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Constitutional Law - First Amendment - Establishment Clause - Symbolic Expression

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CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE—SYMBOLIC EXPRESSION—The United States Supreme Court held that the erection and display of a cross by the Ku Klux Klan on state-owned land surrounding a state capital does not violate the Establishment Clause of the United States Constitution.


Capitol Square is a state-owned plaza that surrounds the seat of government in Columbus, Ohio. In 1993, the Ku Klux Klan (the “KKK”) submitted an application to the Capitol Square Review and Advisory Board (the “Board”) requesting issuance of a permit allowing the erection and display of an unattended cross on the square. Several groups, including homosexual rights organizations and the United Way, had previously been given permission by the Board to hold rallies on Capitol Square. Additionally, the Board had also permitted unattended displays on the square, including a state-sponsored Christmas tree and a privately-sponsored menorah during Chanukah. The Board denied the KKK’s application to erect and display the cross and informed the KKK that the decision was based on a good faith attempt to comply with the United States and Ohio Constitutions.

The KKK brought suit in the United States District Court for the Southern District of Ohio seeking an injunction mandating that the Board issue the permit as requested. The Board

2. Id. at 2445. The Capitol Square Review and Advisory Board was given the responsibility of regulating public access to the square pursuant to an Ohio statute. Id. at 2444. See OHIO REV. CODE ANN. § 105.41 (Anderson 1994) (granting the regulatory responsibility).
3. Capitol Square, 115 S. Ct. at 2444. The Board’s purpose is “to allow a broad range of speakers and other gatherings of people to conduct events on Capitol Square.” Id.
4. Id.
5. Id. at 2445.
6. Id. Generally, the term “injunction” refers to an order by a court either, (1) prohibiting someone from doing an act, or (2) commanding someone to undo some wrong. BLACK’S LAW DICTIONARY 784 (6th ed. 1990). The type of injunction sought
defended its refusal to issue the permit on the ground that the erection and display of the unattended cross on Capitol Square would violate the Establishment Clause of the First Amendment. The district court rejected the Board's argument, granted the injunction, and the permit was issued. The Board petitioned the United States Court of Appeals for the Sixth Circuit for an emergency stay from the order of the district court which was denied, and the KKK cross was erected on Capitol Square for the full length of time specified by the permit.

On appeal on the merits, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. The Sixth Circuit acknowledged the Supreme Court's decisions in Lemon v. Kurtzman, Lynch v. Donnelly, and Allegheny County v. ACLU, as controlling with respect to government-sponsored displays of religious symbols. However, the Sixth Circuit distinguished the KKK display from government-sponsored displays. Thus, the Sixth Circuit relied

here was a "mandatory injunction," meaning an injunction which prohibits refusal to "do or permit some act to which the plaintiff has a legal right." Id.

7. Capitol Square, 115 S. Ct. at 2445. The First Amendment's Establishment Clause provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

8. Capitol Square, 115 S. Ct. at 2445. The district court concluded that the square is a "traditional public forum open to all without any policy against free-standing displays." Id. Additionally, the district court characterized the KKK cross as the type of private expression protected by the First Amendment, and concluded that the Board had failed to show that the cross' existence on the square could reasonably be considered a state endorsement. Id.

9. A stay is used to stop the execution of a judgment. BLACK'S LAW DICTIONARY 1413 (6th ed. 1990).

10. Capitol Square, 115 S. Ct. at 2445. See Capitol Square Review & Advisory Bd. v. Pinette, 114 S. Ct. 626 (denying the stay). The permit allowed the cross to be placed on Capitol Square from December 17, 1993 to December 24, 1993. Capitol Square, 115 S. Ct. at 2445. Justice Stevens, as circuit justice for the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 42 (1994), decided the Board's petition. See Capitol Square, 114 S. Ct. at 626. The Board's request was denied by Justice Stevens because: (1) it was to be taken down the following day, and, as such, whatever harm resulted from its display had already occurred, and (2) Justice Stevens concluded that the issue would not become moot owing to its capability of repetition, thus allowing the Court time to render a full opinion at a later date. See id. (denying the Board's petition for an emergency stay of the district court's order).


15. Capitol Square, 30 F.3d at 678-79.

16. Id. at 679. The Sixth Circuit found that the KKK cross was a private display erected upon a "traditional public forum." Id. The Sixth Circuit distinguished
heavily upon one of its prior decisions rather than Supreme Court decisions in deciding the case. The Sixth Circuit held that erection of the KKK cross on Capitol Square did not violate the Establishment Clause of the United States Constitution.

The United States Supreme Court granted the Board's petition for certiorari in order to settle the dispute among the circuit courts regarding the issue of whether privately sponsored displays of religious symbols in public forums violate the Establishment Clause of the United States Constitution. The Court affirmed the judgment of the Court of Appeals for the Sixth Circuit. The Court began its analysis by indicating that it would address only the issue pertaining to the Establishment Clause. The broad issue addressed by the Supreme Court was whether a state may implement a religiously neutral policy, but yet violate the Establishment Clause when allowing a private actor to display “an unattended religious symbol” in a public forum.

the KKK cross from the creche at issue in Allegheny County by noting that the Allegheny County creche was not displayed in a “traditional public forum.” Id. See Allegheny County v. ACLU, 492 U.S. 573 (1989) (holding that a privately sponsored creche displayed in the City-County building in Pittsburgh, Pennsylvania violated the Establishment Clause).

17. See Capitol Square, 30 F.3d at 679 (relying on the Sixth Circuit decision in Americans United for Separation of Church & State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (en banc) (holding that a private display of a menorah in a public forum did not violate the Establishment Clause)).

18. Id. at 676.

19. A writ of certiorari, as used here, is a device enabling the Supreme Court to employ its discretion in selecting the cases that it will hear. BLACK'S LAW DICTIONARY 228 (6th ed. 1990).

20. Capitol Square, 115 S. Ct. at 2445. The Court noted that the Sixth Circuit's decision was in agreement with the Eleventh Circuit's decision in Chabad-Lubavitch v. Miller, 5 F.3d 1383 (11th Cir. 1993) (holding that the State of Georgia did not violate the Establishment Clause by permitting a menorah to be displayed in the rotunda of the state capitol under a content-neutral policy), but disagreed with the Second and Fourth Circuits. Id. See generally Chabad-Lubavitch v. Burlington, 936 F.2d 109 (2d Cir. 1991) (holding that issuance of an injunction denying an application to place a menorah in a city park is proper content-based regulation), cert. denied, 112 S. Ct. 3026 (1992); Smith v. County of Albemarle, 895 F.2d 953 (4th Cir.) (invalidating placement of a nativity scene on the front lawn of a county office building, thus affirming content-based regulation on speech), cert. denied, 111 S. Ct. 74 (1990).


22. Id. at 2444. Justice Scalia wrote the plurality opinion in four parts. Id. With respect to Parts I, II, and III, Justice Scalia's opinion was that of the Court. Id. With respect to Part IV, however, Justice Scalia was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. Id. at 2444, 2447.

23. Id. at 2445. The KKK asserted in its brief and oral argument that the Board's decision actually rested upon its disagreement with the KKK's political views. Id.

24. Id. at 2444.
The Court recognized that in its prior decisions a state's interest in complying with the Establishment Clause was held sufficient to support "content based regulation" in certain circumstances. Thus, the Supreme Court specifically addressed the issue of whether the KKK's expression would impede Ohio's interest in complying with the Establishment Clause sufficiently to justify the Board's "content-based regulation," denying the KKK access to Capitol Square. In its analysis, the plurality addressed the "endorsement test," relied on by the Board, as it was applied in Allegheny County and Lynch.

The plurality distinguished Allegheny County and Lynch factually from Capitol Square and placed particular emphasis on the location of the displays in Allegheny County and Lynch, and the location of the cross in the instant case. More importantly, however, the plurality clarified its prior tests for the endorsement of religion, and emphasized that the subject of those tests was either governmental expression itself or governmental action that was allegedly discriminatory in favor of private religious expression. The plurality distinguished these considerations from the instant case because the KKK's cross was privately sponsored and was located in a forum traditionally open to the public for such purposes. Thus, the plurality refused to apply the "endorsement test" to the instant case, for to do so, the plurality reasoned, would be to create, in effect, a new "transferred endorsement test." Such a test, the plurality

25. Id. at 2446. "Content-based regulation" means, as in this case, that a state may deny private individuals access to public forums if such a restriction is necessary to serve a "compelling state interest" and is manifest through "narrowly drawn" regulation. Id.

26. Capitol Square, 115 S. Ct. at 2446. The Court cited Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2143-49 (1993) (holding that a public school district's interest in complying with the Establishment Clause is not sufficient grounds upon which to deny individuals the right to use school property for private religious purposes during off-hours, where the same premises had been used for a variety of civic, social and recreational purposes). Id. Also, the Court cited Widmar v. Vincent, 454 U.S. 263, 269, 274 (1981) (holding that a public university cannot exclude religious groups from facilities available to other student groups under an open forum policy). Id.

27. Id. at 2446-47.


29. Capitol Square, 115 S. Ct. at 2448.

30. Id. at 2447.

31. Id.

32. Id.

33. Id. at 2447-48. Justice Scalia, writing for the plurality, stated:
concluded, would run contrary to the long-established principle that neutral governmental action, which benefits religion, is not in violation of the Establishment Clause. 34

Moreover, the plurality noted that there was no need to apply such a test in the instant case, because the private display was located on a public forum that had been used in a similar manner for several years. 35 The plurality emphasized that such a conclusion was implicit in previous Supreme Court decisions. 36 Therefore, the Court held that the display of the KKK cross on Capitol Square, a traditional public forum, did not violate the Establishment Clause. 37 Moreover, the Court reasoned that sectarian displays in an area commonly accepted as a forum for public expression do not violate the Establishment Clause. 38

In a concurring opinion, Justice Thomas supported the Court's decision. 39 However, Justice Thomas emphasized that the KKK's display of the cross was intended to convey more than a religious message, it was also intended to convey a political message. 40

Justice O'Connor, joined by Justices Breyer and Souter, objected to the plurality's reasoning, although all three Justices ultimately concurred in the judgment of the Court. 41 Justice O'Connor concluded that the plurality created an unnecessary

And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion. . . . The test petitioners propose, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.

Id.

34. Capitol Square, 115 S. Ct. at 2447.
35. Id. at 2448.
36. Id. See supra note 26 for a discussion of Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) and Widmar v. Vincent, 454 U.S. 263 (1981). The plurality conceded that it could envision circumstances in which a government may manipulate its control of a public forum in favor of a certain religion. Capitol Square, 115 S. Ct. at 2449. However, the plurality stressed that such circumstances did not exist in the instant case. Id.
37. Capitol Square, 115 S. Ct. at 2450. The Court affirmed the Sixth Circuit's judgment granting the injunction that forced the Board to allow the KKK's cross to be erected, placed, and maintained on Capitol Square. Id.
38. Id. Writing for the plurality, Justice Scalia stated: "Religious expression cannot violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." Id.
39. Id. at 2450 (Thomas, J., concurring).
40. Id. at 2451. Justice Thomas stated: "The Klan had a primarily nonreligious purpose in erecting the cross." Id.
41. Id. (O'Connor, J., concurring).
exception to the "endorsement test." Moreover, Justice O'Connor opined that the "endorsement test" must necessarily be applied in situations such as the instant case, because the test focuses on the "reasonable, informed observer's" perception of such displays. Thus, Justice O'Connor reasoned, the "endorsement test" protects citizens from those assertions by a government that manifest an active violation of the Establishment Clause. Moreover, Justice O'Connor reasoned that the "endorsement test" also protects citizens from equally damaging inactive assertions that provoke a "reasonably informed observer" to conclude that the government favors or endorses a particular religion. Justice O'Connor emphasized that many lower courts have applied the "endorsement test" in similar situations and have reached informed decisions with relative ease. Therefore, Justice O'Connor asserted that when a reasonable observer views a display as a governmental endorsement of religion, courts have a duty to invalidate such a practice in light of the Establishment Clause. Applying this approach to the instant case, Justice O'Connor concluded that the KKK's display did not violate the Establishment Clause.

Justice Souter strongly suggested, however, that an adequate "disclaimer" attached to such a display should become common practice in the future.

Justice Souter joined Justice O'Connor's concurring opinion and filed a separate concurrence precisely because of the possibility of affixing a "disclaimer" to private, unattended displays. Justice Souter's chief contention, like that of Justice O'Connor, was that the "endorsement test" must be applied to

42. Capitol Square, 115 S. Ct. at 2451.
43. Id. Justice O'Connor likened the "reasonable, informed observer" to tort law's "reasonable person." Id. at 2455.
44. Id. at 2451-52.
45. Id.
46. Id. Justice O'Connor expressed the view that there are situations in which a message of endorsement could be sent without direct governmental action. Id. at 2452.
47. Capitol Square, 115 S. Ct. at 2453. Justice O'Connor asserted her disagreement with the plurality's opinion that applying the endorsement test in this and similar situations would needlessly increase the burden on the judiciary. Id.
48. Id. at 2454. Justice O'Connor rejected the plurality's notion that cases such as the instant case can be decided with a "per se" rule. Id. Justice O'Connor stated that each situation must be considered in light of its unique circumstances. Id. Interestingly, an approach such as the approach proposed by Justice O'Connor was precisely the type of approach that the plurality sought to avoid. Id. at 2449.
49. Id. at 2457.
50. Id. at 2453.
51. Id. at 2457 (Souter, J., concurring).
the facts of *Capitol Square*. In Justice Souter's opinion, however, the test must be applied from the perspective of an "intelligent observer." Justice Souter paid particular attention to the *Allegheny County* decision. Justice Souter contended that the "endorsement test" established in *Allegheny County* must not be limited to circumstances in which a government has taken some action of its own. Moreover, in the analysis of the Court's prior and subsequent holdings on this issue, Justice Souter emphasized that employment of the suggested test was "extant," either implicitly or explicitly, in each case. Thus, Justice Souter argued that the plurality's proposed "per se" rule leaves open the possibility for unconstitutional religious expression by a government vis-à-vis private displays on public property.

In a dissenting opinion, Justice Stevens reasoned that the Court should begin its analysis by presuming that the installation of unattended religious symbols on public property is strongly disfavored. Working from this presumption, Justice Stevens' consideration of the facts in *Capitol Square* led him to conclude that the display of the KKK cross was in violation of the Establishment Clause of the First Amendment. Justice Stevens rejected the various tests espoused by the plurality and found that a strict constitutional interpretation affords governments considerable latitude to deny private individuals and/or organizations access to public lands for religious purposes.

Justice Ginsburg also authored a dissenting opinion in which

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52. *Capitol Square*, 115 S. Ct. at 2458.
53. Id.
54. Id.
55. Id.
56. Id. at 2458-60.
57. *Capitol Square*, 115 S. Ct. at 2460. Justice Souter referred to the plurality's assertion that there can be no Establishment Clause violation when a religious expression is: (1) purely private, and (2) occurs in an open, public forum. Id. at 2450.
58. Id. at 2461. Justice Souter contended that governments may, under the rule adopted by the plurality, manipulate public forums in favor of certain religious displays and speakers. Id. Also, Justice Souter concluded that adequate disclaimers should be required in the future in order to avoid the suggestion of governmental endorsement. Id.
59. Id. at 2464 (Stevens, J., dissenting).
60. Id. at 2465-73. Facts of particular import to Justice Stevens included: (1) the cross was unattended and unadorned with a visible disclaimer; (2) the cross was in extreme close proximity to the seat of government; and (3) the cross was clearly on government property. Id.
61. Id. at 2465-69.
she considered the facts of the case in light of the presumption that the Establishment Clause seeks to "uncouple" government from religion. From this position, Justice Ginsburg concluded that the KKK's display on Capitol Square violated the goal of the Establishment Clause and, hence, was unconstitutional.

An analysis of the Supreme Court's Establishment Clause jurisprudence reveals much about the Court's decision in *Capitol Square*. In *Everson v. Board of Education*, the Supreme Court considered whether a state statute that reimburses parents of parochial school children for bus transportation violates the Establishment Clause of the First Amendment. The Court's analysis began with a consideration of the historical underpinnings of the Establishment Clause. The Court acknowledged that the Establishment Clause requires states to act neutrally with respect to religion and religious practices. The Court also acknowledged, however, that the Establishment Clause does not require states to act in a hostile manner toward religion. The Court next addressed the state statute at issue in light of the Establishment Clause. The Court concluded that state legislation must not favor any religion and, thus, oppress the free exercise of religion. The Court held that all students are entitled to safe transportation to and from school and thus, the statute in question did not violate the Establishment Clause. Justice Black, writing for the majority, implied, however, that the state statute at issue in *Everson* reached the brink of permissible legislation under the Establishment Clause.

63. Id.
64. 330 U.S. 1 (1947).
65. *Everson*, 330 U.S. at 5. The Court acknowledged its previous decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that the Establishment Clause of the First Amendment is binding on the states pursuant to the Due Process Clause of the Fourteenth Amendment). Id. at 15.
66. Id. at 10-13. The Court noted that strife existed between those American colonists who were members of religious minorities in England and those who were members of the English religious majority. Id. The Court reasoned that the First Amendment was adopted in order to prevent those members of the English majority living in the colonies from displaying their hostilities toward members of other religions. Id.
67. Id. at 18.
68. Id.
69. Id. at 16.
71. Id. at 16-18. The Court stated that public welfare legislation benefiting religion in other forms, including police and fire protection and road construction and maintenance are also constitutionally valid. Id.
72. Id. at 16.
In *Engle v. Vitale*, the Court considered whether a daily classroom prayer recited in New York public schools violated the Establishment Clause. The Court first determined that the twenty-two-word prayer used in the schools constituted a religious activity. In discussing the Establishment Clause, the Court concluded that direct governmental coercion in favor of a particular religion is not necessary to violate religious freedom. Rather, the Court found that any union of government and religion may serve to foster acrimony between a portion of the citizenry and the government. Thus, the Court found that indirect governmental action may violate the Establishment Clause. The Court held, therefore, that recital of a daily prayer in New York public schools is an improper practice in violation of the Establishment Clause.

The following year, the Court was faced with a remarkably similar issue in *Abington School District v. Schempp*. In *Schempp*, the Court considered whether two state statutes that provided for the practice of opening each public school day with a reading from the Bible violated the Establishment Clause. Both statutes provided for opening exercises each school morning during which students wishing to participate read passages from various scriptures over the schools’ public address systems. The Court began its analysis with an extensive review of Establishment Clause cases, culminating in the Court’s *Engle* decision a year prior. Applying the law as outlined in the previous Establishment Clause decisions to the case before it, the Court determined that the readings constituted a governmentally mandated religious exercise. Thus, the Court

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73. 370 U.S. 421 (1962).
75. *Id.* at 424.
76. *Id.* at 430-31.
77. *Id.* The Court stated: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Id.* at 431.
78. *Id.* at 431.
81. *Schempp*, 374 U.S. at 205. The Court’s opinion addressed two companion cases, one from Pennsylvania and one from Maryland. *Id.* at 205-12.
82. *Id.* at 205-12. The exercises consisted solely of reading and no comments were made or questions posed to the students. *Id.* Additionally, those students who did not want to participate were allowed to abstain after presenting written permission from their parents to school officials. *Id.*
83. *Id.* at 220-21.
84. *Id.* at 223.
found the schools' practice an unconstitutional violation of the Establishment Clause. Moreover, the Court asserted that allowing students the option not to participate in religious exercises does not mitigate the unconstitutionality of the practice.

The next significant case in the Supreme Court's Establishment Clause jurisprudence, *Lemon v. Kurtzman*, concerned two state statutes that provided financial aid to private religious schools. In *Lemon*, the Court announced a three-part test to determine whether a state action violates the Establishment Clause. First, the Court concluded that the purpose of a statute must be secular in order to withstand a constitutional challenge. Next, the Court asserted that the effect of a statute must be such that it "neither advances nor inhibits religion." Finally, the Court required that the statute "must not foster 'an excessive government entanglement with religion.'" Applying this test to the statutes in question in *Lemon*, the Court reasoned that the statutes constituted a significant state involvement with religion. Therefore, the Court held that both statutes evidenced an unacceptable measure of entanglement and were thus in violation of the First Amendment.

The issue before the Supreme Court in *Hunt v. McNair* was

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85. *Id.* at 224-25.
87. *Lemon*, 403 U.S. 602 (1971). In 1970, the Supreme Court considered the issue of whether state tax exemptions for religious organizations violate the Establishment Clause. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). The Court's analysis was two-fold. *Walz*, 397 U.S. at 672-73. First, the Court concluded that the statute's purpose was not to sponsor religion. *Id.* at 672. Next, the Court concluded that the statute only indirectly benefited members of various religions. *Id.* at 673. Thus, the Supreme Court held in *Walz* that when a statute has only an indirect and benign effect upon religion, the Establishment Clause is not violated. *Id.* at 675.
88. *Lemon*, 403 U.S. at 607-10. In Pennsylvania, nonpublic schools received reimbursement for teachers' salaries and school materials pursuant to a state statute. *Id.* at 609. Pursuant to a Rhode Island statute, nonpublic school teachers received a supplemental 15% of their annual salary from the state. *Id.* at 607.
89. *Id.* at 612.
90. *Id.*
91. *Id.*
92. *Id.* at 613.
93. *Lemon*, 403 U.S. at 613. The Court noted that "total separation between church and state" is impossible. *Id.* at 614.
94. *Id.* at 614. The Court stated: "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases." *Id.* at 612.
95. 413 U.S. 734 (1973).
whether a statute allowing for state financing of physical improvements to the campus of a private religious college constituted significant involvement between government and religion so as to render the statute unconstitutional. The Court adopted the three-pronged *Lemon* test to analyze the state's activity. However, Justice Powell, writing for the Court, stated that the three prongs constitute no more than "helpful signposts." Nevertheless, the Court determined that the statute in question had neither a religious purpose, nor the effect of favoring a particular religion. In addition, the Court determined that the degree of entanglement between government and religion resulting from the statute was not beyond the degree acceptable under the Establishment Clause doctrine. The Court held, therefore, that public financing of secular projects undertaken by private, religious colleges is within the acceptable limits of governmental entanglement with religion.

In *Widmar v. Vincent*, the Court was presented with the question of whether a state's interest in complying with the Establishment Clause is sufficient to permit "content-based regulation" of private speech. Thus the Court was confronted with a case in which the First Amendment's Establishment and Free Speech Clauses were in conflict. In *Widmar*, a state university refused to grant a registered student group access to a university facility because the group had a primarily religious purpose. The university defended its decision by asserting that allowance of access to the group would violate the

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96. *Hunt*, 413 U.S. at 740. The statute in question provided for the issuance of bonds to colleges and universities within the state to finance any school “projects,” excluding those for sectarian purposes or for the purpose of religious worship. *Id.* at 736. In the instant case, the challenged bonds were to finance a Baptist college's capital improvements and construction of a dining hall facility. *Id.* at 738.

97. *Id.* at 736-47.

98. *Id.* at 741.

99. *Id.* at 741-45. The Court concluded that the purpose of the statute was primarily secular in nature. *Id.* at 741. Additionally, the Court concluded that the statute’s "primary effect" would not be to enhance or inhibit religion. *Id.* at 745.

100. *Id.* at 748-49. The Supreme Court placed great emphasis on the statute's self-imposed confinement to financing of secular projects in reaching the determination that the governmental entanglement was not sufficient to warrant rendering the statute constitutionally invalid. *Id.*


104. *Id.* at 263.

105. *Id.* at 265. The group, named "Cornerstone," sought permission to use university facilities to conduct meetings during which religious worship and teachings would occur. *Id.*
Establishment Clause.\textsuperscript{106} The students alleged that the university's refusal to allow them access to facilities open to other students was an unconstitutional infringement upon their First Amendment right to free speech.\textsuperscript{107}

The Court assessed the validity of the university's argument that it had a "compelling state interest" through employment of the "Lemon test."\textsuperscript{108} Allowing religious groups to hold meetings in university facilities that are open to all other students, the Court concluded, does not result in governmental "entanglement" sufficient to warrant denial of students' rights to free speech.\textsuperscript{109} The \textit{Widmar} Court held that the university's interest was not sufficiently "compelling" to justify its content-based regulation of speech.\textsuperscript{110}

In \textit{Marsh v. Chambers},\textsuperscript{111} the Court addressed the issue of whether a legislature's practice of beginning each day with a prayer violated the Establishment Clause.\textsuperscript{112} The majority in \textit{Marsh} held the practice valid in deference to historical tradition.\textsuperscript{113}

In \textit{Marsh}, the dissenting opinion, authored by Justice Brennan, acknowledged the majority's failure to apply the three-pronged analysis employed in the Court's prior decisions.\textsuperscript{114} Such an analysis, Justice Brennan concluded, would undoubtedly lead to a finding that the practice was invalid under the Establishment Clause.\textsuperscript{115}

\textsuperscript{106} \textit{Id.} at 270. The university claimed that under the parameters set forth by the Supreme Court in \textit{Lemon} and its progeny, the university had a "compelling state interest" sufficient to justify the university's refusal to grant access to Cornerstone based on the religious content of its meetings. \textit{Id.} at 270-71.

\textsuperscript{107} \textit{Id.} at 265.

\textsuperscript{108} \textit{Widmar}, 454 U.S. at 270-76.

\textsuperscript{109} \textit{Id.} at 275-76.

\textsuperscript{110} \textit{Id.} at 276-77. The Court stated: "Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of content." \textit{Id.} at 276.

\textsuperscript{111} 463 U.S. 783 (1983).

\textsuperscript{112} \textit{Marsh}, 463 U.S. at 786. For many years it has been the practice of the Nebraska legislature to open each day with a prayer read by a chaplain who is paid with public funds. \textit{Id.} at 784-85.

\textsuperscript{113} \textit{Id.} at 784-95. Chief Justice Burger, writing for the majority, expressed the opinion that such a practice: (1) is not an endorsement of a particular religion despite the fact that a single chaplain had been reciting the prayer for 16 years, and (2) is not the type of practice intended to be invalidated by the Framers of the Constitution. \textit{Id.} at 793, 788-92.

\textsuperscript{114} \textit{Id.} at 796 (Brennan, J., dissenting).

\textsuperscript{115} \textit{Id.} at 796. Justice Brennan stated: "In sum, I have no doubt that, if any group of law students were asked to apply the principles of \textit{Lemon} to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." \textit{Id.} at 800-01.
In *Lynch v. Donnelly*, the Court faced the issue of whether a city-sponsored nativity scene in a Christmas display on private land constitutes an Establishment Clause violation. The Court first acknowledged that the history of the United States Government is replete with references to religious traditions, themes and messages. Thus, the Court determined that Establishment Clause cases require individual analysis rather than employment of a fixed per se rule. The Court opined that the analysis of the facts in the instant case must be within the context of the Christmas season. From this perspective, the Court narrowed the issue to whether the creche in question had a secular purpose. The Court equated the display, and the creche within it, with the religious references that have historically been accepted, rather than with those references that have been held as unconstitutional "entanglements" between government and religion. The Court concluded that there was a secular purpose for including the creche in the display. Thus, notwithstanding the creche's religious significance, the Court held that the creche's presence in the Christmas display did not violate the Establishment Clause. The Court reasoned that to hold otherwise would require many of the accepted forms of the nation's "religious heritage" be likewise held unconstitutional.

Although Justice O'Connor concurred in the judgment of the Court, she rejected the Court's reasoning and proposed a new test for use in cases involving the Establishment Clause. Justice O'Connor criticized the utility of the long-standing *Lemon* test and proposed that its principles be incorporated into

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118. Id. at 674-78. Specifically, the Court mentioned: observance of Christmas as a National Holiday, the national motto "In God We Trust," and the display of over 200 religious paintings in the National Gallery. *Id.* at 676-77.
119. Id. at 678. The Court stated: "The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Id.* at 679 (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)).
120. Id. at 679.
121. Id.
122. *Lynch*, 465 U.S. at 679-80. The Court stated: "We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires." *Id.* at 681 n.6.
123. Id. at 684.
124. Id. at 687.
125. Id. at 686. The Court stated: "It is far too late in the day to impose a crabbed reading of the Clause on the country." *Id.* at 687.
126. Id. at 687 (O'Connor, J., concurring).
Thus, Justice O'Connor framed the issue differently—considering whether the display of the creche constituted an endorsement of religion by the city. Justice O'Connor's analysis of this issue incorporated the Lemon test's "purpose" and "effect" prongs. Justice O'Connor's analysis placed great emphasis, however, upon consideration of whether a city's display of a creche would lead a reasonable observer to perceive that the government endorsed a particular religion. Applying this analysis to the city's display, Justice O'Connor first concluded that the city did not intend to convey a message of religious endorsement. In addition, Justice O'Connor concluded that the display did not have the effect of communicating governmental endorsement of religion. Therefore, Justice O'Connor found, as did the majority, that the city's display of the creche did not violate the Establishment Clause under the circumstances.

In Wallace v. Jaffree, the Court was called upon to decide the constitutionality of an Alabama statute which prescribed a moment of silence to be observed in public schools each morning. The Court's analysis of the statute in light of the Lemon test revealed that the statute's purpose was not secular, rather, it was to endorse religion. Thus, the Court declared the statute invalid as against the Establishment Clause of the

128. Id. at 690.
129. Id. Justice O'Connor stated: "To answer [the issue] we must examine both what [the city] intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the Lemon test represent these two aspects of the city's action." Id.
130. Id. at 692. Justice O'Connor asserted further that only those practices that have the effect of endorsing religion and thus making a person's religious beliefs relevant to their standing in the community should be of a concern to the Court. Id.
131. Id. at 691.
132. Lynch, 465 U.S. at 692. In reaching this conclusion, Justice O'Connor asserted that, under the circumstances, the display was no more a governmental endorsement of religion than traditionally accepted "acknowledgments" of religion. Id. According to Justice O'Connor, accepted "acknowledgments" of religion include: legislative prayers of the type held constitutional by the Supreme Court in Marsh, governmental acknowledgments of religious holidays as national holidays, and the printing of the phrase "In God We Trust" on United States currency. Id. at 692-93.
133. Id. at 694.
135. Wallace, 472 U.S. at 40.
136. Id. at 59-60. At trial, there was evidence presented to the district court concerning Alabama Governor Fob James' statements admitting the religious purpose of the statute. Id. at 57 n.44. In addition, the Court acknowledged the district court's findings that the statute's legislative intent was clearly to benefit religion. Id. at 58-59.
First Amendment.\textsuperscript{137} In *Allegheny County v. ACLU*,\textsuperscript{138} the Court considered the similar issue of whether a display of a creche and a menorah on government property during the Christmas season violates the Establishment Clause.\textsuperscript{139} The Court utilized the “endorsement test” set forth by Justice O'Connor in her concurring opinion in *Lynch*.\textsuperscript{140} In so doing, the Court criticized the majority opinion in *Lynch* for its lack of guidance as to what is and is not permissible under the Establishment Clause.\textsuperscript{141} Applying the “endorsement test” to the creche at issue in the case, the Court considered the use of religious symbolism in the context in which it was displayed.\textsuperscript{142} Viewing the creche in this way, the Court concluded that the creche constituted an endorsement of religion sufficient to violate the Establishment Clause.\textsuperscript{143} Applying the same analysis to the menorah, however, the Court concluded that under the circumstances in which it was displayed, display of the menorah did not violate the Establishment Clause.\textsuperscript{144}

Justice O'Connor's endorsement test was the subject of a blistering attack levied by Justice Kennedy in a concurring/dissenting opinion.\textsuperscript{145} Justice Kennedy's opinion advanced a new approach to the Establishment Clause issue—the “coercion test.”\textsuperscript{146} The first prong of the test requires

\textsuperscript{137} Id. at 60-61.
\textsuperscript{138} 492 U.S. 573 (1989).
\textsuperscript{139} *Allegheny County*, 492 U.S. at 578. At issue was a creche displayed in the “Grand Staircase” of the City-County building in Pittsburgh, Pennsylvania and an 18-foot menorah placed outside the building. Id. at 573. Atop the creche was written the words: “Gloria in Excelsis Deo,” meaning “Glory to God in the Highest.” Id. Next to the menorah stood a Christmas tree at the foot of which was a sign proclaiming that the display was the City's “salute to liberty.” Id.
\textsuperscript{140} Id. at 593-94.
\textsuperscript{141} Id. at 594.
\textsuperscript{142} Id. at 597.
\textsuperscript{143} Id. at 612-13. The Court distinguished the creche in this case from the one displayed in *Lynch*, in that the creche in *Lynch* was part of a larger display replete with secular imagery. Id. at 598. The Court cautioned, however, that “a secular state . . . is not the same as an atheistic or antireligious state.” Id. at 610.
\textsuperscript{144} *Allegheny County*, 492 U.S. at 620. The Court stated: “[I]t is not sufficiently likely that the residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval' . . . of individual religious choices.” Id. In a concurring opinion, Justice O'Connor defended the use of the “endorsement test,” stating: “We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases, and that is not a problem unique to the endorsement test.” Id. at 630 (O'Connor, J., concurring).
\textsuperscript{145} Id. at 655 (Kennedy, J., concurring in part and dissenting in part). Justices White and Scalia joined in Justice Kennedy's opinion. Id.
\textsuperscript{146} Id. at 659-60. The “coercion test” has also been referred to as the “proselytization test.” Id.
that governments not coerce any person to subscribe to or participate in any religion or the exercise thereof.47 The second prong of the test requires that governments not act in any manner sufficient to benefit religion to the extent that it establishes a state religion, or has that potential.48 Justice Kennedy asserted that the majority’s rule, and the analysis employed by Justice O’Connor in her concurrence, lacked the “play in the joints” necessary to permit a workable interpretation of the Establishment Clause.49 Thus, employing this analysis to the case, Justice Kennedy concluded that display of neither the menorah, nor the creche, violated the Clause.50

In 1993, in Lamb’s Chapel v. Center Moriches Union Free School District,51 the Supreme Court addressed the issue of whether a public school, under an open forum policy, can deny a religious group access to school facilities in light of the Establishment Clause.52 In its analysis, the Court analogized the facts of the instant case to those in Widmar.53 The Court renewed its Widmar analysis, however, to reflect the

147. Id. at 659.
148. Id. Justice Kennedy noted: “[C]oercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in the extreme case.” Id. at 661. In a concurring opinion, Justice O’Connor remarked:
An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.
Id. at 627-28 (O’Connor, J., concurring).
149. Allegheny County, 492 U.S. at 661-62. Justice Kennedy stated: “[F]ew of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under the faithful application of [the endorsement test].” Id. at 670.
150. Id. at 678-79. Justice Kennedy asserted that, although the decision to display the creche and menorah was not one he would have made had he been in such a position, it is not the role of the Court to act as a “censor” as to what is and is not “orthodox” or “secular.” Id. The majority stated that Justice Kennedy’s opinion was based on a misreading of Marsh. Id. at 603-04.
151. 508 U.S. 384 (1993). Prior to this case, the United States Court of Appeals for the Fourth Circuit decided Smith v. County of Albemarle, 895 F.2d 953 (1990), cert. denied, 498 U.S. 823 (1990). In Smith, the appellate court held that a creche displayed on the front lawn of a county office building violated the Establishment Clause under Allegheny County. Smith, 895 F.2d at 960. Also, in Chabad-Lubavitch v. City of Burlington, 936 F.2d 109 (2d Cir. 1991), cert. denied, 112 S. Ct. 3026 (1992), the court held that a proposed display of a menorah in a city park, where the menorah would be separate from secular aspects of a Christmas display, violated the Establishment Clause. Chabad-Lubavitch, 936 F.2d at 111-12. Both Smith and Chabad-Lubavitch relied heavily upon the Supreme Court’s holding in Allegheny County. See Chabad-Lubavitch, 936 F.2d at 111-12; Smith, 895 F.2d at 957-59.
152. Lamb’s Chapel, 113 S. Ct. at 2143-44.
153. Id. at 2148.
endorsement test announced in Lynch, and adopted in Allegheny County.\textsuperscript{154} Additionally, the Court resurrected the Lemon test in its analysis as it considered the question of whether the proposed use of school facilities constitutes an unacceptable governmental "entanglement" with religion.\textsuperscript{155} Applying these analyses, the Court concluded that to refuse a religious group access to a school would be a violation of the group's First Amendment rights, unsupported by the Establishment Clause.\textsuperscript{156}

It is obvious in reviewing the Supreme Court's Establishment Clause jurisprudence that the issues addressed by the Court have often exceeded the particularities of the conflicts between the parties. At the core of the Establishment Clause cases is posed a single question to the members of the Court. The Court has been asked, time after time, where the line is to be drawn between what is an acceptable display of religion and what is not. Providing the answer to such a question has required the members of the Court to balance the intricacies of America's religious traditions against the Framers' enigmatic decree that "Congress shall make no law respecting an establishment of religion."\textsuperscript{157} Inevitably, tension has resulted between the members of the Court on this issue, as reflected by the fragmented opinion in Capitol Square. Although the decision in Capitol Square is correct, the Justices' opinions reveal little about the interpretive direction toward which the Court as a whole is headed.\textsuperscript{158}

\textsuperscript{154} Id.
\textsuperscript{155} Id. In a concurring opinion, Justice Scalia criticized the Court's employment of the Lemon test, stating:

As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District . . . . Over the years, however, no fewer than five sitting Justices have, in their own opinion, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so . . . . When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice its forbids, we ignore it entirely (citations omitted).

\textit{Id.} at 2149-50 (Scalia, J., concurring).

\textsuperscript{156} Id. at 2148-49.

\textsuperscript{157} U.S. CONST. amend. I.

\textsuperscript{158} On the same day that the Court decided Capitol Square, it also decided Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995). In Rosenberger, the Court considered whether a state university's exclusion of a religious student group from a program providing funding for the cost of a student publication was valid in light of the university's interest in complying with the Establishment Clause. Rosenberger, 115 S. Ct. at 2521. Writing for the Court, Justice Kennedy focused upon the question of the university's "neutrality," and analogized
Amidst the rhetorical dust appeared Justice O'Connor's endorsement analysis. What is remarkable about the endorsement test is the proposition upon which it stands. In *Lynch*, Justice O'Connor analogized her approach as shifting the focus from the "speaker," the subject of a *Lemon* analysis, to the "listener."\(^{159}\) Such an approach acknowledges the rudimentary principle that any test employed must produce results that preserve America's religious pluralism. In short, the test must work to serve the purpose for which it is employed.

According to Justices Scalia and Kennedy, Justice O'Connor's approach went too far. In *Capitol Square*, a significant blow was struck to the endorsement test, as it was limited by the plurality to cases involving direct governmental action.\(^{160}\) In the wake of Justice Kennedy's opinion in *Allegheny County*, where the unconstitutionality was limited to governmental practices having a coercive effect, the plurality's limitation of the endorsement analysis is to be expected.\(^{161}\) Discernible from the pattern established in the opinions authored by Justices Kennedy and Scalia in *Allegheny County* and *Capitol Square*, respectively, is a desire to protect inviolate the religious traditions historically the situation to those in *Lamb's Chapel* and *Widmar*. Id. at 2518-24. Justice Kennedy expanded the *Widmar* and *Lamb's Chapel* holdings, finding that there was no distinction between a university's allocation of its resources for student use and subsidization of student publications. Id. at 2524. Justice Kennedy's analysis briefly visited the "purpose" and "effect" questions raised under the *Lemon* analysis. Id. However, his treatment of those issues was not pivotal to the Court's holding. Id. at 2522. Moreover, the Court concluded: "The government has not willfully fostered or encouraged' any mistaken impression that the student newspapers speak for the University." Id. at 2523 (quoting *Capitol Square*, 115 S. Ct. at 2448). The Court's conclusion represented a recognition of the endorsement analysis, but the Court did not engage in such an analysis in its opinion. Id.

In a concurring opinion, Justice O'Connor applied the "endorsement test." Id. at 2526-28 (O'Connor, J., concurring). Justice O'Connor's analysis led her to concur in the judgment of the Court. Id. at 2526. Thus, Justice O'Connor's successful application of the "endorsement test" in this case reinforced the test's usefulness in guiding courts toward rational decisions in Establishment Clause cases. Id.

The dissent, authored by Justice Souter, asserted that the Court's holding violated the fundamental principle of the Establishment Clause by allowing a state to fund a religious activity. Id. at 2533 (Souter, J., dissenting).

Considering *Rosenberger* and *Capitol Square*, it became apparent that there is no single analysis favored by the Court. Rather, the individual Justices appeared to favor application of particular analyses in cases where their employment produced a desired result. A notable exception to this was Justice O'Connor, who has remained true to the "endorsement test" since her concurrence in *Lynch*.

Recent Decisions

As such, it is evident that this group of Justices will continue to employ strict scrutiny to those cases involving a direct government action, and a somewhat lesser standard to cases like Capitol Square that concern private speech in a public setting.

This approach contrasts sharply with that of Justice O'Connor and Justice Souter. Justice Souter, in his Capitol Square concurrence, asserted that the endorsement test was not new to the Court’s Establishment Clause jurisprudence. Rather, Justice Souter acknowledged the Court’s attention to societal perceptions of governmental relation to religion and religious practices throughout the Establishment Clause cases. Thus, Justice Souter and Justice O'Connor can be expected to continue to apply heightened scrutiny to all establishment clause cases, regardless of the “speaker,” through the use of the endorsement test.

The aggregate of the Court’s division is unclear, but it is evident that in the coming years Establishment Clause interpretation must follow a single path. The endorsement analysis is promising because it provides courts a useful analytical framework, tempered by a recognition of the need to preserve religious freedom through government neutrality. Unfortunately, however, strict adherence to the endorsement test will lead the Court to conclude that many of the “traditional” religious symbols that have been woven into secular America over time are unconstitutional. Ironically, it thus appears that the endorsement test’s fatal flaw is that it works too well. Thus, the specter looming before the Court is the challenge of harmonizing the restrictive results of the endorsement test with government’s traditional religious practices. The unfortunate result in the interim is a society left to ponder how the Court will attempt to do so.

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162. Marsh, 463 U.S. 783 (1983). Nowhere was this position more clearly espoused than in the Marsh decision, where the Court held a legislative tradition of an opening prayer constitutional despite the holding in Lemon. Id. If the Lemon test were employed by the majority, undeniably the practice would have been held invalid. Id. at 800-01. This “selective” employment of Lemon was addressed specifically by Justice Scalia in his dissenting opinion in Lamb’s Chapel, 113 S. Ct. at 2149-50.
163. Capitol Square, 115 S. Ct. at 2457-60 (Souter, J., concurring).
164. Id.