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POLITICAL STANDING AND GOVERNMENTAL ENDORSEMENT OF RELIGION: AN ALTERNATIVE TO CURRENT ESTABLISHMENT CLAUSE DOCTRINE

Neal R. Feigenson*

INTRODUCTION

The Supreme Court's leading establishment clause decision in 1989, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,¹ did little to ameliorate the confusion in a concededly muddled area of constitutional law.² The largest bloc of Justices—four—concluded that neither a nativity scene inside a county courthouse nor a large menorah next to an even larger Christmas tree in front of a local government office building violated the clause. Neither display threatened to coerce religious belief or to establish a state religion, these Justices concluded, and so neither was proscribed by the establishment clause, which permits such governmental acknowledgments of religion as legislative prayers and theistic mottos on coins.³ Three other Justices found both the creche and the menorah unconstitutional because, through the displays, local government impermissibly endorsed or promoted religion.⁴ The remaining two Justices rejected the creche for the same reason, but viewed the menorah and tree, in context, as essentially secular symbols which government might properly sponsor.⁵ This intermediate position, curiously enough, became the decision of the Court, since a majority of the Justices concurred in each of its conclusions.

This outcome certainly invites the same charges of hairsplitting that have hounded the Court's decisions in the twenty years since *Lemon v. Kurtzman*

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1. 109 S. Ct. 3086 (1989).
2. See *infra* note 22 and accompanying text (establishment clause doctrine generally agreed to be confused and unsatisfactory).
3. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3134-46 (1989) (Kennedy, J., concurring in part and dissenting in part).
4. *Id.* at 3124-29 (Brennan, J., concurring in part and dissenting in part).
5. *Id.* at 3093-3116 (Blackmun, J.). In addition, Justice Stevens wrote a separate opinion, joined by Justices Brennan and Marshall, *id.* at 3129-34, to enunciate a narrower principle: the establishment clause "create[s] a strong presumption against the display of religious symbols on public property." *Id.* at 3131 (Stevens, J., concurring in part and dissenting in part).

set forth the current canonical framework of establishment clause analysis.⁶ Yet for the first time, a majority of the Justices adopted a reformulation of *Lemon's* threefold requirement that government action have a secular purpose, not directly aid religion, and not excessively entangle government with religion.⁷ The new approach is Justice Sandra Day O'Connor's "no endorsement" test.

In several opinions written during the last six years, Justice O'Connor has sought to reexamine and refine the *Lemon* standards "in order to make them more useful in achieving the underlying purpose of the first amendment."⁸ Her analysis begins with the principle that "the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."⁹ She then asks whether challenged government action sends a message endorsing or disapproving religion. Endorsement of religion is impermissible because it "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."¹⁰ Justice O'Connor thus uses the notion of participation in the political community to articulate the dimensions of religious liberty and diversity that the establishment clause protects.

In reformulating establishment clause doctrine, Justice O'Connor has identified two concepts with transformative potential: first, the clause may be read to prevent government from using religion to affect the political community; and second, the clause's application depends on the perceived meaning of the government's action. Justice O'Connor herself, however, has stopped short of realizing the full implications of these ideas. As a result, her analysis collapses into a recapitulation of unsatisfactory traditional doctrine.

A fuller exploration of Justice O'Connor's ideas can produce a more intelligible and intellectually honest theory of the establishment clause. Part I of this Article locates her ideas in the context of current doctrine.¹¹ Part II then con-

6. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); see *infra* note 21 and accompanying text (*Lemon* test).

7. Justices Brennan, Marshall, Stevens, and O'Connor joined Justice Blackmun in Part III-A of his opinion, in which he explained the "no endorsement" test, and in Part IV of his opinion, in which he applied the test to the creche. Those four Justices also joined in Part V, in which Justice Blackmun criticized Justice Kennedy's approach. Only Justice Stevens joined in Part III-B, in which Blackmun explained *Lynch v. Donnelly*, and no one joined in Part VI, in which Blackmun analyzed the display of the Christmas tree and menorah.

8. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

9. *Id.*

10. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1983) (O'Connor, J., concurring). "Disapproval sends the opposite message." *Id.* Since government disapproval of religion is alleged far less often and since the analysis of that situation is ordinarily the mirror image of the analysis of endorsement, this Article will concentrate on governmental endorsement of religion. *But see infra* notes 118-22 and accompanying text (discussing law barring clergy from serving in legislature from both endorsement and disapproval perspectives).

11. See *infra* notes 16-54 and accompanying text.

tends that the concept of political standing, which Justice O'Connor uses as a means to the end of protecting religious liberty, is itself a value that the establishment clause must protect. Apart from any actual or potential inhibition of religious liberty, government should strive not to affect any person's political standing on the basis of her religious views.¹² Part III demonstrates that the no endorsement test logically protects against disenfranchisement on religious grounds, and addresses various criticisms in the recent literature.¹³

Part IV criticizes Justice O'Connor's method of implementing the no endorsement test. By asking only whether a suitably defined "objective observer" or "reasonable observer" would perceive endorsement or disapproval of religion in the government's behavior, Justice O'Connor excludes the perceptions of the people most in need of the establishment clause's protection: community members who may be alienated or marginalized by the government action. Moreover, the "objective observer" fails to achieve her professed goal of providing more principled decisionmaking.¹⁴

Finally, Part V provides a framework for judicial assessment of the perceptions of actual community members. The resulting test will effectuate more fully Justice O'Connor's insight that government must not use religion so as to make individuals feel like less than full citizens and equal participants in the political community.¹⁵

I. CURRENT ESTABLISHMENT CLAUSE DOCTRINE AND JUSTICE O'CONNOR'S NO ENDORSEMENT TEST

The establishment clause of the first amendment provides that Congress "shall make no law respecting an establishment of religion."¹⁶ The Supreme Court has held that this proscription covers not only the actual establishment of a state religion, but also the "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁷

Because religious beliefs and institutions are so much a part of many Americans' lives, and because the reach of modern government is so extensive, government and religion cannot help but interact in various ways. As the Court observed in *Lemon v. Kurtzman*, "total separation [of church and state] is not possible Some relationship between government and religious organizations is inevitable."¹⁸ As a result, establishment clause litigation has generated

12. See *infra* notes 55-99 and accompanying text.

13. See *infra* notes 100-44 and accompanying text.

14. See *infra* notes 145-97 and accompanying text.

15. See *infra* notes 198-263 and accompanying text.

16. U.S. CONST. amend. I.

17. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772 (1973) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). It has also been settled since the 1940s that the establishment clause applies to state and local governments. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

18. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514 (1968) (acknowledging the expansion of government action subject to the

"some of the most perplexing questions to come before [the] Court."¹⁹

For the past two decades, Chief Justice Burger's distillation of the law in *Lemon* has, with few exceptions, guided the courts' analyses of establishment clause issues.²⁰ Under *Lemon*, to survive constitutional challenge, government action must: (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) foster no excessive entanglement with religion.²¹

The Supreme Court and numerous commentators have found fault with the *Lemon* test. Its application has resulted in inconsistent decisions, not unified by any apparent principled rationale.²² Especially problematic has been the

establishment clause).

19. *Nyquist*, 413 U.S. at 760. The literature on the establishment clause is enormous, and a general survey of it is beyond the scope of this Article. Three seminal modern articles are Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967) (Part I); Gianella, *supra* note 18; and Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). For a recent and brief survey of positions, see McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987).

20. See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Larson v. Valente*, 456 U.S. 228 (1982); *Widmar v. Vincent*, 454 U.S. 263 (1981); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Stark v. Mattheis*, 403 U.S. 945 (1971).

Only two establishment clause cases have not applied the *Lemon* test. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (*Lemon* test not used to uphold state legislature's use of chaplain); *Larson v. Valente*, 456 U.S. 228 (1982) (using strict scrutiny analysis to invalidate charitable solicitation law under establishment clause because law discriminated between sects).

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

22. The jurisprudence of the establishment clause, and the religion clauses generally, has been called "a mess." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984).

Professor Choper, articulating a typical summary of the Court's decisions, states:

[A] provision for therapeutic and diagnostic health services to parochial school pupils by public employees is invalid if provided in the parochial school, but not if offered at a neutral site, even if in a mobile unit adjacent to the parochial school. Reimbursement to parochial schools for the expense of administering teacher-prepared tests required by state law is invalid, but the state may reimburse parochial schools for the expense of administering state-prepared tests. The state may lend school textbooks to parochial school pupils because, the Court has explained, the books can be checked in advance for religious content and are "self-policing"; but the state may not lend other seemingly self-policing instructional items such as tape recorders and maps. The state may pay the cost of bus transportation to parochial schools, which the Court has ruled are "permeated" with religion; but the state is forbidden to pay for field trip transportation visits "to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students."

Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980) (quoting *Wolman v. Walter*, 433 U.S. 229, 252 (1977)) (other citations omitted) (emphasis in the original).

In *Edwards v. Aguillard*, 482 U.S. 578, 639 n.7 (1987), Justice Scalia, citing the above passage,

determination of what constitutes a "principal or primary effect" that neither advances nor inhibits religion.²³

Confronting this confusion, Justice O'Connor has written that "the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the first amendment."²⁴ She begins by positing that "the Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."²⁵ She then explains that government can impermissibly make religion relevant to political standing in either of two ways. First, government can excessively entangle itself with religion. Entanglement is improper because it interferes with the independence of religious institutions, gives the members of those institutions access to government not fully shared by nonmembers, and fosters the creation of political constituencies defined along religious lines.²⁶

wrote in dissent that the Court's establishment clause jurisprudence was "embarrassing":

[According to *Lemon*, g]overnment may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

Id. at 636 (Scalia, J., dissenting); see also Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 & nn.9-12 (1987) (citing to illustrations of doctrinal inconsistencies).

23. The effect prong of the *Lemon* test is the focus of most establishment clause controversy. Relatively few establishment clause cases turn on the existence of a secular purpose because government can usually articulate a plausible secular purpose. Exceptions, however, do exist. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana statute decreeing equal time for creation science); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama moment of silence statute); *Stone v. Graham*, 449 U.S. 39 (1980) (Kentucky statute requiring that Ten Commandments be posted on classroom walls). Notwithstanding these exceptions, it is "often the case [that] the effect of the statute, rather than its purpose, . . . creates Establishment Clause problems." *Bowen v. Kendrick*, 487 U.S. 589, 634 (1988) (Blackmun, J., dissenting).

Also, few government actions are invalidated solely because they are found to cause excessive government entanglement with religion. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding unconstitutional a Pennsylvania statute which authorized public schools to lend private schools various educational materials, including maps, charts, and films, and to supply them with professional staff for instruction, guidance, and other services). Indeed, the entanglement test has been much criticized as a "Catch-22," whereby the government's supervision of a religious institutional recipient of state aid to prevent impermissibly religious uses of that aid is itself found to involve the government too much in the institution's affairs, thus violating the clause. See, e.g., *Bowen*, 487 U.S. at 634 (Rehnquist, C.J.).

24. *Wallace v. Jaffree*, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring).

25. *Id.* at 69; see also Gianella, *supra* note 18, at 517 (establishment clause must prevent intermingling of religious volunteerism and the political process). See generally Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 858 & nn.177-80 (cataloging other constitutional values protected by the establishment clause and citing to Supreme Court authority for each).

26. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1983). This concept repeats standard establishment clause theory. However, Justice O'Connor has questioned the validity of using political divi-

Second, government makes religion relevant to political standing in a "more direct" fashion by endorsing or disapproving religion.²⁷ Endorsement implies that adherents are "insiders" and that nonadherents are "outsiders"; it tells the former that they are favored members of the political community, and the latter that they are disfavored. Disapproval sends the opposite messages.²⁸ Thus, the establishment clause prevents government from "convey[ing] a message that anyone is inferior or superior because of his or her religion."²⁹

According to Justice O'Connor, the no endorsement approach "clarifies the *Lemon* test as an analytical device."³⁰ The first two prongs of that test inquire whether a challenged government act has a secular purpose, and whether any effect that advances or inhibits religion is primary or merely "indirect" or "remote."³¹ Under Justice O'Connor's reading, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."³²

To a certain extent, earlier Supreme Court opinions presaged Justice O'Connor's focus on the message conveyed by government action. In *Walz v. Tax Commission*,³³ for example, Justice Harlan approved property tax exemptions for religious organizations on the ground that government did not thereby "utiliz[e] the prestige, power, and influence" of a public institution to bring religion into the lives of citizens.³⁴ Similarly, in *Widmar v. Vincent*,³⁵

siveness, traditionally classified under the entanglement prong of *Lemon*, as an independent reason to strike down otherwise permissible government aid to religion. "Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But . . . [t]he entanglement prong of the *Lemon* test is properly limited to institutional entanglement." *Id.* at 689; *see also infra* note 84 (discussing Justice O'Connor's view of political divisiveness notion). Justice O'Connor has also questioned more broadly the use of the entanglement test to invalidate government action. *See Aguilar v. Felton*, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting); *see also Choper, supra* note 22, at 681, *cited in Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

27. *Lynch*, 465 U.S. at 688.

28. *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring); *see also Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 896 (1989) (Brennan, J.) (The "core notion" animating establishment clause analysis is that government may not place its prestige, coercive authority, or resources behind religious belief because that "convey[s] the message that those who do not contribute gladly are less than full members of the community.").

29. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1051 (1986).

30. *Lynch*, 465 U.S. at 689.

31. A merely "indirect," "remote," or "incidental" benefit to religion will not render government action constitutionally invalid. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973).

32. *Lynch*, 465 U.S. at 690; *see also infra* notes 172-75 and accompanying text (discussing relationship of Justice O'Connor's no endorsement test to *Lemon*).

33. 397 U.S. 664 (1970).

34. *Id.* at 696 (Harlan, J., concurring) (quoting in part *School Dist. of Abington v. Schempp*,

Justice Powell wrote that a state university conferred no "imprimatur" or "sign of approval" on a student religious group by allowing the group access to classroom space which was also available to over one hundred other student groups.³⁶ Further, in *Larkin v. Grendel's Den, Inc.*,³⁷ the Court invalidated a Massachusetts statute that granted any church the power to prevent the issuance of a liquor license for premises within a five hundred foot radius of the church. Chief Justice Burger wrote for the majority that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."³⁸

The district court in *Donnelly v. Lynch*,³⁹ the Pawtucket, Rhode Island creche case, also considered the question in this light:

[F]or governmental action to pass muster under the Establishment Clause, the government must dispel even the *appearance* of affiliation with the religious message, for apparent sponsorship is as likely as intentional endorsement to breed religious chauvinism in those whose beliefs are seemingly favored as "good" or "true," and alienate those whose beliefs are seemingly dismissed as unworthy of official attention. . . . [G]overnment sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets. It can take the form of "passive" use of objects or symbols that people perceive as having significant religious meaning in a manner that does not successfully shift the public perception to the object's nonreligious elements.⁴⁰

In several cases, beginning with *Lynch*, Justice O'Connor has applied her understanding that government may not appear to endorse religion. In *Lynch*, she concurred in the majority's decision that Pawtucket's sponsorship of a na-

374 U.S. 203, 307 (1963) (Goldberg, J., concurring)).

35. 454 U.S. 263 (1981).

36. *Id.* at 274.

37. 459 U.S. 116 (1982).

38. *Id.* at 125-26. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3100-01 (1989), Justice Blackmun writes that the concern about endorsement "has long had a place in our Establishment Clause jurisprudence," citing cases as old as *Engel v. Vitale*, 370 U.S. 421 (1962) and *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). Arguably, the focus on messages of endorsement finds an early source in Justice Joseph Story, advocate of government support for religion, who wrote that the last clause of Article VI of the Constitution, prohibiting religious tests for federal office, was intended "to cut off for ever every pretense of any alliance between church and state in the national government." J. STORY, 3 COMMENTARIES ON THE CONSTITUTION 705 (1833) (emphasis added); see also L. PFEFFER, CHURCH, STATE AND FREEDOM 110 (1953) (acknowledging the "widely held belief [during the late eighteenth century] that religion was not within the competence of civil legislatures").

39. 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

40. *Id.* at 1174-75 (emphasis in original) (citations omitted) (City of Pawtucket's sponsorship and display of creche in private park as part of Christmas display had "real and substantial effect of affiliating the City with the Christian beliefs that the creche represents" and thus violated the establishment clause). *aff'd*, 691 F.2d 1029 (1st Cir. 1982) (using strict scrutiny test from *Larson v. Valente*, 456 U.S. 228 (1982), on grounds that City's ownership and use of nativity scenes discriminates between Christian and non-Christian religions), *rev'd*, 465 U.S. 668 (1984).

tivity scene as part of a Christmas display did not violate the establishment clause. In her view, the creche was not intended to communicate endorsement of Christianity, and did not in fact do so.⁴¹ In *Wallace v. Jaffree*,⁴² Justice O'Connor concurred in the Court's decision rejecting an Alabama statute that provided for a moment of silent meditation or prayer at the start of the public school day. Since Alabama already had a moment-of-silence statute, the silent meditation-or-prayer statute could only have been "intended to convey a message of state encouragement and endorsement of religion."⁴³ And, in more recent establishment clause cases, Justice O'Connor has applied the same analysis.⁴⁴

Several other Supreme Court Justices have adopted the no endorsement test, at least in analyzing the effect prong of the *Lemon* test.⁴⁵ Indeed, in the

41. *Lynch v. Donnelly*, 465 U.S. 668, 691-93 (1983).

42. 472 U.S. 38 (1985).

43. *Id.* at 76-78 (O'Connor, J., concurring). Since Justice O'Connor agreed with the majority that the statute failed the secular purpose test, she found it "unnecessary also to determine the effect of the statute," but wrote anyway that "it also seems likely that the message actually conveyed to objective observers by [the silent meditation-or-prayer statute] is approval of the child who selects prayer over other alternatives during a moment of silence." *Id.*

44. *See, e.g.,* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring) (application of § 702 of Civil Rights Act of 1964, which exempts religious organizations from ban on religious discrimination in employment, to nonreligious activity of nonprofit religious corporations does not violate establishment clause; Justice O'Connor writes in her concurrence: "in my view the objective observer should perceive the government action as an accommodation of the exercise of religion rather than as a government endorsement of religion"); *Aguilar v. Felton*, 473 U.S. 402, 423-26 (1985) (O'Connor, J., dissenting) (New York City's use of federal funds to pay salaries of public school teachers to provide remedial educational services to disadvantaged parochial school students on parochial school grounds under public schools' supervision held to violate establishment clause; Justice O'Connor writes in dissent:

In light of the ample record [of 19 years of implementation of the program without any evidence that the program advanced the religious mission of the parochial schools], an objective observer . . . would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: [to help impoverished schoolchildren improve learning skills].;

Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (Connecticut law requiring employers to accede to employees who refuse to work on their Sabbaths "conveys a message of endorsement of the Sabbath observance," and therefore has an impermissible effect); *see also infra* note 237 (discussing *Mergens* case).

45. *See Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986) (Marshall, J.) (Washington State Commission for the Blind's provision of financial vocational assistance to student pursuing bible studies degree at Christian college does not violate first amendment; Justice Marshall writes, "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion"); *id.* at 493 (O'Connor, J., concurring in the judgment and concurring in part) ("[n]o reasonable observer is likely to draw from the facts before us an inference that the state itself is endorsing a religious practice or belief"); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 392 (1985) (Brennan, J.) (shared-time program similar to that in *Aguilar* except that it paid parochial school teachers to provide remedial services under parochial supervision; where religious and "public school" classes taught in same rooms on same day to largely the

three most recent cases, the Court's opinions incorporate the approach. In *Texas Monthly, Inc. v. Bullock*,⁴⁶ Justice Brennan wrote for the majority and quoted in full Justice O'Connor's explanation of her theory in *Wallace*. Justice Brennan concluded that a Texas statute exempting religious publications from a general sales tax violated the establishment clause by endorsing religious belief.⁴⁷ In *Allegheny County*, Justice Blackmun, in an opinion joined by four other Justices, assessed the constitutionality of two religious displays on government property by asking whether the displays had the purpose or effect of endorsing religion.⁴⁸ And, in *Board of Education v. Mergens*,⁴⁹ five Justices agreed with Justice O'Connor that the Equal Access Act, which requires a public secondary school to allow student religious groups to meet on school premises if it allows any "noncurriculum related" groups to do so, does not officially endorse religion.⁵⁰

Many lower federal courts have utilized Justice O'Connor's approach,⁵¹ and

same students, Justice Brennan found that a student "would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day"; *id.* at 400 (O'Connor, J., concurring in part and dissenting in part) (concluding that Grand Rapids program "has the perceived and actual effect of advancing the religious aims of the church-related schools").

One recent Supreme Court decision not employing an endorsement analysis is *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Bowen*, a 5-4 majority ruled that the Adolescent Family Life Act ("AFLA"), under which federal funds are distributed directly to programs affiliated with religious and nonreligious institutions in order to promote adolescent sexual education, did not "facially" violate the establishment clause, and remanded the case to the district court to determine whether the AFLA "as applied" unconstitutionally promoted religious doctrine. *Id.* at 618-22. Justice O'Connor concurred, stating that "[p]ublic funds may not be used to endorse the religious message [of recipients]," but agreeing that more detailed findings were needed to determine whether specific grants under the AFLA violated the establishment clause. *Id.* at 622-23 (O'Connor, J., concurring). The four dissenting Justices found the record sufficient to support the conclusion that federal tax dollars had been spent to support religious teaching. *Id.* at 625-26 (Blackmun, J., dissenting).

46. 109 S. Ct. 890 (1989).

47. *Id.* at 894.

48. 109 S. Ct. 3086, 3092 (1989); *see also supra* note 7 and accompanying text.

49. 110 S. Ct. 2356 (1990).

50. *Id.* at 2356; *see also infra* notes 234-39 and accompanying text (discussing *Mergens* case). Two of those five Justices, Justices Marshall and Brennan, emphasized in a separate opinion that Westside High School had to take additional steps to avoid the appearance of endorsement. *Mergens*, 110 S. Ct. at 2378-83 (Marshall, J., concurring).

51. *See, e.g.*, *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (menorah standing alone in city hall park conveys unconstitutional message of endorsement of Judaism), *cert. denied*, 110 S. Ct. 2619 (1990); *Jager v. Douglas County School Dist.*, 862 F.2d 824 (11th Cir. 1989) (religious invocations before football games unconstitutional because they convey message of endorsement of religion); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 127-28 (7th Cir. 1987) (display of privately owned and constructed creche in lobby of Chicago City-County Building during holiday season communicated "powerful" and "pervasive" message that City endorsed or identified itself with Christianity and therefore violated establishment clause); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.) (city's placement of nativity scene on its lawn during Christmas season unaccompanied by any nonreligious symbols of the holiday violates establishment clause), *cert. denied*, 479 U.S. 939 (1986); *Friedman v. Board of County Comm'rs*,

several commentators have lauded it.⁵² Laurence Tribe, for instance, in the second edition of his constitutional law treatise, calls the no endorsement test an "important" notion and discusses it at length.⁵³ One federal judge has said that it is perhaps "one of the most far-reaching doctrinal developments" in recent establishment clause jurisprudence.⁵⁴

While the no endorsement test is promising, it cannot fulfill its promise as long as the concept of political standing on which the test is based remains inchoate, and its status as an establishment clause value remains unclear. Part II first explains why Justice O'Connor's treatment of political standing leads to difficulties. It then reinterprets political standing as an independent constitutional concern.

II. THE ESTABLISHMENT CLAUSE AND POLITICAL STANDING

All who have adopted the no endorsement test to explain the establishment

781 F.2d 777, 781 (10th Cir. 1985) (en banc) (use of Latin cross and Spanish motto, translated as "With This We Conquer," on county seal displayed on police cars and elsewhere "conveys a strong impression to the average observer that Christianity is being endorsed" and thus violates establishment clause); *Joki v. Board of Educ.*, No. 89-CV-1130 (N.D.N.Y. Aug. 27, 1990) (WESTLAW, Federal library, Dct file) (student painting on wall of public high school auditorium centrally depicting crucifixion has impermissible primary effect of endorsing Christianity); *Smith v. Lindstrom*, 699 F. Supp. 549 (W.D. Va. 1988) (nativity scene on front lawn of county office building had impermissible effect of endorsing religion); *Mather v. Village of Mundelein*, 699 F. Supp. 1300 (N.D. Ill. 1988) (following Seventh Circuit decision in *American Jewish Congress*, finding that creche on front lawn of village hall violates the establishment clause), *rev'd*, 864 F.2d 1291 (7th Cir. 1989) (creche consistent with *Lynch* because context sufficiently secular); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (sixty-five foot high, illuminated Latin cross as war memorial on Marine Corps base in Hawaii "may fairly be considered to convey a message of governmental endorsement of Christianity"); *ACLU v. City of St. Charles*, 622 F. Supp. 1542, 1546 (N.D. Ill. 1985) (citing Justice O'Connor's concurrence in *Lynch* and finding that "primary effect of including an illuminated cross in the city's annual Christmas display was to place the government's imprimatur on the particular religious beliefs associated with the Latin cross"), *aff'd*, 794 F.2d 265 (7th Cir. 1986) (discussing perceptions of display of cross but not citing Justice O'Connor); *Cf. Kaplan v. City of Burlington*, 700 F. Supp. 1315, 1321 (D. Vt. 1988) (placing menorah in city hall park during Hanukkah does not violate establishment clause where perceptions of endorsement of religion were not "objectively reasonable" and where park is open public forum), *rev'd*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990); *Foremaster v. City of St. George*, 655 F. Supp. 844 (D. Utah 1987) (city's depiction of Mormon temple on logo displayed on plaque at city hall does not violate establishment clause; distinguishes *Friedman* and in doing so discusses endorsement test); *McCreary v. Stone*, 739 F.2d 716, 728 (2d Cir. 1984) (finding that Village of Scarsdale could not deny private application to display creche in public park during Christmas based on *Widmar* and majority opinion in *Lynch*, but notes, *inter alia*, that disclaimer message "will ensure that no reasonable person will draw an inference that the village supports any church" associated with the display), *aff'd by an equally divided court sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985).

52. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1205, 1212-25, 1284-95 (2d ed. 1987); Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Loewy, *supra* note 29, at 1051-52.

53. L. TRIBE, *supra* note 52, at 1205, 1212-25, 1284-95.

54. *Smith v. Lindstrom*, 699 F. Supp. 549, 554 (W.D. Va. 1988).

clause, including Justice O'Connor, agree that the central purpose of the religion clauses is to safeguard individual religious liberty,⁵⁵ and believe that the no endorsement test best serves that purpose. The rationale for the test should, therefore, connect the protection of political standing with religious liberty. The explanation might proceed as follows: By making religion relevant to a person's standing in the political community, government threatens to coerce or compromise that person's religious beliefs. Especially if the person is made to feel like an "outsider," she may be led to change religious affiliation so as to become an "insider," realizing that her beliefs now "cost" her something in terms of her standing in the secular community. In preventing this indirect coercion, the establishment clause thus becomes a "prophylactic" against more direct infringements of religious liberty.

Justice O'Connor, however, adopts neither this nor any other explanation of how political standing is related to religious liberty. In her concurrence in *Wallace*, her fullest exposition of her theory of the clause, she says simply that "an endorsement [of religion] infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'"⁵⁶ Political standing plays no explicit role in this reasoning. Indeed, having tied the no endorsement test to the establishment clause's core purpose, Justice O'Connor devotes no further attention to political standing, and concentrates entirely on determining whether government has impermissibly sent messages endorsing religion.⁵⁷

55. See *supra* notes 8-9 and accompanying text; see also, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3119 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (establishment clause should "adequately protect the religious liberty [and] respect the religious diversity of the members of our pluralistic political community"). For a clear statement of the idea without reference to Justice O'Connor's theory, see McCoy & Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986) (threat of political oppression of groups defined by religious belief is "the unifying theme" of the religion clauses).

56. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)). In his dissenting opinion in *Lynch v. Donnelly*, Justice Brennan wrote that when government symbolically endorses a certain religious practice, "[t]he effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support." 465 U.S. 668, 701 (1983) (Brennan, J., dissenting). Justice Brennan appears to have in mind here only those views relating to religion, and so does not conceive the establishment clause as broadly as suggested in this Article. Cf. *infra* notes 64-144 and accompanying text.

57. Although Justice O'Connor has continued to recite the political standing rubric, she has not offered any further analysis of the concept. See, e.g., *Allegheny County*, 109 S. Ct. at 3118 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he creche . . . conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community."); see also Smith, *supra* note 22, at 309 n.169 (noting that Justice O'Connor does not define "political standing"). One purpose of this Article is to elaborate the concept of political standing in a constitutionally plausible way.

By failing to elaborate on the notion of political standing, Justice O'Connor's theory remains prone to the difficulties that inhere in any effort to focus the establishment clause exclusively on indirect threats to religious liberty. Mark Tushnet has summarized the problems with the prophylactic view of the clause:

First, it is unclear how we are . . . to decide how much coercion is too much. Determining that any coercion at all is too much of course returns us to the problems of the strict separation approach [i.e., it is impossible for modern government to avoid all impact on religious sensibilities]. Second, [this approach] does not explain the psychosocial theory of coercion that underlies the prophylactic view of the establishment clause. Finally, [it] seems likely to deprive the establishment clause of any meaning independent of the free exercise clause.⁵⁸

A second traditional attempt to justify the establishment clause as a protection against religious coercion fails to explain the clause's current scope. By expending tax revenues to assist religion, government effectively compels some people to support religion against the dictates of conscience. James Madison, in his famous "Memorial and Remonstrance," opposed assessments to aid religion, and his view has been a cornerstone of establishment clause interpretation ever since.⁵⁹ The problem for modern constitutional law is that government's provision of general services and benefits is now so extensive that tax revenues must be spent to "assist" religion. For instance, tax revenues are spent to provide fire and police services for religious buildings and their users.⁶⁰ To exclude religious entities or believers from such benefits would produce government discrimination against religion, which the establishment clause clearly prohibits and which may run afoul of the equal protection clause as well. In still other circumstances, government may be required to assist religion in order to comply with the free exercise clause.⁶¹

58. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 709 (1986). Note that the independent establishment clause value explained in this Article avoids at least the second and third of Professor Tushnet's criticisms: it is not reducible to the values protected by the free exercise clause nor does it necessarily stand as a first shield of defense for them. By reading the establishment clause as a guarantor of a particular model of secular political community, one must be ready to leave the protection of religious liberty to the free exercise clause, although cleansing political discourse of government-sponsored religious influence may have the by-product of protecting religious liberty. The difficulties of discerning and evaluating alleged violations of this independent value are discussed in the following parts of the Article.

59. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS' CONSTITUTION 82-84 (P. Kurland & R. Lerner eds. 1987); cf. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977) (citing Madison in support of proposition that compulsory political contributions violated claimants' free speech rights).

60. See, e.g., *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747 (1976) (establishment clause does not prevent religious groups from enjoying general benefits provided by government).

61. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (Florida's refusal to award unemployment compensation benefits to Seventh Day Adventist Church member after she was discharged for refusing to work on her Sabbath violated free exercise clause of first amendment); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (state compelled to modify its unem-

Even such a consensus position as that the establishment clause forbids direct Congressional aid to religious sects for their religious missions seems unjustified if the sole purpose of the clause is to protect religious liberty from official persecution.⁶² By falling back on the protection of religious liberty as the only interest behind the establishment clause, Justice O'Connor fails to overcome the traditional difficulties of explaining how the clause now serves that interest.⁶³

Yet the proposition that Justice O'Connor abandons—that the establishment clause prohibits government from making religion relevant to a person's standing in the political community—identifies a value that is not reducible to the protection of religious liberty. Suppose a case obviously within the reach of the clause: a government prevents adherents of a certain religion from exercising their right to vote. The action certainly makes adherence to religion more costly, and its proscription can thus perhaps be justified to protect religious liberty, subject to Professor Tushnet's criticisms. However, such government

ployment compensation program in order to accommodate Jehovah's Witness); *Sherbert v. Verner*, 374 U.S. 398 (1963) (state unemployment compensation programs must accommodate persons discharged because their religious beliefs did not allow them to accede to work requirements). *But cf.* *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) (free exercise clause does not require Oregon to exempt users of peyote in Native American religious rites from generally applicable laws criminalizing drug use). See generally L. TRIBE, *supra* note 52, at 1167-68 and nn.10-11.

62. Nor will expanding the core concept from "religious liberty" to "religious voluntarism" do; presumably nothing prevents any religious institution from rejecting the proffered government aid.

The prophylactic theory of the establishment clause was much more plausible in the late eighteenth century, when governments more readily exercised power to coerce religious belief. Before and after the Revolution, colonial, and then state, governments established particular churches. Massachusetts did not disestablish the Congregational Church until 1833. Other states continued to support religion actively on a nonpreferential basis. See L. LEVY, *THE ESTABLISHMENT CLAUSE* 25-62 (1986). Moreover, within the preceding century local governments had tortured and killed nonconformists. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 71 (2d ed. 1985) (Salem witchcraft trials).

Professor Smith contends that the disappearance of the evils most prominently in the minds of those who drafted and ratified the establishment clause could mean that the clause is now largely superfluous. See Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955, 1029-30 (1989).

Of course, this is not to say that government no longer persecutes adherents of certain religions, but only that the free exercise clause, rather than the establishment clause, seems designed to prevent such persecution. *But see, e.g.,* *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) (free exercise clause held not to protect Native American religious use of peyote); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (free exercise clause held not to prevent government from destroying sacred Native American sites by constructing logging road).

63. Justice O'Connor continues to emphasize that the establishment clause prohibits more than just "'coercive' practices or overt efforts at government proselytization." County of Allegheny v. ACLU Greater Pittsburgh Chapter, 109 S. Ct. 3086, 3119 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (responding to the opinion by Justice Kennedy, concurring in the judgment in part and dissenting in part). But since she limits the clause to "protect[ing] the religious liberty [and] respect[ing] the religious diversity of the members of our pluralistic political community," *id.*, the rationale for prohibiting government endorsement of religion must remain that of protecting against indirect coercion of religious belief, for what other logical connection can there be between the protectable interests she has posited and the harm threatened?

conduct also infringes another ideal of liberal democracy: that government should not inject religion into politics.⁶⁴

As Justice Black observed in the Regents' Prayer case, *Engel v. Vitale*,⁶⁵ "the purposes underlying the Establishment Clause go much further than [preventing indirect coercion of religious belief]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."⁶⁶ Government involvement in religion, even to support it, may co-opt it, and many religious leaders have, therefore, opposed government "endorsement" of their religious symbols.⁶⁷ Moreover, the union of government and religion harms government by implicating the state in religious controversy and by threatening to enlist state power to exclude and repress the "outsiders."⁶⁸

Following Justice O'Connor's cue, we may read the establishment clause to emphasize this second concern. She envisions a political community in which no one is disabled from full participation on religious grounds. In seventeenth- and eighteenth-century England and America, those who did not conform to the dominant or established church were sometimes allowed to practice their beliefs but denied full political rights.⁶⁹ The men who conceived the establishment clause may well have sought precisely to "de-sectarianize" civil authority and civil rights.⁷⁰ In his 1779 "Bill for Establishing Religious Freedom," Thomas Jefferson argued that "our civil rights have no dependance on our religious opinions, any more than on our opinions in physicks or geometry."⁷¹

Indeed, the proposition that the establishment clause prevents government from making religion relevant to a person's standing in the political community extends beyond specific political or civil rights. It prohibits government from using religion to affect its citizens' participation in the political commu-

64. Of course, whether this "ideal" is an essential or dominant element of liberal democracy, in theory or in practice, is itself hotly disputed. Cf. *infra* notes 95-99 and accompanying text (accommodationist theories).

65. 370 U.S. 421 (1962).

66. *Id.* at 431; see also *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) ("[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

67. See *Allegheny County*, 109 S. Ct. at 3131-32 & n.9 (Stevens, J., concurring in part and dissenting in part) (Jewish leaders objected to Pittsburgh's display of menorah); *N.Y. Times*, July 4, 1989, at A14, col. 1 (acknowledging that Jewish leaders, other than those of Hasidic sect of which Chabad is part, deplored Court's decision).

68. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943), quoted in *Wallace v. Jaffree*, 472 U.S. 38, 54-55 n.39 (1985).

69. See, e.g., L. PFEFFER, *supra* note 38, at 106, 126 (political disabilities on religious grounds persisted in some states after 1791); Smith, *supra* note 22, at 305 n.158 (acknowledging the existence of political disabilities on religious grounds in late seventeenth century England) (citing R. BARLOW, *CITIZENSHIP AND CONSCIENCE* (1962)).

70. S. MEAD, *THE OLD RELIGION IN THE BRAVE NEW WORLD* 40-41 (1977).

71. Jefferson, *A Bill for Establishing Religious Freedom*, in 5 *THE FOUNDERS' CONSTITUTION* 77 (P. Kurland & R. Lerner eds. 1987) (also quoted in Smith, *supra* note 22, at 305 n.158); the same language is incorporated into *Virginia, Act for Establishing Religious Freedom*, in 5 *THE FOUNDERS' CONSTITUTION* 84 (P. Kurland & R. Lerner eds. 1987).

nity. After all, the purpose served by ensuring such specific civil rights as the right to vote, speak freely, hold office, or serve on juries is to guarantee to each citizen an equal opportunity to wield lawfully the power of persuasion and thus to help shape political decisions.⁷² Equal participation is the ultimate value. Hence, religion is made relevant to political standing when it affects that participation, and not just when it affects concrete civil rights.

This ideal of political standing may be derived from at least one theory of moral and political philosophy on which the creators of the first amendment drew. As Professor David Richards explains, the freedom of conscience guaranteed by the religion clauses implies in the broadest sense the freedom to make judgments for oneself concerning what is good and right, without governmental influence, through the exercise of one's practical reason.⁷³ The Kantian imperative mandates equal respect for the exercise of that capacity by others.⁷⁴ Accordingly, a central ideal of democratic community is to create "institutions that foster and express such mutual respect for the rational and reasonable will."⁷⁵ But one employs practical reason not merely to decide matters of conscience, which lie beyond the scope of civil government,⁷⁶ but also to arrange the material aspects of life, which are the proper concern of the political community.⁷⁷ Political debate should, therefore, preserve both the ability of each member to participate equally and the entitlement of each member to

72. See, e.g., R. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 6 (1982) (discussing requirements of ideal democracy, which include, among other things, equality in voting, effective participation, and inclusion of all; also discussing the practical limitations on participation).

73. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 67-73 (1986) (offering an explanation of the moral and political theory, expounded primarily by Locke, Bayle, and Kant, from which Jefferson and Madison derived their views on the proper relationship between church and state).

74. *Id.* at 79-80, 84; see also J. RAWLS, *A THEORY OF JUSTICE* 205-07 (1971) (principle of equal liberty of conscience would be selected as initial principle of justice). Rawls observes that the concept, though commonly associated with Kant, also appears in other writers' works. *Id.* at 205 n.6.

75. D. RICHARDS, *supra* note 73, at 80; see also J. RAWLS, *supra* note 74, at 212 ("[Government's] duty is limited to underwriting the conditions of equal moral and religious liberty.").

76. See Jefferson, *supra* note 71, at 77 ("[t]he opinions of men are not the object of civil government."); Madison, *supra* note 59, at 83 ("[i]n matters of religion, no man's right is abridged by the institution of civil society."); see also *infra* note 79 (discussing framers' belief that constitutional government was one of constrained powers).

77. This is exemplified in the Constitution's enumeration of the general items of public interest: "a more perfect union, justice, domestic tranquility, the common defense, the general welfare, the blessings of liberty." U.S. CONST. preamble; cf. J. Locke, *Letter Concerning Toleration*, quoted in D. RICHARDS, *supra* note 73, at 119 (articulating a list of the general goods which civil government might properly take as its object: "life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like").

Professor Richards construes the concept of "practical reason" to include both "prudential rationality," which is concerned with the good, and "moral reasonableness," which is concerned with the right. D. RICHARDS, *supra* note 73, at 73. The former concept is closer to the Aristotelian idea of "practical wisdom," the latter to Kant's "practical reason." For significant differences between the two notions, compare generally ARISTOTLE, *NICOMACHEAN ETHICS*, BOOK VI 152-73 (M. Oswald trans. 1962) with I. KANT, *CRITIQUE OF PRACTICAL REASON* (L. Beck trans. 1956); see also S. KÖRNER, *KANT* 129-65 (1955).

equal respect. And "equal respect for persons calls for constitutional constraints which a legitimate government and community must observe."⁷⁸

When government makes religion relevant to political standing, it distorts ideal political discourse in two ways. First, the liberal ideal of a democratic political community, as expressed in our constitutional scheme of a limited government, assumes radical disagreement over conceptions of the good; it is not the prerogative of government to favor any particular conception.⁷⁹ When an individual or group infuses political discourse with religiously based views, it brings to the debate only one out of many possible perspectives.⁸⁰ However,

78. D. RICHARDS, *supra* note 73, at 69. This is Professor Richards' understanding of the concept of the "social contract." See also J. RAWLS, *supra* note 74, at 11 (social contract as basic principles of justice "that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"). Interestingly, this idea is not itself a purely secular concept, but is derived from the religious idea of the "covenant." See AMERICAN POLITICAL THEOLOGY 14 (C. Dunn ed. 1984) (quoting D. Elazar, *Political Theory of Covenant: Biblical Origins and Development*); D. RICHARDS, *supra* note 73, at 68-69.

For an analogous explanation of the first amendment guarantee of freedom of speech as "a deduction from the basic American agreement that public issues . . . be decided by universal suffrage," see A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25-27, 38-39, 63-70, 88-91 (1948); cf. L. BOLLINGER, *THE TOLERANT SOCIETY* 117 (1986) (protecting extremist speech counters natural impulse to intolerance by fostering habits of tolerance which are essential to self-governing political society based on willingness to compromise).

79. On the framers' understanding that constitutional government was to be one of constrained powers, that government was simply not competent in certain matters, including religion, see, for example, L. LEVY, *supra* note 62, at 65-66 (some opposed establishment clause because they thought it unnecessary to prohibit government from doing that which the constitution gave it no power to do in the first place).

On the ideal that government not identify itself with any particular conception of the good, Professor Richards states:

The specific concern of the antiestablishment clause is that, in contexts of belief formation and revision, the state not illegitimately (nonneutrally) endorse any one conception (whether religious or secular) from among the range of conceptions of a life well and humanely lived that express our twin moral powers of rationality and reasonableness. For this reason, the antiestablishment principle rejects as its criterion any such substantive conception, and requires that state power in the relevant contexts pursue the general goods consistent with rational and reasonable choice of any such substantive conceptions.

D. RICHARDS, *supra* note 73, at 149; see also J. RAWLS, *supra* note 74, at 212 (constitution renders government incompetent to make value judgments regarding the legitimacy or illegitimacy of religious associations); R. UNGER, *KNOWLEDGE AND POLITICS* 76-77 (1975) (liberal political order eschews conception of general good because values are understood as irreducibly subjective); Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 *STAN. L. REV.* 233, 283-84 & nn.308-17 (1989) (recognizing that American ideal of political community derived from Enlightenment theories of secularism and voluntarism in public affairs; state must be value-neutral).

80. Cf. P. BERGER, *THE SACRED CANOPY* 137 (1967) (in pluralist society, religious groups compete with each other and with nonreligious groups in defining the world); Ingber, *supra* note 79, at 284 & n.314 (cites sources for "marketplace of ideas" doctrine of liberal democracy). Whether it is desirable for political discourse to be conducted partially in sectarian terms is another matter. See *infra* notes 89-90.

when government promotes religion or religious belief—by offering religious justifications for policy or even by simply acknowledging private religiosity as good in itself—government approves of policy choices being grounded in religious belief without similarly approving the opposite.⁸¹ By doing so, government prefers at least partially religious to exclusively nonreligious justifications for policy, and thus tends to identify itself with a particular religious conception of the good, violating one premise of liberal democracy.

Second, the legitimacy of policy decisions in a democracy derives from the participation of those affected by the policies.⁸² Once government makes religion relevant to political discourse, some who are not members of the favored religion and who do not share those conceptions will be marginalized: they will no longer feel that they can participate equally in the formulation of policies, or will be perceived by others as less worthy participants.⁸³ This unequal participation undermines the legitimacy of the policies chosen.⁸⁴

81. Justice O'Connor, of course, disputes this: "Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3121 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original); *see also* *Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2382 (1990) (concurring in judgment instead of joining Justice O'Connor's opinion, Justices Marshall and Brennan observe that in absence of disclaimers, Westside High School implicitly considers Christian Club, like all other extracurricular student groups, to be part of a program to develop "citizenship, wholesome attitudes, good human relations, knowledge and skills," and that this violates establishment clause); *id.* at 2380 ("[A]lthough a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student worshippers.").

82. *See, e.g.*, The Declaration of Independence para. 1 (U.S. 1776) ("That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . ."); R. DAHL, *supra* note 72, at 4-6; *cf.* J. RAWLS, *supra* note 74, at 229-30 ("[T]he chief merit of the principle of participation is to insure that government respects the rights and welfare of the governed.").

83. The social psychology of this process of exclusion and marginalization is discussed *infra* notes 100-14 and accompanying text.

84. *Cf.* Ingber, *supra* note 79, at 323-24 & nn.566-67 (government favoritism of religion "tend[s] to . . . undermin[e] the political process's normal functioning"); Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988) (to ensure legitimacy of judicial decisions, legal doctrine should not enshrine one mode of analysis to the exclusion of others, but should promote community of discourse and mutual persuasion based on open acknowledgment of strengths and weaknesses of competing modes).

The argument presented here extends or at least restates the recognized tenet that the establishment clause should prevent government from fomenting political divisiveness along religious lines. The opposite of (violent) divisiveness is not uniformity, but pluralist dialogue; not the elimination of controversy, but the maintenance of a community of conversation in which persuasion of the other is possible. Persuading the other means recognizing the other's right to participate in the dialogue; otherwise, political debate becomes "civil war carried on by other means." A. MACINTYRE, *AFTER VIRTUE* 236 (1981). The focus here, therefore, is on ensuring equal participation, regardless of any special potential for divisiveness created by the alignment of political positions along religious lines.

Justice O'Connor writes: "Political divisiveness is admittedly an evil addressed by the Clause." *Lynch v. Donnelly*, 465 U.S. 669, 689 (1983). Yet Justice O'Connor also believes that such divi-

Justice Blackmun wrote recently that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief."⁸⁵ The appearance is improper because, among other things, it implies that consistency with a particular religious belief is relevant to the wisdom of a policy decision.⁸⁶ Consider an analogy from a limited universe of discourse over which government exercises control: the trial. Federal Rule of Evidence 610 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."⁸⁷ A witness's credibility affects the weight the fact finder will accord to his or her observations and opinions, just as a person's standing in the political community may affect the weight others will give to his or her attempts at political persuasion. While the goals of the two processes differ—an accurate determination as to liability or guilt in the one, a wise policy in the other—the principle is the same in each: government should not promote the use of religion to affect the deliberative process.⁸⁸

siveness is *not* an independent test of the constitutional validity of government action. *Id.* She writes that "guessing the potential for political divisiveness . . . is simply too speculative." *Id.* One may wonder how Justice O'Connor reconciles that conclusion with her position that the seemingly more speculative concept of "relevance to political standing" is an independent test, indeed the only test, of constitutionality. The answer may lie in her belief that the impact of governmental messages on political standing may be determined "objectively." See *infra* notes 145-97 and accompanying text.

85. *Allegheny County*, 109 S. Ct. at 3101.

86. Professor Tribe has offered another argument, albeit a somewhat circular one, against government's use of religious means. Such conduct "entails government's lending a religious organization an inherently state power: the power of official endorsement through government speech." L. TRIBE, *supra* note 52, at 1286 (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)).

87. FED. R. EVID. 610. Note the similarity between this exclusionary rule of evidence and Justice O'Connor's "exclusionary rule" for government speech: each prohibits use of, or reference to, religion to strengthen or to weaken the message presented.

88. Government's complete authority to regulate the trial process effectively extends its imprimatur in some form to the entire proceeding; the trial is not even a limited open forum. By contrast, political discussions may be conducted in large part outside governmental channels and by non-governmental actors. Yet it seems reasonable to draw an analogy between discourse at trial and discourse in the political community insofar as government affects it. Of course, the establishment clause does not prohibit religious considerations not injected by government. See *infra* notes 89-91.

Another difference between the trial and the political community at large concerns the respective roles of juror and voter or officeholder. A juror's sole function is to determine what happened; truth should be the only goal and the credibility of the witness the only relevant variable. A policymaker's functions are much more variegated. Arguably, it is proper for the policymaker to consider who the proponents of a given position are, and not solely the wisdom of their particular proposal, because her job is to accomplish overall the best compromises of competing interests on many issues. The religious orientation of the proponents may well be relevant to that larger function. Nevertheless, the value of equal participation and the right of each citizen to equal respect for her views remains paramount.

It might also be pointed out that in the very context chosen here to illustrate how the establishment clause should forbid government from injecting religious considerations into secular discourse, witnesses may be required to swear an oath concluding "so help me God." Applying the

This is not to say that the establishment clause should prevent private individuals and groups from drawing upon religious conviction when debating public policy, from seeking to enact laws that are consonant with those convictions, or from opposing laws that are not. That proscription would be futile even if it were desirable.⁸⁹ Nor should the clause attempt to extirpate religious motivation from the behavior of government actors.⁹⁰ But government may not

analysis suggested in this Article might very well lead to the invalidation of this oath. Alternatively, the courts might exercise a "prudent abstention" and decline to review such entrenched public customs. See L. LEVY, *supra* note 62, at 127; see also *infra* notes 261-63 and accompanying text (Tushnet's recommendation based on "civic republicanism").

89. See generally K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988) (participants in liberal democracy may properly rely on religious convictions in deciding policy matters). Much recent literature advocates the reintroduction or promotion of religiously based values in the public sphere. See, e.g., R. NEUHAUS, *THE NAKED PUBLIC SQUARE* (1984). But discourse suffers to the extent that argument is grounded only in privately accessible reasons, as explicitly sectarian argument tends to be, since genuine persuasion is impossible unless the speaker can engage the listener on terms the latter can share. See, e.g., K. GREENAWALT, *supra*, at 217 ("The common currency of political discourse is nonreligious argument about human welfare. Public discourse about political issues with those who do not share religious premises should be cast in other than religious terms."); R. NEUHAUS, *supra*, at 36 ("A dilemma . . . facing the religious new right is simply this: it wants to enter the political arena making public claims on the basis of private truths. The integrity of politics itself requires that [this] be resisted. Public decisions must be made by arguments that are public in character.") (emphasis omitted); J. RAWLS, *supra* note 74, at 216 (it is preferable that limits on tolerance be justified by reasons accessible to all rather than by principles of faith, because it is otherwise not possible to argue that the limits have been incorrectly drawn); see also Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 604-05 (1988) (judicial discourse should exemplify shared understanding: "[t]he prudent arbiter . . . must create a shared world by speaking the other's tongue").

But if public argument must be couched in publicly accessible language, a conflict arises: it seems that the religious person must dissemble in public in order to persuade. Professor Tribe writes that "when religious believers arrive at political debates, they must check their beliefs at the door or risk losing their efficacy." L. TRIBE, *supra* note 52, at 1277. But the establishment clause cannot bounce them if they fail to do so. See *infra* note 90; cf. K. GREENAWALT, *supra*, at 220-21 (religious person is not insincere when making public arguments in nonreligious terms, since "political discourse mainly involves advocacy of positions arrived at, not full revelation of all the bases by which a decision is reached," and "[e]ffective argument appeals to grounds that the audience can accept").

90. See K. GREENAWALT, *supra* note 89, at 231-39 (discussing extent to which government officials may draw on religious conviction in deciding political matters).

The Supreme Court has recognized that the establishment clause does not mean that public discourse must be free from religious influences or that religiously motivated persons may not participate:

"Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."

. . . The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

McDaniel v. Paty, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring) (quoting in part Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970)); see also Ingber, *supra* note 79, at 323 & n.561

indicate a preference for political discourse that is grounded in religious belief.⁹¹ And government—given its power in general, the violence with which it stands ready to enforce its decisions,⁹² and its authority over channels of communication in particular—is uniquely able to influence the discourse.⁹³ Indeed, as Dean Mark Yudof writes, the establishment clause “is the only substantive constitutional restraint on what governments may say.”⁹⁴

Some advocate narrower constructions of the establishment clause, favoring even greater governmental “accommodation” of religion than the Supreme Court has permitted. In the Pittsburgh holiday displays case, as noted earlier, Justice Kennedy wrote that the establishment clause forbids only government action that coerces support for religion or tends to establish a state religion.⁹⁵ Chief Justice Rehnquist has interpreted the clause to prohibit only governmental preference of one religion or sect over another.⁹⁶ Others have contended that the clause requires only the institutional separation of church and state.⁹⁷

(acknowledging that religious institutions have the “right to participate in public dialogue surrounding public policy issues”); cf. *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (criticizing majority’s rejection of creationism statute on grounds of legislature’s improper motivation); L. TRIBE, *supra* note 52, at 1279-82 (six reasons why government should not seek to reduce religious-based political divisiveness).

91. Although it will usually be fairly clear whether government is acting, there will no doubt be borderline cases. For instance, how prominently must a government office display religious decorations before the display becomes “government’s” public act? Does a legislator advocating a position on the floor of her house of representatives speak for government?

These questions may be analyzed using the method proposed in Part V below. See *infra* notes 198-263 and accompanying text. Consider, for instance, the case of the legislator during floor debate. Assume, for purposes of argument, some perception that the government endorses religion when an elected representative explicitly draws on or refers to religious values during debate. Does government have an important secular purpose in permitting such behavior? Obviously, the answer is yes: free debate on public issues is the very essence of democratic government. Is there any way of achieving that purpose that would be less likely to engender perceptions that government had taken a position on religion? It is difficult to conceive of one. Indeed, to limit such speech would seem contrary to another portion of the first amendment.

92. See Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

93. See M. YUDOF, *WHEN GOVERNMENT SPEAKS* 6 (1983) (noting government’s ever increasing opportunity to communicate to the public in an abusive fashion). See generally Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U.L. REV. 603, 692-94 & nn.417-27 (1987) (noting that government speech is pervasive and contributes to marketplace of ideas, but also that government speech may threaten personal autonomy).

94. M. YUDOF, *supra* note 93, at 214.

95. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3136 (1989) (Kennedy, J., concurring in part and dissenting in part); see also Choper, *supra* note 22, at 675 (establishment clause prevents government only from coercing or influencing religious belief); McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. REV. 146 (1986) (the balance between the clauses requires nothing more than neutrality).

96. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); see also R. CORD, *SEPARATION OF CHURCH AND STATE* (1982) (history of drafting and ratification of establishment clause supports preferentialist interpretation). *Contra* L. LEVY, *supra* note 62 (drafting and ratification of clause refutes preferentialist position).

97. See Smith, *supra* note 62; see also *ACLU v. Wilkinson*, 701 F. Supp. 1296, 1308-09 (E.D.

One federal district court judge recently described the "wall of separation" as having "been rehabbed . . . to the point where it is more like a wrought iron fence—still a definite barrier, but permitting communication from one side to the other."⁹⁸

A detailed response to each of these competing views is beyond the scope of this article. Arguably, the language and history of the establishment clause and its various interpretations by the courts make each of these options and more quite plausible; which view one prefers, to paraphrase Professor Michael McConnell, depends largely on one's view of the proper relation between church and state.⁹⁹ It suffices for now that understanding the establishment clause to prevent government from making religion relevant to political standing appears validly grounded in the language of the clause, in earlier authoritative interpretations, and in a worthwhile vision of American society.

III. THE NO ENDORSEMENT TEST AND THE PROTECTION OF POLITICAL STANDING

The question remains whether Justice O'Connor's no endorsement test—that the establishment clause prohibits government from acting so as to send messages of endorsement or disapproval of religion—offers a logical and feasible way to prevent government from making religion relevant to political standing. This Part first explains the connection between government's endorsement of religion and its impact on political standing. This Part then defends Justice O'Connor's focus on messages of inclusion or exclusion, and the broad conception of political standing that it implies against criticisms in the recent literature.

One reason that governmental endorsement of religion affects standing in the political community is that religious principles tend to comprise a total world view for their adherents.¹⁰⁰ When government promotes religious beliefs, it will be understood to favor the policy views that the holders of those beliefs

Ky. 1988) (citing Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 Ky. L.J. 61 (1988)), *aff'd*, 895 F.2d 1098 (6th Cir. 1990).

98. *Wilkinson*, 701 F. Supp. at 1314.

99. See *infra* note 185 and accompanying text; Tushnet, *supra* note 58 (lack of consensus about scope of religion clauses inevitably results from disagreement over fundamental vision of society that the clauses represent). On inconclusiveness of historical evidence, compare R. CORD, *supra* note 96, at 3-15 (1982) (history of drafting and ratification of establishment clause supports preferentialist interpretation) with L. LEVY, *supra* note 62 (drafting and ratification of clause refutes preferentialist position) and L. PFEFFER, *supra* note 38, at 139-47 (same). See also R. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT* 69-71 (1968) (historical support for almost any position may be found).

100. See, e.g., P. BERGER, *supra* note 80, at 1-51 (religion is traditionally a crucial part of human construction and maintenance of social world); R. NEUHAUS, *supra* note 89, at 18 (fundamentalism is a "comprehensive public world view for many Americans"); Ladd, *Politics and Religion in America: The Enigma of Pluralism*, in *RELIGION, MORALITY, AND THE LAW: NOMOS XXX* 263, 271 (J. Roland Pennock & J. Chapman eds. 1988) (religion represents "an ultimate and absolute type of value-system" and claims "superiority over all other value-systems").

espouse.¹⁰¹ Thus, a governmental "celebration of religious diversity"¹⁰² will not appear to everyone as merely an acknowledgment of *private* religiosity. Those who think that religious belief has a public role,¹⁰³ whether adherents or non-adherents, will tend to perceive government's preference for the policy views of the chosen religions. Government's display of religious symbols is not the same as its sponsorship of an ethnic food festival. The totalizing aspect of religion also creates a spillover effect from one public policy issue to another: when government makes religion relevant in general or in one context, citizens will take religion to be relevant in other contexts and on other issues as well.

Moreover, because religious identification is so often primary in adherents' conceptions of themselves and of others,¹⁰⁴ people will tend to believe not only that a particular point of view is valid because it coincides with particular religious beliefs but also that the points of view of people who do not share those beliefs cannot be valid. Madison may have recognized this when he objected to a proposed assessment to support religious teachers, in part, because it "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."¹⁰⁵

101. Members of any given organized religion may be found on different sides of most major political issues; nevertheless, certain religious institutions have identifiable "party lines" which dictate their adherents' positions on a range of issues. See generally R. MORGAN, *supra* note 99.

102. This, of course, is how Justice O'Connor interpreted the Christmas tree and menorah display in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989).

103. See R. NEUHAUS, *supra* note 89 (public aspects of religious belief).

104. See, e.g., Ladd, *supra* note 100, at 271 (stating that because most religious value systems are based in belief in transcendental deity,

the values proceeding from [that belief are] more exigent in a number of ways, including emotionally and psychologically, than . . . the values of an atheist or naturalist. For someone who does not share the beliefs on which a theological morality is grounded, it is easy to underestimate their power in the life of believers);

see also *id.* at 273 ("[R]eligious doctrines of every kind draw a line between insiders and outsiders, the faithful and others.").

105. Madison, *supra* note 59, at 83, para. 9; see also Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U.L. REV. 1113, 1164-69 (1988) (government endorsement of religion tends to exclude the offended from the political community by attacking their most fundamental beliefs).

For one perception of the connection between religious belief and political standing, see M. SILK, *SPIRITUAL POLITICS* 159-61 (1988), describing the reaction of Milton Tobian, chair of the Southwest region of the American Jewish Committee, to a speech at the conservative Religious Roundtable's National Affairs Briefing during the 1980 campaign. One speaker, a Baptist pastor, proclaimed that "God Almighty does not hear the prayer of a Jew." Tobian was taping the proceedings, and later circulated a transcript to other Jewish leaders. Tobian described the Briefing as "'the first major public demonstration' of a movement capable of separating 'American Jews from effective participation and influence in American decision making.'" *Id.*

Of course, Jewish sensitivity to state sponsorship of religion is not new. A generation ago, Will Herberg wrote that:

The intrusion of religion into education and public life, the weakening of the "wall of separation" between religion and the state, is feared [by Jews] as only too likely to result in situations in which Jews would find themselves at a disadvantage—greater isolation, higher "visibility," an accentuation of minority status.

W. HERBERG, *PROTESTANT CATHOLIC JEW* 255 (1955).

Americans may approve of ideals of mutual respect and tolerance in the abstract, but tolerance declines when people are confronted with specific instances of unpopular or "outsider" speech. As Professor Michael Corbett reports,¹⁰⁶ while over eighty percent of persons in a survey conducted in the late 1950s agreed with such propositions as "I believe in free speech for all no matter what their views might be," barely one-third of the respondents to another survey taken at about the same time were willing to allow speech by atheists at all; only one in eight would permit an atheist to teach in college.¹⁰⁷ Although the latter figures increased to three-fifths and two-fifths, respectively, by the late 1970s,¹⁰⁸ Professor Corbett still concludes that "Americans do not give equal support to the rights of different groups to express their views."¹⁰⁹

It has, nevertheless, been argued that when government appears to promote religion in general, as opposed to particular creeds, the threat to establishment clause interests is diluted. Often leading the list of "unobjectionable" government actions are such nondenominational messages as "In God We Trust" on coins and the Supreme Court's own "God save this honorable Court."¹¹⁰ These messages, however, can be just as harmful as more overtly sectarian conduct. First, every attempt to define a community of believers, no matter how ecumenical, necessarily excludes those who do not share in the belief.¹¹¹ Reference to belief in a Supreme Being may be broader than reference to Christianity, but still excludes agnostics and atheists.¹¹² Second, no one adheres to religion in general. Each believer belongs to a particular religion, and a government official who promotes God will be understood by many observers to be promoting either his own beliefs or whatever beliefs predominate among those of his class and ethnic group.¹¹³ Similarly, because there is no symbol of reli-

106. M. CORBETT, *POLITICAL TOLERANCE IN AMERICA: FREEDOM AND EQUALITY IN PUBLIC ATTITUDES* 28-45 (1982).

107. *Id.* at 29, 36.

108. *Id.* at 36.

109. *Id.* at 45. Corbett also writes: "The right to religious freedom (including separation of church and state) of those who are not religious or those whose religious views are outside the Protestant-Catholic mainstream tends to be treated rather lightly by Americans." *Id.*; see also L. BOLLINGER, *supra* note 78, at 109-10 (individual whose fellow citizens brand him as atheist or similar nonconformist may become "socially and economically a pariah").

110. See *Lynch v. Donnelly*, 465 U.S. 668, 693 (1983) (O'Connor, J., concurring).

111. See Ladd, *supra* note 100, at 273. For a lyrical depiction of the exclusion produced by efforts to include, see M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 62-63, 65-68 (M. Heim trans. 1980). Of course, the broader the message, the fewer the "outsiders," but this is no justification for such conduct, because some persons will still be marginalized on religious grounds.

112. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being . . .").

113. Cf. *Marsh v. Chambers*, 463 U.S. 783, 822-23 (1983) (Stevens, J., dissenting) (Justice Stevens made the following comment regarding a Nebraska practice of beginning each legislative day with a prayer led by a state-paid chaplain, which was upheld by the majority:

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister

gion "in general," much less of irreligion, any effort to acknowledge symbolically religion in general, or religious diversity, must employ the symbols of various particular faiths. Government then runs the risk of appearing to endorse not all religion, but only the religions whose symbols it displays. This is exactly the scenario in the second holiday display at issue in *Allegheny County*.¹¹⁴

Justice O'Connor's premise that official endorsement of religion affects political standing has been challenged. Professor Steven Smith argues that, even assuming the truth of Justice O'Connor's assertions about the purpose of the establishment clause and the message that government sponsorship of religion sends, her approach fails because there is "no plausible link," no necessary connection, between the two.¹¹⁵ Smith contends that some laws, such as a law barring clergy from serving in the legislature, can alter political status on the basis of religion without necessarily expressing approval or disapproval of religion. The reverse, Professor Smith claims, is also true: some government action, such as putting "In God We Trust" on coins, appears to endorse religion without altering political standing in any realistic sense. Professor Smith concludes that "[i]f the goal of the establishment clause is to make political standing independent of religion . . . the proper doctrinal direction seems al-

in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.);

Jager v. Douglas County School Dist., 862 F.2d 824, 831 (11th Cir. 1989) (noting that Protestantism is the majority religion in the county and that most past pregame invocation speakers had been Protestant ministers, and therefore rejecting "equal access" plan for religious invocations before school football games).

114. Cf. L. TRIBE, *supra* note 52, at 1286 (by using religious symbols, government "will almost invariably violate denominational neutrality") (referring to *Marsh*, 463 U.S. at 823 (Stevens, J., dissenting)); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3128 (1989) (Brennan, J., concurring in part and dissenting in part) (discussing offensiveness of Pittsburgh's message of "religious pluralism").

Justice O'Connor, analyzing the "Salute to Liberty" in *Allegheny County*, seeks to explain how Pittsburgh not only avoided endorsing Judaism or Christianity in particular, but also religion in general over nonreligion. She admits that the menorah is "the central religious symbol and ritual object of [a] religious holiday," but argues that by juxtaposing that symbol next to the "predominantly secular" Christmas tree and accompanying both with a message "salut[ing] liberty," Pittsburgh "conveyed a message of pluralism and freedom of belief during the holiday season," rather than an endorsement of religion over nonreligion. *Allegheny County*, 109 S. Ct. at 3122-23 (O'Connor, J., concurring in part and concurring in the judgment). According to Justice O'Connor, the city's choice of that "secular" symbol of the Christmas holiday season merely acknowledged "a public holiday celebrated by religious and nonreligious citizens alike." *Id.* at 3123. This begs the question of how the nonreligious "celebrate" the holiday. Does the closure of the atheist's workplace to mark the anniversary of Jesus's birth indicate equal footing for the beliefs of the religious and the nonreligious? Additionally, why do "only holidays stemming from Christianity, not those arising from other religions, favorably dispose the government towards 'pluralism'?" *Id.* at 3126 n.* (Brennan, J., concurring in part and dissenting in part). Again, Justice O'Connor's answer is based on what the "reasonable" observer would perceive. See *infra* notes 145-97 and accompanying text.

115. Smith, *supra* note 22, at 305-09.

most embarrassingly plain: . . . [to] develop doctrine which invalidates laws or practices that affect political or civil rights on religious grounds." Justice O'Connor's focus on symbolic effects is "at best a less than faithful proxy for the goal the Court seeks to achieve."¹¹⁶

Yet Professor Smith's paradigm cases fail to show that the endorsement or disapproval of religion is "practically and analytically distinct" from the effect on political standing.¹¹⁷ Consider first his example of a law that prevents the clergy from serving in the legislature.¹¹⁸ He writes:

Such a law *might* reflect disapproval of religion, implying that ministers are unfit for public office. Conversely, the law might suggest *approval* of religion; it might evince a belief that ministers are too virtuous, or are engaged in too important a calling, to be sullied and distracted by mundane political pursuits. Or the law might reflect neither approval nor disapproval of religion, but merely a belief that both religion and politics are better off when kept apart.¹¹⁹

This law "affects political status on the basis of religion *whether or not* [it] also endorses or disapproves of religion."¹²⁰ Its *symbolic* aspect is thus beside the point. Therefore, Professor Smith claims, Justice O'Connor's no endorsement test is, in this case, simply irrelevant to the goal of preventing religion from affecting political standing. It is an underinclusive means of reaching its stated goal, because it fails to reach a case that plainly affronts the acknowledged purpose of the establishment clause.

The law barring clergy from the legislature is obviously a peculiar case for Justice O'Connor's schema. Those adherents of religion who perceive the law as approving religion cannot possibly draw the inference that Justice O'Connor posits in such cases—that they are therefore "insiders" in the political community—since the law itself tends to exclude them from participation. However, no such logical conundrum defeats the application of Justice O'Connor's test to those who perceive the law as disapproving religion.¹²¹ Indeed, the law *facially* disadvantages some people on the basis of their religious calling. Stronger support for the plausibility of perceptions of exclusion and disapproval is difficult to imagine. Whether many people view the law as neither endorsing nor disapproving religion is inconsequential for Justice O'Connor's purposes so long as some people perceive it as doing one or the other.¹²²

116. *Id.* at 309.

117. *Id.*

118. The law that Professor Smith has in mind is Tennessee's law excluding the clergy from public office, which was struck down by the Supreme Court in *McDaniel v. Paty*, 435 U.S. 618 (1978).

119. Smith, *supra* note 22, at 306-07 (emphasis in original) (citations omitted).

120. *Id.* at 307 (emphasis in original).

121. See *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., concurring) (under *Lemon* test, Tennessee law "has a primary effect which inhibits religion"). The majority decided *McDaniel* on free exercise and not establishment clause grounds. *Id.* at 628-29.

122. In the case of the invalidation of religious oath requirements, Smith hypothesizes historical evidence of nonreligious original intent so persuasive that "everyone" concludes the law neither

The text of the law also presents convincing evidence of impermissible legislative intent.¹²³ Justice O'Connor's proscription of messages perceived to endorse or disapprove religion may not be *necessary* to invalidate such a law. But this does not imply that her proscription is an unsound device for guarding against both blatant and subtle encroachments of religion on political standing.

Professor Smith's other paradigm—the invocation which opens a legislative session, or the motto "In God We Trust" minted on coins—seems to present a more serious difficulty for the no endorsement test. "[N]o one loses the right to vote, the freedom to speak, or any other state or federal right if he or she does not happen to share the religious ideas that such practices appear to approve."¹²⁴ Professor Tushnet expresses the same thought:

[I]t is not clear why symbolic exclusion should matter so long as "nonadherents" are in fact actually included in the political community. Under those circumstances, nonadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics.¹²⁵

Yet under Justice O'Connor's theory, government action that lacks a concrete effect on political standing is, nevertheless, invalid if it endorses religion.

This difficulty is more apparent than real, however, because the scope of establishment clause protection extends beyond specific civil rights. The establishment clause "focuses not on the specific individual but on the community of believers (or nonbelievers) and the society at large."¹²⁶ Alone among the provisions of the first eight amendments, the establishment clause primarily concerns the structure of government, touching on individual interests only secondarily.¹²⁷ Select any other clause in those amendments, and the personal

endorses nor disapproves of religion. Smith, *supra* note 22, at 307 n.165. In such a case, Smith rightly concludes, "'endorsement' and [political] 'status alteration' represent distinct, and severable, consequences of the law." *Id.* Of course, in a hypothetical world where everyone gauged the impact of government on religion in the same way, there would be very little establishment clause litigation.

123. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 77-78 (1985) (O'Connor, J., concurring) (inferring impermissible legislative purpose from statutory language authorizing moment of silent meditation or prayer, compared to language of prior statute authorizing moment of silent meditation).

124. Smith, *supra* note 22, at 307.

125. Tushnet, *supra* note 58, at 712.

126. Ingber, *supra* note 79, at 322 & n.556.

127. Mark de Wolfe Howe wrote:

[I]n so far as national power is concerned we are compelled by our respect for the intention of the framers to read the non-establishment clause of the First Amendment as a barrier not only to federal action which infringes religious and other liberties of individuals but as a prohibition of even those federal aids to religion which do not appreciably affect individual liberties.

M. DE WOLFE HOWE, *RELIGION IN A FREE SOCIETY* (1958), reprinted in J. WILSON & D. DRAKEMAN, *CHURCH AND STATE IN AMERICAN HISTORY* 217 (2d ed. 1987). But cf. A. MEIKLEJOHN, *supra* note 78 (free speech clause justified primarily in terms of ideal of self-government rather than individual liberty); see also *Barenblatt v. United States*, 360 U.S. 109, 145-46

interest infringed by a violation comes promptly to mind. A government restriction on publication, for instance, directly infringes the publisher's right of free speech. A convict's right not to be subjected to cruel and unusual punishment is violated when government imposes such a punishment, regardless of how "cruel and unusual" may be defined. The personal values protected by the establishment clause are not so immediately implicated when the clause is violated.¹²⁸

Accordingly, as Justice Black wrote in *Engel v. Vitale*,¹²⁹ the clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."¹³⁰ The establishment clause prevents government sponsorship of religion in order to protect against an atmosphere that is at odds with the liberal ideal of a secular political community. The evil that endorsement produces is not so much that identifiable individuals are actually led to drop out of the participatory democracy (much less that their freedom of religious belief is coerced or influenced) as that government has restructured public discourse along religious lines. To those who perceive government endorsement of religion in financial aid to parochial schools, the true harm is not so much direct personal injury, financial or otherwise, as it is a change in the nature of the political community. The plaintiff's own injury is but a symptom of the more significant structural damage.

The political standing protected by the establishment clause obviously encompasses Smith's and Tushnet's "actual inclusion" in the community, invalidating laws that exclude persons from voting or from serving in the legislature because of their religion, but it must go further. For instance, assume that a state adopted a new flag with distinctively sectarian religious imagery and the slogan "This is a God-fearing state."¹³¹ The government might offer plausible

(1959) (Black, J., dissenting) (same).

This peculiar feature of the establishment clause gave rise to arguments that the clause, unlike the free exercise clause and other protections in the Bill of Rights, was not made applicable to the states through "incorporation" in the fourteenth amendment's guarantee against deprivation of "liberty" without due process. See, e.g., E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 114 (1951) (arguing fourteenth amendment protects only religious liberty, not the establishment of state religion). For whatever reason, it has been well settled since the late 1940s that the establishment clause does apply to state and local governments. See *supra* note 17.

128. Moreover, Supreme Court cases "do not require a plaintiff to demonstrate that a government action necessarily promotes religion, but simply that it creates . . . a substantial risk [of promotion]." *Bowen v. Kendrick*, 487 U.S. 589, 648 (1988) (Blackmun, J., dissenting) (emphasis in original) (citations omitted).

129. 370 U.S. 421 (1962).

130. *Id.* at 430.

131. The hypothetical is not far-fetched: the Arizona Republican Party in 1988 adopted as part of its platform the proposition that the United States is a "Christian nation." It should also be noted that the Party used in support of its campaign for the "Christian nation" proposition a letter solicited from Justice O'Connor citing three cases in which the Supreme Court had allegedly upheld that statement. See, e.g., Gaffney, *O'Connor Fumbles 'Christian Nation' Case*, CHRISTIAN

secular purposes for its action: promoting community spirit or acknowledging community history.¹³² Even in this case, no one could show that government's action had deprived anyone of a specific political right. Yet the establishment clause must prohibit this action. Since Professor Smith's interpretation of the clause would not produce a violation in this instance, his view that symbolism is irrelevant, so long as specific civil rights are preserved, is untenable.¹³³

Though its structural aspect is paramount, Justice O'Connor's conception may be expressed in terms of individual interests: a Jeffersonian right against the government to equal respect for one's opinions on matters of public concern, regardless of one's (ir)religion.¹³⁴ The establishment clause may be understood to reach government action that tends to make a person "feel like an outsider" because of her non-adherence to the favored religious beliefs. The clause prevents government from subjecting religious or atheistic minorities to "greater isolation [and] accentuation of minority status."¹³⁵ In other words, the clause protects people from feeling alienated from or marginalized in the political community by government action.¹³⁶ "Standing in the political community" thus encompasses not just *de jure* status but also *de facto* perceptions of each person's position in that community.¹³⁷

CENTURY, April 12, 1989, at 373-75; *The "Christian Nation" Controversy*, AM. LAW, June 1989, at 70; Dershowitz, *Justice O'Connor's Second Indiscretion*, N.Y. Times, April 2, 1989, at E31, col. 2.

132. *Cf. Friedman v. Board of County Comm'rs*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (finding use of Latin cross and Spanish motto, translated as "With This We Conquer," on county seal displayed on police cars and elsewhere "conveys strong impression to the average observer that Christianity is being endorsed" and thus violates establishment clause, *rev'g* 528 F. Supp. 919, 924 (D.N.M. 1981) (finding that cross and county seal did not have a primary or principal effect of advancing or inhibiting religion, but were rather "a benign reference to religion").

133. Also, note that the Constitution already provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, § 3. While by its terms this applies only to federal office (and hence did not preclude the Tennessee statute, discussed *supra* in the text accompanying notes 118-23), this suggests that the establishment clause was meant to protect more than concrete, identifiable rights such as officeholding from interference on religious grounds.

134. *See supra* notes 73-78 and accompanying text.

135. *See* W. HERBERG, *supra* note 105, at 255.

136. Constitutional law recognizes "mere" alienation as a harm in other contexts. As Professor Arnold Loewy has pointed out, the Court has acknowledged the impropriety of sending objectionable messages to historically disadvantaged groups such as blacks and women. "We refuse to tolerate segregated railroad cars and courtroom seating because of the discomfort of the message, not the seats." Loewy, *supra* note 29, at 1051; *see also* *Lynch v. Donnelly*, 525 F. Supp. 1150, 1174-75 (D.R.I. 1981) (Judge Pettine's remarks concerning the alienation produced by government's endorsement of religion, quoted *supra* in the text accompanying note 40), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984); *cf. Smith, supra* note 22, at 309 (interpreting Justice O'Connor's approach as prohibiting "alienation"); *id.* at 313 ("[A] conception of 'political standing' that includes a right not to feel like an 'outsider,' constitutes a utopian vision rather than a realistic basis for formulating constitutional doctrine.").

137. The expansive notion of the establishment clause presented here should not be difficult to reconcile with current standing doctrine. *Cf. Smith, supra* note 22, at 307 (acknowledging that laws can endorse religion without altering political status). To meet standing requirements, a

Preventing this sort of alienation, moreover, may be justified as a prophylactic against more concrete alterations of political standing. Symbolic acts that seem inconsequential might, cumulatively or over time, foster an atmosphere of public discourse in which adherence to religion does make a difference. Professor Tushnet's arguments that the establishment clause cannot be understood as a first line of defense against violations of religious freedom do not apply as forcefully here.¹³⁸ Presumably, a person whose religious beliefs are sincere and deeply felt will not be easily influenced to abandon those beliefs by the appearance of government sponsorship of another faith, because such sponsorship should be irrelevant to his beliefs. On the other hand, those who consider themselves politically favored by government's endorsement of their religious affiliation face no similar restraint in excluding the non-favored from real participation in decisionmaking. Only by recognizing this special potential for harm can constitutional doctrine remain vigilant against the first thin wedge of oppression in a particularly delicate area.¹³⁹ "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experi-

plaintiff must show an injury in fact that was caused by the allegedly unconstitutional act and the likelihood that a favorable decision would redress that injury. *See, e.g.,* *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). *See generally* L. TRIBE, *supra* note 52, at 107-33. Under Justice O'Connor's approach, government action need not immediately and directly deprive anyone of an identifiable political or civil right to violate the establishment clause, and being made to feel "like an outsider" or "alienated" may not be an "injury in fact"; "mere psychological injury" is not supposed to be enough for standing. *See, e.g., Valley Forge*, 454 U.S. at 485-87. But establishment clause plaintiffs have used other devices to justify standing. For instance, where government funds have been spent on the allegedly unconstitutional act, taxpayer standing suffices. *See Flast v. Cohen*, 392 U.S. 83 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963); *cf. Valley Forge*, 454 U.S. at 479-82 (taxpayer standing limited to "true" spending, exercises of article I, section 8, clause 1 spending power). And where the plaintiff alleges that her use of a public resource has been curtailed, for example, where she finds a religious display on public grounds so offensive that she alters her route to work to avoid seeing the display, standing is satisfied. *Hewitt v. Joyner*, 705 F. Supp. 1443, 1445-46 (C.D. Cal. 1989); *see also* *ACLU v. Wilkinson*, 701 F. Supp. 1296, 1302-03 (E.D. Ky. 1988) (discussion of standing), *aff'd*, 895 F.2d 1098 (6th Cir. 1990); *Jewish War Veterans of United States v. United States*, 695 F. Supp. 3, 9-11 (D.D.C. 1988) (same). These bases for standing are something of a fiction given the interests to be protected; perhaps for this reason, the doctrine of standing is given "distinctive treatment" in establishment clause contexts. *Taub v. Kentucky*, 842 F.2d 912 (6th Cir. 1988); *cf. L. TRIBE, supra* note 52, at 1283 (taxpayer standing does not reflect true nature of interest infringed, which is not financial but a "fundamental personal right not to be a part of a community whose official organs endorse religious views that might be fundamentally inimical to one's deepest beliefs").

138. *See supra* text accompanying note 58.

139. "There are no differences in degree of the denial of constitutionally protected liberties and no governmental act can be approved on the ground that it is only a little bit unconstitutional." *Citizens Concerned for the Separation of Church & State v. City of Denver*, 481 F. Supp. 522, 527 (D. Colo. 1979) (preliminary injunction granted), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980) (lower court judgment vacated for lack of jurisdiction; insufficient evidence in record regarding plaintiffs' standing).

ment on our liberties.'"¹⁴⁰

Professor Tushnet also errs in equating perceptions of exclusion derived from government endorsement of religion with "the disappointment felt by everyone who has lost a fair fight in the arena of politics."¹⁴¹ The establishment clause dictates that if government endorses religion, the fight is not "fair"; government endorsement of religion simply has no place in the arena. As Justice Jackson wrote, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."¹⁴²

The no endorsement test thus serves the purpose of the establishment clause by prohibiting government from sending messages that alter political standing on the basis of religion. But as Professor Smith points out, governments are constantly in action, often in areas that may be perceived to affect religion, and in acting they inevitably send messages that alienate some people on religious grounds.¹⁴³

Ultimately, a degree of alienation must be acknowledged as an inevitable cost of maintaining government in a pluralistic culture. In such a culture, some beliefs must, but not all beliefs can, achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like outsiders.¹⁴⁴

If the no endorsement test is to work at all, it should provide a coherent means

140. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) (quoting Madison, *supra* note 59, at 82 para. 3).

141. See *supra* text accompanying note 125.

142. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), *quoted in* *School Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963). Moreover, in terms of the pluralist political bargaining model, the fight is not fair because the lines dividing one religious group from another are relatively frozen. In religious matters, today's political losers (such as Jehovah's Witnesses at the time of *Barnette*, or Native Americans) have no realistic hope of winning tomorrow.

143. Smith also argues that a prohibition against alienating messages would be hopelessly impractical. Government cannot act without expressing judgments and thus sending messages about beliefs, religious and otherwise, and the religious diversity in this country ensures that at least some persons may be alienated by many of those messages. A proscription against alienation would, therefore, bring government to a halt. Moreover, in some cases, government will alienate people on the basis of religion whichever way it acts. The "no alienation" rule would then be useless as a guide to judicial decisionmaking. Smith, *supra* note 22, at 310-13.

The evidentiary standards proposed in Part V(A) below could help to prevent unsubstantiated claims of alienation from incapacitating government. Furthermore, as discussed in Part V(B) below, a balancing test can be used to save legitimate government action from unwarranted establishment clause veto.

More significantly, that some government action will necessarily produce some alienation does not mean that the ideal articulated by Justice O'Connor should be abandoned. It simply means that the ideal cannot be achieved absolutely. The establishment clause can still be applied in many cases to ensure that governments avoid sending messages endorsing or disapproving religion. Where this is not possible, the establishment clause would compel governments to act in the least alienating or divisive way. See *infra* notes 216-63 and accompanying text.

144. Smith, *supra* note 22, at 313.

of determining which messages are impermissible. Justice O'Connor implements her test by asking whether government's action would appear to an "objective observer" to endorse religion. Part IV criticizes that approach. Part V offers an alternative that more effectively promotes the ideal of political standing which Justice O'Connor has identified.

IV. THE FAILURE OF THE "OBJECTIVE OBSERVER" AS A TEST OF ENDORSEMENT

Justice O'Connor ascertains whether government has endorsed religion by using the perspective of the "objective" or "reasonable" observer.¹⁴⁵ Unfortunately, her approach rests on a flawed philosophy of language, fails to enhance doctrinal consistency or coherence, and, by ignoring actual perceptions of endorsement, disregards "outsiders"—those most in need of the protection that the no endorsement test offers. This Part first addresses Justice O'Connor's underlying theory of meaning. It then unmasks the "objective observer" as an unsuccessful attempt to rectify the jurisprudence of the establishment clause.

Whether government action sends a message of "endorsement or disapproval" depends on the action's meaning. In *Lynch v. Donnelly*,¹⁴⁶ Justice O'Connor offers her theory of meaning. She confines her exposition to the example of verbal utterances, although she acknowledges at one point that government may "'speak[]' by word or deed."¹⁴⁷ In her view, "[t]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."¹⁴⁸ Some listeners will be able to gauge the speaker's intent by placing the "words themselves" in the "context" of the statement or the speaker's explanation of her words. Others, without access to evidence of intent beyond the "words themselves," will "inevitably receive a message determined by the 'objective' content of the statement. . . . For them the message actually conveyed may be

145. Justice O'Connor formulated her theory in terms of the "objective observer," see *infra* notes 146-97 and accompanying text, and used that concept in her next several establishment clause opinions. See *supra* note 44. More recently, she has tended to use the phrase "reasonable observer." See, e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3123 (1989) ("reasonable observer"); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment) ("reasonable observer").

146. 465 U.S. 668 (1983).

147. *Id.* at 690 (Justice O'Connor's quotation marks). This focus on words is somewhat curious, since the very case in which this theory appears, *Lynch*, involved a nonverbal symbol: a creche. Indeed, nonverbal symbolic acts have been at issue in many recent establishment clause cases. See, e.g., *Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (county seal depicting a cross at issue). It is unclear whether aid to parochial school cases should be read as verbal (the statute or regulation permitting and defining the aid) or nonverbal (the practice of assistance) action. It is possible that the verbal model of symbolic action more readily allows Justice O'Connor to draw the line described below between "the objective content" of the message itself and the meaning of the message in context, because verbal acts may seem to her more amenable to self-contained definition.

148. *Lynch*, 465 U.S. at 690.

something not actually intended."¹⁴⁹ Meaning may thus derive either from a combination of words and other evidence or from words alone.

Consider first the second aspect of Justice O'Connor's theory of meaning: the theory that "words themselves" have an "objective" content that uniquely determines what listeners understand. This notion flies in the face of leading contemporary theories of language and communication.¹⁵⁰ The messages that words convey to a community depend on the contexts in which the community members receive the words.¹⁵¹ To say that the audience may not be fully acquainted with the context that the speaker had in mind is not to say that the audience receives a message without context. To some extent, of course, speaker and audience must share a context, a sense of what the words may mean; otherwise, communication would not be possible at all.¹⁵² But the contexts may differ, and in that case what the audience understands is not determined by the words alone, but by something the audience itself brings to the communicative act: the relations between those words and other things the audience knows and believes.¹⁵³

Turning to the first prong of Justice O'Connor's theory of meaning, it is intuitively appealing that the meaning of a statement to its audience should derive, at least in part, from what the speaker intended to convey.¹⁵⁴ Problems arise, however, in the application of this premise to government behavior and its interpretation by the political community. The governmental actor may not "intend" his behavior to communicate any particular message at all.¹⁵⁵ More-

149. *Id.* (quotation marks in original).

150. See S. CAVELL, *MUST WE MEAN WHAT WE SAY?* 11-12 (1969) (explicit meaning of words in natural language never exhausts what is meant by the words). See generally L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 21e (G.E.M. Anscombe trans. 1953) (meaning depends on use in language).

151. Keep in mind that the concern here is not simply with what the words mean, but with "what is meant by" those words. The listener's perceptions may play a much larger role in the latter. For instance, think of a statute providing certain benefits to nonpublic schools, including parochial schools. Members of the community could agree on much of the meaning of the statutory language itself, such as which institutions qualify for aid, how the aid is to be distributed, etcetera, without reaching a consensus on whether those words conveyed a message of endorsement of religion.

152. See S. CAVELL, *supra* note 150, at 33 ("[T]he primary fact of natural language is that it is something spoken, spoken together. Talking together is acting together, not making motions and noises at one another . . ."); see also R. DWORKIN, *LAW'S EMPIRE* 63-64 (1986) (participants in discourse must "agree about a great deal" in order to meaningfully interact in society).

153. Moreover, does it make sense to divide the public, as Justice O'Connor does, into two distinct camps: listeners with thorough access to the context of the message, and others who hear the statement completely outside of its context? Or is it more likely that members of the public range along a continuum of various degrees of familiarity with one or more of the statement's many contexts, standing in different and unstable relationships to the speaker?

154. Dependence on the speaker's or author's intent as a guide to meaning itself presupposes some interpretive strategy that makes that intent relevant. See, e.g., D. RICHARDS, *supra* note 73, at 33-45 (criticizing Raoul Berger's narrow intentionalism as a method of constitutional interpretation); R. DWORKIN, *supra* note 152, at 53-62 (1986) (discussing relationship of artistic and constructive interpretation).

155. Cf. Smith, *supra* note 22, at 286-88.

over, identifying a unitary intent behind any government "utterance" is highly problematic, since most governmental activity is the product of the actions of many individuals, at least some of whom may intend different things and no one of whom need intend the final action. Long-standing debates over intentionalism in constitutional interpretation illustrate this difficulty.¹⁵⁶

Justice O'Connor might attempt to meet the objection that the statement's meaning to its audience cannot depend on the speaker's intent where the audience cannot precisely identify that intent. She might posit that, in the absence of unambiguous evidence of the speaker's intent, the speaker will be held to have intended to convey what those words or actions normally convey.¹⁵⁷ A similar idea, for instance, supports the determination of an "objective" meaning in the "objective theory" of contract.¹⁵⁸

Yet this effort to save the "intended message" aspect of Justice O'Connor's theory of meaning fails for the same reason as does the "words themselves" prong: it ignores the audience's role in the creation of meaning, and the fact that in the actual community meaning is often controversial. To identify "what is normally conveyed" to the community by government action is not necessarily to fix a single, "normative" meaning. What is normally conveyed may well be a variety of messages to different audiences. Justice O'Connor's error is ironic in light of the central purpose of the establishment clause, as contrasted to at least one fundamental goal of contract law. In contract cases, courts must at some point charge parties with knowledge of the meaning ordinarily conveyed by acts like theirs so that "business transactions may proceed with confidence."¹⁵⁹ There is no interest in protecting diverse interpretations

156. See, e.g., P. BOBBITT, *CONSTITUTIONAL FATE* 9-11 (1982) (discussing difficulty of using historical analysis to determine framers' intent); R. DWORKIN, *supra* note 152, at 359-65 (discussing historicism as a means of determining framers' intent); L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 323 (1988) (discussing difficulties with original intent analysis); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209-17 (1980) (discussing intentionalism school of interpretation); Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFFALO L. REV. 217, 219-22 (1987) (discussing original intent analysis). Due to the generality of the language to be construed, the changes in society in the intervening centuries, and the incompleteness of relevant historical records, attempting to discern an "original intent" to guide constitutional interpretation is even more futile than trying to identify the "speaker's intent" behind government's current acts.

157. See Grice, *Meaning*, in *PROBLEMS IN THE PHILOSOPHY OF LANGUAGE* 251-59 (T. Olszewsky ed. 1969).

158. The "objective theory" of contract law focuses on what a person's conduct may reasonably be taken to mean rather than on the person's later assertion of a contrary intent. Hence, a court may bind a party to an agreement, despite later assertions that no meeting of the minds was reached, because that party knew or had reason to know of the other party's intention and understanding. This determination is based in part on the linguistic usages of other people in similar cases. A. CORBIN, *CORBIN ON CONTRACTS* § 106, at 474-77 (1963). The "objective" meaning of the parties' communications thus determined is not an abstract "true" meaning but simply the meaning that the parties, based on the ordinary interpretation of their acts, will be held to have intended.

159. A. CORBIN, *supra* note 158, at 477. It may be argued that contract law protects diversity by enforcing whatever terms of agreement the parties freely choose, with the result that people

merely for diversity's sake. The very purpose of the religion clauses, on the other hand, is to protect minority and even idiosyncratic modes of belief and understanding.¹⁶⁰ Moreover, applying the objective theory of contract does not threaten to marginalize *groups* of persons on the basis of their divergence from the "normal" understanding of words and acts, while the "objective" interpretation of government's impact on religion has precisely that effect.¹⁶¹

The basic flaw, then, in the theory of meaning in which Justice O'Connor grounds her "objective observer" is her assumption that there is such a thing as "[t]he meaning of a statement to its audience."¹⁶² In fact, a message may have many audiences and many meanings. Justice O'Connor allows that different recipients will interpret a message differently, depending on their access to evidence of the speaker's intent. Elsewhere she acknowledges that even those equally familiar, or unfamiliar, with the speaker's explanation for her words may understand the message in different ways; she describes government action endorsing religion as sending one message to adherents and another to nonadherents.¹⁶³ Yet her theory of meaning locks Justice O'Connor into holding that only one meaning is constitutionally significant.¹⁶⁴

may order their affairs in nonstandard ways. Still, the parties to the contract freely agree to be bound, and one can hold the other to her promise—and thus give effect to the atypical transaction—only if the meaning of the terms may be fixed for the parties themselves. By contrast, the diversity that the establishment clause protects is based not on shared meaning, but on *differences* in self-conception and belief among the members of the entire political community. The establishment clause must acknowledge those differences, and, in light of them, the clause protects equality of political standing by imposing on government a duty to avoid making those differences relevant to citizens' perceptions of themselves and each other as members of the political community.

160. See, e.g., Dorsen & Sims, *supra* note 25, at 863-64 (primary purpose of religion clauses is to protect minorities from "untrammelled majorities"); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 794-95 (1984) (views of minority are as important as those of majority); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 610-11 (1985) (criticizing Lynch Court for allowing "society's insiders to characterize the message the outsiders receive"); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1648 (1987) (application of religion clause must turn on perspective of the minority); *The Supreme Court, 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 180 n.56, 182-83 & n.68 (1984) (stressing importance of minorities' perceptions in religion clause cases). Thus, the "average" person should not be the benchmark in establishment clause doctrine.

161. See *supra* notes 100-14 and accompanying text.

162. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (emphasis added).

163. *Id.* at 688.

164. Cf. Justice Brennan's remarks in *Allegheny County*:

I would not, however, presume to say that my interpretation of the tree's significance is the "correct" one, or the one shared by most visitors to the City-County Building. I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. Both are reasonable interpretations of the scene the city presented, and thus both, I think, should satisfy Justice Blackmun's requirement that the display "be judged according to the standard of a 'reasonable observer.'"

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 109 S. Ct. 3086, 3127 (1989) (Brennan, J., concurring in part and dissenting in part).

And which meaning is that? To determine whether “the” meaning of government action is to endorse religion, Justice O’Connor writes, we must examine *both* what the government “intended to communicate” by its action *and* what message the government “actually conveyed.”¹⁶⁵ But the message intended and the message received are not equal partners in the creation of constitutionally recognized meaning. The intended message, properly understood, controls. The message “actually conveyed” is ignored.

This sleight of hand is accomplished through the device of the “objective observer.” In *Wallace v. Jaffree*,¹⁶⁶ evaluating Alabama’s moment-of-silence law, Justice O’Connor states that “[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the government act] as a state endorsement of [religion].”¹⁶⁷ To plot this onto her theory of meaning, the text, of course, contains the “words themselves”; the legislative history and implementation of the statute indicate the speaker’s “intent” in the same way as do a speaker’s explanation and the context of the statement. Thus, the single meaning that the “objective observer” perceives in government’s conduct is close, if not identical, to what Justice O’Connor’s theory describes as the intended message. The “objective observer” is not someone without access to evidence of intent, who will perceive a message “not actually intended.” That real audience of government messages is ignored.¹⁶⁸

Indeed, by asking how an observer “acquainted with the text, legislative history, and implementation of the statute” would perceive the government message, Justice O’Connor indicates that she is not actually concerned with the perception of the government message by its real audience. In *Lynch*, for instance, how many viewers of Pawtucket’s creche were familiar with the city council debates and public pronouncements that preceded its installation? Or, more strikingly, in *Wallace*, how many Alabama schoolchildren authorized to meditate or pray silently were conversant with the legislative history which the court found so crucial?¹⁶⁹ As Professor Smith writes, “the ‘objective observer’s

165. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

166. 472 U.S. 38 (1985).

167. *Id.* at 76.

168. Smith, *supra* note 22, at 294, explains very clearly how the “objective observer” focuses on the intended message and how Justice O’Connor thereby collapses the effect inquiry into the purpose inquiry. The confusion has recently been perpetuated by Justice Blackmun. See *Allegheny County*, 109 S. Ct. at 3102 (Blackmun, J.) (stating that “the question is ‘what viewers may fairly understand to be the purpose of the display’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)). This Article agrees with Professor Smith’s analysis on this point, but not with his contention that the alternative, to consider the perceptions of real human beings, “raises insuperable problems.” Smith, *supra* note 22, at 291; see *infra* notes 199-215 and accompanying text (explaining why considering the actual understandings of citizens will not raise insuperable problems).

169. *Wallace v. Jaffree*, 472 U.S. 38 (1984). Ignoring the children who actually participated in the activities authorized by the statute seems particularly anomalous in light of the Court’s usual solicitude for children’s perceptions of government activity. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (acknowledging that younger children are highly impressionable and

perceptions are remarkably unlike those of most real human beings."¹⁷⁰ Quite possibly the only "objective observer" knowledgeable enough to ascertain the true meaning of the government's message is the judge.¹⁷¹

Justice O'Connor purports to map her twofold inquiry into the intended and received meaning of government action onto the purpose and effect prongs of the *Lemon* test.¹⁷² It is unclear whether Justice O'Connor first developed her no endorsement conception of the establishment clause and the theory of meaning that supports it, and then discovered that she could present the latter as a "clarification" of *Lemon*, or whether she began by trying to squeeze *Lemon* into her theory of meaning. But in her reformulation, the *Lemon* prongs are no longer separate. She writes that the effect prong of *Lemon* "asks whether, *irrespective of government's actual purpose*, the practice under review conveys a message of endorsement or disapproval."¹⁷³ Yet, because the objective observer looks to the "intended" meaning rather than the "objective" meaning, Justice O'Connor collapses the effect test into the purpose test.¹⁷⁴ This reductionism excludes the possibility that a government action aimed at a permissible purpose may still convey an impermissible meaning to members of the community.¹⁷⁵

that state action must be tailored accordingly); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (same).

170. Smith, *supra* note 22, at 292-93.

171. Several scholars have remarked that the "objective observer" who found nothing objectionable about Pawtucket's creche in *Lynch* obviously did not consider the views of the Jews and other "outsiders" whom the establishment clause is presumably designed to protect. See, e.g., L. TRIBE, *supra* note 52, at 1292-94 (criticizing the *Lynch* Court's use of the majority's perspective, not the minority's); Tribe, *supra* note 160, at 611 (analogizing *Lynch* to separate but equal jurisprudence that upheld Jim Crow laws); Tushnet, *supra* note 58, at 711-12 & n.52 (finding it "difficult to believe that the *Lynch* majority would have reached the same result had there been a Jew on the Court to speak from the heart about what public displays of creches really mean to Jews"); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 781-87 (criticizing the *Lynch* Court's "religious insensitivity").

172. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

173. *Id.* (emphasis added).

174. See Smith, *supra* note 22, at 293-94. It is ironic that Justice O'Connor uses the word "objective" to describe her *second* sense of what a message "means" and then ignores that second sense in formulating what an "objective" observer understands.

175. The converse is not a problem because the government action violates the establishment clause regardless of effect if the purpose is impermissible. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Louisiana act providing that public schools spend equal time teaching creationism and evolution had no credible secular purpose).

Professor Smith scoffs at the notion that unintended endorsement of religion should be constitutionally suspect: "[a] doctrine which formally adopted misinformation and misperceptions as the standard for determining the constitutionality of a potentially broad array of public measures would seem, to put it mildly, anomalous." Smith, *supra* note 22, at 290. Labelling *alternative* perceptions as "misperceptions" is precisely the mistake that Justice O'Connor implicitly makes by using the "objective observer" to preclude those alternative perceptions. Cf. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3132 n.10 (1989) (Stevens, J., concurring in part and dissenting in part) (stating that:

In *Lynch*, Justice O'Connor illustrates this process by inferring the absence of any endorsement of religion from the supposed predominance of secular purposes. She writes that

legislative prayers . . . , government declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" . . . serve . . . the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.¹⁷⁶

Conversely, in *Wallace*, Justice O'Connor infers endorsement of religion from the lack of a secular purpose. In that case, she agreed with the majority that the Alabama statute prescribing a moment of silence "for meditation or prayer" at the beginning of the school day was intended to convey an impermissible message endorsing prayer, since Alabama had already passed a statute providing for a moment of silent meditation. She acknowledged that "[w]hile it is . . . unnecessary also to determine the effect of the statute . . . it also seems likely that the message actually conveyed to objective observers by [section] 16-1-20.1 is approval of the child who selects prayer over other alternatives during a moment of silence."¹⁷⁷ This statement makes sense only if the "objective observers," like Justice O'Connor herself, concluded that the statute's legislative history implied an impermissible purpose.

Justice O'Connor further explains the standard for determining the meaning of government action as follows:

[W]hether a government activity communicates endorsement of religion is

[t]his case illustrates the danger that governmental displays of religious symbols may give rise to unintended divisiveness, for the net result of the Court's disposition is to disallow the display of the creche but to allow the display of the menorah. Laypersons unfamiliar with the intricacies of Establishment Clause jurisprudence may reach the wholly unjustified conclusion that the Court itself is preferring one faith over another.").

In this connection, it is also important to observe that "an individual's intentions or wishes can no more produce the general meaning for a word than they can produce horses for beggars, or home runs from pop flies, or successful poems out of unsuccessful poems." That is, " 'X means YZ' . . . holds or fails to hold, whatever I wish to mean. And 'I mean by X, YZ,' where meaning does depend on me, is performative; something I am doing to the word X, not something I am wishing about it." S. CAVELL, *supra* note 150, at 38-39. While Professor Cavell's reference to "the general meaning" of a word does not strictly apply to the present analysis, the basic point does. The meaning of a word in the community of speakers is based on how the members of the community, including, *but not limited to*, the speaker, use and understand the word. The speaker's contrary intention by itself does not change that.

176. *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Justice O'Connor's statement of the holding also conflates the two inquiries: "Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche." *Id.* at 692.

177. *Wallace v. Jaffree*, 472 U.S. 38, 78 (1984) (O'Connor, J., concurring).

not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.¹⁷⁸

Thus, the "objective" or "reasonable" observer is, in the final analysis, the judiciary. Evidence of actual perceptions of government messages by members of the community "may help" determine whether government action endorses religion, but clearly are not essential.¹⁷⁹ Justice O'Connor's method directs attention away from the actual impact of government action on the real community. Other judges following her approach have on occasion been quite cavalier in their dismissal of citizens' genuine perceptions of endorsement, calling them "hypersensitive" and "fastidious."¹⁸⁰ But this makes perfect sense if what matters is the message supposedly intended rather than the messages actually received.¹⁸¹

What does Justice O'Connor hope to accomplish by having the "objective" or "reasonable" observer implement her no endorsement principle? One possibility is that the appeal to objectivity is meant to forestall charges of

178. *Id.* at 76.

179. *Id.*; cf. *ACLU v. City of Birmingham*, 791 F.2d 1561, 1570 (Nelson, J., dissenting) ("The record before us is not particularly illuminating, nor should we expect it to be."). The dissent also quoted the *Lynch* Court's statement that "the question is in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 1570 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

180. *Hewitt v. Joyner*, 705 F. Supp. 1443, 1450 (C.D. Cal. 1989) (In a case where plaintiffs contested a public park's collection of biblical statues and tableaux, the court found that "[a]n objective person would not draw such an inference [of endorsement]. I must lay this accusation only to the hypersensitive views of persons who are 'looking under the rocks' for a cause of complaint."); *Citizens Concerned for Separation of Church & State v. City of Denver*, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (where plaintiffs sought to enjoin city and county from displaying a nativity scene, the court determined that "[i]he First Amendment does not require the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens.").

181. Justice O'Connor's definition of the inquiry as a "legal question" for "judicial interpretation" may not be as well supported by other doctrines as she may believe. The equal protection cases, upon which Justice O'Connor seeks to base her method of determining the content of government messages in establishment clause disputes, do not provide a precise analogy. Whether suspect classifications communicate an "invidious message" depends on whether they are justified by a compelling governmental purpose (such as actual relevant differences between the classes). That is, racial classifications are assumed to communicate an invidious message if they burden an historically disadvantaged class unless they are shown to be necessary to promote a compelling governmental purpose. The test for gender-based classifications is similar: they are assumed to communicate an invidious message unless they bear a substantial relationship to an important governmental purpose. 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* § 18.5, at 363, § 18.20, at 522 (1986). This is plainly different from measuring the effect of a message *independently* of its purpose, as Justice O'Connor purports to be doing in the establishment clause context. In the equal protection cases, it seems appropriate for a judge to gauge whether government action is sufficiently related to a proper purpose. The meaning of a message, however, by Justice O'Connor's own theory, ought to be determined by its effect on its recipients. Her method arrogates this function to the judge.

countermajoritarianism. If the court must determine meaning, a valid determination cannot represent merely the individual judges' subjective interpretations and personal value judgments. It must be grounded in another source of authority, namely, an "objective" science of meaning.¹⁸²

Another possibility is that if the meaning of government messages—and thus the resolution of establishment clause disputes—can be determined "objectively," then perhaps the pattern of results of those disputes will be more coherent and predictable.¹⁸³ In *Allegheny County*, Justice O'Connor writes that she "remain[s] convinced that the endorsement test is capable of consistent application."¹⁸⁴ But as at least one commentator has explained, the objective observer method provides no guidance at all:

Whether an observer would "perceive" an accommodation [of religion] as "endorsement of a particular religious belief" depends entirely on the observer's view of the proper relation between church and state. . . . An objective observer holding separationist views of the First Amendment might be quick to perceive government's contact with religion as endorsement; one following [an accommodationist approach] might have a different reaction. Looking to an "objective observer" cannot substitute for a constitutional standard. Such a formulation serves merely to avoid stating what considerations inform the judgment that a statute is constitutional or unconstitutional. If Justice O'Connor's "objective observer" standard were adopted by the courts, we would know nothing more than that judges will decide cases the way they think they should be decided.¹⁸⁵

Has the "objective" or "reasonable" observer test actually enhanced the consistency and predictability of religion clause adjudication? Perhaps unsurprisingly for a "chancellor's foot" standard, no one has yet discerned any such effect. Other Justices have applied Justice O'Connor's no endorsement test and reached conflicting results.¹⁸⁶ Indeed, one commentator who has championed her approach has noted that its consistent application would invalidate many cases approving symbolic aid to religion, and possibly some approving financial aid as well.¹⁸⁷ Whatever the value of consistency in religion clause cases,¹⁸⁸

182. Richard Sherwin observes that in the context of the law of confessions, Justice O'Connor also purports to adopt a "scientific" approach. Sherwin, *Law, Violence, and Illiberal Belief* (forthcoming article in the *Georgetown Law Journal*).

183. *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

184. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3120 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (observing that three federal circuit courts considering challenges to creches standing alone at city halls all found impermissible messages of endorsement).

185. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48.

186. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1983) (Justice Brennan's interpretation of message conveyed differed from Justice O'Connor's); see *supra* notes 1-10 and accompanying text (discussing *Allegheny County*, 109 S. Ct. 3086 (1989)); see also Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1124, 1146-47 (1985) (Justice O'Connor's *Lynch* concurrence has been quoted freely by other Justices in subsequent cases to justify conclusions she does not agree with).

187. Loewy, *supra* note 29, at 1055-60. Justice O'Connor herself writes that the tax exemptions

Justice O'Connor's "clarification" has failed to achieve it.

More importantly, the pseudo-objectivity of the "objective" observer hides the balance of interests that actually produces establishment clause holdings.¹⁸⁸ This concealment is most blatant in cases in which the establishment clause appears to conflict with the free exercise clause. In *Wallace*, discussing the purpose test, Justice O'Connor notes that "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."¹⁸⁹ Instead, according to Justice O'Connor, "the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause."¹⁹¹ But when Justice O'Connor turns to the effect of government action, she writes:

In assessing . . . whether the statute [lifting a government-imposed burden on free exercise] conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer" . . . is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the free exercise clause strongly supported the exemption.¹⁹²

Justice O'Connor thus fails to acknowledge frankly the balancing process she employs in the effect prong, even though she is willing to acknowledge it in applying the purpose prong.¹⁸⁸

The very form of Justice O'Connor's inquiry obscures the balancing of interests. By asking whether government communicates a message of endorsement

for religious, educational, and charitable organizations upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the mandatory Sunday closing law upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961), and the released time program for off-campus religious instruction approved in *Zorach v. Clauson*, 343 U.S. 306 (1952), all failed the "primary effect of advancing or inhibiting religion" test under which they were decided, but did not violate the establishment clause because they did not communicate a message of government endorsement or disapproval of religion. *Lynch*, 465 U.S. at 691-92.

188. Johnson, *supra* note 22, at 839 (arguing that inconsistency is not a flaw because it allows the Supreme Court to help keep the peace through compromise).

189. See *infra* notes 216-63 and accompanying text; Dorsen & Sims, *supra* note 25, at 858-60; see also L. TRIBE, *supra* note 52, at 792-93 (discussing balancing in other first amendment areas).

190. *Wallace v. Jaffree*, 472 U.S. 38, 83 (1984) (O'Connor, J., concurring).

191. *Id.*

192. *Id.*

193. See also *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (application of § 702 of the Civil Rights Act of 1964, which exempts religious organizations from Title VII's prohibition against religious discrimination in employment, to Mormon Church's secular, nonprofit gymnasium did not violate establishment clause). In *Amos*, Justice O'Connor, rather than admit the possibility that free exercise accommodations might actually and reasonably be perceived as endorsements, yet be constitutionally valid because the Court deliberately decides to balance free exercise and establishment clause interests and favors the former if the two irreconcilably conflict, simply said that there was no endorsement at all—at least none that the objective observer would perceive. *Id.* at 349 (O'Connor, J., concurring).

or disapproval, she seeks a yes or no answer. The message is either permissible or impermissible. This inquiry, however, is less flexible than the "principal or primary effect" prong of *Lemon*, and the cases that follow that test.¹⁹⁴ In those cases, effects advancing or inhibiting religion were tolerated so long as they were indirect or remote. In *Lynch* itself, Chief Justice Burger admitted *arguendo* that the creche "advances religion in a sense," but concluded that the benefit was indirect, remote, and incidental.¹⁹⁵ While the line between "primary" or "direct and substantial" on the one hand, and "remote or indirect" on the other, was impossible to fix on a principled basis, at least courts could acknowledge that the question was one of degree. By contrast, Justice O'Connor poses a question that requires a categorical response. The consequence is highly unfortunate: conflicting categorical answers to similar questions create the appearance of greater conflict of principle, and even absurdity, than do different judgments of degree.

In sum, while Justice O'Connor's no endorsement principle offers an important insight into the purposes of the establishment clause, the "objective" or "reasonable" observer standard which determines endorsement lacks support in a sound theory of meaning and fails to serve its intended doctrinal goals of consistent and coherent decisionmaking. Most significantly, Justice O'Connor's perspective prevents the no endorsement principle from fulfilling what should be its primary function by allowing the court to ignore outsiders' perceptions of government endorsement of religion.¹⁹⁶

Can the no endorsement concept be employed to enhance religious freedom and political community? Is Professor Tribe correct in asserting that Justice O'Connor has "asked the right question," but occasionally produced the wrong answer?¹⁹⁷ Who should decide whether government action sends an impermissible message, if not the "objective observer"? The task is to devise a workable method that takes account of the actual perceptions in the community, especially those of "outsiders," without requiring the invalidation of a valuable government program simply because some person claims to perceive it as an endorsement or disapproval of religion. Part V proposes such a method.

V. A REVISED METHOD: WEIGHING ACTUAL PERCEPTIONS OF ENDORSEMENT AGAINST GOVERNMENT'S SECULAR PURPOSES

The establishment clause can recognize the actual perceptions of individuals who claim to be adversely affected by government action that implicates reli-

194. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 775 (1973) (acknowledging that the principal or primary effect prong allows aid that "indirectly and incidentally" promotes a school's religious function).

195. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1983).

196. It is thus especially ironic that Professor Tribe should write that "the perspective of an objective observer, able to step back from the conventional understanding of the majority and to comprehend the viewpoint of the minority, is particularly important." L. TRIBE, *supra* note 52, at 1225.

197. *Id.* at 1225 n.71.

gion. Courts should permit government activity perceived to endorse or to disapprove of religion to survive challenge only if government can show that the activity is strongly related, if not necessary, to an important secular objective.¹⁹⁸ This method would neither overload the trial courts nor frustrate governmental efforts to achieve important secular goals. Moreover, by commanding government to listen to all of the people for whose protection the establishment clause is designed, the jurisprudence of the clause will compel greater intellectual honesty and greater respect for the ideal of equal political standing.

The first section below suggests that, in determining the meaning of a message for establishment clause purposes, courts may be guided by a similar inquiry in another area of law: whether a statement has a defamatory meaning. The second section indicates how the courts might assess perceptions of governmental endorsement of religion in light of the purposes served by the government action giving rise to those perceptions.

A. *The "Meaning(s) of a Message" in the Law of Defamation*

A number of establishment clause decisions have referred to evidence of how members of the community actually understood the meaning of government action.¹⁹⁹ The ultimate standard for defining endorsement, however, has remained an abstraction: the "objective" or "reasonable" or "average" observer.²⁰⁰ Only one opinion has explicitly posed alternatives to the objective standard. In that opinion, a federal district court considered an actual perceptions test but eventually applied a test much like the "objective observer."²⁰¹

198. See *infra* notes 216-63 and accompanying text.

199. See, e.g., *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985) (plaintiffs presented "highly persuasive evidence" that county "advertised" Catholicism through its county seal); *Jewish War Veterans of United States v. United States*, 695 F. Supp. 1, 8 (D.D.C. 1988) (plaintiff altered travel routes to avoid seeing large illuminated cross on naval base because it made him feel like an "alien"); *Citizens Concerned for Separation of Church & State v. City of Denver*, 526 F. Supp. 1310, 1314-15 (D. Colo. 1981) (plaintiffs introduced psychological study of Jewish school children, assessing whether they could make a distinction between religious and nonreligious symbols).

200. See, e.g., *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) (stating that "[n]o reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief"); *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 781, 782 (10th Cir. 1985) (en banc) ("average observer" standard); *McCreary v. Stone*, 739 F.2d 716, 728 (2d Cir. 1984) ("reasonable person" standard); *Kaplan v. City of Burlington*, 700 F. Supp. 1315, 1321 (D. Vt. 1988) ("objectively reasonable" standard), *rev'd*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990).

201. In *Citizens Concerned for Separation of Church & State*, the plaintiffs sought to enjoin the city and county of Denver from displaying a nativity scene, paid for with public funds, which was part of an annual Christmas lighting display at the main municipal building in downtown Denver. The trial court granted the injunction. 481 F. Supp. 522, 532 (D. Colo. 1979). On appeal, the Tenth Circuit dismissed and remanded with instructions to vacate for lack of jurisdiction because the plaintiffs had not presented sufficient evidence of standing. 628 F.2d 1289, 1297-98 (10th Cir. 1980). The plaintiffs sued again, having corrected the jurisdictional defect. Plaintiff's motion for a preliminary injunction was denied. 508 F. Supp. 823 (D. Colo. 1981). A different

The "objective observer," Professor Smith writes, may be explained as a

judge later modified this decision to deny the preliminary injunction. This new judge held that the nativity scene did not violate the establishment clause. 526 F. Supp. 1310 (D. Colo. 1981).

In the first action, the district court followed *Lemon* and *Nyquist* in asking whether the nativity scene had a primary effect of advancing or inhibiting religion. "Convincing and uncontroverted evidence," including testimony of non-Christian or nonreligious witnesses who felt "left out" by the display, and letters and petitions from the display's supporters, led the court to conclude that the scene's primary effect was on the religious sensibilities of the public: that the scene was "widely viewed as an affirmation and support of the tenets of the Christian faith." 481 F. Supp. at 529.

In the second action, the plaintiffs explicitly argued that the nativity scene violated the establishment clause because members of the community viewed it "as the City's endorsement of the religious content of the nativity scene." 508 F. Supp. at 828. The court attempted to fit the determination of endorsement into the framework of *Lemon* and *Nyquist*:

[A]n endorsement by the City of a particular faith through the display of a religious symbol could have a direct and immediate effect of advancing or inhibiting religion. The problem arises in determining whether the City's use of a nativity scene as part of a larger display constitutes such an endorsement: Is the test whether the court, viewing the matter objectively, perceives such an endorsement, or should the court be governed by the subjective perceptions of the scene's viewers? If the test is subjective, the issue is one of degree: How broadly must an endorsement of religion by the City be perceived before the religious effect becomes "direct and immediate"?

526 F. Supp. at 1312.

Both parties recommended a perceiver-based test, not a judge-based one. Plaintiff argued that "if any reasonable person perceives the display as an endorsement by the City of the Christian faith," an impermissible effect would be proven. *Id.* Defendant argued that "the consensus of the viewers must perceive the impermissible endorsement" before the establishment clause would be violated. *Id.*

The court rejected both approaches. Requiring a consensus "does not provide adequate protection for members of the community who endorse a faith (or lack of faith) other than that of the majority." *Id.* The court continued:

[I]t seems equally clear that the City does not directly advance or inhibit religion merely because a reasonable person or indeed a group of reasonable people perceive the City's display as an endorsement of religion. Reasonable people . . . can find endorsement by the government of religion in ceremonies and traditions that the Supreme Court has stated . . . do not violate the First Amendment.

Id. (citing *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952)). The court purported to combine the tests:

First, the court must determine in light of all the evidence in the case whether the message conveyed . . . is one of endorsement of religion. Secondly, . . . the court must assess the reasonableness of th[e] perception [that the display endorses Christianity] in light of the nature of the symbol involved, the circumstances of its use, and the number of viewers who are likely to share that perception.

Id. at 1312-13.

The court then reviewed the evidence, including letters and petitions to the city from supporters of the display and expert psychological evidence on the effect of the display on non-Christian children. "In attempting to objectively view the display in its context the court concludes that the message conveyed is not an endorsement by the City of the Christian faith, but rather one of general celebration of the holiday season." *Id.* at 1315. While evidence indicated that a number of local citizens, both Christians and non-Christians, perceived it as an endorsement of Christianity, "[i]t has not been shown that that perception is so broad or inevitable that a direct and immediate effect of advancing or inhibiting religion results." *Id.* The court added: "The First Amendment does not require the prerogatives of government be limited by the sensibilities of its most sensitive

device to avoid the "insuperable" problems that recognizing actual perceptions would pose.²⁰² If the perceptions of the majority are the only ones that count, then the establishment clause poses no real obstacle to symbolic endorsement of the majority's religion. But allowing anyone to claim alienation from a perceived government endorsement of religion would be unworkable because almost every government action will alienate someone on religious grounds.²⁰³

Yet using the actual understandings of citizens to determine whether government action conveys a message of endorsement of religion does not present insuperable obstacles. Basic tort law requires just such an analysis to ascertain whether the meaning of a statement is defamatory. While the definition of "defamatory" is of course quite different from that of "endorsing religion," the analytical similarity is substantial. Both tests assess the impact of a statement on a person's standing in the community: in the law of defamation, the standing of the object of the statement; in the establishment clause, as read by Justice O'Connor, the standing of at least some of the recipients of the message, who may or may not also be the objects of the message.

Defamation law is most useful in providing the standard for determining the

or fastidious citizens." *Id.*; see *Zorach*, 343 U.S. at 313, quoted in 508 F. Supp. at 830 (decision on preliminary injunction).

The opinion is perplexing. The test adopted by the court is an awkward hybrid. First, the court is to determine whether the message conveyed by the creche "is" endorsement of religion. The "is" suggests an absolutist judgment by the court. This judgment, however, is to be made "in light of all the evidence." But how does this fit with the court's second step: to assess the reasonableness of the perception of endorsement by some reasonable people? Since the court determined "objectively" that there was no message of endorsement, then why bother gauging the extent of the actual perception of endorsement? Is the requirement that the perception of endorsement be "broad and inevitable" an implicit acknowledgment that such perceptions were "reasonable," but with the insistence that more is required to violate the establishment clause? Ultimately, though *Citizens Concerned for Separation of Church & State* raises the possibility of a perceiver-based standard for the establishment clause, the case does not clearly illustrate that such a test is viable.

202. Smith, *supra* note 22, at 291-92; see also Ingber, *supra* note 79, at 325. Professor Ingber writes that the national community, not an individual or small local group, must define "religion" for purposes of the establishment clause. *Id.* Otherwise, persons with odd views of religion could prevent government from promoting certain values in the schools on the ground that such values represented a "religious" viewpoint. *Id.* Moreover, local definitions of religion would result in "a constitutional balkanizing inconsistent with our traditional view of the Constitution as a unifying symbol." *Id.* In this connection, Professor Ingber praises Justice O'Connor's "objective observer" because it "helps to limit the establishment clause's impact." *Id.* at 325 & nn. 575-76.

The response to Professor Ingber's first point, regarding the need for a national definition of religion, is the assessment of values prescribed *infra* notes 216-63 and accompanying text. The response to the second point, the impact of regional balkanization, is that even under current doctrine, two local governments may act similarly, yet only one arouse opposition based on the establishment clause. In that case the nation will feature a "balkanization" of behaviors, which seems altogether appropriate. If lawsuits arise in both situations, each court must persuade itself that the perceptions of endorsement are sincere; if so, presumably the courts will balance governmental interests similarly, and if they do not, the Supreme Court, if it wishes to declare nationally applicable doctrine, may attempt to do so by mandating a certain weighing of values in a particular type of case.

203. See Smith, *supra* note 22, at 312.

message's meaning. In defamation law, as opposed to the law of obscenity, for instance, "community standards" or the "average observer" do not necessarily rule.²⁰⁴ In a defamation case, "liability is not a question of majority vote."²⁰⁵ Rather, "[i]t is enough that the communication would tend to prejudice [its object] in the eyes of a substantial and respectable minority" of the community.²⁰⁶ While defamation is not "a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent," neither does it depend on the views of "right-thinking people."²⁰⁷ Indeed, "if the plaintiff's reputation is injured in the eyes of a segment of the community whose views cannot be said to be totally irrational or lawless, the courts should give redress against the injury."²⁰⁸

The basis for this standard is the real injury to reputation that can result from minority perceptions:

The law of defamation is, by its very nature, a limitation on free speech and freedom of the press—a limitation necessary to ensure certain highly prized interests of individuals in their reputation and standing among their fellows. But their fellows will necessarily be people of differing and divergent views. A rule of law that would limit legal protection to their reputation among those whose moral standards conformed to those of the majority would seem contrary to our traditions.²⁰⁹

Analogous considerations justify the use of a similar standard for determining the meaning of messages in establishment clause cases; for "reputation among those whose moral standards conformed to those of the majority" we may substitute "the majority's perception of whether the claimant is being viewed as an outsider." The establishment clause explicitly limits the power of government in order to protect against symbolic or real disenfranchisement on religious grounds. The recipients of the messages sent by government action, like the recipients of allegedly defamatory messages, have divergent perspectives and thus divergent understandings of the messages. Refusing to acknowledge perceptions of endorsement by those outside the majority would be the same as refusing to acknowledge that a person may be defamed in the eyes of

204. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (community standards govern definition of obscenity).

205. *Peck v. Chicago Tribune*, 214 U.S. 185, 190 (Holmes, J.).

206. 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.1, at 25 (2d ed. 1986) [hereinafter F. HARPER]; see also *RESTATEMENT (SECOND) OF TORTS* § 559 comment e (1977) (standard by which defamation is determined is one based on a "substantial and respectable minority").

207. F. HARPER, *supra* note 206, at 26; see also *Grant v. Reader's Digest Ass'n*, 151 F.2d 733 (2d Cir. 1945) (L. Hand, J.) (statement that attorney was agent for Communist Party was defamatory because it could lead people to regard attorney with scorn, etc., even though people who thought that would be "wrong-thinking").

208. Note, *Defamation-Imputation of Sympathy with Communism*, 7 ALA. LAW. 347, 349 (1946).

209. F. HARPER, *supra* note 206, at 26.

others who do not share the majority's morality, but who are no less fellow citizens for that.

In one obvious respect, the standard for determining the meaning of a message in defamation cases is not purely subjective. The law provides a reference point outside the claimant: any "segment" of the community whose views are not "totally irrational." Yet this standard is far closer to a subjective standard than it is to Justice O'Connor's "objective" or "reasonable" observer, because it validates a variety of perceptions, while only one viewpoint qualifies as that of the "objective observer."

In marginal cases, establishment clause doctrine need not recognize "totally irrational" perceptions, although this "totally irrational" standard should differ from that used in the defamation context. The plaintiff should be required to *give reasons* why she perceives government behavior as an endorsement of religion. If the underlying constitutional principle is the right of each citizen to participate equally in political dialogue, it seems appropriate to ask of the establishment clause plaintiff that she assume the dialogic responsibility of offering an explanation, but not necessarily a "reasonable" one, for her perception of harm.²¹⁰

Any more rigorous screening of viewpoints would defeat the very purpose of recognizing real perceptions. After all, an individual's perception that government has endorsed religion, and thereby "made her feel like an outsider," is fundamentally subjective: the individual's understanding of her own (ir)religion and her perception of how the government action has affected her

210. Courts might still consider some perceptions "totally irrational," in the sense of being grounded in delusional beliefs, and thus dismiss them without putting the government to its burden of persuasion. Suppose, for instance, a complaint that the allowance of a tax deduction for a contribution to Brown University conveyed a message endorsing religion because Brown was founded as a Baptist institution. That perception of endorsement might be genuine, but because Brown has long since had no religious affiliation, it is hard to imagine how the plaintiff could explain, without recourse to delusional beliefs, that this particular government action endorsed religion.

On the other hand, suppose a complaint that the city of Corpus Christi (or San Francisco, for that matter), by retaining that name, impermissibly endorsed Christianity. Here a non-delusional explanation for the perception of endorsement may readily be imagined: the pervasive official use of a distinctively Christian name could be taken to indicate government's continuing preference for Christianity over, say, the culture indicated by a Native American place-name. *See, e.g.*, N.Y. Times, July 7, 1990, at 10, col. 1 (anti-abortion crusader says he was "called" to Corpus Christi because the name means "the body of Christ"). This complaint, therefore, should survive summary dismissal and force the government to articulate reasons justifying its conduct. In all likelihood, the court would decide that retaining the name "Corpus Christi" is worth the risk of alienation posed by the retention because the city must have some name or another, and the cost and inefficiency entailed by a name change would be great. Nonetheless, allowing the complaint to go forward serves the dual purposes of respecting the complainant by forcing government to speak to her point of view and justify its behavior, and of keeping government open to different viewpoints which, however odd they may seem (at first), provide a necessary corrective, an occasion for self-criticism, for government. *Cf.* A. MEIKLEJOHN, *supra* note 78 (free speech clause guarantees airing of critical ideas necessary for informed self-government).

position in the community.²¹¹ Any requirement that perceptions of endorsement and alienation be "reasonable" or "legitimate" or shared by a certain number of others would represent at least a partial return to an "objective" perspective and the difficulties that it entails.

Satisfying the burden of proof as to "the meaning of the message" should be no more difficult for the plaintiff in an establishment clause case than in a defamation suit.²¹² Moreover, just as intent to defame is not ordinarily an element of the prima facie defamation claim, so a message of endorsement or disapproval may be shown regardless of the intent of the government actor.²¹³

Those who assert violations of the establishment clause may substantiate their claims in a variety of ways. First, testimony linking the claimed perception of endorsement to the undesirable effect of alienation or marginalization will underscore the seriousness of the claim and enhance the claimants' argument that it was indeed the government's action, and not something else, that led the claimants to feel like or be treated as outsiders.²¹⁴ Second, while no claimant should be required to show that some minimum number of persons understood the government action to endorse religion or to impair claimant's standing in the political community, the testimony of witnesses from different backgrounds and situations would further support the asserted connection between the government action and the claimed effect. A claimant who in-

211. In *Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988), *rev'd*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990), for instance, the trial judge noted that many of the letters and calls received by the city concerning its sponsorship of a menorah were "blatantly anti-semitic" [sic], and reasoned that "[t]his undermines the weight of these public reactions in determining whether it is objectively reasonable to conclude that the City communicated an endorsement of religion." *Id.* at 1321 n.7. But why should the fact that these observers *objected* so strongly to the city's action that their position could be characterized as anti-Semitic indicate that their perception of endorsement was inaccurate, or at the very least, unreasonable or disingenuous?

212. See cases cited *supra* note 199 (cases where plaintiffs presented evidence to support their perception that government was unconstitutionally endorsing religion).

213. See *supra* note 175 and accompanying text (explanation of how a government action aimed at a permissible purpose may still convey an impermissible meaning).

214. See, e.g., *Mather v. Village of Mundelein*, 699 F. Supp. 1300, 1309 n.7 (N.D. Ill. 1988) (district court rejected village's argument that plaintiff should not have been offended by village's nativity scene since she had previously been exposed to nativity scenes and other aspects of Christianity; argument "ignores that the cause of plaintiff's injury may be the impression that government is favoring a religion other than her own and not the mere sight of the nativity scene."), *rev'd*, 864 F.2d 1291 (7th Cir. 1989).

It is possible that government action could be perceived as endorsing religion and yet not alienate anyone from the political community. If that were the case, then arguably the establishment clause should not proscribe the action in question. Justice O'Connor's explanation of why government endorsement of religion is objectionable, *supra* notes 24-32 and accompanying text, could be understood as creating a rebuttable presumption of alienation from proof of perceived endorsement. If so, plaintiffs might be asked to show genuine perceptions of endorsement; the burden would then shift to the government to persuade the court that the alleged endorsement was harmless. See Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U.L. REV. 971, 985-87 (1987) (how constitutional doctrine may use burdens of proof to affect relationship of individual liberty and government power).

roduces evidence not only that he perceived such impairment, but also that adherents of the favored religion perceived endorsement of their religion, would be better able to persuade a judge, whose own perspective may be closer to those of the adherents, that the claimant's perceptions are neither frivolous nor delusional.²¹⁵

215. See, e.g., *Jewish War Veterans of United States v. United States*, 695 F. Supp. 1, 6 (D.D.C. 1988) (A Camp Commander wrote a letter congratulating a local commander of Navy Public Works on building a new cross at naval base, stating "[t]he new cross is larger and much brighter than its predecessor. Being erected just before the Christmas season reflected superb timing. Its message and symbolism enrich relationships between the Camp and its surrounding community."); *Donnelly v. Lynch*, 525 F. Supp. 1150, 1173 (D.R.I. 1981) (finding that city "accepted and implemented the view of its predominantly Christian citizens that it is a 'good thing' to have a creche in a Christmas display . . . because it is a good thing to 'keep Christ in Christmas'") (quoting letter to mayor who supported creche), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984); cf. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890, 900 (1989) ("It is difficult to view Texas' narrow exemption [for religious publications from sales tax] as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors.").

Such evidence would also respond to those who might argue that the very act of suing over an alleged establishment clause violation shows that the claimant has not been made to feel like an outsider, since he is taking advantage of one of the community's paradigmatic mechanisms for discourse and complaint resolution: the courts. The perceptions of others (that the government's action made them feel like outsiders or insiders, or that they perceived others to be treated that way) would enhance the claimant's showing that his perceptions are serious.

Another issue that needs to be considered is the proper scope of appellate review of the trial court's finding that the government's message is or is not perceived as endorsing religion: should it be the "clearly erroneous" standard or *de novo* reexamination? The law is not certain. See *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 779 n.2 (10th Cir. 1985). The Supreme Court has recently reiterated that appellate courts have the "ultimate power . . . to conduct an independent review of constitutional claims when necessary." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 506 (1984) (quoting *Miller v. California*, 413 U.S. 15, 25 (1973)). Where "[a] finding of fact is inseparable from the principles through which it was deduced," even "largely factual questions" may be too important to entrust to the trier of fact, and therefore, will be considered "legal" questions for appellate reevaluation. *Id.* at 501 n.17. On the other hand, Chief Justice Burger, writing for the majority in *Lynch*, called the district court's findings "clearly erroneous." *Lynch v. Donnelly*, 465 U.S. 668, 681 (1983). Justice Brennan, in dissent, explicitly stated that the "clearly erroneous" standard should be applied and thought that Justice O'Connor had done so. *Id.* at 704 n.11 (Brennan, J., dissenting). Justice O'Connor did describe the trial court's findings as "clearly erroneous," but she also stated that the court "was in error as a matter of law." *Id.* at 694 (O'Connor, J., concurring). And, in *Wallace*, Justice O'Connor made it clear that ascertaining the meaning of government action is a "mixed question[] of law and fact . . . properly subject to *de novo* appellate review." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985).

Independent appellate review of findings of endorsement under the test proposed in this Article is supported by at least two considerations. First, whether to recognize perceptions of endorsement is largely, but not purely, a question of historical fact. In marginal cases, the court must determine whether the perception is sufficiently explained. Appellate judges are as capable of doing that as are trial judges. Second, as discussed in part V(B) below, identifying endorsement is not the end of the analysis. The court must proceed to balance the evils of endorsement against the governmental interests at stake. See *infra* notes 216-63 and accompanying text. Appellate judges are certainly as competent as trial judges to conduct that evaluation. Moreover, *de novo* review does not mean that doctrine will recognize only the judge-based perception of endorsement which goes under the rubric of the "objective observer." The basic question to be reviewed remains

This method will ensure that all claimants have a forum in which to voice their perspectives. Judges will be compelled to acknowledge these perspectives and will not be able to end the discussion on the basis that an "objective observer" would perceive no offensive message. A court that finds a perception of endorsement or disapproval must then decide whether the government's infringement of the interest protected by the establishment clause is, nevertheless, justified.

B. Balancing Perceptions of Endorsement Against Proper Governmental Objectives

Whether we read the establishment clause with Justice O'Connor to prohibit government from appearing to endorse religion, or with *Lemon* to prohibit government action that "advances or inhibits" religion, we must be faithful to the Constitution's injunction without crippling government's ability to address its legitimate goals. Because a blanket proscription of government aid to or involvement in religion is impossible, even logically incoherent,²¹⁶ deciding establishment clause cases requires the court to consider both constitutional values and productive governmental activity.²¹⁷

Once the court finds a perception that government has endorsed religion, the proposed test shifts the burden to the government to show that its offensive behavior is nevertheless strongly related to an important secular purpose, including the protection of other rights guaranteed by the Constitution.²¹⁸ This

different: did real members of the community actually perceive an endorsement of religion by the government?

216. See *supra* note 18 and accompanying text.

217. See *L. TRIBE*, *supra* note 52, at 1284 & n.3. *Lemon's* designation of "primary" religious effects may be seen as an implicit balance. Justice O'Connor herself, as explained in Part IV of this Article, cannot avoid this balancing, even though she purports to do so. See *supra* notes 189-93 and accompanying text.

218. Insofar as the proposed test is understood as a balancing test, it is subject to certain typical criticisms. Generally speaking, the image of a balancing test suggests, ideally, a mechanism for generating unique outcomes from an objective weighing of determinate, commensurable components. Legal balancing tests appear "manipulable" because two rational persons can explain different outcomes in the same situation in terms of the same test. But while manipulation may result from the conscious or unconscious attempt to rationalize an outcome reached for other reasons, it may also represent nothing more than the discrepancy between the image of the balance and the reality of legal argumentation. Jurisprudence, unlike applied physics, must evaluate open-ended and incommensurable interests. A method for deciding cases, whether in the form of a balance or of a less directed enumeration of relevant factors, is not without merit simply because it does not uncontroversially yield unique outcomes. Indeed, a method can be valuable if it helps significantly to organize the field of controversy and to ensure consideration of all relevant interests.

More specifically, controversy cannot be avoided by any amount of fine-tuning of the components of the balance. No precise definitions can tell us whether government's purpose is "important" enough or whether its means are strongly enough related to that purpose. For instance, while there might be substantial agreement that some government purposes are "important," such as the uniform collection of sales tax, *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (exemption from sales tax for religious publications held unconstitutional), or Social Security tax,

framework is similar to the intermediate scrutiny analysis which the Supreme Court has applied in a growing number of equal protection cases,²¹⁹ and its impact on governmental behavior would be analogous.²²⁰ Most significantly,

United States v. Lee, 455 U.S. 252, 257-58 (1982) (refusing to exempt Amish employer from paying Social Security taxes did not violate free exercise clause), characterizing others as "important," such as celebrating a national holiday or promoting local retail sales and goodwill, Lynch v. Donnelly, 465 U.S. 668, 699 (1983) (Brennan, J., dissenting), appears highly contestable. If relatively few government goals are considered important, then limiting government's use of messages endorsing religion to those necessary to important ends could unduly constrain government if we assume, as Professor Smith does, *supra* notes 143-44 and accompanying text, that almost every government action may be perceived by *someone* as endorsing religion. On the other hand, the description of governmental purposes can be so far manipulated that the term "important" does not sufficiently constrain government, since the purpose of many government activities can be described broadly enough to be deemed "important" under any definition.

Whether means are "necessary" to achieve the state's legitimate secular ends depends on how broadly those ends are defined. For instance, consider remedial instruction programs for poor schoolchildren, such as the one at issue in *Aguilar v. Felton*, 473 U.S. 402 (1985). If the government's goal is "to expand and improve . . . educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children," *id.* at 404 n.1, then sending public school teachers and other professionals into parochial schools to teach and counsel disadvantaged students enrolled there would not appear to be *necessary* to achieve the state's general goal. The remedial program could always be modified to involve less government involvement in (and therefore, arguably, less apparent endorsement of) religion, while still serving the general secular goal of enhancing the special educational needs of the disadvantaged. But suppose the government defines its goal more specifically—for instance, to provide a certain number of hours of instruction to the disadvantaged students. Arguably, the New York City programs in *Aguilar* could be defined in this way, since "[t]he amount of time that each professional spends in the parochial school is determined by the number of students in the particular program and the needs of these students." *Id.* at 406. It may very well be that this specific goal cannot be reached except by sending the public school teachers onto the parochial school campus.

The danger of manipulation may not be as great as it might seem, because the two possibilities for manipulation described above are inversely related: each tends to "correct" the other. The more broadly the government defines its goals in an effort to establish their importance, the more difficult it will be for government to establish that the chosen means (which are perceived to endorse religion and to alienate) are necessary to accomplish those goals. *See infra* note 225 (discussing relationship of means to ends). Still, there is a large amount of play in the joints, and we should not allow the spurious precision of calibrating the balance in a particular way (important versus compelling, necessary versus substantially related) to distract us from the arguments behind the metaphor.

219. *See, e.g.,* L. TRIBE, *supra* note 52, at 1601-18 (discussing intermediate scrutiny generally).

220. *Cf. id.* at 1604-07 (discussing a third technique of intermediate scrutiny which requires "focusing on the challenged rule . . . from the perspective of the disadvantaged group itself"). Among other things, intermediate scrutiny, under the equal protection clause, requires the following of courts and government. (Note how each requirement is paralleled under the proposed establishment clause test). First, the governmental classification at issue must serve a sufficiently important purpose; not just any legitimate state function will do. *Cf. infra* notes 231, 239-40, 242-45 and accompanying text (proposed test requires court to distinguish more important secular purposes from less important ones). Second, the court should view the challenged rule from the perspective of the disadvantaged group itself, rather than from an "objectively neutral" perspective or one deferential to the legislature. Clearly, incorporating actual perceptions of endorsement into establishment clause analysis performs this task. Third, government must articulate a convincing rationale for the classification; the court will not supply one. Fourth, that rationale must not be a

the proposed test compels government to take the possibility of alienation and distortion of political discourse into account and to explain how, in striving to accomplish its legitimate secular functions, it sought to minimize the alienating effects of its actions. The test advises government not to presume that actions touching upon religion, even if benign in intent, are innocuous. It requires government to contemplate the negative impact that its conduct may have on citizens' capacity to view each other and themselves as equal members of the political community, and not to risk that harm except for very good reasons. Official conduct will not be upheld unless government can persuade the court that any such negative impact is a more or less unavoidable side effect of its effort to fulfill more or less obligatory governmental functions.²²¹

Let us examine how various types of establishment clause disputes might be analyzed under the proposed method. One persistent source of controversy is government aid to parochial schools. Such aid, in whatever form, certainly helps religion in its educational functions; it also creates perceptions that government has endorsed religion. The government's response that any assistance to religion is an unavoidable side effect of its legitimate exercise of power follows more or less directly from the Court's acceptance of nonpublic schools in *Pierce v. Society of Sisters*.²²² "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."²²³ The Court's effort to mediate between the government's interest in education and the apparent unconstitutionality of providing material aid to religious institutions has yielded the crazy-quilt of school aid decisions of the last twenty years.²²⁴

purely after-the-fact rationalization. Professor Tribe observes that this requirement "enhanc[es] political accountability: a legislature or agency that cannot count on the post-hoc rationalizations of those charged with responsibility to enforce and defend its enactments . . . might be motivated to ventilate more fully the considerations underlying those enactments." L. TRIBE, *supra* note 52, at 1607.

221. The idea that government must avoid religious symbols if possible has been suggested by at least three Supreme Court Justices. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3114 (1989) (Blackmun, J.) (citing *School Dist. of Abington v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring) (establishment clause forbids use of religious means to serve secular ends when secular means suffice)); see also *Allegheny County*, 109 S. Ct. at 3129-34 (Stevens, J., concurring in part and dissenting in part) (strong presumption against governmental use of religious symbolism). Justice Blackmun believes that government's failure to use an available secular alternative does not necessarily violate the establishment clause but is an "obvious factor" in the endorsement analysis. *Allegheny County*, 109 S. Ct. at 3114 n.67 (emphasis omitted); cf. L. TRIBE, *supra* note 52, at 1285 (stating that the establishment clause prohibits government from "us[ing] religious tools where secular ones would do"). The test proposed in this Article is analogous—for "religious tools," read "messages endorsing or disapproving religion"—but contains the following modification: even if secular tools will not suffice, the government's secular goal must be sufficiently important to justify the sending of religious messages.

222. 268 U.S. 510 (1925) (Oregon could not constitutionally require all children to attend publicly operated schools).

223. *Board of Educ. v. Allen*, 392 U.S. 236, 247 (1968) (White, J.).

224. See *supra* note 22 (briefly describing the seemingly inconsistent, recent establishment

Under the proposed test, whether a court upholds the aid program will depend on two issues. First, is the purpose sufficiently important? Second, are the resulting perceptions of endorsement more or less inevitable, or could the government reasonably have adopted some other means of addressing its goal that would probably have mitigated the alienation? To answer the first question, the court must explain whether the goal of ensuring that all schools, public and private, meet certain educational standards is important enough to warrant the resulting harm to the political standing ideal. If the court decides that the purpose is sufficiently important, the government must still persuade the court that in designing and implementing a particular school aid program, it took into account the extent to which the program might engender perceptions of endorsement of religion, and sought to minimize those consequences to the greatest extent consistent with the achievement of its purpose. This might include, for example, both explaining to those likely to be alienated why the program was worth the constitutional costs and remaining open to being persuaded that an alternative would have better accommodated both interests.²²⁵

This method not only expands the conversation about school aid to include the viewpoints of outsiders,²²⁶ but yields at least two additional jurisprudential

clause jurisprudence).

225. The two parts of the government's explanatory burden are interrelated, not separate. For instance, it can be argued that government's commitment to minimum educational standards for all students can be satisfied without any material assistance to religious schools at all. Government can simply monitor all schools to ensure compliance with standards, and discontinue schools that fail to meet those standards. While monitoring would involve some "entanglement" of the sort that the Supreme Court has found in the past to invalidate certain programs, *see Aguilar v. Felton*, 473 U.S. 402 (1985), it would likely generate less perceived endorsement than any other method of ensuring minimum standards, such as material assistance to parochial schools to bring them up to standards. Thus, there will always be a less offensive alternative to any particular school aid program.

However, the consequence of the absolute no-aid position is that students in private schools that could not afford to maintain standards would have to return to the public schools. Government could argue that the ensuing influx of students into an already strained public school system would further lower achievement in those schools, and would thus disserve government's broader purpose of enhancing educational opportunity for as many students as possible. Thus, analyzing the less offensive alternative issue leads back to the first issue: is government's purpose important enough?

This line of reasoning suggests that once the purpose is held sufficiently important, government's choice of means for implementing that purpose must be given some deference, based on government's assessment of its budget, its expertise in the area, and its continuing administrative responsibility in that area. The proposed test forces government to convince the court that it has thought through the possible alienating effects of its actions, but the test does not require the court to second-guess each detail of the government's program. In many areas of legitimate government activity, therefore, the proposed test's "bite" is placed at the first question: whether the purpose is sufficiently important.

226. Of course, in an important sense not a mere "conversation" but a raging debate involving "insiders" and "outsiders" surrounds the school aid and many other establishment clause controversies. *See infra* note 257 and accompanying text (school textbook cases). The point is that current constitutional *doctrine* does not envision debate at all, but instead a pseudo-scientific calculation of direct versus indirect effects, or a determination of the "objective" meaning of government action. This Article contends that doctrine itself should adopt the model of discourse rather than

benefits. First, by bringing to the surface the assessment of establishment clause values and governmental goals, the proposed test compels judges to connect their decisions more directly to what they consider important about the establishment clause. This is preferable to trying to fix the line between "direct" and "indirect" assistance to religion, which is simply not a principled decision, or, worse yet, trying to determine whether government action "objectively" communicates an endorsement of religion.²²⁷

Second, the proposed test enhances at least the apparent rationality of constitutional doctrine by avoiding the hairsplitting that *Lemon's* application has produced.²²⁸ Most cases close to the current line of constitutionality, whatever their resolution, arise out of perceptions that government has endorsed or disapproved of religion, and the search for fine distinctions among these perceptions is unproductive at best and disingenuous at worst. Few people other than certain legal professionals would actually perceive loans of textbooks to parochial school students to be much more or less of an endorsement of religion than loans of tape recorders, globes, and maps to the parochial schools themselves.²²⁹ Because the same governmental goal is involved in both situations

objectivist analysis.

227. See Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 53 ("Although case-by-case balancing does not create certainty, it puts the Court's prejudices up front rather than allowing it to justify decisions by reference to inappropriate precedent and unconvincing doctrine.").

228. See *supra* note 22 (briefly discussing the seemingly inconsistent, recent establishment clause jurisprudence).

229. Compare Board of Educ. v. Allen, 392 U.S. 236 (1968) (lending textbooks to private school students constitutional) with *Meek v. Pittenger*, 421 U.S. 349 (1975) (lending other instructional materials directly to private schools unconstitutional). In *Meek*, it should be noted, only Justices Stewart, Blackmun, and Powell thought that Pennsylvania could constitutionally lend books to parochial school students but not other materials to the schools themselves. Three Justices would have invalidated both parts of the school aid program, while three others thought that both parts of the program were constitutional. It should also be noted that in *Wolman v. Walter*, 433 U.S. 229 (1977) (invalidating public loans of instructional materials to children attending private schools), the Court frankly acknowledged the "tension" between *Allen* and *Meek*. *Id.* at 251 n.18. The Court agreed to follow *Allen* as a matter of *stare decisis* but declined to extend it. *Id.*

Of course, proof of credible perceptions of endorsement of religion may vary in different challenges to otherwise similar government behavior. It thus might appear that one local government's action could be held constitutional and the same action by another locality unconstitutional, depending on the nature of the respective proofs. The resulting unpredictability would not provide governments with much guidance on the constitutionality of proposed actions, some of which involve the investment of much time and money. Moreover, if the relative strength of the showing of perceptions of endorsement and consequent alienation may affect the balance, one might wonder why the constitutionality of a government program should turn on the degree of perceived endorsement instead of the degree of actual government aid to, and involvement in, religion, which can be measured in certain more objective ways, such as dollars spent, location of services, and so on. See Smith, *supra* note 22, at 303, 307-08 ("[A] doctrinal test or principle which focuses upon the message, rather than upon the underlying evil reflected in that message, seems positively perverse.") (emphasis in original).

However, as explained in the text, since the constitutionality of government action under the proposed method does not depend exclusively on perceptions of endorsement, the threat of incon-

and the means chosen to accomplish that goal are, presumably, strongly related to it, then under the proposed test, either both programs would be constitutional or both would be unconstitutional.²³⁰ Which outcome prevails in both cases depends on whether the court considers the goal of ensuring a certain quality of nonpublic education to be sufficiently important to outweigh any consequent distortion of the ideal of equal political standing.²³¹ And whether the evil of the perceived endorsement is outweighed by the good to be attained would be a matter of "definitional or general balancing,"²³² in which higher federal courts would strike the balance between a given set of interests. The courts would thus help to prevent a "balkanization" of constitutional doctrine without mandating a nationally-uniform interpretation of the "meaning" of government's action.²³³

A second issue, recently decided by the Supreme Court, is the constitutionality of the Equal Access Act of 1984.²³⁴ Some public secondary schools have created "limited open forums" by permitting "noncurriculum related" student groups to meet on school premises outside of normal school hours. Under the act, a school that does so may not use the content of the speech at such meetings, including religious content, as a basis for denying any students "equal access or a fair opportunity" to meet.²³⁵ In *Board of Education v. Mergens*,²³⁶ the Court held the Equal Access Act constitutional.²³⁷

sistency is minimized.

230. The same point applies to religious display cases. *See infra* note 247 and accompanying text.

231. The argument is not that this will always be an easy question to resolve. The need to draw lines will always be present, and cases close to the line can always be posed. To their credit, the majority of Justices in *Allegheny County* recognize this. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3107-08 (1989) (Blackmun, J.); *id.* at 3120 (O'Connor, J., concurring in part and concurring in the judgment). Rather, the point is that the proposed test would shift the line to a location that makes more sense in terms of the values underlying the establishment clause.

232. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 610-11 (1980).

233. *Cf.* Ingber, *supra* note 79, at 325 & nn.574-76 (religion clauses require nationwide, not local, definition of "religion" in order to prevent "a constitutional balkanizing inconsistent with our traditional view of the Constitution as a unifying symbol").

It is of course possible that different governmental bodies confronting similar tasks—for example, whether and how to assist private schools—will formulate their objectives in different terms. Conceivably, this could affect the courts' decisions, since the government must persuade the court that its objective is sufficiently important. But to the extent that one government does not learn the most plausible and persuasive ways to formulate its objectives from others' litigation, presumably the courts can help insure that constitutionality does not turn on the cleverness with which various governments describe their programs.

234. 20 U.S.C. §§ 4071-4074 (Supp. V 1987).

235. 20 U.S.C. § 4071(a), (b).

236. 110 S. Ct. 2356 (1990).

237. *Id.* at 2370-73. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Blackmun, reasoned that *Widmar v. Vincent*, 454 U.S. 263 (1981), which upheld a similar policy at the university level, applied just as well to high schools. Justice O'Connor looked to a Congressional finding that high school students were as capable as college students of understanding that "a school does not endorse or support student speech that it merely permits on a nondis-

The proposed test begins with the likely perception that government endorses religion when it permits student religious groups to meet on public school grounds.²³⁸ The court must then inquire whether any secular purpose at which government aimed the legislation is sufficiently important to justify the perception of endorsement. It might be difficult for government to formulate such a purpose convincingly. Encouraging noncurriculum related student groups in general is one possibility.²³⁹ Promoting free speech is another, although it seems somewhat inconsistent with the public school's extensive right to control student speech in other contexts.²⁴⁰ If the court does not hold that the purpose is sufficiently important, then the school cannot make its facilities available to noncurriculum related student groups. If, however, the court is

criminy basis." *Id.* at 2372. Furthermore, the "broad spectrum" of noncurriculum related student groups active at Westside High School (which did not, however, happen to include any other groups advocating a controversial religious, political, or philosophical position) and the non-participation of school officials at group meetings negated any "reasonable" perception of endorsement. *Id.* at 2372-73. Justices Kennedy and Scalia concurred, following Kennedy's interpretation of the establishment-clause in *Allegheny County*. *Id.* at 2377-78. Justices Marshall and Brennan agreed that the Equal Access Act need not violate the clause but concurred in the judgment only, stipulating that Westside must explicitly disclaim sponsorship or endorsement of the religious group. *Id.* at 2378-83. Finally, Justice Stevens dissented, primarily on the ground that Westside had not created a "limited open forum" in the sense Congress intended in the Equal Access Act and, therefore, that the school was not required to allow the Christian Club to meet. *Id.* at 2383-93. According to Stevens, a high school creates a "limited open forum" obligating it to allow religious groups to meet only if it permits extracurricular groups "advocating partisan theological, political, or ethical views." *Id.* at 2385.

238. The courts have repeatedly indicated that the impressionability of elementary and secondary school students exacerbates the threat of endorsement. *See Garnett v. Renton School Dist.*, 874 F.2d 608, 612 (9th Cir. 1989), *modifying* 865 F.2d 1121, *vacated*, 110 S. Ct. 2608 (1990). In *Garnett*, the Ninth Circuit held that allowing student religious groups to meet in a high school classroom before the start of the school day would violate the establishment clause. 874 F.2d at 610. The court reasoned that the Equal Access Act was inapplicable: the high school was not a "limited open forum" because all of the student groups permitted to meet at the school were curriculum related. *Id.* at 612-14. The court further reasoned that "the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals [all] distinguish public secondary schools from public universities." *Id.* at 612; *see supra* note 169. *But cf. Mergens*, 110 S. Ct. at 2372 (finding that:

Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion. . . . [Congress determined that] "students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other")

(quoting S. REP. NO. 357, 98th Cong., 8, 35 (1984)).

239. In *Mergens*, the school board's policy encouraged student clubs in general as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." 867 F.2d 1076, 1077 (8th Cir. 1989), *rev'd*, 110 S. Ct. 2356 (1990). Whether the school board has a strong interest in promoting partisan ideological student clubs is another question. As a matter of statutory interpretation, this is the issue that divided Justice Stevens from other Court members. *See supra* note 237 (discussing *Mergens*).

240. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (high school principal's editorial control over school-sponsored student newspaper did not violate students' first amendment rights).

persuaded that some such purpose is sufficiently important, the government would probably be able to satisfy its burden of showing that it adopted the least offensive means of accomplishing its goal, because the act explicitly grants equal footing to religious and nonreligious interests. Indeed, by discriminating against religious groups, government would probably be perceived as taking an even more pronounced position on religion.²⁴¹

Consider next the constitutionality of a governmental display incorporating religious imagery. If the display generates a perception that government has endorsed religion, the court must ask if the government's purpose in sponsoring the display is important enough in general to warrant the harm of endorsement. The proposed test, unlike current doctrine, invites the court to distinguish more important secular purposes from less important ones.²⁴² Celebrating a national holiday or promoting local retail sales and goodwill—the purposes offered in *Lynch*—might well be found to be much less crucial to the proper functioning of government and society than, say, ensuring all citizens a minimally adequate education,²⁴³ or the uniform collection of sales,²⁴⁴ or Social Security taxes.²⁴⁵ If so, the purpose of the display would not justify any endorsement of religion. If the court nevertheless decides that the purpose is important enough to justify some endorsement, the government must still persuade the court that it has responsibly attempted to reduce the magnitude of those perceptions—for instance, by avoiding sectarian symbols. Can liberty be adequately “saluted” without the use of a Christmas tree or menorah?²⁴⁶ If so, then government is bound to forgo those symbols. If not, then perhaps the following year, government should reconsider whether “saluting liberty” at Christmas is truly important enough to warrant alienating some citizens on religious grounds. In either event, the court would recognize rather

241. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (public university may allow student religious group to meet in university facilities without violating establishment clause, and must do so in order not to violate free speech clause).

Conceived in traditional terms, the equal access cases pose a classic neutrality dilemma: does government, in providing a benefit, act “neutrally” when it treats religion and nonreligion alike, or when it excludes religion from the benefit in order not to “aid” religion? See *infra* note 253 (discussing neutrality ideal). In *Mergens*, the benefits include official school recognition for the student religious group, access to the school's public address system, newspaper, and other media, and meeting space in a location readily accessible to students who are required by law to be on the premises. The test proposed in this Article avoids the neutrality dilemma by requiring, first, that the benefit be very important to government's basic functions in order to justify the perceived endorsement which the benefit to religion engenders, and second, that there be no less offensive way of delivering the benefit. If allowing noncurriculum related student groups to use school space passes the first test, then it would appear to pass the second.

242. Currently, any secular purpose satisfies the first prong of *Lemon*. See *supra* note 23 and accompanying text.

243. See *supra* notes 225, 239-40 and accompanying text (education as important purpose); see also *supra* note 218 (discussing the significance of labeling a purpose as “important”).

244. See *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989).

245. See *United States v. Lee*, 455 U.S. 252, 256-58 (1982).

246. The display upheld in *Allegheny County* was titled “Salute to Liberty.” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3095 (1989).

than ignore the costs of alienation. Also, the proposed test would yield at least the appearance of a more rational doctrine; the constitutionality of a nativity scene on government property would be unlikely to turn on the proximity of a plaster Santa Claus,²⁴⁷ or that of a menorah on the proximity of a Christmas tree.

As a final example, suppose a complaint that the National Gallery of Art promotes religion by displaying works of art featuring Madonnas and other sectarian subjects. Justice O'Connor would peremptorily dismiss that perception as unreasonable. The context, she believes, "changes what viewers may *fairly* understand to be the purpose of the display—as a typical museum setting . . . negates any message of endorsement of [religious] content."²⁴⁸ But surely one can imagine a perception that the profusion of such images in a federally funded and managed institution endorses religion by indicating that Christianity plays a more important part in the national heritage than do other religions or sects. A court that receives credible evidence of such a perception must begin by acknowledging it. The court might then explain to the person claiming alienation that maintaining a repository of the most significant art is an important secular function of government, and that art historians, the specialists entrusted with the job of selecting the best works of art, do not employ subject-matter as a criterion of evaluation.²⁴⁹ However, almost all of the surviving great European works of art created in certain centuries took Christian themes as their subjects; therefore, a collection of great art from that period must consist largely of works featuring those themes. Excluding works of art solely because of their religious imagery would have a chilling effect on the free speech, and possibly academic freedom, rights of the curators and the public. Moreover, by adopting such a policy of exclusion, government would appear to take a position on religion to a far greater extent than it

247. See, e.g., *ACLU v. Wilkinson*, 701 F. Supp. 1296, 1306-08, 1311 (E.D. Ky. 1988) (discussing interpretations of *Lynch*, including criticism of "Santa Claus too" test), *aff'd*, 895 F.2d 1098 (6th Cir. 1990); cf. *Mather v. Village of Mundelein*, 864 F.2d 1291, 1293 (7th Cir. 1989) (per curiam) ("[we] hope that the Supreme Court will decide *County of Allegheny* in a way that diminishes the role of architectural judgment in constitutional law").

248. See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (emphasis added); cf. *Allegheny County*, 109 S. Ct. at 3132 (Stevens, J., concurring in part and dissenting in part) ("It would be absurd . . . to exclude religious paintings by Italian Renaissance masters from a public museum.").

249. Of course, art historians compare works as greater or lesser examples of a particular genre, such as Madonnas; however, "Madonnas are better (or worse) than landscapes" is not a meaningful art-historical judgment.

It is the importance of the purpose here that would justify government's use of imagery perceived to endorse religion, where the use of sectarian imagery in other contexts, such as holiday displays, would not be justified. In both situations, arguably, government is presenting part of the national heritage (neutral criterion), which in fact contains sectarian images. However, in the case of the National Gallery, the purpose of displaying the images is to provide a source for the study and enjoyment of what experts have selected as the best art. No such purpose is present in the holiday displays.

does by deferring to purely secular criteria.²⁵⁰

The case of the National Gallery collection, then, is not frivolous; it raises major constitutional issues. If we approve of the collection, it should be because we have thoughtfully assessed the competing constitutional concerns, not because we have ignored them. The point of the proposed method of analysis is not necessarily to upset currently accepted practices, but to compel their reexamination in light of critical viewpoints that present doctrine excludes.

Some objections to the proposed method merit consideration. First, does any version of the no endorsement test avoid the pitfalls of the absolute neutrality ideal, discussed at length by Professor Smith and others?²⁵¹ Professor Smith contends that Justice O'Connor's theory, despite its analytical shortcomings, has attracted widespread support because it is the most recent example of "the long-standing quest to define a position of government neutrality towards religion."²⁵² As such, Smith argues, the approach is fundamentally unhelpful in solving problems of church-state relations because the concept of "neutrality" is both ambiguous and empty.²⁵³ Moreover, Justice O'Connor's attempt to shift the question from whether government action *is* neutral to whether government *appears* neutral does not avoid these difficulties.²⁵⁴

Far from being vitiated as simply another attempt to base constitutional doctrine on a neutrality standard, however, the proscription against governmental endorsement of religion, as reconceived in this Article, is neither empty nor radically ambiguous. Just as a free exercise clause case begins with the believer's perception that her religious practice has been infringed,²⁵⁵ so estab-

250. In some respects this situation is like that in *Widmar v. Vincent*, 454 U.S. 263 (1981) (if university provides classrooms for use by all student groups, it has created a partial open forum to which student religious groups must receive equal access), in that screening religious works of art would send a message that government specifically disfavors religion.

251. Smith, *supra* note 22, at 313-31; Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986). Both critiques of neutrality-based theories are valid, so much so that the scholars are hard pressed to rescue establishment clause theory to the extent that it depends on an ideal of governmental neutrality. See Smith, *supra* note 22, at 331 (ideal of neutrality provides no guidance; Smith's own analysis is purely critical and does not suggest alternatives); Valauri, *supra*, at 144-50 (purporting to "escape from neutrality dilemma" by arguing that since principled decisionmaking is impossible, courts should not try to do it, but should instead defer to the legislature).

252. Smith, *supra* note 22, at 313.

253. The ideal of neutrality is ambiguous, and thus does not help to answer difficult establishment clause cases, because one cannot choose between the opposing injunctions "don't aid religion" and "don't inhibit religion" without first deciding on a reference point: aid or inhibit compared to what state of affairs? See P. BOBBITT, *supra* note 156, at 208 (neutrality ideal ambiguous without a standard of generality on which ideal depends); Smith, *supra* note 22, at 314-15 (analyzing contrasting applications of neutrality ideal to facts of *Everson*). The emptiness of the neutrality ideal is that requiring a decisionmaker to be "neutral" reduces to the command that the decisionmaker choose between alternative outcomes only in accordance with proper criteria, but leaves unanswered the crucial question: what are the proper criteria? Smith, *supra* note 22, at 325-29.

254. Smith, *supra* note 22, at 319-25.

255. *But see Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) (majority of Justices ignore

lishment clause doctrine can start with the citizen's perception that her willingness or ability to participate in the political community has been curtailed by the government's endorsement of religion.²⁶⁶ Under the proposed method of analysis, establishment clause doctrine does not impractically compel government to maintain absolute neutrality with regard to religion, but rather to use religion as little as possible in addressing its significant secular goals.

Second, the test permits government to make religion relevant to political

claimant's interest in free religious practice, holding that the Constitution does not require any religious exemption from generally applicable criminal laws).

256. In response to Professor Smith's critique of the no endorsement test as a reconstituted neutrality-based test, Justice O'Connor's approach can be explained in terms of its focus on the role of government action in contributing to a *public community of discourse* (here, about church-state relations). The "messages" sent by government action are not merely shadows of, or weak substitutes for, the "actual" impact of government behavior. They are themselves an important part of our public life insofar as that life involves talking and thinking about the role of religion. Justice O'Connor is reading the establishment clause to minimize government's role in public discourse about religion.

Professor Smith seems not to recognize the independent weight and importance of symbolic behavior, a crucial aspect of Justice O'Connor's insight. For instance, Smith criticizes the use of the no endorsement idea to protect against political disenfranchisement as follows. The message of disenfranchisement allegedly sent by government endorsement or disapproval of religion may be either true or false. That is, government is either discriminating against persons in their civil and political rights on the basis of religion, as the message indicates, or it is not. If the message is false, then government is not actually violating the basic premise that political standing should be independent of religion. If the message is true, "then government *is* violating that premise; but it is violating the premise by making religion relevant to political standing, *not* by sending messages which accurately acknowledge that fact." Smith, *supra* note 22, at 308 (emphasis in original). This reasoning ignores the fact that the *message itself* colors discourse on church-state relations. The perception that government favors or disfavors religion can entrench current discriminatory practices, and may inspire later disenfranchisement where none currently exists.

This principle of abstention differs from the principle of neutrality. A series of government decrees respectively endorsing the practice of all known religions, as well as the refusal or failure to practice religion, would seem to satisfy the demands of at least one sense of "neutrality," but would violate the abstention principle many times over. That this example is not farfetched is clear from recent litigation. For instance, in *Donnelly v. Lynch*, the Mayor of Pawtucket, after the lawsuit was filed challenging the inclusion of the creche in the city's Christmas display, announced his intention to include a menorah in the following year's display. 525 F. Supp. 1150, 1159 (D.C.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1983). And in *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978), the city, having displayed an illuminated Latin cross on city hall at Christmas and Easter for many years, responded to requests from Eastern Orthodox Christians by authorizing the display of their cross around the time of the Orthodox Easter, and in theory opened itself to successive requests from adherents of other religions for similar treatment. *Id.* at 803, 587 P.2d at 669-76, 150 Cal. Rptr. at 873-80 (Bird, C.J., concurring). Chief Justice Bird recognized that "the majority rightly object[ed] to the notion that the city may turn city hall into a vast billboard for religious messages," and that "the City Council of Los Angeles has no business deliberating on such questions as what symbols of other religions are equivalent to the cross and what holidays of other religions are equivalent to Christmas and Easter." *Id.* at 805 n.6, 812, 587 P.2d at 671 n.6, 676, 150 Cal. Rptr. at 875 n.6, 880. Finally, in *Allegheny County*, Pittsburgh's "Salute to Liberty" posed the same problem: as Justice Blackmun acknowledged, "[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." 109 S. Ct. 3086, 3112 (1989) (holding, however, that this display did *not* endorse either religion).

standing only if it has selected, from the alternative means reasonably calculated to serve its goals, the course of action least offensive to establishment clause values. This addresses the damned-if-you-do, damned-if-you-don't situations described by Professor Smith, such as textbook selections by public school authorities, where the government is likely to generate perceptions that it has endorsed religion however it acts.²⁵⁷ Under the test, if any of two or more sufficiently important courses of action will send a message endorsing or disapproving religion, government must select the one that sends the least offensive message.

But how is a court to define "least offensive"? A head count of those claiming offense would obviously entail the same problems as does the use of majority perceptions to define the meaning of a message. Is the intensity of the feelings engendered by the perception of endorsement to be considered, and if so, how? Indeed, difficult as it will be for a court to measure the degree of offensiveness experienced by the complainants, how can the court possibly measure the impact of an alternative but purely hypothetical course of government action? Any determination seems speculative.

On an abstract level, there is no easy answer to this problem. On the concrete level of particular controversies, the difficulty may be mitigated somewhat. In the school textbook cases, for instance, the court might explain to those who perceive the school district's choice as an endorsement of "secular humanism" that, by analogy to the Madonnas in the National Gallery, the selection criteria are nonreligious, which implies that secular humanism is not a "religion" in first amendment terms.²⁵⁸ The school district may also seek to accommodate the practices of those who still feel alienated, for instance, by excusing them from particular classes.²⁵⁹ But it would be naive to contend that any method of analyzing such disputes will avoid controversy altogether. The method proposed in this Article leaves much to the discretion and prudence of judges. By scrutinizing the government's behavior and its explanations for its course of action, and by considering the facts of similar controversies elsewhere, they must determine whether the government did what it responsibly

257. Smith, *supra* note 22, at 291 n.103. Professor Smith offers the example of the controversy over textbooks that allegedly promote secular humanism. The plaintiffs viewed the use of the books as disapproval of their fundamentalist ideals (and as endorsement of the "religion" of secular humanism), while others might view removal of the textbooks as an endorsement of the plaintiffs' religious beliefs. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Board of School Comm'rs*, 827 F.2d 684 (11th Cir. 1987). Another example provided by Professor Smith is based on *Lynch v. Donnelly*: "[w]hether the creche was included in or removed from the Christmas display, the sincere religious sensibilities of some citizens would be offended." Smith, *supra* note 22, at 311.

258. Professor Ingber has argued that religion should be defined for establishment clause purposes to include only generally recognized, or "established," religions. The courts could thereby exclude from consideration the contention that the use of certain textbooks in public schools endorses the "religion" of secular humanism. See Ingber, *supra* note 79, at 306 (secular humanism a "nonreligious ideology").

259. See, e.g., Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 919-40 (1988) (analyzing alternative means of accommodating religious schoolchildren).

could to avoid endorsing religion.

Third, it might be argued that if the exact strength of the showing of perceptions of endorsement and alienation will not be dispositive in most cases—if even a small showing is enough to put the government to its burden of justification—then there is little point in going through possibly elaborate factual proof of whether the government's act has actually conveyed a message endorsing religion. It would seem more efficient to ignore the factual inquiry by presuming perceptions of endorsement.²⁶⁰

Justice O'Connor's reconception of the establishment clause itself provides the answer to this suggestion. The plaintiff's case should not be presumed, because it is important for constitutional doctrine to acknowledge the perceptions of endorsement that surface in response to government action. This responds to the ideal of discretion and mutual forbearance proposed by Professor Tushnet and derived from an article on *Engel v. Vitale*²⁶¹ by Arthur Sutherland.²⁶² Tushnet suggests that the best way to resolve the conflicts between church and state in which the courts have become embroiled, and to reduce political divisiveness along religious lines, would be for citizens, drawing on a sense of the public good drawn from the tradition of civic republicanism, to forgo actions like putting up creches—or suing to have them taken down.²⁶³

The ideal of forbearance may be lauded, but constitutional doctrine should not presume a shared sense of the common good at the expense of concealing opposing viewpoints and thus cloaking obnoxious government action with respectability. Doctrine should recognize the voices of those who claim that government involvement with religion has marginalized them. And recognition entails not only that judges be willing to hear their complaints, as under current case law, but that the meaning of the establishment clause should in great measure depend on their perceptions.

VI. CONCLUSION

The reinterpretation of the establishment clause proposed in this Article requires government to consider the sensibilities of religious and irreligious minorities. At a time when the majority of Congress—along with four members of the Supreme Court, including Justice O'Connor—clamor to impose a “national symbol of unity” on nonconformists,²⁶⁴ it is particularly urgent to pro-

260. This criticism could take on somewhat greater weight in light of the institutionalized nature of much establishment clause litigation. A few “separationist” organizations, such as the American Civil Liberties Union, bring many establishment clause challenges and coordinate such litigation nationwide. See generally F. SORAUF, *THE WALL OF SEPARATION* (1976).

261. 370 U.S. 421 (1962).

262. Tushnet, *supra* note 58, at 736-38 (citing Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962)).

263. *Id.* at 736-39; see also Bradley, *supra* note 227, at 56 (Supreme Court should have denied certiorari in *Lynch v. Donnelly*, 465 U.S. 668 (1983), because any attempt to resolve the issue within confines of prior doctrine would multiply rather than reduce doctrinal uncertainty).

264. See *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (5-4 decision, holding that free speech clause prohibits Texas from criminally punishing person for burning American flag as form of

tect against government's power to send messages of political exclusion. Courts must apply the establishment clause in light of that need.

political protest). On the flurry of Congressional and executive activity in response to the decision, see, for example, *N.Y. Times*, July 24, 1989, at A13, col. 1. President Bush and some members of Congress sought a constitutional amendment to prohibit flag desecration; others promoted a statutory response instead. On October 28, 1989, Congress passed the Flag Protection Law of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989). In *United States v. Eichman*, 110 S. Ct. 2404 (1990), the Court, again by a 5-4 vote, held the law unconstitutional. Subsequently, the House of Representatives voted two hundred fifty-four to one hundred seventy-seven in favor of a constitutional amendment, falling thirty-four votes short of the two-thirds necessary to keep the proposal alive. *N.Y. Times*, June 22, 1990, at A1, col. 3. Five days later, in a vote superfluous but for partisan politics, fifty-eight Senators supported the proposed amendment, nine less than the two-thirds needed to send the proposal to the states had the House not already rejected it. *N.Y. Times*, June 27, 1990, at B6, col. 5.