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A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause

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Comment

A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause.

> The great trick of regarding small departures from the truth as the truth itself—on which is founded the entire integral calculus—is also the basis of our witty speculations, where the whole thing would often collapse if we considered the departures with philosophical rigour.
>
> —Georg C. Lichtenberg[1]

I. INTRODUCTION

The First Amendment to the Constitution prohibits the government from making any law respecting an establishment of religion.[2] The Establishment Clause reflects the sound desire of the Framers to guarantee the religious liberty of all Americans by prohibiting the government from interfering with an individual's religious life. The First Amendment also prohibits the government from abridging the freedom of speech, thus guaranteeing every citizen's right to participate fully in public discourse and to engage in a free exchange of ideas. Together, the Establishment Clause and the Free Speech Clause have fostered and promoted free thinking and self-determination and have become the bedrock of American liberty.[3] However, the government's interest in adhering to the dictates of the Establishment Clause may conflict with an individual's right to free speech. The question then arises as to whether

1. Georg C. Lichtenberg, *Notebooks*, *in* LICHTENBERG: A DOCTRINE OF SCATTERED OCCASIONS 324 (J.P. Stern trans., 1959).

2. The Establishment and Free Speech Clauses of the Constitution read:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech.

U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. Everson v. Board of Educ., 330 U.S. 1, 5 (1947); *see also* Cruz v. Beto, 405 U.S. 319, 322 (1972).

3. *See, e.g.*, GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 24-25, 36, 162-64 (1989) (arguing that self-government depends on the dual principles of public debate and toleration established in the First Amendment).

the Establishment Clause takes precedence over an individual's right to speak freely.

This Comment focuses primarily on the degree of truth underlying one analogy—that between private religious speech and governmental religious speech. Properly defined, an analogy is a form of reasoning in which one thing is inferred to be the same as another in a certain respect, on the basis of a known similarity between the things in other respects.[4] As an imprecise analytical method, an analogy stands invariably on some degree of untruth; that is, an analogy treats distinct and discreet things as if in some respect they were the same. Nevertheless, the appeal of a good analogy is almost irresistible; if one is willing to overlook that initial untruth, the logic is flawless, for it purports to treat like things in a like manner. This Comment examines whether private religious speech in a public forum is analogous to governmental religious speech and whether under the First Amendment a court properly may impose on private religious expression the same restrictions that it imposes on governmental religious expression.

This Comment examines the purpose of the Establishment Clause and then traces the development of Establishment Clause jurisprudence with a particular emphasis on its relation to free speech.[5] It next analyzes the unprecedented approach taken by the Seventh Circuit in *Doe v. Village of Crestwood*[6] and *Doe v. Small*[7] in which the court, in a small departure from the truth, treated private religious expression as if it were governmental religious expression.[8] This Comment analyzes how the Seventh Circuit approach jettisons the Free Speech guarantee in the First Amendment and thereby yields the perverse result of relegating religious speech to an inferior status in a hierarchy of First Amendment rights.[9]

Finally, this Comment proposes an alternative to the extreme measures employed by the Seventh Circuit.[10] This Comment suggests that when attempting to reconcile a perceived conflict between the Establishment Clause and an individual's right to free speech in a public forum, courts should distinguish governmental

4. BLACK'S LAW DICTIONARY 84 (6th ed. 1990).

5. *See infra* notes 11-44 and accompanying text.

6. 917 F.2d 1476 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 8, 1991) (No. 90-1573).

7. 934 F.2d 743 (7th Cir.), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

8. *See infra* notes 72-116 and accompanying text.

9. *See infra* notes 117-55 and accompanying text.

10. *See infra* notes 156-59 and accompanying text.

action from individual speech and fashion a remedy to address solely the unconstitutional governmental act, and leave the individual's rights unimpeded.

II. BACKGROUND

Any analysis of a case decided under the First Amendment must address two immediate issues: 1) whether the decision squares with the text of the Constitution and the historical sources employed to interpret that text; and 2) whether the rationale of the decision comports with the constitutional analysis currently employed by the Supreme Court. Resolution of these two issues involves an interpretation of the Framers' original intent and a review of the modern approach taken by courts when addressing First Amendment cases.

A. Original Intent

Courts and commentators have noted that in the contemporary debate over the meaning of the Establishment Clause and the appropriate standard of review, both sides in the debate have scoured primary sources in an effort to assemble an historical record permitting them to claim the legacy of the Framers' original intent.[11] This debate has generally broken down into two opposing factions: separationists and accomodationists.[12]

Separationists assert that the Establishment Clause demands a strict separation between religion and government.[13] Justice Black's interpretation of the Establishment Clause announced in *Everson v. Board of Education*[14] has served as the separationists' manifesto and has dominated the Court's jurisprudence for the past forty years.[15] The separationists claim a long tradition dating

11. *See* Wallace v. Jaffree, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting); Doe v. Small 934 F.2d 743, 754 (7th Cir. 1991); *see also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 840 (1986) ("I dare say that most of the so-called literature in the field of first amendment law—my own included—reflects the advocate with a cause rather than disinterested scholarship."); Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 685 (1990) ("Because there is an unusual abundance of historical evidence, and because there is ample evidence to support both sides, both sides appeal to history.").

12. *See* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 97-106 (1991); John Witte, *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 491 (1991).

13. *See* DRAKEMAN, *supra* note 12, at 97.

14. 330 U.S. 1 (1947).

15. Writing for the Court in *Everson*, Justice Black pronounced:

> The "establishment of religion" clause of the First Amendment means at least

back to the pilgrims' flight from persecution.[16] Out of this early persecution, argue the separationists, came a respect and desire for religious liberty which commands nothing less than complete separation of church and state.[17] The separationists find textual support for their position in Thomas Jefferson's Letter to the Danbury Baptists.[18] Jefferson's metaphor of a wall of separation between church and state captures the activist spirit and the absolutist stance of the adherents to this view. The separationists find further support for their interpretation in James Madison's *Memorial and Remonstrance Against Religious Assessments*, written to counter a proposal for a general assessment in Virginia in favor of religious education.[19]

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this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16.

16. *See* DRAKEMAN, *supra* note 12, at 52.

17. *Id.*

18. In this letter, Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. . . . I reciprocate your kind prayers for protection and blessing of the common Father and Creator of man.

Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist Association, in the state of Connecticut (Jan. 1, 1802), *reprinted in* JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 130-31 (1987). Noonan notes that while President Jefferson extolled the virtue in the separation of church and state, he closed his letter with a prayer. NOONAN, *supra*, at 131.

19. Madison wrote:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

James Madison, *Memorial and Remonstrance Against Religious Assessments, 1785*, *reprinted in* Wallace v. Jaffree, 472 U.S. 38, 53-54 n.38 (1985).

In contrast, the accomodationists recognize the weight of the Framers' grand pronouncements marshalled by the separationists, but they accuse the separationists of compiling something of a revisionist history.[20] The accomodationists argue that a more complete view of history reveals that the Framers' rhetoric on the separation of church and state did not always comport with their actual practices.[21] Numerous commentators and historians have catalogued these early breaches in the wall between church and state.[22]

In the first Supreme Court decision to break from Justice Black's interpretation of the Establishment Clause in *Everson*, now Chief Justice Rehnquist embraced the accomodationist school of thought in his dissenting opinion in *Wallace v. Jaffree*.[23] Rehnquist's dissent in *Wallace* has become one of the authoritative statements of the accomodationist school. Interpreting the Establishment Clause in light of the Framers' practices, Justice Rehnquist concluded that the Establishment Clause only prohibits the establishment of a national religion and the favoring of one sect over another.[24] Rehnquist declared that the Court erred in its previous interpretations of the Establishment Clause based on an incomplete constitutional history rooted in Jefferson's "misleading metaphor" of a wall of separation between church and state.[25]

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20. *See* Wallace v. Jaffree, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting) (arguing that the Court's previous interpretation of the Establishment Clause was based on an incomplete view of history); DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 99-106 (1987) (arguing that the Framers never intended a complete separation of church and state as evidenced in the young Republic's favorable policies toward religion); Walter Kindles, Keynote Address to the 1991 Annual Meeting of the National Bar Association, *reprinted in* LIEF CARTER, AN INTRODUCTION TO CONSTITUTIONAL INTERPRETATION 87 (1991) (arguing that modern jurisprudence misinterprets Locke, Madison, and Jefferson as desiring a secular state).

21. *See* DREISBACH, *supra* note 20, at 102.

22. For example, historians note that Madison and the First Congress appointed a chaplin and adopted a resolution in favor of a day of prayer and thanksgiving the day after adopting the Establishment Clause. DRAKEMAN, *supra* note 12, at 52; DREISBACH, *supra* note 20, at 111. In Virginia, Jefferson sponsored a bill to punish sabbath breakers, and as President, allowed federal support for religious missions to the Indians. DRAKEMAN, *supra* note 12, at 52; DREISBACH, *supra* note 20, at 120-27. For more extensive discussion of such church and state breaches, see ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978).

23. 472 U.S. 38 (1985).

24. *Id.* at 99 (Rehnquist, J., dissenting).

25. *Id.* at 92 (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortu-

The debate over the original intent of the Framers of the First Amendment certainly will continue, and while courts value the work of historians inquiring into the origins of the Bill of Rights, such scholarship has limited probative value because "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems."[26] However, the philosophical thrust of the Bill of Rights demonstrates the general proposition that the Framers intended to protect individual liberty.[27] With the Establishment Clause, the Framers intended to define the limits of the new government and to reserve for the individual the freedom to choose his own values in accordance with his own conscience.[28]

B. The Modern Approach

The Supreme Court did not interpret the Establishment Clause until 1947, in *Everson v. Board of Education*,[29] over one hundred and fifty years after the First Congress adopted the First Amendment. In the forty years following *Everson*, the Court has expanded the scope of the Establishment Clause to prohibit an ever-increasing range of governmental activity.[30] The Court's modern approach to Establishment Clause issues consists of a three-prong test promulgated by the Court in *Lemon v. Kurtzman*.[31] Under the *Lemon* test, the Court will uphold a challenged statute or other governmental action if: (1) it has a secular purpose; (2) its primary

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nately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

26. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 233-34 (1963) (Brennan, J., concurring).

27. *See* PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 13 (1964) (arguing that the protection and promotion of religious liberty is the central concern of the First Amendment); FRANCIS GRAHAM LEE, WALL OF CONTROVERSY: CHURCH-STATE CONFLICT IN AMERICA 117 (1986) (arguing that the purpose of the Bill of Rights and the First Amendment was "to pinpoint those areas over which the federal government was powerless to legislate"). As one scholar has observed:

> [T]he intended direction of the first amendment was the enhancement of individual freedom. . . . [T]he objectives were to establish an equality among persons, so that each individual could choose without interference how to commune with his god, and to avoid the havoc that religious conflicts had imposed on mankind throughout history.

Kurland, *supra* note 11, at 860.

28. *See generally* Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305 (1990) (discussing value-neutral liberalism and tolerance in relation to the First Amendment).

29. 330 U.S. 1 (1947).

30. *See infra* notes 32-33.

31. 403 U.S. 602 (1971).

effect neither advances nor inhibits religion; and (3) it does not involve an excessive entanglement with religion.[32]

In applying the *Lemon* test, the Court has engaged in a fact-intensive analysis in which constitutionality turns upon elusive distinctions. Under the *Lemon* test, the Court has made various and seemingly inconsistent judicial determinations; and despite the number of decisions in this area, no clear standard has evolved.[33]

32. *Id.* at 612-13. Since 1972, the Court has applied the *Lemon* test to a variety of issues arising under the Establishment Clause. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (holding that a statute granting aid to religious and non-religious organizations providing counseling on teenage sexuality does not violate the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (finding that a Louisiana statute prohibiting the teaching of the theory of evolution in public schools unless creationism is also taught has no secular purpose and has the primary effect of advancing religion and is thus unconstitutional); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 485 (1986) (determining that the First Amendment does not preclude state assistance to a blind student studying to become a minister); Aguilar v. Felton, 473 U.S. 402, 410 (1985) (finding that a New York City program providing on-premises instruction to parochial school students risks excessive entanglement between church and state and thus is unconstitutional); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985) (holding that the Establishment Clause prevents a public school district from providing classes to private school students); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) (holding that a Connecticut statute which provides workers with an absolute right not to work on their Sabbath violates the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (finding that an Alabama statute authorizing a moment of silence in public schools has no secular purpose and consequently is unconstitutional); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982) (holding that a Massachusetts statute giving churches a discretionary veto over the granting of liquor licenses to establishments within 500 feet of a church violates the Establishment Clause); Stone v. Graham, 449 U.S. 39, 40 (1980) (finding that a Kentucky statute requiring the display of the Ten Commandments in public classrooms has no secular purpose and is therefore unconstitutional); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980) (holding that a New York statute providing public funds to private schools for performing services mandated by the state has a secular purpose and thus is constitutional); Wolman v. Walter, 433 U.S. 229, 235-36 (1977) (holding that state aid to private schools in the form of diagnostic and therapeutic services is constitutionally permissible, but that the Establishment Clause prohibits a state from loaning instructional materials and equipment to non-public school students); Meek v. Pittenger, 421 U.S. 349, 373 (1975) (Brennan, J., concurring) (determining that a state may loan textbooks to students in private schools without violating the Establishment Clause); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (finding that a New York plan to give sectarian schools reimbursement grants violates the Establishment Clause); Hunt v. McNair, 413 U.S. 734, 741 (1973) (holding that a South Carolina statute creating an agency to assist institutions of higher education in financing construction projects does not violate the Establishment Clause); Levitt v. Committee for Public Educ. and Religious Liberty, 413 U.S. 472, 480 (1973) (finding that a New York statute reimbursing private schools for administrative costs constitutes an impermissible aid to religion).

33. *Compare Everson*, 330 U.S. at 16-17 (decided prior to *Lemon*, holding that the state could provide private school students with bus transportation to and from school) *and* Board of Educ. v. Allen, 392 U.S. 236 (1968) (decided prior to *Lemon*, holding that the state could provide textbooks to private school students) *with* Wolman v. Walter, 433 U.S. 229, 249, 254 (1977) (decided after *Lemon*, holding that the state could not provide

Thus, because of the risk of inconsistent judgments under the *Lemon* test, many commentators have criticized the test and have urged the Court to abandon it.[34]

In more recent cases, the Court increasingly has focused on whether the government has endorsed a religion or a religious practice.[35] Proposed by Justice O'Connor in *Lynch v. Donnelly*,[36] the endorsement test is essentially a refinement of the second prong of the *Lemon* test. Under the second prong of the *Lemon* test, the Court asks, "was the primary effect of the challenged practice to advance religion?"[37] Applying the endorsement test, the Court asks, "would a reasonable person view the challenged governmental practice as endorsing religion?"[38] Courts applying the endorsement test, however, engage in the same specific content and context analysis that plagued courts applying the *Lemon* test.[39]

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private school students with transportation on school field trips, or with maps and magazines).

34. *See* DRAKEMAN, *supra* note 12, at 106 ("[T]he most compelling criticism of the three-part test is the fact that it has failed to generate any clear or consistent First Amendment jurisprudence."); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986) ("These decisions are wholly unprincipled and indefensible."); 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, 1070 (1986) (concluding that the Court's approach to Establishment Clause cases is muddled and inconsistent); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?* (criticizing the Court's current analysis for being confused and incoherent), *reprinted in* CHRISTIAN L. CASTLE & JAMES L. SWANSON, THE FIRST AMENDMENT LAW HANDBOOK 269 (1990); William P. Marshall, *Unprecedential Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 928 (1986) (arguing that Establishment Clause jurisprudence is inconsistent and at times incomprehensible).

35. *See* Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370-71 (1990) (holding that allowing student religious organizations in secondary schools equal access to school facilities is not an endorsement of religion); County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (finding that a government display of religious symbols is unconstitutional if it has the effect of endorsing religion); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (finding that government support of the distribution of religious messages by religious organizations violates the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (striking down a Louisiana statute requiring that creationism be given equal treatment with evolution in public schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-92 (1985) (invalidating two programs allowing use of state-paid staff to provide instruction to non-public school students on religious school premises because of significant risk of state sponsored indoctrination of religious beliefs); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (invalidating an Alabama moment of silence statute).

36. 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

37. *Lemon*, 403 U.S. at 612.

38. *Lynch*, 465 U.S. at 688. Professor Tribe has formulated a similar test and proposes that the challenged practice be judged from the perspective of a "reasonable nonadherent." LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1296 (2d ed. 1988).

39. *See* James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon:*

The imprecision and inconsistency of the current constitutional tests are perhaps best demonstrated by an examination of the cases dealing with the issue of religious displays on public property during a holiday. In *Lynch v. Donnelly*,[40] a city's display of a creche at Christmastime in a park was constitutionally permissible because the display also included secular symbols negating any inference of endorsement.[41] However, in *County of Allegheny v. ACLU*,[42] the Court held that a creche displayed in a courthouse violated the Establishment Clause, even though a private organization had donated the display.[43] Yet, in the same opinion, the *Allegheny* Court held that a menorah displayed outside of the courthouse did not violate the Establishment Clause because the menorah stood near a Christmas tree.[44] Thus, the holdings in *Lynch* and *Allegheny* demonstrate the discrepancies that the current analysis yields; and until the Court fashions a coherent approach, lower courts will continue to struggle with these discrepancies.

III. DISCUSSION

Charles Evans Hughes once quipped that the Constitution is what judges say it is.[45] In two recent First Amendment cases, *Doe v. Village of Crestwood*[46] and *Doe v. Small*,[47] it seems as if the Seventh Circuit Court of Appeals has taken that aphorism to heart in fashioning a novel analysis which equates an individual's private religious expression in a public forum with governmental religious expression, and subsequently restricts the individual's expression with the pretext of complying with the Establishment Clause.[48] In both cases, the Seventh Circuit disregarded the reasoning of prior

The Endorsement Test as the New Establishment Clause Standard, 65 NOTRE DAME L. REV. 671, 688-96 (1990) (discussing the problems of hypothetical objectivity and the reasonable observer standard and arguing that in judging religious activity, there is no universal standard of reasonableness).

40. 465 U.S. 668 (1984).

41. *Id.* at 692 (O'Connor, J., concurring). The secular symbols in the *Lynch* display included, among other things, reindeer and a sleigh, a Santa Claus, a Christmas tree, an assortment of candy canes, a group of carolers, and a sign declaring "Seasons Greetings." *Id.* at 671.

42. 492 U.S. 573 (1989).

43. *Id.* at 600-02.

44. *Id.* at 616-18.

45. Charles Evans Hughes, Speech in Elmira, New York (May 3, 1907), *in* BRUCE BOHLE, THE HOME BOOK OF AMERICAN QUOTATIONS 95 (1986).

46. 917 F.2d 1476 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 8, 1991) (No. 90-1573).

47. 934 F.2d 743 (7th Cir.), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

48. *See infra* notes 72-116 and accompanying text.

Supreme Court cases and has embarked on an uncharted and ill-fated course that threatens to consume fundamental First Amendment freedoms.[49]

A. The Supreme Court

The Supreme Court has declined to create a hierarchy of constitutional rights.[50] On two occasions, the Court has had the opportunity to review cases involving a potential conflict between the Establishment Clause and the Free Speech Clause: *Widmar v. Vincent*[51] and *Board of Education v. Mergens*.[52] In each case, however, the Court expressly declined to decide the issue.[53]

In *Widmar v. Vincent*,[54] the Court considered the constitutionality of a state university's policy of denying religious groups access to university facilities. Writing for the majority, Justice Powell rejected the university's contention that the Establishment Clause mandated its policy of exclusion.[55] Instead, Justice Powell analyzed the issue as one of free speech in a public forum and found the university's policy of exclusion to be an impermissible content-based discrimination against religious speech.[56] The Court held that a university policy allowing religious groups equal access to a public forum would not confer an imprimatur of state endorsement on the religious group.[57]

By deciding the case solely on free speech grounds, the Court expressly avoided deciding the conflict between the competing

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49. *See infra* notes 117-55 and accompanying text.

50. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (declining to favor one constitutional right over another in weighing freedom of expression against the right to a fair trial).

51. 454 U.S. 263 (1981).

52. 110 S. Ct. 2356 (1990).

53. *Widmar*, 454 U.S. at 273 n.13; *Mergens*, 110 S. Ct. at 2373. The Court did decide a series of cases upholding the right of Jehovah's Witnesses to hold services in public parks: Poulous v. New Hampshire, 345 U.S. 395 (1953); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951). However, these cases did not present outright Establishment Clause issues, and the Court decided them as public forum cases. *See* Laycock, *supra* note 34, at 12.

54. 454 U.S. 263, 265-66 (1981).

55. *Id.* at 276.

56. *Id.* at 277 (observing that the university's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards").

To exclude speech based solely on its content from a public forum, the State must demonstrate that the restriction is "necessary to serve a compelling state interest" and that the restriction is "narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

57. *Widmar*, 454 U.S. at 273.

First Amendment interests.[58] However, the Court did suggest that the asserted state interest in abiding by the Establishment Clause would not be sufficiently compelling to justify a content-based exclusion against religious speech.[59]

In the 1990 Term, the Court confronted another possible conflict between the Free Speech Clause and the Establishment Clause. *Board of Education v. Mergens*[60] involved a challenge to a high school's policy denying a student group equal access to the school's facilities for religious purposes, claiming that such denial was in violation of the Equal Access Act.[61] The Court reiterated its holding in *Widmar*, stating that allowing a religious group equal access to a public forum does not violate the Establishment Clause.[62] A policy of neutrality towards religion, the Court reasoned, demands that religious groups have the same rights in a public forum that non-religious groups have.[63] Furthermore, when a religious group operates in a public forum, a reasonable observer would not perceive the government as endorsing that activity merely because it occurred in a public forum.[64]

The Court noted that while the Establishment Clause prohibits governmental speech endorsing religion, such a situation is wholly distinct from private speech promoting religion in a public forum, the latter falling under the purview of the Free Speech Clause.[65] Consequently, the Court held that allowing religious groups equal access to open fora does not violate the Establishment Clause and, therefore, the Court was not compelled to decide the free speech

58. *Id.* at 273 n.13 ("[We need not] reach the questions that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause.").

59. *Id.* at 276.

60. 110 S. Ct. 2356 (1990).

61. *Id.* at 2371. Under the Equal Access Act, 20 U.S.C. §§ 4071-74 (1988), enacted in 1984, Congress extended the *Widmar* rationale to public secondary schools by providing that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

62. *Mergens*, 110 S. Ct. at 2370-71.

63. *Id.* at 2371.

64. *Id.* at 2372.

65. *Id.* ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

issue.[66]

The Supreme Court has yet to decide a case addressing a conflict between the Free Speech Clause and the Establishment Clause. The Court has nevertheless held that free expression in a public forum is one of the highest of constitutional values.[67] The value the Court places on freedom of expression is reflected in the requirement that the state make a showing of a compelling governmental interest before it can restrict such speech.[68] In view of the deference accorded the individual liberties enshrined in the First Amendment, the lower courts that have addressed the tension between the Free Speech Clause and the Establishment Clause have reached startling conclusions.[69]

B. The Seventh Circuit

Due to the lack of guidance from the Supreme Court, lower courts addressing the conflict between the Free Speech and Establishment Clauses have had to struggle in their attempt to arrive at an appropriate resolution of the issue. In two recent cases, *Doe v. Village of Crestwood*[70] and *Doe v. Small*,[71] the Seventh Circuit had the unenviable task of attempting to reconcile the competing interests of the Free Speech Clause and the Establishment Clause.

In *Doe v. Village of Crestwood*, the Seventh Circuit upheld a district court's order enjoining a Roman Catholic priest from celebrating mass at an Italian festival in a public park.[72] The Village of Crestwood sponsored a festival, "A Touch of Italy," which provided a broad range of activities designed to celebrate Italian culture, including a mass said in Italian.[73] The plaintiff, Doe, sued the Village, alleging that the mass violated the Establishment Clause.[74]

Writing for the court, Judge Easterbrook[75] applied Justice O'Connor's endorsement test and found that the mass was undeni-

66. *Id.* at 2373 ("[W]e do not decide respondents' claims under the Free Speech and Free Exercise Clauses.").

67. Carey v. Brown, 447 U.S. 455, 467 (1980) (observing that public picketing "has always rested on the highest rung of the hierarchy of First Amendment values").

68. *Id.* at 476.

69. *See, e.g., infra* notes 72-116 and accompanying text.

70. 917 F.2d 1476 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 8, 1991) (No. 90-1573).

71. 934 F.2d 743 (7th Cir.), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

72. *Crestwood*, 917 F.2d at 1479.

73. *Id.* at 1477.

74. *Id.*

75. Judge Flaum joined Judge Easterbrook's opinion for the court. *Id.* at 1480. Judge Coffey dissented. *Id.*

ably religious despite the secular activities surrounding it.[76] Accordingly, Judge Easterbrook conceded that the entire case turned on whether the mass was sponsored by the Village or whether it was sponsored by the Crestwood Woman's Club, a private organization.[77] Reviewing the record, the court held that the district court's conclusion that the Village was at least one of the sponsors of the mass was not clearly erroneous.[78] The majority based its holding on the fact that a Village employee had invited the priest to the festival and that a Village publication included an advertisement promoting the festival and inviting the public to the mass.[79] The court viewed this as evidence sufficient to conclude that the Village improperly endorsed religion and consequently violated the Establishment Clause.[80]

In dissent, Judge Coffey argued that a reasonable person viewing a mass at an Italian festival would not perceive the Village as endorsing the mass because Roman Catholicism is such a significant part of Italian culture.[81] Judge Coffey expressed concern over the fact that the plaintiff used the Establishment Clause not for the protection of religious liberty, as the Framers intended, but rather as a tool to suppress the religious expression of others.[82] Finally, Judge Coffey could not see how the mass in the park impaired the plaintiff's religious liberty, and therefore, he could not find a constitutional violation.[83]

In *Doe v. Small*,[84] the Seventh Circuit decided another case involving a conflict between the Establishment Clause and a private

76. *Id.* at 1479. The festival celebrating Italian culture consisted primarily of Italian sports, Italian music, and Italian food. *Id.* at 1478.

77. *Id.* at 1479.

78. *Id.* ("On this slim record, however, the district judge's conclusions cannot be found clearly erroneous.").

79. *Id.* The court found objectionable a small inset in the Village sponsored advertisement. *Id.* The inset read: "Join Us for a Traditional Italian Mass Celebration at 4 p.m. Sat., August 11th. No admittance charge for Mass." *Id.* at 1480.

80. *Id.*

81. *Id.* at 1483-87 (Coffey, J., dissenting).

82. *Id.* at 1494 (Coffey, J., dissenting). In particular, Judge Coffey noted:

> The plaintiff is concerned only with attempting to suppress the religious practices of others, not the government's suppression of his own religious liberty. The Establishment Clause of the First Amendment was never intended to be used as a sword to suppress and stifle the religious practices or beliefs of American citizens.

Id. (Coffey, J., dissenting).

83. *Id.* (Coffey, J., dissenting) ("It is impossible to impair one's religious belief without somehow preventing him from expressing it. . . . Let us not contrive ways to make it difficult for people to practice the religion of their choice.").

84. 934 F.2d 743 (7th Cir.), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

organization's right to free speech and free exercise. Doe, the plaintiff in *Small*, resided in the City of Ottawa, Illinois, and sued the City and its mayor, George Small, to enjoin a display consisting of sixteen paintings depicting the life of Jesus Christ from appearing in a public park.[85] The paintings had appeared annually in the park since 1956 as part of a Christmas display, and initially were maintained by the City.[86] In the 1970s, the City declined to put up the paintings.[87]

In 1980, a private organization, the Ottawa Jaycees, acquired the paintings and, once again, displayed them in the park at Christmastime.[88] In 1986, under Mayor Small's leadership, the Ottawa City Council passed a resolution endorsing the activities of the Ottawa Jaycees in maintaining the display.[89] The district court granted the plaintiff's motion for summary judgment and prohibited the display of the paintings in the park.[90] The Ottawa Jaycees appealed, denying that the display violated the Establishment Clause and asserting a violation of their own rights of free speech and free exercise.[91]

On appeal, the Seventh Circuit first considered the Establishment Clause issue. The court reviewed the history and purpose of the Establishment Clause,[92] and then subjected the issue of the paintings in the park to the rigor of two constitutional tests: the *Lemon* test and Justice O'Connor's endorsement test.[93] The court found that the display failed the secular purpose[94] and primary ef-

85. *Id.* at 747-52.

86. *Id.* at 747. The paintings were originally commissioned by a merchant's association in Ottawa in an effort to promote the holiday of Christmas. *Id.* With each painting measuring eight feet high, the display spanned most of the west side of the park. *Id.*

87. *Id.* at 748. The City did not show the paintings due to public criticism of the display. *Id.*

88. *Id.*

89. *Id.* at 749. The City Counsel resolved to "endorse the activities of the Ottawa Jaycees in maintaining, erecting, dismantling and storing" the pictures. *Id.* The City also granted the Jaycees permission to place permanent foundations in the park for the paintings. *Id.* at 750.

90. *Id.* at 746.

91. *Id.*

92. *Id.* at 752-57. For an examination of the origins of the Establishment Clause, see *supra* notes 11-28 and accompanying text.

93. *Small*, 934 F.2d at 757-58. For a general discussion of the *Lemon* test and Justice O'Connor's endorsement test, see *supra* notes 31-39 and accompanying text.

94. *Small*, 934 F.2d at 763. On the first prong of the *Lemon* test, the court found that the City's resolution in support of the display lacked a secular purpose. *Id.* at 760. The court rejected the Jaycees' argument that the display was a permissible accommodation of religion as part of a Christmas celebration. *Id.* at 762. Distinguishing the Ottawa display from the displays in *Lynch* and *Allegheny* where the Supreme Court found a city's display of a religious symbol permissible, *see supra* notes 40-44 and accompanying text,

fects[95] prongs of *Lemon*. The court also found that the City's past involvement with the display constituted impermissible endorsement.[96]

In its free speech analysis, the Seventh Circuit took an unprecedented approach and found that the state had a compelling interest in preserving the Establishment Clause and consequently that the state may restrict an individual's religious expression.[97] The court rejected the Jaycees' claim that the First Amendment protected private religious expression in a public forum.[98] The court then distinguished the *Small* case from the Supreme Court's decisions in *Widmar* and *Mergens* on a factual basis.[99] The court reasoned that since the state could enforce a content-based exclusion of speech in the presence of a compelling state interest, and that since the state had a compelling interest in not violating the Establishment Clause, the state could abridge the Jaycees' right to free speech.[100]

In a spirited dissent, Judge Coffey warned that the majority opinion set a dangerous precedent with the ease in which it suppressed fundamental First Amendment freedoms, namely, free

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the *Small* court found that the religious message conveyed by the display was not sufficiently neutralized by the presence of other secular symbols. *Small*, 934 F.2d at 762.

95. *Small*, 934 F.2d at 766. On the second prong of the *Lemon* test, the court continued its inquiry into the content and the context of the display. *Id.* at 764-66. Finding the content of the paintings undeniably religious, the court distinguished the paintings from the display of the creche in *Lynch* because in *Small*, the pictures depicted the life of Christ, not just his birth. *Id.* at 764.

96. *Id.* at 764. Finally, in coming to the endorsement test, the court looked to the City's past involvement with the display. The court concluded that because of the duration and regularity of the display, the display would necessarily convey a message of endorsement to a reasonable observer. *Id.* at 768.

97. *Id.* at 770 ("[T]he state may enforce a content-based exclusion of free speech in the presence of 'a compelling state interest that is narrowly drawn to achieve that end.' "). For opinions discussing free speech in a public forum, see cases cited *supra* note 53 and *infra* note 133 and accompanying text.

98. *Small*, 934 F.2d at 770-71. The court stated:

> Where private speakers desire access to a public forum, the relevant constitutional inquiry remains the same. Neither the Park's status as a public forum nor the display's sponsorship by the Jaycees, a private organization, resolves the conflict between the Establishment Clause and free speech clause in favor of the defendant.

Id. at 770.

99. *Id.* at 772. The Seventh Circuit distinguished *Small* from *Widmar* based on the fact that in *Widmar*, the religious group was not the sole group appearing in the public forum so that there was no danger that the religious group would dominate the forum. *Id.* In contrast, in *Small*, the court observed that only the Jaycees' display appeared in the park such that the danger of the appearance of endorsement was increased. *Id.* The court distinguished *Mergens* on the basis that it was decided on statutory grounds. *Id.*

100. *Id.* at 770 ("Quite simply, government has a compelling interest in complying with the constitutional requirement not to violate the Establishment Clause.").

speech and free exercise.[101] Judge Coffey first determined that the Jaycees' display of the paintings constituted private religious speech.[102] The City, he noted, expended no funds and offered no other support for the display, and the relationship between the City and the Jaycees was no different than the relationship between the City and any other private organization that sought to use the park.[103] Judge Coffey took issue with the majority's assertion that the City had sought to promote the Jaycees' display, and that therefore the City's endorsement transformed the Jaycees' expression into governmental speech.[104] Since the City provided equal access to the park, Judge Coffey noted that the majority's conclusion rested on the false assumption that the government seeks to promote all that it refuses to censor.[105]

In addition, Judge Coffey harshly criticized the majority's application of the *Lemon* test to private speech.[106] He noted that because all religious speech promotes or endorses religion, the majority opinion, taken to its logical conclusion, would effectively exclude all religious expression from public forums.[107] Furthermore, Judge Coffey found that the majority erred in its attempt to distinguish *Small* from *Widmar* and *Mergens* since in both of those cases the Supreme Court held that the government could not close a public forum to a private party's religious practices.[108]

Relying on *Widmar* and *Mergens*, Judge Coffey proceeded to apply the *Lemon* test to the specific governmental act at issue, namely, the City's policy granting the Jaycees access to the park.[109] Judge Coffey rejected the majority's assertion that permitting reli-

101. *Id.* at 792 (Coffey, J., dissenting) ("[The majority] has embarked on a journey whose end would exclude any and all religious types of expression from public forums.").

102. *Id.* at 796 (Coffey, J., dissenting).

103. *Id.* at 793-94 (Coffey, J., dissenting). Judge Coffey also noted that the paintings were accompanied by a sign in the park that read: "THIS DISPLAY HAS BEEN ERECTED AND MAINTAINED SOLELY BY THE OTTAWA JAYCEES, A PRIVATE ORGANIZATION, WITHOUT THE USE OF PUBLIC FUNDS." *Id.* at 795 (Coffey, J., dissenting).

104. *Id.* at 797 (Coffey, J., dissenting) ("When the extent of the City's involvement with the display is compiled, it is obvious that the City's actions fail to convert the Jaycees' private speech into governmental speech.").

105. *Id.* at 805, 816 (Coffey, J., dissenting).

106. *Id.* at 802-03 (Coffey, J., dissenting). Judge Coffey reasoned that the Establishment Clause applied exclusively to government action and, consequently, that the majority erred in its reliance on the *Lemon* test. *Id.* (Coffey, J., dissenting).

107. *Id.* at 801 (Coffey, J., dissenting).

108. *Id.* at 805-07 (Coffey, J., dissenting).

109. *Id.* at 812 (Coffey, J., dissenting). Not only did Judge Coffey find the City's policy of equal access permissible under the Establishment Clause, but he found that *Widmar* and *Mergens* mandated such a policy. *Id.* (Coffey, J., dissenting).

gious expression in a public forum advances or endorses religion.[110] He noted that a reasonable observer would not regard a governmental policy of equal access allowing religious speech in a public forum as an endorsement of religion.[111] Moreover, Judge Coffey argued that even if the City itself had sponsored the Jaycees' display, the surrounding holiday display was sufficient to neutralize any possibility of endorsement.[112]

Finally, Judge Coffey applied the third prong of the *Lemon* test, which prohibits excessive governmental entanglement with religion[113] and found no threat of entanglement from the Jaycees' display, or the city's policy of equal access.[114] Rather, he found excessive entanglement in the new course the majority opinion had charted, which requires the courts to decide what is permissible religious expression and what is not.[115] In conclusion, Judge Coffey accused the majority of being hostile to religion, reasoning that if the First Amendment protects hate speech and morally offensive speech, surely the First Amendment must also protect religious speech.[116]

IV. ANALYSIS

Justice Brennan once warned that the Establishment Clause should not be used as a sword to justify the repression of religion.[117] Once vaunted as the treasured shield of individual religious liberty and the guard against governmental intrusion, it seems that the day indeed has come when the Establishment Clause has become a pretext for governmental censorship of religious speech.

The analysis employed by the Seventh Circuit in addressing the conflict between the Free Speech and the Establishment Clauses seriously limits religious expression.[118] Certainly, traditional Es-

110. *Id.* at 816 (Coffey, J., dissenting).

111. *Id.* (Coffey, J., dissenting).

112. *Id.* at 817 (Coffey, J., dissenting). The paintings were part of a larger holiday display that included a fifteen foot snowman, holiday lights, candles, and bows. *Id.* at 767.

113. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

114. *Small*, 934 F.2d at 819-20 (Coffey, J., dissenting).

115. *Id.* at 819 (Coffey, J., dissenting).

116. *Id.* at 821 (Coffey, J., dissenting) ("If this decision stands, private religious speech will be banned from public forums. Rather than demonstrating neutrality toward religion, a policy of banning private religious speech from a public forum clearly demonstrates hostility.").

117. McDaniel v. Paty, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) (striking down a Tennessee statute that disqualified ministers from serving as legislators).

118. *See supra* notes 72-116 and accompanying text.

tablishment Clause analysis prohibited the government from lending support to a religious organization's religious message.[119] However, it is the government's support of the message, not the religious message itself, that violates the Establishment Clause. The analysis employed by the Seventh Circuit in *Crestwood* and *Small* extends beyond merely prohibiting state support of religious expression, and, as these cases illustrate, actually prohibits the expression itself.[120]

At issue in all the Establishment Clause cases is the question of governmental endorsement.[121] For example, in *Allegheny*, the Supreme Court found that the location of a creche on a courthouse stairway represented an impermissible governmental support of religious expression.[122] The Court, however, held only the governmental endorsement impermissible—the endorsement being simply the location of the display on the stairway.[123] The remedy in *Allegheny*, as in any case where an Establishment Clause violation occurs, was to order the state to stop endorsing the display, namely, to remove the display from the staircase.[124]

In contrast, the Seventh Circuit in both *Crestwood* and *Small* went well beyond curtailing what it perceived to be governmental endorsement of religious expression.[125] In *Small*, the court found that a city council resolution constituted endorsement, and yet, in its disposition of the case, the court went beyond attacking the state's act of endorsement and proceeded to affirm the district court's order completely banning the display from the park.[126] Similarly, in *Crestwood*, the governmental endorsement consisted of a newspaper advertisement, and yet, instead of ordering the state to stop advertising, the Seventh Circuit upheld the district court's order prohibiting the priest from saying mass in the Village

119. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

120. *See supra* notes 72-116 and accompanying text.

121. *See* cases cited *supra* notes 32, 35.

122. County of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989) ("[T]he creche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government.") (citation omitted).

123. *Id.* at 600 n.50 ("[A]ny display located there fairly may be understood to express views that receive the support and endorsement of the government . . . . The county created a visual link between itself and the creche.").

124. *Id.* at 602 ("The display of the creche in this context, therefore, must be permanently enjoined.").

125. *See supra* notes 72-116 and accompanying text.

126. Doe v. Small, 934 F.2d 743, 746 (7th Cir. 1991) ("Because the City wished to promote the religious message of the paintings by permitting their annual display in Washington Park, we affirm the judgment below.").

park.[127]

If the Seventh Circuit had followed Supreme Court Establishment Clause precedent,[128] it would have narrowed its holding to proscribing the acts of governmental endorsement. Critical in the Court's jurisprudence has been the understanding that the Establishment Clause applies only to the government.[129] Likewise, where the Court has found endorsement, it has ordered the state to cease only its endorsement.[130] The Court has never ordered individuals or private organizations to abandon their rights of free speech or free exercise under the guise of complying with the Establishment Clause. In striking disparity, however, stand the Seventh Circuit's decisions in *Crestwood* and *Small*. If the Seventh Circuit had followed Supreme Court precedent, in *Crestwood*, the court would have ordered the Village to cease advertising the mass; and in *Small*, the court would have declared the City's resolution to support the display unconstitutional.

One of the problems with the Seventh Circuit's analysis in *Crestwood* and *Small* was the court's failure to adequately recognize the significance of the public forum. In those cases in which courts have prohibited the display of religious symbols, the location of the display constituted an endorsement.[131] However, in *Small* and *Crestwood*, the issue of endorsement turned on facts wholly unrelated to the location of the display. It is well established that a

127. Doe v. Village of Crestwood, 917 F.2d 1476, 1479 (7th Cir. 1990).

128. In a long line of cases, the Supreme Court has held that the Establishment Clause forbids state endorsement or promotion of religion. *See* Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370-71 (1990); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989); Edwards v. Aguillard, 482 U.S. 578, 593 (1987); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-92 (1985); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); Engel v. Vitale, 370 U.S. 421, 436 (1962).

129. *See, e.g., Allegheny*, 492 U.S. at 600 ("But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations.").

130. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (finding that government support of the distribution of religious messages by religious organizations violates the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (striking down a Louisiana statute requiring that creationism be given equal treatment with evolution in public schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397-98 (1985) (invalidating two programs allowing use of state paid staff to provide instruction to non-public students on religious school premises because of significant risk of state sponsored indoctrination of religious beliefs); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating an Alabama moment of silence statute).

131. *See, e.g., Allegheny*, 492 U.S. at 600 n.50. ("The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.").

park is a quintessential public forum.[132] A religious display in a public park to which all citizens have equal access, because it is a public forum, does not carry the imprimatur of governmental approval that might result if the display occurred in a closed forum over which the government exercised control.[133] Instead, it is the Village's advertisement in *Crestwood* and the City's resolution in *Small* that would have qualified as impermissible endorsements of religion and thus would violate the Establishment Clause regardless of where the display or activity took place. If the mass in *Crestwood* took place in a local church, the Village's advertisement inviting the public to the mass would be no less of an endorsement because the mass was going to be held in a church rather than in a public park. Yet, in such a case, the court would be loath to issue an injunction prohibiting the mass. Rather, it would proscribe the government's act of endorsement and leave the private religious activity undisturbed.[134]

Specifically, the Supreme Court has held that private religious speech has the same rights in the public forum as non-religious speech,[135] and yet the Seventh Circuit has carved out a dangerous exception to this rule. In *Small* and *Crestwood*, the Seventh Circuit has created a double standard which affords religious speech a lesser degree of protection than non-religious speech. The apparent rationale behind these decisions is that religious speech in a public park is more susceptible to governmental regulation and

132. *See* United States v. Grace, 461 U.S. 171, 178-79 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); Amalgamated Food Employers Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968) ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely"). In Hague v. CIO, 307 U.S. 496, 515 (1939), the Court wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id.

133. *See, e.g.*, ACLU v. Village of St. Charles, 794 F.2d 265 (7th Cir. 1986) (finding that a cross erected on the roof of a municipal firehouse violated the Establishment Clause).

134. *See, e.g.*, Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980) (holding that the city could not pay the cost of building an altar for a Papal mass but that the mass could be held in the park), *cert. denied*, 451 U.S. 987 (1981); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (allowing the Pope to say mass in a public park).

135. Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370-71 (1990); Widmar v. Vincent, 454 U.S. 263, 273 (1981).

outright prohibition. Yet neither the law nor logic supports such a position. To the contrary, the Court has held that where there is equal access to a public forum, the law makes no distinction between religious and non-religious speech in that public forum.[136] However, in *Small* and *Crestwood*, but for the fact that the individual or private organization expressed a religious view, the state would not have restricted the speech of the individual or the organization. If in *Crestwood* and *Small* the religious speech had been governmental speech, then the speech should have been suppressed. In these cases, however, the government endorsed the religious speech of a private party—the government did not act on its own initiative and communicate its own religious speech.[137]

The extreme measures taken and the incongruous results reached by the Seventh Circuit in *Crestwood* and *Small* are perhaps attributable in part to the constitutional test the court employed. In both *Crestwood* and *Small*, the Seventh Circuit purported to apply Justice O'Connor's much-heralded endorsement test.[138] When it first appeared on the scene, commentators had high hopes that the endorsement test would save the *Lemon* test from a much-deserved ruin[139] and transform Establishment Clause jurisprudence into a coherent and intelligible body of law.[140] Yet, as *Crestwood* and *Small* demonstrate, the endorsement test brings with it the same sort of fact-intensive analysis that plagued the *Lemon* test.[141]

Courts engaging in the endorsement analysis have succumbed to the same picayune inquiry that characterized the approach under *Lemon* by which courts seemingly abandoned the ancient maxim:

136. *Mergens*, 110 S. Ct. at 2372; *Widmar*, 454 U.S. at 273; *see also* William P. Marshall, *Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 560 (1983) ("After *Widmar*, religious speech is speech—no more, no less.").

137. *See supra* notes 72-116 and accompanying text.

138. *Small*, 934 F.2d at 757; *Crestwood*, 917 F.2d at 1478.

139. *See supra* notes 33-34 and accompanying text for a discussion of the shortcomings of the *Lemon* test.

140. For favorable comments on the endorsement test, see 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 (1987); 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, 1051 (1986); William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); *Developments in the Law—Religion and State*, 100 HARV. L. REV. 1606, 1647 (1987); W. Scott Simpson, Comment, *Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465 (1986).

141. See sources cited *supra* note 34 for critical commentary on the *Lemon* test.

lex non curat de minimis.[142] Few things are more disconcerting than observing a court engage in such tortured analysis in which the question of constitutionality turns upon apparently trivial distinctions in location and proximity.[143] Even more puzzling is the approach that validates the opening of a session of a state legislature with a prayer lead by a chaplin hired by the legislature[144] but invalidates a religious display that appears only during holiday seasons.[145]

The endorsement test promises to perpetuate the muddled and confused doctrine that arose under the *Lemon* test. The analysis in *Crestwood* demonstrates the difficulties in discerning the limits of endorsement: the dissent argued that the presence of a multiplicity of cultural activities negated the religious effect of a Catholic mass;[146] and the majority wryly retorted that not even a herd of reindeer would negate such a distinctly religious activity.[147] Even more unusual was the exchange between the majority[148] and dissent[149] over the importance of Roman Catholicism to an accurate portrayal of Italian culture. Thus, in practice, the endorsement turns on the same trivial distinctions that determined the outcome under *Lemon*, and consequently, the endorsement test does not

142. "The law cares not about trifles." BLACK'S LAW DICTIONARY 921 (6th ed. 1990).

143. Justice Kennedy has referred to Justice O'Connor's endorsement test as a "jurisprudence of minutiae." County of Allegheny v. ACLU, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting).

144. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983). Chief Justice Burger wrote for the Court in *Marsh*: "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

The question the Court would now ask is not whether opening a legislative session with a prayer "establishes" a religion, but rather whether such a practice "endorses" religion or more precisely would a reasonable person perceive such a practice to "endorse" religion.

145. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989).

146. Doe v. Village of Crestwood, 917 F.2d 1476, 1485 (7th Cir. 1990) (Coffey, J., dissenting).

147. *Id.* at 1478-79 ("Even a herd of reindeer and a forest of jumbo candy canes could not neuter a mass.").

148. Judge Easterbrook wrote for the court: "Although the seat of the Roman Catholic Church is in Rome, Christianity is not distinctly Italian, and homage to Italian culture and food does not imply religious observance." *Id.* at 1479.

149. In dissent, Judge Coffey countered: "In view of the pervasive role of Roman Catholicism in Italian culture, a presentation of Italian culture that is purely secular, according to a *reasonable person*, would be considered most inaccurate and inappropriate." *Id.* at 1483 (Coffey, J., dissenting).

hold out much hope for those who desire a consistent body of law under the Establishment Clause.

Furthermore, the endorsement test seems to distract the court's attention from the primary inquiry under the Establishment Clause, namely, an infringement on religious liberty.[150] Under the endorsement test, as under *Lemon*, courts debate the theological implications of religious symbols and sacred rituals and ultimately decide what religious expression is proper. Yet such an inquiry will never yield a consistent standard; rather, it will result in continued piecemeal litigation with all the inconsistencies that such an approach entails. In seeking to arrive at an appropriate standard to adjudicate Establishment Clause cases, perhaps a more coherent approach would focus on the relation between the government's act of endorsement and the alleged harm to the plaintiff's liberty interest instead of the intense analysis of the content of the display.

The leading proponents of the endorsement test argue that endorsement cuts to the very heart of the command of the Establishment Clause.[151] Yet, history and practice say otherwise. Instances of state endorsement of religion pervade many areas of civic life. Certainly the phrase "In God We Trust" on the nation's currency and the practice of taking oaths of office on a Bible endorse religion in the common sense of the word.[152] These practices place the prestige of the federal government behind distinctly and undeniably religious practices.[153] Consistency and justice under the endorsement analysis would require the government to expunge these favorable references to religion from the official vocabulary of the state.[154] Furthermore, while the exclusive focus on governmental endorsement concededly eradicates any governmental favoritism of

150. *See* sources cited *supra* note 27.

151. *See* County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) ("As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause . . . ."); *see also* Laycock, *supra* note 34, at 9-13 (discussing the endorsement test and the concept of government neutrality in First Amendment jurisprudence).

152. The Oxford English Dictionary defines "endorse" as: "To confirm, sanction, countenance, or vouch for (statements, opinion, acts, etc.; occasionally persons), as by an endorsement." V OXFORD ENGLISH DICTIONARY 233 (2d ed. 1989).

153. In *Allegheny*, Justice Kennedy observed: "Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past." *Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring and dissenting).

154. Professor Laycock, a leading separationist, argues such traditional acknowledgements of religion that pepper the history of the Republic violate the Establishment Clause and its underlying principles: "The government should not put 'In God We Trust' on coins; it should not open court sessions with 'God save the United States and this honora-

religion, it fails to address any negative implications of the Establishment Clause. As history demonstrates, the threat to religious liberty has come just as often from governmental disfavor and persecution of religion as from governmental endorsement of religion.[155]

V. PROPOSAL

When the state endorses or sponsors the religious activity of an individual, the dynamic of the Establishment Clause analysis must change. The paradigmatic case in which the court considers a challenge to a state act shifts to one in which the court must also consider the competing interests of the individual. The court cannot hold the individual and the government to the same standard: the government must comply with the Establishment Clause, while conversely, the individual must be free from having to submit to any such burden by virtue of the guarantees of free speech and free exercise in the First Amendment. The court cannot excuse the government from the command of the Establishment Clause. Neither can the court deprive the individual of his fundamental rights of free exercise and free speech. Courts, therefore, must draw a line between the state's interest in not violating the Establishment Clause and the rights of the individual; and the line logically falls between the state's impermissible act of endorsement and the individual's liberty interest. Under such analysis, then, courts should identify the act of endorsement with enough specificity to enable it to order that it cease, while leaving the individual's right to free expression unharmed. Such an approach would ensure that courts will not jettison an individual's religious liberty in a shotgun approach to First Amendment jurisprudence.

On the broader question of what constitutional test to employ when deciding an Establishment Clause issue, perhaps the standard proposed by Justice Kennedy holds the most promise for delivering the Court's Establishment Clause jurisprudence from its

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ble Court'; and it should not name a city or a naval vessel for the Body of Christ or the Queen of the Angels." Laycock, *supra* note 34, at 8.

155. Consider for example the plight of the Church of Jesus Christ of Latter Day Saints (the Mormons) in the late nineteenth century. NOONAN, *supra* note 18, at 194-207. From the 1860s until the end of the century, Congress passed legislation to combat the growth of the Mormon church. *Id.* at 200. While debating the Tucker Act, an act declaring forfeit the property of the Mormon Church, one Congressman supporting the Act stated: "The bill strikes at the very root of the church. It absolutely repeals the charter which gave it existence." 18 CONG. REC. 592 (Jan. 12, 1887) (statement of Ezra B. Taylor), *reprinted in* NOONAN, *supra* note 18, at 201.

current muddled state.[156] Justice Kennedy, along with a prominent commentator[157] and several respected Circuit Court of Appeals judges,[158] advocates the adoption of a "proselytization" or "coercion" test. The Framers intended the Bill of Rights to protect individual liberty, and they intended the First Amendment to protect religious liberty by prohibiting the government from interfering with religion, compelling observance of religion, or exacting support for religion. Justice Kennedy has noted that absent coercion, the risk of impairing religious liberty is minimal.[159] Thus, a violation of the Establishment Clause would turn on a showing of coercion.

Although defining the appropriate limits of coercion may present some difficulties, the coercion test holds promise for restoring rationality to Establishment Clause jurisprudence. Under the coercion analysis, the court would focus on the impact the challenged practice has on the religious liberty of the plaintiff. If a governmental act does not impair an individual's religious liberty, that act should not run afoul of the Establishment Clause. While the coercion standard may not be a panacea, it does promise to focus the inquiry on the central concern of the Establishment Clause, namely, the protection of religious liberty.

VI. CONCLUSION

A concern for religious liberty and the rights of the individual demands that all of the rights guaranteed in the First Amendment

156. In his concurring opinion in *Allegheny*, Justice Kennedy offered his version of the coercion test:

> [I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts to in fact proselytizing.

Allegheny, 492 U.S. at 659-60 (Kennedy, J., concurring and dissenting).

157. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938 (1986) ("It is difficult to see . . . how an establishment could exist in the absence of some form of coercion.").

158. In the Seventh Circuit, both Judges Coffey and Easterbrook have expressed favorable views of the coercion standard. *See* Doe v. Small, 934 F.2d 743, 792 n.1 (7th Cir. 1991) (Coffey, J., dissenting) ("Without such coercion, I doubt that there can be governmental establishment of religion."); Mather v. Village of Mundelein, 864 F.2d 1291, 1298, (7th Cir. 1989) (Easterbrook, J., concurring) ("[W]hen the government speaks but does not compel others to worship or penalize those with different views, there is no serious threat to religious liberty.").

159. *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring and dissenting) ("Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.").

be given full and equal consideration. The First Amendment confers on religious speech the same protection that it confers on other forms of speech. The Establishment Clause should promote religious liberty and thwart efforts by the government to interfere with religion, not facilitate those efforts.

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