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Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations

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COMMENT

Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the *Lemon* Test for Establishment Clause Violations

Most alleged violations of the establishment clause[1] are subject to the test set forth in *Lemon v. Kurtzman*.[2] To be valid under the *Lemon* test, a statute or action alleged to violate the clause must, first, have a secular purpose; second, have a primary effect that neither advances nor inhibits religion;[3] and, third, not foster an excessive governmental entanglement with religion.[4] These steps are known respectively as the purpose, effect, and entanglement prongs of the *Lemon* test.

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1. The establishment clause forbids Congress to pass a law or take an action "respecting an establishment of religion." The fourteenth amendment applies this prohibition to the states. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. 403 U.S. 602 (1971). An important exception to the widespread use of *Lemon* is Marsh v. Chambers, 463 U.S. 783 (1983); *see infra* text accompanying notes 15-22. Lynch v. Donnelly, 465 U.S. 668, 679 (1984), cited *Marsh* and Larson v. Valente, 456 U.S. 228 (1982), as two occasions on which the Supreme Court has not applied the *Lemon* test to establishment clause problems. In *Larson*, Justice Brennan asserted on behalf of the majority: "[T]he *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions." *Id.* at 252 (emphasis in original) (footnote omitted); *cf. Lynch*, 465 U.S. at 679 (*Lemon* was not applied in *Larson* because the latter case involved "substantial evidence of overt discrimination against a particular church.").

3. As several scholars have noted, the "inhibits" language of the second prong is at variance with the language of the first amendment. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-85 (1981) ("The 'inhibits' language . . . is the rankest sort of dictum—unexplained, never relied on, and founded in an obvious mistake. Its suggestion that any inhibition of religion raises establishment questions should be disregarded."); *see also* Recent Developments, 29 VILL. L. REV. 505, 513 n.23 (1984). The propriety or impropriety of the "inhibits" language is beyond the scope of this comment.

4. 403 U.S. at 612-13. *Lemon* is a more concise statement of the test described in School Dist. v. Schempp, 374 U.S. 203, 222 (1963). Justice Brennan has called *Lemon* "[t]he most commonly cited formulation" of the establishment clause test. Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting). Earlier, Justice Stewart,

Recently, Justice O'Connor proposed a "refinement"[5] of *Lemon*'s first two prongs in her *Lynch v. Donnelly*[6] and *Wallace v. Jaffree*[7] concurrences. In general, her modified prongs seek to prevent activities that convey an *impression* that government is fostering religion. The new prongs ask (1) whether "government intends to convey a message of endorsement . . . of religion" and (2) whether government actually communicates such a message.[8] These may be called Justice O'Connor's "intent"[9] and "message-conveyed" prongs.[10] *Lemon*'s third prong (entanglement) remains intact under O'Connor's *Lynch* and *Jaffree* analyses.[11] And a challenged statute or action must, as under *Lemon*,[12] satisfy all three prongs to be constitutionally valid.[13]

This comment suggests that *Lemon*'s purpose and effect prongs are ill-suited to resolving establishment questions, and demonstrates the superiority of Justice O'Connor's modifications.[14] Part I presents one of the purpose prong's shortcom-

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writing for a plurality, called the test "a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged" under the establishment clause. Meek v. Pittenger, 421 U.S. 349, 358 (1975).

5. Wallace v. Jaffree, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring).

6. 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

7. 105 S. Ct. 2479, 2496-505 (1985) (O'Connor, J., concurring).

8. *Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring).

9. Of course, there is essentially no difference between the "intent" of Justice O'Connor's phraseology and the "purpose" in the *Lemon* test.

10. Justice O'Connor calls her three-pronged result the "endorsement test." *Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring). That term, however, is somewhat misleading. The two modified prongs do not examine only government "endorsement" of religion, as Justice O'Connor's nomenclature suggests.

11. It should be noted, however, that Justice O'Connor, like many others, questions the wisdom of the entanglement prong in at least one case not discussed here. Aguilar v. Felton, 105 S. Ct. 3232, 3246-48 (1985) (O'Connor, J., dissenting).

12. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973).

13. In *Jaffree*, where she concurred that the challenged statute was unconstitutional, Justice O'Connor analyzed the case under only one prong, apparently finding it unnecessary to consider the other two prongs when the first was not met. 105 S. Ct. at 2501-02 (O'Connor, J., concurring). In *Lynch*, on the other hand, she analyzed all three prongs to approve of the challenged activity. 465 U.S. at 689-93 (O'Connor, J., concurring).

14. The endorsement test is a modification rather than a replacement, since both the endorsement test and the original *Lemon* test deal generally with intent and impact. "Purpose" in the Lemon test is much like "intent" in the endorsement test, and a "message conveyed" is one "effect." The differences, however, are significant. Under *Lemon*, a court must find a secular purpose; Justice O'Connor's version only requires that no improper purpose be found. The essence of *Lemon*'s second prong is not merely "effect," but specifically "advancement"; the essence of Justice O'Connor's second prong is the message that the state activity conveys.

ings—that it is too easy a hurdle because it can usually be satisfied by calling the challenged activity a tradition. Justice O'Connor's modification of this prong makes the test less amenable to the tradition argument. Part II discusses the effect prong's inadequacy to account for the sensitivities of religious minorities. The new test's "message-conveyed" prong directly addresses those sensitivities.

I. *Lemon's* PURPOSE PRONG AND ITS MODIFICATION

A. The Purpose Prong: A Fill-in-the-Blanks Test

To satisfy the purpose prong of the *Lemon* test, a court must find that the challenged statute or action advances a secular purpose. In cases applying this requirement, courts have found the preservation of tradition to be a legitimate purpose even where the tradition preserved involves arguably religious activities. Several recent cases illustrate this tendency.

1. Using tradition to fill in the blank

a. Marsh v. Chambers.[15] Although the *Lemon* test was not employed in *Marsh*, the case clearly demonstrates the pervasiveness of the tradition argument. *Marsh* involved a Nebraska state legislator's establishment clause challenge to the legislature's practice of opening its sessions with prayers offered by a state-employed minister. Chief Justice Burger's analysis affirming the practice began by noting: "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[16] The decision rested primarily on "[t]his unique history."[17] Legislative prayer, said the Court, "has become part of the fabric of our society."[18]

Nowhere in the Court's opinion did it even purport to apply the *Lemon* test.[19] Before *Marsh*, the Justices had used the

15. 463 U.S. 783 (1983).

16. *Id.* at 786.

17. *Id.* at 791.

18. *Id.* at 792.

19. Certainly the Court has evidenced an unwillingness to make *Lemon* an ironclad test. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (opinion by Burger, C.J., who nonetheless strongly reaffirmed the use of *Lemon* in the later case of Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985)). *Marsh*, however, completely ignores the test.

Lemon test many times.[20] They have used it since.[21] But *Marsh* indicated that a tradition sufficiently rooted in our cultural identity may skirt the *Lemon* test altogether.[22]

b. Lynch v. Donnelly.[23] Eight months after *Marsh*, the Supreme Court invoked tradition to satisfy *Lemon*'s purpose prong. *Lynch v. Donnelly* challenged a city-owned Christmas display set up on private property by Pawtucket, Rhode Island in its downtown shopping district. The display included Santa's house, sleigh, and reindeer; a live Santa who distributed candy; twenty-one cardboard figures representing, among other things, a clown, a dancing elephant, a robot, and a teddy bear; and a life-sized crèche, or nativity scene.[24] Plaintiffs protested inclusion of the crèche. In its analysis of the city's purpose, the Court noted that:

> [t]he District Court inferred from the religious nature of the crèche that the city has no secular purpose for the display. In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole . . . . The city . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.[25]

The crèche, the court held, is a tradition at Christmas time; because a state can preserve tradition, the purpose prong was satisfied.[26]

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20. *E.g.*, Mueller v. Allen, 463 U.S. 388, 394-403 (1983); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123-27 (1982); Widmar v. Vincent, 454 U.S. 263, 271-77 (1981); Stone v. Graham, 449 U.S. 39, 40-43 (1980) (per curiam); Wolman v. Walter, 433 U.S. 229, 235-55 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748, 754-67 (1976); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-98 (1973); Hunt v. McNair, 413 U.S. 734, 741-49 (1973).

21. *E.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222-23 (1985); Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914, 2917 (1985); Wallace v. Jaffree, 105 S. Ct. 2479, 2489-93 (1985); *Lynch*, 465 U.S. at 680-85.

22. There is some indication, however, in Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985), that the *Marsh* rationale may never apply to cases involving "the education of our children."

23. 465 U.S. 668 (1984).

24. Donnelly v. Lynch, 525 F. Supp. 1150, 1155-56 (D.R.I. 1981). The district court enjoined future display of the crèche. The First Circuit affirmed, 691 F.2d 1029 (1982), *rev'd*, 465 U.S. 668 (1984).

25. 465 U.S. at 680.

26. Judge Barrett of the Tenth Circuit, in a recent dissenting opinion, commented on *Lynch* and related it to the case then before the court:

c. Stein v. Plainwell Community Schools.[27] *Stein* involved prayers held at the graduation ceremonies of two public school districts. In one district, two students chosen by administrators offered an invocation and benediction at their high school's graduation ceremony. This practice had been in effect for about five years. In the other district, the graduating seniors, who organized the ceremony, had for fifteen years selected a local minister to pray.[28] On preliminary injunction, the court rejected establishment clause challenges to both practices. Dismissing an argument that prayer is inherently religious, the court found that prayer has a "dual nature"—part religious, part secular,[29] and that these prayers had the secular purpose of preserving tradition.[30] Both districts, it noted, "are following a long tradition of including invocations and benedictions in their ceremonies."[31]

> In this great land of amalgamated races, nationalities and religious backgrounds, we must be cognizant [in applying Lemon v. Kurtzman] of significant aspects of our rich history and culture. It was this premise that the Supreme Court relied upon in Lynch v. Donnelly. . . . The crèche [there] represented a Christian religious symbol. However, it did not involve a First Amendment entanglement violation because the Supreme Court held that the deep secular, historical and cultural aspects of the entire display were more weighty on the constitutional scale. Here, too, the display of the Christian symbol of the Cross, in combination with the secular symbols, has deep historical and cultural significance to Bernalillo County . . . .

Friedman v. Board of County Comm'rs, 781 F.2d 777, 785 (10th Cir. 1985) (Barrett, J., dissenting), *cert. denied*, 106 S. Ct. 2890 (1986); *see infra* note 41.

27. 610 F. Supp. 43 (W.D. Mich. 1985).

28. *Id.* at 45.

29. *Id.* at 47.

30. Some devout Christians may find the tradition argument quite objectionable. Citizens Concerned for Separation of Church & State v. City of Denver, 508 F. Supp. 823 (D. Colo. 1981), a slightly earlier case dealing with the crèche issue, epitomized at least one source of that offense when it noted with apparent approval that "the man responsible for the . . . display . . . testified that he included the nativity scene because it was part of Christmas, just like Santa Claus and the reindeer." *Id.* at 826. Many writers have argued that state-sponsored religious tradition degrades religion—perhaps largely because of this disturbing juxtaposition. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) (The Court's reasoning relegates the crèche "to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part."); Marsh v. Chambers, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) (denying that prayer is an act of worship in order to permit legislative prayer hands its supporters a Pyrrhic victory); Laycock, *supra* note 3, at 1383-84 ("[G]overnment sponsored religious rituals tend to be watered-down imitations of the real thing . . . . Those who take religion seriously have reason to be alarmed when public officials proclaim that crosses and Christmas carols have no religious significance.") (footnotes omitted). Admittedly, however, religious delicacy cannot itself dictate constitutional analysis.

31. 610 F. Supp. at 48.

Consistent with *Marsh* and *Lynch*, *Stein* held that a state does not transgress the establishment clause when it preserves a state tradition in an essentially religious act.[32]

2. Tradition: a ready answer

The tradition argument's crucial shortcoming—that which makes it judicially unsound—is that it is almost always available. A court wanting to approve a practice challenged under the establishment clause can, in almost every case, satisfy the purpose prong by calling that practice a tradition.

The tradition that courts invoke in this connection is at best a set of practices begun during or before our nation's infancy that comprises the essence of our cultural or national identity,[33] though a usage of shorter duration may at times satisfy a judge.[34] Many, if not most, acts practiced by our "traditional" religious faiths are also an integral part of this identity.[35] For example, the Christmas Eve Mass is a long and continuing tradition practiced by a substantial portion of our population. May a state agency devoted to historical preservation promote the Mass? This state activity could, as a preservation of tradition, satisfy at least the purpose prong with little difficulty.

Each part of our establishment clause test should have a function. But because the tradition argument can so readily satisfy the purpose prong, that prong is entirely toothless. Such a blunted test is no test at all.

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32. *Accord* Friedman v. Board of County Comm'rs, 781 F.2d 777, 785 (10th Cir. 1985) (Barrett, J., dissenting) ("We are all aware that public high school graduation ceremonies have historically included a call upon God's blessings and guidance in the course of invocation and benediction exercises. This practice has a long established historical tradition."), *cert. denied*, 106 S. Ct. 2890 (1986); *see infra* note 41.

33. Some may think this definition of "tradition" too demanding. If it is too strict—if practices of lesser duration, or practices not of the essence of our identity, should qualify as traditions—more state practices would fit the definition. In that case, the argument that the tradition rationale is too easily met would be even stronger.

34. *See, e.g.*, Stein v. Plainwell Community Schools, 610 F. Supp. 43, 45 (W.D. Mich. 1985) (practices upheld as traditional were 5 and 15 years old, respectively.).

35. The Supreme Court recognizes religion's pervasive presence in our national tradition. Chief Justice Burger stated in Lynch v. Donnelly, 465 U.S. 668, 674 (1984), that "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." In School Dist. v. Schempp, 374 U.S. 203, 213 (1962), the Court wrote: "It can be truly said, therefore, that today, as in the beginning, out national life reflects a religious people . . . ." To the same effect is Justice Douglas' well-known statement in Zorach v. Clauson, 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being."

B. Superiority of Justice O'Connor's Intent Prong

Lemon's purpose prong demands that a challenged activity be found to have a secular purpose. However, since nearly all religiously-oriented practices adopted by legislatures or quasi-legislative bodies can be called traditions, this line of reasoning may serve to approve of almost any such practice.

Justice O'Connor's intent prong differs significantly from the purpose test. The *Lemon* test validates a state action which has any secular purpose.[36] Justice O'Connor's revision views intent from the opposite angle. If any improper purpose exists, then the state action is unconstitutional. For example, assume a city wishes to convey with its crèche the message that Christianity is the preferred religion,[37] but also wishes to commemorate the historic origins of a traditional holiday. Under *Lemon*, the crèche would be acceptable although one purpose is clearly unconstitutional. O'Connor's reformulation would hold the crèche unconstitutional. A state action may partake of many innocuous purposes, but may not convey any message endorsing religion.[38] Thus O'Connor's intent prong forecloses the use of tradition as a legitimate secular purpose in establishment clause analysis.

II. *Lemon's* EFFECT PRONG AND ITS MODIFICATION

A. The Effect Prong and the "Outsiders Argument"

The foregoing has attempted to show the weakness of *Lemon*'s purpose prong and the corresponding superiority of Justice O'Connor's proposed modification. Justice O'Connor's suggestions also improve the effect prong, which does not address the concern that state religious practices may convey to religious minorities a sense that they are social and political out-

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36. *See* Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984):

> The city contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that Lemon . . . requires. Were the test that the government must have "exclusively secular" objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.

37. Justice Brennan argued in his *Lynch* dissent that this was the City of Pawtucket's predominant purpose. *Id.* at 699-701 (Brennan, J., dissenting).

38. It would appear then that Justice O'Connor misapplies her own test. Her concurring posture indicates both that the crèche was *only* displayed with a secular purpose, and that it conveyed no message of Christian endorsement to the non-Christian minorities of Pawtucket. Such a finding appears to be untenable in light of the endorsement test.

siders. That worry is valid and should be addressed in establishment clause analysis. *Lemon*'s effect prong asks whether government advances religion. But since conveying a message to members of minority religions that they are outsiders only *very* indirectly advances a majority religion, the effect prong does not adequately take into account whether the state conveys such a message to minorities. Justice O'Connor's test, on the other hand, is well-framed to consider what message religious minorities receive.

1. Validity of the outsiders argument

Scholars and courts occasionally propound what may be called the outsiders argument: state religiously-oriented activities should be closely scrutinized because they convey to religious minorities, who do not participate in those activities, a sense that they are outsiders. As Justice O'Connor explained in her *Lynch* concurrence: "Endorsement 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."[39] Several courts at all levels of the federal judiciary have echoed the *Lynch* concurrence on this point. The Northern District of Illinois favorably quoted the above passage in ruling last year that a Latin cross in a city's Christmas lighting display violated the establishment clause.[40] And the Tenth Circuit recently relied on Justice O'Connor's concurrence, stating that "[r]eligious minorities may not be made to feel like outsiders because of government's malicious or merely unenlightened endorsement of the majority faith."[41] Finally, the Supreme Court

39. *Lynch*, at 686 (O'Connor, J., concurring); *see also id.* at 727 (Blackmun, J., dissenting) ("[N]on-Christians feel alienated by [the] presence [of the crèche].").

40. ACLU of Ill. v. City of St. Charles, 622 F. Supp. 1542, 1546 (N.D. Ill. 1985), *aff'd*, 794 F.2d 265 (7th Cir. 1986).

41. Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (holding unconstitutional a county's official seal which featured a gold-colored Latin cross over which appeared the Spanish words "Con Esta Vencemos"—With This We Conquer), *cert. denied*, 106 S. Ct. 2890 (1986); *see also* Bender v. Williamsport Area School Dist., 741 F.2d 538, 561 (3d Cir. 1984) ("[P]rayer in the public schools . . . may particularly ostracize and stigmatize those students who are atheists or adhere to [minority] religious beliefs. The peer pressure inherent in a high school environment exaggerates [this] ostracism."), *vacated*, 106 S. Ct. 1326 (1986).

itself has cited that concurrence with approval, without acknowledging that it embodies a change.[42]

State jurists and legal scholars, too, have advanced the outsiders argument. For example, Chief Justice Bird of the California Supreme Court recently asserted that "persons who do not share those holidays [whose religious meaning a city promotes openly] are relegated to the status of outsiders by their own government."[43] Similarly, Professor Tribe, in criticizing the *Lynch* majority, claimed that the Court had all but ignored:

> what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and nonbelievers that they are heretics, or at least not similarly worthy of public endorsement? The *Lynch* Court allowed society's insiders to characterize the message the outsiders receive . . . .
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> At issue in *Lynch* . . . was whether ours is to be a society in which the perspective on civil rights and human dignity is to be from . . . majority to minority, from insiders to outsiders—or the other way around.[44]

Solicitude for the impressions of religious minorities is well-founded. Our courts repeatedly assert that avoidance of a "tyranny of the majority" undergirds the Constitution.[45] "The first amendment," wrote a district court recently, "is regarded properly as a shield protecting fundamental rights of individuals

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42. Justice Brennan cited the *Lynch* concurrence for the proposition that government violates "a core purpose" of the establishment clause when it "conveys a message of government endorsement . . . of religion." Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226 (1985). See also Wallace v. Jaffree, 105 S. Ct. 2479, 2492-93 (1985), where the Court referred to Justice O'Connor's intent prong as "*one* of the questions that we must ask" under the purpose prong.

43. Fox v. City of Los Angeles, 22 Cal. 3d 792, 803, 587 P.2d 663, 670, 150 Cal. Rptr. 867, 874 (1978) (Bird, C.J., concurring). *Fox* ruled that the city's erection of a lighted cross in front of city hall during Christmas and Easter violated both the California and United States Constitutions.

44. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*? 98 HARV. L. REV. 592, 611 (1985) (citation omitted); *see* Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 46-47 ("The first amendment protections are most crucial to . . . outsiders"—members of non-established groups—because they lack political power.).

45. *E.g.*, Philly's, Inc. v. Byrne, 732 F.2d 87, 91 (7th Cir. 1984); Burton v. Cascade School Dist., 512 F.2d 850, 855 (9th Cir.) (Lumbard, J., dissenting in part), *cert. denied*, 423 U.S. 839 (1975); Cary v. Board of Educ., 427 F. Supp. 945, 952 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979); Johnson v. Sanders, 319 F. Supp. 421, 433 n.32 (D. Conn. 1970), *aff'd mem.*, 403 U.S. 955 (1971); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649, 659 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962).

against government excess or tyranny of the majority."[46] The establishment clause was thus intended, at least in part, to protect the minority from the majority. By making religious minorities feel like disfavored members of the community, a state is apt to sanction a tyranny of the majority.

2. *Inadequacy of the effect prong to address the outsiders argument*

Causing one to feel like an an unfavored member of the political community[47] only *very* indirectly (if at all) advances a particular religion and therefore does not violate the effect prong. One might argue that ostracizing a minority individual may persuade him to leave his faith and join a majority religion, thus indirectly advancing the majority by adding to its membership. If this were true, *Lemon*'s effect prong would weakly address the outsiders argument. But this purported effect is not only so indirect as to be unforeseeable, it is also unlikely, since persecution of religious minorities can tend to strengthen rather than to imperil religious convictions.[48] The advancement of religion is clearly not its *primary* effect, as the *Lemon* test contemplates. Since *Lemon*'s effect prong asks not whether an individual is made to feel ostracized but whether his neighbor's religion is advanced, the *Lemon* prong is inadequate to answer the outsiders argument.

B. Superiority of Justice O'Connor's Message-Conveyed Prong

"What is crucial" under the establishment clause, Justice O'Connor contends, "is that a government practice not have the effect of communicating a message of government endorsement

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46. Visser v. Magnarelli, 530 F. Supp. 1165, 1175 (N.D.N.Y. 1982) (quoting Loughney v. Hickey, 635 F.2d 1063, 1071 (3d Cir. 1980) (Aldisert, J., concurring)), *aff'd*, 673 F.2d 1300 (3d. Cir. 1981).

47. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

48. *See, e.g.*, E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 95, 101 (rev. ed. 1967) ("The [early Christian] Church continued to develop in spite of or, perhaps, partly because of persecution . . . . The rapid spread of Christianity [in the first century], even during the periods of heaviest persecution, proved that indeed the blood of the martyrs was the seed of the Church."); W. DURANT, THE AGE OF FAITH 349 (1950) ("The faith of their fathers became more precious to the Jews [of the seventh century] the more it was attacked . . . ."); W. DURANT, THE REFORMATION 598 (1957) ("As the holocaust [under Catholic Mary in the sixteenth century] advanced it became clear that it had been a mistake. Protestantism drew strength from its martyrs as early Christianity had done . . . .").

. . . of religion."[49] Thus she would ask not whether the primary effect of a government practice is to advance religion, but whether government conveys through that practice a message of endorsement of religion. This modified test clearly addresses the outsiders concern.

III. Conclusion

Justice O'Connor's modifications of the *Lemon* test improve two important facets of establishment clause analysis. First, a court desiring to satisfy the purpose prong can reasonably ascribe to almost any state religious practice the purpose of preserving tradition. Justice O'Connor's intent analysis constricts that argument. Second, *Lemon*'s effect prong does not answer the concern that state religious activities may ostracize religious minorities. The proposed message-conveyed prong directly addresses that concern. Both changes afford a more honest and effective way of evaluating establishment clause problems.

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