Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test

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Introduction

> Church and state would not be such a difficult subject if religion were . . . some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room.[1]

One person's desire to involve others in her religious observance often collides with another's desire to be left alone. The United States has tried to accommodate both desires by drawing a boundary line between acceptable and unacceptable government activity in the religious sphere. The result has been confusing and inconsistent jurisprudence. Under the test of *Lemon v. Kurtzman*,[2] state action violates the Establishment Clause of the First Amendment if it fails to meet three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that

1. Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting).
2. 403 U.S. 602 (1971).

neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[3]

Although the Supreme Court has not overturned *Lemon*,[4] many commentators and justices have expressed dissatisfaction with the test.[5] Much attention has focused on the test proposed by Justice O'Connor in her *Lynch v. Donnelly*[6] concurrence suggesting that the Establishment Clause prohibits government action that "endorses" religion. The endorsement test, proposed as a clarification of the *Lemon* test,[7] has received some scholarly praise.[8] It has, however, also received a great deal of criticism[9]—most purporting to be "fatal."

3. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1971)).

4. The Supreme Court has usually applied the *Lemon* test, but has noted its reluctance "to be confined to any single test or criterion." Lynch v. Donnelly, 465 U.S. 668, 679 (1984). In at least two cases, the Court did not apply the *Lemon* test. Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Marsh v. Chambers, 463 U.S. 783 (1983). In its most recent term, the Supreme Court declined an invitation to reconsider *Lemon*. *See* Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

5. *See, e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 CAL. L. REV. 5, 7-8 (1987) [hereinafter Choper, *Update*] (calling this area of the law a "conceptual disaster area"); William P. Marshall, *'We Know It When We See It': The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 497 (1986) (noting that even the Court has acknowledged the inconsistencies in its jurisprudence).

6. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). For similar tests proposed by commentators, see DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE (1991) (arguing that establishment is a "religiously non-preferential endorsement," a benefit available to all religions but not available to non-religious activities); Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 693 (1968) ("[T]he [establishment] clause should be read to prohibit only aid which has as its motive or substantial effect the imposition of religious belief or practice."); *id.* at 727 ("A no-imposition standard makes it unnecessary to decide whether particular state action constitutes coercion. Compelling religious participation is certainly an imposition, but so is persuasion, endorsement or any other means of influencing choice.").

7. *Lynch*, 465 U.S. at 687. For a discussion of whether O'Connor's test is indeed a clarification of *Lemon*, see *infra* part II.B.

8. *See* Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 54-55 (1990); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 180 (1987) (arguing for governmental "liberal neutrality," under which courts should "inquire whether the statute or government belief in question is intended to cause people to adhere to a particular set of beliefs, or is likely to do so"). As Beschle's analysis demonstrates, this Article's suggestion that government should not influence religious choices is not new. Nonetheless, previous scholarship and O'Connor's articulation of the test have been reluctant to take endorsement or influence to their logical conclusions, as this Article does.

9. *See, e.g.*, Theodore C. Hirt, *'Symbolic Union' of Church and State and the 'Endorsement' of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence*, 24 WAKE FOREST L. REV. 823 (1989); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86

Commentators have listed problems with the test as currently formulated, and suggested that these problems mandate rejection of the test. Some of the criticism, particularly the argument that the test is too vague as currently formulated, is valid. This Article argues that a refined endorsement test is the proper approach for interpreting the Establishment Clause. The problems with O'Connor's endorsement test are remediable. A more precise definition of "endorsement" will enable the "unwieldy" test[10] to have practical application. The endorsement test is the only test currently supported by a Supreme Court Justice that gives adequate protection to the values the Establishment Clause must protect.

Part I of this Article contrasts the endorsement test, as it has been applied thus far, with the most prominent alternative, the coercion test. Part II surveys the problems with Justice O'Connor's formulation of the endorsement test. Part III proposes a new understanding of endorsement, based on "adoptive action," and applies it to a variety of contexts. Part IV proposes a model of government-citizen interaction based on government influence of individual religious decisions in order to identify the values that an Establishment Clause test must protect. Part V uses that model to argue that the endorsement test best represents the values embraced in Establishment Clause jurisprudence.

I. Justice O'Connor's Endorsement Test and the Coercion Test

A. Justice O'Connor's Endorsement Test

According to Justice O'Connor, government can violate the Establishment Clause in two ways.[11] First, government can become excessively entangled with religious institutions.[12] The "second and more direct infringement" occurs when state action communicates or is intended to communicate endorsement of religion.[13] Endorsement,

MICH. L. REV. 266, 292 (1987); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701-02 (1986).

10. *See* Hirt, *supra* note 9.

11. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

12. This Article does not propose inclusion of entanglement in the Establishment Clause test because it is not necessary to protect the values underlying the Establishment Clause. For a critique of the use of entanglement in Establishment Clause jurisprudence, see Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-85 (1980).

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

while partly a question of historical fact, is largely "a legal question to be answered on the basis of judicial interpretation of social facts."[14]

In *Lynch*, Justice O'Connor suggested that endorsement should be measured by the actual perceptions of real people:

> The 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. . . . If the audience is large, as it always is when the government 'speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message.[15]

O'Connor's discussion of the facts of *Lynch*, however, did not provide any indication of how the standard was to be applied.[16] The *Lynch* Court considered the constitutionality of a city's Christmas nativity display.[17] The display was located in a park in the center of the city's shopping district.[18] The park was owned by a nonprofit organization. O'Connor's analysis of the facts began: "Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche."[19]

It is not clear whether O'Connor believed her own perceptions of endorsement were dispositive, or whether she intended the statement as a mere rhetorical device. Regardless, the criteria she used in forming her belief were not specifically stated. O'Connor went on to note that "no one contends" the crèche endorsed religion,[20] leaving unclear how claims would have been evaluated.

In later cases, O'Connor used "a purely fictitious character"[21] to measure endorsement. In her concurrence in *Wallace v. Jaffree*,[22] she explained that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of religion.[23]

14. *Id.* at 694 (O'Connor, J., concurring).
15. *Id.* at 690 (O'Connor, J., concurring).
16. *Id.* at 670-71 (O'Connor, J., concurring).
17. *Id.* (O'Connor, J., concurring).
18. *Id.* at 671 (O'Connor, J., concurring).
19. *Id.* at 692 (O'Connor, J., concurring).
20. *Id.* (O'Connor, J., concurring).
21. Smith, *supra* note 9, at 292.
22. 472 U.S. 38 (1985) (O'Connor, J., concurring).
23. *Id.* at 76, (O'Connor, J., concurring).

Wallace invalidated an Alabama statute that set aside a one-minute moment of silence "for meditation or voluntary prayer"[24] in public schools. O'Connor found that a mandatory moment of silence was not necessarily an endorsement of prayer,[25] but that Alabama's statute did not pass constitutional muster. O'Connor noted that the legislative history of the statute strongly suggested it was intended to endorse prayer.[26] Prior to enacting the statute at issue in *Wallace*, Alabama law provided for a moment of silence.[27] The only difference between the two laws was that the earlier statute did not list voluntary prayer as one of the activities for which the moment was designated. The legislative history indicated that the sole purpose of the new statute was "to return voluntary prayer to our public schools."[28] O'Connor concluded that an objective observer would view this evidence and conclude that the state had intended to endorse religion.[29] Unfortunately, Justice O'Connor failed to explain how an objective observer differed from a judge, or what constituted endorsement in general.

A majority of the Court embraced the endorsement test in *Allegheny v. ACLU*.[30] In *Allegheny*, the Court found the display of a crèche in a courthouse an endorsement, but held that a public display of a Jewish Chanukah menorah next to a Christmas tree did not constitute endorsement. The Court found several factors relevant. First, it explained the religious and cultural meanings of the various religious symbols. The Court noted that the crèche display included a written message that was clearly religious: "Glory to God in the Highest!"[31] The opinion pointed out that nothing in the setting of the crèche detracted from its religious content.[32] The Court stated: "Government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. . . . Government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine."[33]

24. *Id.* at 40.
25. *Id.* at 73 (O'Connor, J., concurring).
26. *Id.* at 77 (O'Connor, J., concurring).
27. *Id.* (O'Connor, J., concurring).
28. *Id.* (O'Connor, J., concurring).
29. *Id.* at 78 (O'Connor, J., concurring).
30. 492 U.S. 573, 593-94 (1989).
31. *Id.* at 598.
32. *Id.* at 598-99. The Court distinguished *Lynch* by observing that the *Lynch* crèche contained various "secular" Christmas symbols, such as Santa Claus and his reindeer.
33. *Id.* at 601.

The Court also spoke of "the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith."[34] The Court did not, however, articulate a standard to measure endorsement.[35] There was no majority opinion on the question of why the Christmas tree and Menorah were permissible.

B. Endorsement as a Clarification of *Lemon*

When O'Connor first proposed the endorsement test, she claimed to be merely suggesting a clarification of *Lemon*.[36] Yet, if it were a clarification, it would simply be a more detailed explanation of the *Lemon* test and not alter the basic direction of *Lemon*'s inquiry. Instead, the endorsement test replaces the foci of the *Lemon* test with foci of its own, thereby altering the test considerably; how state action affects religion is no longer important. Rather, the endorsement test focuses on how people perceive the relationship between the state and religion. The endorsement and *Lemon* tests are different approaches that often yield divergent results.[37]

If, for example, the state action benefits religion, the two tests ask different questions. The second prong of the *Lemon* test asks whether the "principal or primary effect [is] one that neither advances nor inhibits religion."[38] This prong commands an evaluation of the various effects relative to each other, asking whether the secular effect is "primary." If it is, then the benefit conferred upon religion, including any benefit to religion vis-a-vis other religions, is constitutionally permissible. In theory, any benefit to religion is legitimate so long as that benefit is not the primary one.[39] The endorsement test ignores the effect

34. *Id.* at 603.

35. Four other members of the Court joined the portions of Justice Blackmun's opinion quoted above. Writing only for himself, he suggested that endorsement is measured by the perceptions of adherents to the religion claimed to be endorsed, the perceptions of nonadherents, and the perceptions of a reasonable observer. *Id.* at 620.

36. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

37. *See* Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1595, 1659 (1992).

38. *Lemon*, 430 U.S. at 612-13.

39. There have been several approaches to the meaning of "primary." One is to refer to the most significant effect as "primary" and to other effects as "secondary." The Court took this approach in Mueller v. Allen, 463 U.S. 388, 396-98 (1983). In *Mueller*, the Court sustained a Minnesota tax deduction for certain educational expenses which principally benefitted parents with children at parochial schools. The Court found that although there was a benefit to religion, the benefit from the group of available tax deductions was far broader.

and asks only whether the act signifies a symbolic union of church and state.

Suppose that the President of the United States gave a speech which encouraged Americans to become more religious and that his motivation was to fulfill a promise to his brother. Further, suppose that social scientists subsequently demonstrated that no one followed the President's advice and that many people reacted by losing respect for the President. The *Lemon* test requires the presence of a secular purpose. Therefore, the first prong of *Lemon* would be satisfied because the president had a secular purpose. The effect on the public's opinion of the president would be the primary effect, the action would therefore pass the second prong of the *Lemon* test.[40] The third prong of the *Lemon* test—entanglement—would similarly pose no problem because there is no intertwining of administrative machinery.

It would, however, be an endorsement. Most likely, a court would find that the president intended to endorse religion. Therefore, the purpose prong of the endorsement test would not be satisfied. Similarly, the speech would constitute an endorsement, failing O'Connor's effects prong. The entanglement prong, however, would be satisfied because there would be no intertwining of administrative machinery. Thus, the action would fail two of O'Connor's prongs, but no prong of *Lemon.*

O'Connor attempts to harmonize the two tests: "Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."[41] This statement contradicts the plain meaning of the sec-

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Another interpretation of the effects prong is to use "primary" to refer to the effect most closely connected to the action and call "derivative" those effects dependent on the primary one. *See* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 277-83, 309 (1968).

Still another method that the Court has used in applying the second prong of the *Lemon* test is to consider the magnitude of the benefit to religion in an absolute sense. In *Lynch*, the crèche display passed the second prong because it was less beneficial to religion than other programs previously sanctioned. For example, the expenditure of taxpayer funds for textbooks for parochial schools was approved in Board of Education v. Allen, 392 U.S. 236 (1968). *See* Lynch v. Donnelly, 465 U.S. 668, 681-82 (1984).

40. While this illustration depends in part on one's definition of "advance," one test is relative and the other is absolute. Moreover, the secular purpose and effect is in no way "derivative." There is no need for the religious goal—greater spirituality on the part of Americans—to occur in order for the carrying out of the promise or the backlash to happen.

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

ond prong of the *Lemon* test, which mandates that "the principal or primary effect" of a law "must be one that neither advances or inhibits religion."[42]

C. The Coercion Test

The other test that may replace the *Lemon* test is the coercion test. Given that the value of any test is dependent in large part on what the alternatives are, it is important to consider coercion, a test that currently enjoys considerable support.[43]

Consideration of the coercion test is complicated as there is not one coercion test, but many, united under one banner. It is, however, possible to classify the varying coercion tests based on their treatment of two variables: (1) What behavior the government promotes, and (2) what tools the government uses to promote the behavior.

Proponents of the coercion test disagree about whether the activity the government promotes must be *active* in order for coercion to exist, or whether a *passive* activity can be coercive. *Passive* activities only require presence at a religious event. Additional activity beyond mere presence is *active*.[44] In other words, the question is whether coerced attendance at a religious function violates the Constitution, or whether only coercion of participation—defined as something more than physical presence—is unconstitutional.

The distinction between these two coercion tests is evident from the majority and dissenting opinions in *Lee v. Weisman*.[45] In *Lee*, the Court held a religious invocation at a middle school graduation unconstitutional. The *Lee* Court divided over whether the graduation invocation was coercive. The minority espoused the position that the action could not be coercive if the state action caused only passive participation.[46] Deborah Weisman was forced to stand silently during

42. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

43. *See* Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgement in part and dissenting in part). Justice Kennedy's approach may now command a majority of the Court. *See Constitutional Law Conference*, 61 U.S.L.W. 2237, 2240 (October 27, 1992) (Professor Choper arguing that the *Lee v. Weisman* opinions reveal that there are now five votes for a coercion test). For a specific discussion of the ambiguities in the Kennedy coercion test, see Holland, *supra* note 37, at 1672. Several academics also support the coercion test. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES, 34 n.135 (1995) (supporting a similar test); Holland, *supra* note 37; Michael W. McConnell, *Coercion: the Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986).

44. *E.g.* saying a prayer aloud or gesturing in a particular way, is *active*.

45. 112 S. Ct. 2649 (1992).

46. Even though both the majority and minority spent considerable effort arguing whether the ceremony was coercive, neither advocated making coercion the exclusive Es-

her graduation ceremony while a rabbi prayed out loud, and (presumably) other people prayed silently. According to the majority, this was forced participation in religion.[47] The exercise was not voluntary, because graduation is an important event in people's lives that few would ordinarily choose to miss.[48] The religious phase of the graduation ceremony was not voluntary, because children had to choose between silently standing and subjecting themselves to the attention and embarrassment that would have accompanied leaving, sitting or speaking at the ceremony.

Justice Scalia and three other dissenters took issue with the conclusion that this was "participation in religion." The dissent believed that standing silently at such a ceremony was not itself "religious," but a sign of respect for others.[49]

The other variable attending a coercion test is what tools the government is prohibited from employing, that is, what "coercion" means. No coercion-test advocate has taken the position that coercion is limited to express criminal prohibitions. Justice Kennedy has stated, for example, that erection of a large Roman Cross atop city hall would have a coercive effect, even though it would not rise to the level of official government sanction.[50]

III. Problems with O'Connor's Formulation of Endorsement

The Endorsement Test is the correct test to apply the Establishment Clause. The criteria for application of this test, however, are too vague.

A. Problems with Focusing on Real People

As noted earlier, O'Connor's initial formulation in *Lynch* of the endorsement test focused on "the 'objective' meaning of [purported

tablishment Clause test. *Lee*, 112 S. Ct. at 2655 (majority refused to reconsider *Lemon*, but noted that the Court had always held religiously coercive laws unconstitutional); *id.* at 2685 (Scalia, J., dissenting) (lamenting both the Court's particular application of coercion analysis and its use of a "psycho-coercion" approach, "which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself").

47. *Id.* at 2658 ("There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.").

48. *Id.* at 2659.

49. *Id.* at 2683 (Scalia, J., dissenting).

50. *Allegheny*, 492 U.S. at 661, (Kennedy, J., concurring in the judgement in part and dissenting in part).

religious activity] in the community."[51] She gave no clue about how one should cull one "objective" meaning from an act or message. Nor was she necessarily correct in assuming that there is one "objective" interpretation.

O'Connor's application of the endorsement test suggests the test is less empirical than one might think from the plain words of her description in *Lynch*. In *Lynch*, O'Connor made no reference to the testimony of community members. If the test should not be applied empirically, it is unclear how to determine the "objective" meaning.

If, however, the formulation is a suggestion that courts decide endorsement issues based on the testimony of members of the community,[52] the test is doomed.[53] Government would be paralyzed if the perception of any one person (i.e. the plaintiff in a particular case) were enough to block government action.[54] On the other hand, requiring a majority to perceive endorsement in a government action would fail to protect religious minorities.[55] Moreover, courts would encounter substantial difficulties in determining whether perceptions of endorsement were genuine.

Although this approach would have the virtue of at least some degree of attention to the reactions of real people, it is hardly unique. Regardless of the way a court measures endorsement, the bringing of an Establishment Clause case probably means that some real person thinks the state has endorsed religion.

Professor Feigenson has proposed a version of the "real person" test which borrows concepts from defamation and equal protection law.[56] The analogy to defamation law comes in the first step of the process of determining whether there has been a constitutional violation: a plaintiff's perception that the government has endorsed religion, along with a cogent supporting explanation, is enough to shift the burden to the government to prove the legitimacy of its act.[57] The government act will be subjected to "intermediate scrutiny."[58] The

51. *See supra* text accompanying note 15.

52. This is Smith's interpretation. *See* Smith, *supra* note 9, at 291-95.

53. Hirt, *supra* note 9, at 839 ("[A]n essential defect in evaluating symbolic union [is] determining the number of persons competent to evaluate its existence, and from what segments of society the 'observers' should be selected.").

54. Smith, *supra* note 9, at 291.

55. *See* Smith, *supra* note 9, at 291-92 (discussing the goal of preventing the creation of insiders and outsiders).

56. *See* Feigenson, *supra* note 8, at 94-101.

57. *Id.*

58. For a general explanation of "intermediate scrutiny," see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1601-18 (1988).

government must prove that its action is "strongly related to an important secular purpose, including other rights guaranteed by the Constitution."[59]

Despite the clarification Professor Feigenson's analogy provides, criticisms of using real people still apply because the test relies heavily on the reactions of individuals who may be hyper-sensitive and/or ingenuine. Instead of giving those who claim to perceive endorsement the power to thwart state action, the test gives them the power to subject state action to rigorous scrutiny.

Feigenson's approach is cogent and may ultimately be workable. Feigenson's approach, however, is simultaneously too strict and too lenient. A great deal of state action is useful, but does not rise to the level of an "important" governmental interest. Such actions may be halted under Feigenson's test, even where the actions are relatively innocuous. On the other hand, Feigensen's test permits any endorsement, no matter how damaging to First Amendment values, that is reasonably tailored to an important government interest. As will be discussed below, the First Amendment may require more protection.[60]

B. Problems with Using the Objective Observer Standard

The use of a fictitious character to determine the objective meaning of a government act avoids the problems associated with the "real people" standard. Nonetheless, use of a fictitious character generates problems. Justice O'Connor's discussion of the objective observer standard is short on defining characteristics. As Professor Marshall asked, "Is the objective observer . . . a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view?"[61] Whatever set of values is to be plugged into this "objective observer" black box, application of the standard faces practical difficulties. Any choice carries all of the problems discussed above, without the problems of determining whether the perceptions of endorsement are genuine, but with the problems that accompany any person's attempt to think like someone else.

59. Feigenson, *supra* note 8, at 101.

60. *See infra* Parts IV and V.

61. Marshall, *supra* note 5, at 537. *See also The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 234 (1989) ("The first problem with the endorsement test concerns the relevant perspective from which to judge the effect of governmental acts.").

Because the objective observer standard lacks an "empirical touchstone,"[62] there is a danger that the standard will enable Judges to ask whether they perceive endorsement. This risk does not assume that judges will act in bad faith. They may try to be fair and reasonable and follow precedent, but still be left without guidance because the standard lacks clear, concrete principles. Words do not have an "objective meaning" to all people. Therefore, a judge will have difficulty applying the standard. More importantly, the ultimate resolution of the case will be difficult, if not impossible, to evaluate.

A standardless test allows the user to guide the test to the desired result, rather than vice-versa.[63] The use of an objective observer thus far suggests that it is hardly a guarantee of consistent results.[64] Unless the endorsement test has a more clearly-defined procedure for separating endorsements from non-endorsements, it is doomed to be an amorphous "I know it when I see it"[65] standard, rather than a principled test worthy of the constitution it serves. Justice O'Connor has yet to offer a satisfying procedure.

The use of the objective observer standard is not necessary or helpful for the endorsement test. If the objective observer's outlook is undefined, it provides no guidance to the judge except as a reminder to be impartial and objective. If the observer's outlook is defined, the usefulness of working through a fictitious character, rather than simply announcing criteria for judges to apply, is unclear. Thus, the Court should abandon the objective observer standard, and adopt a test that does not require judges to think like nonexistent people.

C. Response to the Criticism

There are two potential responses to these legitimate criticisms of O'Connor's endorsement test. One is to abandon the test altogether. The other is to refine the test while minimizing its problems. This Article takes the latter approach because the test has substantial advantages over other tests. Before comparing the tests, however, it is

62. Smith, *supra* note 9, at 292-93; Feigenson, *supra* note 8, at 90 ("[T]he 'objective' or 'reasonable' observer is, in the final analysis, the judiciary."). *See The Supreme Court—Leading Cases*, *supra* note 61, at 235. This is a particular problem given that the question ought to be one of law, adjudicated based on consistent constitutional principles, rather than the values of an individual or a community.

63. *See The Supreme Court—Leading Cases*, *supra* note 61, at 235.

64. *See* Feigenson, *supra* note 8, at 91 (noting conflicting conclusions reached by justices purporting to apply the objective observer test).

65. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The quotation was first cited in this context by William P. Marshall. *See* Marshall, *supra* note 5.

first necessary to explore what endorsement means, and how the test ought to be applied. Thus, the following section proposes a definition of the endorsement test.

IV. Endorsement as "Adoptive Action"

The first step in justifying the endorsement test is to search for a more precise understanding of what endorsement means. To endorse is to express definite approval or acceptance.[66] Thus, any understanding of endorsement should isolate state actions that publicly approve or disapprove of religion.[67] The proposal of this Article, the "adoptive action" standard, grows out of this understanding:

The government unconstitutionally endorses religion when it takes adoptive religious action. An adoptive religious act is an action that expresses approval or disapproval of religion in general, a particular religion, or a "distinctively religious" element of a religion. If approval or disapproval is not explicit, it should nonetheless be inferred when a special benefit or burden has been assigned to religion in general, a particular religion, or a distinctively religious element of a religion, unless it seems likely that the benefit or burden was assigned pursuant to purely secular criteria that are not a "sham." Courts considering Establishment Clause challenges confront a wide variety of situations, and the test should be consistent when applied to all of them.

Evaluation of endorsement involves a determination of what a particular act communicates. All actions bear communicative potential. Sometimes an actor uses tools of communication, such as symbols and language, and acts primarily with the purpose of communicating a message to others. At other times, an actor may not use tools of communication or intend to communicate. Even then, any observer interprets the act.

It is not difficult to attach meaning to another's act. To make the endorsement test legitimate, the test must offer a principled method of interpretation that justifies choosing one meaning over another. This Article does not purport to present an infallible method of choosing the best interpretation in all situations. It simply offers interpretive tools in the hope that those tools will make the interpretive process reasonably consistent. No test, at least no constitutional test claiming to strike a reasonable balance between important conflicting values, can eliminate the ambiguity and judgment inherent in adjudi-

66. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 749 (1986).

67. Reference to religion throughout includes irreligion; the state may not direct its approbation or criticism at religion or irreligion.

cation.[68] At best, a test can strike a good balance between the conflicting values and be administrable.

Finding an unconstitutional endorsement requires consideration of three elements: (1) who the actor is, (2) what the subject matter of the action is, and (3) what the relationship between the actor and the subject matter is.

A. The Actor: Who Cannot Endorse?

The Establishment Clause restricts government actions. Consequently, agents of the state who are acting in their official capacity are the only actors within the ambit of the test. All state agents have independent potential for endorsing religion. Application of the test does not involve a determination of an overall state message. Any actor vested with at least some authority to act independently in the name of the state should not use that power to establish religion. Viewing every state actor as having independent potential for taking unconstitutional action is consistent with the longstanding approach of the courts. Courts do not require that legislative action be national or statewide for it to be unconstitutional.[69]

Thus, every act of each state agent is an independent unit for purposes of the endorsement test. Each person and institution, to the extent that he, she or it has been vested with sufficient state power, has the ability to use that power to violate the Constitution. Some state agents are extremely unlikely to take any religious action in their official capacities. A city dog-catcher, for example, is vested with state power, but any action she takes with regard to religion would likely be outside the scope of her granted authority.

B. The Subject-Matter of the Action: What Cannot Be Endorsed?

Since the proposed test prohibits the government from communicating a "religious" position, one must have some sense of what "religion" is. A comprehensive definition of religion is beyond the scope of this Article. Instead, the Article will use an operational definition of religion based on shared cultural meaning.[70] Given the endorse-

68. *Cf.* Emmet T. Flood, Note, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795 (1991) (arguing that the ability of legal rules to anticipate and handle particular sets of facts is overestimated, and that fact construction requires skills ignored by most jurisprudential theories).

69. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (New Jersey township); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (school district).

70. Such an approach is, on some level, intellectually unsatisfying. It is, nonetheless, followed for two reasons. First, providing a comprehensive definition of religion is a task

ment test's focus on communication, it is important to evaluate what has been communicated by an act. This depends on shared meaning because it relates to some form of public broadcast (either by word or deed).

Yet, "shared meaning" may seem a vague concept. One early commentary attempting to define religion for purposes of the First Amendment[71] provides an effective set of operational criteria upon which this Article will rely. A judge should determine whether something is a religion based on its organization (structural elements, defined roles, etc.), theology (complexity of belief system), and attitudinal conformity (ideological homogeneity).[72]

It might be objected that the definition is obviously geared towards groups and that unique individual belief systems should be included in the word "religion." Yet, for purposes of an endorsement test, non-inclusion of unique individual belief systems is acceptable. Organizations are visible social actors, and their visibility turns them into social icons that bear shared meaning. Almost everyone has heard of major religions and knows at least something about them. If a "religion" belongs to only one person, it will not have a shared religious meaning in society at large.[73] The judge may wish to ask whether a particular group "look[s] and sound[s] like groups that are unquestionably religious."[74]

The government may not endorse religion in general, a particular religion as a whole, or a distinctively religious element of a religion. Identifying the first two of these is relatively straightforward, because the actor refers to them explicitly. This is not implicated unless the state names the word "religion" or names a particular religion. Refer-

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that has stymied some of the most learned commentators in the field. Second, while the absence of such a definition is devastating in other contexts, such as free exercise cases, it is not fatal here. The Endorsement Test examines whether the symbolic meaning of acts are primarily communicative. The meaning that is relevant is the shared cultural meaning, not necessarily the meaning to any one person. To that extent, the stronger the religious or antireligious meaning of something, the greater the risk that the state's relationship to it may be an endorsement. If there is no shared meaning, there is no danger of endorsement.

71. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083-89 (1978).

72. *Id.* at 1087.

73. It is also worth noting that the risk that the Establishment Clause was meant to address, and the risk that remains a risk to Establishment Clause values, pertains to the relationship between government and large organized religions. Without the kind of prominence that creates shared meaning, a person or group is unlikely to have access to political power sufficient to channel toward religious ends.

74. Note, *supra* note 71, at 1087.

ence to Christianity, for example, is an undeniable reference to a religion.

The third item, a "distinctively religious" element of a religion, may sometimes be more difficult to identify. A "distinctively religious" element of a religion is one that has meaning primarily in a religious framework. Examples of distinctively religious aspects of religions include beliefs, rituals, and symbols. Not all beliefs, symbols, and rituals used by religions have distinctively religious meanings. The fact that the eagle has symbolic religious meaning to American Indians[75] does not bar its continued use by the government of the United States in official seals, because the religious meaning is not a shared one. Although many symbols have primary religious meanings independent of their contexts, some of the decisions will need to be based on the context of the symbol.

Most cases involve beliefs, symbols, and rituals that can be clearly identified with religion in general or a particular religion or group of religions (prayer, bible readings, the ten commandments, crèches, etc.). Thus, in most cases it will be easy to identify whether something is a distinctively religious element of a religion. Beliefs, symbols, and rituals with secular and religious aspects will, of course, be more difficult to classify. In such cases, the inquiry is different for beliefs than it is for symbols and rituals.

Beliefs are easier to classify than symbols or rituals because their meaning is more explicit. Whether the belief implicitly or explicitly relies on religion for its force is useful for determining the extent to which the belief is associated with religion. State action should not be invalidated simply because it is consistent with a particular religion; it must also involve something associated primarily with religion.

For example, the state may outlaw abortion despite the fact that the impermissibility of abortion is a tenet of some religions. Neither religion in general, nor any particular religious sect, can claim exclusive ownership of the prohibition against abortion in the same way that, for example, Christianity could claim ownership of the notion that Jesus was the Messiah. While certain religions take positions on abortion that rely on religious beliefs, lines drawn based on religious affiliation could not adequately separate, even roughly, those who believe that abortion should be legal and those who believe it should not be. Many people form opinions without relying on religious precepts,

75. Britt Banks, *Birds of a Feather: Cultural Conflict and the Eagle in American Society*, 59 U. COLO. L. REV. 639 (1988).

and pro-choice/pro-life lines can be drawn within religions rather than between them.

The important distinction is between support for a belief that can be religious (e.g., welfare programs are desirable because the bible says so vs. welfare programs are desirable because they decrease the crime rate) and support for a belief that must be religious (e.g., there is a supreme ruler of the universe). When motivations for a belief are diverse (e.g., some people support welfare programs because they believe they are carrying out divine will, and others because they believe it will lower the crime rate), the belief cannot have a shared religious meaning. When what is endorsed has no shared religious meaning, there is no endorsement of religion.

For a symbol and ritual used in religious and secular realms, the question is whether it is identified with a religion or a religious sect. This involves a two-step inquiry. First, the source of the symbols or ritual creates a strong presumption regarding its current identity. Something that grew out of religion will require a substantial metamorphosis and universalization to become so secular that it is no longer distinctively religious. The second step examines the extent to which the category defined by who has adopted the belief, symbol, or ritual is coterminous with categories defined by membership in religious groups. The categories need not match precisely, but if they are close, particularly if there is a correlation between crossover and assimilation, then it is distinctively religious.

This standard becomes clearer when applied to one of the more difficult rituals to classify, the display of Christmas trees. Some would argue that the display of Christmas trees, although it originates in the ritual of the Christian faith, has probably evolved to the point at which it is no longer distinctively religious.[76] In many contexts, Christmas trees enjoy a robust existence devoid of religious meaning. Families that ignore virtually every element of Christian ritual buy Christmas trees as a component of a celebration that revolves around family reunion and gift exchange, not the birth of a messianic figure.

While Christmas trees may seem innocuous to those who display them, they retain Christian symbolism. Christmas trees, as the name suggests, have long had a strong association with Christianity. The source, Christianity, creates a presumption that Christmas trees are distinctively religious. Even though they were not originally part of

76. *See* John Smith, *Is Christmas Dead?*, SAN FRANCISCO EXAMINER, December 20, 1992, at D1.

the celebration of Christmas,[77] but adapted from Pagan rituals,[78] today the trees are strongly identified with Christianity. Non-Christian Americans who display Christmas trees took the practice from American Christians.[79]

The second prong considers whether lines can be drawn defining who uses Christmas trees that correspond with religious groups. People who display Christmas trees are overwhelmingly Christian, even though the extent to which they practice other aspects of Christianity (e.g. going to church) varies considerably. It is true that some non-Christians display Christmas trees. Yet, for the most part, those people who do not identify themselves as Christians and have Christmas trees belong to no religion[80] or have rejected most of their own religious traditions. For example, an observant Christian is far more likely to celebrate Christmas than an observant Jew or Muslim.

Thanksgiving, though it has religious origins, is a holiday whose celebration is unrelated to religious affiliation. It is impossible to draw religious lines that separate those who celebrate Thanksgiving and those who do not. While certain religious groups may reject Thanksgiving, neither the class of people who celebrate nor those who do not is religiously homogenous.

Something may be classified as "distinctively religious" even though the thing is not unique to one religion (but rather is common to several or many religions), or because it is believed that the thing is part of some "civil religion" that is more "American" than "religious," despite using religious icons. Commentators have tried to distinguish "civil religion" from "sectarian religion." Civil religion, however, is

77. Susan Martin, *Why All These Traditions? Exploring the Origins of Some Holiday Customs*, BUFFALO NEWS, December 23, 1992, at 7 (Christmas tree began in Germany in first half of 8th Century).

78. Simon Schama, *Christmas Tree Tradition Is Rooted in Pagan Past*, ST. PETERSBURG TIMES, December 25, 1991, at 25A.

79. Pagan Christmas trees were oak trees. Mia Stainsby, *Christmas: the Real Thing: The Meaning of It All*, VANCOUVER SUN, December 19, 1992, at E11. Further, the pagan trees were not decorated. Martin, *supra* note 77, at 7.

80. It may be suggested that superficial compatibility between atheism and Christmas trees demonstrates that Christmas trees are secular symbols. Because secular American culture has been influenced by and has adopted many aspects of Christianity (and to that extent is already "Christian" in some measure), a fairer test is the compatibility between beliefs, symbols, and rituals and other religions.

Because some religions reject all contact with larger society, it would be unfair to focus only on one other religion. Yet given the diversity of religions, the fact something has been accepted by religions other than those that shun contact with society (in addition to those who have no religious identity at all) is a good indication that the thing is not distinctively religious.

necessarily sectarian because many people are excluded. Under the civil religion reasoning, the federal government could make Christianity the official religion of the United States, as long as it did not choose one particular sect. If expressing a belief in God is not "religious" for the purposes of the Establishment Clause, then the term is virtually meaningless.

This Article criticized Justice O'Connor for assuming that each action has only one "objective" meaning. The approach outlined here may seem vulnerable to the same criticism. There are three things, however, that should be noted. First, this Article does not assume the existence of one "correct" meaning; rather, guided by interpretive rules, it looks for the most common meaning, and accepts that there may be no common meaning. If looking to interpretive rules and social meanings does not yield one common meaning to be used, the state action is permissible.

Second, the use of interpretive rules (e.g., whether something is "distinctively religious") distinguishes this approach from O'Connor's, which gives no assistance to a judge striving to glean social meaning.

Third, Justice O'Connor's search for an "objective meaning" involves two questions: whether something is religious, and whether it is an endorsement. This Article relies on shared meaning only for the first question: its goal is to define what endorsement means, and to assume that we have a fairly good sense in all but the most difficult cases of what "religion" is.

C. Relationship Between Actor and Subject-Matter: What Is Endorsement?

Deciphering the relationship between actor and subject-matter should focus on whether action the actor takes is "adoptive." Adoptive action is action that conveys a message with one voice to a particular audience. "Adoptive" means that it is reasonable to infer that the state has not only allowed the message, but also adopted the message as its position on the question.

1. Explicit Endorsement: Primarily Communicative Acts

For actions that are primarily communicative, determining whether the state has endorsed religion requires examining the text of the message to see whether the state indicated a preference for religion or irreligion. A straightforward example would be a presidential declaration that a particular religion is the true religion: an agent of

the state would be putting the power of the state behind a theological position.

Usually, religion in public school classrooms is primarily communicative. Teachers are vested with state power to make authoritative statements to their audiences. Teachers in state schools should not preach religion to their students. Classroom activities such as prayer[81] and bible readings,[82] and teaching that the world was divinely created[83] would be adoptions of religion. Even the Pledge of Allegiance, because it takes a position on a religious question (most would say the central religious question), is adoptive.[84]

Communication is particularly problematic when the state displays religious symbols because symbols are purely communicative objects. When the face of the state and the face of religion begin to merge, the state begins to establish religion. Thus, the state cannot display a distinctly religious symbol, like a crèche or the Ten Commandments, in a place identified with state authority.[85] The less

81. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that vocal prayer in public schools is unconstitutional).

82. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 224 (1963) (declaring unconstitutional a statute requiring that public school classes begin each day with readings from the Bible).

83. *See* Edwards v. Aguillard, 482 U.S. 578, 604 (1987) (invalidating a Louisiana statute that required any teacher who taught the theory of Evolution to teach "Creation Science" as well).

84. The Supreme Court held that students may not be required to participate in the Pledge. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). At least one court has refused, however, to hold recital of the Pledge unconstitutional if students may be silent while teachers and other students are reciting it. Sherman v. Community Consolidated Sch. Dist., 980 F.2d 437, 442 (7th Cir. 1992). Though the position that voluntary recital of the Pledge is unconstitutional is not a popular one, the Pledge has effectively become a prayer, and voluntary prayer has been held unconstitutional, even when those praying are silent. *See* Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985). It should also be remembered that the religious reference in the Pledge is not coincidental. After the Supreme Court invalidated school prayer in *Engel*, there were substantial "efforts to return God to the public schools." Leo Pfeffer, *The Deity in American Constitutional History*, *in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 119, 139 (James E. Wood, Jr., ed. 1985). President Eisenhower attended a sermon in New York at which the Reverend lamented the secularness of public education, and of the Pledge in particular, urging that the words "under God" be added. *Id.* at 140. President Eisenhower subsequently convinced the Congress to amend the Pledge. *Id.*

85. *See* Stone v. Graham, 449 U.S. 39, 40 (1980) (finding unconstitutional the posting of the Ten Commandments in public school classrooms); Allegheny v. ACLU, 492 U.S. 573, 624 (1989) (prohibiting the display of a crèche in a state courthouse); Americans United for Separation of Church and State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1992). *But cf.* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (finding constitutionally permissible a crèche erected by a city in a park owned by a private organization); Allegheny v. ACLU, *supra* (allowing Chanukah menorah); Chabad-Lubavitch of Georgia v. Miller, 976 F.2d 1386 (11th Cir. 1992) (allowing menorah display in rotunda of state capitol because state

closely a forum is linked with state authority, and the less preferential access is given to religion, the less likely it is that the arrangement poses an establishment problem.

An essential component of communication is the context in which it takes place. Just as the words "this is a holy image" can affect the way an image is communicated, so can the setting of the image. For example, a religious painting in the National Gallery would not be an endorsement of religion even though the same painting could easily be presented in a classroom in a way that does endorse religion. There should be a presumption that context does not nullify words or images presented. This presumption is overcome, however, in situations where the context does not represent a government position on a religious question.

Endorsement of religion should be prohibited regardless of how long the particular endorsement has been tolerated. Courts have generally upheld long-standing religious state practices, even when they represent an obvious confluence of religion and the state. William Marshall calls such practices "cultural heritage."[86] For example, the Court declared constitutional the national motto, "In God We Trust,"[87] religious legislative invocations,[88] presidential proclamations of holidays that include religious overtones, religious references in the Pledge of Allegiance, and a federal statute directing the President to proclaim a National Day of Prayer.[89]

The fact that our society has long engaged in a particular practice, however, does not prove that the practice does not endorse religion.[90] Justice Holmes argued that practices dating back two hundred years by common consent should enjoy a strong presumption of constitutional legitimacy. O'Connor relied on this argument in her *Wallace* concurrence.[91] Professor Loewy disagrees with this notion of ongoing common consent: "Nobody asked blacks about segregated schools,

"intentionally opened the Rotunda to numerous varieties of speech and symbolic expression").

86. Marshall, *supra* note 5, at 507.

87. *Lynch*, 465 U.S. at 676.

88. Marsh v. Chambers, 463 U.S. 783, 790-91 (1983).

89. *See Lynch*, 465 U.S. at 676-77 (reciting a litany of government practices).

90. Nor does it imply that criticism of the practice is new. For example, James Madison, who as a legislator voted in favor of legislative prayer, later said that he thought the practice was probably unconstitutional. Marsh v. Chambers, 463 U.S. 783, 791 n.12 (1983). President Jefferson refused to make a religious Thanksgiving proclamation on the grounds that it was unconstitutional. Lee v. Weisman, 112 S. Ct. 2649, 2674 (1992) (Souter, J., concurring).

91. 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

and nobody asked nontheists about the invocation."[92] Democratic government tends to produce laws and state practices that reflect the values of the majority; the Bill of Rights exists to protect certain interests from majority encroachment.

When state action ventures into the realm of the religious, there is a danger of establishment, even if the state action seems innocuous to those who hold the values of the majority. Professor Lawrence makes a similar argument with regard to racial discrimination:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and introduce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[93]

Longstanding endorsements may seem harmless to those used to them, but they *are* endorsements, and violate the constitution just as other endorsements do.

2. *Acts That Are Not Primarily Communicative*

Much that the government does, of course, is not primarily communicative. Again, while we cannot discern what an act *will* communicate, we can decide what the act is *likely* to communicate, and to some extent, what the act *reasonably* communicates. These determinations are based on the explicit content of the action and common cultural interpretive norms. By identifying classes of state action that communicate a position on religious questions, we will be able to identify those actions with the greatest risk of influence.

When we examine a government policy, there is a clear government position on one question: the desirability of the policy itself. When the government acts, it is reasonable to infer that the government policy is worthwhile. For example, if the government adopts a

92. Arnold H. 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, 1057 (1986).

93. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

recycling program or prays, a position on recycling or praying can be inferred.

It is possible, however, to go beyond the specific policy in the search for government positions. Policies are adopted pursuant to criteria. Some policies can be explained only by resorting to criteria that proclaim religious positions. Those policies have a relatively high potential for influence, because people observing the policy can impute the religious criteria to the government.

In other words, is there a persuasive explanation for the state action that does not posit an impermissible religious preference? Would the state, for example, have allocated funds differently if it were neutral as to religion? Thus, the way to glean a message from an action that is not primarily communicative is to ask whether the state is acting in accordance with publicly announced secular criteria that are not a sham. Only when the criteria are religious is the government's symbolic theological neutrality is in danger.

a. Purpose Defined

This is what is sometimes meant by the word "purpose." Unfortunately, "purpose" is vague, and often more confusing than helpful. Statutory purpose is sometimes confused with legislative motivation. For example, a legislator's vote against military spending, based on her religious beliefs, conveys no state religious position because there is no religious communication. Actual legislative motivation is irrelevant for two reasons. What is important is the state's *apparent* criteria, not what is in the minds of state actors. Second, the criteria are important only insofar as they help us determine what the action reasonably communicates. In many cases (e.g. "A primarily communicative" acts[94]), the criteria are wholly irrelevant.

b. Problems with the Purpose Prong

The problems with the *Lemon* test's purpose prong have been discussed extensively elsewhere.[95] Justice O'Connor's treatment of purpose is even more problematic. Justice O'Connor's justifications for the purpose prong fail to stand up against scrutiny, and the very difficulty of identifying the purpose behind a communication militates against use of the purpose prong.[96]

94. *See supra* Part IV.C.1.

95. *See supra* note 5 and accompanying text.

96. As this Article explains later, there is one circumstance in which purpose is both relevant and ascertainable. When a religious purpose is unavoidable, because all secular

The explanation Justice O'Connor offered in *Wallace* for her inclusion of purpose in the endorsement test is insufficient. She asserted that the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[97] Yet her justification went only to conveyance, not to attempted conveyance: "When 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."[98] If, on the other hand, the government attempts unsuccessfully to throw its weight behind a particular religious belief, (i.e., it fails to communicate its support for the belief), then the coercive pressure on religious minorities is harder to see.

Justice O'Connor's other justification for the prong was that the secular purpose requirement "reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share."[99] Positive incidental benefits flow from the invalidation of state action on constitutional grounds because the decision reminds the state not to act that way in the future. Yet the need to remind legislatures to act constitutionally does not itself make laws unconstitutional; there must be something about a law that offends constitutional principles. A court would not, for example, invalidate laws that do not impede free speech simply because a judge has found evidence that key legislators *intended* to impede free speech.

O'Connor, however, failed to identify the harm done when the government communicates a religious position. The problem is not simply that the use of purpose as an automatic element of the endorsement test lacks justification, but that it undermines the test by making its application more difficult and subjective in contexts where purpose is unclear. The difficulty of discerning what someone or something intended to do,[100] as *Lemon* requires, is nothing as compared to the difficulty of determining the communication intended. The former speculates about subjective factors—intentions—in light of results and potential results that can be described objectively. For example, when a woman paints a picket fence white, it is unreasonable

explanations are implausible, then that is relevant to the Establishment Clause inquiry. Yet because divining a purpose is usually a fruitless task, it should not be an inherent part of every Establishment Clause analysis.

97. *Wallace*, 472 U.S. at 70.

98. *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

99. *Wallace*, 472 U.S. at 75-76.

100. *See supra* text accompanying note 91.

to infer that she is doing so in the hope that it will make her pencil sharp: there is an immense array of irrational purposes that can be ruled out immediately.

Such is not the case with intent to communicate because what one intends to communicate may bear a rational relationship to the message any given observer perceives. Misunderstandings occur often, and interpretation frequently neglects intended messages and finds unintended ones. Here, it is important to distinguish the reliability of observed phenomena and the meaning attached to the phenomena. We cannot, as we did above, begin our query with the phrase "given what we know occurred," but rather must begin "given the meaning we have tentatively attached to what we know occurred."

An act will have an outcome most can agree occurred. Once that outcome is established, possible purposes can be accepted or rejected based on whether the means chosen are rationally related to them. That is, the analysis can utilize known causal relationships. A judge questioning what someone intended to *communicate* has no such relationships upon which to rely. The effects of an act are almost always related in some way to the purpose because people do not act randomly.

Human communication is not subject to any law of nature and is far more difficult to wield with precision. It is common for someone to mean one thing by a statement, but for the listener to receive a different message, or for several listeners to take away several different messages. Not only are the listeners' interpretations likely to be different, they may also remember the original spoken words differently. Acts have measurable effects independent of interpretation and words have no precise meaning independent of context and interpretation.[101]

Finally, this analysis assumes that an act carries with it some intention to communicate. The government, however, may act without intending to communicate anything at all.[102] For example, a decision to repair a pothole in a street is probably more a function of a desire to promote safety than of a desire to "send a message" to anyone. Searching for an intended message, like searching for an intended result, assumes that the government is a unitary rational actor. Even under the most simple model of legislative behavior, however, many

101. *See* Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRIT. INQUIRY 625 (Summer 1978).

102. *See* Smith, *supra* note 9, at 286.

people make independent judgements about what best serves the interests of the sovereign.

A number of political scientists have vociferously disputed the idea that government makes decisions based on rational examination of goals, options, costs and benefits. They have noted that governmental decisions are often the product of organizational processes and bureaucratic politics.[103] When one thinks of government as a huge network of bureaucrats following standard operating procedures—as it increasingly is in the modern administrative state—it becomes far more difficult to argue that a government action is the result of a desire on the part of "the government" to communicate something.

c. The Relevance of the Purpose Prong

Purpose, however, is not completely irrelevant. There is a difference between explaining how evidence of purpose, if available, fits into a test, and requiring that a court find "the purpose" of state action in every case, no matter how difficult it might be. Furthermore, there is a difference between asking "whether the purpose of an act is to endorse religion," asking whether the purpose of a state action is apparent, and whether the apparentness and religiousness of that purpose communicates a religious position. Most purposes have nothing to do with communication, but the fact that a law was obviously designed with religious goals in mind may send a religious message. If, for example, the state gives one million dollars to a religious group to buy prayer books, the test should not be whether the line in the budget "intended to endorse religion." It may be, for example, that the sponsor intended to aid a bible-manufacturer in her district, and that most other legislators who endorsed the measure had no relevant intent. It should be enough that the state cannot point to secular criteria that rationally led to this policy.

For both primarily communicative and not primarily communicative action, the line between what reasonably communicates state positions on religious questions and what does not is an important one. Actions that "reasonably communicate" bear the greatest risk of influence. For other actions, this should be obvious: explicitly religious messages that are more likely to religiously influence than other messages. For primarily uncommunicative actions, if we can reasonably infer a religious position, so will many other people.

103. Both of these theories are discussed and contrasted with the "rational actor" model in GRAHAM T. ALLISON, THE ESSENCE OF DECISION (1971).

d. Determining Whether Primarily Uncommunicative Action is Adoptive

As noted earlier, the key to determining whether an act that is not primarily communicative is adoptive is whether it is taken pursuant to secular criteria. This section will discuss how that test should be applied.

Given that the primary burden on the state is to use secular criteria when making decisions, religion may at times receive benefits not available to all. Under some definitions of "endorsement," placing religious activities within a limited group of permitted activities constitutes "endorsing" the religious activities as worthwhile. Such an understanding, however, is unworkable. In the United States, most religious activities fall in the preferred classification "legal activities." For example, while the government may "prefer" prayer to criminal activity, any endorsement test that invalidated a zoning ordinance because it allowed houses of worship but not brothels would do unacceptable damage to the Free Exercise Clause, because no religion would be permitted,[104] effectively establishing irreligion.[105]

Moreover, just as government cannot assign a benefit to religion simply for being religion, neither can it single out religion for punishment *because* it is religion. This is not to say that there is never a risk of endorsement in this category of cases; it is merely to say that such actions are not *per se* unconstitutional. Only if the state confers an advantage on religion for being religious does the state wander into the realm of adoptive action.

Of course, a religious preference is impermissible when treated as either an intrinsic or instrumental good. Thus, a statute should not stand if it allocates money to a religious group on the basis that spreading the gospel improves the well-being of the community, even though community well-being is a secular criterion.[106] Religion can-

104. Or, the state would be forced to allow brothels and even more undesirable institutions.

105. *See* McDaniel v. Paty, 435 U.S. 618, 641 (1978) ("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."). For an argument that this has already happened, see N.J. DEMERAH III & PHILIP E. HAMMOND, RELIGION IN SOCIAL CONTEXT: TRADITION AND TRANSITION 168-73 (1969). *But see* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

106. Professor Choper reaches similar results by arguing "if the primary effect is to serve a religious end, the action's purpose should not be characterized as secular even though an *ultimate* or *derivative* public benefit may be produced." Choper, *supra* note 39 at 278. *See also* Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitu-*

not be an "engine of civil policy"[107] because it cannot become one without the state passing judgment not only on the religion's ability to compete in purely secular realms (e.g., deciding that Christian Brothers can produce a better wine value than their competition, or that a Jewish group has made the highest bid to purchase government land[108]), but also on the religious aspects of the religion (e.g., Catholic beliefs improve people).

The state can convey its resources to religion so long as religion is not given preferential access. Although the state actively supports religion in this way, such actions are not adoptive because the state simply allows religion to compete for state resources as anyone else would, without penalty or advantage.[109] The state can allocate resources without passing judgment on the value of a group's activities, beyond a level necessary to ensure that the activities are legal, if the resources are allocated consistent with the assumptions discussed in this article. The easiest cases involve resources available to all, including religious groups. The state may, for example, provide fire and police services to religion.[110]

The state may also distribute scarce resources to religious groups when the above criteria are met. A common example is allocating the use of a state-owned space as a forum for religious activities. The state may provide a forum for a religious activity, so long as it is clear from the context that the religious character of the activity did not win it preferential access. For example, a school may permit religious

tional Standard, 47 MINN. L. REV. 329, 335 (1962-63). Yet since he rejects second-guessing legislative motives, and does not require that the state utilize the most effective (or the most secular) method of achieving its secular goals, he leaves the state too much freedom to characterize the religious and secular benefits in ways that do not make the secular purpose derivative. For example, if one characterizes the secular purpose of classroom prayer as "to prepare children for their work, to quiet them from the outside," *id.* at 369, the secular benefits are derivative. On the other hand, if the secular benefit is "keeping children off of the streets," then the secular benefit is realized regardless of whether the religious one is achieved. Further, if the secular benefit of an activity is not derivative, religion may then be "mixed in" without risk of unconstitutionality. If the Pledge of Allegiance does not rely on its religious reference to promote patriotism, *see id.* at 348-49, then any religion the Pledge contains must be unobjectionable.

107. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, para. 5, *quoted in* Everson v. Board of Educ., 330 U.S. 1, 67 (1947).

108. *See* Southside Fair Hous. Comm. v. New York, 928 F.2d 1336, 1348 (2nd Cir. 1991).

109. *Cf.* Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1 (1992) (arguing that equality increasingly drives Establishment Clause jurisprudence, and searching for the appropriate conception of equality for the jurisprudence to use).

110. *See* Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

groups to meet if they allow other groups to meet as well, and the school sends no message that any particular activity is preferred.[111]

In most cases, if a forum is widely available, the fact that religion is using it at a given time does not mean the state has taken a position on the message of the group. Even if a forum is not as widely available, the allocation is legitimate so long as the criteria for selection are apparent and purely secular (e.g., religious paintings are displayed in the National Gallery because their artistic value is on a par with other paintings there). For example, if the state wishes to restore buildings based solely on historical and aesthetic considerations, it may consider religious buildings in the program.[112]

The reason it matters whether secular criteria are "apparent" is that although imputing meaning is in some ways subjective, to the extent that we can identify common interpretive patterns, we can more precisely define what the action reasonably communicates. When government action carries an obvious, persuasive secular explanation, we can define as objectively unreasonable any claim that the action communicates a state religious position. There are other relevant factors as well. Because one makes a conscious choice to support a particular position, the degree of government control is an essential factor in determining whether the state endorses a message by providing the forum. Another factor is the degree to which those who are not part of the religion receiving the benefit can avoid the state action.

The forcefulness of any communication is largely a function of coercion[113] that attends the communication. Effective communication

111. *See* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990). One troubling aspect of Mergens is that School Board Policy 5610 recognized student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Id.* at 231. There are two ways to understand this. One is that the policy set forth criteria for selecting organizations that could meet at school. This would raise concerns about school endorsement of religion. The other is that the policy endorsed the idea of students meeting in groups as compared to totally unstructured time.

In light of the Equal Access Act's command of content-neutrality, the second reading is preferable. *But cf.* Michael L. Commons & Joseph A. Rodriguez, *"Equal Access" without "Establishing" Religion: The Necessity for Assessing Social Perspective-Taking Skills and Institutional Atmosphere*, 10 DEVELOPMENTAL REV. 323, 334 (1990) (presenting empirical data that casts doubt on the ability of secondary school administrators to treat all student groups equally).

Although it is probably true that the school was not indifferent to the subject matter of the groups, e.g., it would not allow a group whose purpose was to take drugs, limiting clubs to lawful activities does not mean endorsing the ideology of any particular club.

112. *See* Frohliger v. Richardson, 218 P. 497 (Cal. 1923).

113. Coercion and other similar factors are not wholly irrelevant to the Establishment Clause but should not constitute the content of the test alone.

requires not only a speaker but also an audience. A state action that people cannot avoid observing or being a part of carries the strongest presumption of religious communication. Classroom lessons fall into this category. Not far behind are those state actions that can be avoided, but whose avoidance requires special effort and carries a significant cost (e.g., asking to be excused in front of one's peers). Activities that require special effort for participation should be presumptively valid. Thus, a graduation speaker who invokes divine blessing[114] is a far greater constitutional problem than a pre-graduation prayer session held in another part of the school.

Lack of state control over the ultimate allocation of benefits can help a program survive constitutional challenge. For example, if the state gives students vouchers to use at the school of their choice,[115] the state would not take a position as to which kinds of education are desirable and which are undesirable, beyond requiring accreditation (i.e., secular criteria applied equally). A similar result is obtained if state-paid sign language interpreters accompany deaf students to parochial schools.[116]

And even though a limited number of people are on a government payroll, the fact that some employees give a portion of their salaries to religion is irrelevant. First, all people, religious and nonreligious, are eligible for government jobs. Second, religious donations are beyond the control of the government.[117] An endorsement must appear to be a conscious choice. It is not an endorsement if individuals, not the government, make the ultimate decisions that benefit religion.

For similar reasons, there is an important difference between the state doing something on its own initiative, and as a concession to demands of a bargaining adversary. This is consistent with the Supreme Court's view of state action.

Although it is impossible to articulate a precise rule for finding shams (a sham is, after all, a concerted effort to bypass the goals of a

114. *See* Lee v. Weisman, 112 S. Ct. 2649 (1992) (invalidating the practice of inviting clergy to deliver middle school graduation invocations).

115. *See* Witters v. Washington Dep't of Services, 474 U.S. 481 (1986) (allowing a blind person to use a state vocational grant for training to become a religious professional).

116. *See* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2642 (1993).

117. True, the government could require employees to pledge not to donate money to religion. This, however, would be an unconstitutional infringement on free exercise. Nor does the knowledge that employees will donate money to religion constitute sufficient governmental affirmative action to aid religion for it to be an endorsement.

rule while conforming to the letter of the rule), certain factors provide guidance.

The size of the limited class is the most important consideration. If the class is limited, and religious groups are the only ones *with certain characteristics that are omitted* from the class, then their exclusion discriminates against religion and endorses irreligion. Just as a large class containing only a few religious groups is likely to be permissible, a very small class that consists exclusively or almost exclusively of religious groups,[118] or a class not dominated by religious groups in which religious groups receive the lion's share of benefits,[119] is highly suspicious. The state would need to make a stronger demonstration that its actions were based on secular criteria, relevant to a significant state interest. The need for legislative freedom requires substantial deference, allowing some "shams" to slip through the cracks. The state, however, must make at least a plausible case that there is a state interest that it is seeking to further.

Thus, the state can create a tax exemption for all "charitable," "nonprofit," or a similar class of institutions, so long as the criteria are facially secular and have a rational basis, the class is not religiously dominated, and the benefit is distributed fairly to everyone who qualifies under the criteria.

The state has an even stronger case for eligibility of religious entities if it receives a material benefit in return. For example, if the government "purchases" something tangible, and the seller offered the "best deal," it is unreasonable to infer that the government agreed with the seller on a theological level. This analysis, however, applies only to acts that are not primarily communicative. When acts are primarily communicative, the separate analysis described above[120] should be followed.

One particularly thorny category of selectively conferred benefits is "non-interference." Non-interference consists of religious exemptions from laws and regulations of general applicability. Given what has been said so far, non-interference would seem to be adoptive. It is certainly conceivable that a theory of the Free Exercise Clause could demonstrate that the clause requires an exception to an Establishment Clause theory that in principle does not allow for some religious ac-

118. *See* Comm. Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (state income tax benefits to parents of children in private schools, virtually all of which were secular).

119. *See* Mueller v. Allen, 463 U.S. 388 (1983) (tax credit for all parents, but parents paying tuition were primary beneficiaries).

120. *See supra* Part IV.C.1.

commodation. Furnishing such a theory, however, is beyond the scope of this Article. It should be remembered, however, that the state can grant exceptions to classes whose boundaries are not drawn along religious lines; for example, exempting all those with good faith conscientious objection to a particular law.

V. The Individual, Religion, and the State

Before considering what test best serves the Establishment Clause, it is useful to examine religion as an individual phenomenon, and the effect of government participation in that phenomenon. This groundwork should provide standards for comparing the possible tests.

A. Religion and Individual Choice

Religion is an intensely personal phenomenon. Certainly, there are group religious activities; nonetheless, every human is ultimately alone when it comes to religious decisions. Many children have religion (or atheism, for that matter) thrust upon them by parents. Yet once they reach adulthood, and to some extent earlier, individuals determine for themselves what organized religions (if any) they will participate in, what doctrinal precepts and rituals they will accept, and what original religious beliefs or behavior they will adopt. Their choices may be similar to those of other people, but no one, government or other individuals, can make their choices for them.

This is inevitable. No matter how extensive our regulatory state becomes, all the government can do is create incentives for acting one way or another, or influence beliefs through its communication. Even if the government criminalized belonging to a particular religion, this would deter many people but would not take away their free choice. Government can influence choices at the level of belief and behavior, but it cannot take the choices away from the individual.

B. Government Influence on Individual Religious Decisions

Government actions influence individual behavior, sometimes in ways that are intended and sometimes in ways that are unanticipated. Government religious policy is no exception to this rule. One of the primary goals of this Article is to articulate a framework for evaluating which religious influences should be permitted and which should not be. Such an evaluation should look to two subordinate questions. First, how desirable or undesirable is the particular influence? Sec-

ond, what are the other characteristics of the government action that causes influence?

It is a truism that our government is not one of unlimited powers, that there are certain areas assigned to its judgment, and certain areas that are not. Government religious influence on individual religious decisions is *per se* undesirable. Given that religious influence (or the risk of it) often attends important government functions, however, the undesirability of influence may not be enough for courts to invalidate government action.

Government religious influence is wrong because religion is not an area that the Constitution assigns to the government's discretion. The Establishment Clause, which prohibits any action "respecting an establishment of religion,"[121] is an emphatic rejection of the notion that the government may select an official religion under *any* conceivable set of criteria. The ban on laws "prohibiting the free exercise [of religion]"[122] is a warning to the government not to pass judgment on individual religious practices.

While the courts have allowed government to interfere with religious behavior that impedes the pursuit of important secular state goals,[123] government may not single out religious practices for persecution because it disagrees with their theological legitimacy. This conception of the religion clauses, as mandating that government should not pick a religion for its citizens, squares with the other provisions of the First Amendment. As Justice Jackson stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[124]

This conception of the First Amendment is also supported by broader theories that explain the structure the Constitution erects, the functions it permits and denies government. When the majority, through the apparatus of democratic government, is given the authority to make policies applicable to all, it is almost invariably because government has advantages over individual action that are needed or useful.

First, government overcomes collective action problems that prevent individuals acting independently from accomplishing what is in

121. U.S. CONST., amend. I.

122. *Id.*

123. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (Free Exercise Clause does not provide religious exemption to anti-peyote laws).

124. West Virginia v. Barnette, 319 U.S. 624, 642 (1943).

the collective interest. A classic example is public works construction, such as a bridge. Although everyone in an area may agree a bridge is needed, without government there would be "free rider" problems: individuals would value the bridge but not contribute, assuming that it would be built anyway because other people want it. If government levies taxes and constructs the bridge, it can ensure that all contribute.

Second, government has superior and relatively impartial information-gathering capabilities. It has the resources to analyze the costs and benefits of various plans comprehensively. Therefore, if no private company is big enough to oversee construction of all aspects of the bridge, the government can do it.

Third, the government can implement community values on questions for which there are no objectively "right" and "wrong" answers, but are appropriate for community disposition. If the bridge can terminate either at a hospital or at an airport, the community should be able to weigh the tradeoffs and decide what it values most on this question affecting the entire community.

The Constitution assigns religious decisions to the individual because none of these advantages of government is particularly important in the religious sphere. Collective action problems are not a concern: to the extent that individuals wish to act in groups, they can. But no one should be forced to participate in religious activities. Voluntarism is the essence of collective religious action. Religion does not revolve around projects that people would contribute to only if others did because religion is primarily an individual process. It does not leave most people longing for a draconian coercive apparatus to compel others to act in a particular way; to the extent that people do wish that, their wish is constitutionally impermissible.

Nor are government's information-gathering capabilities particularly useful on religious questions. Religion often claims to offer truth. Yet there is no way to determine whether government religious influence represents truth, because there are no objective standards for evaluating the value of particular religions or religion in general, as there are for methods of building bridges. As individuals, we can believe that one religion is better than another, or that there is no supreme being, or that there is life after death. But we cannot prove any of these notions to someone who does not accept certain starting assumptions on faith. Only the individual can decide, after considering his own most fundamental values and beliefs, what his religious views are.

It is for similar reasons that the government's third advantage is also irrelevant, and is in fact inimical to the nature of religion: the Constitution does not throw religious questions to majority decision-making because the individual nature of religion makes community values less important than individual values. In fact, while the give-and-take that is characteristic of political negotiation may be acceptable in the case of a bridge, it tends to debase religion.[125]

C. Consequences of Government Influence

There are at least three potential consequences of government religious influence. First, it can affect individual religious choices. Second, it can cause psychological damage to non-adherents. Third, it can deter individuals from participating in the social and political spheres and encourage religious discrimination and persecution in those spheres.

1. Altering Religious Choices

The most important consequence of government influence is that it may alter "pure" religious choices. That is, individuals' religious

125. Some commentators have argued that state religious intervention is desirable. Michael Maddigan, for example, has suggested that use of "civil religion" by government is beneficial to society. *See* Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 S. CAL. L. REV. 293 (1993). Maddigan would allow civil religion on the basis that the state and the market are crowding out voluntary associations (some of which are religious), and the voluntary associations perform useful roles in society. There are four problems with his analysis. First, it is not clear that government and the market pose meaningful dangers to voluntary associations. Second, even if they do, public acknowledgment of religion probably will not save them.

In fact, government involvement may even harm religion. Many people concluded that this actually happened during the 1992 presidential campaign, when some politicians frequently invoked God while campaigning. *See Using God as a Cudgel*, N.Y. TIMES, Sept. 1, 1992, at A16 (National Council of Churches decried practice as "blasphemous"); William Safire, *God Bless Us*, N.Y. TIMES, Aug. 27, 1992 at A23 ("[T]he name of the Lord is being used as a symbol for the other side's immorality, much as the American flag was used in previous campaigns as a symbol for the other side's lack of patriotism.").

Second, though he points to benefits of religion, Maddigan does not show that religious voluntary associations are better than secular ones at inculcating important values. Why, for example, does going to church more effectively promote community values than attending a neighborhood group that meets weekly to discuss issues of community importance?

Third, pinning our hopes on religion to remedy the shortcomings of state and market is arguably unwise, especially given that many people feel alienated by traditional religion. Secular voluntary associations, in contrast, are accessible to everyone.

Fourth, given the values at stake in the Establishment Clause, it is probably not safe to allow the community to homogenize individual values in order for the community to function more effectively.

choices may be different from what they would have been without any government influence.[126] This is particularly true of children in pre-college educational settings.[127] Even adults are sensitive to influence, especially given the authority of the government, and the inability of individuals to empirically verify that they themselves, and not the government, are right. When people believe that government is lending its authority to a religious position, the religious position may become more appealing than it would otherwise have been.

It would be a gross exaggeration to claim that all people instantly emulate whatever the government does. Nevertheless, many people look to leaders not only to address specific national problems but also to provide moral, ethical, religious, and other kinds of personal leadership.

The challenge is even greater for members of minority religions, for whom communication of a government position only compounds the knowledge that their position is one rejected by the majority. Once again, if we could be sure that the majority is more likely to be "right" about religion than the minority, this would be less of a problem, but we cannot.

Because we value religious autonomy, we make no effort to stop majority religions from broadcasting their existence or beliefs to others, no matter the discomfort or influence this may cause members of minority religions. The government, however, has no First Amendment right to practice religion.

It is individuals who are the best judges of their own religious needs. Religion is a process so fundamental to self-definition that choices about religion are essentially choices about identity. Therefore, because government is less qualified than the individual is this area, to the extent that it influences individual choices, it is influencing them in the "wrong" direction.

126. Admittedly, the notion of "pure" choices is somewhat artificial, given that in many ways we are the products of all influences upon us, and have no distinct identities separate from our experiences. The construct of pure choice, is useful, nonetheless, to the extent that it compares how we would be with and without government influence.

127. *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("[S]tudents [in elementary and secondary schools] are impressionable . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."); Elizabeth W. Ozorak, *Sociological & Cognitive Influences on the Development of Religious Behaviors & Commitment in Adolescence*, 28 J. FOR THE SCI. STUDY OF RELIGION 448 (1990) (providing data on the impressionability of teenagers).

Government's religious influence can have real consequences.[128] It might, for example, accelerate the assimilation of members of minority religions,[129] or encourage insincere religiosity.[130] Many people respond on some level to signals they receive from their political or social culture. When these cultures encourage some religious behavior and discourage others, many people can ignore the encouragement effectively, but others will adapt to their environment.

2. *Psychological Harm*

In addition to the risk of altering "pure" individual decisions, this kind of communication also risks imposing psychological costs on nonadherents. Religious beliefs go to the core of a person's identity, and the state should not launch a psychological assault on those whose beliefs or self-identification differ from those of the majority.[131] This assault can be particularly potent when individual government actions combine to erect a "unified national identity" with regard to religion that intrudes upon distinct individual religious identity.[132]

Further, one's religion is not a discrete, severable component of one's self. For many people, religious beliefs form the underpinnings of legitimacy: I believe that I am a good person because I am doing what my religious beliefs tell me to do. As a result, when those beliefs are thrown into question, identity, relationships, and past actions all become suspect. Identities validated by government action ("the in-group") may perceive no significant phenomenon, but others ("the out-group") may feel personally attacked, and lose self-esteem. If this causes no change in behavior, just a decrease in self-esteem, this is

128. *Cf.* Feigenson, *supra* note 8, at 63 ("By making religion relevant to a person's standing in the political community, government threatens to coerce or compromise that person's religious beliefs.").

129. *Cf.* Timothy Bakken, *Religious Conversion and Social Evolution Clarified: Similarities Between Traditional and Alternative Groups*, 17 SMALL GROUP BEHAVIOR 157 (1987) (arguing that conversion is caused by psychological pressures, not rational selection from a marketplace of ideas); John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 CAL. L. REV. 981, 989-1001 (1992) (contending that symbols and rituals transmit group religious identity).

130. *See* James Hitchcock, *Church, State and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3 (1981).

131. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164-66, 1172-76 (1988) (discussing the harmful effects of state challenges to individual religious beliefs).

132. Janet L. Dolgin, *Religious Symbols and the Establishment of a National 'Religion'*, 39 MERCER L. REV. 495, 512 (1988) ("A unified national identity replaces individual and group identities . . . collective interests become identical with the interests of the state.").

substantial harm. Yet the influence can have social consequences as well.

3. *Social Harms*

The consequences of social harms from state endorsement of religion go beyond the religious sphere: the government may be communicating a divisive message that draws lines based on religion but whose implications are social and political. This can have profound consequences, given that so much social interaction is based on perceptions.

In justifying her test, Justice O'Connor highlights one of the more immediate consequences of this contention that the government's pen can be as mighty as its sword. Endorsement, she argues, "sends a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders, favored members of the political community."[133]

Some commentators have reacted to this argument with skepticism. Steven Smith, for example, contends that relatively undramatic symbolic communication, such as legislative invocations and the theistic motto on coins "do not appear to alter anyone's actual political standing in any realistic sense; no 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 idea that such practices appear to approve."[134]

By focusing entirely on the least significant communication, Smith unfairly downplays the effects of the class. What is more, even relatively innocuous communication that is explicitly religious has undesirable effects. Smith caricatures O'Connor's argument, assuming that her claim is that the proximate effect of religious communication is a palpable change in political status.

The consequences, however, are more attenuated and less immediately discernable. Obviously, government communication of a religious message does not instantly alter political rights. Rather, it creates *perceptions* that there are insiders and outsiders, and such perceptions have real consequences. The perceptions are reasonable: by

133. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Interestingly, Steven Smith, a critic of the endorsement test, cites historical support for this goal. Smith, *supra* note 9, at 305-06 n.158.

134. Smith, supra note 9, at 307. *But see* MADALYN M. O'HAIR, FREEDOM UNDER SIEGE: THE IMPACT OF ORGANIZED RELIGION ON YOUR LIBERTY AND YOUR POCKETBOOK (1974) (documenting the power of organized religion in America).

definition, a communicative alignment with one particular religious position suggests actual alignment. When government aligns itself with one group, those who are not members of the group become outsiders. Although status is determined in part by the rights one can exercise, it is largely a function of what one perceives one's status to be and what others perceive one's status to be.[135]

The ideals to which America aspires include the Lockean notion of maximum expression and open discourse characterized by mutual respect.[136] If we lived up to this ideal, any negative influence from religious communication would dissipate in the air of rationality. Yet, the assumption that we live in a purely rational society assumes too many things that are not true: it assumes that America is free of prejudice, that the marketplace of ideas functions perfectly, and that speech evaluated based on its content and not the identity of the speaker. In other words, it assumes that people do not discriminate against each other based on religion and that government can be treated as "just another speaker."

Prejudice remains a real element in American society. This country's history contains evidence of shameful religious persecution,[137] and religious prejudice that persists to the present.[138] Social forces,

135. *Cf.* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV 503, 519 (1992) ("Although the status of a social group is defined by a host of interactions in the community's public life, the symbols of government play a conspicuous role in that process."); M. FRANCIS ABRAHAM, MODERN SOCIOLOGICAL THEORY 228 (1982) (George Mead pointed out that "[t]he self organizes our knowledge of 'who we are' and what we think of ourselves in terms of our perception of others' responses.").

136. *See* Holland, *supra* note 37, at 1631-32.

137. *See* Zorach v. Clauson, 343 U.S. 306, 318-19 (1952) ("Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim, and kill those they branded 'heretics,' 'atheists' or 'agnostics.'"); Hitchcock, *supra* note 130, at 4 ("The earliest American settlers affirmed the desirability of greater freedom than existed in the Old World, yet believed with equal conviction that society had to rest on a common moral consensus. At various times in history this consensus has been thought to exclude Quakers, Catholics, Jews, and other religious groups."). *See also Fundamental Constitution of Carolina*, *in* CHURCH AND STATE IN AMERICAN HISTORY (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987) (imposing religious requirements for property ownership and making the act of speaking irreverently at a religious assembly unconstitutional); Francis Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS. 23, 27 (1981) (arguing that the majority's decision to force Mormons to abandon polygamy was an act of religious tyranny). In the 1950s, billboards urged readers to "Attend Church this week." Hitchcock, *supra* note 130, at 3.

138. *See One in Five Americans Hold Antisemitic Views, Study Says*, THE REUTERS LIBRARY, November 16, 1992 (Available on LEXIS in NEXIS database); *Increase in Antisemitic Incidents Reported in the U.S., Canada*, THE JERUSALEM POST, Feb. 11, 1992 (citing a study that documented 1,879 antisemitic incidents in the United States, the highest number in the thirteen years the study had been done); Patricia Stundza, *Bias Still Rules,*

independent of government, impose significant a burdens on those who are not part of the religious majority. Government religious partisanship, even when well-intentioned, can fan the flames of intolerance and bigotry by adding a voice of support for the notion that religious out-group status is a mark of inferiority.

Although it is unlikely that government religious messages will have immediately measurable impacts on political rights, it may encourage grassroots debasement of those rights. For example, though government does not take away a person's ability to speak by verbally siding with a religion the speaker does not belong to, the government may ultimately impair the speaker's exercise of this fundamental right.

Similarly, while a government religious communication is unlikely to remove anyone's freedom to run for political office in a legal sense, it may undermine the right in a practical sense. If outsiders come to believe that it is politically impossible for them to be elected to the office, they may simply choose not to run. To the extent that the government encourages already-existing attitudinal barriers to political participation by religious minorities, such as the continuing unwillingness of significant percentages of the population to elect a Jewish president,[139] it is pushing our society backward. The framers of the Constitution were aware of the degree to which religion could stir irrational passions.[140] Furthermore, we should be particularly careful not to underestimate the extent to which a government religious communication will affect people whose beliefs are implicitly or explicitly rejected.

This has implications for the speaker who is denied one of his or her most fundamental political rights. It also has implications for the discourse in which he or she is participating. As one commentator noted, "religious principles tend to comprise a total world view for their adherents."[141] Consequently, when "government promotes religious beliefs, it will be understood to favor the policy views that the

Study Says; Blacks, Women, and Jews Behind in Business, AMERICAN BANKER, Feb. 13, 1984, at 2 ("Commercial banks and insurance companies continue to have a reputation for not being friendly to Jews.").

139. *See Trial Heats: The Public Rates the Presidential Hopefuls*, NATIONAL JOURNAL, May 7, 1983, at 982 (only 79% of those surveyed would vote for a Jew for president, and only 83% would vote for a Jew for vice-president); *see also* Mitchell Bard, *Did My Mother Lie to Me?*, THE NEW LEADER, April 4, 1988, at 8 (Surveys probably overreport willingness to elect female, Black, or Jewish presidents because "they essentially ask people to admit to being bigoted.").

140. Hitchcock, *supra* note 130, at 7.

141. Feigenson, *supra* note 8, at 73-74.

holders of those beliefs espouse."[142] Usually, this means enhancing the position of a religion vis-a-vis where it should be in a "free market" of religious ideas.

Government communication, however, can even undermine the position of the religion endorsed:

> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[143]

Although the impact of religious government actions may be unpredictable, and it may actually harm religious groups it is intended to help, so many of the possible outcomes are undesirable that government should not communicate any religious position.

D. Types of Government Influences

The preceding section argued it is undesirable for government to influence individual religious decisions. Despite the risk of influence that is present whenever government acts, however, government must have the power to pursue legitimate ends. There are two variables that are relevant to understanding which influences the Establishment Clause should prohibit. The greater the risk of influence, the more important it is to prevent the action. At the same time, the more important the action is in secular terms, the more reluctant we should be to prevent it. We would presumably feel different about a government function that serves no legitimate end and is extremely likely to have significant impact on individual religious behavior than about a central government function that bears a much smaller risk of influence.

1. Risk of Influence

The risk of influence is a function of communication. Without communication, there can be no influence. All government actions bear communicative potential. Given the interpretation inherent in communication, it is not unusual for different people to have different interpretations of an act that are often different from anything the actor intended. Later sections of this Article will explore what types of things "reasonably communicate" religious meanings. For now, it is enough to note that a statement or action that reasonably communi-

142. *Id.*
143. Engel v. Vitale, 370 U.S. 421, 431 (1962).

cates a religious message (a conclusion we draw based on what we know about the common meaning of the components of the statement or action) is more likely to actually communicate a religious message than one that does not. As a result, it is more likely to have religious influence. We can never be certain about how people will interpret things, but when a message has words commonly associated with religion, we can guess that it will convey religious meaning to a significant number of listeners.

2. *Legitimate Secular Functions*

The previous section argued that drawing the line based on what "reasonably communicates" a religious position protects against state actions with the greatest risk of influence. This section will argue that the line also gives sufficient protection to the other values at stake. In other words, the "reasonably communicates line" goes far enough, because it identifies the greatest threats; it does not go too far, because it leaves the government room to address social problems. This methodology protects government's legitimate secular functions. Government does not need to be able to communicate religious messages to carry out the duties assigned to it by the Constitution. Religion, as noted above, is not the province of the government.

Government cannot claim any need to utilize religious criteria in choosing legislation. Government may, at times, find it useful, even in terms of secular goals, to communicate religious messages. Yet it does not need to, and given the harm that accompanies such messages, should not be permitted to.

In other words, if we forbid the government from reasonably communicating religious preferences, it can still carry out its essential functions. We cannot forbid government from having any impact on an individual's religious thinking, because any action carries that risk. Of course, even central government functions inevitably raise questions involving religion. While some functions, such as building roads or delivering mail, can be conducted without confronting religious issues, others cannot. For those more difficult areas, the government will have to be careful to avoid taking a religious position.

Distinguishing between what reasonably communicates a religious position and what does not, is not a perfect solution. Limits on governmental actions have disadvantages. Potentially, we may lose benefits to the extent that the First Amendment prevents the government from doing things it perceives to be necessary.

Two conclusions emerge from this. *If the government needs to do something in order to perform a central function, or to facilitate the exercise of individual judgment with regard to religion, then the action does not reasonably communicate a religious preference.* The emphasis, once again, is on the difference between what something communicates and what something reasonably communicates. "Communicates" depends on one individual's perceptions. "Reasonably communicates" is a term of art, defined with attention to all the considerations this Article discusses: The need for the government to address social problems, cultural meaning, historical context, etc.

The second point is that, although all limitations on government action have their costs, the tradeoffs involved in increasing government power beyond the line of "reasonable communication of a religious preference" become increasingly unattractive. There may be benefits to a policy that communicates a state religious preference. A group prayer at the beginning of the school day may have a calming effect on students. Yet the costs become far more acute when the tools are explicitly communicative and the message is explicitly religious. Although the effects are admittedly difficult to measure, they become exponentially more likely to have an impact on the listener as what is reasonably communicated becomes more religious.

The "reasonably communicates" line does not give the government all the power it wants, and it does not eliminate all religious influence. Rather, it minimizes the greatest threats to religious choice and government power. This is not ideal, but it is the best a test can do given the inherent tension in the Establishment Clause.

VI. A Comparison of the Tests

The line discussed above, between what is likely to communicate and what is not, is represented by the endorsement test. "Communication of a religious government position" is religious endorsement. Other tests do not adequately protect the values at issue in the Establishment Clause.

A. Vagueness

"Coercion"-type tests, regardless of how formulated, are inadequate because they are vague, and ultimately either too harsh or too lax. Speaking in terms of "religious liberty"[144] is inadequate. The word "liberty" carries a great deal of historical baggage that ladens it

144. *See* Choper, *supra* note 39, at 267; Choper, *supra* note 43, at 333.

with meanings tied to the degree of government regulation. Thus, there is little liberty where government tells individuals what to do and taxes heavily, and much liberty under a government that exerts less direct control over the individual's actions. The term arose at a time when government could accomplish what it wished by brute force, and has only clumsy application to a society in which government has much more sophisticated interactions with its citizens than decrees and tax collectors.

Some commentators frame their tests in terms of "individual choice."[145] These commentators talk about the religion clauses as an attempt to leave religious choices to the individual. Other commentators, in contrast, assume that there is a clear line that the government crosses, thereby "taking away" choices from the individual. Conversely, these commentators argue that if the government does *not* cross the line, the individual is making choices "freely," and the government is acting constitutionally.

This approach, for reasons we have already seen,[146] is not a useful way of approaching the problem.[147] It is difficult to compare the endorsement and coercion tests because the word "coercion" is so vague that it represents many possible lines. All government actions bear some risk of influence, and none ultimately take choices away from individuals. Government can do religious harm without creating legal obligations that diminish liberty.[148]

Undoubtedly, we can draw clear lines that prohibit classes of influence far smaller than endorsement. Such lines would not, however, draw sound distinctions between the influences they allow and those they prohibit. We might, for example, bar the government from explicitly prohibiting or requiring particular religious behavior. For example, there is little functional difference between a civil fine and a tax, but the latter would be permissible while the former would not.

We could prevent the government from attaching any sort of penalty or reward to religious behavior. The problem with this approach

145. *See id.*; Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Schwarz, *supra* note 6.

146. *See supra* text accompanying notes 42-49.

147. *Cf.* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 709 (1986); Holland, *supra* note 37, at 1674 (pointing to "the Establishment Clause's notion of freedom of conscience, which is violated *whenever* the government interferes with an individual's religious freedom, not merely when the individual acts less than voluntarily").

148. This is what Professor Choper means when he speaks of "compromising" religious liberty, though the meaning of "compromise" is left unclear.

is that it allows the government to achieve similar results by taking advantage of existing social processes, or creating social processes, to do the enforcement. If, for instance, elementary school teachers led their classes in the Lord's Prayer, but no student was formally punished for nonparticipation, it is likely that the stigma attached to being "the only one not praying" would encourage some students to pray even if they would not otherwise wish to. In contrast, an endorsement test acknowledges the social reality of peer pressure, and prohibits the government from utilizing that social pressure to achieve its own ends. Under an endorsement test, government cannot endorse religion even without formal penalty, thereby setting social processes in motion and those allowing non-governmental processes to do the coercing.

B. The Need to Presume Influence

One key difference between the endorsement test and other tests pertains to presumptions about influence. The endorsement test assumes influence; other tests assume no influence unless the plaintiff proves influence (usually "coercion").[149] This section has been an attempt to demonstrate that the entire class of endorsements, because they are by definition communicative and pose the risk of influence, is difficult to identify and prove. Given these factors, it is preferable to presume influence. This is nothing unusual in constitutional law: courts have often presumed violations of constitutional rights when violations were likely but difficult to identify on a case-by-case basis.[150]

149. *See* Allegheny v. ACLU, 492 U.S. 573, 669-74 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Choper, *supra* note 12, at 696-700; Holland, *supra* note 37, at 1676.

150. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (states may not adopt measures likely to deter women from having abortions, regardless of whether the measures deter in particular cases); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (due process requires the imposition of procedural notice requirements for disposition of mortgages); Miranda v. Arizona, 396 U.S. 868 (1969) (holding that a suspect's legal entitlement to remain silent without official sanction did not satisfy his Fifth Amendment right not to incriminate himself unless the government makes clear to him that he has the right); North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969) (protecting against sentencing increases that violate due process requires judges to make explicit their reasons for increasing a defendant's sentence after a second trial); Massiah v. United States, 377 U.S. 201 (1964); Rideau v. Louisiana, 373 U.S. 723, 727 (1962) (stating that local television broadcast made juror bias likely, and thus no specific showing was necessary).

C. Recognition of the Cumulative Impact of Social Influences

Other tests disaggregate influence, assuming that if one action does not demonstrably exert (or would not be likely to exert) significant influence, then it should be disregarded and the subsequent action challenged *tabula rasa*. That, however, is not the way the human mind works. Our decisions are products of many influences that have accumulated; one event may trigger a decision, but it does not act in a vacuum. Perceptions of governmental action, even when each particular action is relatively minor, accumulate over a lifetime and can profoundly affect an individual's value system.[151] Only the endorsement test prevents this accumulation by focusing on the nature of the act rather than its measurable impact.

D. Avoiding Measurement Problems

Coercion tests—unlike the endorsement test—assume that significant influence can be measured or predicted effectively. That is not a safe assumption. First, influence must be identified before courts will consider the issue. Humans have only a primitive understanding of their own motivations and do not scrutinize their own motivations. In short, the people most susceptible to government influence may not realize or care that they have been influenced. Even if people would come forward, such an approach puts them in the awkward position of having to show injury, when they themselves ultimately control their own decisions. In contrast, if the test bars endorsement, those who challenge the law need only recognize a religious message; they need not psychoanalyze themselves.

Second, although it is relatively easy to identify on a case-by-case basis those actions *most* likely to influence individual behavior, it is far more difficult to identify lesser but still significant risks.[152] There are

151. *Cf.* Feigenson, *supra* note 8, at 81 ("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."); Beschle, *supra* note 8, at 187.

152. The problem is not just one of deciding how probable influence will be, but also of deciding how significant the result of the influence would be. Coercion tests generally require the product of the influence to be fairly significant: if people are likely to be affected only in relatively minor ways, coercion is acceptable.

The difficulty with taking that approach is that some of the historical underpinnings seem far broader. The clearest example is a religious tax. The Framers of the Constitution viewed this as one of the greatest evils to be addressed by the Establishment Clause. *See* Choper, *supra* note 39, at 268 ("[I]t is beyond reasonable dispute that [the Establishment Clause] purported to secure religious liberty, in particular by prohibiting taxation for religious purposes."). In Madison's view, the problem with a state religious tax was not simply its coerciveness, but also the fact that "it is itself a signal of persecution. It degrades from

two possibilities here. First, the tests could require speculation about what effect the state action would *tend* to have, with actual effects as relevant but not dispositive factors. The test might ask, for example, whether the state action "tends to coerce."[153] Such a test, however, would be incomplete without specifying what people are to be considered as potential victims of coercion.

An endorsement test will stumble on the same obstacle only if tied to actual perceptions of endorsement.[154] If the question is whether the state action would tend to coerce *anyone*, the court would have to base its decision on the characteristics of the most idiosyncratic and sensitive members of society. This would tie the hands of the state.

If, on the other hand, the question asks whether a reasonable person would be coerced, the test would embody majoritarian norms and neglect the real needs of religious minorities. This, of course, would render the Establishment Clause feckless.

Any attempt to base the test on the use of a "reasonable nonadherent" would be hopeless. It would be a two-step process. First, a judge would define the religious beliefs of this imaginary person. Second, the judge would determine what reactions are reasonable for a person with those beliefs. Though the second step would be easier than the first, they both would be laden with difficulty. There is simply no way of selecting a single set of religious beliefs with which to imbue the "reasonable minority person." To do so would be to pass judgment about what religious beliefs are reasonable and would therefore itself be an establishment of religion.[155] Social order sometimes compels us to proscribe certain actions, but individual religious beliefs should never be judged by the state.

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the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Lee* 112 S. Ct. at 2673 (Souter, J., concurring) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 5 THE FOUNDERS' CONSTITUTION, 82, 83 (Phillip B. Kurland and Ralph Lerner Ed., 1987).

At the same time, the impact on each individual is probably not significant. For example, the federal government gives $50 million to a purely religious program. One hundred fifteen million Americans filed income tax returns in 1993. Robert A. Rosenblatt, *IRS Loses Millions in Fraud With Electronic Tax Filing*, L.A. TIMES, Feb. 11, 1994, at 1. Therefore, the program would cost taxpayers an average of less than 50 cents each.

153. *Cf.* Choper, *supra* note 12 (The question is whether action is "likely to compromise" religious beliefs.).

154. *See supra* text accompanying note 17.

155. If, as proposed here, the test becomes whether the action in question supports a conclusion that an agent of the state in her official capacity has taken a position on a question of religious dogma, a decision by a judge regarding the legitimacy of various religious beliefs would be a clear violation of the Establishment Clause.

Nor is there any method of obviating the selection of a set of religious beliefs under this approach. Without a more specific definition, a judge cannot determine what a reasonable reaction is, for it is not clear what "reasonable" means in this context. Reasonability can be determined in other contexts, such as tort law,[156] by reference to general community behavior or cost/benefit calculation. Neither is appropriate here. The same diversity that inhibits the selection of a set of beliefs impedes a determination of reasonability.

When the reasonableness of *decision* is evaluated based on its risks and benefits, at least some of the important considerations can be weighed. Evaluating the reasonableness of a *reaction,* on the other hand, is infinitely more subjective. To ask whether a reaction is reasonable is to ask one of two questions. One is whether the reaction is reasonable *for the person who is reacting.* This question is not very helpful, because the answer is almost invariably "yes."

The more common meaning of an evaluation of whether one person's reaction is reasonable is a query as to whether other people would have reacted similarly. A man is said to react unreasonably because he is overreacting compared to how others would react to the same situation. Perhaps if the judge selected a member of a common religion, she could fairly say that he would react as others would. Again, it is fine to use "reasonableness" to impose community standards in other areas, such as torts, but when it comes to religion, we should not evaluate reasonableness by asking whether an individual reacts like everyone else. Such an approach to a coercion test would make protection of religious groups directly proportional to the size of the group membership, and would leave smaller groups vulnerable to government manipulation. If some non-Christians are unaffected when they walk by a crèche in a state building, and others who walk by the same display feel very uncomfortable, which reaction is "correct"? A predictive approach leaves too much discretion in the hands of a judge to make judgments about human responses to external influences. This administrative morass is a strong reason to design the test around a conceptual category rather than an ad hoc mechanism.

Even if the measurement problems are resolved, the larger jurisprudential problem persists. Barring only some of the government's religious communication leaves intact a class of influence that, because it is communicative, bears a significant risk of undesirable religious influence.

156. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173-93 (5th ed. 1984).

E. Language and History

There is also support in the language of the First Amendment to ban a category of action based on the relationship between government and religion, rather than those particular actions found to have specific effect. The Establishment Clause forbids the government from making any law "respecting an establishment of religion." The Establishment Clause, unlike many other clauses in the Bill of Rights, does not explicitly create a legally enforceable right, the violation of which gives rise to a judicial remedy. All provisions of the Bill of Rights circumscribe government action. Most of those provisions, however, are phrased to prohibit the government from having a particular effect on an individual; the Establishment Clause is not such a provision.[157]

As Justice Souter noted, a coercion test is difficult to square with the text of the Constitution. He points out that the Free Exercise Clause protects individuals against governmental religious coercion, and consequently the coercion test would render the Establishment Clause "a virtual nullity."[158]

To establish is to put something into place. Establishment need not, by definition, have any one particular effect on individuals. Moreover, an emphasis on "religious liberty" as a "core value"[159] is difficult to square with the plain language of the Constitution. As one commentator has noted, "Great Britain has shown that a formal religious establishment can become compatible with a high degree of religious liberty."[160]

There is some historical basis for attention to symbolism, not just coercion. The Framers of the Constitution were concerned about messages the government sent when it took positions on religious questions.[161] James Madison opposed any state attempt to promote

157. *See* Feigenson, *supra* note 8.

158. Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Souter, J., concurring). *But cf.* Steven M. Tipton, *Republican and Liberal State: The Place of Religion in an Ambiguous Polity*, 39 EMORY L.J. 191, 192 (1990) ("Seen from the traditional standpoint of 'civic freedom' defining the Constitution's final ends, the free exercise is the controlling idea, which non-establishment serves.").

159. *See* Choper, *supra* note 39, at 267; Holland, *supra* note 37, at 1638; McConnell, *supra* note 43, at 941.

160. Canavan, *supra* note 137, at 26.

161. *See* Lee v. Weisman, 112 S. Ct. 2649, 2673 (1992) (Souter, J., concurring) ("[T]he Framers' special antipathy to religious coercion did not exhaust their hostility to the features and incidents of establishment.").

religion. He and Jefferson opposed "any political appropriation of religion."[162]

VII. Conclusion

It is not enough to say that a law may have no particular effect: that statement raises two additional questions. The first is "on whom?" Defining the target group too restrictively leaves vulnerable minorities unprotected. Defining it too broadly puts legislatures at the mercy of individuals. Although it is not uncommon for individuals to prevent state action by invoking rights, it is unusual for them to do so by claiming to have certain feelings. The second question is why one effect chosen is constitutionally essential, while other seemingly important values are neglected.

Endorsement is a preferable standard. It focuses on the relationship between government and religion, rather than on the relationship between government and the populace. Thus, endorsement avoids having to determine whose feelings count and whose do not. The concept of endorsement carries ambiguity, but such ambiguity can be resolved by defining "endorsement" more precisely. Both concepts, endorsement and establishment, share a concern for the nature of the uses of state power. Justice O'Connor's test, with further clarification and definition, is the one that the Court ought to endorse.

162. *Id.* at 2673-74.