

Washington University Journal of Law & Policy

Volume 21 *The Rehnquist Court and the First Amendment*

January 2006

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Recommended Citation

Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J. L. & POL'Y 263 (2006),
https://openscholarship.wustl.edu/law_journal_law_policy/vol21/iss1/11

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The Endorsement Court

Jay D. Wexler*

I. INTRODUCTION

Since 1986, when William H. Rehnquist was confirmed as the sixteenth Chief Justice of the United States,¹ the Supreme Court has virtually rewritten the entire law regarding the First Amendment's Religion Clauses.² With respect to the Free Exercise Clause, the Court, in its 1990 *Employment Division v. Smith*³ decision, reversed years of jurisprudence and held that the First Amendment does not entitle religious believers to exemptions from neutral laws of general application. On the Establishment Clause side, the Court recently overturned a series of its earlier decisions on its way to creating a body of law quite amenable to the funding of religious organizations.⁴ As long as government money passes through the hands of private individuals who themselves choose how to spend that money from a set of options that does not encourage religious choices, the arrangement will be constitutional.⁵ With regard to legislative accommodations for religion, the Court has made clear

* Associate Professor, Boston University School of Law. The author would like to thank the student editors at the *Washington University Journal of Law & Policy* for putting together a terrific symposium, and the participants at the symposium, particularly Tom Berg, for extremely helpful comments on a previous draft of this paper. The author also thanks Greg Dekermenjian for his excellent research assistance.

1. Chief Justice Rehnquist took the judicial oath to become the Chief Justice on September 26, 1986; he had previously served as an Associate Justice of the Supreme Court since January of 1972. Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited May 16, 2006). Chief Justice Rehnquist passed away in September of 2005.

2. Those Clauses state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

3. 494 U.S. 872 (1990).

4. *See, e.g., Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

5. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

that legislatures have significant leeway to grant exemptions to religious believers from general laws, subject only to a few important limitations.⁶ Most recently, in *Locke v. Davey*,⁷ the Court granted political decision-makers parallel authority to accommodate religious non-belief by holding that the state of Washington could refuse to fund theology majors from its general college scholarship program.

Finally, the Rehnquist Court was the first to apply the so-called “endorsement test” to evaluate the constitutionality of government-sponsored religious symbols and displays. The endorsement test was developed by Justice O’Connor in her concurrence in *Lynch v. Donnelly*,⁸ a 1984 case involving a Pawtucket, Rhode Island, display of a crèche surrounded by various holiday “figures and decorations,” and adopted by five Justices in *County of Allegheny v. ACLU*,⁹ a 1989 case involving two different holiday displays in Pittsburgh, Pennsylvania. The test asks whether a “reasonable observer” would feel that the government has sent “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁰

Although the Supreme Court itself has applied the endorsement test in only a handful of cases, the test has played an extremely important role in how courts throughout the country have evaluated government action. Lower federal courts and state courts have applied the test in hundreds of cases¹¹ to evaluate the constitutionality of many types of religious symbols and displays, from a Latin cross erected on a city water tower,¹² to the “In God We Trust” inscribed on U.S. currency,¹³ to Mississippi’s state flag,¹⁴ to Ohio’s state

6. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

7. 540 U.S. 712 (2004).

8. 465 U.S. 668, 671 (1984) (O’Connor, J., concurring).

9. 492 U.S. 573, 620 (1989).

10. *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

11. See William M. Howard, Annotation, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R.5TH (2003).

12. *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (disallowing symbol).

13. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (disallowing display).

14. *ACLU v. Capitol Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176 (S.D. Ohio

motto.¹⁵ As such, the endorsement test is one of the Rehnquist Court's most important Religion Clause innovations.

Since its inception, the endorsement test has been the subject of intense scholarly and judicial criticism. Commentators have argued, for example, that the test lacks historical support, threatens the dignity of the federal courts, and contradicts the Court's own accommodation jurisprudence.¹⁶ Three other critiques, however, are perhaps of greatest importance. The first contends that the test inappropriately elevates symbolic harm or mere offense to constitutionally cognizable injury. The second argues, on a variety of specific grounds, that the test is incoherent and incapable of consistent application. The third critique suggests that the test favors majority religious traditions over minority ones, because the judges who must decide whether a symbol or display sends a forbidden message are themselves generally adherents of a majority tradition.¹⁷

The thesis of this Article is two-fold. First, it argues that the majority bias critique is the most persuasive criticism of the endorsement test, followed (at some distance) by the contention that application of the test compromises the dignity of the federal courts. What unites these two critiques is that they focus not on the content of the endorsement test itself, but rather on the identity of the decision-maker applying the test. The Article also proposes a possible radical solution to these two critiques by suggesting that Congress could create an Article I court staffed by experts in a wide range of majority and minority religious traditions. This court would decide endorsement challenges to religious symbols or displays, subject only to discretionary (but full) Supreme Court review. As this Article notes, creation of such a tribunal would raise a variety of difficult constitutional (and other) issues, but such a proposal would, nonetheless, be worthy of Congress' serious consideration.

The Article proceeds in two main parts. Part II briefly introduces the endorsement test and its primary critiques. It then evaluates those

1998) (upholding the motto: "With God, All Things are Possible").

15. *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003) (upholding use of the St. Andrew's Cross on a flag).

16. See *infra* notes 53–79 and accompanying text.

17. For discussion of these three critiques, see *infra* notes 53–79 and accompanying text.

critiques and argues that the majority bias critique is the most persuasive criticism of the endorsement test. Part III proposes a draft statute that would establish an Article I “Endorsement Court” to decide endorsement challenges to government-sponsored religious symbols and displays. It then discusses the potential constitutional issues raised by the statute and argues that the advantages of such a statute would outweigh its disadvantages.

II. THE ENDORSEMENT COURT, ARTICLE III STYLE

A. *The Supreme Court*

The holiday display challenged in the *Lynch* litigation involved, in the words of the Supreme Court:

[M]any of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the crèche . . . which . . . consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals.¹⁸

When the First Circuit struck down this display,¹⁹ it did so on the grounds that the religious display favored Christianity over other religions, and thus deserved strict scrutiny review under the Court’s decision in *Larson v. Valente*,²⁰ which invalidated a statute that “denied an exemption from certain registration and reporting requirements to religious organizations receiving more than half of their total contributions from non-members.”²¹ Because the town’s display lacked any legitimate secular purpose, the First Circuit held that it failed *Larson*’s strict scrutiny standard.²² The First Circuit’s

18. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

19. *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982).

20. 456 U.S. 228 (1982).

21. *Donnelly*, 691 F.2d at 1034 (citing *Larson*, 456 U.S. 228).

22. *Id.* at 1035.

analysis is particularly interesting because it illuminates the fact that prior to the Supreme Court's creation and adoption of the endorsement test, courts did not analyze cases involving the government display of religious symbols differently from any other case involving alleged state promotion or advancement of religion.

In *Lynch*, the Supreme Court did not announce any new standard to evaluate religious displays. Chief Justice Burger's majority opinion upholding the display simply noted that it did not have the primary effect of advancing religion.²³ However, Justice O'Connor's concurrence planted the seeds for a new standard.²⁴ Justice O'Connor attempted to "clarif[y] [the Court's] Establishment Clause doctrine"²⁵ by explaining that the government can violate the clause through either "excessive entanglement with religious institutions"²⁶ or "government endorsement or disapproval of religion."²⁷ According to O'Connor, the government may neither act with the purpose of endorsing religion, nor convey a message of endorsement, even in the absence of an actual intention to endorse.²⁸ With respect to the latter problem, O'Connor wrote: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."²⁹ Pawtucket's holiday display had neither the forbidden purpose nor effect, according to Justice O'Connor, both because it was intended as a "[c]elebration of public holidays, which have cultural significance" (purpose)³⁰ and because "the overall holiday setting" of the included crèche "negate[d] any message of endorsement" of the display's religious content (effect).³¹

23. *Lynch*, 465 U.S. at 682–84.

24. *Id.* at 687–93 (O'Connor, J., concurring).

25. *Id.* at 687.

26. *Id.* at 687–88.

27. *Id.* at 688.

28. *Id.* at 690.

29. *Id.* at 692.

30. *Id.* at 691.

31. *Id.* at 692.

Five Justices adopted the endorsement test as law in 1989, three years after Justice Rehnquist was confirmed as Chief Justice. In the *Allegheny* case, the Court reviewed two different Pittsburgh holiday displays: a crèche sitting alone on the Grand Staircase of a county courthouse, and an eighteen-foot menorah placed next to a forty-five-foot Christmas tree and a sign reading “Salute to Liberty.”³² The Court struck down the crèche display,³³ but upheld the other display,³⁴ in a convoluted series of opinions that disagreed on, among other things, whether the meaning of the larger (but more secular) tree should be understood in light of the meaning of the smaller (but clearly religious) menorah, or vice versa.³⁵

Although determining the precise holding of *Allegheny* is a difficult exercise requiring patience, attention to detail, and perhaps a pencil and notepad to record which Justice voted how and on what issue,³⁶ it is clear that five Justices believed that the endorsement test was the proper test for evaluating the constitutionality of the displays. For example, in his opinion for the Court invalidating the crèche display, Justice Blackmun concluded that “by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government’s lending its support to the

32. County of Allegheny v. ACLU, 492 U.S. 573, 578–82 (1989).

33. *Id.* at 579.

34. *Id.*

35. Compare *id.* at 617 (“The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.”), with *id.* at 641 (Brennan, J., concurring in part and dissenting in part) (“Even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol [as the menorah]. . . There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol.”).

36. Just as one example of how convoluted this set of opinions is, consider the introduction to Justice Blackmun’s lead opinion:

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III–A, IV, and V, an opinion with respect to Parts I and II, in which JUSTICE STEVENS and JUSTICE O’CONNOR join, an opinion with respect to Part III–B, in which JUSTICE STEVENS joins, an opinion with respect to Part VII, in which JUSTICE O’CONNOR joins, and an opinion with respect to Part VI.

Id. at 578.

communication of a religious organization's religious message."³⁷ Elsewhere in the same opinion, he wrote:

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.³⁸

The various opinions in *Allegheny* provide additional details regarding the nature of the endorsement test. Specifically, they make clear that the entire context of the challenged display, particularly its historical context, is important for evaluating the display's constitutionality. For example, describing Justice O'Connor's opinion in *Lynch*, Justice Blackmun noted that the endorsement "inquiry, of necessity, turns upon the context in which the contested object appears."³⁹ Justice O'Connor, for her part, elaborated on her *Lynch* test by noting that "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins,"⁴⁰ and by explaining that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."⁴¹

The Court has applied or invoked the endorsement test in a handful of cases since it decided *Allegheny*,⁴² most notably in *Capitol Square Review and Advisory Board v. Pinette*,⁴³ in which it held that the state of Ohio had not violated the Establishment Clause by allowing the Ku Klux Klan to display a cross on the grounds of the state capitol. The deciding opinion was penned by Justice O'Connor,

37. *Id.* at 601.

38. *Id.*

39. *Id.* at 595.

40. *Id.* at 629 (O'Connor, J., concurring).

41. *Id.* at 630 (O'Connor, J., concurring).

42. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

43. 515 U.S. 753 (1995).

who found “no realistic danger that the community would think that the [State] was endorsing religion or any particular creed . . . by granting respondents a permit to erect their temporary cross on Capitol Square.”⁴⁴ Justice O’Connor went on to explain that the relevant perspective for endorsement purposes is not the “actual perception of individual observers, who naturally have differing degrees of knowledge,”⁴⁵ but rather “the reasonable observer . . . [who] must be deemed aware of the history and context of the community and forum in which the religious display appears.”⁴⁶ Justice O’Connor believed that such a reasonable observer would not have viewed Ohio’s actions as endorsing Christianity because he or she would have observed “the Klan’s cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct.”⁴⁷

Most recently, the Court, in its final term led by Chief Justice Rehnquist, appeared to use the endorsement test, at least in part, to invalidate Ten Commandments displays in two Kentucky courthouses.⁴⁸ In finding that the history of the displays—in particular, the fact that they were erected only after a court invalidated two previous displays that were manifestly religious⁴⁹—evidenced an improper religious purpose, the Court employed endorsement language and quoted central passages from *Lynch*, *Allegheny*, and *Capitol Square*.⁵⁰ Among others, the Court made numerous references to the “reasonable observer,” suggesting at one point that “[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays.”⁵¹

44. *Id.* at 772 (O’Connor, J., concurring) (citations and internal quotations omitted).

45. *Id.* at 779 (O’Connor, J., concurring).

46. *Id.* at 780 (O’Connor, J., concurring).

47. *Id.* at 782 (O’Connor, J., concurring).

48. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

49. *Id.* at 2740–41.

50. *See id.* at 2733, 2737, 2738.

51. *Id.* at 2740. In the companion case to *McCreary*, the Court upheld a longstanding Ten Commandments monument on the grounds of the Texas Capitol. *See Van Orden v. Perry*, 125 U.S. 2854 (2005). The deciding vote in that case was issued by Justice Breyer, whose opinion casts some doubt on the continuing validity of the endorsement test; Justice Breyer himself did not invoke the test, instead stating that he “see[s] no test-related substitute for the exercise of legal judgment.” *Id.* at 2869 (Breyer, J., concurring).

Of course, with Justice O'Connor's retirement, the Endorsement Court may soon disappear, depending on whether her replacement finds the test persuasive.⁵² As a result, this is a particularly opportune time to consider the strengths and weaknesses of the endorsement test and whether Congress should consider taking steps to indicate its approval of the test.

B. Endorsement Test Critiques

Judges and scholars have subjected the endorsement test to withering critiques since its inception. The following summarizes some of the more important criticisms of the test. The discussion is not comprehensive, but simply introduces these critiques to provide a background for the Article's later arguments.

First, some have argued that the endorsement test finds no support in early American thought regarding the proper relationship between church and state. Michael McConnell is perhaps the most notable proponent of this view, though he does not press the point particularly strongly in his critique of the endorsement test.⁵³ Pointing to the First Congress' thanksgiving resolution, among other things, McConnell argues that "[t]he early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways,"⁵⁴ and that "[t]he generation that adopted the First Amendment viewed some form of governmental compulsion as the essence of an establishment of religion."⁵⁵ Under this view, a government sponsored crèche, for instance, could not be considered an establishment of religion because it coerces nobody, and because the framing generation believed that some sort of actual coercion was a sine qua non of an establishment violation. Of course, this view rests on the implicit

52. See Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135.

53. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 154 (1992) (noting that he "will not elaborate the point here").

54. *Id.* at 155.

55. *Id.* at 154–55; see also Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 957 (1989) (noting that the endorsement test is "lacking in historical and textual support").

assumption that current constitutional doctrine must be consistent with the framing generation's original intent.

Second, some have argued that the endorsement test is inconsistent with the Court's accommodation doctrine. The accommodation doctrine allows political decision-makers to exempt religious believers from generally applicable legal requirements, so long as the exemption alleviates a governmentally imposed burden on the believer's free exercise of religion, does not overly burden non-beneficiaries, and is administered neutrally among different religious traditions.⁵⁶ According to these critics, any legislative accommodation or exemption from a generally applicable law necessarily endorses religion. Again, McConnell argues that the test

casts suspicion on government actions that convey a message that religion is worthy of particular protection—as any accommodation of religion necessarily does . . . [t]here is no way to distinguish between government action that treats a religious belief as worthy of protection, and government action that treats a religious belief as intrinsically valuable.⁵⁷

Likewise, Jesse Choper suggests that “[w]hen the state exempts a minority religion from a generally applicable prohibition, such as permitting members of Native American religious groups to use peyote as part of their rituals, this . . . may reasonably be viewed as government endorsement of religion.”⁵⁸ Choper even goes so far as to argue that including religious groups in a broad category of both religious and non-religious beneficiaries of government funding or other benefits—a practice clearly appropriate under Supreme Court doctrine (and perhaps required in some instances)—is also an endorsement of religion.⁵⁹ Under this analysis, the endorsement test is flawed because it is patently inconsistent with another important aspect of the Court's Religion Clause doctrine.

56. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

57. McConnell, *supra* note 53, at 151.

58. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL'Y 499, 532 (2002).

59. *Id.* at 531.

Third, some have criticized the endorsement test for involving the federal courts in what can only be described as a ridiculous enterprise. For example, Judge Easterbrook of the Seventh Circuit once famously suggested that the test “requir[ed] scrutiny more commonly associated with interior decorators than with the judiciary.”⁶⁰ He further observed that “[i]t is discomfiting to think that our fundamental charter of government distinguishes between painted and white figures—a subject the parties have debated,”⁶¹ and that “[i]t would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with . . . witnesses testifying that they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane.”⁶² Justice Kennedy echoed these sentiments in *Allegheny* when he claimed that the test “threatens to trivialize constitutional adjudication.”⁶³ To illustrate his point, Kennedy mocked Justice Blackmun’s application of the test to the crèche on the county courthouse staircase. He noted:

JUSTICE BLACKMUN embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as “a center of attention separate from the crèche.” After determining whether these centers of attention are sufficiently “separate” that each “had their specific visual story to tell,” the court must then measure their proximity to the crèche. A community that wishes to construct a constitutional display must also take care to avoid floral frames or other devices that might insulate the crèche from the sanitizing effect of the secular portions of the display. The majority also notes the presence of evergreens near the crèche that are identical to

60. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

61. *Id.*

62. *Id.* at 130.

63. *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part).

two small evergreens placed near official county signs. *After today's decision, municipal greenery must be used with care.*⁶⁴

Although these critiques may appear to be mere rhetorical flourishes intended to ridicule a test flawed on other grounds, I believe they represent an important independent criticism. They suggest that the test, whatever its other flaws, is undesirable because it is beneath the federal courts' dignity to concern themselves with such "marginalia" as the placement and appearance of objects.⁶⁵ Although the critics do not make the point explicitly, inherent in their ridicule appears the suggestion that continued application of such an absurd and undignified test will bring disrepute on the courts and undermine their legitimacy in the eyes of the public.

A fourth critique contends that the endorsement test wrongly elevates mere offense, alienation, or symbolic harm to judicially redressable injury. As Jessie Hill recently put it, this

line of criticism takes issue with the notion that courts should be asking the endorsement question at all, arguing that the symbolic injury on which the endorsement test is centered should not constitute constitutionally cognizable injury, or that the injury involved—the injury to individuals' sensibilities—is too subjective to produce a meaningful and predictable jurisprudence.⁶⁶

This harm-focused critique has taken several forms. For example, Stephen Smith has argued that the alienation that the endorsement test seeks to alleviate is unavoidable in our religiously diverse society; any government action, including the articulation and application of the endorsement test itself, will inevitably alienate somebody's religious beliefs.⁶⁷ Thus, the test, according to Smith, is

64. *Id.* at 674–75 (Kennedy, J., concurring in part and dissenting in part) (citations omitted and emphasis added).

65. *Id.* at 676.

66. B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 507 (2005).

67. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 309–12 (1987). Smith also disputes Justice O'Connor's purported link between endorsement and the political status of non-adherents. *See id.*

“simply unworkable.”⁶⁸ Jesse Choper, for his part, finds the redress of mere “distressed sensibilities”⁶⁹ inconsistent with principles of federal court review, arguing that such redress “run[s] counter to the general precept that the awesome power of judicial review should not readily be invoked to remedy harm no greater than ‘indignation,’ ‘offense,’ or the ‘psychological consequence presumably produced by observation of conduct with which one disagrees.’”⁷⁰ Bill Marshall, although defending the endorsement test on other grounds,⁷¹ argues that the test must be understood to protect against more than offensive government conduct to prevent inconsistency with the Court’s free speech jurisprudence.⁷²

Fifth, many have argued that the endorsement test is inherently incoherent and incapable of consistent application. Again, there are many variations on this general critique. McConnell, for example, argues that the test is nothing more than a Religion Clause version of the “I know it when I see it” principle because “[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no ‘neutral’ position, outside the culture, from which to make this assessment.”⁷³ Choper finds fault with the notion of the “reasonable observer” as well, arguing that it is difficult to know “whose perceptions ought to count,” as well as what “level of knowledge [should be] attributable to the reasonable observer.”⁷⁴ Smith contends that the concept of “endorsement” itself is ambiguous and likely

68. *Id.* at 305–12.

69. Choper, *supra* note 58, at 521.

70. *Id.* at 530 (footnotes omitted); *see also id.* at 510 (“I do not believe that mere feelings of offense should rise to the level of a judicially redressable harm under the Establishment Clause, absent any real threat to religious liberty.”).

71. *See* William P. Marshall, “We Know It When We See It:” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 498 (1986) (“I will argue that despite its problem of inherent subjectivity, a symbolic understanding of establishment may appropriately provide a cohesive framework under which establishment jurisprudence may be remodeled.”).

72. *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 353 (1991) (“I conclude that the infusion of an offensiveness component into religion clause jurisprudence is inappropriate and should be eliminated.”).

73. McConnell, *supra* note 53, at 148.

74. Choper, *supra* note 58, at 511.

impossible to clarify.⁷⁵ Most recently, Jessie Hill has invoked so-called “speech act theory” to criticize the concept of “context” in the endorsement test. Specifically, she argues that “the indeterminacy and unpredictability in the application of the endorsement test are . . . inherent in the problem of attempting to determine the social meaning of symbolic government action against the backdrop of extreme viewpoint plurality, without the potentially stabilizing element of subjective intent to guide the inquiry.”⁷⁶ Although all of these versions of the critique focus on somewhat different problems, they all suggest that the endorsement test is inherently amorphous and indeterminate, and therefore impossible for lower courts to apply in anything but an inconsistent ad hoc manner.

Finally, a number of scholars have argued that the endorsement test is inherently biased in favor of majority religious traditions. Once again, Jessie Hill puts it well by noting that the

societal power structure . . . makes the religious symbols and practices of dominant groups seem natural, and therefore dictates that the speech act of endorsement is only successful when it appears to exceed what it considered a ‘normal’ amount of government approval . . . [which] is likely to be greater with respect to majority, mainstream religions, whose practice and culture are more closely tied to the history and culture of the United States.⁷⁷

McConnell echoes this view, arguing that “[m]essages affirming mainstream religion . . . are likely to be familiar and to seem inconsequential. As Justice O’Connor has interpreted her approach, if a practice is ‘longstanding’ . . . , it is unlikely to ‘convey a message of endorsement. . . . In our culture, most ‘longstanding’ symbols are those associated with Protestant Christianity.”⁷⁸ Other commentators, including Steven Gey and Larry Tribe, have criticized the

75. Smith, *supra* note 67, at 276–83. Smith also critiques the “objective observer” concept, among others. *See id.* at 292–95.

76. Hill, *supra* note 66, at 494.

77. *Id.* at 521; *see also id.* (“By refusing to take into account the differences between majority and minority religions, the Court’s endorsement test analysis threatens simply to reproduce unconsciously the majority perspective and to reinforce majority religious power.”).

78. McConnell, *supra* note 53, at 154.

endorsement test on similar grounds.⁷⁹ This critique focuses in part on the formulation of the endorsement test, particularly its attempt to exclude “ubiquitous” acknowledgements of religion from invalidation, but it also focuses on the nature of the decision-maker applying the test. As will be discussed below, the problem of majority bias is far greater when the decision-makers themselves are members of a majority tradition and are, therefore, much less likely to view a symbol of that majority tradition as anything more than a harmless acknowledgement of a long-standing cultural belief.

C. Assessing the Critiques

This section explains why the majority-bias critique of the endorsement test is the most compelling of the critiques discussed above. In my view, the main problem with the endorsement test is not the content of the test itself, which generally asks the correct question about the constitutional propriety of religious symbols and displays,⁸⁰ but rather the nature of the tribunal that must apply the test in particular cases.

In my view, the originalist critique of the endorsement test carries little weight. McConnell’s suggestion that non-coercive endorsements were common in the early republic may well be correct given the Free Exercise Clause’s prohibition on religious coercion,⁸¹ but the notion that the Establishment Clause protects only against compulsion runs into the persuasive and well-known

79. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1293 (2d ed. 1988); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 481 (1994) (“By employing an ‘objective observer’ to decide questions of endorsement, Justice O’Connor relays the message to religious minorities that their perceptions are wrong; or, even worse, that their perceptions do not matter.”).

80. See, e.g., Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O’Connor’s Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 851 (2001) (“The issue of endorsement seems particularly germane to cases involving government displays of religious symbols.”); Hill, *supra* note 66, at 495 (noting that in cases dealing with religious displays, “the endorsement test’s focus on the symbolic or ‘expressive’ harm caused by religious symbols is entirely appropriate”); Marshall, *supra* note 72, at 355 (noting that the endorsement test is “supported by sound considerations”); *id.* at 355 n.23 (summarizing the “virtues of the endorsement inquiry”); Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 715 (2001) (arguing that the “prohibition of endorsement is an indispensable element of the Establishment Clause”).

81. See McConnell, *supra* note 53, at 155.

counterargument that such an interpretation renders the clause redundant.⁸² Moreover, the fact that governmental proclamations of religion that did not “favor[] one sect over another”⁸³ were prevalent during the founding era does not necessarily suggest that the framers believed that endorsement of a particular tradition or sect, as a crèche display arguably does, would also be constitutionally appropriate.

More to the point, however, the historical argument rests on a controversial assumption regarding the relationship between original understanding and contemporary interpretation that I do not share. This is not an appropriate forum for hashing out the arguments in favor of and against originalism as an interpretive method.⁸⁴ It may be true that if one subscribes to this method, the endorsement test (at least as currently framed) would likely not survive. However, it is worth noting that the endorsement test would not be the only victim of an originalist re-reading of the Establishment Clause; indeed, it is possible that the entire doctrine would require scrapping.⁸⁵ An originalist reading of the Establishment Clause seems particularly inappropriate given the vast increase in religious diversity in the United States over the past two hundred years, the history of religious persecution and violence in America and elsewhere during that period, and the growth of secularism as a significant intellectual force. These developments have resulted in a church-state milieu far different from the one in which the framers lived in ways that rightfully affect how we should understand the clause, at least under a pragmatic view of constitutional interpretation.⁸⁶

82. See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 205 (1992) (“But the Establishment Clause cannot be mere surplusage. If the Free Exercise Clause standing alone guarantees free exercise of non-religion, the Establishment Clause must do more than bar coercion of non-believers. Thus a “coercion” test for establishment would reduce the Establishment Clause to a redundancy.”).

83. McConnell, *supra* note 53, at 155.

84. For arguments in favor of originalism, see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). For critiques of originalism, see, for example, RONALD M. DWORKIN, *LAW’S EMPIRE* (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

85. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 727-33 (2005) (Thomas, J., concurring) (arguing on originalist grounds that the Establishment Clause only prohibits Congress from interfering with a state establishment of religion).

86. For examples of pragmatic constitutional theory, see, for example, Stephen Breyer,

The criticism that the endorsement test is inconsistent with the Court's accommodation doctrine is also not particularly persuasive. The Court allows legislatures to accommodate religious beliefs by granting exemptions from generally applicable laws if they are burdensome to religion, so long as the exemption is applied evenhandedly among different faiths and is not overly burdensome to non-beneficiaries.⁸⁷ When a legislature accommodates religion in such a way—for example, by allowing Native Americans to ingest peyote as part of a religious ceremony—it does not endorse the “truthfulness and value” of the religion,⁸⁸ but rather simply recognizes that, for many people, religious belief is an important basis for thought and behavior that deserves respect. Even if this distinction is not crystal clear to everyone, nothing prevents the Court from simply announcing (as it basically has) that accommodations otherwise meeting constitutional requirements will not be considered endorsements.

In his critique, Smith argues that such a carve out for legislative accommodations is incoherent because it rests on distinguishing between legislators acting “because *they* believe in religion (in which case the measure would probably be considered an invalid endorsement), or because they believe *their constituents* believe in religion (in which case the measure would be a permissible accommodation).”⁸⁹ According to Smith, the distinction makes no sense, both because legislators are themselves citizens and because legislators represent their constituents by acting on their own beliefs.⁹⁰ I agree that such a distinction is flawed (among other things, legislators do not generally have only one intention in passing a law), but I do not believe that this distinction animates the accommodation carve-out. Contrary to Smith's assumption, under current doctrine, a court will not find an accommodation to be an endorsement *even if* the legislators enacting it do so because they believe that religion is “true or beneficial,” so long as the record does

Our Democratic Constitution, 77 N.Y.U. L. REV. 245, 246–47 (2002); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

87. See *supra* note 56 and accompanying text.

88. Smith, *supra* note 67, at 279.

89. *Id.*

90. *Id.* at 280.

not indicate that they enacted the accommodation *only* because they think religion is true or beneficial. In a typical case, because accommodations do in fact relieve significant burdens on important beliefs, it is plausible for the Court to assume, as it does, that at least a good part of the reason for granting an accommodation was that religion is an important source of value and action that deserves respect, even if the legislators also happen to think that religion is true or beneficial.⁹¹ It is also plausible for the Court to assume that this is the message that an accommodation actually sends to reasonable objective observers, in the absence of clear evidence demonstrating that the legislators intended to send or in fact did send the message that religion is true or beneficial.

In any event, the fact that an accommodation carve out has led some observers (those who think that accommodation and endorsement are indistinguishable) to believe that the doctrine is somewhat incoherent at the margins hardly counts as a devastating critique of a doctrine trying to make sense of such an intractable area of constitutional law.⁹² This is particularly true in light of the fact that, in the sixteen years since the Court adopted the endorsement test, the purported inconsistency between the accommodation and endorsement doctrines has posed no particular problems in the application of either endorsement or accommodation law.

The argument that the endorsement test wrongly elevates claims of mere offense or symbolic injury to cognizable federal rights is also not decisive. To begin with, even those who object to the endorsement test on this ground generally concede that remedying symbolic harm is not beyond the power of the judicial branch. For example, Choper, in explaining that symbolic injury is sufficient to satisfy Article III's "concrete injury" requirement under the Court's standing jurisprudence, acknowledges that "constitutional decisions have invalidated laws solely because of their expressive harm, *i.e.*, their communication of 'negative or inappropriate attitudes' toward

91. The evenhandedness requirement protects against legislators acting because they think that a particular religion is true or beneficial, or even more deserving of respect than others.

92. See Marshall, *supra* note 71, at 498 ("[T]here is a substantial argument to be made that the difficulty in achieving an intelligible establishment clause doctrine rests primarily with the issue itself and only to a lesser extent with the Court's deficiencies.").

persons or groups, and have approved nominal damages to remedy constitutional violations where actual injury cannot be shown.”⁹³ Thus, recognizing symbolic injury under the Establishment Clause does not create a constitutional anomaly or require courts to engage in a completely unfamiliar inquiry.

Moreover, the recognition and redress of symbolic injuries caused by improper church-state relations finds strong support in a growing field of legal scholarship focusing on the harms caused by various types of government expression.⁹⁴ This so-called “expressivist school” of legal thought contends that “what a law expresses may render it unconstitutional, regardless whether any of its tangible or material effects are constitutionally troubling.”⁹⁵ Of course, expressivism has been on the receiving end of blistering critiques as well,⁹⁶ and a full defense of the endorsement test must wrestle with these criticisms to be complete. I will not engage in such a wrestling match here, but simply note that an approach to the Establishment Clause focusing on the symbolic dimension of government conduct is particularly compelling because the recent increase in national religious diversity has caused government-sponsored religious messages to become more problematic than ever before,⁹⁷ and because focusing on the perceptions of both non-believers and believers directly serves several of the Establishment Clause’s basic purposes, including promoting civil peace, respecting individual conscience, and protecting religion from the deleterious effects of state support.⁹⁸

93. Choper, *supra* note 58, at 529–30 (quoting Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000)).

94. See generally Anderson & Pildes, *supra* note 93.

95. Hill, *supra* note 66, at 510.

96. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

97. See, e.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 773 (2001) (“This appraisal of comparative trends, moreover, is not limited to the legal landscape; within the political culture as well, the center of gravity of Establishment Clause controversy has shifted away from issues involving government money and toward issues of government religious messages.”).

98. For an excellent argument on this point, see Diamond & Koppelman, *supra* note 80, at 727–32.

The argument that the endorsement test is indeterminate, provides little guidance for lower courts, and will inevitably result in inconsistent decisions is a strong critique. However, this claim is hardly unique among analytical frameworks in constitutional law,⁹⁹ which is filled with such “know it when we see it” tests. To take just a few examples from administrative law,¹⁰⁰ the endorsement test is not really any less determinate than the following:

- The *Morrison v. Olson*¹⁰¹ test for deciding whether a removal restriction on an executive branch officer is unconstitutional because it “impede[s] the President’s ability to perform his constitutional duty.”¹⁰²
- The *Commodity Futures Trading Commission v. Schor*¹⁰³ test for determining whether Congress can assign a non-Article III court adjudicatory powers, which considers, among other factors, “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts.”¹⁰⁴
- The *Mathews v. Eldridge*¹⁰⁵ test for determining whether the government has provided sufficient process for withdrawing a legally protected property interest, requiring courts to consider the strength of the government interest, the strength of the private interest, and the risk that not providing additional process will result in an erroneous deprivation.¹⁰⁶

Obviously, these examples could be multiplied with the consideration of tests employed in other fields of constitutional law. To provide one more example, consider the “intermediate scrutiny” test that the Court has applied to content-neutral speech restrictions,

99. See Brownstein, *supra* note 80, at 847–51.

100. Administrative law is a class that I happen to teach from time to time.

101. 487 U.S. 654 (1988).

102. *Id.* at 691.

103. 478 U.S. 833 (1986).

104. *Id.* at 851.

105. 424 U.S. 319 (1976).

106. *Id.* at 335.

restrictions on commercial speech, and laws discriminating on the basis of gender, among others.¹⁰⁷ This standard of scrutiny asks whether the government's interest in enacting the law is sufficiently "important" and whether the means chosen are substantially related to the law's objective.¹⁰⁸ Like the endorsement test, the intermediate scrutiny standard has been roundly criticized as indeterminate and resulting in ad hoc judicial decision-making,¹⁰⁹ but it has been far from unworkable in practice and, in fact, has much support for its recommendation.¹¹⁰

The endorsement test, like these other tests, is an example of judicial minimalism, in the sense that it necessarily results in very narrow decisions that turn on the specific details and characteristics of the particular case being adjudicated.¹¹¹ Because they are minimalistic, these tests will inevitably give little guidance to lower courts and may result in inconsistent decisions.¹¹² These are some of the costs of minimalism, and they apply to the endorsement test just as they do to other minimalistic tests, but there are benefits to minimalism as well.¹¹³ One of these benefits is that by employing judicial minimalism, the Court can take its time with particularly difficult issues (such as the proper limits of church-state interaction) and allow the state of the law to evolve as the Court learns more about the particular circumstances giving rise to these complicated controversies.¹¹⁴ As the Court decides more cases, it is hoped that, over time, the doctrine will become clearer and more focused, until the series of decisions creates a body of jurisprudence that provides predictability and adequate guidance. The Court has admittedly not

107. For a comprehensive discussion of the intermediate standard, see generally Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998).

108. *See id.* at 317–18.

109. *See id.* at 301 (collecting critiques).

110. *See id.* at 325–39 (arguing in favor of the intermediate scrutiny standard).

111. On minimalism generally, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

112. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 28–29 (1996).

113. *See id.* at 7–8.

114. *See* Wexler, *supra* note 107, at 314–15, 330–39.

yet reached this goal with regards to the endorsement test, but this in itself is not a critique of any particular minimalist doctrine.

One could argue that the endorsement test differs from other minimalistic constitutional tests in that, by relying on the concept of the reasonable observer who views a display in its entire context, it adds a level of uncertainty and incoherence not present with the other tests. It is true that the reasonable observer concept is subject to the criticism that it is independently indeterminate (who is this observer; what are his or her characteristics?).¹¹⁵ Further, Jessie Hill is certainly correct to suggest that the contextual nature of the endorsement test exacerbates its indeterminacy; as she notes, both the physical and historical context of any display can be understood in myriad ways depending on one's perspective.¹¹⁶

I doubt, however, that these features of the endorsement test meaningfully differentiate it from other indeterminate constitutional tests. All such tests involve terms or concepts, such as "reasonable observer" or "historical context," that are not self-defining and require further elaboration from higher courts to be applied with any consistency. For instance, without further guidance, how should a lower court determine whether an adjudicatory body has exercised an "essential attribute" of federal judicial power, whether the private interest in a protected property interest is high, low, or somewhere in between, whether a government objective is "important" enough to pass constitutional muster, or whether a Congressional restriction on Presidential power has impeded the President's ability to carry out his constitutional duties? For each of these inquiries, lower courts must simply struggle through cases, using their own powers of logic and judgment, until higher courts instruct them to do something different. The same is true of the endorsement test. Is the "reasonable observer a member of one of the regnant faiths, a minority adherent, or an atheist?"¹¹⁷ We do not know until the Supreme Court tells us, but there is nothing inherent in the concept of the "reasonable observer" that would prevent the Court from further specifying what it means.

115. See *supra* notes 73–76 and accompanying text.

116. See Hill, *supra* note 66, at 522–27.

117. Choper, *supra* note 58, at 511.

The same is true with regard to context. Should a lower court consider a display's border to be part of the display or the demarcation indicating the end of the display?¹¹⁸ Simply saying that lower courts should look at "physical context" does not answer the question, of course, but nothing prevents the Supreme Court from deciding what approach makes the most sense in most cases and instructing lower courts to adopt that approach. Scholars and other observers can then argue whether the Court made the right choice, but that is a far different matter than saying that the Court's test is indeterminate and subjective.

These are the critiques of the endorsement test that are either misplaced or overstated. On the other hand, the criticism, voiced by McConnell, Hill, and others,¹¹⁹ that the endorsement test improperly favors majority religions over minority ones is compelling. This is a substantive critique, rather than one focused on lack of predictability or determinacy. It claims, at least in the version that I prefer, that: (1) The endorsement test's virtues include its support of certain values—equality, protection of conscience, promoting civil peace¹²⁰—that require judges to attend to the way in which minority religious believers (and non-believers) perceive the meaning of religious displays and symbols promoting majority traditions;¹²¹ and (2) It is very difficult for judges who are themselves not, for the most part, members of minority traditions to understand those perceptions and to empathize with them.¹²² Of course, a majority bias in the application of the endorsement test is not inevitable. Members of the Court could recognize the inherent difficulties in understanding the perceptions of people who are very different from themselves and

118. Hill, *supra* note 66, at 39.

119. See *supra* notes 77–79 and accompanying text.

120. See *supra* note 98 and accompanying text.

121. See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 980 (2004) ("Under a minority-protection approach, the non-endorsement test too should emphasize the perspective of those in the minority faith."). To be sure, Berg believes that "the protection and equalization of minority faiths should not be the sole criterion for Religion Clause cases," *id.* at 922, but he does suggest that "the protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one." *Id.* at 923.

122. See Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711–12 & n.52 (1986).

move to counteract these difficulties. For example, the Court could establish a presumption against religious displays,¹²³ explicitly indicate that courts should carefully consider the perspectives of minority believers when deciding cases, or perhaps even invite minority traditions to file amicus briefs with the Court.¹²⁴ However, the Court has not taken any of these measures, and, as its recent decision upholding the Ten Commandments monument on the Texas Capitol grounds demonstrates, it does not explicitly consider minority religious believers' perceptions when deciding these cases. The majority decision in *Van Orden*, for example, contains not a shred of consideration of how, for example, a Hindu, a Buddhist, a Zoroastrian, a Jew, or an atheist might perceive the monument in question.

Although it does not rise to the importance of the majority-bias critique, the argument that the endorsement test undermines the dignity of the courts carries some weight as well. What law professor has taught these cases without milking them for laughs? What if there were *two* reindeer? What if the menorah was *fifty* feet high? What about *three* reindeer? What if the menorah *did a silly dance*? The jokes are too easy; they practically write themselves. Why is this? It is difficult to make the same kind of jokes in any other area of law, even in those areas, such as the ones discussed above, that are also highly indeterminate. One could certainly criticize, for example, the Court's Fourth Amendment jurisprudence for requiring courts to make similar subtle distinctions (Were the drugs in the bag? Was the bag open? Was it in the trunk?), but the distinctions are hardly as funny. Something about the nature of the displays—that they are visual, perhaps, or that they often include sacred objects together with everyday ones—makes the endorsement exercise uniquely ridiculous,

123. See Hill, *supra* note 66, at 539–44.

124. One example of such a brief (not explicitly invited by the Court, of course) was the brief submitted in the Pledge of Allegiance case on behalf of various Buddhist organizations and believers. This brief is discussed below, *see infra* notes 182–85 and accompanying text. Another possibility, at least at the trial level, would be to ensure that expert witnesses testify as to the perceived effects of the challenged symbol or display. As Professor Berg pointed out at the symposium, such witnesses do, in fact, sometimes testify. But the introduction of such testimony does not seem to have softened the majority bias problem with the endorsement test at the appellate or Supreme Court levels, even if it might have some beneficial effects at the trial level.

even to those who (like me) support it as theoretically sound. Surely it is a cause for serious concern when the courts routinely engage in a task that is widely perceived as, for lack of a better way to put it, downright goofy.

Interestingly, what both of these critiques of the endorsement test share is a focus on the decision-maker who must apply the test, rather than on the content of the test itself. This raises the question of whether Congress could fashion an institutional arrangement that would keep the endorsement test intact, but change the actors who apply it. Such an arrangement would be possible and, perhaps, desirable. This Article now turns to this topic.

III. THE ENDORSEMENT COURT, ARTICLE I STYLE

A. Article I Courts, Generally

Although Article III of the Constitution provides that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”¹²⁵ and that the judges of these courts must enjoy both salary and tenure protection,¹²⁶ Congress has long vested adjudicatory power in tribunals staffed by decision-makers who enjoy neither salary nor tenure protection.¹²⁷ Examples include not only the prominent Tax¹²⁸ and Bankruptcy Courts¹²⁹ and the system of federal magistrate judges responsible for much of the nation’s initial criminal law work,¹³⁰ but also adjudicatory bodies of all sorts within the various federal agencies. The Supreme Court has placed some limits on Congress’ authority to grant jurisdiction to these tribunals, most famously by striking down the Bankruptcy Courts as constituted in

125. U.S. CONST. art. III, § 1.

126. *See id.* (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

127. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 217–18 (4th ed. 2003).

128. *See* 26 U.S.C. § 7441 (2000) (establishing the Tax Court as an Article I court).

129. *See* 28 U.S.C. § 152 (describing appointment of Bankruptcy Judges to fourteen year terms, though they are also described as being “judicial officers” of the Article III district courts).

130. *See id.* § 631 (providing for the appointment and tenure of magistrate judges).

1982,¹³¹ but for the most part it has tolerated these arrangements. For instance, the Court has upheld the magistrate court system, on the grounds that magistrates act “subsidiary to and only in aid of the district court,” which maintains “total control and jurisdiction.”¹³² The Court has also upheld arrangements allowing agency adjudicatory bodies to determine various private claims between individuals and organizations that are related to public regulatory programs.¹³³ In *Schor*, the Court articulated the “test”—alluded to above¹³⁴—governing whether jurisdiction in an Article I court or agency is proper. It noted:

Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.¹³⁵

Courts have held that Congress can vest non-Article III tribunals with the power to decide constitutional questions,¹³⁶ although it is far from clear whether such decisions must be reviewable by an Article III court, and, if so, whether review by the Article III court must be searching in nature.

131. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

132. *United States v. Raddatz*, 447 U.S. 667, 681 (1980).

133. *See, e.g., Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

134. *See supra* note 104 and accompanying text.

135. *Schor*, 478 U.S. at 851.

136. *See, e.g., Crawford v. Comm’r of Internal Revenue*, 266 F.3d 1120 (9th Cir. 2001); *Rager v. Comm’r of Internal Revenue*, 775 F.2d 1081 (9th Cir. 1985).

B. A Proposed Statute

It is my contention that something like the following statute would be worth Congress' serious attention:

The Endorsement Courts Act of 2006

Sec. 1 Establishment. There shall hereby be established an "Endorsement Court" to assist the federal Article III courts with adjudication of claims that government symbols or displays¹³⁷ unconstitutionally endorse religion in violation of the Establishment Clause of the First Amendment.

Sec. 2 Jurisdiction. The Endorsement Court shall have jurisdiction to hear any claim that any government symbol or display unconstitutionally endorses religion in violation of the Establishment Clause of the First Amendment.

Sec. 3 Jurisdiction of the Federal Courts. No Federal District Court or Court of Appeals shall have jurisdiction to hear any claim that any government symbol unconstitutionally endorses religion in violation of the Establishment Clause of the First Amendment. The Supreme Court of the United States may exercise de novo appellate review of any final decision of the Endorsement Court at its discretion by writ of certiorari as described in 28 U.S.C. 1254.

Sec. 4 Appointment of Endorsement Court Judges. The Endorsement Court shall be staffed by seven Endorsement Court Judges. Endorsement Court Judges shall be appointed by the Supreme Court of the United States, pursuant to procedures established by the Supreme Court.

The Endorsement Court shall consist of the following:

(a) One Judge with substantial knowledge of a Protestant religious tradition.

137. Clearly this phrase, as well as other terms in the statute, would need to be defined, and such definitions would surely be difficult to craft. This Article does not attempt any such definitions, but assumes that a workable definition could be drafted.

(b) One Judge with substantial knowledge of Catholicism.

(c) One Judge with substantial knowledge of Judaism.

(d) Two Judges with substantial knowledge of an Eastern religious tradition, including Buddhism, Hinduism, Taoism, or Confucianism.

(e) One Judge with substantial knowledge of a religious tradition not represented in subsections (a)–(d).

(f) One Judge with substantial knowledge of atheism.¹³⁸

Sec. 5 Tenure of Endorsement Court Judges. Each Endorsement Court Judge shall serve for a period of three years,¹³⁹ unless removed prior to the end of the term by the Supreme Court of the United States. The President of the United States shall have the power to remove any member of the Endorsement Court only in cases of malfeasance or neglect.¹⁴⁰

Sec. 6 Salary of Endorsement Court Judges. The salary of Endorsement Court Judges shall be [some reasonable amount].

138. As noted below, the mix of knowledge reflected in this section is by way of example only; a different mix may be preferable, or perhaps the statute would work better simply by requiring appointment of judges who reflect a broad knowledge about religion. Professor Berg suggested at the symposium, quite persuasively, that dividing up the religious universe in the way the draft statute does is only one way to split up that universe, and not necessarily the best way. For example, Professor Berg is certainly correct to say that another quite relevant, perhaps better, way to split up the religious universe would be to follow the insight of James Davison Hunter, who roughly divides modern religious belief into progressive and orthodox visions. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 107–31 (1991). As a theoretical matter, this may indeed be a better way to classify religious beliefs in the modern world. As a practical matter, it would probably be much more difficult to write such a classification into a statute such as this one. Moreover, it is important to keep in mind that the statute calls for its members to have “substantial knowledge” of certain religious traditions, not that they themselves are members of those traditions (a qualification which would be constitutionally problematic for reasons discussed below). It seems to me that those who have substantial knowledge of certain religious traditions would likely possess knowledge of different varieties within those traditions, both orthodox and progressive, and could understand how both orthodox and progressive members of those traditions would view a religious symbol or display.

139. There is nothing particularly magical about three years; perhaps five or seven or some other length would work better.

140. Perhaps the President should have no removal power at all.

Sec. 7 Supervision of Endorsement Court Judges. Endorsement Court Judges shall be subject to the supervision of the Supreme Court of the United States, with respect to disciplinary action and other relevant administrative matters.

Sec. 8 Procedures. Claims shall be presented to the Endorsement Court, and the Endorsement Court shall hold a hearing on those claims, pursuant to procedures established by the Supreme Court of the United States. Those procedures shall provide, at a minimum, for the written and oral presentation of evidence and arguments to the Endorsement Court by the party challenging the government symbol or display and the party defending such symbol or display.

Sec. 9 Final Decision. The Endorsement Court shall, within a reasonable time following a hearing, render a final written decision and order regarding whether the challenged symbol or display constitutes an endorsement of religion, as defined and explained by the Supreme Court of the United States. One Endorsement Court Judge shall write a majority decision representing the views of the majority of the Endorsement Court. Individual Endorsement Court Judges may contribute additional concurring or dissenting opinions as warranted. Congress urges individual Endorsement Court Judges to provide written explanations of how the challenged symbols or displays would affect the adherents of the religious traditions with which they possess knowledge. Orders of the Endorsement Court become final and enforceable upon issuance.

Before I engage in an analysis of the desirability of such a statute, several caveats are in order. First, I have drafted the statute in more or less ordinary language, rather than making an effort to have the proposal read like an actual statute. Thus, the statute may be less precise than it should or would be if it were a real proposal.¹⁴¹

141. For example, I have made no effort to define the words “symbol” or “display” (or “religious” for that matter). Clearly, these words would have to be defined, and, just as clearly, whatever definitions would ultimately be included in the statute would cause problems (and

Second, although the intent of the statute is to decrease somewhat the involvement of the federal courts with the endorsement test, and to give much of that work to a non-Article III tribunal staffed by individuals with knowledge of a range of religions, I absolutely am not wedded to the specific arrangement put forth by the draft statute, including the precise mix of religious knowledge referred to in section four. It is but one example of the general notion I attempt to advance; variations within the general scheme may prove to be preferable either as a policy or constitutional matter, and I will attempt to note these possible alternatives in my discussion. Finally, I mean what I say in the sentence immediately prior to the draft statute: My claim is not that such a statute would definitely be more desirable than the current regime, but rather only that such a statute is worth consideration and discussion, even if only as a way of thinking about how federal judges should apply the endorsement test.

C. Constitutional Issues

This subsection identifies the various constitutional issues raised by the draft statute and addresses them briefly, with the intention of noting where the statute might be most vulnerable to attack and how it might be tweaked to avoid these problems if necessary.¹⁴² It is worth noting at the outset that the Supreme Court has given little guidance as to many of the issues raised by the statute, and therefore there is ultimately no way to predict with any certainty whether any particular part of the statute would be held unconstitutional. Indeed, this may be an additional independent advantage of enacting such a statute. Given that it would almost certainly be challenged, it could result in new law clarifying Congress' limits when it seeks to create alternative institutional arrangements to vindicate federal rights. The following subsections address the most important constitutional issues potentially raised by the draft statute, namely whether the jurisdictional provision violates Article III and whether the

litigation) at the margins. This problem, however, hardly distinguishes the draft statute from any other statute.

142. The statute could even be written to address certain contingencies, such that if one part of the statute is found unconstitutional, a different section remedying the constitutional problem will take effect.

appointment provision violates either the Appointment Clause of Article II or the Religious Test Clause of Article VI.¹⁴³

1. Jurisdictional Provision

First, of course, there are potential constitutional problems with the basic arrangement—that is, stripping the lower federal courts of jurisdiction over the endorsement issue and vesting it with an Article I court, subject only to discretionary, but full, Supreme Court review. Taking the jurisdiction-stripping subissue first, no judicial or scholarly consensus exists regarding Congress’ power to limit the jurisdiction of the lower federal courts, except to the extent that it is “untenable” to suggest “that lower federal courts created by Congress must have the full judicial power described in Article III.”¹⁴⁴ Nonetheless, there is a good chance that the arrangement put forth by the draft statute would be held constitutional. First, it finds support in Article III’s text, which gives Congress discretion to create lower federal courts in the first place.¹⁴⁵ Based on this text, some have advanced the persuasive argument that Congress’ power to refuse to create lower federal courts implies the lesser power to restrict the jurisdiction of those courts once they have been created.¹⁴⁶ If this is true, the basic arrangement of the draft statute would certainly be constitutional.

Even under theories suggesting limits on Congress’ power to restrict the jurisdiction of lower federal courts, certain features of the proposed statute weigh heavily in favor of its constitutionality. First,

143. Of course, these are not the only potential constitutional issues raised by the draft statute. For example, the statute could be subject to attack on Establishment Clause grounds because of its specific mandate to include religious knowledge as a prerequisite for the exercise of governmental authority, or for requiring too precise a mix of religious knowledge on the Endorsement Court. The statute may also raise separation of powers problems as well, for example through the requirement that the Supreme Court develop procedures for the Endorsement Court to follow.

144. CHEMERINSKY, *supra* note 127, at 191; *see also id.* at 192 (noting that “this theory . . . has not been followed at any point in American history”).

145. *See* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphasis added).

146. *See* CHEMERINSKY, *supra* note 127, at 192–96, 192 n.3 (discussing this argument and citing authorities).

the statute does nothing to affect state court jurisdiction over endorsement claims, which Congress has no power to affect. The Supreme Court would continue to have full jurisdiction to review judgments of the highest state court that are based on the First Amendment. Second, under the statute, the Supreme Court has full, if discretionary, jurisdiction to review the decisions of the Endorsement Court, so that the statute does not cut off all federal court consideration of the endorsement issue. Finally, although the Endorsement Court is not an Article III court, it is substantially controlled by one with respect to both the appointment and removal of its members and disciplinary and administrative matters. These provisions ensure that an Article III tribunal remains a very vital component in the enforcement of the non-endorsement right.

An examination of some of the more prominent arguments for limiting Congress' power to restrict lower federal court jurisdiction demonstrates the strengths of the draft statute.¹⁴⁷ For example, Justice Story once advanced the famous theory, based on the "shall be vested" language of Article III,¹⁴⁸ that some federal court review of all federal claims must be available, and therefore that, in cases in which state court review of a federal claim is unavailable, there must be some lower federal court to hear the claim or else no federal court will be able to do so (because Congress cannot expand the original jurisdiction of the Supreme Court¹⁴⁹).¹⁵⁰ This theory, however, does not threaten the draft statute, both because state court review of endorsement claims remains available and because the statute provides for review by the Supreme Court of the Endorsement Court's decisions.

Professor Eisenberg's theory, which rests in large part on the difficulty of Supreme Court superintendence over federal law in an

147. Of course, the Court has required Congress to indicate with extreme clarity its intent to bar review of constitutional claims before recognizing such limits. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988); *Johnson v. Robison*, 415 U.S. 361 (1974). The draft statute is worded with the intent to be extremely clear regarding preclusion of lower federal court review of endorsement claims for this reason.

148. *See supra* note 126.

149. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

150. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328–31 (1816).

era of excessive population and litigiousness,¹⁵¹ is more threatening to the draft statute's jurisdiction stripping provision. However, the threat is somewhat undermined by the draft statute's focus on one specific issue (rather than eradicating the lower federal courts altogether) and by its provision vesting control of its personnel in the Supreme Court (giving the Supreme Court more superintendence power over endorsement law than it otherwise would have in a typical jurisdiction stripping scenario).

Whether the draft statute's vesting of jurisdiction of endorsement claims in the Endorsement Court would survive review under the *Schor* test is similarly unclear. But again, several factors weigh in favor of the statute's constitutionality. Much like the Commodity Futures Trading Commission's (CFTC) jurisdiction to hear state law counterclaims, upheld in *Schor*, the draft statute also grants the Endorsement Court power over only a "particularized area of law," and does not give it the power to exercise "all ordinary powers of district courts."¹⁵² Also, the Endorsement Court's decisions are subject to de novo review by an Article III court, an important factor in *Schor* and in other cases.¹⁵³ Although the Endorsement Court's orders (unlike those of the CFTC in *Schor*) are self-enforcing, district court enforcement was only one of several factors examined by the *Schor* court.¹⁵⁴ If necessary, the draft statute could be amended to require district court enforcement, preferably with a provision requiring district court enforcement in the great majority of cases—for example, when the district court finds that the Endorsement Court's order is not "clearly erroneous" in light of Supreme Court precedent. Finally, the "nature of the claim"—namely, that it is a constitutional one—probably weighs somewhat against the draft statute in the overall *Schor* balance. However, the fact that the Supreme Court retains appointment, removal, and supervision power over the Endorsement Court (a feature not present in any other relevant case) weighs heavily the other way, because it ensures that

151. Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

152. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852–53 (1986) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982)).

153. *Id.* at 852.

154. *See id.*

ultimate control over the application of the endorsement test remains in the hands of an Article III tribunal.

2. Appointment Provision

The appointment provision of the draft statute performs several important functions. It ensures that the Supreme Court, an Article III tribunal, maintains substantial control over the Endorsement Court, which (as just described) is an important safeguard against an Article III challenge to the statute. The appointment provision also ensures that the members of the Endorsement Court possess knowledge of a variety of religious traditions, both majority and minority, to alleviate the majority-bias critique of the endorsement test.¹⁵⁵

However, there are at least three possible problems with the appointment provision of the draft statute. First, one can plausibly argue that vesting appointment of the Endorsement Court members in the Supreme Court is inconsistent with the Appointments Clause of Article II. This clause provides that the President has the power (with the advice and consent of the Senate) to appoint “Officers of the United States,” but Congress may vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁵⁶ Members of the Endorsement Court are almost certainly “officers,” given their important duties and authority to enter final orders;¹⁵⁷ thus, whether Congress can vest the power to appoint these members in the Supreme Court (a “Court[] of Law”)¹⁵⁸ turns on whether they are inferior or principal officers. At one point, the Supreme Court answered this question by applying yet another multi-factored test, focusing on the nature and duration of the

155. There is nothing particularly special in having seven members of the Endorsement Court, or in the specific mix of religious traditions delineated in sections 4(a)-(f) of the draft statute. It may be the case that more (or fewer) judges would better serve the goals of the statute, or that a different, more diverse mix of traditions would be preferable. Perhaps the statute could be even more vague, specifying only that the members of the Endorsement Court “shall possess a broad range of religious knowledge,” or something similar.

156. U.S. CONST. art. II, § 2, cl. 2.

157. Government officials who exercise “significant governmental authority” are officers who must be appointed pursuant to the requirements of the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1 (1976); *see also Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868 (1991).

158. *See supra* note 156 and accompanying text.

officer's jurisdiction, the extent of the officer's powers and duties, and whether the officer is subject to removal by another officer.¹⁵⁹ Today, it seems that, at least “[g]enerally speaking,” the Court decides the question by asking whether the officer is “supervised” by some other officer.¹⁶⁰ If the officer is supervised, he is inferior; if not, he is principal.

Although the question is by no means free from doubt,¹⁶¹ substantial arguments support classifying the Endorsement Court judges as inferior officers. In *Edmond v. United States*, the Supreme Court held that judges on the Coast Guard Court of Criminal Appeals were inferior officers because their decisions were reviewable by a higher court and because they were administratively supervised by the Judge Advocate General.¹⁶² Likewise, Endorsement Court judges are administratively supervised by the Supreme Court (and can be removed without cause), and their decisions are subject to review by the Court. Indeed, the reviewability issue cuts even more heavily here than in *Edmond*, because the Supreme Court would review decisions of the Endorsement Court de novo, whereas the Court of Appeals for the Armed Forces exercised a more narrow scope of review over the Court of Criminal Appeals' decisions.¹⁶³ Nor can *Edmond* be distinguished on the ground that Endorsement Court Judges, because they decide constitutional issues, serve more important purposes than the Coast Guard Court of Criminal Appeals judges; the latter presided over a variety of criminal cases, including those involving the death penalty,¹⁶⁴ and therefore handled an even broader array of constitutional issues than would the Endorsement Court judges.

Second, one might argue that, by placing qualifications on who the Supreme Court may appoint to serve on the Endorsement Court—namely, the “substantial knowledge” requirements contained in

159. *Morrison v. Olson*, 487 U.S. 654 (1988). Applying this test, the appointment of the Endorsement Court judges would likely, though not certainly, be constitutional. Their duties are limited to adjudicating one area of law, and their judgments are subject to de novo review by an Article III tribunal.

160. *Edmond v. United States*, 520 U.S. 651, 662–63 (1997).

161. For one thing, federal district judges and federal circuit court judges are generally considered to be principal officers. *Weiss v. United States*, 510 U.S. 163, 191 & n.7 (1994).

162. See *Edmond*, 520 U.S. at 664.

163. See *id.* at 665.

164. See *id.*

sections 4(a)-(f)—the statute infringes on the Court’s Appointment Clause power to choose whoever it wants to fill positions. In other words, this argument asserts that the only power the Appointment Clause grants to Congress with respect to inferior officers is to choose which body (the President alone, a court of law, or a head of an agency) may appoint them. Once Congress makes this choice, the argument suggests, the body that Congress has chosen has unbridled discretion to fill the inferior officer position.

This argument has a strong textual appeal, but it is highly unlikely that any court would adopt it. Congress has long established qualification restrictions with respect to both principal and inferior officers, and the current United States Code is filled with them.¹⁶⁵ Moreover, Supreme Court dicta supports the notion that Congress can impose reasonable qualification restrictions on the choice of appointees.¹⁶⁶ In addition, an early Attorney General opinion concurs with this notion, so long as the qualification restriction gives the appointing officer significant leeway in choosing who to appoint.¹⁶⁷ Finally, the notion that Congress can impose reasonable qualification restrictions on appointments is not only supported by long-standing and widespread institutional practice, but has theoretical appeal as well. This is so because one can explain this authority as simply an incident to Congress’ unquestioned power to create offices in the first place.

Finally, one could argue that the Religious Test Clause of Article VI independently prohibits the religious knowledge qualifications of section 4(a)-(f) of the draft statute. The Religious Test Clause provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United

165. *See, e.g.*, 2 U.S.C. § 437(c) (requiring that no more than three of the six members of the FEC may be of the same political party); 5 U.S.C. § 8472 (providing that in making appointments to the Federal Retirement Thrift Investment Board, the President must consult with various members of Congress); 10 U.S.C. § 4337 (requiring that the Chaplain of the U.S. military must be a “clergyman”); 16 U.S.C. § 3632 (providing for appointment of Pacific Salmon Treaty commissioners); 28 U.S.C. § 505 (requiring that the Solicitor General must be “learned in the law”); 38 U.S.C. § 305(a)(2) (requiring that the Undersecretary of Health in HHS must be selected without “regard to political affiliation”).

166. *See Myers v. United States*, 272 U.S. 52, 129 (1926).

167. *Civil Service Commission*, 13 Op. Att’y Gen. 516, 520 (1871).

States.”¹⁶⁸ Certainly, on some level, the requirement that an appointee have “substantial knowledge” of a particular religious tradition sounds like a religious “test,” but the “test” of which the clause speaks refers to “affirmations” of religious beliefs, rather than to “examinations” of religious knowledge.¹⁶⁹ Perhaps one could argue that the religious knowledge requirement serves as a proxy for religious affiliation, and therefore that these requirements in fact promote the very evil with which the framers were concerned when they drafted this Clause.

I agree that the Clause should be construed to refer to true proxies for religious affiliation, but at least two factors weigh in favor of not finding such an illegitimate proxy present here. First, there is a real difference between religious affiliation and religious knowledge. The entire academic field of religious studies is based on the assumption that possessing knowledge about a religious tradition is quite different from believing in its tenets or truth.¹⁷⁰ Second, knowledge of a religious tradition, rather than belief in its claims, is, in fact, the qualification that best serves the purposes of the statute. Because the endorsement inquiry focuses on what a “reasonable observer” would think about a challenged symbol or display, rather than on what any one adherent would think, the knowledge requirement best ensures that the Endorsement Court judge will have some idea of what the average adherent of the religious tradition would think about the display. Thus, the statute does not intend to ensure that an adherent of the religious tradition in question is selected to serve on the Court.

D. Advantages and Disadvantages of the Draft Statute

This section briefly discusses the advantages and disadvantages of enacting a statute such as that proposed by this Article. Because I argue that the advantages outweigh the disadvantages, I will first discuss the statute’s drawbacks, and then examine its benefits.

168. U.S. CONST. art. VI, § 3.

169. See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

170. For discussion of teaching about religion in an objective manner, see generally Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159 (2002).

1. Disadvantages

At least four disadvantages to adopting the draft statute come to mind.¹⁷¹ First, as the statute's constitutionality would certainly be challenged,¹⁷² because it raises difficult and important constitutional questions,¹⁷³ adopting the statute would result in expensive and time-consuming litigation. Moreover, if the statute is found wholly unconstitutional, the time, money, and effort spent to enact it would be wasted, except for the fact that it may be valuable to force the courts to weigh in on one or more of the novel issues raised. Nonetheless, this potential problem, though real, is fairly minor compared to the advantages of the statute.

Second, the statute places an increased administrative burden on the Supreme Court. By requiring the Court to promulgate rules governing Endorsement Court procedures, to appoint the judges of the Endorsement Court, and to supervise those judges (including possibly removing them), the statute requires the Court to undertake additional burdensome responsibilities. On the other hand, the Court already has many such responsibilities, and enjoys an administrative apparatus to support its obligations. So long as Congress provides additional funding for administrative support, the increased administrative burden imposed by the statute is not overly demanding. Regardless, if one views this as a significant problem, only the appointment and removal powers must necessarily reside with the Court (for constitutional reasons¹⁷⁴). Congress could promulgate the Endorsement Court procedures itself or delegate this duty to another body, either to one that already exists or to a new one established by the draft statute.

171. There may certainly be other disadvantages. For example, it was pointed out at the symposium that the draft statute may create a conflict of interest problem, since the Supreme Court, which reviews the work of the Endorsement Court, appoints the members of that Court. It was also pointed out that the Endorsement Court in many ways resembles the Federal Circuit, which many believe has failed to live up to its promise as a specialized tribunal.

172. The statute, as I envision it, would not strip the courts of jurisdiction to consider its own constitutionality; indeed, it may be wise to include a specific provision creating fast-track jurisdiction in a single court to hear the inevitable challenge that would be brought against the law.

173. See *supra* notes 141–70 and accompanying text.

174. See *supra* notes 153–56 and accompanying text.

Third, placing the adjudication of the endorsement issue in the hands of a non-Article III tribunal may send the unwanted message that the right protected by the Establishment Clause's non-endorsement norm is not particularly important. If the statute sent this message, it would be a serious problem, although one that likely would not outweigh the benefits of the statute, specifically with respect to its promotion of the non-endorsement norm.¹⁷⁵ Although it is certainly possible that some may receive this message from the adoption of the statute, particularly given that the media does not always communicate legal developments in the most accurate fashion, it is unlikely that this is the message that most people will receive. Not only does the statute keep the Supreme Court ultimately in charge of enforcing the right at issue, but the statute's very purpose is also to make this right more robust by entrusting its enforcement to an adjudicatory body staffed by individuals more attuned to its importance. Because the message received will be undesirable only if the statute's goal somehow becomes distorted, it is unwise to decline to pass the statute simply because of the message it might possibly send. If such distortion appears to be a particularly likely possibility, members of Congress responsible for this legislation could make extra efforts to emphasize the pro-endorsement rights message intended by the statute.

Finally, precluding lower federal court review of endorsement questions may set an undesirable precedent that would support the preclusion of judicial review of other important constitutional claims. Members of Congress have periodically endorsed stripping jurisdiction to hear claims the members disagree with from the federal courts, including claims regarding abortion rights, school prayer, and other controversial issues.¹⁷⁶ Such preclusion would not, of course, be a good idea from a minority rights perspective or from the perspective that federal courts should maintain the power to control the shape and enforcement of constitutional rights generally. If it were true that the draft statute would, in fact, set such a precedent, this would make the statute undesirable. This is because augmenting protection of the endorsement right is not worth the

175. See *infra* notes 181–85 and accompanying text.

176. See CHEMERINSKY, *supra* note 127, at 170.

sacrifice of other more fragile, and arguably more important, constitutional rights. However, it is unlikely that the draft statute, if understood correctly, will set such a precedent. For one thing, the statute maintains federal court control over the right at issue, both by allowing for Supreme Court review and by providing for Supreme Court oversight of the Endorsement Court itself. More importantly, the statute's purpose is to augment protection of the right, rather than to undermine it. The statute's underlying premise is that the endorsement test is fundamentally correct, but enforced by suboptimal decision-makers. This is very different from the premise of other jurisdiction-stripping efforts, whose starting points are generally that the right in question is fundamentally incorrect. Thus, defenders of the draft statute, and minority rights more generally, can successfully distinguish this statute from other attempts to strip the jurisdiction of the federal courts.

2. Advantages

The advantages of the draft statute outweigh its disadvantages. I will discuss three of the advantages here, in increasing order of importance. First, entrusting primary endorsement adjudication to one body, instead of to numerous district courts and courts of appeals, will unify and standardize the law governing the display of religious symbols throughout the country.¹⁷⁷ This is advantageous both with regard to specific types of displays (e.g., we would know whether “In God We Trust” or Ten Commandments monuments sponsored by the Fraternal Order of Eagles would be constitutional throughout the nation) and to important questions of endorsement law, such as those identified by Choper, Hill, and others (e.g., what qualifies as the physical context of a display or what characteristics should we assume the reasonable observer to possess).¹⁷⁸ In a sense, of course, this argument proves too much; if uniformity and standardization were considered to be an advantage significant enough to justify altering the federal court system, such virtues might

177. Of course, state courts would continue to provide some variety and experimentation, at least on issues not directly considered by the Supreme Court.

178. See *supra* notes 72–76 and accompanying text.

justify the eradication of lower federal courts entirely, something I certainly do not endorse. On the other hand, promoting uniformity and certainty in this one small area of constitutional law may be uniquely beneficial as compared to other areas, given the inherently indeterminate and ambiguous nature of the endorsement test.

Second, removing endorsement claims from the lower federal courts would free them from having to decide the many minute and seemingly silly (to some) questions required by the endorsement test. To the extent that courts appear undignified and even ridiculous when they spill ink to resolve such issues as whether a display's flowered border is part of a challenged display,¹⁷⁹ whether the presence of evergreen trees changes the meaning of a display,¹⁸⁰ or whether painting a figure alters a display's overall message,¹⁸¹ the creation of the Endorsement Court will ameliorate these difficulties. The average First Amendment class may elicit less laughter than before, but legal scholars, news journalists, and concerned citizens would likely hold the federal courts in higher regard than they do now.

By far the most important advantage of the Endorsement Court, however, is that it places the adjudication of the endorsement test into the hands of individuals who know something about religion, who represent a variety of majority and minority religious traditions, and who can be expected to apply the test in a way that will promote the test's important purposes. As it currently stands, the endorsement test entrusts judges who are generally members of majority religious traditions with the responsibility of deciding whether a state-sponsored display or symbol sends a message to outsiders that they are not political equals. While it certainly is not impossible for such a judge to make this determination in a reasonable fashion, the task is a highly difficult one. After all, the test, by its very terms, requires judges to get inside the heads of members of the minority tradition to attempt to understand how that person would perceive the message. Of course, it is far easier for someone deeply acquainted with a minority tradition to understand how a government sponsored message would be perceived by a member of that tradition. To the

179. Hill, *supra* note 66, at 522–23.

180. See *supra* note 64 and accompanying text.

181. See *supra* note 61 and accompanying text.

extent that one of the endorsement test's primary purposes is to protect the interests of those whose beliefs are not part of the mainstream, creation of the Endorsement Court would constitute a significant advance from the status quo.

As just one example, consider the amicus brief submitted to the Supreme Court in the Pledge of Allegiance case (*Elk Grove Unified School District v. Newdow*)¹⁸² on behalf of 300,000 Buddhist Americans.¹⁸³ This unique brief, which argued that the Pledge is unconstitutional as currently written, attempted to communicate how the average Buddhist views the Pledge's phrase "under God," and to explain why the average Buddhist believes that the phrase is inconsistent with his or her religious beliefs.¹⁸⁴ The brief explained in some detail, with relevant citations and quotations, why Buddhists do not believe in the concept of God and why the Pledge endorses a view of ultimate reality inconsistent with Buddhism. For example, in summarizing its case against the Pledge, the brief argued:

When Buddhist schoolchildren recite the words describing this as a nation "under God," they voice the name of a deity from a particular religious tradition that is different from their own, they articulate a religious concept that is inconsistent with their religion, they violate the ethical teaching prohibiting untrue utterances, and they exalt a concept that clashes with the "awakening to supreme wisdom" that is their religion's very goal.¹⁸⁵

One might argue that briefs such as these can alleviate the endorsement test's inherent majority bias by informing the Justices how various minority religions view certain displays or symbols. The Justices could then use this information to help them empathize with

182. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

183. Brief Amicus Curiae Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents, *Elk Grove*, 542 U.S. 1 (No. 02-1624), 2004 WL 298115 [hereinafter Amicus Brief].

184. Of course, it is unclear whether the draft statute would extend to a claim regarding the Pledge of Allegiance's constitutionality, since the statute as currently drafted does not define the terms "display" or "symbol."

185. Amicus Brief, *supra* note 183, at 23–24. The brief goes on to argue that excusing religious objectors from having to recite the Pledge does not cure the constitutional violation. *Id.* at 24–26.

these minority perspectives. This argument surely carries some weight, but, ultimately, briefs such as that in the Pledge case can only do so much. Not only are the Justices swamped by amicus briefs in important cases—and therefore cannot possibly pay serious attention to all of them—but reading about a religious perspective does not translate directly into empathizing with that perspective. This is particularly true when the perspective is communicated through the relatively dry and straightforward vehicle of a legal brief. It is unlikely, therefore, that the submission of amicus briefs could significantly resolve the problem of majority bias in the application of the endorsement test. Although it is hardly conclusive evidence, it is notable that neither the government's reply brief nor any of the opinions in the *Newdow* case itself referred specifically to the Buddhists' brief.

On the other hand, it is far more likely that the perspectives illuminated by this brief would play some role in a decision of the Endorsement Court. If one of the members of the court has substantial knowledge of Buddhism, that member will likely have already internalized the message of the brief, and will bring it to bear on his or her decision. Even if there is no member of the court with substantial knowledge of Buddhism, those members possessing knowledge of some other minority tradition will be more likely to understand and empathize with the Buddhist perspective, and thus to consider that perspective seriously when rendering a verdict on the symbol or display in question. Either way, there is a substantial likelihood that entrusting endorsement questions to an Endorsement Court will result in decisions more protective of minority believers than those rendered by the lower federal courts under the current system.

IV. CONCLUSION

With the recent retirement of Justice O'Connor, the future of the endorsement test is highly uncertain. For this reason, it is worth pausing at this moment to consider the merits and drawbacks of the test, which is one of the Rehnquist Court's most important First Amendment contributions. The test has endured much criticism in its twenty years of existence, but many of these criticisms are overstated.

The endorsement test's most notable flaw rests not in its content, but in the disconnect between its content and the institutional actors who must apply it. Federal judges, who are generally members of majority religious traditions, are not particularly well-suited for understanding how government sponsored messages will be understood by those who belong to minority traditions. As a result, the endorsement test, as currently applied, risks an unfortunate majority-religion bias. One possible solution to this problem is for Congress to entrust the adjudication of endorsement claims to a so-called "Endorsement Court" staffed by members with substantial knowledge of a range of religious traditions, both majority and minority. Such a radical solution poses its own problems, not the least of which is the possibility that the court would be struck down on constitutional grounds. However, the proposal also carries the quite significant advantage of ensuring that the endorsement test is applied in a manner that protects the very minority believers in need of its protection. Such a solution, therefore, is worth Congress' serious attention.

Regardless of whether Congress ever considers such an option (and it is, of course, quite unlikely ever to do so), considering the possibility of creating such an Endorsement Court is a worthwhile exercise in itself because it forces us to consider how endorsement decisions would differ if they were made by judges who were informed by substantial knowledge of a range of religious traditions and perspectives and gave serious thought to how a religious symbol or display would be understood by a reasonable observer of a minority tradition. In a sense, then, the Endorsement Court is an experiment in thought more than anything else. There is no reason why judicial decision-makers (as well as policy-makers from the other branches of government) should be unable to consider the legitimacy, constitutional or otherwise, of a religious display from the imagined perspective of minority believers. If Congress will not, or cannot, place the application of the endorsement test in the hands of minority religious believers, perhaps the message of this Article is that the legal decision-makers vested with such power should reimagine themselves as a way of solving the test's most intractable difficulties.