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## Robinson v. City of Edmond: Establishment Clause Jurisprudence and a Case for Governmental Acknowledgement of the Historical Role of Religion

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# ROBINSON v. CITY OF EDMOND: ESTABLISHMENT CLAUSE JURISPRUDENCE AND A CASE FOR GOVERNMENTAL ACKNOWLEDGEMENT OF THE HISTORICAL ROLE OF RELIGION

## I. INTRODUCTION

The role of religion in the founding and history of America is unquestioned. Also unquestioned is the intent of our forefathers to prohibit governmental establishment of a national religion.<sup>1</sup> But was the gap between church and state intended to be filled by a "high and impregnable"<sup>2</sup> wall?

In January 1993, five residents of Edmond, Oklahoma<sup>3</sup> filed a lawsuit in the United States District Court for the Western District of Oklahoma against the City claiming violations of both federal and state constitutional law.<sup>4</sup> *Robinson v. City of Edmond*<sup>5</sup> was the culmination of a growing dispute among citizens concerning the city seal of Edmond and what some perceived as a governmental endorsement (or establishment) of Christianity as the preferred religion of the City.

What was the City's egregious step toward the prohibited area of governmental establishment of religion? One of four quadrants of its seal depicted a Latin or Christian cross.<sup>6</sup> At trial, the district court entered judgment in favor of the City, finding that no violation of either federal or state constitutional law had occurred.<sup>7</sup>

The plaintiffs appealed. *Robinson* represented the third occasion for the Tenth Circuit to review the constitutionality of a city seal bearing religious symbols.<sup>8</sup> In each instance, applying the highly-criticized three pronged test

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1. See *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

2. *Everson*, 330 U.S. at 18. See also *infra* notes 165-80 and accompanying text.

3. Edmond, Oklahoma is a primarily residential city located in central Oklahoma and north of Oklahoma City.

4. See *Robinson v. City of Edmond*, No. CIV-93-153-R, mem. op. at 1 (W.D. Okla. June 1, 1994). Plaintiffs claimed a violation of the First Amendment of the United States Constitution and violation of Article II, Section 5 of the Oklahoma Constitution. See *id.*

5. 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996).

6. See *id.* at 1228. The seal is reproduced *infra* p. 632.

7. See *id.*

8. See *id.* at 1230. The Tenth Circuit previously found depiction of a Latin cross upon a county seal violative of the Establishment Clause in *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (en banc), and likewise ruled depiction of a local church building upon a city seal violated the Establishment Clause in *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989). See *infra* text accompanying notes 83-99.

derived from *Lemon v. Kurtzman*,<sup>9</sup> the Tenth Circuit ruled the seal violated the Establishment Clause of the First Amendment.<sup>10</sup>

By a 6-3 vote,<sup>11</sup> one vote shy of the four needed for review, the United States Supreme Court denied certiorari. In a dissenting opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, expressed the need for the Court to settle the growing conflict among lower courts concerning display of religious symbols on government seals.<sup>12</sup> Rehnquist noted that the Seventh Circuit, in *Harris v. City of Zion*,<sup>13</sup> likewise had determined religious depictions on city seals unconstitutional, and also followed the *Lemon* test to reach such a decision.<sup>14</sup> Meanwhile, the Fifth Circuit, in *Murray v. City of Austin*,<sup>15</sup> had reached an opposite conclusion without specific reliance on *Lemon*,<sup>16</sup> although noting that the seal of Austin would have met the three-prong test.<sup>17</sup> The Chief Justice further expressed a desire to resolve a split among appellate courts concerning the proper requirements for standing to sue,<sup>18</sup> and further questioned whether the plaintiffs in *Robinson* had suffered sufficient injury to justify standing,<sup>19</sup> as the Tenth Circuit only briefly mentioned this issue.<sup>20</sup>

As a result of the judgment against Edmond, the City now faces substantial expenses in altering the city insignia<sup>21</sup> and paying legal expenses, including those incurred by the plaintiffs.<sup>22</sup> Foregoing the more costly option of a complete redesign, the City decided to leave the unconstitutional quadrant empty.<sup>23</sup>

9. 403 U.S. 602 (1971).

10. The Establishment Clause is that portion of the First Amendment which reads, "Congress shall make no law respecting an establishment of religion," while the Free Exercise Clause is the second portion of the provision which states, ". . . or prohibiting the free exercise thereof." U.S. CONST. amend. I.

11. See *Robinson*, 116 S. Ct. at 1702 (Rehnquist, J., dissenting).

12. See *id.* at 1702-03. Numerous other cases have dealt with varying forms of religious symbols upon public property with varying results from the courts. See e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding a privately owned creche displayed at county courthouse during holiday season is unconstitutional when displayed without surrounding secular symbols); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding a publicly owned creche does not violate Establishment Clause when displayed in holiday season).

13. 927 F.2d 1401 (7th Cir. 1991).

14. See *Robinson*, 116 S. Ct. at 1703 (Rehnquist, J., dissenting).

15. 947 F.2d 147 (5th Cir. 1991).

16. See *id.* at 158.

17. See *id.*

18. See *Robinson*, 116 S. Ct. at 1703 (Rehnquist, J., dissenting).

19. See *id.* Although neither the district court nor the appellate court made any detailed reference to "injury" suffered, the plaintiffs' attorney, Michael Salem of the American Civil Liberties Union (ACLU), asserted that the record provided substantial evidence for standing and further included testimony of one plaintiff, Martin Feldman, who allegedly drove out of his way to avoid seeing the seal. See Chris Casteel, *High Court Rejects Edmond Cross Seal Ruling Appeal Refused*, THE DAILY OKLAHOMAN, May 14, 1996, at 1.

20. The court pointed out that standing is always necessary when dealing with Establishment Clause challenges, but referenced the lack of dispute between the parties concerning plaintiffs' standing to sue. See *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 n.6 (10th Cir. 1995), cert. denied, 116 S. Ct. 1702 (1996). However, Chief Justice Rehnquist noted that the court made no reference to any evidence concerning plaintiffs' claim of injury other than stating that "[p]laintiffs are non-Christians who live or work in Edmond." See *Robinson*, 116 S. Ct. at 1703 (Rehnquist, J., dissenting) (quoting *Robinson*, 68 F.3d at 1228).

21. See *High Court Rejects Edmond Cross Plaintiff Celebrates; Mayor Displeased*, THE DAILY OKLAHOMAN, May 14, 1996 at 1 [hereinafter *High Court Rejects*]. See *infra* text accompanying note 267.

22. See *id.* See also *infra* text accompanying note 268.

23. See *Blank Space on Seal Approved*, THE DAILY OKLAHOMAN, Aug. 1, 1996, at 11.

While few will question that no monetary price can be placed upon the value of our religious freedoms, the inconsistencies<sup>24</sup> and scrutiny of minutiae<sup>25</sup> which have resulted from *Lemon* and its progeny continue to raise the question of whether our current Establishment Clause jurisprudence is grounded upon the proper foundation. Again, did our forefathers intend to build a "high and impregnable" wall separating church and state?

This note discusses the intriguing facts and law surrounding *Robinson*. Additionally, this note illustrates that in the quest for a consistent standard and interpretation of the Religious Clauses, the Supreme Court must reexamine the origins of the Religious Clauses, the actions of our forefathers following adoption of these clauses, and the extent to which they should be applied today.<sup>26</sup> Further, this note contends that such reexamination is necessitated by current interpretations of the Establishment Clause which generally result in a preference for non-religion over religion and frequently require denial of the historical role played by religion in the development of our states and local communities, results never intended by the authors of the First Amendment.<sup>27</sup>

## II. ROBINSON v. CITY OF EDMOND

### A. Statement of Facts and Trial Court Ruling

*Robinson* arose from a dispute concerning the official seal of the City of Edmond. The circular seal, adopted in 1965,<sup>28</sup> had a center portion depicting

24. See *infra* note 191.

25. See *County of Allegheny v. ACLU*, 492 U.S. 573, 674-76 (1989) (Kennedy, J., concurring in part and dissenting in part), where Justice Kennedy criticizes the law asserted by Justice Blackmun concerning public displays of religious symbols during the holiday season. According to Justice Kennedy, reviewing courts will be relegated to considering whether secular symbols such as Santas and reindeer were included, measuring the distance between religious and secular symbols, and ensuring that municipal greenery is not used to form floral frames for religious symbols. Therefore, Establishment Clause jurisprudence concerning religious symbols essentially finds the court "using little more than intuition and a tape measure." *Id.* at 675. Judge Easterbrook of the Seventh Circuit likewise levels criticism by stating, "[i]t would be appalling to conduct litigation under the Establishment Clause . . . with . . . witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting).

26. In a dissenting opinion, Chief Justice Rehnquist became the first justice to provide such reexamination of the history of the First Amendment in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

27. The Supreme Court holds that government cannot favor religion over non-religion. See *Allegheny*, 492 U.S. at 593 (1989). Likewise, Justice Douglas previously expressed similar forbiddance of governmental indifference toward the role of religion throughout the history of the United States and in the lives of its people, by stating:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a *callous indifference* to religious groups. *That would be preferring those who believe in no religion over those who do believe* . . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to . . . religious influence.

*Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (emphasis added).

28. The city seal, intended for identification of city property and personnel, was designed by local resident Frances Bryan and chosen as a result of a local contest. See *Robinson v. City of Edmond*, No. CIV-93-

two hands shaking while the remaining area broke into four equal quadrants, each containing emblems or symbols which corresponded with the history of the City: one contained a steam engine and oil derricks,<sup>29</sup> one contained the local landmark Old North Tower,<sup>30</sup> one contained a covered wagon in front of the number 1889,<sup>31</sup> while the final quadrant contained a Latin or Christian cross.<sup>32</sup> The seal represented the official insignia of the City and appeared on signs, flags, vehicle, uniforms, stationary, utility bills, and the walls of the City Council chambers.<sup>33</sup>

The suit involved five non-Christian plaintiffs who either lived or worked in Edmond, Oklahoma.<sup>34</sup> The plaintiffs sought declaratory and injunctive relief against the City.<sup>35</sup> Included as plaintiffs were: Dr. Wayne Robinson, the minister of the Channing Unitarian Church in Edmond;<sup>36</sup> Curtis Battles and Wendell Miller, members of the Unitarian Congregation and residents of the City;<sup>37</sup> Martin Feldman, a Jewish resident;<sup>38</sup> and Barbara Orza, who was dismissed by the district court due to unavailability at trial.<sup>39</sup> The defendants were the City, its mayor individually and in his official capacity, and the city council members, again, as individuals and in their official capacities.<sup>40</sup> Eventually, the district court dismissed the plaintiffs' claims against the mayor and city council members as individuals.<sup>41</sup>

The plaintiffs sued under 42 U.S.C. §1983, claiming a violation of the Establishment Clause, the Free Exercise Clause, and the Oklahoma Constitution.<sup>42</sup> The district court granted partial summary judgment for the City on the Free Exercise claim and its counterpart in the Oklahoma Constitution.<sup>43</sup> Fol-

153-R, mem. op. at 1-2 (W.D. Okla. June 1, 1994). The contest sought the seal which best portrayed the history and background of the city and further suggested references to the city's "birth in the Run of '89, the college and the culture, commerce, agriculture and downright friendliness of the city." *Id.*

29. *See id.* at 2. This section was intended to represent commerce. *See* Bobby Ross Jr. & Lisa Beckloff, *Edmond Cross Ruling Eyed Other Cities May Be Affected*, THE DAILY OKLAHOMAN, Oct. 23, 1995, at 1 [hereinafter *Edmond Cross Ruling*].

30. *See Robinson*, No. CIV-93-153-R, at 2. This section was intended to represent education. The Old North Tower is a local historical landmark located on the campus of the University of Central Oklahoma in Edmond. *See Edmond Cross Ruling*, *supra* note 29. The Old North Tower is where the first higher education classes were held in Oklahoma Territory. *See Robinson*, No. CIV-93-153-R, at 4.

31. *See Robinson*, No. CIV-93-153-R, at 2. This section was intended to represent the use of covered wagons in the Oklahoma Land Run of 1889, the birth of settlement in Edmond. *See id.* at 4.

32. *See id.* This section was intended to represent the role of religion, and specifically Christian churches, in the history of Edmond. *See id.* at 4-5. *See also infra* notes 52-57 and accompanying text.

33. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1228 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996).

34. *See id.* at 1228.

35. *See id.*

36. *See id.* It is worth noting that Dr. Robinson, seemingly the primary plaintiff in this case and certainly the most publicly outspoken party throughout the controversy, left Edmond prior to denial of certiorari by the Supreme Court. Dr. Robinson moved to become minister at the First Universalist Church of Minneapolis. *See High Court Rejects*, *supra* note 21, at 1.

37. *See Robinson*, 68 F.3d at 1228.

38. *See id.*

39. *See id.* at 1228 n.1.

40. *See id.* at 1228.

41. *See id.*

42. *See id.* *See also supra* note 4.

43. *See id.*

lowing a two day trial, Judge David L. Russell<sup>44</sup> granted judgment for the City.<sup>45</sup> Although failing to explain his finding of validity under the Oklahoma Constitution,<sup>46</sup> Judge Russell applied the *Lemon* test in ruling that the seal did not violate the Establishment Clause of the United States Constitution.<sup>47</sup> While the district court based its ruling on *Lemon*, it included a modification taken from Justice O'Connor's concurring opinion in *County of Allegheny v. ACLU*.<sup>48</sup>

Since 1971, *Lemon* has generally been utilized in Establishment Clause cases despite extensive criticism, specifically regarding the difficulty of its application and the inconsistency of its results.<sup>49</sup> For government action to be upheld under *Lemon*, it must (1) have a secular purpose, (2) have a principal or primary effect which neither advances nor inhibits religion, and (3) avoid fostering excessive government entanglement with religion.<sup>50</sup> The O'Connor modification utilized by the district court concerns the first two prongs of the test and calls for viewing the effects of the government action as perceived by an average observer.<sup>51</sup>

In ruling for the City, the district court admitted that the cross obviously brings a religious implication when viewed in isolation.<sup>52</sup> The court continued, however, by emphasizing the totality of judicial scrutiny, noting "[y]ou cannot look at this seal from just one quadrant."<sup>53</sup> Judge Russell's opinion turned on the combination of secular symbols mixed with the religious symbol and the historical representation of each quadrant.<sup>54</sup> While the other quadrants represented commerce, education, and the settlement of the City, the cross summarized the role played by religion in the founding, development, and history of Edmond.<sup>55</sup> At trial, the City argued, and supported with testimony, that within months of the Oklahoma Land Run, four churches had established themselves in Edmond and played an important role in the growth of Edmond.<sup>56</sup> The City further pointed out that Edmond was the home of the first church established in the Oklahoma Territory following the Land Run, St. John the Baptist Catholic Church.<sup>57</sup>

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44. Judge Russell is Chief Judge of the United States District Court for the Western District of Oklahoma.

45. See *Robinson*, 68 F.3d at 1228.

46. See *id.*

47. See *Robinson v. City of Edmond*, No. CIV-93-153-R, mem. op. at 3 (W.D. Okla. June 1, 1994).

48. 492 U.S. 573 (1989).

49. See *infra* note 191.

50. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

51. See *Robinson*, 68 F.3d at 1229-30.

52. See *Robinson*, No. CIV-93-153-R, at 5.

53. See Bobby Ross Jr., *Seal's Cross Depicts History, Judge Says*, THE DAILY OKLAHOMAN, May 26, 1994, at 1 [hereinafter *Seal's Cross Depicts History*].

54. See *Robinson*, No. CIV-93-153-R, at 4-5.

55. Judge Russell found, "Religion is a part of Edmond's history as are railroads, covered wagons, schools and the land run." *Id.* at 5.

56. See *Seal's Cross Depicts History*, *supra* note 53 at 1. The original designer of the seal, Frances Bryan, testified that she included the cross as tribute to the prominent role of churches during the origins of Edmond. See *id.*

57. See *Robinson*, No. CIV-93-153-R, at 4-5. See also *High Court Rejects*, *supra* note 21, at 1.

The district court further relied on the duration of time which had passed without complaint from citizens.<sup>58</sup> The court noted the passage of "almost twenty-five years before anyone seemed to notice the cross was there."<sup>59</sup> The plaintiffs themselves testified that they resided in Edmond for years before realizing that the cross was displayed upon the seal.<sup>60</sup> The court found such an uncontroversial span of time "significant when considering the perception of the average observer."<sup>61</sup> In the end, the district court was convinced that the cross on Edmond's city seal did not have the effect of endorsing religion, nor was it intended to endorse religion.<sup>62</sup> The court concluded that the Constitution, while prohibiting the establishment of religion, does not require government to ignore the existence of religion.<sup>63</sup>

### B. Tenth Circuit Appeal

Following judgment for the City, plaintiffs appealed to the Tenth Circuit Court of Appeals. On appeal, the case had been narrowed to payment of attorney fees<sup>64</sup> and the issue of violation of the First Amendment's Establishment Clause.<sup>65</sup> Yet another consideration of *Lemon* was in order.

As stated earlier, the Fifth and Seventh Circuit Courts of Appeals have heard similar cases.<sup>66</sup> The Fifth Circuit, in *Murray v. City of Austin*,<sup>67</sup> became the only federal appellate court to allow a religious symbol to remain on a city seal.<sup>68</sup> Incorporating a modified version of Stephen F. Austin's family coat of arms,<sup>69</sup> the City adopted the seal in 1916. The final version depicted a small Latin cross between outspread wings<sup>70</sup> and atop a pentagon containing a lamp of knowledge.<sup>71</sup> The district court granted summary judgment for the City,<sup>72</sup> and the Fifth Circuit upheld the ruling based upon the history, purpose, and context of the seal.<sup>73</sup> Although refusing to directly rely upon *Lemon*, the court

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58. See *Robinson*, No. CIV-93-153-R, at 2.

59. *Seal's Cross Depicts History*, *supra* note 53, at 1.

60. *See id.*

61. *See id.*

62. See *Robinson*, No. CIV-93-153-R, at 5.

63. *See id.*

64. This note does not directly analyze the issue of attorney fees. However, the analysis does reveal the burden that payment of such fees is likely to place upon cities in future litigation. See *infra* text accompanying notes 267-68.

65. See *Robinson v. City of Edmond*, 68 F.3d 1226, 1228-29 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996).

66. See *supra* text accompanying notes 12-17.

67. 947 F.2d 147 (5th Cir. 1991). Reproduction of the city's seal is included in the opinion at page 159.

68. See *Robinson*, 68 F.3d at 1232.

69. The City of Austin was named after Stephen F. Austin who is known as the "father of Texas." See *Murray*, 947 F.2d at 149.

70. "The Latin cross in the coat of arms signified that a progenitor had participated in a crusade; and the wings represented St. Austin . . . the Archbishop of Canterbury." *Id.* at 149.

71. Intended to represent "the educational advantages of the City" such as the University of Texas located in Austin. *Id.* at 149.

72. See *Murray v. City of Austin*, 744 F. Supp. 771, 775-76 (W.D. Tex. 1990), *aff'd*, 947 F.2d 147 (5th Cir. 1991).

73. See *Murray*, 947 F.2d at 154-58.

ruled that Austin's seal would have passed the three-prong test because the principal or primary effect of the insignia was not to advance or inhibit religion but rather had the "effect of identifying city activity and property and promoting Austin's unique role and history."<sup>74</sup>

Conversely, the Seventh Circuit, in *Harris v. City of Zion*,<sup>75</sup> reviewed two city seals<sup>76</sup> and found both violated the Establishment Clause. The seal of Rolling Meadows, Illinois, contained a four-leaf clover which depicted inside each leaf a water tower, two industrial buildings, a leaf, and a tall, slender cross in front of a one story building.<sup>77</sup> The seal of Zion, Illinois, presented a shield topped by the statement "God Reigns" and divided into four portions containing a dove, a Christian cross, a crown and scepter, and the name "Zion."<sup>78</sup> The district court<sup>79</sup> allowed the Rolling Meadows seal to stand, but found the Zion seal to be in violation of the Establishment Clause because of its effect of endorsing religion.<sup>80</sup> Following a consolidated review of both seals, the Seventh Circuit found the crosses to be "blatantly sectarian" and more than "mere commemoration" while "effectively endors[ing] or promot[ing] the Christian faith."<sup>81</sup> The court expressly rejected the arguments of historical representation and detraction by the secular symbols away from the religious symbols.<sup>82</sup>

*Robinson*, however, represented the third review by the Tenth Circuit of a governmental seal bearing religious symbols.<sup>83</sup> In *Friedman v. Board of County Commissioners of Bernalillo County*,<sup>84</sup> the seal of Bernalillo County, New Mexico, conveyed the Spanish motto "CON ESTA VENCEMOS" ("With This We Conquer" or "With This We Overcome")<sup>85</sup> and centered around a Latin cross<sup>86</sup> emanating rays of light above mountains and sheep grazing on a plain.<sup>87</sup> The district court<sup>88</sup> ruled in favor of the County based upon its con-

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74. *Id.* at 155.

75. 927 F.2d 1401 (7th Cir. 1991). Reproduction of the cities' seals are included in the appendix to the opinion at pages 1416-17.

76. Two trials were consolidated for trial by the district court. *See id.* at 1402.

77. The one story building is actually a depiction of a local church. *See id.* at 1403.

78. *See id.* at 1417. The City of Zion was founded in 1896 by the Reverend John Alexander Dowie, founder of the Christian Catholic Church. *See id.* at 1403. The city was originally intended as a "religious utopian community." *Id.* at 1424 (Easterbrook, J., dissenting). The city seal was then adopted in 1902 and since retained by city council vote in 1986 based upon historical reasoning. *See id.* at 1413-14.

79. *See Harris v. City of Zion*, 729 F. Supp. 1242 (N.D. Ill. 1990), *rev'd.*, 927 F.2d 1401 (7th Cir. 1991).

80. *See id.* at 1249-50.

81. *Harris*, 927 F.2d at 1415.

82. *See id.*

83. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1230-31 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 1702 (1996). *See also supra* note 8.

84. 781 F.2d 777 (10th Cir. 1985) (en banc). Reproduction of the county's seal is included in the appendix to the opinion at pages 783-84.

85. *Id.* at 779. Conflicting testimony was given at trial as to whether the statement "With This We Conquer" referred to the cross or to the seal itself. *See id.*

86. Testimony revealed a nearly unanimous opinion that the cross represented the historical role played by Catholicism, Christianity, and the Spanish conquistadors in the settlement of the Southwest and New Mexico. *See id.*

87. Interpretation of the symbolism represented by the sheep differed between the parties. The plaintiff testified that he saw the sheep as representing the "flock of Jesus." *Id.* However, the defendants brought forth experts testifying the sheep merely symbolized the historical role of the sheep-raising industry in the county,



tention that the cross represented the historical role which the Catholic Church had played in the settling of the Southwest.<sup>89</sup> Further, the court found the seal to be a historical symbol rather than an expression of religion.<sup>90</sup>

Original review by the Tenth Circuit affirmed the lower court holding. On rehearing, however, the court, sitting en banc, reversed, ruling that the seal violated the Establishment Clause by endorsing Christianity.<sup>91</sup> Specifically, the court found that an average observer would conclude the seal's primary or principal effect was the advancement of religion.<sup>92</sup>

Similarly, in *Foremaster v. City of St. George*,<sup>93</sup> the seal of St. George, Utah depicted the temple of the Church of Jesus Christ of Latter Day Saints in the lower bottom quarter.<sup>94</sup> A putting green accompanied the sketch of the temple, and a hill dominated the bottom half while the upper half contained a setting sun and a cluster of grapes.<sup>95</sup> The district court<sup>96</sup> granted summary judgment in favor of the City holding that the symbol of the temple did not have the primary effect of endorsing the church.<sup>97</sup> The Tenth Circuit reversed and remanded, ruling that a genuine issue of material fact remained as to the perception of an average observer when viewing the city logo.<sup>98</sup> Although the appellate court did not make a specific ruling on the constitutionality of the seal, it focused on the second prong of the *Lemon* test which holds a govern-

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and directly denied any symbolism connected to Christianity. *See id.*

88. *See Johnson v. Board of County Comm'rs of Bernalillo County*, 528 F. Supp. 919 (D.N.M. 1981), *rev'd sub. nom. Friedman v. Board of County Comm'rs of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (en banc).

89. *See id.* at 925. The court noted further support for the county's "historical" argument by citing other vestiges of religious symbolism left by Catholicism or Christianity upon the state:

Catholicism cannot be separated from New Mexico history. Catholicism is as much of New Mexico history as the conquistadors who explored this area and named the State capital "Santa Fe", which translated means "the City of the Holy Faith", and named our beautiful mountain range "Sangre de Cristo", which translated means "the blood of Christ."

*Id.* at 924.

90. *See id.* at 925.

91. *See Friedman*, 781 F.2d at 780-82.

92. *See id.* "Primary effect" of "advanc[ing] religion" is the second prong of the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Plaintiffs' evidence persuaded the court in *Friedman* that an average observer would conclude the county government was "advertising" Catholicism through the depiction of the cross upon the county seal. *See Friedman*, 781 F.2d at 781.

93. 882 F.2d 1485 (10th Cir. 1989). Reproduction of the city's seal is included in the appendix to the opinion. *See id.* at 1493.

94. *See id.* at 1486. Local tradition holds that the Mormon Temple stands upon ground dedicated by Brigham Young. The temple was the first of its kind in the West and has since become a tourist attraction with a visitors center on the surrounding public grounds. *See id.*

95. *See id.* The seal also included the motto "Where the Summer Sun Spends the Winter" emblazoned across the middle. *Id.*

96. *See Foremaster v. City of St. George*, 655 F. Supp. 844 (D. Utah 1987), *rev'd.*, 882 F.2d 1485 (10th Cir. 1989).

97. *See id.* at 852. The plaintiff also challenged the constitutionality, under the Establishment Clause, of a city utility subsidy for the temple. *See Foremaster*, 882 F.2d at 1486. Since 1942, the city's Utility Department had credited the temple's monthly electric bill to help cut the cost of illuminating the temple at night. *See id.* Although the district court ruled that the plaintiff lacked standing to sue, the Tenth Circuit reversed, finding that the plaintiff suffered economic harm. *See id.* at 1488.

98. *See Foremaster*, 882 F.2d at 1490-91.

mental action violates the Establishment Clause if the action has a primary effect of advancing religion.<sup>99</sup>

The *Robinson* court relied heavily on *Foremaster* and *Friedman* along with the Seventh Circuit's decision in *Harris*.<sup>100</sup> After narrowing the issues to the Establishment Clause inquiry, review was further limited to the second prong of the *Lemon* test, which is concerned with the "effect" of governmental action.<sup>101</sup> In determining the effect, the court looked at the "particular physical setting[]"<sup>102</sup> of the seal and evaluated the effect based upon the objective view of an average observer.<sup>103</sup> Further, the court noted that its ruling in *Friedman* took into consideration "the seal's composition and use"<sup>104</sup> and "its pervasiveness" into the everyday lives of residents.<sup>105</sup>

The City brought forth three main arguments, all of which were summarily rejected. First, the City argued that the seal represented the history of Edmond.<sup>106</sup> The court quickly rejected this argument by noting the sectarian nature of the Christian cross and contending success of such an argument would essentially negate the Establishment Clause because religion is prominent in many communities.<sup>107</sup> Additionally, the court noted the intent behind the seal and its symbols is irrelevant if the average observer would interpret the seal as advancing religion.<sup>108</sup>

Second, the City argued that the majority of the residents of Edmond, both Christian and non-Christian, did not believe the seal endorsed religion.<sup>109</sup> The court ruled that this argument made a false assumption of law and explained that the objective view is based on an average observer, not the local community.<sup>110</sup> In the court's opinion, an average observer viewing the Edmond seal necessarily perceived that the City of Edmond endorsed Christianity.<sup>111</sup>

Finally, the City argued that one can distinguish the Edmond seal from those which have been found unconstitutional as its inclusion of secular symbols neutralized any religious connotation given to the seal through depiction of the cross.<sup>112</sup> By denying the City's third, and possibly strongest argument, the court refused "to carefully and minutely distinguish the Edmond seal . . . based upon the particular dimensions of the cross[] . . . or the secular or non-secular nature of other elements of the seal."<sup>113</sup> With dismissal of the final defense

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99. *See id.* at 1491.

100. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1230-33 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996).

101. *See id.* at 1229-30.

102. *See County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989).

103. *See Robinson*, 68 F.3d at 1230 (quoting *Friedman v. Board of County Comm'rs of Bernalillo County*, 781 F.2d 777, 781 (10th Cir. 1985) (en banc)).

104. *Id.* (quoting *Friedman*, 781 F.2d at 782).

105. *Id.* at 1231 (quoting *Friedman*, 781 F.2d at 782).

106. *See id.* at 1232.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.* at 1232-33.

111. *See id.* at 1233.

112. *See id.*

113. *Id. But cf. Murray v. City of Austin*, 947 F.2d 147, 157-58 (5th Cir. 1991); *id.* at 169-70 (Goldberg,

argument, the court concluded that Edmond's usage of a Christian cross on its city seal violated the Establishment Clause.<sup>114</sup>

### C. *Certiorari Denied* — Chief Justice Rehnquist's Dissenting Opinion

Sounding the death knell for the Edmond city seal, the Supreme Court narrowly voted to deny certiorari, leaving the City merely one vote short of review.<sup>115</sup> Denial of certiorari in *Robinson* illustrates the division of the Court over the current status of Establishment Clause jurisprudence. However, Chief Justice Rehnquist seized the opportunity in a brief dissent to express both his concern over potential flaws in the Tenth Circuit's opinion as well as his desire to resolve the developing conflicts among lower courts in dealing with religious symbols upon government property in general.<sup>116</sup>

## III. ESTABLISHMENT CLAUSE JURISPRUDENCE

### A. *First Amendment Origins and History*

James Madison has been considered the Father of the United States Constitution.<sup>117</sup> Despite his eventually extensive involvement in development of the Bill of Rights, Madison was not at the forefront of those who demanded an inclusion of specific protections for individual rights into the Constitution.<sup>118</sup> Despite generally favoring a Bill of Rights, Madison expressed various doubts about the need or usefulness of such an addition to the proposed Constitution and opined that he "never thought the omission a material defect."<sup>119</sup> Primarily, he was satisfied that the Constitution, through the powers given to the federal government,<sup>120</sup> sufficiently provided for protection of individual rights against federal government encroachment.<sup>121</sup> Coupled with the limitations placed upon the federal government, Madison believed that the size of the country would diminish the possibilities of a single-minded majority being formed to a sufficient degree as to attain the power required for oppression of minority groups.<sup>122</sup> Madison was unconvinced of the true effectiveness of a written document claiming to protect the rights of individuals because expe-

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J., dissenting).

114. See *Robinson*, 68 F.3d at 1233.

115. See *Robinson*, 116 S. Ct. at 1702.

116. See *id.* at 1702-03.

117. See JANE MCCONNELL & BURT MCCONNELL, *PRESIDENTS OF THE UNITED STATES* 34 (1970).

118. See *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

119. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 *LETTERS AND OTHER WRITINGS OF JAMES MADISON FOURTH PRESIDENT OF THE UNITED STATES* 424 (Philadelphia, J.B. Lippincott 1865) [hereinafter 1 *LETTERS OF MADISON*].

120. Madison believed the Republican form of government inherently protected the citizens against governmental oppression as both political and physical power was vested in the people. What power the government did possess had been consented to by the people. See *id.* at 425.

121. See *id.*

122. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 *LETTERS OF MADISON*, *supra* note 119, at 352-53.

rience had revealed a propensity of citizens to violate unpopular written proclamations.<sup>123</sup> After all, the document is merely paper which a powerful majority could freely choose to disregard.<sup>124</sup> Beyond being relatively powerless, a written document could easily be misconstrued as enumerating the *only* rights held by individuals.<sup>125</sup> In the end, Madison set aside his own doubts and apprehension and vowed his support for inclusion of a Bill of Rights in order to win ratification by the states and advance the union.<sup>126</sup>

### 1. Virginia Passage of Bill for Establishing Religious Freedom

Madison's role in the passage of the Religious Clauses is no less noteworthy than his prominence in the development and passage of the Constitution. In Virginia, following Thomas Jefferson's departure to France as foreign minister,<sup>127</sup> Madison carried through Jefferson's Bill for Establishing Religious Freedom<sup>128</sup> which disestablished the Anglican church.<sup>129</sup> Passage of this bill was possible because of Madison's astute political maneuvering which effectively killed a separate bill intended to broaden a tax levy supporting Christian ministers.<sup>130</sup> In 1785, during consideration of the levy, Madison published an essay, *Memorial and Remonstrance Against Religious Assessments*,<sup>131</sup> which argued against taxation in support of the church and greatly swayed the popular sentiment of Virginia.<sup>132</sup>

### 2. Congressional Passage of the First Amendment

With the prominence of the Virginia debates and the leadership he provided therein, Madison found himself at the forefront of the religious debate in the First Congress.<sup>133</sup> As promised to the states, consideration of amendments be-

123. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 LETTERS OF MADISON, *supra* note 119, at 424.

124. See *id.* at 427.

125. See *id.* at 424.

126. See *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

127. Jefferson left for France on July 5, 1784, and returned to the United States on November 23, 1789. See 1 NATHAN SCHACHNER, THOMAS JEFFERSON: A BIOGRAPHY 263, 384 (1951).

128. See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 410-11 (1986). Originally drafted by Jefferson, the lengthy declaration is contrasted with the brevity of the religious clauses of the First Amendment and reads in portion:

*We the General Assembly of Virginia do enact* that no man shall be *compelled* to frequent or support any religious worship, place, or ministry whatsoever, nor shall be *enforced, restrained, molested, or burthened* in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 250 (1988) (emphasis added).

129. See Laycock, *supra* note 128, at 410.

130. See *id.* at 410-11.

131. Madison's *Memorial and Remonstrance* is reprinted in full in the appendix following Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. 1, 63-73 (1947).

132. See Laycock, *supra* note 128, at 410-11.

133. See CORD, *supra* note 128, at 4-6.

gan during the summer of 1789.<sup>134</sup> Perhaps reflecting his opinion that the omission of a Bill of Rights was not a "material defect," Madison seemed somewhat passive concerning his own proposals.<sup>135</sup> Justice Rehnquist, dissenting in *Wallace v. Jaffree*,<sup>136</sup> noted this passivity by commenting that "Madison's subsequent remarks . . . were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens."<sup>137</sup>

Although little documentation of the debate concerning the Religious Clauses exists,<sup>138</sup> the intended meaning of the clauses can be ascertained through examination of the various changes to the proposal as it moved toward approval by Congress. Numerous state versions of Religious Clauses were submitted for consideration.<sup>139</sup> Virginia's version stands out, however, as current Establishment Clause law relies upon Virginia's debates. Reflecting similar proposals by North Carolina,<sup>140</sup> New York, and Rhode Island,<sup>141</sup> the relevant portion of the Virginia proposal read: "[N]o particular religious sect or society ought to be favored or established, by law, in preference to others."<sup>142</sup>

Madison's own proposal stated as follows: "The civil rights of none shall be abridged on account of religious beliefs or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>143</sup> Many transformations ensued.

After submission to committee,<sup>144</sup> Madison's version became "no religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>145</sup> During House debate Madison revealed that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and

134. See Laycock, *supra* note 128, at 411.

135. While recognizing the prominent role Madison certainly played in the construction and development of the amendments which compose the Bill of Rights, then-Justice Rehnquist contended that in advancing proposals for the Religious Clauses to the Federal Constitution Madison was "speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Wallace v. Jaffree*, 472 U.S. 38, 97-98 (1985) (Rehnquist, J., dissenting).

136. 472 U.S. 38 (1985). The case involved an Alabama moment-of-silence statute for school children. Despite legislative language intended to convey an idea of neutrality upon the statute, the Supreme Court majority ruled the statute unconstitutional because voluntary prayer was expressly included among the choices of actions which could be taken during the one-minute time period. *See id.* at 60-61.

137. *Id.* at 93-94 (Rehnquist, J., dissenting).

138. The only documentation concerning the debates surrounding the Religious Clauses is from the House on August 15, 1789. *See Jaffree*, 472 U.S. at 95. (Rehnquist, J., dissenting).

139. *See* CORD, *supra* note 128, at 6-7.

140. North Carolina and Rhode Island were the only two states that failed to vote in favor of ratification of the United States Constitution because of the omission of a bill protecting individual rights. *See Jaffree*, 472 U.S. at 93 (Rehnquist, J., dissenting).

141. The proposal by New York and Rhode Island differed only slightly from Virginia's by stating "no religious sect or society" rather than "no particular religious sect or society." *Id.* at 93 n.2; *see* CORD, *supra* note 128, at 7.

142. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Jonathan Elliot ed., 2d ed. 1937).

143. History of Congress, Amendments to the Constitution (June 1789), reprinted in 1 ANNALS OF CONGRESS 434 (Joseph Gales, ed., 1834).

144. This was a Select Committee consisting of eleven members including Madison. *See Jaffree*, 472 U.S. at 95 (Rehnquist, J., dissenting).

145. ANNALS OF CONGRESS, *supra* note 143, at 729.

enforce the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience."<sup>146</sup> While agreeing with Madison's understanding of the proposed amendment, one congressman expressed his concern that the words of the amendment may become "extremely hurtful to the cause of religion" because "others might find it convenient to put another construction upon it."<sup>147</sup> We are further given an insightful notation into the issues Madison intended to confront through the Religious Clauses: "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would *compel* others to conform."<sup>148</sup> Eventually the House version emerged reading: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>149</sup>

Because Senate debates were kept secret, no documentation of its discussions exists.<sup>150</sup> Eventually, the Senate altered the House version to read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."<sup>151</sup> A joint conference was then held which turned out the final version utilized today in our First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>152</sup>

### 3. Religious Accommodation Surrounding First Amendment Passage

Considering the divergence of information available, commentators have succeeded at interpreting such information in directly conflicting manners.<sup>153</sup> Strict separationists have traditionally relied upon the writings of Madison and Jefferson and the debates surrounding Virginia's struggle for religious liberty to conclude that an impregnable wall must be maintained between church and state.<sup>154</sup> Meanwhile, despite the relatively small amount of known debate surrounding the passage of the First Amendment, many have interpreted a more narrow stance of accommodation by noting actions taken by the First Congress and early presidents, including Jefferson and Madison.<sup>155</sup>

Numerous events have been cited by commentators in support of accommodation. For example, the day after House passage of the First Amendment Religion Clauses, a resolution was offered in the House asking President Wash-

146. *Id.* at 730 (emphasis added).

147. *See id.*

148. *Id.* at 731.

149. *Id.* at 766.

150. *See Laycock, supra* note 128, at 412.

151. CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT 130 (1964).

152. U.S. CONST. amend. I.

153. *See Jaffree*, 472 U.S. at 91 (Rehnquist, J., dissenting); *CORD, supra* note 128. *But cf. Lee v. Weisman*, 505 U.S. 577, 620-26 (1992) (Souter, J., concurring); *Everson v. Board of Education*, 330 U.S. 1 (1947).

154. *See Everson*, 330 U.S. at 8-16, 28-43 (Rutledge, J., dissenting).

155. *See generally CORD, supra* note 128; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984); *Jaffree*, 472 U.S. at 91-114 (Rehnquist, J., dissenting).

ington to proclaim a day for public prayer and thanksgiving.<sup>156</sup> Subsequently, George Washington, John Adams, and James Madison issued Thanksgiving Day Proclamations with Thomas Jefferson as the lone dissenter among the first four presidents.<sup>157</sup>

Similarly, Congressional chaplains are often cited as another accommodation of religion made by the First Congress.<sup>158</sup> The citation of congressional provision for chaplains becomes even more noteworthy when pointing out that Madison himself sat on the committee that recommended the Congressional Chaplain system, yet he acquiesced making no argument of constitutional violation.<sup>159</sup> And finally, early presidents often effected direct support of religion through Senate treaty agreements.<sup>160</sup> In particular, President Thomas Jefferson signed a treaty agreement with the Kaskaskia Indians to provide money in support of a Roman Catholic priest and church for the Indian tribe<sup>161</sup>—a treaty which reflected those made by earlier and future presidents.<sup>162</sup> Such actions of accommodation as these, and others,<sup>163</sup> by the authors of the Religious Clauses provide foundation for narrower interpretation than currently acknowledged, and cast doubt on the themes of strict separation between church and state and strict neutrality between religion and irreligion set forth by the Supreme Court in *Everson v. Board of Education*.<sup>164</sup>

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156. See *Jaffree*, 472 U.S. at 100-01 (Rehnquist, J., dissenting).

157. See *id.* at 103. Jefferson believed the proclamation to be violative of the Constitution and asserted that the timing of religious exercises such as prayer and fasting was better left to the choice of the people. See *id.* Madison issued such Thanksgiving Day Proclamations four times. See *CORD*, *supra* note 128, at 53. Eventually, after leaving the presidency, Madison recanted the constitutionality of these proclamations and the constitutionality of congressional chaplains in his "Detached Memoranda." See *id.* at 29-36.

158. See *CORD*, *supra* note 128, at 23-24.

159. See *id.* at 23.

160. See *id.* at 57-80.

161. See *Jaffree*, 472 U.S. at 103 (Rehnquist, J., dissenting).

162. In addition to Jefferson's treaty, George Washington, James Monroe, John Quincy Adams, Andrew Jackson, and Martin Van Buren, along with their Senates, also made similar treaty agreements providing public money for the building of churches. See *CORD*, *supra* note 128, at 58-60.

163. See *Lee v. Weisman*, 505 U.S. 577, 632-36 (1992) (Scalia, J., dissenting).

164. 330 U.S. 1 (1947).

B. "Wall of Separation"<sup>165</sup>

For nearly 150 years, the Supreme Court reviewed the Establishment Clause conflict only twice.<sup>166</sup> It was not until 1947, in *Everson v. Board of Education*,<sup>167</sup> that the Court made the first detailed analysis and declaration as to its interpretation of the Establishment Clause.

*Everson* involved an alleged violation of the Establishment Clause by New Jersey's statutory policy empowering local school districts to make agreements for the transportation of children between school and home.<sup>168</sup> Based upon the power granted by the statute the defendant township passed a resolution providing reimbursement of parental expenditures for travel by their children upon buses of the public transportation system.<sup>169</sup> This authorization for reimbursement was limited to transportation to and from public and parochial schools.<sup>170</sup>

The majority ruled in favor of the township, finding no violation of the First Amendment because the expended tax dollars did not directly support the parochial schools.<sup>171</sup> This decision is truly ironic in that it came from the very Court which sought to ensure a "high and impregnable" wall between church and state.<sup>172</sup> Despite being a 5-4 decision, the *Everson* Court was unanimous in its opinion that the First Amendment erected a wall between church and state.<sup>173</sup> Subsequently, *Everson* has been credited with establishing the

165. The words "wall of separation" originated from a January 1, 1802, letter written by President Jefferson to the Danbury Connecticut Baptist Association, and the relevant paragraph stated:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation on behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

CORD, *supra* note 128, at 114-15 (emphasis from original). Jefferson's words concerning separation of church and state were first given in *Reynolds v. United States*, 98 U.S. 145, 164 (1879). *Reynolds*, in part, dealt with the constitutionality of a federal law directed toward the Mormon Church by outlawing bigamy. However, unlike *Everson*, use of Jefferson's quote concerning the wall of separation between church and state was directed toward the Free Exercise Clause rather than the Establishment Clause. See CORD, *supra* note 128, at 119.

166. See CORD, *supra* note 128, at 103-05. Neither *Bradfield v. Roberts*, 175 U.S. 291 (1899), nor *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908), engaged in any meaningful analysis of the Establishment Clause.

167. 330 U.S. 1 (1947).

168. See *id.* at 3.

169. See *id.*

170. See *id.* at 20 (Jackson, J., dissenting). The resolution provided for reimbursement for students of public and Catholic schools only. By this limitation any students who had attended private, Baptist, or any other sectarian school would not have received compensation for travel to and from school. See *id.* at 19-20. For the Court which proclaimed the need for a "high and impregnable" wall separating church and state, this seems to be a somewhat contradictory result by upholding a clearly sectarian favoritism through local government dollars. The dissent, as would be expected, also found the majority's holding perplexing in light of the stated conclusions of law. See *id.* at 19.

171. See *id.* at 18.

172. See *id.* The majority opinion concluded, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.*

173. See *Everson v. Board of Education*, 330 U.S. 1 (1947).



separationist viewpoint of Establishment Clause jurisprudence; however, the four dissenting justices were the true proponents of strict separation. The dissent viewed the ruling as a step backward in allowing religious and governmental action to intermingle.<sup>174</sup> In reaching a conclusion, the majority set the stage by reflecting upon practices of oppressive government supported churches in Europe which began to arise in early America.<sup>175</sup>

Both the majority and dissenting opinions then interpreted the Establishment Clause through the words of Jefferson and Madison in the Virginia debates to reach their conclusions of a required neutrality by the government toward religion and a wall of separation between church and state.<sup>176</sup> Following the *Everson* opinion, it became the standard in Establishment Clause cases to cite the Virginia debates, especially Madison's *Memorial and Remonstrance*, in support of the strict separationist position.<sup>177</sup>

Beyond the importance of the decision itself as the first detailed interpretation of the Establishment Clause by the Supreme Court, *Everson* was likewise monumental for its application of the Establishment Clause of the United States Constitution to state action through the Fourteenth Amendment's Due Process Clause.<sup>178</sup> Prior to *Everson* and the Fourteenth Amendment, the religious protections of the United States Constitution only applied against actions by the federal government, more specifically to actions of Congress. Originally, the states maintained control over what individual protections to provide their citizens against state governmental actions. In fact, some states continued the practice of recognizing an official state church following ratification of the Federal Constitution, with the final state church being disestablished as late as 1833.<sup>179</sup> However, *Everson's* application of the Fourteenth Amendment made the Establishment Clause a uniform ground floor provision throughout the country, allowing states to provide additional, but not less, protection.<sup>180</sup>

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174. Justice Jackson stated, "I cannot read the history of the struggle to separate political from ecclesiastical affairs . . . without a conviction that the Court today is unconsciously giving the clock's hands a backward turn." *Id.* at 28 (Jackson, J., dissenting).

175. *See id.* at 8-11.

176. *See id.* at 11-13; *id.* at 31-42 (Rutledge, J., dissenting).

177. *See, e.g.,* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 214 (1963); Engel v. Vitale, 370 U.S. 421, 428, 431 n.13 (1962).

178. *See Everson*, 330 U.S. at 8. *See also* CORD, *supra* note 128, at 99-101.

179. The Congregational Church was maintained in Connecticut until 1818, in New Hampshire until 1819, and in Massachusetts until 1833. *See* CORD, *supra* note 128, at 4.

180. The *Everson* Court asserted this new standard by stating, "The First Amendment, as made applicable to the states by the Fourteenth Amendment . . . commands that a state 'shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'" *Everson*, 330 U.S. at 8 (emphasis added).

Following *Everson*, the Court heard monumental cases concerning prayer<sup>181</sup> and Bible reading<sup>182</sup> in public schools. The Court neglected to provide any definitive rule of interpretation regarding Establishment Clause. It was not until 1971, in *Lemon v. Kurtzman*,<sup>183</sup> that the Court put forth a list of criteria by which to determine the constitutionality of a government action involving religion.

### C. The Lemon Test and Its Resulting Unpredictability

In *Lemon*, the majority announced a tripartite test intended to clarify Establishment Clause jurisprudence and thereby provide a uniform rule of review.<sup>184</sup> The test required that a government activity: (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) must not involve excessive entanglement of government with religion.<sup>185</sup> For governmental activity to withstand judicial scrutiny, each prong of the tripartite *Lemon* test must be met, and failure on any of the three prongs results in a finding of unconstitutionality under the Establishment Clause.<sup>186</sup>

The *Lemon* test failed to produce predictable results from the day of its inception, and incoherence mixed with confusion has resulted ever since.<sup>187</sup> On the same day of the *Lemon* decision, the Court divided over application of the third prong of the *Lemon* test<sup>188</sup> in *Tilton v. Richardson*.<sup>189</sup> The disagreement finally resulted in a splintered opinion as mutual agreement could not be reached among any five of the nine justices.<sup>190</sup>

The subsequent confusion and inconsistent opinions<sup>191</sup> stemming from application of *Lemon* have resulted in a broad range of criticism by commentators and the Court.<sup>192</sup> Some commentators seeking strict separation lay blame

181. See *Engel v. Vitale*, 370 U.S. 421 (1962).

182. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

183. 403 U.S. 602 (1971).

184. See *id.* at 612-13.

185. See *id.* The first two prongs were taken from the Court's earlier decision in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), and the Court adopted the third prong from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

186. See *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995), *cert denied*, 116 S. Ct. 1702 (1996).

187. See *infra* note 191.

188. See *CORD*, *supra* note 128, at 199-200.

189. 403 U.S. 672 (1971).

190. See *id.*

191. Then-Justice Rehnquist best described these inconsistencies by noting:

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.

*Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).

192. See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-57 (1989) (Kennedy, J., concurring in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ Latter-day Saints v. Amos*, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring); *Jaffree*, 472 U.S. at 107-13 (Rehnquist, J.,

not on flaws within the test itself, but rather on the Supreme Court's application and recent alterations of the three prong test.<sup>193</sup> They contend that strict application of the test would result in uniform and consistent decisions by conforming to the absolute separationist interpretation set forth in *Everson*.<sup>194</sup>

Conversely, numerous justices of the Supreme Court have criticized the *Lemon* test from the point of view of accommodation.<sup>195</sup> Even the author of the majority opinion in *Lemon*, Chief Justice Burger, eventually warned against rigid application and downplayed the role of the test by calling the elements mere "signposts."<sup>196</sup> Furthermore, Chief Justice Burger, presenting a metaphor far different from that of a "high and impregnable" wall, seemed to credit the confusion to the difficulty of the issue itself by stating that the Establishment Clause provides only a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>197</sup>

Following *Lemon*, the Court has reviewed some Establishment Clause cases without direct reliance on the tripartite test, giving the appearance that *Lemon* is beginning to fall from favor.<sup>198</sup> However, when confronted with governmental display of religious symbols, the Court continues to rely on *Lemon* with some modifications.<sup>199</sup>

dissenting). *But see* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463; Joshua D. Zarrow, Comment, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477 (1986).

193. *See generally*, Gey, *supra* note 192; *see* Zarrow, *supra* note 192, at 515-16.

194. *See* Gey, *supra* note 192, at 533-34; Zarrow, *supra* note 192, at 515-16. Professor Gey consistently argues that true religious liberty can only be secured through strict and absolute separation between church and state thereby ensuring insulation of all religious viewpoints against government endorsement of any particular sect. *See* Gey, *supra* note 192, at 533-34.

195. *See* *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (criticizing difficulty of applying *Lemon*); *Jaffree*, 472 U.S. at 108-14 (Rehnquist, J., dissenting) (criticizing *Lemon*'s origins in earlier Supreme Court cases which based their conclusions upon faulty interpretation of history surrounding the Establishment Clause); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 768-69 (1976) (White, J., concurring) (criticizing inclusion of the third prong of the *Lemon* test).

196. *See Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting). Chief Justice Burger also warned against any notion that an easy formula could be produced:

The Court's extended treatment of the "test" of *Lemon* . . . suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." . . . In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.

*Id.* (citations omitted).

197. *Lemon*, 403 U.S. at 614.

198. *See* *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994); *Lee v. Weisman*, 505 U.S. 577 (1992); ; *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). *See also* *Lynch v. Donnelly*, 465 U.S. 668, 670-87 (1984) (upholding city display of a nativity scene in Christmas setting), where Chief Justice Burger again warned against reliance on *Lemon* as the sole test for Establishment Clause review and based the majority's holding on the context in which the city's nativity scene was displayed and the traditional American history of accommodating and recognizing the diverse religious backgrounds of the citizens.

199. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

#### D. Replacements for Lemon

Due to the instability and criticisms of the *Lemon* tripartite test, alterations and replacements are being implemented and introduced by some justices of the Supreme Court. The three most prominent suggestions have been Justice O'Connor's endorsement test (or "reasonable observer"), Justice Kennedy's psychological coercion test, and Justice Scalia's legal coercion test.

##### 1. The Endorsement Test — "Reasonable Observer"

Justice O'Connor first introduced her endorsement test in a concurring opinion in *Lynch v. Donnelly*.<sup>200</sup> In *Lynch*, the Court upheld the display of a publicly owned creche<sup>201</sup> as part of an overall Christmas display in a private park.<sup>202</sup> The proposed modification to the *Lemon* three-prong test attempted to clarify application of the first two prongs by defining them as subjective and objective questions.<sup>203</sup> Justice O'Connor further modified the first two prongs to focus on "endorsement or disapproval of religion" rather than focusing on "secular purpose" and "advancement or inhibition of religion."<sup>204</sup> Therefore, the "purpose" prong looks to whether the government intended to endorse or disapprove religion, and the "effect" prong inquires, regardless of the government's purpose, whether the action in fact conveys a message of governmental endorsement or disapproval.<sup>205</sup> In the end, the proposed modifications require judicial review of possible governmental entanglement with or endorsement of religion.<sup>206</sup>

Justice O'Connor defends the endorsement test by asserting that it best captures what she sees as the essential mandate of the Establishment Clause—that government shall not make "adherence to a religion relevant in any way to a person's standing in the political community."<sup>207</sup> Her reasoning then follows that governmental endorsement is the proper area of focus because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>208</sup>

In concurrence in *County of Allegheny v. ACLU*,<sup>209</sup> O'Connor stated the issue to be whether a reasonable observer would view the action or symbol as a

200. 465 U.S. 668 (1984).

201. The creche is the traditional Christmas nativity scene depicting the birth of Jesus Christ. *See id.* at 671.

202. *See id.* at 671-72.

203. *See id.* at 690 (O'Connor, J., concurring). Justice O'Connor justified use of both subjective and objective review on the grounds that some viewers would judge the government's intent based on *context* while others inevitably would judge intent based on *content*. *See id.*

204. *See id.* at 690-92.

205. *See id.* at 691-92.

206. *See id.* at 689.

207. *Id.* at 687. *See also* *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).

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

209. 492 U.S. 573 (1989).

governmental endorsement of religion, or, in other words, "as a disapproval of his or her particular religious choices."<sup>210</sup> This inquiry, however, continues the trend of a heightened sensitivity to context, particularly in the area of religious symbols.<sup>211</sup> Under the endorsement test, context helps evaluate the reasonable observer's perception of the challenged action or display, and a number of considerations are taken into account including history, "the longstanding existence of practices," and the particular physical setting.<sup>212</sup> Therefore, in *Allegheny*, while ruling a creche standing alone in the county courthouse violated the Establishment Clause, Justice O'Connor considered the display of a menorah<sup>213</sup> in front of a government building non-violative in light of its context (display during the holiday season next to a Christmas tree).<sup>214</sup> This context negated any message of endorsement which could be perceived from the religious nature of the symbol.<sup>215</sup>

Although Justice O'Connor in her concurrence in *Lynch* noted that the objective meaning in the community would guide review,<sup>216</sup> at least one commentator has asserted that the decisions of lower courts will vary according to the identity given to the "objective observer" by each individual judge.<sup>217</sup> If the court desires a finding of constitutionality, the court may use an informed observer who is familiar with the community's history, politics, and setting.<sup>218</sup> However, if the court desires a finding of unconstitutionality, it may utilize a simple passerby who "hypothetically has just stepped off the bus when he or she observes the display."<sup>219</sup>

In the most recent case concerning display of religious symbols, *Capitol Square Review and Advisory Board v. Pinette*,<sup>220</sup> Justice O'Connor took necessary steps to define the "reasonable observer" in order to avoid a divergence of identities given by lower courts. Although the controversy involved the display of a cross by the Ku Klux Klan in the Capitol Square, an area designated as a public forum, the Court dealt with the case on Establishment Clause grounds rather than freedom of speech grounds.<sup>221</sup> Again in concurrence, Justice O'Connor specified that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer"<sup>222</sup> and not that of a "casual passerby."<sup>223</sup> The "reasonable observer" of the endorsement test is analogous

210. *Id.* at 631 (O'Connor, J., concurring).

211. *See id.* at 629. *See also Lynch*, 465 U.S. at 679-80; *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

212. *Allegheny*, 492 U.S. at 630-31, 635 (O'Connor, J., concurring).

213. A candelabrum with a central candlestick and eight branches used as part of a lamp lighting ritual celebrating the Jewish holiday Chanukah or Hanukkah. *See id.* at 583-85.

214. *See id.* at 637.

215. *See id.* at 635-36.

216. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

217. *See Gey, supra note 192*, at 479-80.

218. *See id.* at 479.

219. *Id.*

220. 115 S. Ct. 2440 (1995).

221. The Court limited the ruling as the record and opinions of the lower courts only addressed the Establishment Clause issue. *See id.* at 2444-45.

222. *Id.* at 2452 (O'Connor, J., concurring) (emphasis added).

223. *Id.* at 2455. The dissent postulated a naive or "casual passerby" by asserting that a violation of the

to an individual representing the "personification of the community ideal of reasonable behavior, determined by the [collective] social judgment"<sup>224</sup> in tort law. By defining the hypothetical observer as "informed," Justice O'Connor recognized that there will always be someone who might perceive some government action as endorsement of religion, however, "[a] State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable."<sup>225</sup>

## 2. The Coercion Tests

The coercion tests of Justices Kennedy and Scalia both originated from Justice Kennedy's dissenting opinion in *Allegheny*.<sup>226</sup> Differing interpretations of coercion subsequently surfaced, however, in *Lee v. Weisman*,<sup>227</sup> a case reviewing nonsectarian prayer at public school graduations. Justice Kennedy, in the majority opinion, chartered a course for a psychological coercion test by "protecting freedom of conscience from subtle coercive pressure."<sup>228</sup> According to Justice Kennedy, governmental control over the graduation ceremony resulted in subtle coercive pressure over students in the form of public pressure and peer pressure to remain silent during the prayers.<sup>229</sup> While the psychological coercion test prohibits direct and indirect coercion, Justice Scalia pronounced his preference for a legal coercion test which prohibits only direct coercion, or that which is "backed by threat of penalty."<sup>230</sup> Whether or not the psychological and legal coercion tests would result in differing outcomes concerning religious displays or symbols is unclear, as the *Allegheny* dissent represents the only Supreme Court opinion discussing a coercion test in such an area.

Despite the differences of opinion between the two justices, both perceive *Everson*, *Lemon*, and strict separation as being hostile toward religion, and both rely upon coercion as the proper test based upon original intent along with historical or traditional governmental acknowledgment of the role of religion throughout the history of American life.<sup>231</sup> In the *Allegheny* dissent, Justice Kennedy specifically referred to the words of James Madison in which Madison expressed his understanding of the Religion Clauses to prohibit Congress from

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Establishment Clause occurs if "some reasonable observers would attribute a religious message to the State." *Id.* at 2469-70 (Stevens, J., dissenting).

224. *Id.* at 2455 (O'Connor, J., concurring) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)).

225. *Id.*

226. See *Allegheny*, 492 U.S. at 655-79 (Kennedy, J., concurring in part and dissenting in part). See also *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128-40 (7th Cir. 1987) (Easterbrook, J., dissenting); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) [hereinafter McConnell, *Coercion*]; Michael W. McConnell, *Religious Freedom at a Crossroad*, 59 U. CHI. L. REV. 115, 157-65 (1992) [hereinafter McConnell, *Religious Freedom*].

227. 505 U.S. 577 (1992).

228. *Id.* at 592.

229. See *id.* at 593.

230. *Id.* at 640-42 (Scalia, J., dissenting).

231. See *Allegheny*, 492 U.S. at 658-60, 669-74 (Kennedy, J., concurring in part and dissenting in part).

enforcing legal observation of religion by law or compelling worship contrary to anyone's beliefs.<sup>232</sup> Similar use of words associated with "compulsion" or "enforcement" are likewise found in documents, although typically relied on for support of a strict separationist stance, such as Madison's *Memorial and Remonstrance* and Thomas Jefferson's Virginia Act for Establishing Religious Freedom.<sup>233</sup> Relying on history and original intent, Justice Kennedy asserted that the "great object" of the Religion Clauses is "[t]he freedom to worship as one pleases without government interference or oppression."<sup>234</sup> Therefore, the goal of the coercion tests is to attain this "great object" by "[b]arring all attempts to aid religion through government coercion."<sup>235</sup>

#### IV. ANALYSIS

##### A. Establishment Clause

When considering the development of Establishment Clause jurisprudence, one is struck by the fact that the first thorough interpretation of the Establishment Clause by the Supreme Court was void of any reference to the debates surrounding passage of the First Amendment. No serious analysis of the debates or actions of the Framers was undertaken by any justice of the Court until 1985,<sup>236</sup> a full thirty-eight years after the Court's *Everson* decision.<sup>237</sup> Few question the leading role Madison likely played in composing the amendments constituting the Bill of Rights, however, despite claiming accordance with original intent, the *Everson* Court relied on contentions and arguments by Madison which were made outside the arena of Congress and then completely ignored Madison's interpretation of the Religious Clauses which he expressed on the House floor.<sup>238</sup> Jefferson, whom the Court relied on in creating the metaphor of the "wall" separating church and state, was not a member of the First Congress and not in the country at the time of drafting, debating, and adopting the First Amendment.<sup>239</sup> "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."<sup>240</sup>

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232. See *id.* at 660 (quoting ANNALS OF CONGRESS, *supra* note 143, at 730).

233. Madison used statements such as "sanctions of a law," "not by force or violence," "force him to conform," "compulsive support," and "attempts to enforce by legal sanctions." See McConnell, *Coercion*, *supra* note 226, at 937-38. Similarly, the Virginia Act, written by Jefferson, used such terms as "compelled," "enforced," "restrained," and "burthened". See *id.* at 938. See also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Establishment Clause paraphrased as "forestall[ing] compulsion by law of the acceptance of any creed or the practice of any form of worship.").

234. *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part).

235. *Id.*

236. See McConnell, *Coercion*, *supra* note 226, at 937.

237. See *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

238. See CORD, *supra* note 128, at 121-22. Regardless of Madison's prior and subsequent expressions which may reveal a separationist stance, the greatest weight should be given to the statements and opinions which were actually made and presented on the House floor for debate. See McConnell, *Coercion*, *supra* note 226, at 937.

239. See *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

240. *Id.*

The debates over the Religious Clauses provide merely a small glimpse into the intent of the Framers. When considering the numerous acts of accommodation and acknowledgment following or surrounding passage of the First Amendment, however, such analysis indicates a more narrow interpretation. These acts of accommodation, especially those by Madison and Jefferson, cannot be dismissed as mere "trivial breaches" or temporary "backsliding."<sup>241</sup> Consider, for example, that Jefferson's treaty with the Kaskaskia Indians, providing funds for support of a Catholic church and priest, was signed by Jefferson in 1803—only one year after having written his infamous letter stating that the Religion Clauses erected a wall separating church and state.<sup>242</sup>

The fundamental problem with *Everson* and *Lemon* is their mutually errant interpretation of history. Similarly, the endorsement test completely lacks a historical foundation in history.<sup>243</sup> If truthfully applied, all three standards would always result in a finding that traditional acts of governmental accommodation or acknowledgment of religion are unconstitutional. Surely atheists generally perceive a message of endorsement or advancement of religion when viewing traditional acts of acknowledgment such as Thanksgiving Day Proclamations, appeals to God in presidential speeches, legislative chaplains, and the national motto.<sup>244</sup> They thereby must feel less than full members of the political community. Likewise, such governmental acts sharply conflict with the strict separationist theme set forth in *Everson* and subsequently followed by the Supreme Court. While Justice O'Connor's proposed modification of the "reasonable observer" in *Capitol Square* improves the endorsement test by narrowing the scope, the coercion tests asserted by Justices Kennedy and Scalia are the only tests which coincide with the history and tradition of accommodation and acknowledgment of the prominent role of religion among the American people.

#### B. Robinson v. City of Edmond

At the time of appeal in *Robinson*, Establishment Clause jurisprudence concerning religious displays or symbols was principally governed by *Lynch* and *Allegheny*.<sup>245</sup> In *Lynch*, the Court, hesitantly relying on *Lemon*, found that display of a city owned creche did not violate the Establishment Clause when

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241. *Lee v. Weisman*, 505 U.S. 577, 616, 625 (1992) (Souter, J., concurring). Justice Souter attempts to explain away these "breaches" by asserting that they "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle." *Id.* at 616 n.3. He then forgives Madison for his "backsliding" over Thanksgiving Day Proclamations and acquiescence over legislative and military chaplains by relying on Madison's "Detached Memoranda," a document written by Madison following his retirement from public life. *See id.* at 624-25. Justice Souter does at least confront the transitions in the wording of the Religious Clauses through congressional consideration, however, he then relies heavily on Madison's *Memorial and Remonstrance* and "Detached Memoranda," documents written before and after ratification respectively. *See generally id.* at 620-26. Notably missing from Justice Souter's opinion are Madison's words during debate on the House floor. *See generally id.*

242. *See* *CORD*, *supra* note 128, at 114-16.

243. *See* *McConnell, Religious Freedom*, *supra* note 226, at 154-55.

244. 36 U.S.C. §186 (1988) ("In God we trust.").

245. *See* *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert denied*, 116 S. Ct. 1702 (1996).



perceived in the context of the holiday season and upon consideration of historical acknowledgment of the role of religion in America.<sup>246</sup> Similarly, in *Allegheny*, the Court upheld the display of a menorah on public property based upon the context of the holiday season and the overall display of which included secular symbols of the season.<sup>247</sup> Therefore, *stare decisis* requires that review take into consideration the history, context, and overall setting of the display.

In holding the Edmond city seal unconstitutional, the Tenth Circuit ignored the mandate of *Lynch* and *Allegheny*. First, despite Edmond's history of being the location of the first church established in the Oklahoma Territory, the court held that the history of a community may not be honored by display of a sectarian symbol.<sup>248</sup> However, in both *Lynch* and *Allegheny*, the sectarian nature of the symbols was not determinative to a finding of unconstitutionality, as both displays were upheld. Similarly perplexing is the appellate court's refusal of Edmond's history argument on grounds that such an argument "could always 'trump' the Establishment Clause, because of the undeniable significance of religion and religious symbols in the history of many of our communities."<sup>249</sup> This holding contradicts the Court's continued reliance on history and the role played by religion to justify allowance of governmental accommodation and acknowledgment of religion.<sup>250</sup> Essentially, when concerned with governmental seals, the Tenth Circuit allows local governments to honor their history, but the role of religion is required to be ignored.

Second, although acknowledging the relevancy of the context and setting of the seal, the court refused to consider "the secular or non-secular nature of other elements of the seal."<sup>251</sup> In rejecting the City's attempt to distinguish the Edmond seal from the seal in *Friedman*,<sup>252</sup> regardless of obvious differences between the two seals, the court declined to rule that some religious images are permitted while other religious images are not, simply based on the nature of the other elements included in the display.<sup>253</sup> However, this has not been the case for the Supreme Court as revealed by comparing the holdings of *Lynch* and *Allegheny* where one display of a creche was upheld while the other was found violative of the Establishment Clause.<sup>254</sup> In *Allegheny*, the Court cited inclusion of secular symbols as the primary distinguishing factor between the

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246. See generally *Lynch v. Donnelly*, 465 U.S. 668, 670-87 (1984).

247. See *County of Allegheny v. ACLU*, 492 U.S. 573, 629-36 (1989) (O'Connor, J., concurring).

248. See *Robinson*, 68 F.3d at 1232.

249. *Id.*

250. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 632-36 (1992) (Scalia, J., dissenting); *Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 669-74 (Kennedy, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 100-04 (1985) (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 673-78; *Marsh v. Chambers*, 463 U.S. 783, 784-96 (1983).

251. *Robinson*, 68 F.3d at 1233.

252. The relevant seal displayed a Latin cross emanating rays of light as the main symbol. See *supra* text accompanying notes 84-92.

253. See *Robinson*, 68 F.3d at 1233.

254. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (creche violative of Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding display of creche).

displays relevant to the two cases.<sup>255</sup> By refusing to take into account the other secular symbols included in the Edmond seal, the Tenth Circuit focused its attention primarily on the depiction of the cross. As noted by Chief Justice Burger, “[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”<sup>256</sup>

Finally, the *Robinson* court stated application of an objective standard when perceiving the seal through the eyes of an average observer, but then relied on testimony of one witness to determine the message conveyed by the cross.<sup>257</sup> The court quoted testimony given in *Friedman* where “[a] rabbi testified that the seal suggested to him that there was an ‘officialness’ about Christianity.”<sup>258</sup> Rather than reflecting the standard set forth by the Supreme Court which looks to the “‘objective meaning . . . in the community,’”<sup>259</sup> such reliance on testimony of one individual more closely resembles a subjective standard of review contrary to established precedent.

This errant application of the “reasonable observer” could have been avoided by applying O’Connor’s clarifications given in *Capitol Square*.<sup>260</sup> Unfortunately, *Robinson* and *Capitol Square* were decided around the same time period and the “reasonable, informed observer” was not utilized.<sup>261</sup> The clarifications given by Justice O’Connor potentially could have resulted in a different outcome for the Edmond seal because the informed hypothetical observer “must be deemed aware of the history and context of the community and forum in which the religious display appears.”<sup>262</sup> Furthermore, the subjective views of one, or even a few, are not determinative, as “the endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of a faith to which they do not subscribe.”<sup>263</sup>

Immediately following the adoption of the Declaration of Independence a committee was formed, consisting of Benjamin Franklin, John Adams, and Thomas Jefferson, to select a seal for the newly formed country.<sup>264</sup> One suggestion, although obviously not adopted, included Jefferson’s proposal for half of the seal to depict “the children of Israel in the wilderness led by a cloud by day, and a pillar by night.”<sup>265</sup> By depicting the children of Israel, Jefferson intended to memorialize a “favorite contention of the settlers . . . that they were

255. See *Allegheny*, 492 U.S. at 596-98.

256. *Lynch*, 465 U.S. at 680.

257. See *Robinson*, 68 F.3d at 1230.

258. *Id.* (quoting *Friedman v. Board of County Comm’rs of Bernalillo County*, 781 F.2d 777, 781 (10th Cir. 1985)).

259. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

260. See *supra* text accompanying notes 220-25.

261. *Robinson* was decided less than four months after *Capitol Square*.

262. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2455 (1995) (O’Connor, J., concurring).

263. *Id.* Four months following *Robinson*, the Tenth Circuit followed the *Capitol Square* holding in *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), *cert denied*, 116 S. Ct. 1830 (1996), where the court upheld the national motto, “In God we trust,” as not violating the Establishment Clause.

264. See GILBERT CHINARD, *THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM* 86 (2d ed. 1975).

265. *Id.* The other half was to depict “Hengist and Horsa, the Saxon chiefs, from whom we claim the honor of being descended, and whose political principles and form of government we have assumed.” *Id.*

a chosen people."<sup>266</sup> Similar to Jefferson's proposal, the City of Edmond chose to memorialize its unique history, which also included a prominent role played by religion, yet Jefferson's proposal to depict the children of Israel would certainly find the same plight as that which befell Edmond's seal if it were subjected to the Tenth Circuit's interpretation of the Establishment Clause.

### C. Ramifications

The primary legal concern for local communities facing the prospect of potential constitutional challenges is costs. As for Edmond, altering the seal to comply with the *Robinson* ruling has resulted in a cost to the City of more than \$40,000.<sup>267</sup> Although plaintiffs' attorney sought over \$192,000 in attorney fees, the district court eventually required the City of Edmond to pay a total fee of \$105,721.<sup>268</sup>

Numerous other city seals in Oklahoma likewise portray religious symbols which could become subject to judicial review,<sup>269</sup> and at least one city already faces a potential challenge.<sup>270</sup> The *Robinson* decision does not bode well for the eventual fate of official seals depicting religious symbols because, unlike the Fifth Circuit decision in *Murray*,<sup>271</sup> the Tenth Circuit turned a blind eye to arguments of history, context, and setting. However, the introduction of the "reasonable, informed observer" does suggest a narrower interpretation of the Establishment Clause than that applied in *Robinson*.

## V. CONCLUSION

The inconsistencies and uncertainties in Establishment Clause jurisprudence originated with the *Everson* decision. By ignoring the debates surrounding passage of the First Amendment the Supreme Court announced a theme of absolute separation between church and state which fails to comport with traditional governmental accommodation and acknowledgment of the role of religion in American history. *Everson* also established the unfortunate metaphor of an "impregnable wall" which has only served to mislead and confuse the courts and thereby the citizenry.

Subsequently, the *Lemon* tripartite test, with its origins in the *Everson* decision, thoroughly confuses Establishment Clause jurisprudence. The Tenth Circuit's holding in *Robinson* presents a perfect example of the need for clarifi-

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266. *Id.*

267. See Susan Parrott, *Cross Battle Costs Edmond \$105,721 Fee*, THE DAILY OKLAHOMAN, Oct. 17, 1996, at 1.

268. *See id.*

269. The seals of Oklahoma City, The Village, Del City, Luther, Bethany, and Shawnee all contain some form of religious symbol. See *Edmond Cross Ruling*, *supra* note 29, at 1.

270. A retired Methodist minister has requested a redesign of the city seal of Bethany, Oklahoma, because reference to "Southern Nazarene University," a local university, is included. See Christy Watson, *Religious Link On Bethany Seal Prompts Debate*, THE DAILY OKLAHOMAN, Nov. 8, 1996, at 1.

271. See *supra* text accompanying notes 67-74.

cation and adoption of new criteria with firmer foundation in history and original intent. The endorsement test would be an improvement, but it likewise suffers from lack of historical support. Meanwhile, the coercion tests offer grounding in historical fact and a far clearer guideline for lower courts, the citizenry, and governmental entities. Regardless of which test finds greater support among the justices, the Supreme Court would make great strides toward clarification of Establishment Clause jurisprudence by distancing itself from *Everson* and expressly rejecting the *Lemon* tripartite test. However, the Court appears content to simply allow *Lemon* to slowly fade from usage. Until all vestiges of *Lemon* disappear, confusion will reign. Communities such as Edmond, Oklahoma will be forced to ignore the role of religion when commemorating their history.

*Kyle D. Freeman*

APPENDIX

