruction constitutionally valid).

<sup>11</sup> See Lewis & Vild, *supra* note 8, at 687-88 (observing that two recent Supreme Court cases involving Establishment Clause, *Texas Monthly, Inc. v. Bullock*, 489 U.S.

enormous amount of scholarly literature.<sup>12</sup> Ultimately, most Establishment Clause cases can be reduced to one fundamental issue—whether the First Amendment requires an impregnable “wall of separation between church and State,”<sup>13</sup> or if it allows for some interaction or accommodation between the two.<sup>14</sup>

Although this debate continues today, this Note adheres primarily to the principles underlying the accommodation view, without engaging in the heavy burden of discussing the validity or accuracy of either theory. Such an analysis has already been undertaken by many Supreme Court Justices<sup>15</sup> and constitutional scholars.<sup>16</sup> Instead, this Note compares three recent circuit court decisions and their application of current Supreme Court Establishment Clause jurisprudence: *Americans United for Separation of Church and State v. City of Grand Rapids*,<sup>17</sup> *Kreisner v. City of San Diego*,<sup>18</sup> and *Chabad-Lubavitch of Georgia v. Miller*.<sup>19</sup>

1 (1989), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), alone generated nine opinions).

<sup>12</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1413-14 (1990) (“[S]cores of law review articles and a number of scholarly books have been devoted to the historical background of the establishment clause . . .”).

<sup>13</sup> 16 THE WRITINGS OF THOMAS JEFFERSON 281 (1905). Jefferson first penned this now famous phrase concerning the religious clauses in his letter to the Danbury Connecticut Baptist Association in 1802. Compare CORD, *supra* note 8, at 114-16 (providing full passage and accommodationist explanation of Jefferson’s views) with LEO PFEFFER, CHURCH, STATE AND FREEDOM 133-35 (1967) (separationist’s view of letter).

<sup>14</sup> Raymond W. Mitchell, Comment, *A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause*, 23 LOY. U. CHI. L.J. 867, 869 (1992) (“This debate has generally broken down into two opposing factions: separationists and accommodationists.”).

<sup>15</sup> See, e.g., *Everson*, 330 U.S. at 13-16, 33-43. The “wall of separation” theory was most lucidly espoused in both Justice Black’s majority opinion in *Everson*, *id.* at 13-16, and later in Justice Rutledge’s dissent, *id.* at 33-43. By contrast, in a dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985), Justice Rehnquist proposed the opposite view of accommodation, requiring less separation between the two spheres. *Id.*

<sup>16</sup> See, e.g., STORY, *supra* note 3, at 722. Joseph Story, who served as a Supreme Court Justice from 1845 to 1881, and as a professor at Harvard Law School from 1829 to 1881, is among the foremost scholars who supported the accommodationist view. *Id.* In addition, twentieth century legal scholars Edwin Corwin and Professor Robert L. Cord have also endorsed this view. See CORD, *supra* note 8, at 17. *But see* PFEFFER, *supra* note 13, at 149-50. Pfeffer champions the view that the purpose of the Clause was to “erect a wall of separation between the church and State.” *Id.* See generally LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986) (supporting separationist view).

<sup>17</sup> 980 F.2d 1538 (6th Cir. 1992) (en banc).

<sup>18</sup> 988 F.2d 883 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994).

<sup>19</sup> 976 F.2d 1386 (11th Cir. 1992).

Although the courts were correct in applying the test articulated by the Supreme Court in *Lemon v. Kurtzman*,<sup>20</sup> each applied the test differently, resulting in seemingly incompatible holdings.<sup>21</sup>

Part I of this Note includes a brief description, including historical justification, of the two primary interpretations of the Establishment Clause: separation and accommodation. Part II reviews the current Supreme Court jurisprudence as well as the modern approach to Establishment Clause cases. Part III examines the *Chabad-Lubavitch*, *Kreisner*, and *Grand Rapids* decisions, discussing and comparing the courts' analyses. Finally, Part IV proposes a novel definition of the "reasonable observer" standard, borrowing language from the *Kreisner* opinion, that would be both consistent with the purpose of the Establishment Clause and would promote greater uniformity for future decisions.

## I. INTERPRETATION OF THE ESTABLISHMENT CLAUSE

Debate over the appropriate interpretation of the Establishment Clause is generally led by two opposing factions: separationists and accommodationists.<sup>22</sup> Separationists assert that the intention of the religion clauses is to keep "the states' hands out of religion . . . [and] religion's hands off the state";<sup>23</sup> they argue that a strict "wall of separation between church and state"<sup>24</sup> is necessary. Separationists believe that within this type of framework

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<sup>20</sup> 403 U.S. 602 (1971). For a definition and analysis of the test formulated in this case, see *infra* notes 46-68 and accompanying text.

<sup>21</sup> Compare *Grand Rapids*, 980 F.2d at 1539 (holding menorah temporarily erected on plaza used as public forum not constitutional violation) and *Kreisner*, 988 F.2d at 885 (finding Christmas display in city park not violative of Establishment Clause) with *Chabad-Lubavitch*, 976 F.2d at 1387 (holding privately-owned menorah in state capitol building, previously used for other types of displays, unconstitutional).

<sup>22</sup> See Mitchell, *supra* note 14, at 869.

<sup>23</sup> *Everson*, 330 U.S. at 26-27 (Jackson, J., dissenting).

<sup>24</sup> *Everson*, 330 U.S. at 15-16. In this case, the Court first espoused the "wall of separation" theory:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force . . . a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for . . . professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax . . . can be levied to support any religious activities . . . Neither a state nor the Federal Government can . . . participate in the affairs of any religious organizations . . . and vice versa. In the words of Jefferson, the clause . . . was intended to erect "a wall of separation between Church and State."

the freedom of religion and freedom of conscience, which are "too precious to be either proscribed or prescribed by the State,"<sup>25</sup> can best be protected from the intrusion of government.<sup>26</sup> Furthermore, proponents of this view suggest that the desire to protect the *state* from religious interference militates against any interaction between the two.<sup>27</sup>

By contrast, accommodationists argue that faithful interpretation<sup>28</sup> of the Establishment Clause recognizes the legitimacy of a relationship between religion and government.<sup>29</sup> They contend that the Framers merely sought to prevent the establishment of an official church or religion.<sup>30</sup> Moreover, scholars of this ap-

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*Id.* See generally SAUL K. PADOVER, *THE COMPLETE JEFFERSON* 518-19 (1943) (reprinting now famous letter Jefferson sent to Danbury Connecticut Baptist Association on January 1, 1802, wherein he first penned metaphor).

<sup>25</sup> *Lee v. Weisman*, 112 S. Ct. 2649, 2656 (1992). In holding that the benediction given by a clergyman at a high school graduation violated the Establishment Clause, Justice Kennedy, writing for the majority, embraced a separationist's viewpoint. *Id.* at 2661. This opinion is in sharp contrast to Kennedy's strongly pro-accommodation dissent just three years earlier in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting).

<sup>26</sup> See *TRIBE*, *supra* note 3, § 14-3, at 816. In analyzing historical views toward government and religion, Tribe notes Roger Williams' fear that "worldly corruption . . . might consume the churches if sturdy fences against the wilderness are not maintained." *Id.* (quoting MARK D. HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965)); cf. *Engel v. Vitale*, 370 U.S. 421, 432 (1962) (striking down nondenominational prayer mandated in New York schools, and reasoning that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (citation omitted)).

<sup>27</sup> *Everson*, 330 U.S. at 27 (stating that society benefits when separated from "bitter religious controversy" and safeguarded from any religion "getting control of public policy or the public purse").

<sup>28</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 696-97 (1976). Chief Justice Rehnquist now argues that the judiciary, as appointed and not elected officials, must faithfully apply the Constitution as the Framers intended, and allow the other branches of government to make changes in the Constitution to meet the needs of society and to reflect new values. *Id.*

<sup>29</sup> See *STORY*, *supra* note 3, § 1865, at 722. "Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice." *Id.*; see also Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 *YALE L.J.* 1237, 1255 (1986) (focusing on traditional and cultural aspects of "civil religion," author argues that courts can find legitimate roles for religion in society without crossing Establishment Clause); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 *WM. & MARY L. REV.* 933, 940 (1986) (remarking that absent governmental coercion towards one religion, state has "legitimate pursuits" which often "incidentally assist[ ] the various religions").

<sup>30</sup> *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting). This dissent reflects a traditional accommodationist view that the Establishment Clause was

proach have sharply criticized separationism as "a pretext for governmental censorship of religious speech"<sup>31</sup> and "active hostility to the religious."<sup>32</sup>

Even within these two schools, however, there is some disagreement as to the precise limits of desirable accommodation or separation. Scholarly literature reflects viewpoints ranging from absolute separation to affirmative government encouragement of religion.<sup>33</sup> There seems to be little consensus on the exact constitutional threshold.

Interestingly, proponents in the opposing camps both support their positions by citing the Framers' original intent<sup>34</sup> and by noting the history surrounding the adoption of the Establishment

written to prohibit only "the establishment of a national church." *Id.*; see CORD, *supra* note 8, at 15. In a similar vein, Cord argues that the Clause protects "against invasion solely by the national government . . . allow[ing] the states, unimpeded, to deal with religious establishments as they [see] fit." *Id.*

<sup>31</sup> Mitchell, *supra* note 14, at 883 (noting Justice Brennan's warning of future repression of religion under guise of Establishment Clause jurisprudence in *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring)).

<sup>32</sup> *Wallace*, 472 U.S. at 86 (Brennan, J., dissenting) (observing that commitment to secular or neutral state can lead to "active hostility to the religious" (quoting Judge Goldberg concurring in *Abington School Dist. v. Schempp*, 374 U.S. 203, 206 (1963)); see *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

An example of judicial hostility to religion can be found in Justice Douglas's concurring opinion in *Lemon*, 403 U.S. at 602 n.20. "The whole [Catholic school] education . . . is filled with propaganda . . . Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics." *Id.* (citation omitted).

<sup>33</sup> Compare Cord & Ball, *supra* note 1, at 915 (calling for formal or strict separation in order to protect individual religious liberty) with Bruce Fein, *On Reading the Constitution*, 90 MICH. L. REV. 1225, 1235 (1992) (suggesting religion clauses permit government to favor religion over nonreligion).

<sup>34</sup> See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 589-90 (1989) (positing that "[p]recisely because of the religious diversity," Founders wrote First Amendment to protect individual consciences regarding religion); Kurland, *supra* note 5, at 836-57. Responding to the religious intolerance experienced in parts of New England, other colonies gradually grew more accepting of minority denominations of Christianity. *Id.* This separationist sentiment "culminated in the right to religious freedom embodied in the first amendment." *Id.*

In his dissent in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), in which the Court invalidated a clergy benediction, Justice Scalia argued that original intent encompassed much accommodation of religion and warned that the Constitution "cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." *Id.* at 2685 (Scalia, J., dissenting); CORD, *supra* note 8, at 5 (stating that "words and actions of the initial framers" do not support separationist theory, but rather original intent to prohibit establishment of state church).

Clause.<sup>35</sup> Scholars from both sides also acknowledge certain incongruities in the evidence; for example, while both theorists claim that Madison<sup>36</sup> and Jefferson<sup>37</sup> supported their view, neither side can fully explain the apparent inconsistencies between the statesmen's political writings and their public lives.<sup>38</sup>

In further support of their view, accommodationists point to such evidence as the wording of the Clause,<sup>39</sup> as well as the long history of church-state relations in this nation.<sup>40</sup> Separationists, however, insist that both the "current fundamental operating

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<sup>35</sup> Compare Kurland, *supra* note 5, at 845-46 (arguing that Constitution written in response to issues such as Established Church, which many colonists had experienced in many new colonies as well as in England) with Storry, *supra* note 3, § 1868 at 726. At the time of the adoption of the First Amendment, "the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state." *Id.*

<sup>36</sup> Compare Tribe, *supra* note 3, § 4-3, at 1159 (asserting that Madison advocated separation of spheres to protect public from "a corrupt[ ] coalition" of government and religion and to protect religion from unwarranted trespass) with Donald L. Drake, CHURCH-STATE CONSTITUTIONAL ISSUES 52 (1991) (noting that Madison, contrary to being separationist, adopted resolution in favor of day of prayer and thanksgiving immediately after ratifying Establishment Clause).

<sup>37</sup> See Wood, *supra* note 5, at 105. In addition to Jefferson's letter to the Danbury Baptists, support for the view that he was a strict separationist can be gleaned from his participation in the enactment of the "Act for Establishing Religious Freedom" in Virginia. *Id.* at 10. This act became the model statute for other states wanting to change the close relationship between church and state. *Id.* But see Cord, *supra* note 8, at 115-16. Arguing that Jefferson could not have been a separationist, Cord notes the treaty Jefferson made with the Kaskaskia Indians just one year after his Danbury letter. *Id.* The treaty specifically provided for financial support to build a Catholic church and to pay for a priest. *Id.*

<sup>38</sup> See Cord, *supra* note 8, at 17-47.

<sup>39</sup> See Cord, *supra* note 8, at 11-12. Accommodationists contend that had the Framers intended to prohibit all government involvement with religion, they would have used the words "the establishment" rather than "an establishment." *Id.* (quoting Michael T. Malbin, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978)). This wording could only mean that a prohibition against government preference of one religion over another, not actions which deal with religions nonpreferentially, was at the heart of the Clause. *Id.*

<sup>40</sup> See, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2678-81 (1992) (Scalia, J., dissenting) (citing traditions of prayers at public ceremonies, presidential oaths sworn on Bible, and Supreme Court opening invocation calling for providential guidance); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting) ("Any approach less sensitive to our heritage [than government accommodation] would border on latent hostility toward religion."); Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (noting that in same week that Bill of Rights was submitted to states for ratification, Congress passed legislation providing for paid chaplains for both houses).



principles of . . . society"<sup>41</sup> and much of the recent case law support their position.<sup>42</sup> Obviously, this debate is far from over.

## II. CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE

Although current Establishment Clause jurisprudence can be traced back to *Everson v. Board of Education*,<sup>43</sup> the Court did not formalize a consolidated approval to the Establishment Clause cases until 1971 in *Lemon v. Kurtzman*.<sup>44</sup> In holding unconstitutional two state statutes which provided for monetary assistance to nonpublic schools,<sup>45</sup> the *Lemon* Court summarized the "cumulative criteria developed by the Court over many years"<sup>46</sup> in order for a state action to withstand a challenge under the Establishment Clause: (1) the statute must have a secular purpose, (2) its primary effect must neither advance nor inhibit religion, and (3) it must not create excessive entanglement between government and religion.<sup>47</sup>

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<sup>41</sup> John F. Wilson, *Original Intent and the Quest for Comparable Consensus, in THE FIRST FREEDOM: RELIGION & THE BILL OF RIGHTS*, *supra* note 5, at 113, 129. The Clauses, if they are to have meaning today, must reflect changes in society since the time of the drafting. *Id.* Thus, the political culture today is a valid basis for the "ideal of religion as independent of government." *Id.* at 131.

<sup>42</sup> See *Lee*, 112 S. Ct. at 2649 (prohibiting "non-sectarian" prayers by clergy at school graduation); *Abington School Dist. v. Schempp*, 374 U.S. 203, 219 (1963) (striking down statute requiring Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (holding nondenominational prayer in public schools unconstitutional). *But see Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding Nebraska Legislature's practice of opening sessions with prayer); *Lynch*, 465 U.S. at 668 (upholding municipal policy of creche display at Christmas).

<sup>43</sup> 330 U.S. 1 (1947). Since this decision, there has been much debate concerning the development of contemporary Supreme Court doctrine in the area. See Note, *supra* note 6, at 1609.

<sup>44</sup> 403 U.S. 602 (1971); see Note, *supra* note 6, at 1644. Since 1971, "establishment clause analysis has been governed by the tripartite test in *Lemon v. Kurtzman*." *Id.*

<sup>45</sup> *Lemon*, 403 U.S. at 606-07. The Court struck down a Rhode Island statute which provided additional salary support to teachers of secular subjects in private schools whose "average per-student expenditure on secular education" was below that of the public school. *Id.* In practice, the only teachers to apply for the benefits were employed in Catholic schools. *Id.* at 608. The Court also struck down a Pennsylvania statute which provided for the reimbursement of "secular educational services" in nonpublic schools, including teachers' salaries and textbooks used for secular subjects. *Id.* at 609.

<sup>46</sup> *Id.* at 612.

<sup>47</sup> *Id.* at 612-13. This test would effectively safeguard against "three main [Establishment Clause] evils . . . 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

The test has been the subject of much criticism since the Supreme Court enunciated in it *Lemon*.<sup>48</sup> Foremost among the censure is the allegation that the test “has no . . . grounding in the history of the First Amendment,” but rather is a creation of later judicial musing.<sup>49</sup> The test has also been criticized for its lack of uniform application over the past twenty-two years.<sup>50</sup> Despite its continued use of *Lemon*, the Court has never confined itself to *Lemon* as the rigid rule of universal application in Establishment Clause cases.<sup>51</sup> Finally, both accommodationists and separationists criticize the apparent inconsistencies in decisions that apply the test.<sup>52</sup>

Nevertheless, the *Lemon* standard remains the primary test for the Establishment Clause cases.<sup>53</sup> Within the last decade, it

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<sup>48</sup> See *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting) (stating that *Lemon* test deserves criticism it has generated from members of Court); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting) (“I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating [it] . . . Persuasive criticism of *Lemon* has emerged.”); see also Gene R. Nichol, *Religion and the State*, 27 WM. & MARY L. REV. 833, 835 (1986) (observing that *Lemon* test is “on a collision course with itself”); Note, *supra* note 6, at 1644 (stating test provokes much criticism and dissatisfaction from both sides of debate, in both academia and judiciary).

<sup>49</sup> *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting); see *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (“[T]he first prong of *Lemon* is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case.”).

<sup>50</sup> See *Wallace*, 472 U.S. at 68 (O’Connor, J., concurring) (noting that application of test has proven problematic and that in *Marsh v. Chambers*, 463 U.S. 783 (1983), Court failed to apply test at all); *Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting) (“[T]he interment of [*Lemon*] may be the one happy byproduct of the Court’s otherwise lamentable decision.”).

<sup>51</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting Court’s repeated unwillingness “to be confined to any single test or criterion”); *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., dissenting) (terming *Lemon* “helpful signpost” or “guideline” rather than “comprehensive test”); see also William P. Marshall, “*We Know It When We See It*: The Supreme Court and Establishment”, 59 S. CAL. L. REV. 495, 496 (1986) (stating that role of *Lemon* test has been unclear). Attitudes of the Court towards the test have ranged from unnecessary, to helpful as a guideline, to essential in analysis. *Id.* at 497.

<sup>52</sup> See Nichol, *supra* note 48, at 834. Nichol comments on seemingly arbitrary outcomes of cases including, *inter alia*, the affirmance of state aid for a blind man’s study for the ministry in *Witters v. Washington Dep’t of Servs. for the Blind*, 106 S. Ct. 748 (1986), and the invalidation of a school system’s moment of silence for meditation or voluntary prayer in *Wallace v. Jaffree*, 472 U.S. 38 (1985). *Id.*; see Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1112 (1989) (noting that even with fine-tuning of test, opponents still claim “bizarre results” are produced).

<sup>53</sup> See, e.g., *Lee*, 112 S. Ct. at 2655 (refusing to reconsider constitutional framework provided in *Lemon*); *Lynch*, 465 U.S. at 678 (applying test yet refusing to bind

has been subjected to some revision, however, primarily at the hands of Justice O'Connor.<sup>54</sup> The first modification appeared in 1984 in *Lynch v. Donnelly*.<sup>55</sup> The *Lynch* Court held municipal ownership and display of a creche in a privately owned park to be constitutional.<sup>56</sup> In a concurring opinion, O'Connor suggested a clarification of the Court's Establishment Clause jurisprudence.<sup>57</sup> Focusing on the second prong of the *Lemon* test, that the statute's primary effect neither advance nor inhibit religion, O'Connor proposed that the Court reframe the issue to question whether the state action constituted endorsement or disapproval of religion.<sup>58</sup> Specifically, she stated that government actions should be found as endorsements if they had the effect of making "religion relevant, in reality or public perception, to [a person's] status in the political community."<sup>59</sup>

Justice O'Connor, again in a concurrence, built on the "endorsement" test in *Wallace v. Jaffree*.<sup>60</sup> The Court, in applying *Lemon*, struck down an Alabama statute which had instituted, in public schools, a period of silence to be used "for meditation or voluntary prayer."<sup>61</sup> The crucial twist O'Connor added to the test was the application of an "objective observer" test to measure the effects produced by a state action.<sup>62</sup> O'Connor suggested questioning "whether an objective observer acquainted with the text, legis-

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future courts to its use); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (holding that student use of state university classrooms for religious groups constitutional under *Lemon*).

<sup>54</sup> See, e.g., *Lynch*, 465 U.S. at 668; *Wallace*, 472 U.S. at 38; see also Note, *supra* note 6, at 1647-48 (observing O'Connor's reformulation of *Lemon* as better to "achieve the establishment's core purpose of prohibiting government 'from making adherence to a religion relevant in any way to a person's standing in the political community'" (quoting *Lynch*, 465 U.S. at 687) (O'Connor, J., concurring)); *infra* notes 55-63 and accompanying text (detailing O'Connor's suggested revisions). See generally Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 448-55 (1985) (providing overview of O'Connor's work on Court—particularly principle of liberal neutrality used in religion clause cases).

<sup>55</sup> 465 U.S. 668 (1984).

<sup>56</sup> *Id.* at 687 (O'Connor, J., concurring).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 690 (O'Connor, J., concurring).

<sup>59</sup> *Id.* at 692 (O'Connor, J., concurring).

<sup>60</sup> 472 U.S. 38, 68-74 (1985) (O'Connor, J., concurring).

<sup>61</sup> *Id.* at 40. Another Alabama statute which called for a moment of silence "for meditation" alone was previously found constitutional by the district court, and this holding was not questioned in the appeal before the Supreme Court. *Id.* at 41.

<sup>62</sup> *Id.* at 76 (O'Connor, J., concurring).

lative history and implementation of the statute, would perceive it as a state endorsement of prayer."<sup>63</sup>

In subsequent cases, the Supreme Court adopted O'Connor's guidelines concerning both endorsement and the objective observer,<sup>64</sup> which until then had only been found in concurring opinions. Nevertheless, three recent circuit court cases involving religious holiday displays illustrate the need for further clarification of the test.<sup>65</sup>

### III. CIRCUIT COURTS' TREATMENT OF RELIGIOUS DISPLAYS

One area of particular contention within the Establishment Clause debate has been the issue of government involvement with religious displays at holidays.<sup>66</sup> The Supreme Court has visited this question at least two times in the past ten years alone.<sup>67</sup> Despite the Court's recent attention, however, the circuits continue to use conflicting standards of a "reasonable observer" to determine violations of the Establishment Clause.<sup>68</sup>

#### A. *The Eleventh Circuit*

In *Chabad-Lubavitch of Georgia v. Miller*, the Eleventh Circuit affirmed the lower court's holding that the display of a fifteen-

<sup>63</sup> *Id.* (O'Connor, J., concurring).

<sup>64</sup> *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-594 (1989); *Board of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990).

<sup>65</sup> *See Chabad-Lubavitch*, 976 F.2d at 1395 (defining objective observer as unaware of forum's previous activity); *Kreisner*, 988 F.2d at 892 (noting that "hypothetical observer . . . is familiar with history of the government practice at issue"); *Grand Rapids*, 980 F.2d at 1549 (holding that "reasonable observer knows that other speakers have used the Plaza before, and will do so again"); *see also* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 175 (1987) ("Since this concept of the absence of government endorsement has only been put forward in a handful of separate opinions by Justice O'Connor," the theory is still "largely undeveloped."); *infra* notes 112-16 and accompanying text (illustrating problems with current jurisprudence and need for uniform application among courts).

<sup>66</sup> *See infra* note 67 (listing recent Supreme Court cases involving such displays).

<sup>67</sup> *See, e.g., Lynch*, 465 U.S. at 668 (creche owned and displayed by city in private park found constitutional); *County of Allegheny*, 492 U.S. at 621 (ruling on two holiday displays, with different results). In *County of Allegheny*, a creche donated to the county courthouse was placed on the courthouse's Grand Staircase, unaccompanied by other holiday displays. *Id.* at 579-81. The second display, a privately owned 18-foot menorah, was placed next to a 45-foot Christmas tree at the entrance to the City-County Building. *Id.* at 587. The Court, for various reasons, found the creche, but not the menorah and tree to be an unconstitutional display. *Id.* at 621.

<sup>68</sup> *See infra* notes 69-113 and accompanying text (detailing analysis and various standards used to determine same issue in each circuit).

foot menorah in the rotunda of the state capitol violated the Establishment Clause.<sup>69</sup> Chabad-Lubavitch, a Hasidic Jewish organization,<sup>70</sup> owned and maintained the menorah erected in the display.<sup>71</sup> In the previous year, Chabad had been granted permission to place the menorah on the plaza in front of the capitol.<sup>72</sup> Chabad had posted a sign stating "HAPPY CHANUKAH from CHABAD OF GEORGIA" next to the display, and on each night of Chanukah conducted a lighting ceremony.<sup>73</sup> Due to a policy change enacted by the building authority and upheld by the court,<sup>74</sup> Chabad was forced to move the menorah inside the state capitol building the following year.<sup>75</sup> Although the rotunda had been used by numerous groups in the past as a forum for different displays and press conferences,<sup>76</sup> Chabad-Lubavitch was denied permission by the state Attorney General who believed the display to be "an impermissible appearance of state sponsorship."<sup>77</sup> Both the district court and the Eleventh Circuit agreed with this finding.<sup>78</sup>

The court, finding the rotunda to be a limited public forum,<sup>79</sup> stated that only a compelling state interest could sustain the

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<sup>69</sup> *Chabad-Lubavitch*, 976 F.2d at 1395.

<sup>70</sup> *Id.* at 1387. Chabad-Lubavitch is an organization "dedicated to reawakening and educating other Jews and the public on the Jewish faith." *Id.*

<sup>71</sup> *Id.* at 1387-88.

<sup>72</sup> *Id.* at 1387.

<sup>73</sup> *Id.*

<sup>74</sup> *Chabad-Lubavitch*, 976 F.2d at 1388-89. Content-neutral policies, prohibiting speech based on "reasonable time, place and manner" restrictions are constitutional. *Id.* at 1388. The policy enacted by the Georgia Building and Grounds Authority prohibited the unattended display on the grounds, but left the Rotunda of the State Capitol available for such displays. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1390. Over the preceding nine years, the state had never denied access to any group, allowing the display of an eighteen-foot Indian teepee, a Holocaust Commemoration, and press conferences of different political action groups. *Id.* "[H]istorical, educational and cultural events, and many others have been permitted by the State in conformity with a content-neutral, equal access policy and . . . the State has allowed access to the Rotunda on a first-come, first-serve basis to all interested parties." *Id.*

<sup>77</sup> *Id.* at 1388.

<sup>78</sup> *Id.* at 1387.

<sup>79</sup> *Chabad-Lubavitch*, 976 F.2d at 1395. Based on the nature of the property at the heart of government, and the state's open policy concerning its use as a forum for free expression, the court concluded that the rotunda was not a traditional public forum, but rather a limited one. *Id.*

state's decision to deny access to Chabad.<sup>80</sup> The desire to avoid a violation of the Establishment Clause was found to be a sufficiently compelling interest.<sup>81</sup> Applying the *Lemon* test, the court found that, based on the context of the message,<sup>82</sup> the menorah would be an impermissible endorsement by the state.<sup>83</sup> The court stated that although the rotunda had often been used for "a broad spectrum of protected speech,"<sup>84</sup> an observer "would be unaware of that previous activity" and would not view it "in the context of the State's longstanding practice."<sup>85</sup> Thus, the audience, many of whom would be out-of-town visitors to the capitol, would be uninformed of prior uses of the rotunda and would therefore conclude that the State supported the religious message contained in the menorah display.<sup>86</sup>

### B. *The Ninth and Sixth Circuits*

In *Kreisner*, the Ninth Circuit was confronted with a similar issue of whether an eight-scene Christmas display erected in San Diego's Balboa Park violated the First Amendment's prohibition against an establishment of religion.<sup>87</sup> The circuit court upheld the district court's holding that the display did not violate the Establishment Clause<sup>88</sup> and held that the display could remain as long as its sponsors did not receive preferential treatment from the city.<sup>89</sup>

Balboa Park was owned by the City of San Diego and housed theaters, museums, picnic areas, sports fields, and a zoo.<sup>90</sup> Prior

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<sup>80</sup> *Id.* at 1391. "Once property has been designated as a limited public forum by opening it generally to the public, content-based distinction is permissible only if narrowly tailored to serve a compelling state interest." *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

<sup>81</sup> *Id.* "The Supreme Court has held that the need to avoid an establishment clause violation does represent a compelling state interest, *but only if the proposed speech actually violates the clause.*" *Id.* (emphasis added) (citing *Widmar*, 454 U.S. at 271).

<sup>82</sup> *Id.* at 1393. The court analogized the menorah display in the rotunda to the creche display on the Grand Staircase in *County of Allegheny* as both were unaccompanied religious symbols located at the heart of government operations. *Id.*

<sup>83</sup> *Id.* at 1395.

<sup>84</sup> *Chabad-Lubavitch*, 976 F.2d at 1394.

<sup>85</sup> *Id.* at 1395.

<sup>86</sup> *Id.*

<sup>87</sup> *Kreisner*, 988 F.2d at 885.

<sup>88</sup> *Id.* at 883.

<sup>89</sup> *Id.* at 885.

<sup>90</sup> *Id.*

to the *Kreisner* matter, the city had allowed a private, nonprofit organization, the Community Christmas Center Committee, to sponsor secular as well as religious holiday displays.<sup>91</sup> The religious display at issue consisted of life-sized scenes depicting the life of Christ, often accompanied by biblical references.<sup>92</sup> In prior years, the city had erected, removed, and stored the displays on its property.<sup>93</sup> However, in 1988 this policy changed,<sup>94</sup> and the Committee took over maintenance and began reimbursing the city for electrical costs.<sup>95</sup>

The court began its analysis of the First Amendment issues by tracing the principles established by the Supreme Court in *Lemon v. Kurtzman*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, and *Lee v. Weisman*.<sup>96</sup> Although the court recognized the flaws of the *Lemon* standard,<sup>97</sup> it dutifully adhered to the test, applying the most recent additions to the reasonable observer standard.<sup>98</sup> In finding no endorsement by the City of San Diego, the court employed the following standard of the reasonable observer:

[He] is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the Free Speech Clause and public forum doctrine . . . [He] is aware of Balboa Park's public forum nature and the city's first-come, first-served permit pol-

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<sup>91</sup> *Id.* The constitutionality of the secular display, which included a Santa Claus, reindeer, and a Christmas tree, was not in question in this case. *Id.*

<sup>92</sup> *Kreisner*, 988 F.2d at 886.

<sup>93</sup> *Id.* at 907 (Boochever, C.J., dissenting).

<sup>94</sup> *Id.* at 886. In 1988, the City Attorney issued an opinion stating such involvement in the religious display by the city was a violation of the Establishment Clause. *Id.* As a result, the policy changed. *Id.*

<sup>95</sup> *Id.* The city granted other privileges to the Committee, which the court deemed permissible. *Id.* For example, pursuant to its policy to waive user fees for "non-profit community service organizations," the city did not charge the Committee for the space. *Id.* The court considered the waiver valid, as the fee was only charged to those organizations that had exclusive use of the area in question, which the Christmas Committee did not. *Id.* at 897. In addition, the city allowed the Committee to set up donation barrels at the site despite its nonsolicitation ordinance. *Id.* at 909 (Boochever, C.J., dissenting). The court refused to rule on this issue as it questioned the constitutionality of the ordinance itself. *Id.* at 896.

<sup>96</sup> *Id.* at 888.

<sup>97</sup> *Kreisner*, 988 F.2d at 889. The court noted that in the most recent Supreme Court case, *Lee v. Weisman*, the majority declined to reconsider the *Lemon* test. *Id.* Therefore, the court saw "no justification for the . . . articulation of a new Establishment Clause test." *Id.*

<sup>98</sup> *Id.* at 892.

icy. Our observer realizes that the Park . . . host[s] an eclectic range of uses throughout the year.<sup>99</sup>

In essence, the court reasoned that as Balboa Park was a traditional public forum, a reasonable observer would view a city permit for a religious display as an act of "tolerance of religious speech,"<sup>100</sup> whereas a denial would "demonstrate hostility to religion rather than the neutrality contemplated by the Establishment Clause."<sup>101</sup>

A similar result was reached in *Grand Rapids*,<sup>102</sup> in which a group of citizens challenged the city's policy of allowing a private Jewish organization, Chabad House, to display a menorah in a public plaza<sup>103</sup> during the holiday season.<sup>104</sup> The Sixth Circuit held that the use of the plaza to display the menorah did not violate the Establishment Clause.<sup>105</sup>

The court's holding rested on two pivotal factors: (1) the menorah was owned and sponsored by a private organization, and therefore constituted private speech,<sup>106</sup> and (2) the menorah stood in a traditional public forum.<sup>107</sup> Furthermore, in applying the reasonable observer standard, the court did not question whether *any* person *might* find that the city endorsed Judaism, but rather whether "*the* reasonable observer *would* conclude that the city en-

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<sup>99</sup> *Id.* (citing *Wallace*, 472 U.S. at 76, 83 (O'Connor, J., concurring)).

<sup>100</sup> *Id.* at 894.

<sup>101</sup> *Id.*

<sup>102</sup> 980 F.2d 1538 (6th Cir. 1992) (en banc).

<sup>103</sup> *Id.* at 1540. The plaza housed the county building and city hall, and faced the courthouse and police station. *Id.*

<sup>104</sup> *Id.* at 1541. Individual citizens along with an organization, Americans United for Separation of Church and State, brought suit in 1990 to enjoin the city from issuing a permit to Chabad House to erect its menorah. *Id.*

<sup>105</sup> *Id.* at 1539.

<sup>106</sup> *Id.* at 1542. Because Chabad House, not the government, was the individual "speaking" through its display, it was protected under the guaranty of free speech. *Id.* As the court noted, only the government and not a private individual can establish a religion in violation of the Constitution. *Id.* at 1543. In addition, the court reasoned that "Chabad House's decision to engage in *religious* speech does not inherently limit its freedom; religious speech and association receive the full protection of the first amendment." *Id.* at 1542.

<sup>107</sup> *Grand Rapids*, 980 F.2d at 1541. According to the court, traditional public fora "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). It was agreed by both parties that the plaza was a traditional public forum as it had been used for many activities in the past including a Right to Life rally, a Hunger Walk, an Italian Festival, and an Arts Festival. *Id.* at 1540.



dorse[d] the religion."<sup>108</sup> By refusing to define the reasonable observer as one "who knows nothing about the nature of the exhibit—he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it,"<sup>109</sup> the court denied the plaintiffs an "Ignoramus's Veto."<sup>110</sup> Instead, the court noted that a reasonable observer would understand the distinction between government endorsement of speech and government accommodation of speech.<sup>111</sup>

#### IV. THE REASONABLE OBSERVER

All three circuit courts used somewhat different definitions of the reasonable observer. The standard utilized in the Eleventh Circuit requires nothing more of the reasonable observer than the ability to view the display.<sup>112</sup> In sharp contrast, both the Ninth and Sixth Circuits impute certain knowledge to the reasonable observer before analyzing the effects of the religious displays.<sup>113</sup> It is submitted that the Ninth and Sixth Circuits offer superior standards, although they do require further clarification.

Despite the two circuits' focus on the type of public forum at issue, it is suggested that whether the religious display occurs in a traditional or limited public forum should have little bearing on whether the private religious speech is permitted in the public forum.<sup>114</sup> The Constitution promotes equal access of private reli-

<sup>108</sup> *Id.* at 1544 (emphasis added).

[W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think Grand Rapids endorses religion. Instead we ask whether *the* reasonable observer *would* conclude that Grand Rapids endorses religion by allowing [the display].

*Id.*

<sup>109</sup> *Id.* at 1553.

<sup>110</sup> *Id.* "The Ignoramus' Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine." *Id.* It would essentially give to those persons eager to see endorsement of religion in every governmental act the power to censor speech which would otherwise be permissible. *See id.*

<sup>111</sup> *Id.* at 1554. Chabad House sought "nothing that this court would not readily compel the city to grant to any secular group in similar circumstances." *Id.*

<sup>112</sup> *See supra* notes 79-86 and accompanying text (providing explanation of standard employed).

<sup>113</sup> *See supra* notes 96-101, 105-11 and accompanying text (detailing standard and rationale behind circuit courts' determinations).

<sup>114</sup> *See Doe v. Small*, 964 F.2d 611, 618 (7th Cir. 1992). "[T]he Supreme Court has refused to find the Establishment Clause to be a sufficiently compelling interest to

gious speech to the public forum in both of these situations.<sup>115</sup> It is, therefore, further submitted that if the type of forum at issue is inconsequential, the characteristics of the reasonable observer will take on added significance. In fact, the perspective of the reasonable observer may become as crucial an issue in the Establishment Clause cases as it has in other areas of the law.<sup>116</sup>

But who is this observer? Many scholars suggest, as did Justice O'Connor in *Lynch*, that the observer should be viewed as a nonadherent of a majority religion.<sup>117</sup> This theory has a number of flaws: (1) not all nonadherents will agree as to what constitutes

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exclude private religious speech even from a limited public forum created by the government." *Id.*; *Lubavitch Chabad House, Inc. v. Chicago*, 917 F.2d 341, 347 (7th Cir. 1990) ("First Amendment jurisprudence mandates that if the government opens a public forum to allow some groups to erect communicative structures, it can not deny equal access to others because of religious considerations.").

<sup>115</sup> See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). "[W]e are unable to recognize the State's interest in [avoiding Establishment Clause violations] as sufficiently 'compelling' to justify content-based discrimination against . . . religious speech." *Id.* However, the Court does recognize the state's right to impose "[r]easonable time, place, and manner" and content-based regulations which are "narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). As one writer has stated:

While there is strong evidence of separationist sentiment among the framers, there is certainly no significant evidence that separationism was anything more than a means of achieving neutrality. There is nothing to indicate that government hostility to religion was considered desirable. Indeed, the free exercise clause is clear evidence that such hostility was not even considered permissible.

Beschle, *supra* note 65, at 178.

<sup>116</sup> See *Lewis & Vild*, *supra* note 8, at 691. The standard of a reasonable observer has been used in many different contexts in law; for example, in negligence cases, "reasonableness describes a quality of expected behavior," *id.* at 692; in criminal law, "reasonableness measures a quantity of evidence or behavior" *id.* and finally; in contract law, "[i]t is also used to embody an interpretive perspective." *Id.* at 691-92.

<sup>117</sup> See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). In determining the effects prong of the *Lemon* standard, Justice O'Connor focused on the message sent to nonadherents of the religion in question. *Id.* Later, in *County of Allegheny*, O'Connor referred to the nonadherent's view again. 492 U.S. at 625. O'Connor stated that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*; see *TRIBE*, *supra* note 3, § 14-15, at 1293. Adopting the nonadherents view is appropriate in that "actions that reasonably offend nonadherents may seem so natural and proper to adherents as to blur into the background noise of society." *Id.*; *Lewis & Vild*, *supra* note 8, at 693. "To avoid impermissible effects, it is necessary to give minority views veto power." *Id.* These scholars believe this approval would shift the emphasis from reasonableness to the genuineness of the perception of endorsement. *Id.*

endorsement;<sup>118</sup> (2) few judges will have a nonadherent's view;<sup>119</sup> and (3) such a perspective will not necessarily serve the purpose of the Establishment Clause, as a nonadherent's perception of exclusion may be completely irrational.<sup>120</sup>

It is proposed that the reasonable observer should be defined neither as an adherent nor a nonadherent, but rather, simply as objective.<sup>121</sup> Any other classification of the observer would prove to be without substantive significance or value in removing bona fide violations of the Establishment Clause. Placing objectivity as the cornerstone of this inquiry would ensure that the ill effects of either open favoritism or hostility of religion would be avoided.

Furthermore, objectivity should demand that the reasonable observer be informed, as both the *Kreisner* and *Grand Rapids* courts contemplated. The observer should be deemed to receive the full message, since the effect of any message can change dras-

<sup>118</sup> See Kenneth L. Karst, *The First Amendment, the Politics of Religion, and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 516-17 (1992). "There may be no unitary outsider's perspective" on many subjects because religious outsiders could hold "widely diverse views." *Id.*

<sup>119</sup> See *TRIBE*, *supra* note 3, §§ 14-15. It is judges who "must recognize the range of possible responses and cannot avoid selecting among them." *Id.*; Karst, *supra* note 118, at 516-17 (noting that, ultimately, judge's perception is of sole importance). "[I]t requires considerable empathy on the part of judges, particularly those who themselves adhere to the majority religion." *Id.*; Titshaw, *supra* note 52, at 1119 ("[J]udges are often religious persons themselves. No degree of higher scrutiny can fully compensate for judges' inability to overcome totally their own religious traditions and prejudice in deciding establishment clause cases.").

<sup>120</sup> See *Kreisner*, 988 F.2d at 899 (Kozinski, J., concurring). "The Establishment Clause, as the name suggests, forbids only the establishment of religion, not the mere appearance of doing so." *Id.*; see *Lee*, 112 S. Ct. at 2681 (Scalia, J., dissenting) ("I find it a sufficient embarrassment that our own Establishment Clause jurisprudence regarding holiday displays . . . has come to 'require scrutiny more commonly associated with interior decorators than with the judiciary.' But interior decorating is a rock hard science compared to psychology practiced by amateurs." (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting))).

<sup>121</sup> See Titshaw, *supra* note 52, at 1104. Justice O'Connor has recognized that objectivity is a necessary perspective. *Id.* In *Lynch*, O'Connor asked what the "objective" meaning of the *Statement* in the community was." *Id.* (quoting *Lynch*, 465 U.S. at 690) (O'Connor, J., concurring). However, the inherent fault in O'Connor's "member of the community" standard is that it allows the community's majority religions to determine the standard. *Id.* at 1104 n.91. Some suggest that, instead, majority religions be subject to stricter scrutiny. *Id.* at 1116-17. This higher standard for majority religions raises equal protection concerns and appears to be an unconstitutional establishment of minority religions. *Id.* at 1117.

tically if it is altered or misunderstood.<sup>122</sup> Specifically, it is submitted that courts should attribute to the reasonable observer knowledge of the forum and its previous accommodation of different types of speech, as well as the extent of practical government involvement in the display or activity.<sup>123</sup> To do otherwise would be to grant the power of veto to an "obtuse observer." The Ignoramus's Veto is an unrealistic legal fiction upon which important constitutional doctrine should not rest.<sup>124</sup> To grant such veto is akin to giving the heckler the power to silence political speech.<sup>125</sup>

Yet another reason to impute knowledge to the observer is that failure to do so would cause displays by mainstream religions to be deemed violative of the Establishment Clause, whereas displays by more bizarre, cult-like, or lesser known religions could withstand First Amendment scrutiny, since no reasonable observer would believe the government endorses them.<sup>126</sup> In effect, the Eleventh Circuit test, requiring little of the observer, imposes a harsher standard on majority religions, thus resurrecting both Equal Protection and Free Exercise problems.<sup>127</sup>

#### CONCLUSION

Since its inception, the Establishment Clause has been the subject of much tortuous and conflicting analysis. This Note has attempted to work within the current Supreme Court framework to propose a clarification of the *Lemon* test. The suggested reasonable observer standard recognizes an equal access policy for all

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<sup>122</sup> See *Doe v. Small*, 964 F.2d 611, 629 (7th Cir. 1992) (Easterbrook, J., concurring) (commenting that religious speech should not be censored because passerby misinterprets its public function).

<sup>123</sup> See *Beschle*, *supra* note 65, at 187-88. Some commentators presume that the reasonable observer will have this underlying knowledge. *Id.* Deciding what is an endorsement should be done,

not on the bases of whether there is a 'primary effect' of aiding religion, but rather whether the display or ceremony will be reasonably perceived as a choice of values by government, an endorsement of the message of the symbol or ceremony. Thus, giving a privately sponsored creche . . . access to a public park [on nonpreferential basis] threatens liberal neutrality far less than a city-sponsored display of the same type.

*Id.*

<sup>124</sup> See *Grand Rapids*, 980 F.2d at 1553.

<sup>125</sup> See *Doe*, 964 F.2d at 630. "An obtuse observer will not appreciate that the Constitution requires the government to tolerate all kinds of speech in public places and so will infer that the government endorses what it does not forbid." *Id.*

<sup>126</sup> See *Titshaw*, *supra* note 52, at 1117-19.

<sup>127</sup> *Titshaw*, *supra* note 52, at 1117-19.

speech, thereby minimizing hostility towards religion while promoting consistency within the law. What could be more reasonable?

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