1990

Using the Lemon Test as Camouflage: Avoiding the Establishment Clause. [Clayton v. Place, 884 F.2d 376, reh'g denied, 889 F.2d 192 (8th Cir. 1989), cert. denied, 110 S.Ct. 1811 (1990)]

Douglas C. Shimonek
INTRODUCTION

One difficulty which arises in the judicial application of constitutional law is interpreting the meaning and objectives of constitutional text. On an intuitive level, it appears futile, if not meaningless, to attempt implementing a constitutional provision in practical situations without an understanding of the goals and interests that the provision serves. This general constitutional difficulty certainly accompanies the first amendment’s establishment clause. It is inaccurate to say there is anything approaching a consensus on the goals of the establishment clause. Even if a consensus could be reached regarding the purposes of the establishment clause, any practical implementation of these goals would remain difficult.  

1. See discussion infra note 17 and accompanying text.  
2. This would, no doubt, stem from our inability to reach conclusive definitions of important terms embodied in the establishment clause; “religion,” for example, is a term which has eluded definition in all the Supreme Court’s establishment clause decisions. See, Ingber, Religion or Ideology: A Needed Clarification of the Religious Clause,

835
Despite this difficulty, the federal and state courts are continuously called upon to determine whether government action, on both a federal and state level, violates the establishment clause. Responding to the difficulty of implementing the establishment clause, the Supreme Court, in *Lemon v. Kurtzman*, developed a three-part test consistently applied in cases involving alleged violations of the establishment clause. This test, commonly known as the *Lemon* test,

---


3. See Supreme Court decisions infra note 6. In addition, some recent federal appellate court establishment clause cases dealing with education include: Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076, 1079 (8th Cir.), cert. granted, 109 S. Ct. 3240 (1989) (held that student-organized prayer meetings did not violate establishment clause); Garnett v. Renton School Dist., 874 F.2d 608, 614 (11th Cir. 1989) (holding that allowing students to use public school classrooms prior to school day for religious meetings would violate the establishment clause); Jager v. Douglas County School Dist., 862 F.2d 824, 835 (11th Cir. 1989) (held invocation preceding high school football games unconstitutional); Steele v. Van Buren Pub. School Dist., 845 F.2d 1492, 1495 (8th Cir. 1988) (band teacher's "new tradition" of mandatory prayer sessions before rehearsals and performances in violation of establishment clause); Smith v. Board of School Comm'r's, 827 F.2d 684, 695 (11th Cir. 1987) (held use of home economics, history and social studies textbooks in public schools does not advance secular humanism or inhibit theistic religion in violation of establishment clause); Stein v. Plainwell Community Schools, 822 F.2d 1406, 1409 (6th Cir. 1987) (held nondenominational invocations at public high school commencement ceremonies do not violate the establishment clause); Phan v. Virginia, 806 F.2d 516, 525 (4th Cir. 1986) (held reimbursement of handicapped student's expenses for attending religious education institutions not violate establishment clause); Parents Ass'n v. Quinones, 803 F.2d 1235, 1242 (2d Cir. 1986) (city's plan to provide exclusive program for Jewish girls violates establishment clause); Stark v. St. Cloud State Univ. 802 F.2d 1046, 1052 (8th Cir. 1986) (state college policy allowing students to complete academic requirements by teaching at religious institutions violated establishment clause because the policy created a symbolic union between church and state in the minds of parochial school students); May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), dismissed on other grounds sub nom. Karcher v. May, 108 S. Ct. 388, 389 (1987) (statute allowing "minute of silence" at beginning of school day violates establishment clause because it lacks secular purpose); Bell v. Little Axe Indep. School Dist., 766 F.2d 1391, 1406 (10th Cir. 1985) (religious meetings on public elementary school premises during school hours held unconstitutional); Grove v. Mead School Dist., 753 F.2d 1528, 1543 (9th Cir.), cert. denied, 474 U.S. 826 (1985) (held use of English text containing religious comment does not constitute violation of establishment clause).


5. While the Court has applied the *Lemon* test consistently over the past eighteen years, some controversy remains over the Court's actual commitment to the *Lemon* analysis. Justice Brennan, for instance, in his dissent in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), questions the Court's commitment to the *Lemon* test because of the majority's "less-than-vigorous application" of the test. Id. at 696.

6. See, e.g., Hernandez v. Commissioner, 109 S. Ct. 2136, reh'g denied sub nom. Graham v. Commissioner, 110 S. Ct. 16 (1989) (held disallowance of charitable de-
was developed as an analytical aid for courts to decide whether specific government action violated the establishment clause.

The Lemon test itself is short and straightforward: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"7 Despite what appears to be a clear

standard, courts have found the Lemon test difficult to understand and apply.

In a concurring opinion in Lynch v. Donnelly,8 Justice O'Connor offered an alternative to the Lemon test and establishment clause analyses.9 The Court edged toward Justice O'Connor's analysis in later cases10 and seemingly adopted it in County of Allegheny v. American Civil Liberties Union (ACLU).11 Allegheny involved two challenges to a Pennsylvania city and county's display of religious symbols during the holiday season. This new test was the result of Justice O'Connor's apparent dissatisfaction with the application of the Lemon test.

Justice O'Connor's test is based on the premise that the establishment clause is intended to prevent government endorsement of any particular religion or religion generally.12 Thus, the test focuses on the objective governmental intent of a particular action, as well as governmental subjective intent, which is the intent perceived by the public at large. Justice O'Connor's analysis also embraces Lemon's prohibition of excessive government entanglement with religion.

In the analytical framework of establishment clause cases, Allegheny's role, or intended role, is uncertain. The Court's opinion, does not indicate whether the O'Connor/Lynch test applies only to establishment clause cases involving government display of religious symbols, or whether the test is used in all cases involving alleged violations of the establishment clause.

There is also some doubt whether the O'Connor/Lynch test is intended to clarify, modify, or usurp traditional applications of the Lemon test. Given this varied background, it is not surprising the lower federal courts and state courts have had a difficult time focusing on the underlying objectives of the establishment clause, and instead have fallen into the habit of making formalistic applications of the Lemon test. The decision in Clayton v. Place,13 illustrates the confusion as to the underlying objectives of the establishment clause. In Clayton, the United States Court of Appeals for the Eighth Circuit upheld a Missouri school district's long-standing, religiously-motivated rule prohibiting extra-curricular dancing by students on school grounds. The United States Supreme Court denied certiorari of the case in April 1990.

This comment, focuses briefly on the objectives of the establish-

ment clause and its implementation through the *Lemon* and O'Connor/Lynch tests. In addition, this comment specifically utilizes the Eighth Circuit's decision in *Clayton* to illustrate the confused nature of current establishment clause analysis.

I. THE OBJECTIVES OF THE ESTABLISHMENT CLAUSE

The first amendment mandates that "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof." 14 Although originally intended as a limitation on the federal government, the first amendment was made applicable to state and local government through the due process clause of the fourteenth amendment. 15

Justice Jackson's opinion in *West Virginia Bd. of Educ. v. Barnette* 16 sets out some general constitutional principles which the Supreme Court has adhered to: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 17

The Supreme Court has discussed the specific objectives of the establishment clause on several occasions. 18 The modern trend re-

---

15. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). See also Cantwell v. Connecticut, 310 U.S. 296 (1940). The language of the fourteenth amendment may make it difficult to understand how the establishment clause, a limitation on the powers of Congress, applies to the states. In a concurring opinion, Justice Brennan points out:

   It has ... been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a "freedom" of the individual. The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.


For further discussion on the application of the Bill of Rights to the states through the fourteenth amendment, see M. CURTIS, NO STATE SHALL ABRIDGE (1986).

17. Id. at 642.
18. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (establishment clause prevents intrusion of state into church affairs when possible, but without complete separation); Everson v. Board of Educ., 330 U.S. at 18 (describing "wall of separation" between church and state).

It may seem strange to discuss the objective to the establishment clause by referring to the Supreme Court's interpretation of the clause. However, there is a legitimate reason for doing so. Consider that at the time the first amendment was enacted, it applied only to the federal government. Consider also that most estab-
garding the establishment clause has its roots in the opinion of the Supreme Court in *Everson v. Board of Education*: 19

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 20

The Supreme Court has since utilized the *Everson* list of specifics to formulate a less complex axiom stating that the establishment clause "at the very least, prohibits government from appearing to take a

lishment clause cases challenge the actions of state governments. Examining the ubiquitous "original intent of the framers" may reveal that the framers never intended the first amendment to limit the actions of state government.

Although this comment attempts to avoid a discussion of "interpretivism" (that is, the idea that constitutional decisions must be based on the framers' "original intent") versus "noninterpretivism" (the idea that constitutional decisions should reflect evolving constitutional norms), it is worth noting Professor Tushnet's comments:

> [In order for interpretivism to be valid constitutional theory, it] must rest on an account of historical knowledge more subtle than the naive presumption that past attitudes and intentions are directly accessible to present understanding. . . . [T]he most plausible such account . . . requires an imaginative transposition of former world views into the categories of our own. . . . [S]uch an imaginative transposition implies an ambiguity that is inconsistent with the project of . . . [interpretivism]. The project of imaginative transposition can be carried through in a number of different ways, with a number of different results, none of which is more "correct" than the others. The existence of such an indeterminacy means that interpretivism, unless it falls back on nonliberal assumption, cannot constrain judges sufficiently to . . . [avoid] judicial tyranny.


Given the difficulty with an interpretivist approach to the establishment clause, it seems that the only available approach to analyzing the problem is to examine the principles which the Supreme Court has accepted. Also note that when lower courts seek to explicate the underlying principles of the establishment clause, they look almost invariably to the Supreme Court, rather than making independent judgments about the nature of the establishment clause. In a manner of speaking, the goals of the establishment clause are whatever the Supreme Court says they are.


20. Id. at 15–16.
position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' "21

II. THE LEMON TEST

In Lemon v. Kurtzman,22 the Supreme Court set forth a three-part test for determining whether government action violates the establishment clause of the first amendment.23 First, the action must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, it must not foster an excessive government entanglement with religion.24 State action violates the establishment clause if it fails any of these three tests.25

Since its inception, the Lemon test has been utilized in establishment cases by the Supreme Court26 as well as the lower federal and state courts.27 The Supreme Court has rejected a formalistic application of the Lemon test stating that it is not intended to be viewed as a demarcation of the precise limits of the necessary constitutional inquiry.28 Rather, the test only sets forth guidelines to identify instances where the objectives of the establishment clause have been impaired.29 In addition, the Court strictly scrutinized governmental action when it involved the public school environment, because of the government's power to shape impressionable young minds.30

A. Secular Legislative Purpose

Lemon's secular purpose requirement is intended to prevent a government actor from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.31 This

23. The Court indicates in Lemon that it has culled these three prongs from previous Supreme Court decisions. Id. at 612. See Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (excessive entanglement); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (secular purpose and principal effects).
24. 403 U.S. at 612–13 (quoting Walz, 397 U.S. at 674).
26. But see, Marsh v. Chambers, 463 U.S. 783 (1983). Marsh dealt with the unique subject of prayer before a legislative session and the Court strictly limited the holding to the facts before it.
27. See supra note 3.
29. Id.
31. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (permissible for legislature to alleviate
does not require, however, that the governmental purpose be unrela-
ted to religion.32

Under the Lemon test, "legislative purpose" refers to the actual
motives of those responsible for the challenged action.33 While the
Court is deferential to secular purposes advanced by the government
in support of its action, those purposes must not be a sham.34

In addition, the Court has invalidated legislation or governmental
action lacking a secular purpose, but only when the Court concluded
the statute or activity was wholly motivated by improper religious
considerations.35 Even where the benefits to religion are substantial,
there will be no conflict with the establishment clause provided a
valid secular purpose is present.36

B. Primary Effect Neither Promotes Nor Inhibits Religion

Under the Lemon requirement that challenged governmental action
have a principal or primary effect that neither advances nor inhibits
religion, the action is not unconstitutional simply because it allows
churches to advance religion.37 Rather, for governmental action to
have forbidden effects under Lemon, it must be evident that the gov-
ernment itself has advanced religion through governmental activities
and influence.38

It is difficult to determine when government action has these for-
significant governmental interference with ability of religious groups to carry out
their religious missions).

32. Id.

promote religion clear when state enacts law to serve religious purpose); Witters v.
Washington Dep't of Services for the Blind, 474 U.S. 481, 486 (1986) (fact that small
amount of aid flows to religious education does not show state's actual purpose was
to endorse religion); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (appropriate to ask
whether government's actual purpose is to endorse or disapprove of religion).

34. Edwards v. Aguillard, 482 U.S. at 586-87; Wallace v. Jaffree, 472 U.S. at 64.

35. Lynch v. Donnelly, 465 U.S. at 680 (Christmas display may have legitimate
reh'g denied, 449 U.S. 1104 (1980) (posting of Ten Commandments in public school
rooms has no secular legislative purpose); Epperson v. Arkansas, 393 U.S. 97,
107-09 (1968) (law suppressing teaching the theory of evolution held
unconstitutional).

36. Lynch, 465 at 680 (citing Everson v. Board of Educ., 330 U.S. 1 (1947) and
Board of Educ. v. Allen, 392 U.S. 236 (1968)).

providing classrooms to nonpublic school students at public expense have primary
effect of advancing religion); see also Hunt v. McNair, 413 U.S. 734, 743-44 (1973)
(statute that benefitted Baptist-controlled college did not have primary effect of
advancing religion).

38. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-
Day Saints v. Amos, 483 U.S. 327, 337 (1987) (law not unconstitutional simply be-
cause it allows churches to advance religion).
biden effects. The Court has outlined three considerations in Grand Rapids School Dist. v. Ball. The Court held first, the government should not be involved in the inculcation of religious tenets or beliefs; second, no symbolic link between government and religion may exist; and third, the action may not subsidize the primary religious mission of the institutions affected.

The Court noted, however, that not every law conferring an indirect, remote, or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid. In these indirect aid cases, the government’s primarily secular ends have been accomplished by primarily secular means, and thus no primary effect of advancing religion has been found. The mere subsidization of a

39. Note Justice Scalia’s dissent criticizing the purpose prong of the Lemon test:

But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how and where to find it. For while it is possible to discern the objective “purpose” of a statute (the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist.


41. Id. See also Meek v. Pittenger, 421 U.S. 349, 372 (1975) (statute providing for loan of state-paid professional staff to nonpublic schools held invalid because of risk of state-sponsored indoctrination too great).


45. School Dist. of Grand Rapids v. Ball, 473 U.S. at 393 (governmental policies with secular objectives may incidentally benefit religion); Meek v. Pittenger, 421 U.S. at 359 (not all programs that provide incidental benefit to religious institution are prohibited); Board of Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968) (statute requiring public schools to lend textbooks to private schools held valid).
religious program is insufficient to invalidate governmental action under the establishment clause. The aid to religion must be direct and substantial.

C. Excessive Entanglement

In *Lemon v. Kurtzman*, the Court laid out the characteristics of what constitutes excessive entanglement. In deciding whether government action fosters excessive government entanglement with religion, the Court looks to ‘the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the resulting religious authority.’

The requirement that government action not foster an excessive entanglement with religion has been interpreted by the Court to include both administrative entanglement, and political divisiveness along religious lines. However, political divisiveness along religious lines by itself is not sufficient to invalidate otherwise legitimate government action. Rather, the test envisions ‘comprehensive, discriminating and continuing state surveillance’ or ‘enduring entanglement.’ ‘[There exists an] overriding interest in keeping the government . . . out of the business of evaluating the relative merits


47. Id. See also Commissioner for Bd. of Educ. & Religious Liberty v. Nyquist, 413 U.S. at 783 (tuition grants to parents of private school students violate establishment clause).


49. Id. Notice that these three factors are very similar to the criteria which Justice Brennan set out in support of Lemon’s effect prong in School Dist. of Grand Rapids v. Ball, 473 U.S. at 397-98. Some commentators have suggested this is simply confusion on the part of the Court, while others maintain that the problem actually is that the excessive entanglement prong and the primary effects prong are simply restatements of the same underlying test. See Ripple, The Entanglement Test of the Religious Clauses—A Ten Year Assessment, 27 UCLA L. REV. 1195 (1980); Comment, Grand Rapids School District v. Ball and Aguilar v. Felton: Confusion in Applying Lemon v. Kurtzman’s Effects and Entanglement Tests, 50 ALB. L. REV. 811 (1986).


51. Lynch v. Donnelly, 465 U.S. at 684 (political divisiveness alone does not serve to invalidate otherwise permissible conduct).

52. Id. at 684.

53. Id. at 684 (distinguishing Lemon v. Kurtzman, 403 U.S. at 619-22).

The Court in *Lynch* sustained the district court’s finding on the absence of excessive entanglement by distinguishing the entanglement present in *Lemon*. In *Lemon*, the enduring entanglement included regular inspection of school expenditure records and constant contact with teachers to ensure compliance with first amendment limitations. See *Lemon*, 403 U.S. at 619, 621-22.
of differing religious claims.”

While some limited and incidental entanglement between church and state is inevitable, the third prong of the Lemon test is intended to maintain the wall of separation between church and state. Yet the Supreme Court has recognized that “the line of separation, far from being a ‘wall’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” Accordingly, the Court has stated that government entanglement with religion is a question of “kind and degree.”

III. The O'Connor/Lynch Test and the Allegheny Analysis

In Lynch v. Donnelly, a case dealing with government display of religious symbols, Justice O'Connor's concurring opinion suggested a "clarification of our establishment clause doctrine." In


56. The third prong of the Lemon test prohibits excessive government entanglement with religion. See supra note 7 and accompanying text. The third prong is more difficult to analyze than the first two prongs of the Lemon test. Given the structure of the Lemon test, i.e., only one prong needs to fail to establish an establishment clause violation, part of the difficulty may stem from the Court's failure to address the third prong in all challenged actions. See, e.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (third prong of Lemon test not addressed by the Court).

57. See Lemon, 403 U.S. at 614 (goal is to prevent intrusions between state and religion as much as possible); see also Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (describing wall of separation).

58. Lemon, 403 U.S. at 614.


60. 465 U.S. 668 (1984). The Court in Lynch held the city's inclusion of a crèche in its Christmas display did not violate the establishment clause. Id. at 687.

61. In Lynch, the City of Pawtucket, Rhode Island erected a Christmas display each year as part of its observance of the holiday season. The display consisted of a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, figures representing a clown, elephant, teddy bear, hundreds of colored lights, a large "Seasons Greetings" banner, and a crèche including the traditional nativity figures: infant Jesus, Mary and Joseph, angels, shepherds, kings and animals. Lynch v. Donnelly, 465 U.S. at 671.

62. Id. at 687 (O'Connor, J., concurring).

Following the Supreme Court's decision in Lynch v. Donnelly, a great number of cases have challenged government display of religious symbols. Some recent examples include: ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir. 1990) (challenging construction and use of "rustic stable" including manger, on state capitol grounds); Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) (challenging display of nativity scene on front lawn of county office building); Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) (challenging city's display of menorah in city hall park); Doe v. City of Warren, 889 F.2d 1087 (6th Cir. 1989) (challenging city's display of
accordance with Justice O'Connor's belief that "[t]he establishment clause prohibits government from making adherence to a religion relevant . . . to a person's standing in the political community," she modified the purpose prong of the Lemon test as follows: first, does the government action intend to "convey a message of endorsement or disapproval of religion;" second, does the action communicate or convey a message of "government endorsement or disapproval of religion;" third, does the action involve excessive institutional entanglement with religion.

Thus, the O'Connor/Lynch analysis reshapes the first and second prong of the Lemon test into, respectively, tests of objective and subjective government endorsement. As Justice O'Connor stated:

Examination of both the subjective and the objective components of the message communicated by a government action is . . . necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

The test also rids the entanglement test of any independent consideration of political divisiveness. Again, as Justice O'Connor stated:

Although several of our cases have discussed political divisiveness under the entanglement prong of Lemon, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional. Guessing the potential for political divisiveness inherent in a government practice is simply too specu-

---

63. Id. Justice O'Connor noted two ways in which the government can "run afoul" of this prohibition. The first is "excessive entanglement with religious institutions." The second is "government endorsement or disapproval of religion." Id. at 687-88.

64. Id. at 691 (proper inquiry under the purpose prong of Lemon).

65. Id. at 692. This prong has recently been subjected to criticism in Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency? 98 HARV. L. REV. 592, 611 (1985) ("crucial constitutional choices . . . cannot be made by judicial analysts concerned solely with efficient means to ends and not with appraisal of the ends themselves.").


67. Id. at 690.
ative an enterprise, in part because the existence of the litigation itself may affect the political response to the government practice. [T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the Lemon test is properly limited to institutional entanglement.68

Following her concurrence in Lynch, Justice O'Connor has continued to advocate the Court's acceptance of her modification as the method of analysis in establishment clause cases.69 The Court has edged toward the O'Connor/Lynch analysis. For example, when setting out the purpose prong of the Lemon test in Edwards v. Aguillard,70 Justice Brennan, writing for the majority, quoted from Justice O'Connor's concurrence in Lynch.71

More recently, in County of Allegheny v. ACLU,72 Justice Blackmun adopted Justice O'Connor's test as the analytical framework for the Court's opinion:


First and foremost, the concurrence squarely rejects any notion that this Court will tolerate some government endorsement of religion. Rather, the concurrence recognizes any endorsement of religion as "invalid," . . . because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Second, the concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates. . . . The concurrence . . . emphasizes that . . . "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion."73

68. Id. at 689 (citations omitted).
70. 482 U.S. 578 (1987) (held Louisiana's Creationism Act violated establishment clause because the Act lacked a clear secular purpose).
71. Id. at 585. "The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, J., concurring).
72. 109 S. Ct. 5086 (1989). The Supreme Court struck down as unconstitutional the city of Pittsburgh's nativity scene display and upheld the city's display of a menorah placed next to the city's Christmas tree.
73. Id. at 3102 (citations omitted). Justice Blackmun's adoption of the O'Connor/Lynch analysis may not be as firmly based upon his assessment of the ana-
The intended practical effect of the Allegheny analysis is unclear. Justice Blackmun specifically stated, Justice O'Connor's concurrence in Lynch v. Donnelly "provides a sound analytical framework for evaluating governmental use of religious symbols." However, it is not clear whether Justice Blackmun's language is to be interpreted in a limiting fashion; or whether he intended the Allegheny analysis to be utilized only in situations involving challenges to governmental displays of religious symbols. A complete analysis of the Allegheny decision suggests that it was intended to apply in all situations involving establishment clause questions. Justice Blackmun wrote:

> Our [decisions following Lemon v. Kurtzman] further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion . . . . Thus, in Wallace v. Jaffree, . . . . the Court held unconstitutional Alabama's moment-of-silence statute because it was "enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities." The Court [in Edwards v. Aguillard] similarly invalidated Louisiana's "Creationism Act" because it 'endorses religion' in its purpose. And the educational program in School District of Grand Rapids v. Ball, was held to violate the Establishment Clause because of its "endorsement" effect.

Justice Blackmun significantly utilized these particular cases, none of which involved governmental display of religious symbols, as the basis for adopting the O'Connor/Lynch analysis. Justice Blackmun's selection clearly indicates the Court did not intend to limit the use of the Allegheny analysis to only a handful of establishment clause cases.

Both Justice O'Connor's concurrence in Lynch and Justice Blackmun's majority opinion in Allegheny characterize themselves as "clarifications" of the Lemon test, however, the analysis is more than a mere "clarification." Whereas the Lemon test is meant to test for manifestations of violations of the establishment clause, the Allegheny analysis tests for violations themselves.

For instance, the first prong of the Lemon test examines whether a government action has a secular purpose. It does so because the lack of a secular purpose is one way in which government endorsement of religion manifests itself. Likewise, the second prong of the Lemon test is concerned with the advancement or inhibition of religion sim-
ply because this is how an inadvertent endorsement of religion would manifest itself. The Allegheny analysis removes the additional level of complexity by asking the fundamental questions: Is the government action an objective, or subjective, endorsement of religion?

IV. THE BACKGROUND OF THE CASE

Although the Eighth Circuit's decision does not discuss the underlying facts in great detail, the district court opinion and Circuit Judge Gibson's dissent from the denial of rehearing discuss the factual background at some length.

Purdy is a small rural community in southwestern Missouri, where religion is an important part of daily life. Certain churches in Purdy, are vehemently opposed to social dancing. Rule 502.29 of the Purdy R-II School District prohibits school dances and forbids the use of school premises to conduct a dance. The School District had followed this policy for some time.

At a School Board meeting in 1978, student representatives sought permission to hold dances at school facilities. The School Board rejected the request. In 1984, Purdy students once again attempted to change the rule. The students initially contacted the superintendent, who was receptive to the students' desire to change the rule. The School Board president thought it might be a good idea to attempt to change the rule, but was concerned that such a change might create controversy. Three Board members favored

78. Clayton v. Place, 889 F.2d 192, 193-94 (8th Cir. 1989) (Gibson, J., dissenting).
79. Clayton v. Place, 884 F.2d 376, 378 (8th Cir. 1989). The court noted that one denomination "specifically requires 'a separation from worldliness, including dancing' " and another "teaches 'social dancing is sinful.' " Id. at 378 (quoting Clayton, 690 F. Supp. at 856).
80. Rule 502.29 states in full: Secret Organizations-School Dances. No fraternities, sororities, secret societies, or other organization shall be permitted, nor shall any student organization be permitted to elect its own membership. School dances are not authorized and school premises shall not be used for purposes of conducting a dance.
82. Clayton, 884 F.2d at 377. The record did not indicate when the rule was enacted.
83. Id. The School Board voted down the request by 4-2.
84. Id. The students requested permission to have a school homecoming dance. The superintendent contacted Board members to hear their views on the dance issue. Id.
85. Id. The President stated that "the last time the dance issue was brought up it generated a lot of heat."
changing the rule, although one conditioned his support on a lack of controversy. Two other Board members opposed the change. Following this mixed reaction by the Board members, no formal request was made and no official action was taken.

A different group of students and parents attempted to change the rule during the 1985–86 school year. At a meeting with the superintendent, the parents asked why the district prohibited dances. In response to their question, the superintendent stated: "[W]hy should this [the rule] surprise you, this is a conservative, religious community."

At the February 1986 School Board meeting, the students and parents requested reconsideration of the no-dancing rule. A local Baptist minister, opposing the change, requested a place on the March agenda to make a presentation. The Board deferred action on the rule until the March meeting.

At the March School Board meeting, the largest crowd ever was in attendance. When the proposed rule change was discussed, religion was not directly mentioned, but a letter from the Ministerial Alliance was read in its entirety by the Baptist minister who attended the February meeting. The Baptist minister also spoke against the change asking those in attendance to stand if they opposed the change. The majority of people in attendance did so. Following the meeting, in closed session, the Purdy R-II School Board decided to take no

86. Id. Two Board members believed most people in the community did not want the rule changed. Another member was also concerned about "community support and possible school chaperoning."

87. Id.

88. Id.

89. Id. The parents then asked if the Baptists in the community were the group opposed to dancing. The Superintendent replied, "Let's just say protestants." Id.

90. Id. Prior to this meeting, a Board member told one of the parents he opposed the rule change because his church preached that dancing was "wrong and immoral." Id.

91. Id. Id. 884 F.2d at 378; see also Id. 690 F. Supp. at 852.

During the interim, one parent contacted a Board member who stated although he had voted for a dance in the past, he had caught so much "flak" from community ministers that he planned to vote against a change at the March meeting. Id. 690 F. Supp. at 853. Another Board member stated his church opposed dancing and he would vote against the change. Id. Yet another Board member, while attending a Sunday school lecture to discuss the proposed rule change, stated that as long as he was a School Board member there would be no dancing in Purdy schools. Id.

Further, Purdy's "Ministerial Alliance," a group of five Baptist and Pentecostal churches, met to organize opposition to a rule change. They encouraged their congregations to attend the upcoming School Board meeting to voice opposition to any change. Id.

92. Id.

93. Id.
Consequently, a group of parents, students and taxpayers brought suit contending that the no-dancing rule violated the freedom of association and speech clauses of the first amendment and the establishment clause of the first amendment. They also claimed it violated article I, section 7 of the Missouri Constitution.

V. Clayton v. Place

The United States District Court for the Western District of Missouri rejected the plaintiffs' freedom of speech and association claims, but held the no-dancing rule violated each prong of the Lemon test. In addition, the court held that the rule violated article I, section 7 of the Missouri Constitution.

On appeal, the United States Court of Appeals for the Eighth Circuit, held the rule was valid under each prong of the Lemon test. First, the court found the rule satisfied the secular purpose prong.
since "extracurricular dancing is a wholly secular activity."101 "Further, the rule carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements."102

Second, the court held there was no evidence that any religious doctrine was "principally or primarily advanced by the Board's enforcement of the no-dancing rule."103 The court reasoned "[a]ny arguably religious effect of the rule is indirect, remote, and incidental" because "[n]o student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so."104 The court also found nothing in the rule to suggest the School District impermissibly took "a position on the questions of religious belief" or made "adherence to a religion relevant in any way to a person's standing in the political community."105

Finally, the court found there was no indication "the rule foster[ed] excessive government entanglement in religious affairs."106 "If anything, the rule promote[d] less, rather than more, school involvement" in religious affairs.107 The court further stated political divisiveness was not a factor to be considered in the entanglement prong of the Lemon test outside parochial school financial aid cases.108

The Eighth Circuit denied the rehearing and the rehearing en banc of the case by a 5-4 margin.109 The dissenting judges, in an unusual move, wrote two separate opinions.110 The dissenting opin-

101. Clayton, 884 F.2d at 379. The court noted the "plaintiffs conceded at oral argument (and the district court acknowledged) that extracurricular dancing is a wholly secular activity."
102. Id. The court concluded the no-dancing rule "on its face thus satisfies the first prong of the Lemon analysis."
106. Clayton, 884 F.2d at 379.
107. Id. (citing Corporation of the Presiding Bishop of the Church of Latter-Day Saints, 483 U.S. at 339).
108. Id. The court referred to the district court's finding "that the dancing debate was deeply divisive in the Purdy community." Id. (quoting Clayton, 690 F. Supp. at 856).
109. Clayton, 889 F.2d at 193. The court gave no rationale for denying the petition for rehearing. The court's stated justification for denying the suggestion for rehearing en banc was "by reason of the lack of majority of active judge's voting." Id.
110. Id. Dissenting Circuit Judge Gibson argued the action of the School Board violated each element of the Lemon test. Id. at 195. Chief Judge Lay wrote in dissent "[p]erhaps the no-dancing rule's symbolic effect would be less potent if the rule could be explained, at least in part, by some plausible secular purpose." Id. at 196.
ions were highly critical of the previous holding.

VI. Clayton v. Place Analyzed

The Eighth Circuit's analysis strongly focused on the formal requirements of the Lemon test, and largely ignored the establishment clause itself. As such, it did not focus on the underlying objectives of the establishment clause. Rather, the court's analysis took a somewhat formalistic approach to the matter.

The opinion also ignored the Allegheny case except to list the traditional elements of the Lemon test. Setting aside, for the moment, an application of the Allegheny analysis and the underlying objectives of the establishment clause, the court's formalistic analysis under a traditional application of the Lemon test is fatally flawed.

A. Secular Purpose

The court's application of the Lemon purpose prong fails on many levels. The court stated that extracurricular dancing is a "wholly secular activity." The questionable nature of this assertion aside, the secular nature of the students' dancing is irrelevant. The traditional Lemon test asks whether the governmental action has a secular purpose, not whether the subject of the governmental action has a secular purpose. Unless government dancing has been challenged, any analysis of the secular purpose of dance is immaterial and meaningless.

Through this misapplication of the purpose prong, the court made the focus of the secular purpose prong the action of the students rather than the action of the government. It seems obvious if a governmental body attempts to ban an activity which is normally secular, and it does so for purely religious reasons, the establishment clause has been violated. For example, a religious group constituting a majority of the voters in their community, opposes technological advances. The group passes an initiative banning all advanced technology. Most likely the court would not examine the secular nature of technological advances to determine whether the initiative violated...
the establishment clause. The Supreme Court has made it clear the purpose prong applies to the actual purpose of the government, and not the activity regulated.\textsuperscript{115}

The Eight Circuit's application of the purpose prong of the \textit{Lemon} test also strips the clause of any independent meaning, making it simply redundant with the free exercise clause. The free exercise clause is intended to prevent government interference in the religious actions of its citizens.\textsuperscript{116} The establishment clause is intended to stop government itself from acting in religious matters.\textsuperscript{117} The scope of each clause is not the same, but the court's approach renders them functionally equivalent.

Second, the record clearly indicates dancing in this community was not a "wholly secular activity," but was charged with religious overtones. Whether a particular activity is religious or not obviously depends on the facts of each case.\textsuperscript{118} A religious activity in one area might not be religious in another. As Supreme Court cases involving the free exercise clause point out, it is not the religious belief of the majority that matters; it is the belief of the individuals involved that matter.\textsuperscript{119}

The court also states the rule does not offend the purpose prong of the \textit{Lemon} test since "the rule carries within its text absolutely no religious component."\textsuperscript{120} This conclusion is flawed on two levels: First, as the dissent in the order denying rehearing recognizes, "[t]he \textit{Lemon} test cannot be circumvented by merely omitting from a rule any explicit statement of a religious purpose. Rather, the first part of the \textit{Lemon} test depends upon the government's 'actual purpose' in making a decision."\textsuperscript{121} Second, dancing is a religious issue in Purdy.

\begin{thebibliography}{99}
\item \textit{115.} See Edwards v. Aguillard, 482 U.S. 578, 585 (1987) ("\textit{Lemon}'s first prong focuses on the purpose that animated adoption of the Act.").
\item \textit{116.} See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). See also L. Tribe, \textit{American Constitutional Law} 816–17 (1978) ("The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief.").
\item \textit{117.} County of Allegheny v. ACLU, 109 S. Ct. 3086, 3099 (1989) (court's understanding of the meaning of the establishment clause); see also Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947) (listing prohibited activity under the establishment clause).
\item \textit{118.} See, e.g., County of Allegheny v. ACLU, 109 S. Ct. 3086, 3101–02 (1989); Edwards, 482 U.S. at 583 ("Court must determine whether the Establishment Clause violated in the special context of the public elementary and secondary school system.").
\item \textit{119.} See, e.g., Frazee v. Illinois Dept' of Employment Sec., 109 S. Ct. 1514, 1517–18 (1989) (rejecting notion that claim of free exercise clause protection must be based on religious beliefs of particular organization).
\item \textit{120.} Clayton, 884 F.2d at 379.
\item \textit{121.} Clayton, 889 F.2d at 193, citing Edwards, 482 U.S. at 585.
\end{thebibliography}
Due to the religious beliefs of the Purdy community, the prohibition of dance in and of itself provides the religious component.

The court defends this point by stating that "[c]ondemnation of dancing is not firmly rooted in Judeo-Christian moral or ethical standards."122 This is irrelevant. It is not standard Judeo-Christian theology which guides the community, but their own personal religious beliefs. It is too much to require that a rule must be based on standard Judeo-Christian theology in order to have a religious motivation. As the cases involving free exercise of religion point out, an individual's sincerely held religious beliefs are as valid as those held by organized religion.123

Further, the court has left incomplete the mandate of the purpose prong by failing to produce a valid secular legislative purpose to the rule. The court should not simply ignore this element because it cannot find a secular purpose to satisfy the prong. Because the purpose prong looks to the actual intent of the action involved, it is difficult to assert that the intent was secular until it is actually isolated.124

The court takes this approach in order to avoid the thrust of the purpose prong. Because the court is unable to find a valid secular purpose, it simply, though incorrectly, states that the rule has no religious component. Apparently, the court assumes that because no religious component was found in the text of the rule, it must have a secular purpose. This, however, is precisely the type of subterfuge that the purpose prong was intended to prevent. By forcing government to advance a valid secular purpose for any action, the purpose prong was intended to prevent government from taking what can only be classified as religious action.

Indeed, the appellate court does not even attempt to recognize a valid secular purpose for the rule. The district court, as trier of fact, found that the secular purposes which the School Board advanced at trial to be a sham.125 In addition, the court failed to address the Supreme Court's analysis in Allegheny. Under the first prong of the Allegheny analysis, the objective intent of government in taking an action must not have the purpose or effect of endorsing religion.126 One of the problems the court faces in this respect is the fact that no one in Purdy remembers when the rule was enacted.127

122. Clayton, 884 F.2d at 379 (adopting district court observation).
123. See supra note 119.
124. See Edwards, 482 U.S. at 585.
125. Clayton, 690 F. Supp. at 855. The trial court in Clayton was particularly impressed by the fact that the School Board discarded its rental policy rather than allow dancing. The court added that the "reasons propounded by the majority were a mere pretext for the real religious reasoning" of the no-dance rule. Id.
This fact, however, is immaterial. The governmental action at the center of this dispute is the School Board's ongoing refusal to allow students to hold dances on school premises, not the original enactment of the rule. More specifically, the case challenged the Board's refusal to take any action during the 1985-86 school year. The objective intent of the School Board members is easy to discern. As noted above, all the members who voted against a rule change did so in accordance with their religious beliefs or due to religious intimidation.

B. Neither Promotes Nor Inhibits

The Eighth Circuit's statement that the no-dancing rule does not principally or primarily advance any religious doctrine, because no student is prohibited from dancing away from school, is ill-founded for two reasons. First, it has long been established that coercion is not necessary to form the basis of a constitutional violation.128 Obviously, those students who do not feel that dancing is sinful or "worldly" are forced to oblige the beliefs of those who do. Despite the fact that the students have arranged dances outside school premises,129 a stigmatic aura of government religious censorship is cast over any such event. The overall effect is that the government has endorsed the idea that dancing is worldly and an unsuitable activity for students. This seems to be a straightforward endorsement of a particular religious view.

Second, the court simply ignores the "subjective endorsement" analysis set forth in Allegheny. Under Allegheny, the second prong of the Lemon test asks whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."130 In this instance, it is easy to see how a school's condemnation of dancing would be interpreted by the students to be a government endorsement of the religious community's belief that dancing is sinful. It is obvious, on the record, that the court has taken a position on questions of religious belief and made religion relevant to a person's standing in the community.131 As the dissent by Chief Judge Lay points out:


129. Clayton, 690 F. Supp. at 854 (students have arranged a banquet and "prom" off-campus for the past twelve years).


131. Id. at 3102.
To the residents of Purdy—especially the students of Purdy R-II High School—the rule's message is unmistakably clear: the school district promotes the tenets of the local religious community. As a symbol of religious endorsement, the rule is no less obvious than a monument anchored to the schoolhouse lawn pronouncing: "THIS SCHOOL ADHERES TO THE BASIC TENETS OF THE MINISTERIAL ALLIANCE CHURCHES."\textsuperscript{132}

Particularly significant is the fact that in response to a parent's group request that they be allowed to rent school facilities for a dance, at no added expenses to the school and conducted without school supervision, the Board held an emergency meeting to abandon the whole rental policy rather than allow dancing on school premises.\textsuperscript{133} The School Board's message is obvious.

C. Excessive Entanglement

The court misapplied the excessive entanglement test in \textit{Clayton} by turning it into a test of greatest entanglement among several alternatives. The test does not ask if an action might involve less entanglement than some other alternative, but rather if the challenged action involved excessive entanglement itself.\textsuperscript{134}

This misapplication points out a flaw with the third prong of the \textit{Lemon} test. There may be situations in which most, if not all, alternatives of the test involve the government's excessive entanglement in the affairs of religion.

It is also interesting to note the strange transformation that the "nature of dancing" underwent in the time period between the court's application of \textit{Lemon}'s purpose prong and its application of \textit{Lemon}'s excessive entanglement prong. In its application of the purpose prong, the court stated that dancing was a "wholly secular activity."\textsuperscript{135} However, in applying the entanglement prong, the court stated "[i]f anything, the rule promotes less, rather than more, school involvement in what plaintiffs contend is a religiously significant activity."\textsuperscript{136} On this basis, the court concluded that the rule did not involve excess entanglement with religion.

It is difficult to understand how the court may accept the plaintiffs' suggestion that dancing was a religious activity for the purpose of satisfying the entanglement prong, and then reject that same contention for the purpose of satisfying the purpose prong.

The court also states that a rule cannot be overturned simply be-

\textsuperscript{132} \textit{Clayton}, 889 F.2d at 196.
\textsuperscript{133} \textit{Clayton}, 690 F. Supp at 855.
\textsuperscript{134} See supra note 23–24 and accompanying text.
\textsuperscript{135} \textit{Clayton}, 884 F.2d at 379.
\textsuperscript{136} \textit{Id.}
cause it comports with the religious views of the community.137 While this is true,138 in order for this principle to apply, the rule must be otherwise neutral under the Lemon test.139 Since the rule in this case does not pass scrutiny under the Lemon test, this principle is clearly inapplicable.

Finally, at the trial court level, the School Board members testified as to their motivation. All those who voted against the rule, without exception, did so either to implement the religious beliefs of their church or because of intimidation by the religious community.140 It is hard to imagine any more entanglement than occurred in this case.

VII. Clayton v. Place Under the Objectives of the Establishment Clause

The Supreme Court has made it amply clear that the Lemon test was only intended to act as a “signpost” and analytical aid to implementing the objectives of the establishment clause.141 If the objectives of the establishment clause have been subverted by an application of the Lemon test, then this result cannot stand, the Lemon test notwithstanding.

In creating tests which are to be used to aid analysis in cases involving difficult constitutional principles, the Supreme Court does not intend for the test to swallow up the underlying constitutional principle. A formalistic application should not be allowed to harm the substance of the Constitution.

In this case, a straightforward examination of the objectives of the establishment clause clearly reveal that the Purdy R-II School Board’s action violated the spirit of the establishment clause. The court states that “[a]t bottom, the proper remedy for plaintiffs’ disenchantment with a Board that refused to change a rule . . . is found at the ballot box and not in the Constitution.”142 In effect, the Eighth Circuit conclusion implies that a minority which feels it has been wrongly subjected to the religious views of the majority should not look to the Constitution, or the courts, for protection. Rather, they should attempt to enforce the Constitution themselves through the democratic process. Minorities may find little comfort in this

137. Id. at 380.
139. Id. at 695.
140. Clayton, 690 F. Supp. at 852–53. For example, board member Terry stated that he voted for dance in the past but received so much “flak” from ministers that he would not so vote again. Id. at 853.
141. See supra note 28.
142. Clayton, 884 F.2d at 381.
proposition. It is because they are minorities that the majority is able to impose its beliefs on them. The politically powerless minorities, therefore, are left with little or no protection.

If we accept Justice Jackson’s statement\(^{143}\) that the purpose of the Constitution and the Bill of Rights is to protect against the tyranny of the majority, we must reject the Eighth Circuit’s failure to provide aid to a minority subjected to the unconstitutional will of the majority. As Circuit Judge Gibson pointed out in his dissent to the order denying rehearing:

This is a case about religious tyranny. The members of five churches who have strong views on the religious significance of dancing successfully exerted pressure on the board to prohibit school dances. In the overall scheme of things, a dance at Purdy high school, with an enrollment of 519, may not be of earth-shattering significance. Yet, our Constitution protects all citizens, including the students of Purdy high school, from religious, as well as political, oppression by a majority. The first amendment rights of those students sound a call that this court should not ignore.\(^{144}\)

CONCLUSION: AN ARGUMENT FOR AN ALLEGHENY ANALYSIS

Despite claims that it is biased against religion,\(^{145}\) the endorsement analysis achieves the underlying goals of the first amendment better than the \textit{Lemon} test. The \textit{Lemon} test is easily used as camouflage, allowing courts to avoid confronting the establishment clause.

The principal problem with the \textit{Lemon} test, in this respect, as amply highlighted in \textit{Clayton}, is that it allows courts to avoid asking the fundamental questions or applying the underlying principles of the establishment clause in a direct and tangible way. The \textit{Lemon} test deals with manifestations of the establishment clauses’ principles and not with the principles themselves.

The endorsement test of the \textit{Allegheny} analysis is not so easily skirted. It directly asks the fundamental questions and applies the underlying principles. The \textit{Lemon} test asks: “Is there a secular purpose?” and the \textit{Allegheny} analysis asks: “Did the government intend to endorse religion?” Although the former question attempts to ferret out the latter, this is an unnecessary step. The result is that the \textit{Lemon} test asks for a manifestation of endorsement while the \textit{Allegheny} test asks for endorsement itself. This extra level of analytical complexity in \textit{Lemon} makes it easier for a court to lose sight of those underlying principles which are the basis of any establishment clause challenge or analysis.

\(^{143}\) See supra note 17 and accompanying text.

\(^{144}\) \textit{Clayton}, 889 F.2d at 195.

There is no compelling reason why the extra level of complexity is necessary. In fact, as was the case here, the court is more likely to be confused by the Lemon test's check for manifestations, and would probably be more comfortable in applying the principles themselves. The Allegheny analysis is no more difficult to understand than a straightforward Lemon test application, and it is easier to apply.

In addition, the Lemon test only checks specific manifestations of government endorsement of religion, whereas the Allegheny analysis checks for any government endorsement of religion. For example, the first prong of the Lemon test asks only whether the challenged government action has a secular purpose, since a lack of secular purpose is a manifestation of government endorsement of religion. The first prong under the Allegheny analysis does not limit itself solely to any particular manifestation, but encompasses any objective indication of government endorsement of religion in violation of the first amendment's establishment clause. This broader analytical base aids the court in making the necessary determination of whether the establishment clause has been violated.

In summary, the Allegheny analysis' focus on both the objective and subjective intent of the government makes it harder to give deference to secular purposes which deftly avoid any explicit mention of religion while remaining charged with religious intent. The Allegheny analysis is thus better able to judge government neutrality in establishment clause cases.

Douglas C. Shimonek