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Damned If You Do, Damned If You Don't? The Pitfalls and Pratfalls of Complying with the Establishment Clause

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The Pitfalls and Pratfalls of Complying with the Establishment Clause

By: Ayesha N. Khan*

Establishment Clause jurisprudence has been called "tangled,"[1] "confusing," and "confused."[2] The late Justice Scalia – one of the fiercest critics of Supreme Court jurisprudence in this area – went so far as to call the state of the law "embarrassing."[3] Others have been more diplomatic. They have expressed the view that Establishment Clause cases "sacrifice[ ] clarity and predictability for flexibility"[4] and that the language of the Clause – which prohibits the government from making any law "respecting an establishment of religion" – is itself opaque.[5] To be sure, that opacity has cramped the Court's efforts to settle on a standard to guide Establishment Clause decision-making, but shifts in the political and philosophical perspectives of the Supreme Court's Justices have played an equally prominent role in muddying the doctrine.

An Early Touchstone -- The *Lemon* Test: In 1973, the Court adopted what ultimately became known as the "*Lemon* test," which asks whether a challenged governmental practice (1) lacks a secular purpose; (2) has the primary effect of advancing religion; or (3) excessively entangles government with religion.[6] The Court would subsequently refine the *Lemon* test to include an "endorsement" standard[7] and collapse the test's third prong into the second,[8] but it continued to apply the standard with relative consistency for the next few decades.[9]

More Recent History – A Multiplicity of Tests: The *Lemon* test met with criticism, most notably from Justice Scalia, who characterized it as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[10] The instances in which the test had been "killed and buried" included *Lee v. Weisman*, a high-school-graduation prayer case in which the Court applied a "coercion test" that asked whether a challenged practice coerced participation in a religious exercise.[11] Other instances in which the Court eschewed the *Lemon* test included a single controlling Justice's application of a "legal judgment" test in a case involving a Ten Commandments display[12] (more on that later); and the Court's application of a "historical test" to uphold a legislative-prayer practice in *Marsh v. Chambers*[13] (more on that later, too).[14] One commentator claims that, over the years, the Court has applied ten different tests in Establishment Clause cases.[15]

It is therefore understandable that some federal circuits have taken to applying several tests in any given Establishment Clause case.[16] Other circuits apply different tests depending on the fact pattern.[17] Not surprisingly, this has generated some confusion. The three areas that have been most beset with confusion are legislative prayer, government-sponsored religious displays, and public funding of religion, each of which is discussed in turn below. As in other areas of Establishment Clause jurisprudence, the legal precedents in these areas offer

some bright-line rules but also leave many questions unanswered.

1. Legislative Prayer: The Supreme Court has addressed legislative prayer on two occasions: *Marsh v. Chambers*[18] and *Town of Greece v. Galloway*.[19] *Marsh* upheld the Nebraska state legislature's practice of employing a paid clergyman to deliver a nonsectarian prayer[20] at the beginning of legislative sessions. The Court emphasized that an "unambiguous and unbroken history of more than 200 years" indicated that the people who wrote the First Amendment did not view paid legislative chaplains and opening prayers as unconstitutional.[21] In addition to looking to history, the Court deemed it important that the audience members for the prayers were adults, who are "presumably not readily susceptible to religious indoctrination or peer pressure."[22] At the same time, however, the Court stated that legislative prayer is not a free-for-all: a prayer practice that is "exploited to proselytize or advance any one, or to disparage any other, faith or belief" would not pass muster.[23]

Because the Chaplain had voluntarily excised references to Jesus Christ, the *Marsh* Court had no reason to address whether faith-specific prayers would be deemed to proselytize or advance any one religion, a question that was answered in the negative in *Town of Greece*. At issue in that case was a Town's practice of inviting local volunteer clergymen to deliver an invocation to open Town Board meetings. Town leaders said they would allow a minister or layperson of any persuasion, even an atheist, to give the invocation. But most of the local congregations were Christian; and from 1999 to 2007, all of the participating ministers were too. Some of them read Bible passages, invoked religious holidays, and spoke in a distinctly Christian idiom – for example, discussing Jesus Christ's resurrection and crucifixion. After local residents complained, the town invited a Jewish layman and the chairman of the local Baha'i temple to lead the prayer. A Wiccan priestess who had read press reports about the prayer controversy was likewise granted an opportunity to give the invocation.

In a closely divided 5-4 vote that tracked traditional conservative-liberal lines, the Court approved the Town's practice, concluding that requiring prayers to be nonsectarian would be inconsistent with the historical underpinnings that justify the practice. The Court expressed doubt that consensus could be reached on what qualifies as generic or nonsectarian.[24] And it explained that the Founders were accustomed to prayers with explicitly religious references and that Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. Diversity is achieved – both in the U.S. Congress and in the Town of Greece – not by limiting what can be said, but by allowing prayer-givers from diverse religious traditions. The Court concluded that "[o]nce [the government] invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.[25]

The Court recognized, however, that prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion" may fall short of permissible.[26] Although two of the Town's guest ministers had strayed from the realm of permissible presentations – by characterizing objectors as a "minority" who are "ignorant of the history of our country" and by lamenting that other towns did not have "God-fearing" leaders – the practice was permissible "on the whole." Reprising a theme from *Marsh*, the *Town of Greece* Court held that, absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer is unlikely to meet with success.[27]

In addition to prohibiting practices that reflect a pattern of denigration, the Court explained that legislators should not direct the public to participate in the prayers, single out dissidents for opprobrium, or indicate that decisions might be influenced by a person's acquiescence in the prayer.[28] Such practices could run afoul of the principle that government may not coerce its citizens to support or participate in any religion or its exercise.[29] Although some guest ministers in Greece had solicited attendees to rise or bow their heads, board members had not done so.[30] The fact that citizens attended and participated at town meetings – to accept awards; to speak on matters of local importance; and to petition the board for permits, business licenses, and zoning variances – likewise did not render the practice coercive because, according to the Court, the principal audience for the prayers was the legislators themselves.[31]

The Court distinguished a town meeting from a high-school graduation ceremony on the ground that, in the former circumstance, members of the audience can leave the room during the prayer, arrive late, and even voice opposition to the practice during the public-comment portion of the meetings.[32] The Court also found it noteworthy that the prayers were delivered during the ceremonial part of the town's meeting, rather than during a portion of the meeting in which Board members are engaged in policymaking.[33]

Town of Greece did not indicate how pervasive denigrating or proselytizing remarks would need to be for a practice to be deemed unconstitutional. Nor did the Court address whether its holding would apply with equal force when legislators themselves offer the prayer. Two subsequent appellate decisions, and potential consideration by the Supreme Court, may provide answers to those questions.

In *Lund v. Rowan County*,[34] the facts closely resembled those in *Greece*: the overwhelming majority of the Rowan County Commission's opening prayers included

Christianity-specific references, the prayers typically began with a variant of "let us pray," and audience members largely joined in standing and bowing their heads during the prayer. But the invocations were not delivered by guests; they were delivered on a rotating basis by the five members of the Board, all of whom were Christian.

A federal district court concluded that Rowan County's prayer practice could not find refuge in *Town of Greece*, but a panel of the Fourth Circuit reversed. It upheld the practice 2-1 under the view that the facts in *Rowan* were more similar than dissimilar to those in *Greece*: both involved practices that date to the Founding; both involved prayers that were replete with Christian-specific references; in both, the primary audience for the prayers was lawmakers rather than attendees; the deliberative body took a hands-off approach to the content of the prayers; attendees were invited to stand for the prayers but were also free not to do so or to leave the room and there was no evidence that objectors were penalized; and while some objectors had been denigrated, these occurrences did not add up to a pattern.[35] In concluding that the identity of the prayer-givers was a distinction without a difference, the Court pointed to *Town of Greece's* discussion of *Marsh*: "While *Town of Greece* involved a rotating group of local clergy and *Marsh* concerned a paid chaplain, the Supreme Court attached no significance to the speakers' identities in its analysis and simply confined its discussion to the facts surrounding the prayer practices before it."[36] Thereafter, however, the full Fourth Circuit voted to rehear the case. As of this article's publication, additional briefs had been submitted and the full court had heard oral argument, but no decision had been issued.

In another case with similar facts to those in *Rowan County*, the Sixth Circuit ruled 2-1 that the municipality had overstepped. In *Bormuth v. County of Jackson*,[37] a local resident challenged a Board's practice of opening its monthly meetings with a prayer. As in both *Town of Greece* and *Rowan County*, local residents participated in the monthly meetings. The prayers were delivered by members of the Board of Commissioners on a rotating basis and were preceded by the Board Chairman asking those in attendance to "rise" and "assume a reverent position."[38]

The court distinguished *Town of Greece* on several grounds: the prayer-givers were the Commissioners themselves, so there was no opportunity for persons of other faiths to counteract the uniformly Christian-specific messages; one of the Commissioners had stated that the Board members deliberately chose to deliver the prayers themselves to ensure that the public didn't say things that people "are not going to like;"[39] the Commissioners directed the public to participate in the prayers at every monthly meeting;[40] and some of the Board's members had singled out the plaintiff for opprobrium when they stated that his lawsuit was an "attack on Christianity and Jesus Christ," characterized his lawsuit as "political correctness nonsense," called him a "nitwit," made their displeasure known when the plaintiff used the

public-comment period of a meeting to denounce the prayer practice, and denied him a position on the Board of Public Works after he had filed suit.[41] In distinguishing *Rowan County*, the court noted that there was no evidence there that the commissioners had chosen to deliver the prayers themselves in order to exclude non-Christian prayer-givers or that the Commissioners had insulted and penalized the plaintiff – and that, in any event, the Fourth Circuit had voted to rehear the case.[42]

However, a mere twelve days after the *Bormuth* panel decision was issued, the full Sixth Circuit voted to rehear the case, which had the result of vacating the panel opinion.[43] It remains to be seen how the en banc Sixth Circuit will rule and whether the ultimate loser in that case will seek review by the U.S. Supreme Court. Meanwhile, the full fourth Circuit will undoubtedly issue a ruling in *Rowan County* and the loser in that case could likewise seek review in the U.S. Supreme Court. If both circuits ultimately reach the same result, U.S. Supreme Court review becomes much less likely.[44]

2. Government-Sponsored Religious Displays: Another area of Establishment Clause jurisprudence characterized by 5-4 divides is the question of government-sponsored religious displays. Here's what is known right now:

a. No Religious Purpose: First, the government should not erect displays with a religious purpose. In *ACLU v. McCreary County*,[45] the defendant counties had passed resolutions ordering the text of the Ten Commandments to be hung in the hallways of county courthouses. After the ACLU filed suit, the counties modified the display to add eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element.[46] The district court preliminarily enjoined that second display, concluding that it lacked a secular purpose. The counties then modified the display again, changing its title to "The Foundations of American Law and Government Display" and incorporating eight additional items of equal size, including the Magna Carta, the Declaration of Independence, the Bill of Rights, and other items.[47] The district court supplemented its preliminary injunction to require removal of the third iteration of the display and the Sixth Circuit affirmed.[48]

The Supreme Court voted 5-4 to affirm the lower court's ruling. In doing so, it relied on the "purpose" prong of the *Lemon* test, holding that the primary purpose behind the County's action had been to advance religion. The Court concluded that the progression in the displays demonstrated that the County was "reaching for any way to keep a religious document on the walls of courthouses."[49] The Court was careful to note, though, that it was not holding that a sacred text can *never* be integrated into a governmental display; indeed, it acknowledged that its own courtroom frieze included the figure of Moses holding tablets exhibiting a portion of

the Commandments, in the company of 17 other lawgivers.[50]

b. Longstanding Non-Controversial Religious Items With Secular Aspects: Second, as *McCreary* indicated, the government can maintain longstanding religious displays that are integrated with a variety of other non-religious items. In *Van Orden v. Perry*,[51] the plaintiff challenged a Ten Commandments monument that had been on display for 40 years, along with 17 other monuments and 21 historical markers, on 22 acres of park land surrounding the Texas State Capitol. The Supreme Court upheld the display in a 5-4 vote but, this time, the majority declined to rely on the *Lemon* test. Instead, a plurality of the Court drew on the historical test of *Marsh*, concluding that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history."[52] According to the plurality, because acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America and such acknowledgments have both religious and secular elements, they do not run afoul of the Establishment Clause.[53]

Justice Breyer provided the fifth vote to create a majority. He noted that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case" and that in borderline cases, there is no "substitute for the exercise of legal judgment."[54] Breyer's "legal judgment" was that the circumstances surrounding the display's placement on the capitol grounds and its physical setting suggested that the State intended to highlight the Commandments' nonreligious aspects; and the fact that the monument had been on the Texas state grounds without complaint for 40 years indicated that the community understood that.[55]

c. Integration with Secular Symbols: A third principle that can be gleaned from the case law is that the government can incorporate religious items in a holiday display that includes a variety of secular elements or sends a message of diversity and inclusion. In *Lynch v. Donnelly*, the Court upheld a governmental holiday display of a crèche alongside numerous secular objects, such as candy-striped poles, a Santa Claus, colored lights, a reindeer, cutout figures of animals, a Christmas tree, carolers, and a "Season's Greetings" banner.[56] Five years later, in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[57] the Court evaluated two separate displays: a crèche display in a county courthouse; and a display that incorporated a menorah, a Christmas tree, and a sign saluting liberty outside a city-county building.[58] The Court found that the crèche endorsed religion because it was the display's centerpiece (accompanying poinsettia plants and evergreen trees simply served as framing) and it appeared alongside a sign proclaiming "Gloria in Excelsis Deo!" ("Glory to God in the Highest.")[59] In reaching this conclusion, the Court distinguished *Lynch* as follows:

> unlike in *Lynch*, nothing . . . detracts from the crèche's religious message. The *Lynch* display composed a series of figures and objects, each group of which had its own focal point. . . . Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.[60]

Conversely, the Court upheld the menorah display because, when coupled with a Christmas tree and a sign celebrating liberty, the display had the effect of conveying a secular message of recognition of the different ways to celebrate the holiday season.[61]

Unanswered Questions: These three guiding principles leave many questions unanswered. For instance, would the third amended display in *McCreary* (incorporating the Bill of Rights and other seminal political documents) have withstood scrutiny if it had been erected in the first instance? At least two lower courts have answered that question in the affirmative.[62] Another question left open by the Supreme Court's decisions is how long a display must have been in place to be "grandfathered" under *Van Orden* and how clear a religious purpose must be for a display to be impermissible.

The Tenth Circuit's decision in *Green v. Haskell County Board of Commissioners*[63] sheds some light on those questions. There, the court struck down a Board's decision to add a Ten Commandments display to a courthouse lawn that already included several other monuments, concluding that the display had a primarily religious effect. The court relied on the facts that two of the three County Commissioners had attended the monument's unveiling, which included remarks by local pastors; those same two Commissioners had attended a rally in support of the monument and one of them had made religious statements in the monument's defense; their statements appeared to be made in their capacity as Commissioners rather than in their private capacity and the Commission as a whole had taken no steps to disavow the comments; the overall message conveyed by the items was less cohesive than the overall message conveyed by the monuments in *Van Orden*; and the display had been challenged within one year of its erection.[64]

Yet other questions remain. For example, will a private donor's intent be imputed to the government? Will a government entity be protected from liability if the challenged monument was erected pursuant to a public-forum policy that allows contributors to erect what they wish? Would a disclaimer on a monument give the display legitimacy? A recent decision that brings together these and other elements provides some answers. In *Felix v. City of Bloomfield*,[65] the plaintiff challenged a Ten Commandments monument on the lawn in front of a municipal building complex that included City Hall. The display had been proposed by a member of the City Council (who had since retired), but it was funded by private individuals and entities. After the display was initially proposed, the City Council adopted a public-forum policy that allowed local citizens to display items relating to the

history and heritage of the City's law and government. The Ten Commandments display, which included a disclaimer stating that its message was of the donors and not the City, was unveiled with a ceremony that included many religious elements and was attended by the monument's proponent, who was by then no longer a member of the Council. Pursuant to the public-forum policy, several other non-religious items were subsequently added to the lawn by the same donor.

The Tenth Circuit relied on a variety of factors to conclude that the government's action endorsed religion in violation of the Establishment Clause: the monument resided directly in front of the city's principal government building; the initial request was for the Ten Commandments alone; the fundraising focused on churches; the dedication ceremony was religious; and the monument was challenged less than a year after its unveiling.[66] The court concluded that the disclaimer was ineffective because the government had adopted the monument's message by accepting the display and because public properties are not, as a matter of law, public fora for erection of permanent monuments. The court also noted that the public-forum policy had been adopted after the initial display was approved and concluded that adding other items did not amount to the kind of sufficiently purposeful, public, and persuasive actions necessary to legitimize an otherwise impermissible display.[67]

The holding in *Felix*, like those in many religious-display decisions, was highly fact-specific. In this area of Establishment Clause jurisprudence, perhaps more than others, the devil is in the details. And because the legal principles are ambiguous and therefore malleable, the outcome in any given case will often turn at least in part on the judge's political and cultural leanings.

3. Public Funding of Religion: The provision of public funds to religious institutions has arguably engendered more confusion than any other aspect of Establishment Clause jurisprudence. This is ironic, because concern with the funding of religion was what animated the Founders' decision to include the Establishment Clause in the First Amendment in the first place.[68]

It is relatively well-established that there is no constitutional violation when government aid makes its way to religious institutions as a result of the genuine and independent choices of private individuals.[69] Four decisions from the 1990s illustrate the point. In *Mueller v. Allen*, the Court rejected an Establishment Clause challenge to a Minnesota program authorizing personal tax deductions for various educational expenses, including private school tuition costs, even though the majority of the program's beneficiaries were parents of children in religious schools.[70] In *Witters v. Washington Department of Services for the Blind*, the Court rejected a challenge to a vocational scholarship program that provided tuition aid to a

student studying at a religious institution to become a pastor.[71] In *Zobrest v. Catalina Foothills School District*, the Court rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools.[72] And in *Zelman v. Simmons-Harris*, the Court upheld an educational voucher program despite the fact that most voucher recipients sent their children to parochial schools.[73] Together, these decisions indicate that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, wholly as a result of their own genuine and independent private choice, direct that aid to religious institutions, the program is not readily susceptible to challenge under the Establishment Clause.[74]

In contrast, government programs that provide aid *directly* to religious schools, without an intervening third party, are subject to a more nuanced analysis.[75] The Supreme Court has held that when an institution is "pervasively sectarian" (that is, when "'religion is so pervasive that a substantial portion of [the institution's] functions are subsumed in the religious mission . . . .'"),[76] it cannot receive government aid because the religious components cannot be divorced from the secular ones.[77] In such circumstances, there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the institution's religious mission.[78] Aid can be given, however, to religiously affiliated institutions that are not pervasively sectarian when adequate safeguards are put in place to ensure that the aid supports only secular elements.[79] Thus, the Court held, building-construction aid could be given to religiously affiliated colleges, provided that the constructed or repaired facilities would not – now or in the future – be put to religious use.[80] The provision of such aid to *pervasively sectarian* institutions, however, is frowned upon.[81]

More recently, however, the Supreme Court issued a fragmented decision in *Mitchell v. Helms*[82] that arguably marked a jurisprudential shift. There, the Court considered a program that channeled federal funds via state educational agencies to local entities that, in turn, loaned educational items, such as library and media materials and computer software and hardware, to public and private elementary and secondary schools for "secular, neutral, and nonideological" programs.[83] The enrollment of each participating school determined the amount of aid received; and in an average year, about 30% of the funds were allocated for private schools, most of which were Catholic or otherwise religiously affiliated.

A plurality of four Justices voted to uphold the program pursuant to a simple rule: Aid is permissible when it is allocated with neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.[84] The two concurring Justices, however, disagreed with the

plurality's conclusion that neutrality in selection is all that matters and that diversion of the funds to religious use was irrelevant. In their mind, that was so only for true private-choice programs, where the aid is given to the intervening beneficiary; it was not so for per-capita funding programs like the one at issue, where the aid is given directly to the institution.

The two concurring Justices concluded that, because the program in question fell into the latter category, the aid was permissible only because the funding program incorporated various protections: the aid was distributed on the basis of neutral, secular criteria and was available to assist students regardless of whether they attended public or private schools; the program was designed to supplement programming otherwise available to religious schools and explicitly prohibited funds from being used to supplant funds from other sources; no funds ever reached the coffers of a religious school because the funds were controlled by public agencies, which purchased and retained title to the materials and then lent them to the schools; and the statute required the materials and equipment to be "secular, neutral, and nonideological."[85]

These caveats – which the plurality characterized as a "smorgasbord of 11 factors"[86] – left open several questions, the most important of which was how the Court would treat cash grants (as opposed to in-kind benefits). A few lower courts have grappled with that question. In *American Atheists, Inc. v. City of Detroit Downtown Development Authority*,[87] the Sixth Circuit upheld churches' participation in a downtown revitalization program under which reimbursement grants funded by property tax revenues were given to downtown property owners to renovate building exteriors. The Court concluded that the pervasively-sectarian doctrine remained alive but that the presumption created by the doctrine had been rebutted because the "the vast majority of the reimbursed repairs – the renovation of exterior lights, pieces of masonry and brickwork, outdoor planters, exterior doors, concrete ramps, entrance ways, overhangs, building trims, gutters, fencing, curbs, shrubbery and irrigation systems – lack any content at all, much less a religious content."[88] The exceptions (for example, funds for church signs that display customized messages) were "de minimis" and did not doom the program because any displayed messages were attributable to the churches, not to the government.[89]

A similar fact pattern was presented in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*,[90] but this time, the government had *prohibited* awards to religious institutions. There, a church's preschool and daycare center sought access to a Missouri Department of Natural Resources program that offered funds to qualifying organizations for the purchase of recycled tires to resurface playgrounds. The Church's application was rejected pursuant to a state constitutional provision that prohibits public funds from being used in aid of a religious institution. The Church filed suit, claiming that the denial ran afoul of the Equal Protection Clause and various clauses of the First Amendment. After the Eighth Circuit rejected the

claim in a divided panel opinion, the Supreme Court accepted review.

In deciding the case, the High Court will be asked to revisit its decision in *Locke v. Davey*,[91] in which it rejected a challenge to Washington State's decision to disallow devotional theology students from participating in a scholarship program for post-secondary education. The plaintiff, a scholarship recipient, sued upon learning that his scholarship could not be used toward a degree in pastoral ministry, alleging violations of the Free Exercise and Equal Protection Clauses (among other claims).[92] The *Locke* Court upheld Washington's restriction because the scholarship program was not borne of animosity towards religion, but, rather, went "a long way toward including religion in its benefits" by permitting payment for attendance at pervasively religious schools;[93] and because the challenged program neither imposed sanctions on the practice of religion nor forced students to choose between a religious belief and the receipt of a governmental benefit.[94]

In its filings with the U.S. Supreme Court, Trinity Church echoes many of the arguments that the plaintiff made in *Locke*. For example, the Church argues that the categorical exclusion of religious institutions from the Missouri Scrap Tire Grant Program exhibits a hostility to religion that violates the Free Exercise and Equal Protection Clauses. But the Church argues that its case should come out the other way and that the decision in *Locke* should be limited to the funding of devotional training of clergy, which, Trinity Church argues, raises unique historical concerns.[95]

Missouri, in turn, points out that the Court has long held that the government does not infringe the exercise of a constitutional right by declining to subsidize it.[96] In the State's view, "Trinity Lutheran mistakes the State's adherence to traditional anti-establishment values for hostility to religion."[97] And it argues that the Church's interpretation of *Locke* has it precisely backwards: the more religious an activity, the greater the free-exercise interests; so if funding can be denied for a purely religious pursuit, it can surely be denied for a project that is not even remotely religious.[98]

It is not clear which argument will prevail – but the arguments do highlight an important dynamic. Most of the Supreme Court's cases have asked whether government *can* provide funds and materials to religious institutions when it chooses to provide such aid to secular institutions. *Trinity Lutheran*, however, asks a different question (as did *Locke*): whether government *must* provide aid to religious institutions in such circumstances. An affirmative answer to the former question gives state and local governments the leeway to do as they wish; an affirmative answer to the latter question, by contrast, ties governments' hands.

Looking Forward: Whether pending appellate decisions, as well as the upcoming

change in the Supreme Court's composition, will bring greater clarity to this area of the law remains to be seen. Incoming Supreme Court Justice Neil Gorsuch has generally disfavored a robust interpretation of the Establishment Clause. For example, he dissented from the denial of rehearing in *Green v. Haskell County Board of Commissioners*, the case (discussed above) in which a panel majority struck down a Ten Commandments display on an Oklahoma county's courthouse lawn. In his view, the display should have been subject to a less exacting standard than the *Lemon* test and the Commissioner's religious statements should not have been attributed to the Commission as a whole.[99] Similarly, in *American Atheists, Inc. v. Duncan*, where a panel of the Tenth Circuit had struck down a memorial for Utah Highway Patrol officers that consisted of 12-foot-tall crosses bearing the Highway Patrol's symbol,[100] Gorsuch joined a dissent from the denial of rehearing, arguing that the crosses had a secular meaning that could be divorced from their religious significance.[101]

These and other opinions written or joined by Judge Gorsuch suggest that Justice Kennedy will remain the swing vote in Establishment Clause cases, at least for the time being, and that Establishment Clause jurisprudence will remain a highly nuanced, continually evolving area of municipal law practice.

[1] Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).
[2] Doe v. Duncanville Indep. Sch. Dist., 986 F.2d 953, 959 n.7 (5th Cir. 1993).
[3] Edwards v. Aguillard, 482 U.S. 578, 639 (Scalia, J., dissenting).
[4] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1979).
[5] Lemon v. Kurtzman, 403 U.S. 603, 612 (1973).
[6] *Id*. at 612-13.
[7] *See Cnty. of Allegheny*, 492 U.S. at 592 (explaining that the endorsement test asks whether a reasonable observer would conclude that the governmental action has either the purpose or the effect of endorsing or disapproving of religion).
[8] *See* Agostini v. Felton, 521 U.S. 203, 232-33 (1997).
[9] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002); Agostini v. Felton, 521 U.S. 203, 234-35 (1997); Bowen v. Kendrick, 487 U.S. 589, 602 (1988).
[10] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).
[11] 505 U.S. 577, 592 (1992).
[12] Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).
[13] 463 U.S. 783 (1983).
[14] These tests apply to laws or actions affording uniform benefit to all religions. *See* Larson v. Valente, 456 U.S. 228, 252 (1982). In contrast, the Court applies a fourth standard to governmental actions that discriminate among religions. In that instance, courts apply "strict scrutiny," asking whether the action is "closely fitted to the furtherance of any compelling governmental interest asserted." *Id.* at 255.
[15] Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728-64 (2006).
[16] *See, e.g.*, Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001) (noting "three lines of analysis

developed by the Supreme Court," "the three-part inquiry of Lemon v. Kurtzman," "the 'coercion' test," and "the 'endorsement' test").

[17] *See, e.g.*, ACLU of Ky. v. Mercer Cnty., 432 F.3d 624, 636 (2005) (concluding that *Lemon* remains applicable in challenge to religious display).

[18] 463 U.S. 783 (1983).

[19] 134 S. Ct. 1811 (2014).

[20] *Id.* at 793 n.14.

[21] 463 U.S. at 788, 791-92; *see also Cnty. of Allegheny*, 492 U.S. at 602 (*Marsh* "relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights")

[22] *Id.* at 792 (internal citations and quotation marks omitted).

[23] *Id.* at 794-95.

[24] *Town of Greece*, 134 S. Ct. at 1822.

[25] *Id.* at 1822-23.

[26] *Id.* at 1823.

[27] *Id.* at 1824.

[28] *Id.* at 1826

[29] *Id.* at 1825

[30] *Id* at. 1826.

[31] *Id.* at 1825.

[32] *Id.* at 1827 (distinguishing Lee v. Weisman, 505 U.S. 577 (1992), which invalidated a public school's practice of having a student deliver a prayer at high-school graduation ceremonies).

[33] *Id.* at 1827.

[34] Lund v. Rowan Cty., 837 F.3d 407 (4th Cir. 2016), *vacated for reh'g en banc*, ___Fed. App'x___, 2016 WL 6441047 (4th Cir. Oct. 31, 2016).

[35] 837 F.3d at 417-30.

[36] *Id.* at 418.

[37] 849 F.3d 266, No. 15-869, 2017 WL 603851 (6th Cir. Feb. 15, 2017).

[38] *Id.* at *1.

[39] *Id.* at *12.

[40] *Id.* at *14.

[41] *Id.* The court also offered another ground of distinction: that the Board had acted with the purpose of imposing religion on the public, as reflected in the fact that it included prayers at public meetings but not at ones attended by the Commissioners alone. Because this argument had been made by an amicus, rather than by the plaintiff, however, the court concluded that it could not rest its decision on this factor. *Id.* at *13.

[42] *Id.* at *17.

[43] *See* __ F.3d __, No. 15-1869, 2017 WL 744030 (6th Cir. Feb. 27, 2017).

[44] None of the cases discussed above involved prayer at school-board meetings, where the courts are truly all over the map. Just recently, in American Humanist Ass'n v. McCarty, __ F.3d __, 2017 WL 1055571 at *6 (5th Cir. 2017), the Fifth Circuit upheld a school board's practice of inviting a student to deliver a one-minute statement, which usually (but not always) consisted of an invocation – often including references to Jesus Christ and requests to the audience to "stand for the prayer" or "bow your heads." The presentation had historically been denominated an "invocation" but, prior to the filing of the lawsuit, the school district began referring to the period as involving a "student expression" and enacted a policy stating that the presentations do not reflect the school district's views. *Id.* at *2. The audience mostly consisted of adults who were free to come and go, but the meetings were also frequently attended by students who were there to receive awards or to perform as part of the school band or choir. *Id.* The court concluded that a school board is more like a legislature than a school

classroom or event and the *Town of Greece* therefore controlled. *Id.* at *4.

The court noted, however, that several other circuits have come out the other way. *Id*. at *5. In Coles ex re. Coles v. Cleveland Board of Education, 171 F.3d 369, 383 (6th Cir. 1999), the court held that the legislative-prayer exception does not apply to school-board meetings, which are inextricably intertwined with the public-school system. It struck down a practice in which prayers, often sectarian, were delivered by clergymen chosen by the school board president or by the school board president himself. *Id.* at 373. The Third Circuit reached the same result in Doe v. Indian River School District, 653 F.3d 256, 278-79 (3d Cir. 2011), where the prayers were delivered by rotating board members and almost always included Christian references. *Id.* at 265. The Fifth Circuit distinguished those cases on the grounds that they predated *Town of Greece*, that the prayers were in some instances delivered by board members themselves, and that the school boards had official representation from students. 2017 WL 1055571, at *5. The Fifth Circuit also noted that, in Bacus v. Palo Verde Unified School District Board of Education, 52 Fed. Appx. 355, 356-57 (9th Cir. 2002) (per curiam), the Ninth Circuit had struck down the presentation of sectarian prayers at school-board meetings, but the Fifth Circuit noted that its sister circuit had assumed that legislative-prayer jurisprudence was applicable to the school-board setting and that *Town of Greece* since held that the Constitution does not require invocations to be nonsectarian. 2017 WL 1055571, at *6.

In light of the developing split in the circuits, it may not be long before the Supreme Court steps in to address whether and how *Marsh* and *Town of Greece* map on to the school-board setting.

[45] McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).
[46] *Id.* at 853-54.
[47] *Id*. at 856.
[48] *Id.* at 857-58.
[49] *Id*. at 873.
[50] *Id.* at 874.
[51] 545 U.S. 677, 681 (2005).
[52] *Id.* at 686.
[53] *Id.* at 688, 691-92.
[54] *Id.* at 699, 700 (Breyer, J., concurring).
[55] *Id.* at 701-704.
[56] 465 U.S. 668, 671, 681-85 (1984).
[57] 492 U.S. 573 (1989).
[58] *See* 492 U.S. at 579-82.
[59] *See id*. at 580, 598-602.
[60] *Id*. at 598.
[61] *See id*. at 614-20 (Blackmun, J.); *Id.* at 634-36 (O'Connor, J., concurring).
[62] *See* ACLU of Ky. v. Mercer Cnty., 432 F.3d 624, 631-32 (6th Cir. 2005); Books v. Elkhart Cnty., 401 F.3d 857, 862 n.2 (7th Cir. 2005).
[63] 568 F.3d 784 (10th Cir. 2009).
[64] *Id*. at 801-06.
[65] 841 F.3d 848 (10th Cir. 2016).
[66] *Id*. at 857-59.
[67] *Id.* at 861-62, 864.
[68] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 103-04 (1968) ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general."); *see also* NOAH FELDMAN, DIVIDED BY

GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support.").

[69] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002) (citing Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[70] 463 U.S. at 397-400.

[71] 474 U.S. at 483-89.

[72] 509 U.S. at 8.

[73] 536 U.S. at 653.

[74] *Id.* at 652.

[75] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 810–814 (2000) (plurality op.); *id.* at 841–844 (O'Connor, J., concurring in judgment); Agostini v. Felton, 521 U.S. 203, 225–227 (1997); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995) (collecting cases).

[76] Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

[77] Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976); *accord Hunt*, 413 U.S. at 743 ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . .").

[78] *Bowen*, 487 U.S. at 610 (emphasis added).

[79] *See, e.g., Bowen*, 487 U.S. at 609-10; *Hunt*, 413 U.S. at 743-44.

[80] *See* Tilton v. Richardson, 403 U.S. 672, 683-84 (1971) (plurality op.) (approving provision of aid to religiously affiliated colleges for construction of buildings that are not used for religious instruction, training or worship, but striking down twenty-year limitation on use prohibition); *id.* at 664 (White, J., concurring).

[81] *See Nyquist*, 413 U.S. at 774, 776-77 (striking down statute providing money for maintenance and repair of parochial schools because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions*") (emphasis added).

[82] 530 U.S. 793 (2000).

[83] *Id.* at 802.

[84] *Id.* at 809-12.

[85] *Id.* at 848-49.

[86] *Id*. at 825.

[87] 567 F.3d 278 (6th Cir. 2009).

[88] *Id.* at 292, 296.

[89] *Id*. at 293-94.

[90] 788 F.3d 779 (8th Cir. 2015).

[91] 540 U.S. 712.

[92] *Id.*

[93] *Id*. at 721, 724, 725.

[94] *Id.* at 720-21.

[95] Br. for Pet'r at 36, Trinity Lutheran Church of Columbia, Inc. v. Pauley, *petition for cert. granted*, No. 15–577 (Apr. 14, 2006).

[96] Br. for Resp't at 4, Trinity Lutheran Church of Columbia, Inc. v. Pauley, *petition for cert. granted*, No. 15–577 (June 28, 2006).

[97] *Id*. at 16.

[98] *Id*. at 22.

[99] 574 F.3d 1235, 1245, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of reh'g en banc).

[100] 616 F.3d 1145, 1164 (10th Cir. 2010).
[101] American Atheists, Inc. v. Davenport, 637 F.3d 1095, 1106 (10th Cir. 2010) (Kelly, J., dissenting from denial of reh'g en banc).

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