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County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test

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Over forty years ago the United States Supreme Court announced in Everson v. Board of Education\(^1\) that the first amendment's establishment clause\(^2\) was “intended to erect 'a wall of separation between church and State.'”\(^3\) The Court concluded in the same case that the amendment also commands that a state “cannot hamper its citizens in the free exercise of their own religion.”\(^4\) During the past four decades, the Court has struggled to accommodate these countervailing values, often choosing one over the other.\(^5\) The Court has developed various tests to assist in its interpretation of establishment clause cases. Yet no single test or common terminology has dominated the Court's analyses. To the contrary, the Court repeatedly has emphasized its “unwillingness to be confined to any single test or criterion in this sensitive area.”\(^6\)

County of Allegheny v. ACLU\(^7\) represents the Court's most recent effort to formulate a feasible establishment clause doctrine. While several recent establishment clause opinions reflect consideration of Justice O'Connor's "endorsement test," Allegheny is the first time the Court has adopted it formally. This Note traces the Court's struggle to develop a workable establishment clause doctrine and discusses the endorsement test, culminating with its adoption in Allegheny. The Note concludes that the endorsement test provides a sound analytical framework for achieving consistency in future establishment clause cases.

During the 1986 holiday season Allegheny County, Pennsylvania permitted two religious groups to display holiday scenes in downtown Pittsburgh.\(^8\) A Roman Catholic group provided a crèche, a depiction of the manger scene in Bethlehem shortly after the birth of Jesus Christ.\(^9\) The crèche was displayed on the...
The grand staircase of the Allegheny County Courthouse. The Courthouse is owned by Allegheny County and is its seat of government.

The creche included representations of the infant Jesus, Mary, Joseph, shepherds, farm animals, wise men, and an angel bearing a banner proclaiming "Gloria in Excelsis Deo!" Attached to a fence surrounding the scene was a plaque stating: "This Display Donated by the Holy Name Society." Poinsettias and a small evergreen tree donated by the county completed the scene. No other figures or decorations appeared on the grand staircase. The county used the crèche in its annual Christmas carol program, which it dedicated to world peace.

The second display, located in the entrance of the City-County Building, included an eighteen-foot Chanukah menorah owned by Chabad, a Jewish group, and erected and maintained by the city. Adjacent to the menorah was a forty-five foot Christmas tree also provided by the city. A sign at the foot of the tree bore the Mayor's name and read "Salute to Liberty."

The Greater Pittsburgh Chapter of the American Civil Liberties Union (ACLU) filed suit against the county and the city, seeking to enjoin the displays of the crèche and menorah. The ACLU claimed that each of the displays violated the establishment clause of the first amendment. The United States District Court for the Western District of Pennsylvania denied the ACLU's request for a permanent injunction, concluding that the "displays had . . . secular purpose[s]" and "did not create an excessive entanglement of government with . . . religion."
The United States Court of Appeals for the Third Circuit reversed, holding that the crèche and the menorah had the impermissible effect of endorsing religion. The court noted that each display was “located at or in a public building devoted to core functions of government” and further observed that neither display had been “subsumed by a larger display of non-religious items.”

The United States Supreme Court affirmed the judgment of the court of appeals regarding the creche, but reversed its judgment regarding the menorah. The plurality, speaking through Justice Blackmun, adopted an approach suggested by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*, and concluded that its present task in *Allegheny* was to “determine whether the display of the creche and the menorah, in their respective ‘particular physical settings,’ ha[d] the effect of endorsing or disapproving religious beliefs.”

With respect to the crèche display, the Court held that by permitting the display the county sent an unmistakable message to the public that it supported and promoted the crèche's religious message. Justice Blackmun observed that the words “Gloria in Excelsis Deo,” the absence of nonreligious items, and the location of the display had the combined effect of “endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.” As for the menorah in the second display, however, the Court held that the display did not have the effect of endorsing religion. Recognizing that the tree and the menorah represented both Christmas and Chanukah, Justice Blackmun framed the relevant question as “whether the combined display of the tree, the sign, and the menorah ha[d] the effect of endorsing both Christian and Jewish faiths.” The Court concluded that the display did not have this effect; rather, the display “simply recognize[d] that both Christmas and Chanukah are part of the same winter-

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27. *Allegheny*, 109 S. Ct. at 3093 (plurality opinion).


30. *Id.* at 3104 (plurality opinion).

31. *Id.* at 3105 (plurality opinion).

32. *Id.* at 3115 (plurality opinion).

33. *Id.* at 3113 (plurality opinion). Justice O'Connor disagreed with the plurality's application of the endorsement test with respect to the menorah. *Id.* at 3122 (O'Connor, J., concurring). In Justice O'Connor's view, Justice Blackmun's framing of the issue disregarded "the fact that the Christmas tree is a predominantly secular symbol and, more significantly, obscures the religious nature of the menorah and the holiday of Chanukah." *Id.* (O'Connor, J., concurring). The relevant question, she concluded, was whether the menorah display, "the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty[,] sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs." *Id.* (O'Connor, J., concurring).
holiday season, which has attained a secular status in our society." 34

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, wrote a bitter dissent, 35 arguing that the majority's view of the establishment clause reflected an unjustified hostility toward religion. 36 Citing a long line of accommodationist 37 cases, Justice Kennedy argued that a government's display of a religious symbol is constitutional unless it "advances religion to such a degree that it actually 'establishes a [state] religion or religious faith, or tends to do so.'" 38 Mere governmental accommodation of an existing symbol, he continued, does not violate the establishment clause "unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." 39 Applying this standard to the crèche and menorah, Justice Kennedy concluded that, by permitting the displays, "the city and county had sought to do no more than 'celebrate the season,' and to acknowledge . . . the historical background and the religious as well as secular nature of the Chanukah and Christmas holidays." 40

34. Id. at 3113 (plurality opinion). Ironically, the plurality seems to have misapplied Justice O'Connor's test. See supra note 33 (suggesting that the plurality's first mistake was framing the issue incorrectly). As Justice O'Connor explained:

Justice Blackmun's opinion acknowledges that a Christmas tree alone conveys no endorsement of Christian beliefs, it formulates the question posed by Pittsburgh's combined display of the tree and the menorah as whether the display "has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society." . . . The opinion is correct to recognize that the religious holiday of Chanukah has historical and cultural as well as religious dimensions, and that there may be certain "secular aspects" to the holiday. But that is not to conclude . . . that Chanukah has become a "secular holiday" in our society . . . Under Justice Blackmun's view, however, the menorah "has been relegated to the role of a neutral harbinger of the holiday season," almost devoid of any religious significance. Allegheny, 109 S. Ct. at 3122 (1989) (O'Connor, J., concurring) (citations omitted).

35. Allegheny, 109 S. Ct. at 3134 (Kennedy, J., dissenting). The dissent concurred in judgment with respect to the menorah. Id. (Kennedy, J., dissenting).

36. Id. (Kennedy, J., dissenting).

37. The accommodationist approach prohibits governmental support of one religious sect over another, but permits neutral government support of religion as a general institution. See Zorach v. Clausen, 343 U.S. 306, 313-14 (1952) (upholding state law permitting public schools to release students during school hours to attend off-campus religious instruction); Comment, Constitutional Law—American Civil Liberties Union v. City of Birmingham: Establishment Clause Scrutiny of a Nativity Scene Display, 62 Notre Dame L. Rev. 114, 117-18 (1986); infra note 46 (comparing accommodationist and absolutist approaches).

38. Allegheny, 109 S. Ct. at 3136 (Kennedy, J., dissenting). In determining whether an impermissible degree of religious advancement was present in Allegheny, Justice Kennedy cited other types of church-state contacts that the Court has allowed in the past. Id. at 3137-38 (Kennedy, J., dissenting). For example, in Lynch v. Donnelly, 465 U.S. 668, 683 (1984), the Court upheld the display of a crèche despite the fact that "the display advance[d] religion in a sense." The Court reasoned that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Id. (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)). Likewise in Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld the legislative practice of employing a chaplain because "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." Marsh, 463 U.S. at 791 (citations omitted).


40. Id. (Kennedy, J., dissenting). Justice Kennedy concluded that the government's interest in "celebrat[ing] the season" fell "well within the tradition of government accommodation and ac-
Over the last four decades, the Court repeatedly has been asked to define the limits of the establishment clause. The Court first examined the establishment clause in *Everson v. Board of Education.* In *Everson* the Court evaluated a New Jersey statute authorizing the use of tax proceeds to pay for transportation of students attending parochial schools. Justice Black, writing for the majority, boldly pronounced that "[n]o tax in any amount, large or small, can be levied to support any religious activities." Nevertheless, the Court upheld the statute. Noting that the state did not contribute money directly to the schools, the majority concluded that the legislation merely provided a "general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The Court's holding and reasoning in *Everson* reflected the competing tensions inherent in the establishment clause and manifested in the absolutist and accommodationist approaches. On one hand, Justice Black declared that

knowledge of religion that has marked our history from the beginning." *Id.* (Kennedy, J., dissenting).

41. 330 U.S. 1 (1947). Although a handful of earlier Supreme Court cases indirectly touched upon establishment clause issues, *Everson* is the foundation for contemporary analysis of the clause. See Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor,* 62 Notre Dame Law Rev. 151, 152 n.4 (1987); see, e.g., Cochrane v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Arver v. United States, 245 U.S. 366 (1918). It was not until 1940, in *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), that the Supreme Court held that the first amendment is applicable to the states.

42. *Everson,* 330 U.S. at 3.

43. *Id.* at 16. The full text of Justice Black's pronouncement is as follows:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force 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 disbelief, 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 "wall of separation between church and State." *Id.* at 15-16. Justice Black's words represent the absolutist position. Additional cases reflecting the absolutist position include *Abington School Dist. v. Schempp,* 374 U.S. 203, 205 (1963) (invalidating state law requiring Bible reading in public schools); *Engel v. Vitale,* 370 U.S. 421, 424 (1962) (invalidating state law prescribing official prayer in public schools).

44. *Everson,* 330 U.S. at 18. The Court noted the conflicting tensions underlying its analysis: New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. . . . [However], we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of general program under which it pays the fares of pupils attending public and other schools. *Id.* at 16-17. In his dissent, Justice Jackson compared the majority's holding to Byron's Julia who, "whispering 'I will ne'er consent,'—consented." *Id.* at 19 (Jackson, J., dissenting).

45. *Id.* at 18.

46. The establishment clause dichotomy consists of the absolutist and accommodationist approaches. The absolutist approach is associated with the "wall of separation" metaphor, and de-
"[t]he First Amendment has erected a wall between church and state. That wall must be high and impregnable." On the other hand, he continued, the amendment also "commands that [the state] cannot hamper its citizens in the free exercise of their own religion."

Five years after Everson, the Court adopted an accommodationist approach in Zorach v. Clauson. Zorach addressed the constitutionality of a New York City program permitting public schools to release students during the day to attend off-campus religious instruction sponsored by local religious groups. Noting that the first amendment requires the "complete and unequivocal" separation of church and state, the Court nevertheless upheld the program. Tempering the absolutist approach with a philosophy of accommodation, the majority emphasized that "separation" does not require the state to be suspicious, hostile, or unfriendly toward religion. The Court concluded that by encouraging theological instruction and cooperating with religious authorities, the state had followed the "best of our traditions" by showing "respect for the religious nature of our people."

In the decade following Zorach, the Supreme Court shifted its position and adopted an absolutist approach. In Lemon v. Kurtzman the Court used absolutist policies to articulate a three-pronged test for establishment clause violations. Under the Lemon test a statute or government practice will survive an establishment clause challenge only if it meets the following requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religions...; finally, the statute must not foster 'an excessive government entanglement with religion.'" The Lemon Court applied its newly formulated test to Rhode Island and Pennsylvania statutes, each of which provided state funds to private elementary schools. The Rhode Island statute provided a pay supplement for teachers of nonsecular subjects in all private schools. The Pennsylvania statute mandated complete separation between church and state. The accommodationist approach prohibits government support of one religious sect over another, but permits neutral government support of religion as a general institution. See Comment, supra note 37, at 117-22 (tracing history of Court's establishment decisions, emphasizing shift between absolutist and accommodationist approaches).

47. Everson, 330 U.S. at 18.
48. Id. at 16.
50. Id. at 308.
51. Id. at 312.
52. Id. at 315.
53. Id. at 312.
54. Id. at 314.
55. See supra text accompanying note 47 (defining the absolutist approach).
56. 403 U.S. 602 (1971).
57. Id. at 612-13.
58. Id. (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
59. Id. at 606.
60. Id. at 607. The Rhode Island Salary Supplement Act rested on "the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers." Id.
ute authorized direct aid to private schools for teaching secular subjects.\textsuperscript{61} Applying the first prong of the new test, the Court found that because each statute intended to enhance the quality of secular education, each had a secular purpose.\textsuperscript{62} The Court declined to decide whether either statute had a primary effect of advancing or inhibiting religion, choosing instead to base its decision on the entanglement prong, the very existence of which reflects a concern with absolutist values.\textsuperscript{63} Noting that the government support authorized by the statutes necessarily required substantial state supervision,\textsuperscript{64} the Court held that each statute fostered an impermissible degree of entanglement between government and religion.\textsuperscript{65} Therefore, the Court concluded, each statute violated the establishment clause.\textsuperscript{66}

Twelve years later in \textit{Marsh v. Chambers}\textsuperscript{67} the Supreme Court once again shifted to an accommodationist approach. \textit{Marsh} involved the Nebraska Legislature's practice of opening each session with a prayer by a state-paid chaplain.\textsuperscript{68} Without explanation, the \textit{Marsh} Court chose not to apply the \textit{Lemon} test.\textsuperscript{69} Justice Burger, writing for the majority, held that the practice of legislative prayer did not violate the establishment clause.\textsuperscript{70} He concluded that,

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[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. . . . It is not, in these circumstances, an "establishment" of religion or a step toward establishment.\textsuperscript{71}
\end{quote}

By 1984 the Supreme Court had yet to formulate a comprehensive and cohesive test to resolve establishment clause inquiries. The Court's treatment of establishment clause cases during the previous four decades had been characterized by dramatic shifts between inconsistent analyses.\textsuperscript{72} Although the \textit{Lemon}
test initially offered hope for consistency in these cases, the Court wavered in its application. The Court sometimes stated that the Lemon test was indispensable;\(^ {73}\) at other times that it was a helpful signpost;\(^ {74}\) and, at still other times, the Court reserved the right to disregard it altogether.\(^ {75}\)

In 1984 the Court for the first time considered the constitutionality of a state-sponsored nativity scene in \textit{Lynch v. Donnelly}.\(^ {76}\) The seasonal display, owned and erected by the city of Pawtucket, Rhode Island, was located in a park owned by a nonprofit organization and located in the center of a shopping district in Pawtucket. It included many figures and decorations normally associated with the Christmas season.\(^ {77}\) In addition to a traditional crèche, the display included: a Santa Claus house, reindeer, Santa’s sleigh, a Christmas tree, carolers, a clown, and a large banner reading “SEASONS GREETINGS.”\(^ {78}\) Relying on Zorach and Marsh, the Court expressly rejected the absolutist concept of a “wall of separation” between church and state.\(^ {79}\) To Chief Justice Burger and the majority, the pertinent question was not whether governmental conduct confers benefits or gives special recognition to religion—as an absolutist approach would dictate—but whether such conduct “establishes a religion or religious faith, or tends to do so.”\(^ {80}\) The \textit{Lynch} Court applied the first prong of the Lemon test and determined that the crèche had the secular purpose of depicting the historical origins of the holiday.\(^ {81}\) It then applied Lemon’s second prong to determine whether the crèche had the primary effect of conferring a substantial benefit on religion in general or upon Christianity in particular.\(^ {82}\)

\(^{73}\) See Stone v. Graham, 449 U.S. 39 (1980) (striking down Kentucky statute requiring display of the Ten Commandments in public school classrooms); see also Marshall, supra note 4, at 497 (“[A]t... times the Court has held that [the Lemon test] must be rigorously applied.”).

\(^{74}\) See Hunt v. McNair, 413 U.S. 734, 741 (1973).

\(^{75}\) See Larson v. Valente, 456 U.S. 228, 252 (1982); see also supra notes 67-71 and accompanying text (Marsh Court ignored Lemon test and instead upheld practice of legislative prayer as societal tradition).


\(^{77}\) \textit{Id.} at 671.

\(^{78}\) \textit{Id.}

\(^{79}\) \textit{Id.} at 672-78. The Constitution, in the \textit{Lynch} majority’s view, does not require complete separation between church and state; to the contrary, “it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any... [H]ostility would bring us into ‘war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.’” \textit{Id.} at 673 (quoting McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948)). The Court noted further that, “[i]n [the] modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.” \textit{Id.} at 678.

\(^{80}\) \textit{Id.} at 678.

\(^{81}\) \textit{Id.} at 681. The Supreme Court held that “the district court erred by focusing almost exclusively on the crèche.” \textit{Id.} at 680. In contrast, the Supreme Court focused its inquiry on the crèche in the context of the Christmas holiday season. \textit{Id.} at 679-80. Thus, the crèche served the secular purpose of allowing the city to celebrate the traditions and historical origins of Christmas. \textit{Id.} at 680.

\(^{82}\) \textit{Id.} at 681-82.
The majority held that inclusion of the crèche in the display was no more an "advancement or endorsement of religion" than other practices the Court had recognized in the past. Finally, turning to the third prong of Lemon, the majority held that the crèche had not created excessive administrative entanglement between church and state. Consequently, the Court held that the display was constitutional.

In her concurrence in Lynch, Justice O'Connor presented her "endorsement test" for the first time. This test, she explained, clarified the Lemon test by modifying the "purpose" and "effect" prongs. Under the endorsement test, a government practice must satisfy both prongs of a two-step inquiry in order to be constitutional. The first inquiry, analogous to the purpose prong of the Lemon test, focuses on the subjective intent of the government practice and determines "whether the government intends to convey a message of endorsement or disapproval of religion." Applying this standard to the Lynch crèche, Justice O'Connor concluded that the city of Pawtucket did not "intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions." She reasoned that

[the evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have

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83. Id. at 681-83. Chief Justice Burger stated:

The Court has made it abundantly clear ... that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in government supported museums.

Id. at 683 (citations omitted); see also Marsh v. Chambers, 463 U.S. 783, 786 (1983) (upholding tradition of legislative prayer); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-67 (1976) (plurality opinion) (upholding noncategorical grants to church-sponsored colleges and universities); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (upholding federal grants for college buildings at church-sponsored institutions of higher education combining secular and religious education); Zorach v. Clauson, 343 U.S. 306, 315 (1952) (upholding school time release program for religious training); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (allowing expenditure of public funds for transportation of students to parochial schools).

85. Id. at 685.
86. Id. at 687 (O'Connor, J., concurring).
87. Id. at 691 (O'Connor, J., concurring); see supra notes 56-66, and accompanying text (discussing the Lemon test).
88. Lynch, 465 U.S. at 690 (O'Connor, J., concurring). An affirmative answer to either prong results in an establishment clause violation. Id. (O'Connor, J., concurring). The fact that a practice does not violate Justice O'Connor's test does not foreclose the possibility that government practice may still be declared unconstitutional for excessive entanglement between church and state. As Justice O'Connor recognized in Lynch, "Government can run afoul of [the establishment clause] in two principal ways. One is excessive entanglement with religious institutions .... The second and more direct infringement is endorsement or disapproval of religion." Id. at 687-688 (O'Connor, J., concurring). The endorsement test concentrates on the second principal infringement and leaves the entanglement prong to the Lemon analysis.

89. Id. at 691 (O'Connor, J., concurring).
90. Id. (O'Connor, J., concurring).
The second inquiry of the endorsement test, analogous to the Lemon test’s effect prong, focuses on the objective effect of the government practice and determines whether the governmental practice actually conveys a message of governmental endorsement or disapproval of religion. As Justice O’Connor explained, the effect prong of the Lemon test should not be interpreted to require “invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.” “What is crucial,” she concluded, “is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.” In making this determination, she continued, the “government practice must be judged in its unique circumstances” to ascertain “whether it constitutes an endorsement or disapproval of religion.” Applying her new test to the facts of Lynch, Justice O’Connor concluded that the crèche display did not actually convey the message that the Pawtucket government “endorse[d] the Christian beliefs represented by the crèche.”

Justice O’Connor took advantage of an opportunity to refine her endorsement test in her concurring opinion in Wallace v. Jaffree. In Wallace the Court addressed the question whether an Alabama statute authorizing a moment of silence for “meditation or voluntary prayer,” violated the establishment clause. Returning to an absolutist position, a majority of the Court applied the purpose prong of the Lemon test to the Alabama statute. Justice Stevens, writing for the majority, adopted Justice O’Connor’s endorsement terminology, framing the appropriate question as “whether [the] government’s actual purpose...
is to endorse or disapprove of religion."\textsuperscript{99} "Whenever the State itself speaks on a religious subject," the Court concluded, "one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'"\textsuperscript{100} The Court then examined the legislative history of the statute and determined that its purpose was to reinstitute voluntary prayer in public schools.\textsuperscript{101} The Court held that such a purpose clearly endorsed religion and that, therefore, the Alabama statute violated the first amendment.\textsuperscript{102}

In her concurring opinion, Justice O'Connor expounded upon the endorsement principles she had introduced in \textit{Lynch}.\textsuperscript{103} In her view, the crucial issue was whether Alabama's moment of silence statute embodied an "impermissible endorsement of prayer in public schools."\textsuperscript{104} As her \textit{Lynch} concurrence indicated, the resolution of this issue involves a two-part scrutiny.\textsuperscript{105} First, the Court must inquire into the legislature's intent in enacting the statute; second, it must determine the statute's actual effect.\textsuperscript{106} With respect to the first requirement, Justice O'Connor stated that the inquiry into the purpose of the moment of silence law should be deferential and limited.\textsuperscript{107} Turning to the second re-

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  \item 99. \textit{Wallace}, 472 U.S. at 56 (quoting \textit{Lynch}, 465 U.S. at 690 (O'Connor, J., concurring)). Although the Court borrowed Justice O'Connor's endorsement terminology from her \textit{Lynch} concurrence, it did not adopt her test. \textit{See id.} To the contrary, the majority reaffirmed the \textit{Lemon} test as a basis of establishment clause inquiry. \textit{Id.} at 55-56. The Court did, however, use Justice O'Connor's language to clarify the purpose prong of the \textit{Lemon} test. \textit{See id.} at 56. Nevertheless, it fell short of adopting the endorsement test because it failed to address Justice O'Connor's second inquiry—whether, irrespective of the government's actual purpose, the practice actually conveys a message of endorsement or disapproval. \textit{See \textit{Lynch}, 465 U.S. at 690 (O'Connor, J., concurring)}.
  \item 100. \textit{Wallace}, 472 U.S. at 60-61.
  \item 101. \textit{Id.} at 56-57. "The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." \textit{Id.} Senator Holmes later stated that he did not have any other purpose for introducing the bill. \textit{Id.} at 57. The State failed to present any evidence of a secular purpose. \textit{Id.}
  \item 102. \textit{Id.} at 61.
  \item 103. \textit{See supra} notes 86-96 and accompanying text. Justice O'Connor noted that the \textit{Lemon} test has proved problematic. \textit{Wallace}, 472 U.S. at 68 (O'Connor, J., concurring). Yet she was unwilling to abandon the test in its entirety. \textit{Id.} (O'Connor, J., concurring). Rather, she stated, [\textit{The standards announced in \textit{Lemon} should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," to be followed or ignored in a particular case as our predilections may dictate.} \textit{Id.} at 68-69 (O'Connor, J., concurring) (citations omitted).
  \item 104. \textit{Wallace}, 472 U.S. at 70 (O'Connor, J., concurring). Justice O'Connor phrased the issue more narrowly,
    \begin{quote}
      The crucial question is whether the State has conveyed or attempted to convey the message that the children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires the courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.
    \end{quote}
\textit{Id.} at 73-74 (O'Connor, J., concurring).
  \item 105. \textit{See supra} notes 86-96 and accompanying text.
  \item 106. \textit{Id.}
  \item 107. \textit{Wallace}, 472 U.S. at 74. \textit{See also} \textit{Everson v. Board of Educ.}, 330 U.S. 1, 6 (1974) (courts must exercise "the most extreme caution" in assessing whether a state statute has proper public purpose); McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring) (a court has no right to psychoanalyze the legislature when determining the intent of the government).
\end{itemize}
requirement, Justice O'Connor presented the “objective observer” concept. The relevant issue,” she concluded, “is whether an objective observer acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.” The courts, Justice O'Connor continued, should assume that this “objective observer” is “acquainted with the Free Exercise Clause and the values it promotes.” Applying these principles to the facts, Justice O'Connor would have held that, through the moment of silence statute, the Alabama legislature had intended to endorse prayer in public schools. She further concluded that the message actually conveyed to the objective observer was “approval of the child who select[ed] prayer over other alternatives during a moment of silence.” Thus, Justice O'Connor concluded, the Alabama Code did more than permit prayer during a moment of silence; “[i]t endorse[d] the decision to pray during a moment of silence, and accordingly sponsor[ed] a religious exercise.”

In Allegheny the Court expressly adopted Justice O'Connor's endorsement test. Unlike the Court's reasoning in Wallace, the Allegheny Court focused on the effect of the government practice. The effect of the display, the Court noted, “depends upon the message that the government practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.’ The answer to this question, the plurality continued, necessarily depends upon the context in which the display appears. Thus, the Court concluded that the proper question was whether the displays of the crèche and menorah, “in their respective ‘particular settings,’” had the effect of endorsing or disapproving religious beliefs.” With respect to the crèche, the Court concluded that Allegheny County, by permitting the display, had sent the impermissible message to the viewers that it supported and promoted the Christian faith. In contrast, the Court found that the display of the menorah did not represent the

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108. See Wallace, 472 U.S. at 76 (O'Connor, J., concurring). O'Connor premised the "objective observer" concept on the belief that the effect of a statute or government practice is not entirely a question of fact:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an individual message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.


109. *Id.* (O'Connor, J., concurring).

110. *Id.* at 83 (O'Connor, J., concurring).

111. *Id.* at 76 (O'Connor, J., concurring).

112. *Id.* at 78 (O'Connor, J., concurring). In light of Justice O'Connor's determination that the state intended to convey a message of endorsement, any further scrutiny is unnecessary, as a "yes" to either inquiry constitutes a violation of the establishment clause. *Id.* at 78 (O'Connor, J., concurring).

113. *Id.* at 78-79 (O'Connor, J., concurring).

114. *Allegheny*, 109 S. Ct. at 3102 (plurality opinion).

115. *Id.* (plurality opinion).

116. *Id.* (plurality opinion).

117. *Id.* at 3104 (plurality opinion). ("by permitting the 'display of the crèche in its particular physical setting,' the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message").
The distinguishing factor between the crèche and menorah displays was the context in which each was presented. The Court concluded that the display of the menorah, unlike the crèche display, simply represented a recognition of cultural diversity: "the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporary alternative tradition."

The Allegheny decision may be insignificant. After all, the Supreme Court's struggle to formulate and apply a cohesive establishment doctrine over the years has achieved little success. As a result, establishment precedent is merely a series of confusing and seemingly unconnected decisions. In this light, Allegheny may represent no more than an extension of the Court's miserable record in the establishment context and the endorsement test may prove as ephemeral as other previously dominant tests. The logical conclusion is that Allegheny will be an isolated decision that will affect subsequent cases only sporadically.

A variation of this argument contends that adoption of the endorsement test in Allegheny has more to do with results than with analyses. Thus, the Court will apply the endorsement test when necessary to reach an intended result, but will discard it when its application is not helpful. Although the
endorsement test was adopted by a majority, the Court failed to agree on its application.\textsuperscript{127} This lack of consensus suggests that the Court may have as much difficulty applying the endorsement test as it did applying the Lemon test.\textsuperscript{128}

Notwithstanding the above caveat, Allegheny potentially represents more than a mere continuation of the Court’s erratic record in the establishment clause area. First, Allegheny marks the Court’s first express adoption of the endorsement test. By all accounts, Lynch should have controlled in Allegheny; instead, the Court rejected Lynch in favor of Justice O’Connor’s endorsement test. Second, Allegheny marks the Court’s first use of the endorsement concept to uphold a governmental practice; in previous decisions the Court sometimes used the endorsement concept as an additional method for invalidating practices,\textsuperscript{129} but never before has it employed the concept to validate a governmental practice. Finally, the Allegheny Court applied the endorsement test to two different symbols and obtained divergent results.\textsuperscript{130} Through consistent application of the test, the Court upheld the constitutionality of one display while it invalidated the other. In past cases, majorities have adopted either accommodationist or absolutist positions;\textsuperscript{131} by uniformly applying the endorsement test in Allegheny, however, the majority implicitly forged a path between these extremes.

Allegheny’s significance is threefold. First, it departs from the Court’s prior record of unpredictability in establishment clause cases.\textsuperscript{132} Second, it represents a shift in the Court’s focus from substantive to symbolic goals.\textsuperscript{133} Third, it illus-

(although Justice Blackmun has not been as rigid as Justices Brennan and Marshall), and Stevens have sided with absolutist views. See Allegheny, 109 S. Ct. 3086 (Chief Justice Rehnquist and Justice White siding with accommodationist view; Justices Brennan, Marshall, and Stevens siding with absolutist view; Justice Blackmun splitting between accommodationist view with respect to menorah and absolutist view with respect to crèche); Wallace v. Jaffree, 472 U.S. 38 (1985) (Chief Justice Burger and Justices White and Rehnquist siding with accommodationist view; Justices Brennan, Marshall, Blackmun, and Stevens siding with absolutist approach); Lynch v. Donnelly, 465 U.S. 668 (1984) (Chief Justice Burger and Justices White and Rehnquist siding with accommodationist approach; Justices Brennan, Marshall, Blackmun, and Stevens siding with absolutist view); Marsh v. Chambers, 463 U.S. 783 (1983) (Chief Justice Burger and Justices White and Blackmun siding with accommodationist approach; Justices Brennan, Marshall, and Stevens siding with absolutist approach). In Wallace, Justice Powell, a former member of the Lynch majority, shifted to the absolutists’ side. See Wallace, 472 U.S. at 39. Following Wallace, Justice Kennedy replaced Chief Justice Burger and proved to be equally loyal to accommodation. See Allegheny, 109 S. Ct. at 3134 (Kennedy, J., dissenting). Justice O’Connor, who sided with the majority in both Lynch and Wallace, has remained the swing vote. See Lynch, 465 U.S. at 670; Wallace, 472 U.S. at 39. In Allegheny, Justices Blackmun and O’Connor were the only two Justices who voted both to uphold the menorah and to invalidate the crèche. See Allegheny, 109 S. Ct. at 3093. Justice Blackmun and, to a greater extent, Justice O’Connor, likely will continue to cast the deciding votes.

\textsuperscript{127} A majority of the Court agreed on the adoption of Justice O’Connor’s test and its application with respect to the crèche. Allegheny, 109 S. Ct. at 3093. With respect to the menorah, however, Justice Blackmun wrote alone, while Chief Justice Rehnquist and Justices White, O’Connor, Scalia, and Kennedy concurred in judgment. Id.

\textsuperscript{128} See supra notes 72-75 and accompanying text.


\textsuperscript{130} See supra notes 27-34 and accompanying text.

\textsuperscript{131} See supra notes 41-85 & 98-102 and accompanying text.

\textsuperscript{132} See infra notes 135-62 and accompanying text.

\textsuperscript{133} See infra notes 163-75 and accompanying text.
trates a shift from a doctrine characterized by dichotomy to one characterized by neutrality.134

The Court's rejection of Lynch and adoption of the endorsement test reflects the dissatisfaction present within the Court since it first examined the establishment clause in 1947. The development and adoption of Justice O'Connor's test represent a break from the Court's prior record in establishment clause cases; it exhibits an effort by the Court to move forward in developing a revised and more workable doctrine.

Over the past four decades the Court has shifted back and forth between extreme absolutist and accomodationist positions.135 This dichotomy began in Everson136 and has dominated the establishment issue ever since.137 The first of two competing considerations inherent in the establishment clause is the interest in absolute separation between church and state.138 Balanced against this interest is the countervailing principle that the first amendment prohibits states from hampering "citizens in the free exercise of their own religion."139

The Zorach140 decision introduced the concept of accommodation into the Court's establishment doctrine. Although the Court did not retreat from its separationist terminology,142 it contrasted this concern against the need for accommodation.143 The Court took a significant step toward solidifying a comprehensible establishment doctrine in Lemon. The Lemon test used the underlying policies of both Everson144 and Zorach.145 Although the Lemon decision recognized both absolutist and accomodationist concerns,146 it emphasized the absolutist approach.147

The Court's dissatisfaction with the Lemon test increased with successive

134. See infra notes 176-82 and accompanying text.
135. See supra notes 41-85 & 98-102 and accompanying text.
136. 330 U.S. 1 (1947); see supra notes 41-48 and accompanying text (discussing Everson).
137. See supra notes 41-120 and accompanying text.
139. Id. at 16.
140. 343 U.S. 306 (1952).
141. The words "separationist" and "absolutist" are used interchangeably.
142. The Court, echoing Everson, still asserted that the first amendment requires complete separation between church and state. Zorach, 343 U.S. at 312. Although the Everson decision upheld a challenged statute, it is most often remembered for its harsh dicta concerning the "wall of separation between church and State." Everson, 330 U.S. at 16; see supra note 44.
143. Zorach, 343 U.S. at 312.
144. See Beschle, supra note 41, at 171 ("Lemon is, no doubt, a faithful elaboration on the rationale (if not the holding) of Everson"). Professor Beschle has noted:

This is not to say that Chief Justice Burger intended Lemon to strongly endorse "separation" as an ideal. Indeed, he rejected "total separation" as "not possible in an absolute sense." . . . [T]he wall is . . . maintained "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."

Id. at 171 n.124 (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).
145. Lemon, 403 U.S. at 614 ("Our prior holdings do not call for total separation . . . . Some relationship between government and religious organizations is inevitable") (citing Zorach, 343 U.S. at 312).
146. See supra text accompanying notes 55-58.
147. See supra notes 63-66 and accompanying text.
applications. The Lynch opinion clearly signaled the imminent abandonment of the Lemon test. Justice O'Connor's dissatisfaction with the majority's reasoning in Lynch prompted her to write separately to clarify the Court's establishment doctrine. Although both the concurrence and dissent in Lynch disagreed over the result under its particular facts, they agreed on the reasoning to be employed.

In Wallace v. Jaffree the Court shifted to adopt a separationist approach. Justices Powell and O'Connor, who each filed separate concurring opinions, joined a majority otherwise comprised of the original Lynch dissenters. The majority drew heavily upon many of the concepts introduced in Justice O'Connor's Lynch concurrence. Justice Powell wrote separately to reaffirm the principles embodied in the Lemon test. Rather than arguing the Lemon test's merits, however, Justice Powell merely asserted that the test had been the only formula ever adopted by a majority of the Court. In essence, his argument expressed the view that a flawed but established standard was better than an untested standard. Justice Rehnquist urged that the Court discard the Lemon test altogether.

In light of the discord over the Court's establishment doctrine, it is not surprising that the Court began looking for alternatives. Justice O'Connor had introduced and refined her test over the previous five years. The four dissenters in Lynch took particular notice of her views. In Wallace, the Court chose not to adopt her endorsement test and chose instead to apply loosely some of the concepts it embodied. The fact that the majority balked in Wallace allowed Justice O'Connor the opportunity to develop her test further. Thus the

148. 465 U.S. 668 (1984); see supra notes 76-85 and accompanying text (discussing Lynch).
149. See Beschle, supra note 41, at 169. According to Professor Beschle, "the five-majority ... introduced the analysis by noting merely that 'we have often found [the Lemon test] useful' and stating that 'we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.'" Id. (quoting Lynch, 465 U.S. at 679).
150. Allegheny, 109 S. Ct. at 3102 (plurality opinion).
151. Id. at 3103 (plurality opinion).
153. See supra notes 97-102 and accompanying text.
155. See supra notes 86-96 and accompanying text (discussing Justice O'Connor's concurrence in Lynch).
156. Wallace, 472 U.S. at 63 (Powell, J., concurring).
157. Id. (Powell, J., concurring).
158. Id. at 108-10 (Rehnquist, J., dissenting).
162. Wallace, 472 U.S. at 57-61 ("In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion' ... [W]e must ask 'whether the government intends to convey a message of endorsement or disapproval of religion.'" (quoting Lynch, 465 U.S. at 690-691 (O'Connor, J., concurring)).
Court's adoption of Justice O'Connor's test in *Allegheny* was a logical step in its search for a more workable establishment clause doctrine.

*Allegheny* is also significant in terms of its shift from substantive to symbolic goals. While substantive jurisprudence concerns limiting certain types of government activity, a symbolic understanding focuses on eliminating the perception of impermissible government activity. Substantive policies characterize most of the Court's establishment doctrine history. Only recently has the Court begun to formulate a doctrine founded upon symbolic interpretations.

*Lemon* identified the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " The *Lemon* test, and in particular its entanglement prong, focused on guarding against these evils by providing a measure of how much government involvement in religious affairs was excessive. By delving into the actual mechanics and details of the church-state relationship, the *Lemon* analysis can only yield a substantively oriented result—a result dictating which specific government activities must be curtailed.

Unlike the *Lemon* test, which concentrates on the concrete, the endorsement test focuses on the abstract. Specific government activities, in and of themselves, are irrelevant; the crucial issue is the message that the specific government practice conveys. As Justice O'Connor explained in *Lynch*,

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164. *Id.* at 513.
167. See Marshall, *supra* note 4, at 514-21; see, e.g., School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (school district programs providing classes at public expense to parochial school students violated the establishment clause in that the programs had the "primary or principal" effect of promoting religion); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (Connecticut statute providing observers of the Sabbath with the absolute right not to work on their Sabbath violated the establishment clause because it impermissibly advanced a particular religious practice); Wallace v. Jaffree, 472 U.S. 38, 58-61 (1985) (Alabama statute authorizing one-minute period of silence for prayer in public schools violated the establishment clause because the legislative intent behind adoption of the statute was to endorse religion and had no secular purpose); *Lynch* v. Donnelly, 465 U.S. 668, 681-87 (1984) (city-sponsored seasonal crèche display did not violate the establishment clause because the display had the secular purpose of celebrating a holiday recognized by Congress and any benefit to religion by the display was too remote or incidental to constitute endorsement).
169. "In the establishment inquiry, 'the concrete,' is the challenged government action, and 'the abstract' is the issue whether that action denotes improper endorsement." Marshall, *supra* note 4, at 513.
170. As Professor Marshall has explained:

It is the message denoted by the government activity that is critical. For example, assume a state provides direct financial payment to a minister. The establishment harm is not in
"[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."171 What is critical, then, "is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion [because] [i]t is only practices having that effect . . . that make religion relevant, in reality or public perception, to status in the political community."172

The difference in approach between the majority's rationale and Justice O'Connor's reasoning in Lynch is apparent in each party's treatment of Marsh.173 For example, "[t]he Lynch majority employed Marsh comparatively: to forbid the use of the crèche, 'while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.'"174 In contrast, Justice O'Connor in Lynch harmonized the result in Marsh by explaining that legislative prayer . . . is a form of acknowledgement of religion "that serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." The function and history of this form of ceremonial deism suggest that "those practices are not understood as conveying government approval of particular religious beliefs."175

Finally, Allegheny is significant because it represents a shift toward doctrinal neutrality.176 Prior to Allegheny the Court's establishment clause formula reflected a dichotomy. Everson first established the competing tensions given form in the absolutist and accommodationist approaches.177 Although the Court did not, in later cases, strictly construe the Everson opinion, that case has remained influential. Thus, prior to Allegheny, the establishment clause formula did not change. Although the Court wavered between the absolutist and accommodationist approaches, the underlying goal was separation between church and state. The debate did not concern whether separation was desirable, but rather how much separation was desirable. The absolutists emphasized the first amendment's anti-establishment concepts while the accommodationists emphasized the amendment's free exercise principles. Lemon perpetuated the Everson

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the payment. It is in what the payment symbolizes. For, example, for many, financial payment to a minister employed by a public school will symbolize improper state endorsement of religion, while payment to a minister in the military will not.

Id. at 513.


172. Id. at 692 (O'Connor, J., concurring).

173. Marsh v. Chambers, 463 U.S. 783 (1983); see Allegheny, 109 S. Ct. at 3102 n.46 (plurality opinion).


175. Id. (plurality opinion) (citations omitted) (quoting Lynch, 465 U.S. at 693 (O'Connor, J., concurring)).

176. See Beschle, supra note 41, at 171-91; Loewy, supra note 165, at 1047.

177. See supra notes 46-48 and accompanying text.
Logically, then, application of the Lemon test produces results characteristic of separationist ideology. In contrast, a test formula founded on symbolic concepts does not.

Lemon, by limiting the degree of entanglement between church and state, necessarily produces separationist results. Justice O'Connor's test, however, substitutes neutrality for separation. In her view, the establishment clause does not require separation, but only requires the government to remain neutral in its dealings with religious organizations. Government endorsement of one religious organization over another, or of religion over no religion, is not neutral and is therefore unconstitutional. The crucial question is not whether the government activity in question has achieved the proper degree of separation, but instead, whether it sends a message of endorsement.

In his dissent in Wallace, Justice Rehnquist criticized the majority for basing its analysis on Everson's "wall of separation" concept. The essence of his argument was that the establishment clause was never "intended to erect 'a wall of separation between church and State.'" "It is impossible," he concluded, "to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with [Thomas] Jefferson's misleading metaphor for nearly 40 years." If Justice Rehnquist's interpretation is correct, then the Lemon test, or any other test founded upon substantive principles, is ill-suited to produce consistent results. A variation of Justice Rehnquist's argument is that the founding fathers did intend to separate church and state, but only as a starting point; the framers' ultimate goal was neutrality, with separation merely as a means to achieve that end.

Regardless of the founding fathers' intentions, it may no longer be feasible to interpret the Constitution as requiring a wall of separation between church and state. In today's complex and modern world, it is virtually impossible to prevent interaction between government and religion. During post-revolutionary times the level of government activity was minimal; government was

178. See supra notes 56-66 and accompanying text.
179. See Lynch, 465 U.S. at 687 (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." (emphasis added)).
180. See Loewy, supra note 165, at 1049-51.
181. Id.
182. See Allegheny, 109 S. Ct. at 3102 (plurality opinion).
184. Id. at 91-92. (Rehnquist, J., dissenting) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).
185. Id. at 92 (Rehnquist, J., dissenting).
186. See Beschle, supra note 41, at 178-79.
187. Id. at 171-73. Professor Beschle has argued that separation, regardless of whether intended by the founding fathers, is simply impossible in the modern age. According to Professor Beschle, separation is "[a] concept easily understood in an overwhelmingly Protestant eighteenth century society, and one which once accepted would not be difficult to implement in that same society, [but] has neither of those attributes today." Id. at 172.
188. Id. at 172.
therefore less likely to interfere with religion. Additionally, colonial America was a Protestant nation. Today, however, there are dozens of religious denominations, many regularly interacting with their communities. Consequently they are more likely to come into contact with the government. Unlike separation, neutrality does not require, or even encourage, total government noninvolvement. As a practical matter, then, in modern society neutrality provides a sounder foundation upon which to formulate an establishment doctrine.

Any workable "test" for alleged establishment clause violations must address several identifiable conflicts inherent in the issue. One conflict results from cultural heritage: certain religious symbols, acknowledgements, and accommodations lie beyond the scope of the establishment clause. As Chief Justice Burger observed in Lynch, "We are a religious people whose institutions presuppose a Supreme Being." Religious expression is common throughout the cultural history of the United States. Examples include the national holidays of Christmas and Thanksgiving, the national motto "In God We Trust," the

189. Id.
190. Id. Professor Beschle has noted the significance of the Protestant component in colonial America:

[During the colonial period], America was a Protestant nation. Even Americans who held strong religious convictions belonged to churches with theological roots relatively compatible with the view that religion was properly a private matter between the believer and his God.

Id. Religions, during colonial times, focused on the direct relationship between the believer and God. Id. at 172 n.128. The Great Awakening of the 1730s and 1740s was characterized by the concepts of individual conversion, choice, and rebirth. Id.; see M. MARTY, PILGRIMS IN THEIR OWN LAND 107-28 (1984).

191. See Beschle, supra note 41, at 172-73. Professor Beschle has noted that United States' religious tradition "draws heavily on the thought of Augustine, who expounded on the distinction between the 'city of God' and the 'city of man.'" Id. at 172. As the number of denominations has grown, the "City of God" and the "City of Man" have expanded their borders and religion has undergone fundamental changes. As Professor Beschle has explained:

Religion no longer asserts merely the right to believe and worship, but also regards as essential the obligation to create a better world. At the same time, government no longer considers its sole obligation to be keeping peace so that individuals may fulfill themselves, but actively works to facilitate the individual's welfare. Consequently, no boundary exists along which to erect a wall of separation.

Id. Professor Beschle has further explained that the "rise of the 'social gospel' in nineteenth-century Protestantism and the integration into American society of large numbers of Catholics and Jews, whose religious traditions were more closely related to a sense of community than to individualism, insured religious involvement in government affairs." Id. at 172-73.

192. Id. at 172-73.
193. Id. at 174 ("neutrality connotes lack of favor or disfavor").
194. See Marshall, supra note 4, at 504.
195. Id. at 507 ("[T]here are religious acknowledgments, symbols, and accommodations in the public culture that are beyond first amendment purview . . . . This phenomenon will be termed 'culture heritage.'")

196. Id. ("[A] de facto establishment of religion prevails throughout the land." (quoting M. HOWE, THE GARDEN AND THE WILDERNESS 11 (1965))).

“one nation under God” language in the Pledge of Allegiance to the American Flag, and the traditional prayer given prior to each legislative session.\textsuperscript{198} Although history cannot validate otherwise unconstitutional practices,\textsuperscript{199} the Court has declined to declare these activities unconstitutional.\textsuperscript{200} Instead, the Court has recognized through accommodation that, “government action has ‘follow[ed] the best of our traditions’ and ‘respect[ed] the religious nature of our people.’”\textsuperscript{201} Balanced against these cultural traditions are antiestablishment principles. Any successful and satisfactory establishment clause doctrine must reconcile these competing values.\textsuperscript{202}

A second establishment conflict, apparent within the text of the constitution,\textsuperscript{203} is between establishment and freedom of religious exercise.\textsuperscript{204} Although the first amendment states that “Congress shall make no law respecting the establishment of religion,”\textsuperscript{205} it also states that “Congress shall make no law . . . prohibiting the free exercise” of religion.\textsuperscript{206} Thus the Constitution simultaneously forbids governmental establishment of religion and governmental interference with its free exercise.\textsuperscript{207} An establishment formula must strike a balance between these forces; an extremist position under one clause necessarily violates the other clause.

The Everson Court was correct in concluding that the founding fathers intended the first amendment to require separation between church and state.\textsuperscript{208} The more difficult question, however, is whether the framers intended separation to be an end, or instead, merely a means to some other desired goal such as neutrality.\textsuperscript{209} The answer is significant because in today's modern society, in

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\item[198.] Lynch, 465 U.S. at 676-77. Professor Marshall has argued:
National holidays such as Thanksgiving and Christmas, even if partially “secularized,” have strong religious bases. Our cities are named Corpus Christi and San Francisco, our parks named Zion, and our mountains named Sangre de Cristo. Our mottos and emblems are replete with religious references. Our regulatory programs are pervaded with religious exceptions.

Marshall, supra note 4, at 507-08; see Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); Johnson v. Board of County Comm’rs, 528 F. Supp 919 (D.N.M. 1981).

\item[199.] Allegheny, 109 S. Ct. at 1321 (O’Connor, J., concurring).

\item[200.] See, e.g., Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding Nebraska legislature’s practice of opening each session with prayer); see Smith, The Special Place of Religion in the Constitution, 1983 SUP. CT. REV. 83, 100-01 (discussing the Court’s respect for cultural heritage).

\item[201.] Lynch, 465 U.S. at 677-78 (quoting Zorach v. Clausen, 343 U.S. 306 (1952)).

\item[202.] See Marshall, supra note 4, at 509 (“There are certain religious symbols and practices that the establishment clause leaves untouched. Establishment doctrine must reconcile anti-establishment principles with a ‘de facto establishment’ reality.”).

\item[203.] See supra note 4.


\item[205.] U.S. CONST. amend. I.

\item[206.] U.S. CONST. amend. I.

\item[207.] See supra note 4 and accompanying text.

\item[208.] Beschle, supra note 41, at 178.

\item[209.] Id.
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which the administrative state touches the lives of its citizens in numerous and
diverse ways, separation has become an obstacle to the achievement of neu-
trality. Consequently, an establishment doctrine premised on the goal of sep-
paration is by its nature fundamentally ill-suited to achieve the ultimate goal of
neutrality.

In Allegheny the Court chose neutrality over separation. The Court’s
adoption of Justice O’Connor’s endorsement test represents a realization of the
impracticality of achieving neutrality through the goal of separation. This rul-
ing has laid the groundwork for the development of an establishment formula
more consistent and enduring than any doctrine the Court has adopted in the
past.

The endorsement test promises to provide the Court with a sound analytical
framework for deciding establishment clause cases because it is consistent with
the overall posture of the first amendment. The founding fathers recognized
that in a pluralistic society citizens come from diverse religious backgrounds or
may even adhere to no particular religious beliefs at all. Whatever else the
establishment clause may stand for, at the very least it mandates that the “gov-
ernment may not demonstrate a preference for one particular sect or creed” over
another. Notwithstanding historical practices and long-standing traditions
that the government has upheld in the past, the first amendment has always
required complete respect for religious diversity in society.

The endorsement test captures the “essential command” of the first
amendment by incorporating the antidiscrimination principle inherent in the est-
ablishment clause. It recognizes that in a pluralistic and modern society in
which religion and government necessarily come in contact, there will be partic-
ular religious groups that wish to impose their beliefs upon the rest of the com-


211. Beschle, supra note 41, at 178.
212. See supra notes 179-82 and accompanying text.
213. See Beschle, supra note 41, at 190.
215. Id. at 3107 (plurality opinion).
216. Id. at 3106 (plurality opinion).
217. Id. at 3119 (O’Connor, J., concurring).
218. Id. at 3110 (plurality opinion).
219. Id. (plurality opinion).
220. Id. at 3119 (O’Connor, J., concurring).
221. Id. at 3144 (Kennedy, J., dissenting).
because it examines the particular contexts in which the government employs religious symbols. The test is sensitive to unique circumstances, is highly context specific, and requires difficult line drawing; it therefore may not always yield a unanimous results. Nevertheless, the endorsement test synthesizes and gives meaning to much of the Court's establishment clause history and is capable of providing a consistent and workable doctrine to assist the Court in establishment clause inquiries in the future. By harmonizing the establishment clause inquiry with the overall mandate of the first amendment, the Allegheny decision represents an initial step toward more consistent and predictable judicial decisionmaking in this area.

Christopher S. Nesbit

222. Id. at 3107 (plurality opinion).
223. Id. at 3119 (O'Connor, J., concurring).