REVIVAL: TOWARD A FORMAL NEUTRALITY APPROACH TO ECONOMIC DEVELOPMENT TRANSFERS TO RELIGIOUS INSTITUTIONS

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INTRODUCTION**

Few exercises in constitutional interpretation forge such fundamental divisions between individuals as does the effort to define the meaning of the Establishment Clause of the First Amendment. The ramifications of this inherent divisiveness are plainly illustrated by the jurisprudential quagmire spawned by the Supreme Court’s attempts to apply the clause to the many distinct scenarios that arise under it. A cursory glance at the Supreme Court’s decisions interpreting the Establishment Clause is sufficient to reveal a number of sharply divided opinions with justices asserting vigorous arguments interpreting the meaning of the clause in various contexts. Unfortunately, these strong divisions produced jurisprudence wrought with confusion and ambiguity.1 Despite decades of decisions, attempts at predicting outcomes are often futile and the landscape of the law in the area is perpetually changing. Even the fundamental principles of the Court’s analysis are prone to precipitous change. While early Supreme Court precedent focused on an “effects” oriented approach to deciding Establishment Clause issues, the Court’s recent decisions illustrate a rather abrupt, but not an altogether unforeshadowed, shift toward a principle of formal neutrality, at least in certain cases.2

Indisputably, the modern Court has strayed from strict reliance upon the effect-heavy elements of the much-studied and much-maligned Lemon test3 to inquiries centered more upon the formal neutrality of government action that allegedly violates the Establishment Clause.4

** As an initial matter, I must acknowledge that I owe credit to Professor James J. Kelly of the Notre Dame Law School for the idea which spawned this Note. Professor Kelly’s blog posting brought the underlying case to my attention and also offered interesting questions posed by the District Court’s decision which I hope to help answer herein. James J. Kelly, City of South Bend Enjoined by U.S. District Court from Transferring Land to Catholic HS, Land Use Prof Blog (September 8, 2011), http://lawprofessors.typepad.com/land_use/2011/09/city-of-south-bend-enjoined-by-us-district-court-from-transferring-land-to-catholic-hs.html.

1. See Steven G. Gey, Reconciling the Supreme Court’s Four Establishment Clauses, 8 U. PA. J. CONST. L. 725, 728 (2006) (noting that, over the course of a decade, various Justices articulated ten different Establishment Clause standards).

2. See FRANK S. RAVITCH, LAW AND RELIGION, A READER: CASES, CONCEPTS, AND THEORY 327-328 (Thomson West 2008). As discussed later in this Note, Ravitch illustrates that the Supreme Court laid the groundwork for a doctrinal shift toward formal neutrality in a series of cases regarding the constitutionality of government aid to religious institutions.


Yet, precedent reveals that no single test is applicable in every context, and perhaps the \textit{Lemon} test, as originally formulated, retains some amount of viability in certain Establishment Clause disputes.\textsuperscript{5} What is clear, however, is that the collective net cast by the totality of the Court’s decisions is still not broad enough to comfortably accommodate all government actions which entail Establishment Clause implications. As a product of the Supreme Court’s jurisprudential shortcomings, the Nation’s lower courts and those who practice within them suffer from a lack of clarity and guidance, especially in hard cases.

A recent decision by an Indiana District Court enjoining the City of South Bend from transferring land to a Catholic high school as part of an economic development plan highlights the failure of the Supreme Court’s jurisprudence to provide clear standards.\textsuperscript{6} Relying largely on a suspect \textit{Lemon} analysis, the court in \textit{Wirtz v. City of South Bend}\textsuperscript{7} ruled that the intended transfer violated the Establishment Clause because it would send a message to the community that the government endorsed the religious doctrine of the high school.\textsuperscript{8} Furthermore, the court found that the \textit{ad hoc} nature of the transfer sufficiently distinguished the case from the religiously neutral programs upheld in the Supreme Court’s recent cases that exhibit a burgeoning reliance upon a principle of formal neutrality.\textsuperscript{9}

The \textit{Wirtz} court’s opinion begs the question of whether the Establishment Clause effectively prevents religious institutions from enjoying the benefits of below-market economic development land transfers. Surprisingly, this inquiry has never been squarely addressed by a federal court, rendering the decision in \textit{Wirtz} more influential than it otherwise might have been. In \textit{Wirtz}, the Northern District of Indiana ostensibly answers the question posed in the affirmative. Public land transfers to private organizations are necessarily \textit{ad hoc} in nature, inevitably bestow some benefit upon the private organization, and

\begin{itemize}
\item neutral aid program that had the effect of bestowing substantial benefits upon religious institutions); Muller v. Allen, 463 U.S. 388 (1983) (upholding the use of tax revenues to reimburse parents for various school costs regardless of whether their children attended a public school or private religious institution).
\item However, one commentator suggests that “effects” no longer matter, at least when indirect aid is at issue, and that the only inquiries to be made under \textit{Lemon} and \textit{Zelman} are whether an aid program is facially neutral and whether public money flows through a private “circuit breaker.” Such a reading of the Court’s decisions essentially eviscerates what was left of \textit{Lemon} in the government aid context. See Ravitch, \textit{supra} note 2, at 383.
\item \textit{Wirtz} v. City of S. Bend, Ind., 813 F. Supp. 2d 1051 (N.D. Ind. 2011).
\item 813 F. Supp. 2d 1051 (N.D. Ind. 2011).
\item Id. at 1069.
\item Id. at 1062.
\end{itemize}
frequently occur at below-market levels, especially in an environment where a city is prone to give incentives to private entities in a proactive effort to revive a floundering economy. As such, it is difficult to envision a transfer that would survive the District Court’s analysis in *Wirtz*.

However, the *Wirtz* court, perhaps justifiably given the state of the doctrine, made several significant legal errors on the way to its ultimate conclusion. First, the court erred by relying heavily on an “endorsement” approach to reach its decision. The history of the endorsement test reveals that it performs well in some cases but fails to provide an adequate standard in others.10 Second and more importantly, the court, in finding South Bend’s perceived endorsement of a religious institution to be dispositive, failed to adequately consider the nature of South Bend’s economic development plan and the Supreme Court’s recent move toward a formal neutrality approach in its Establishment Clause jurisprudence. Indeed, in light of considerable doubt surrounding the Supreme Court’s Establishment Clause precedent and particularly the applicability of the endorsement analysis to various situations, the District Court should not have relied on the endorsement test to reach its decision. Moreover, the court’s endorsement analysis makes way for unfavorable policy outcomes in future cases. Formalistic adherence to the endorsement formulation of *Lemon*’s second prong in the context of economic development land transfers effectively precludes such transfers from taking place at all. This result is neither necessary nor desirable. For these reasons, a new standard is needed to evaluate economic development transfers to religious institutions, and this Note offers such a standard for consideration.

Part I of this Note explores the contours of the complicated history of the Establishment Clause by examining the creation of the *Lemon* test and the inconsistencies of the test’s subsequent application. The Note then explores Justice O’Connor’s endorsement modification to that test. Part I concludes with a discussion of the Supreme Court’s move toward embracing a principle formal neutrality. Part II provides a factual history of the transfer at issue and a detailed summary of the District Court’s opinion in *Wirtz*. Part III of the Note explains that the Constitution does not preclude economic development transfers to religious institutions. Part III also provides reasoning for why the endorsement test is patently insufficient to evaluate the constitutionality

10. *Id.* at 1068 (finding that the transfer would have the effect of leading the “objective well-informed, reasonable observer to think the City is endorsing St. Joseph’s High School . . .”).
of such transfers and offers a standard based on a principle of formal neutrality better able to guide future courts confronted with similar issues. Lastly, Part IV adds a brief conclusion to this Note.

I. BACKGROUND

A. The Modern Establishment Clause and Lemon

The Constitution instructs, “Congress shall make no law respecting an establishment of religion . . . .”11 This language spawned what is colloquially known as the “Establishment Clause,” a divisive and frequently contested portion of the law which guides the Nation. Unfortunately, the disputes arising under the clause concerning whether and when government went too far in establishing a religion produced a Supreme Court jurisprudence that, since its inception, failed to offer clear answers to important questions or substantial guidance to the lower courts and legislatures.

In 1947, the Supreme Court incorporated the Establishment Clause into the 14th Amendment, thus applying it to the states.12 In Everson v. Board of Education,13 the decision which accomplished incorporation, the Supreme Court, largely rejecting a prior jurisprudence of accommodation, pushed Establishment Clause doctrine toward a focus on neutrality and a stronger emphasis on the separation between church and state.14 Noting the broad interpretation afforded to the Establishment Clause, the Everson court stated that, at the very least, the constitutional prohibition on government establishment of a religion means:

[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church . . . or force him to profess a belief or disbelief in any religion . . . .15

11. U.S. Const. amend. I.
14. See Stockman, supra note 12, at 1811; see also William P. Marshall, “We Know It When We See It” The Supreme Court Establishment, 59 S. CAL. L. REV. 495, 495 (1986) (stating that since Everson, “it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common and characterizing the whole of Establishment Clause doctrine as ‘legendary for its inconsistencies’”).
Despite this attempt at articulating the meaning of the clause, commentators reflecting on *Everson* frequently offer harsh criticism of the jurisprudence that followed, with a specific emphasis on the decision’s failure to offer a definitive test with which to approach Establishment Clause issues.16

Following *Everson*, the Supreme Court decided disputes under the Establishment Clause by employing a rather simple analysis that asked: (1) whether the contested government action had a religious purpose, and (2) whether such action had a religious effect.17 In 1971, however, the Court decided *Lemon v. Kurtzman*18 and crafted a comprehensive test for adjudicating alleged Establishment Clause violations.19 In establishing the *Lemon* test, the Court synthesized its past precedent into a tripartite standard. The test states that in order to fall short of violating the Establishment Clause, the contested governmental action must: (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion, and; (3) not foster excessive government entanglement with religion.20

On its face, the *Lemon* test appears to offer that which *Everson* was lacking—a workable standard with an inherent flexibility that would prove useful going forward. Yet, the test produced quite the opposite outcome, and Supreme Court precedent varies wildly in articulating the exact role that *Lemon* plays in resolving Establishment Clause disputes.21 Charting the course of the *Lemon* test’s application, author William Marshall notes that in certain instances, the Court has asserted that the test must be strictly applied.22 In others, the Court refers to the

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16. See Stockman, *supra* note 12, at 1812. The Court’s failure, Stockman argues, led to a series of *ad hoc* analyses determined largely by the facts of any given case. Ultimately these analyses prevented the court from offering any simple unifying principles and plunged Establishment Clause jurisprudence into a realm of uncertainty thus leaving judges and legislatures to play a guessing game.

17. Frank J. Ducoat, Note, *Inconsistent Guideposts: Van Orden, McCreary County, and the Continuing Need for a Single and Predictable Establishment Clause Test*, 8 RUTGERS J.L. & RELIGION 14, *3 (2007). Similarly to other commentators, Ducoat proceeds to criticize the Supreme Court’s inability to present a unifying Establishment Clause principle and to characterize the Court’s post-*Lemon* jurisprudence as reaching results that are both inconsistent and bizarre. *Id.* at *4.


19. *Id.* at 612-13.

20. *Id.*

21. See Marshall, *supra* note 14, at 497. The Supreme Court’s ambiguous treatment of the *Lemon* test, Marshall argues, created “a patchwork of *ad hoc* decisions inside a legal framework that . . . lost its intellectual integrity.” *Id.* at 498.

Lemon test as offering mere guideposts for courts to follow. In still other circumstances, the Court decided Establishment Clause cases absent a Lemon analysis, bringing into question the test’s continued validity.

Realizing the problems stemming from the Court’s treatment of Lemon, the Justices have not shied away from offering criticism of their own. The eminently quotable Justice Antonin Scalia, expressing his dismay at the Lemon test’s persistence, once commented: “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 . . . attorneys.” In less colorful terms, the Court has criticized its jurisprudence by characterizing the Lemon test as sacrificing “clarity and predictability for flexibility.”

Although much-maligned, the Lemon test’s temporary disappearance from Supreme Court precedent in more recent years failed to produce noticeably more consistent results. Surveying cases following the test’s apparent abandonment in Lee v. Weisman, commentator Ann E. Stockman noted that none of the various other tests proffered by the Justices could garner a majority. As a result, inconsistencies again littered Establishment Clause jurisprudence. Stockman stated such inconsistencies were apparent in decisions which:

[U]pheld the entrance of public employees into private schools for the first time, struck down a separate school district made up solely of members of a culturally distinct religious sect, and approved the use of public space for religious messages on the same access policies of those allowed to use the space for non-religious messages.

Perhaps in implicit acknowledgment of the Court’s failure to adopt a

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24. See Marsh v. Chambers, 463 U.S. 783 (1983). In Marsh, the Court illustrated a tradition of opening legislative sessions with prayer spanning the entirety of the Nation’s history and then relied heavily upon that tradition to dismiss an Establishment Clause challenge to such a practice in the Nebraska legislature; see also Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (praising what Justice Scalia perceived as an “otherwise lamentable” decision for forsaking the Lemon analysis and stating, “The Court today demonstrates the irrelevance of Lemon by essentially ignoring it . . . .”).
new standard, the Lemon test returned after Weisman but remains floundering in uncertainty.\footnote{Indeed, the Lemon test appears in even the most recent of Establishment Clause decisions. See Salazar v. Buono, 130 S. Ct. 1803 (2010) (criticizing the lower court’s application of the effects prong of the Lemon test and remanding for proper consideration).}

Despite the unsettled nature of the Lemon test, it remains a crucial facet of Establishment Clause jurisprudence, and many modern analyses necessarily begin with a discussion of its three-prong test. As a result, the inconsistency that pervades the Supreme Court’s jurisprudence has been handed down to the nation’s circuit and district courts, who ultimately bear the burden of the division of the Justices. The test has not remained static, however, and the Court has offered important substantive changes to its analysis. As will be argued in an analysis of the decision in Wirtz, however, these changes, perhaps understandably, are often overlooked or overemphasized by the lower courts. The most relevant of these doctrinal changes are explored in the subsequent sections.

\textit{B. The Evolution of Lemon and O’Connor’s Endorsement Test}

The Establishment Clause is implicated in an extremely broad range of government actions. The complexity of the varied issues presented to the Supreme Court for adjudication, rather than solely the waffling positions of the Justices, can be counted as a cause of the ambiguity and inconsistency that plagues the doctrine. Indeed, the nature of the range of issues the Establishment Clause covers likely accounts for the flexibility incorporated into the Lemon analysis. Due to this inherent complexity, the Court has, over time, developed nuanced approaches to the separate issues that fall within the ambit of the Establishment Clause.\footnote{Establishment Clause doctrine can be broken down and organized into several distinct parts. Among these are cases which involve organized religious exercises in public schools, organized religious exercises outside of public schools, the teaching of religious concepts in public schools, public displays of religious symbols by both privates and state actors, and government aid to religious institutions and religion itself. See generally RAVITCH, supra note 2.} As such, there is a danger that inheres to a lower court’s strict, formalistic reliance upon any one particular approach, especially when it applies that approach to factual scenarios that fall outside of its breadth. By adhering to any single approach to decide all disputes, a lower court risks applying a standard, which may be perfectly adequate to decide one type of Establishment Clause issue, to an issue for which the standard is wholly unsuited. This issue is discussed further in relationship to the Wirtz decision below. For present
purposes, however, a discussion of the “endorsement test,” one of the most significant additions to Lemon, is in order.

In 1984, the Supreme Court decided Lynch v. Donnelly,31 an Establishment Clause case involving the public display of a Nativity scene. The facts of this case are surprisingly simple. Each year, the city of Pawtucket, Rhode Island erected a Christmas display in a park owned by a nonprofit organization in the city’s shopping district.32 The Nativity scene at issue constituted a facet of a larger compilation that included secular messages such as “Seasons Greetings” and symbols such as Christmas trees and a Santa Claus house.33 Certain Pawtucket citizens and individual members of the American Civil Liberties Union challenged the inclusion of the Nativity scene in the display, alleging an Establishment Clause violation.34 Chief Justice Burger focused on the secular purpose of the display as a whole, and through his application of the Lemon test, concluded that the city had not violated the Establishment Clause.35 This opinion garnered the support of a plurality of Court.

Lynch, however, finds its historical significance in the concurring opinion of Justice Sandra Day O’Connor. Satisfied with the ultimate result but believing Lemon’s standard to be in need of refinement, Justice O’Connor proposed what is now commonly known as the “endorsement test.”36 Justice O’Connor stated that the dispositive issue in Lynch was whether Pawtucket endorsed Christianity by including the Nativity scene in its Christmas display and such a determination, she argued, necessarily required an inquiry into the objective and subjective components of the display.37 Subjectively, Justice O’Connor asserted, a court must ask what message the government intended to convey.38 Objectively, a court must consider what message the government’s action actually conveyed.39 In proposing the standard, Justice O’Connor stated, “The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of

32. Id. at 668.
33. Id.
34. Id. at 671.
35. Id. at 685. Chief Justice Burger succinctly summarized the plurality’s holding by stating, “We are satisfied that the City has a secular purpose for including the crèche, that the City has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.” Id.
36. Id. at 690 (O’Connor, J., concurring).
37. Id.
38. Id.
39. Id.
endorsement or disapproval." According to Justice O’Connor, the principal problem with government endorsement of religion is that it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

Following its creation in *Lynch*, the endorsement test appeared in several of Justice O’Connor’s concurring and dissenting opinions. The contexts in which she employed the standard include challenges to prayer in public schools, government religious displays, private religious displays on public property, and the Pledge of Allegiance. In these subsequent cases, Justice O’Connor also elaborated on and clarified her endorsement analysis by asserting that the relevant inquiry should hinge upon “whether an objective observer, acquainted with the text, legislative history, and implementation of the [contested action], would perceive it as a state endorsement of [religion].” Despite the harshness of the criticism of the Court’s establishment doctrine in general, the endorsement test enjoyed a reasonably favorable reception by commentators. Though never adopted as the definitive test or even the

40. Id.
41. Id. at 688. As discussed below, it was precisely this language that the District Court in *Wirtz* relied upon in deciding to enjoin the City of South Bend’s intended transfer.
42. See *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O’Connor, J., concurring) (finding that a state statute authorizing a daily period of silence in public schools for meditation or voluntary prayer had the impermissible effect of endorsing religion); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 627, 632 (1989) (O’Connor, J., concurring in part and dissenting in part) (stating that the placement of a Nativity scene in the lobby of the county courthouse conveyed a message of government endorsement of Christianity but that a holiday display of a menorah, a Christmas tree, and a sign saluting liberty did not); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O’Connor, J., concurring) (asserting that a state’s tolerance of a display of crosses erected by the Ku Klux Klan on public property would not lead the reasonable observer to conclude that the state endorsed religion); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44-45 (2004) (O’Connor, J., concurring) (asserting that the phrase “under God” as contained in the Pledge of Allegiance is merely a ceremonial reference and does not amount to endorsement of religion).
43. *Wallace*, 472 U.S. at 76.
44. See, e.g., *Gey*, supra note 1, at 738 (asserting that “[the endorsement test’s] statements of separationist principle nicely encapsulate the structural function of the Establishment Clause, which is designed to divorce political participation from religion. The prohibition of establishment puts everyone on an equal political footing, regardless of their idiosyncratic religious beliefs or lack of belief. . . . Justice O’Connor’s explanation of her endorsement analysis provided a rare articulation of this structural reality.”); see also, David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 584 (2002) (praising the endorsement test for avoiding formalism and for paying attention to the effects of various government programs); see generally *Marshall*, supra note 14.

Of course, the endorsement test suffers many detractors who claim that the test is no panacea for the
most important facet of a Lemon analysis, the endorsement test was also, on occasion, well-received by Supreme Court majority opinions.45

It is clear, however, that the endorsement test is not applied in every Establishment Clause case, and the test’s absence speaks to its patent inapplicability to some Establishment Clause issues. Perhaps most telling of this assertion are the instances where even Justice O’Connor did not resort to an endorsement analysis46 or instances in which O’Connor expressed doubt in continuing to use the Lemon analysis at all.47 Judging by a reading of her opinions, Justice O’Connor would agree that applying her endorsement test is simply futile in certain scenarios. Indeed, in Board of Education of Kiryas Joel Village School District v. Grumet,48 Justice O’Connor warned against continuing the search for a “Grand Unified Theory” with which to approach Establishment issues and further stated that the Court runs the danger of doing more harm than good by “shoehorning new problems into a test that does not reflect the special concerns raised by those problems.”49

What is also clear, however, is that Justice O’Connor’s endorsement test endures as being particularly useful in deciding disputes arising in the contexts in which the test has traditionally been applied—that is, cases involving religious symbols or government speech.50 In these types of cases, particularly those considering the many ills of Lemon. See Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test, 86 Mich. L. Rev. 266, 268 (1987) (asserting, “If the ‘no endorsement’ test ultimately offers cause for hope . . . the hope is that the test’s deficiencies, once perceived, will prompt jurists and scholars to leave behind what has proven to be a doctrinal dead end and turn their attention to exploring more promising avenues that may lead toward an adequate establishment doctrine”); see also, Cole, Faith and Funding: Toward a Regressivist Model of the Establishment Clause, at 584 (after first praising the test, Cole notes that it has not be an unmitigated success because it “provides few clear guidelines, and appears to turn on judges’ inevitably subjective assessments of a hypothetical reasonable observer’s perceptions about the cultural significance of state practices.”).

45.  See, e.g., Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (citing O’Connor’s Lynch concurrence for the proposition that “the purpose prong of the Lemon test asks whether government’s actual purpose is to endorse or disapprove of religion”).

46.  Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding as constitutional an Ohio school voucher program that had the effect of largely benefiting sectarian schools, a decision with which Justice O’Connor concurred).

47.  Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring) (characterizing the Lemon test as too vague to be useful and arguing for the creation of several narrow tests to be applied in various areas).


49.  Id. at 718. Furthermore, O’Connor’s concurrence illustrates her belief that neutrality, above all other principles, should guide government decisions regarding religion. As such, O’Connor implored the Supreme Court to turn away from its increasing animosity toward religion. Id. at 717-719.

50.  See supra note 42 and accompanying text.
constitutionality of the public display of religious symbols, the endorsement test is alive and well. 51 Given the endorsement test’s limited applicability, however, the Supreme Court has often turned to other means of deciding some Establishment Clause disputes. Specifically, the Court’s modern focus centers on principles of formal neutrality.

C. The Supreme Court Moves toward Formal Neutrality in Aid Cases

As this Note now moves to discuss the Supreme Court’s recent jurisprudence of formal neutrality, it is worth mentioning for clarity’s sake that Justice O’Connor’s endorsement test itself is rooted in neutrality, at least in one sense of the term. Indeed, the key focus of the endorsement test is to ensure that the government appears to be acting absent any intent to endorse a religion at the expense of alienating nonadherents. Stated another way, it is absolutely crucial to the endorsement analysis that the contested government action appears to be neutral. 52 In contrast, the doctrine of formal neutrality is concerned with whether the government acted absent a motivation to promote or burden religion without regard to the perceptions of the reasonable observer. Philip Kurland classically defined this principle in the following manner:

The [free exercise and establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden. 53

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51. See, e.g., Salazar v. Buono, 130 S. Ct. 1803 (2010) (criticizing the lower court’s application of the effects prong of the Lemon test and remanding for proper consideration); Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (holding that memorial crosses placed by the government along Utah highways endorsed Christianity); Cnty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 616 (1989) (displaying a cross in a central location in a government building on Easter was the prototypical example of a display conveying the message of government endorsement of Christianity); Buono v. Norton, 371 F.3d 543, 549 (9th Cir. 2004) (holding an eight-foot cross designed to be a war memorial located on government owned land violated the Establishment Clause); Trunk v. City of San Diego, 629 F.3d 1099, 1125 (9th Cir. 2011) (holding that a war memorial containing a large white cross primarily conveyed a message of government endorsement of religion that violated the Establishment Clause).

52. Professor Steven Smith refers to this principle as “symbolic neutrality.” Smith asserts that the key question asked by the endorsement test is not whether government acted with the intent to aid religion, rather, the test boils down to an inquiry of whether “government has attempted to depart from . . . an appearance . . . of neutrality.” See Smith, supra note 44, at 319.

As briefly mentioned in the preceding section, the Supreme Court necessarily decides the multifarious Establishment Clause issues with varied approaches. Among these approaches is formal neutrality as defined above. This approach has become increasingly prevalent in the line of cases where the Court explores the constitutionality of government aid that benefits religious institutions. Of course, “aid” may be broadly defined to encompass the whole of Establishment Clause jurisprudence, but for purposes of the following discussion, “aid” should be construed as financial and other beneficial support provided to a religious institution by the government or a governmental entity. Traditionally, the term “aid,” as used here, would implicate those cases involving government grants, subsidies, tax exemptions, and other types of general funding. As explained below, the doctrine in this area of Establishment Clause jurisprudence has undergone considerable changes, and the Court’s modern approach of formal neutrality permits government aid to religious institutions, at least when that aid ostensibly flows through the filter of a private decision-maker.

Formal neutrality did not always dominate the Court’s decisions in government aid cases. Shortly after the creation of the Lemon test, the Court relied upon a separationist approach when deciding cases in which government aid benefited schools with a religious affiliation. In Meek v. Pittenger, for example, the Court ruled a program that promoted the mere lending of instructional materials to religious schools unconstitutional. Indeed, even a cursory review of the Court’s

Laycock did not personally subscribe to Kurland’s formulation of neutrality. Instead, Laycock advocated for a form of neutrality he described as “substantive.” Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). Laycock defined substantive neutrality to mean that the Establishment Clause requires government “to minimize the extent to which it either encourages or discourages belief or disbelief, practice or nonpractice, observance or nonobservance.” Id. at 1001. At its most basic level, “substantive neutrality” means that “religion is to be left as wholly to private choice as anything can be.” Id. at 1002. This formulation of neutrality, or at least variations of it, has garnered some favor among commentators in the field. See, e.g., Frank S. Ravitch, A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause, 38 Ga. L. Rev. 489, 504-505 (2004). However, a complete discussion of the nuances of the many distinct formulations of neutrality offered by several commentators is beyond the scope of the present Note.

54. See supra note 28 and accompanying text.
55. See RAVITCH, supra note 2, at 309 (defining “aid” in the same manner as it is defined in the present Note).
56. See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (striking down three programs under the “effects” prong of the Lemon test because the aid indirectly received by sectarian schools could be easily diverted to support the religious aspects of a sectarian school even if such a result was not mandated).
58. Id. at 371-371.
decision in *Meek* and other cases in the years following *Lemon* reveals a majority of Justices consistently wary of the possible constitutional problems stemming from a religious institution’s use of government aid, no matter if that aid was indirect or not. 59 Highlighting such wariness, in *Aguilar v. Felton*, decided in 1985 and later overruled by a case discussed below, the Court struck down a section of a federal statute that required federally funded remedial education teachers to offer instruction to certain students regardless of whether that student was enrolled at a public institution or at a private religious school. 60

It is important to note that although the flexibility of the *Lemon* test and the strength of some early Establishment Clause precedent 61 afforded the Supreme Court the ability to erect a “wall of separation” in the aid cases mentioned above, the Establishment Clause does not strictly necessitate that outcome. On the opposite end of the requirement to ensure some divide between the state and religion, it would be similarly impermissible and unfair to cut off religious institutions from all forms of public benefit under all circumstances, and the Supreme Court expressly cautioned against such an approach. 62 Thus, the Court has long recognized that government policies with legitimate secular objectives are not objectionable merely because they incidentally benefit religion. 63 Furthermore, commentators note that there is no controversy surrounding many of the avenues through which a religious institution may enjoy public benefits, such as tax subsidies received through nonprofit tax exemptions, individual deductions taken by members of religious institutions, and more general public benefits such as police

59.  *Id.*; see also, *supra* note 56 and accompanying text considering *Nyquist*; Wolman v. Walter, 433 U.S. 229 (1977) (striking down programs that loaned educational materials directly to students attending religious institutions because the schools incidentally enjoyed the benefit of the equipment).

60.  *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997). Specifically, the Court found that this program resulted in a violation of *Lemon*’s “entanglement” prong due to the fact that the aid was often given to these students on school premises in pervasively sectarian institutions and would therefore require consistent government inspection to ensure that the teachers were not injecting their instruction with a religious message. *Aguilar*, 473 U.S. at 411-413.

61.  *Everson v. Bd. of Educ. Of Ewing Twp.*, 330 U.S. 1, 16 (1947) (asserting that the Establishment Clause was intended to erect a wall of separation between Church and State).

62.  The *Everson* Court, despite its “wall of separation” language, also argued that the state could not penalize religions by handicapping them. *Id.* at 18.

63.  See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (stating, “The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.”).
Given the malleability of Establishment Clause jurisprudence and the availability of public benefits to religious institutions generally, it should come as no surprise to find the sway of the Supreme Court edging ever closer to a jurisprudence grounded in principles of formal neutrality. Quite clearly, the last few decades have whittled away at the strong separationist principles guiding the Court of old.

Beginning in the mid-1980s and into the 1990s, the Court exhibited through a series of decisions a greater willingness to defer to the legislature when it came to programs which made government funds available to private individuals despite the fact that the funds given to such individuals may find their way to benefiting religious institutions. In these cases, however, the Court retained a focus upon the practical effects of the contested programs under *Lemon*’s second prong. So, while deferring largely to the facial neutrality of programs in many cases, the Court remained unwilling to completely depart from the *Lemon* analysis.

*A gostini v. Felton*, a seminal decision in the Court’s Establishment Clause jurisprudence, set the Supreme Court on its path away from *Lemon* and toward a true formal neutrality approach in aid cases. The dispute in *Agostini* arose from the same program that gave rise to the challenge above in *Aguilar*, which concerned the constitutionality of a government program that provided on-site instruction by federally funded teachers to children attending religious institutions. The practical effect of the Court’s decision to strike down the program in *Aguilar* was to force off-site teaching of the students who benefited from the courses, thereby substantially increasing costs while simultaneously decreasing the efficiency of providing instruction.

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64. See Cole, supra note 44, at 580.
66. See, e.g., *Zobrest*, 509 U.S. at 12.
67. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (engaging in a complete *Lemon* analysis to consider the constitutionality of the Adolescent Family Life Act, which awarded grants to public agencies as well as private religious organizations that provided services relating to teen pregnancy).
69. In an effort to keep public employees from being physically present on school grounds, instruction to students of religious schools who participated in the program was conducted in vans converted into classrooms. The instruction also occurred via computer-aided instruction on campus.
Citing these burdens and the changes in Establishment Clause jurisprudence since the Court decided *Aguilar*, the proponents of the program appealed the permanent injunction preventing public employees from teaching in religious schools. The *Agostini* Court, in an opinion delivered by Justice O’Connor, overruled the decision to strike down the program in *Aguilar*.

The importance of *Agostini* is not merely that it overruled precedent, but also that it brought considerable modifications to the *Lemon* analysis in aid cases. Specifically, the third prong of the *Lemon* test was subsumed into the second prong, and the Court changed the effects analysis. This change came through the Court’s distillation of the effects prong into three elements considering whether the aid: (1) resulted in a governmental incentive to undertake religious indoctrination; (2) defined its recipients by reference to religion; and (3) created excessive government entanglement with religion. Given that it is difficult to imagine a facially neutral program that would violate the first and second elements of the test, the *Agostini* modification to *Lemon* illustrates a Court in the process of taking substantial strides toward an approach with formal neutrality at its core.

D. Formal Neutrality Embraced in *Zelman*

As could be expected after *Agostini*, the modern approach to Establishment Clause cases involving government aid hinges almost entirely upon whether the contested program from which the aid is dispensed is formally neutral. When a program satisfies facial neutrality, the Court has been remarkably willing to set aside the considerations that guided former opinions, and the Court’s recent decisions in the aid context have gone further than ever before in dispensing with effects-laden inquiry under *Lemon*.

These modifications increased the cost of running the program considerably. *Agostini*, 521 U.S. at 213.

70. Id. at 214.
71. Id.
72. Id. at 222-25.
73. Id. at 234-35.
74. Though the trend toward formal neutrality is unmistakable, the Court has not been entirely consistent in its application of formal neutrality principles. At times, the Court has deferred largely to the will of the state legislature regarding certain aid programs, even if facets of that program relied on strict separationist principles. See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (upholding a state statute that denied state scholarship funds to a student who wanted to pursue a degree in theology at a Christian institution).
The decision in *Mitchell v. Helms*, for example, illustrates the sea of change that took place in the Court’s approach to government aid to religious institutions. The *Mitchell* Court considered an Establishment Clause challenge to a federal program that lent educational materials and equipment directly to public and private schools, many of which were religiously affiliated. The enrollment of a participating school determined the amount of aid that particular school received. In a plurality opinion, four Justices applied the *Agostini* test and found that the program passed constitutional muster because, among other things, a student’s decision to enroll in a participating religious school amounted to a “private choice” and because the program made funds available to public and private schools equally. The plurality also contended that the question of whether the funds were divertible directly to a religious organization is immaterial to the Establishment Clause analysis because indoctrination by means of a private school diverting such aid could not be attributed to the government. As such, the Court showed a tendency to value the formal neutrality of government action far more than the actual effects of the government program when deciding whether the program complied with the Establishment Clause.

Finally, the Court took its most overtly formally neutral position in *Zelman v. Simmons-Harris*. *Zelman* concerned a challenge to an Ohio school voucher program that distributed tuition assistance to families in need. Upon receiving aid, the parents of a child had the sole discretion to determine where that aid was spent. During the 1999–2000 school year, eighty-two percent of private schools participating in the program were religiously affiliated and ninety-six percent of the students participating in the program attended private religious schools. Again, a plurality of the Court upheld the aid program.

The *Zelman* plurality summarized prior precedent and succinctly stated that an Establishment Clause challenge cannot defeat “a
government aid program [that] is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."\(^{83}\) The Ohio voucher program, the Court stated, was a program of "true private choice," and as such, it did not violate Establishment Clause principles.\(^{84}\) Thus, even though the program had the practical effect of bestowing considerable benefits upon religious schools, the Court’s emphasis on formal neutrality proved dispositive.

Having traced the trajectory of the Supreme Court’s Establishment Clause jurisprudence in both the endorsement and the aid contexts, an analysis of the opinion of the District Court for the Northern District of Indiana in *Wirtz* is appropriate. As illustrated below, the true tension in *Wirtz* centered upon whether it would be Justice O’Connor’s traditional endorsement analysis or the Supreme Court’s recent move toward formal neutrality culminating in *Zelman* that would determine the constitutionality of South Bend’s intended transfer. The *Wirtz* court opted for endorsement.

### II. STATEMENT OF THE CASE

#### A. The Factual History of *Wirtz* v. City of South Bend

The City of South Bend, Indiana, developed a comprehensive city plan covering a timeline of twenty years, addressing the entire geographic area of the city, and stating various policies and goals conducive to the city’s success in the first decades of the 21st Century.\(^{85}\) Plans for economic development, of course, formed an integral facet of the plan. In cultivating economic success over recent years, South Bend engaged in a variety of transactions with non-religious private entities, secular public schools, and a religious organization.\(^{86}\) In 2006, South Bend transferred a building it previously purchased to a locally owned business for $100,000.\(^{87}\) Two more transactions followed in 2007. First, when the City made a below-market transfer to another locally owned business in order to allow that business to expand and, second, when the City transferred a parking lot for two dollars to a private entity.

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\(^{83}\) Id. at 652.

\(^{84}\) Id.


\(^{86}\) *Wirtz* v. City of S. Bend, Ind., 813 F. Supp. 2d 1051, 1060 (N.D. Ind. 2011).

\(^{87}\) Id. at 1061.
in order to promote condominium and office development. 88 Throughout 2009 and into 2010, the City either flatly donated or transferred land for nominal consideration to local physicians, local artists, a regional hospital, a city development commission, and a public college. 89 Most recently, South Bend transferred land and $3 million in combined city and state funds to the Salvation Army, an avowedly Christian organization dedicated to spreading the gospel of Christ and meeting the needs of the underprivileged. 90

In the midst of these attempts at revitalization, Saint Joseph Regional Medical Center, a hospital located in downtown South Bend, decided to leave the city and thereby to vacate the twenty-one acres on which it stood. 91 Early in the 2000s, St. Joseph’s High School (St. Joseph’s), a private school overseen by the Catholic diocese, expressed interest in the land as a possible site for a $35 million project that would result in the creation of a new high school and athletic complex. 92 Adjacent to the land vacated by the medical center stood a Family Dollar store, which was in full operation upon a lot that was not listed for sale. The owners of that store were approached by St. Joseph’s regarding its interest in purchasing the land, but the parties failed to reach an agreement for its sale. In 2007, South Bend sought to induce St. Joseph’s to bring its substantial project to the heart of the City as a facet of its economic revitalization plan, and as such, the City proposed a purchase of the Family Dollar parcel, intending to then transfer the land to St. Joseph’s. 93

The South Bend Common Council passed an ordinance authorizing the purchase of the Family Dollar parcel for $1.2 million with the intent of transferring the land to St. Joseph’s. The City used funds from its economic development income tax fund to purchase the land. 94 As originally conceived, the transaction began with the City first transferring the land to an Indiana non-profit corporation, which would then transfer the land to St. Joseph’s subject to the condition that the public would retain the rights to certain uses of the football field and track for a period of ten years. 95 The transfer agreement also addressed

88. Id.
89. Id. at 1060-61.
90. Id. at 1060.
91. Id. at 1053-54.
92. Id. at 1054.
93. Id.
94. Id.
95. Specifically, for a period of ten years, St. Joseph’s was contractually bound to allow certain public uses which included allowing access of community organizations to the athletic
concerns regarding the sectarian nature of St. Joseph’s High School and expressly stated that “[n]o participation in any religious activity shall be required of any participant in any service provided [by St. Joseph’s to the public relating to the public’s use of the track and athletic facilities].”

Intending to use the Family Dollar parcel to build parts of its football stadium, track, and a parking lot, St. Joseph’s ultimately purchased the Medical Center’s former property and began constructing its new high school. Prior to completion of the transfer of the Family Dollar parcel, however, four taxpayers brought an action to enjoin the transfer under the argument that South Bend’s intended action would violate both the Establishment Clause of the United States Constitution and Article 1, sections 4 and 6 of the Indiana Constitution. Ultimately, the District Court for the Northern District of Indiana agreed.

B. The Opinion of the District Court for the Northern District of Indiana

On September 7, 2011, the District Court for the Northern District of Indiana granted a preliminary injunction to prevent the imminent transfer of the Family Dollar parcel from the City of South Bend to St. facilities, providing summer sports camps for area youth, and coordinating with local youth sports organizations to make available the athletic facilities for their use. Though tangentially referred to in the District Court’s opinion at times, the specifics of the public uses allowed under the original transfer agreement are never set forth in the opinion. As such, I contacted counsel for the City of South Bend and subsequently received the stipulated facts of the case. To my knowledge, the stipulated facts are not available online at this time.

96. This language also is contained in the transfer agreement as represented in the stipulated facts of the case, and as stated in the previous note, these facts may not be available to the public generally absent the submission of a public records request to the clerk of the District Court for the Northern District of Indiana.

97. Wirtz, 813 F. Supp. 2d at 1054.

98. Id.

99. After the District Court granted the preliminary injunction in Wirtz, South Bend sought to cure the District Court’s perceived Establishment Clause violation and moved to amend or dissolve the injunction by proposing a transfer that would be made via an open bidding system. South Bend intended the transfer to be made pursuant to an Indiana Statute that would allow the City to reject an offer from the highest bidder if it could provide an explanation for so doing. Prospective bidders were to be evaluated on their ability to use the property in a way that furthered the City’s economic development plan consisting of the construction of St. Joseph’s new high school and its accompanying athletic complex. St. Joseph’s was prepared to pay $345,000 for the parcel under this new scheme. The District Court, however, remained unconvinced that such a transfer did not violate the Establishment Clause and again held that the objective, well-informed, reasonable observer would view the transfer as the City’s express endorsement of religion. As such, the court denied South Bend’s motion to amend or dissolve the injunction. See Wirtz, 813 F. Supp. 2d 1051.
Though neither party considered the Lemon test necessary to deciding the case, the District Court disagreed and noted the Seventh Circuit’s reliance on Lemon in several previous decisions. As such, the District Court conducted the Lemon analysis, focusing almost completely on the effects prong of the test.

The District Court proceeded to conduct its analysis of Lemon’s effects prong under the guidance of Justice O’Connor’s endorsement test. In making that decision, the District Court necessarily adhered to what it perceived to be the controlling formulation of Lemon under its court of appeals, the Seventh Circuit. The court noted several cases in which the Seventh Circuit relied upon the endorsement analysis to decide Establishment Clause disputes. These cases included an evaluation of a display of the Ten Commandments, a state statute mandating a period of silence in public schools, a statue of Christ located in a city park, and mandatory religious presentations to government employees authorized by a county sheriff.

Ultimately, the District Court for the Northern District of Indiana concluded that the proposed transfer violated the Establishment Clause. The District Court stated:

100. Id.
101. Id. at 1057.
102. The court stated that neither the secular purpose nor the entanglement prongs of Lemon were at issue in the case. Specifically, the court noted, “[The Plaintiffs] don’t contest the City’s secular purpose to revitalize the East Race area or contend that the proposed transaction will excessively entangle a governmental body with a religious institution. This allows the court to focus entirely on the second prong, namely, whether the transfer of the Family Dollar parcel will have the principal or primary effect of advancing or inhibiting religion.” Id.
103. Though the City contended that the endorsement analysis was no longer a valid approach to deciding a dispute arising under the effects prong, the District Court disagreed and stated that it was not the court’s place to dispose of Supreme Court precedent. Id. at 1058 (stating “it isn’t the role of a district court to decide Supreme Court precedent has been implicitly overruled”).
104. Id. (stating that the endorsement analysis was “alive and quite healthy” in the Seventh Circuit).
105. Books v. Elkhart Cnty., Ind., 401 F.3d 857, 867 (7th Cir. 2005) (finding that the display was constitutional because, among other things, it did not have the principal or primary effect of endorsing religion).
106. Sherman ex rel. Sherman v. Koch, 623 F.3d 501 (7th Cir. 2010) (holding that the primary effect of the state statute did not have the effect of advancing or inhibiting religion).
107. Freedom from Religion Found., Inc. v. City of Marshfield, Wis., 203 F.3d 487 (7th Cir. 2000) (finding that the location of the statue of Christ violated the establishment clause by creating a perception of city endorsement of religion).
108. Milwaukee Deputy Sheriffs’ Ass’n v. Clarke, 588 F.3d 523 (7th Cir. 2009) (finding the Establishment Clause was violated when an authority figure invited a Christian organization that engaged in religious proselytizing to speak on numerous occasions at mandatory government employee meetings).
The proposed Family Dollar transaction has the appearance of putting adherents and nonadherents on different footing, which would lead an objective, well-informed, reasonable observer to think the City is endorsing St. Joseph’s High School, the local Catholic community, or the Diocese that operates the high school. To the adherents, namely the supporters of St. Joseph’s High School and the Diocese, this below-market transfer of real estate could be considered an endorsement of their undertaking to rebuild and expand the high school. A well-informed and reasonable nonadherent would see the below-market transfer as a direct endorsement of a particular religion.109

While the Wirtz Court’s endorsement analysis was the key to its holding that the intended transfer was unconstitutional, the court also addressed the Supreme Court’s formal neutrality cases in response to an argument by the City. However, these cases, the court reasoned, did not secure the constitutionality of South Bend’s intended transfer under the Establishment Clause.110 The City argued that, under the neutrality cases discussed above, the transfer of the Family Dollar parcel was constitutional as but one facet of a program consisting of multiple transfers, none of which relied upon the transferee’s religious affiliation or lack-thereof.111 The District Court was not persuaded.112 The court honed in on the ad hoc nature of the transfer to distinguish this case from the program considered in Zelman.113 Particularly, the District Court found two problems with the ad hoc transfers. First, the ultimate decision to make a land transfer rested in the hands of independent government decision-makers instead of private individuals.114 Second, each single transfer lacked specific, neutral criteria to guide the government in making the transfer.115 As such, the District Court held that the transfer failed to satisfy the Zelman standard because it was not part of a neutral program and because the aid intended for St. Joseph’s did not reach the school through the private choices of individuals.

In its analysis, the District Court frequently cited the below-market

110. Id. at 1067-68.
111. Id. at 1063-64.
112. The court did note that the City had a pattern of development transfers that was neutral toward religion but found that the City’s intent, which the court agreed was secular in nature, was largely immaterial because the reasonable observer would view the transaction as a signal of the City’s endorsement of the Catholic faith. Id. at 1068.
113. Id. at 1062-1063.
114. Id. at 1067.
115. Id. at 1067-68.
nature of South Bend’s intended transfer. The court asserted that this below-market transfer would be akin to the City giving an unrestricted gift of cash to St. Joseph’s. This, the court stated, violated the Establishment Clause because such a gift to a pervasively sectarian institution may result in religious indoctrination. Later in its opinion, the court again cited the below-market nature of the transfer as grounds for establishing that the Establishment Clause would be violated because the City, despite the conditions allowing for public use of the property, would be giving more than it was getting. As such, the court found that “a well-informed and reasonable nonadherent would see the . . . transfer as a direct endorsement of a particular religion.” Given the frequency of the court’s citation to the below-market nature of the transfer, this trait of the proposed agreement was ostensibly of singular importance to the court’s analysis. As stated above, enjoining economic development land transfers to religious institutions due to their below-market nature will preclude such institutions from receiving many, if not most, transfers that would benefit a city’s plan for economic revitalization. As Part III explains, such a result is not mandated by the Constitution and is not desirable from a policy perspective.

III. ANALYSIS

A. Lower Court Precedent Supports the Constitutionality of Public Land Transfers to Religious Institutions

At the outset, it is necessary to note that economic development land transfers to religious institutions do not fit comfortably within any single Establishment Clause analysis proffered by the Supreme Court, and looking to the decisions of the circuit and district courts also fails to provide much in the way of guidance. Surprisingly, few courts have decided cases concerning the constitutionality of land transfers to religious institutions, especially in the economic development context. Indeed, the Wirtz court noted that neither the parties nor the court found

116. Id.
117. Id.
118. Id. at 1065. The City, while recognizing the below-market nature of the transfer, implored the court to consider the non-economic consideration that would benefit South Bend, namely the choice of St. Joseph’s to bring its $35 million project downtown. Without the inducement of the transfer of the Family Dollar parcel, the City argued that a ghostly twenty-one acre vacancy would have marred property at the heart of the city. Id. at 1065.
119. Id. at 1068.
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any case law directly on point.  
However, this section of the Note illustrates that lower courts confronting similar issues tend to rule that public transfers to religious institutions do not violate the Establishment Clause.

Perhaps the most relevant of these cases is Southside Fair Housing Committee v. City of New York. In Southside, the Second Circuit Court of Appeals considered the question of whether the sale of urban renewal property to a Hasidic community for purposes of developing, among other things, a 6,000-seat synagogue violated the Establishment Clause. The Second Circuit ruled in favor of the transfer, basing its decision in part on the fact that the public in general would benefit from the development of depressed land. Moreover, the Second Circuit found that the primary effect of the transfer to the Hasidic community in Southside was not to advance religion but to revive a blighted area of the city. Thus, the transfer survived Establishment Clause scrutiny.

The Supreme Court of Minnesota reached a similar result in In Re Condemnation by the Minneapolis Community Development Agency. The dispute in that case arose after the Minneapolis Community Development Agency filed a petition to condemn property as part of a program to develop a city block in downtown Minneapolis. The planned restoration project had the effect of conferring a benefit on the local Young Men’s Christian Association (YMCA), and as such, the condemnation was challenged under the Establishment Clause. After applying the Lemon test, the court held that the condemnation was

120. Id. at 1061.
121. The District Court in Wirtz considered this case but found that it was distinguishable from South Bend’s intended transfer. Specifically, the court found the fact that the land in Southside was sold for market value to be critical in making the distinction between the two cases. Since the transfer in Wirtz was to occur at below-market levels, the court reasoned that Southside was of very limited applicability. Id. at 1061. The Wirtz court was, however, selective in its treatment of Southside. First, the Second Circuit considered the sale price of the land only in terms of deciding whether the sale violated the effects prong of Lemon by impermissibly subsidizing the primary religious mission of the Hasidic community. Southside Fair Hous. Comm. v. City of New York, 928 F. 2d 1336, 1348 (2d Cir. 1991). The transfer of the Family Dollar parcel in Wirtz for purposes of building a football field and track could hardly be said to amount to a subsidy of the primary religious mission of the Catholic faith. Second and more importantly, the District Court did not even mention the Second Circuit’s endorsement analysis. That portion of the Southside opinion is discussed below.
122. Southside, 928 F.2d at 1356.
123. Id. at 1347.
124. Id. at 1348-51.
125. 439 N.W.2d 708 (Minn. 1989).
126. Id. at 709.
127. Id.
constitutional because, among other things, the comprehensive plan did not “fund a specifically religious activity.” Moreover, in recognizing that the YMCA would enjoy incidental benefits stemming from the condemnation, the court stated: “Of course, there are advantages to the YMCA . . . just as there are advantages to the project in having a health and recreational center as an anchor. But these indirect considerations do not impose upon the neutrality required by the establishment clause.”

One commentator notes that land transfers to religious institutions are also frequently upheld in eminent domain cases where the challenger asserts that transferring property to religious entities does not amount to a constitutional “public use.” Specifically, courts upholding such transfers tend to tout the public benefits that flow from religious organizations to local communities. These benefits conferred upon the public make religious institutions important components of their respective communities, and as such, courts often find the public purpose requirement of eminent domain takings satisfied. Such public benefits would also undoubtedly flow from economic development land transfers to religious institutions whose very purpose is to stimulate the local economy as a whole. As such, the Wirtz court’s contention that the public gets less than it gives when a religious institution receives a below-market transfer appears to be refuted, at least in some factual scenarios.

These cases serve to reinforce the assertion above that the decision in Wirtz was neither necessary nor desirable. Courts have found economic development transfers to religious institutions capable of satisfying the Lemon test, and in the eminent domain cases, courts did

128. Id. at 713.
129. Id.
131. Id. at 1125. Specifically, Haddad names hospitals operated by religious organizations, private religious schools, drug rehabilitation centers, universities, homeless shelters, day care centers, and orphanages as examples of the public benefits conferred upon communities by religious institutions. Id.
132. Id. at 1125-27. Haddad also notes that the analysis of the “public purpose” requirement in eminent domain cases is strikingly similar to the analysis in which courts engage when deciding whether the “secular purpose” prong of the Lemon test has been satisfied in Establishment Clause cases. Id. at 1120. As such, though the eminent domain cases do not necessarily speak to the validity of economic development land transfers under the Establishment Clause, the fact that courts in each type of case consistently uphold such transfers is at least evidence that the public is receiving as much as it is giving in these transactions.
not hesitate to point to the wide range of benefits that often stem from land transfer transactions between the government and religious organizations. Ostensibly, South Bend’s transfer to St. Joseph’s would also have provided benefits to the City, namely furthering South Bend’s comprehensive development plan by preventing a large tract of land in the heart of the City from remaining vacant and by providing access to recreational facilities to the community. Of course, the mere existence of incidental benefits of a transaction is insufficient to cure a constitutional problem. Accordingly, an Establishment Clause violation would rightly preclude South Bend’s intended transfer. However, the District Court for the Northern District of Indiana erred by applying the endorsement test in this context and erred by ruling that the transfer would breach the barrier separating church and state.

B. The Endorsement Test Fails to Provide an Adequate Standard to Determine the Constitutionality of Economic Development Land Transfers to Religious Institutions

Despite the Wirtz-court’s heavy reliance upon it, Justice O’Connor’s endorsement test is ill-suited to resolve the issues that arise when the government decides to transfer land to a religious institution as a facet of an economic development plan. The test is certainly useful in some contexts. However, it is limited in value when applied to complex factual scenarios where determining what the reasonable observer would perceive necessarily relies on first making several assumptions regarding the observer’s knowledge of those things that cannot be seen by the naked eye.

One of the primary problems with applying the endorsement test to situations involving economic development land transfers is defining just who the “reasonable observer” is, what the reasonable observer should know, and when he or she should know it. Indeed, the failure of the endorsement test’s ability to solve establishment disputes in the land transfer context is illustrated plainly by the Wirtz court’s own struggle to decide what the reasonable observer should and should not know.133 In Wirtz, after noting that the “reasonable observer” is “well-informed,” the Court stated that if the proper time to judge the perception of the reasonable observer is at the time the City decided to transfer the Family Dollar parcel, the reasonable observer might need to be omniscient. As such, the Court asserted:

133. Wirtz v. City of S. Bend, Ind., 813 F. Supp. 2d 1051, 1068 (N.D. Ind. 2011).
Rather than dwell on what the objective and informed reasonable person knew and when she knew it, the court assumes that the objective and informed reasonable person knows that the City’s acquisition and contemplated transfer of the Family Dollar parcel is a follow-up to representations made to induce St. Joseph’s High School to develop the property the Medical Center was vacating.134

The “who, what, and when” questions raised in the previous paragraph are simply—or at least more simply—answered in the types of cases for which the endorsement analysis is typically applied and for which the endorsement analysis should be reserved. It is relatively easy to gauge the reasonable observer’s perception of and reaction to the presence of a cross on public land, a statue of Christ in a public park, the placement of the Ten Commandments in a courthouse, a classroom of children in a public school reciting the Pledge of Allegiance, or those same children engaged in a moment of silence and prayer.135 It is significantly more difficult to answer those questions in the context of a city’s transfer of land to a religious organization. The Second Circuit in Southside found the endorsement test unhelpful for just this reason and asserted that cases involving land transfers are clearly distinguishable from those involving religious symbols on public land.136 In dismissing the argument that the transfer in Southside violated the Establishment Clause, the Second Circuit stated, “[a] reasonable observer passing a synagogue or church built on urban renewal land would have no way of associating that institution with the government.” 137 Similarly, a reasonable observer passing an athletic complex adjacent to a Catholic high school would not find the imprimatur of the government stamped upon it.

Many commentators have seized upon the endorsement test’s susceptibility to the danger of judges injecting their own subjective assessments when determining what the hypothetical reasonable observer would perceive as he or she analyzed a government practice.138 In a particularly scathing review of this trait of the endorsement test, Steven D. Smith argued:

[A] purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive; and there is no empirical touchstone or outside referent upon which a critic could rely

134. Id. at 1067.
135. See generally supra Part I.B.
137. Id.
138. See, e.g., Cole, supra note 44, at 584.
to show that the author was wrong. The most that could be said in a
given case is that the “objective observer’s” perceptions are
remarkably unlike those of most real human beings. 139

The District Court for the Northern District of Indiana in Wirtz fell
into this trap of the endorsement analysis. Not only was the District
Court forced to contend with an inherent flaw in the test, but the absence
of a clear place in time for which the reasonable observer could perceive
South Bend’s transfer rendered application of that test exceedingly more
difficult and uncertain. Whether armed with good intentions or not, the
Wirtz court’s arbitrary assignment of knowledge to the fictitious
observer it created sapped the endorsement test of any value and stands
as a testament to the poverty of the test’s application in this context.

Moreover, the District Court failed to avoid the omniscience
problem that it recognized. If the court assumes that the reasonable
person knows the contemplated transfer emerged from private
negotiations to develop the vacated property, from where does the court
assume that knowledge is derived? Further still, to come to the court’s
conclusion that the reasonable observer would find that South Bend
endorsed Catholicism via the transfer, the reasonable observer ostensibly
would have to have knowledge of the below-market nature of the
transfer as well as knowledge that the public use of the facilities would
not extend into perpetuity. Even if the reasonable person knew all of
this, do we also assume that he or she would be informed of the fact that
no secular entities expressed interest in developing the land? Would it
also be assumed that this observer knows that economic development
supplied South Bend’s primary motive in initiating the transfer or that
the City previously transferred several pieces of property to nonsectarian
entities as a part of the same development initiative?140

By the time the court finishes making its assumptions, the
reasonable observer is but an avatar of the court armed with an intimate
personal knowledge of the facts and driven by the underlying values of
the judge who authors the opinion. The “reasonable observer” in the
land transfer context will therefore perceive endorsement only when the
court believes endorsement exists.141

The District Court in Wirtz also overvalued the relevance of its
appellate court’s endorsement test jurisprudence. Even though the Wirtz
court was quick to note that the endorsement test is “quite healthy” in

139. See Smith, supra note 44, at 292-93.
140. See generally supra Part II.A.
141. See Smith, supra note 44, at 293.
the Seventh Circuit, a cursory analysis of the cases cited for this proposition reveals that the *Wirtz* court’s application of the endorsement test was novel and not compelled by Seventh Circuit decisions. Consistent with a proper application of the endorsement analysis, the Seventh Circuit previously used the endorsement standard to evaluate the constitutionality of government actions which blatantly implicated religion, namely those factual scenarios where the reasonable observer could validly judge whether the government appeared to favor religion. However, the Seventh Circuit does not apply the endorsement test in all scenarios and has recently decided Establishment Clause cases without even mentioning *Lemon*. In *Badger Catholic, Inc. v. Walsh*, the Seventh Circuit considered whether a state university’s reimbursement of expenses of speakers invited to campus by a religious organization through a program equally available to secular speakers violated the Establishment Clause. The Seventh Circuit held that paying a religious speaker’s expenses did not violate the Establishment Clause because such payment was distributed from “a neutral program justified by the program’s secular benefits . . . even if the religious speaker uses some of the money for prayer or sectarian instruction.” As such, the Seventh Circuit relied upon the formal neutrality of the program at issue in *Badger Catholic* to uphold it, not upon whether a reasonable person would perceive endorsement.

Simply stated, the endorsement test is an unsatisfactory standard for deciding Establishment Clause disputes concerning economic development land transfers. The endorsement analysis necessarily relies upon the perceptions of the well-informed, reasonable observer. However, when the very task of determining who the reasonable observer is and what he or she knows results in nothing less than the court assuming the reasonable observer’s role, the endorsement test is rendered ineffective. Reliance on the endorsement analysis in this context will inevitably produce jurisprudence fraught with inconsistency
and arbitrary decision-making. Even the creator of the endorsement test and its greatest advocate did not recommend the test as a “grand unified theory” to be applied in every Establishment Clause case.\textsuperscript{149}

The District Court for the Northern District of Indiana failed to recognize the limits of the endorsement test. Therefore, the District Court also erred in deciding \textit{Wirtz}. Yet, this does not necessarily mean that South Bend’s intended transfer was constitutional. Even though the endorsement test is not suited to decide the issue, the City’s transfer of the Family Dollar parcel to St. Joseph’s may have been unconstitutional upon other grounds. It is the contention of this Note, however, that the intended transfer, when viewed under a principle of formal neutrality, passes constitutional muster.

C. \textit{Cases Concerning the Constitutionality of Economic Development Transfers to Religious Institutions Should Be Guided by Reliance upon Formal Neutrality}

If economic development land transfers to religious institutions fall outside the scope of the endorsement test, a standard must be ascertained which can adequately decide disputes arising in this context. The approach of formal neutrality appears well-suited for the task. Undoubtedly, formal neutrality doctrine gained traction with the Supreme Court in recent Establishment Clause decisions, if only in the aid context.\textsuperscript{150} More importantly, the formal neutrality approach can provide a standard that is less susceptible to the predilections of the court, more likely to produce consistent results, and still sufficient to ensure that government acts without an impermissible religious motive. Furthermore, the aspects of formal neutrality criticized by commentators in the aid context, as discussed below, are diminished in the land transfer context.

Prior to discussing what it is about formal neutrality, as formulated in the aid context, that translates well to evaluating the constitutionality of religious land transfers, it is worth considering the facets of the \textit{Zelman} standard that are not so easily converted. It is immediately clear that the largest hurdle presented to applying formal neutrality to the economic development land transfer context is the Supreme Court’s


\textsuperscript{150} See \textit{supra} Part II.A & B. See also Daniel O. Conkle, \textit{The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future}, 75 IND. L.J. 1, 10 (2000) (stating that “formal neutrality has become the dominant theme under both the Free Exercise and the Establishment Clauses”).
reliance on the presence of “true private choice” to establish the neutrality of the government programs at issue in the aid cases. Indeed, in dismissing South Bend’s argument that Zelman should guide the decision in Wirtz, the District Court stated, “[t]oday’s case isn’t Zelman. There is no independent decision maker.”

The second problem of applying the Zelman standard to the economic development transfer context was also realized by the District Court in Wirtz. Zelman relied on the fact that a single “program” applied equally to sectarian and non-sectarian schools could justly be declared “neutral.” In contrast, the District Court in Wirtz noted that South Bend engaged in making ad hoc transfers, each involving unique circumstances, unique city action, and requiring separate negotiations. At best, the District Court asserted, the City had a pattern of development that was neutral with respect to religion. As such, because South Bend’s development plan did not explicitly apply religion-neutral criteria to the evaluation of every transfer, the District Court determined that the City’s case was distinguishable from the Supreme Court’s aid cases.

In one important sense, the District Court correctly found that the formal neutrality analysis in Zelman was inapplicable to the facts in Wirtz. After all, the City of South Bend decided to transfer the Family Dollar parcel absent any true private control, and the City’s history of development transfers were indeed ad hoc in nature and not part of a narrowly and specifically defined program. Quite simply, a direct application of the Supreme Court’s standard in Zelman contributes little to deciding Establishment Clause issues in the economic development land transfer context.

However, it would be absurd to believe that the exact standard applied by the Supreme Court in the aid context would be applicable to all Establishment Clause disputes. The contention of this Note is that formal neutrality, as described by Kurland above, should be the

151. See Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (stating that the Supreme Court has never found a program of true private choice to offend the Establishment Clause).
152. Wirtz, 813 F. Supp. 2d at 1062.
153. Id. at 1067.
154. Id.
155. Id.
156. Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1, 96 (1961). Kurland advanced formal neutrality as a remedy to the inconsistency of the Supreme Court’s Establishment Clause jurisprudence, but it is important to note that Kurland did not believe formal neutrality should be applied mechanically to solve the Establishment Clause problems coming before the Court. Kurland characterized the principle of formal neutrality as merely “a starting point.” Id. Because the principle of formal neutrality should only be the starting point of
guiding principle in determining the constitutionality of economic development land transfers to religious institutions. To say this is not to say that the Zelman standard should directly apply to all Establishment Clause cases. The Zelman standard is but the principle of formal neutrality embodied in the aid context as expressed by the Supreme Court; it is not formal neutrality per se. Therefore, Zelman and the other formal neutrality cases mentioned above should be understood as evidence of the Supreme Court’s shift from a focus on effects and perceptions to a focus on the principle that government decisions which do not “utilize religion as a standard for action or inaction” do not violate the Establishment Clause.  

Broadening the application of formal neutrality by applying it to the religious land transfer context arguably makes more sense than applying it to government aid cases, where the principle is now seemingly dispositive. Criticizing the Supreme Court’s decision in Zelman, Steven Gey argued that formal neutrality in aid cases is but a pretext for condoning the preferential funneling of substantial amounts of funding to religious institutions. Furthermore, Gey argues that formal neutrality in the aid context amounts to government’s use of “its coercive taxing authority to force one person to support another person’s faith.” Economic development transfers to religious institutions do not implicate the same concerns due to the very nature of the transaction. Religious institutions receive development transfers precisely because they will confer a larger benefit upon the community. As such, there is less concern of such a transfer being a mere pretext, especially in the larger scheme of a comprehensive secular plan; there is also less cause for arguing that such transfers support another individual’s faith with taxpayer money since the transfers do not directly fund any form of religious indoctrination.  

Moreover, a formal neutrality analysis which tends to validate land transfers to religious institutions as part of a comprehensive plan makes
policy sense. Religious institutions are important components of the communities that benefit from their local presence. Under the Wirtz court’s analysis, religious institutions would rarely, if ever, be eligible for a below-market economic development transfer. Indeed, in faulting the City’s intended transfer for not being properly evaluated under secular criteria, the District Court stated, “[m]ost importantly, each transaction requires separate legislative approval, which converts even the most neutrally intentioned, long-range development plan into a series of individual actions by the currently-empowered legislators.” Land transfers are, of necessity, *ad hoc* in nature and the execution of a comprehensive development plan will, as it did in *Wirtz*, take years to perfect. To hold that each transaction is essentially void because of government control over the ultimate approval, despite overwhelming evidence of the government’s secular intent, is illogical and would likely preclude any transfer from benefiting both religious institutions and their surrounding communities.

D. A Recommended Standard and *Wirtz* Analysis

The novel standard recommended by this Note for evaluating economic development transfers to religious institutions is simple: courts should find no Establishment Clause violation when (1) a transfer is a single transaction in the context of a secular comprehensive development plan; (2) the relevant community will derive a significant discernible benefit, whether monetary or otherwise, from the transfer; and (3) there is no actual evidence that government’s primary goal was to favor religion through the transfer.

This standard should effectively preserve the major premise of Kurland’s principle of formal neutrality—that is, that religion may not form the basis for government action or inaction. The first two elements of the proposed standard serve to ensure that a preference for religion is not the motivating factor behind a transfer. The third element seeks to prevent end runs around the Establishment Clause where a transfer occurs in the context of a comprehensive plan and is beneficial to the community, but where there nonetheless exists evidence tending to prove that government initiated the transfer primarily to benefit religion exists nonetheless.

The *Wirtz* transaction would surely pass constitutional muster under

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161. *See supra* note 132 and accompanying text.
First, South Bend’s intended transfer was one in a series of transfers made under a secular comprehensive plan that conferred benefits upon numerous religiously neutral entities. Second, bringing a $35 million construction project to downtown South Bend certainly constituted a “significant discernible benefit” to the relevant community. Lastly, South Bend clearly intended to further its development plan and not to benefit religion, a fact with which the District Court agreed.164

The proposed standard of this Note seeks to provide a framework with which future courts may effectively resolve Establishment Clause challenges to economic development land transfers. The Wirtz decision presents a case study illustrating the near total failure of modern Supreme Court precedent to provide an adequate structure to decide these land transfer problems. Indeed, both the endorsement test and a direct application of the Court’s Zelman standard are of little value in this context. Courts will, however, inevitably confront this issue again, and the standard outlined above offers an avenue for resolution that will result in decisions that respect the separation requirements of the Establishment Clause and avoid the broad and unnecessary preclusion of land transfers that benefit local communities and the institutions that receive them.

IV. CONCLUSION

The decision in Wirtz is now unlikely to have much of a lasting impact on the whole of Establishment Clause jurisprudence. The Seventh Circuit recently dismissed the City of South Bend’s appeal as moot and untimely.165 Ultimately, the City moved the District Court to modify the preliminary injunction to allow the sale of the land to the highest bidder so that St. Joseph’s would be fully prepared to begin the new school year.166 The injunction was modified accordingly, and St. Joseph’s received the parcel after entering the highest bid.167 Thus, the short saga of Wirtz came to an end. Yet, the District Court’s decision in Wirtz still serves to illuminate the shortcomings of the Supreme Court’s Establishment Clause jurisprudence and to compel discussion of just how to approach economic development land transfers to religious

164. The Wirtz court characterized South Bend’s comprehensive plan as “nonsectarian” and stated, “The City’s actual intent is likely to endorse the high school’s construction project, not the high school itself or the religion with which the high school is affiliated . . . .” Wirtz, 813 F. Supp. 2d at 1068.
165. Wirtz v. City of S. Bend, 669 F.3d 860 (7th Cir. 2012).
166. Id. at 861.
167. Id.
As of this date, the Supreme Court’s Establishment Clause jurisprudence evokes harsh criticism from commentators and fails to offer the guidance lower courts and legislatures seek from the High Court.\textsuperscript{168} Not only do the failings of the Supreme Court make it exceedingly difficult for the Nation’s lower courts to rule upon Establishment issues, but more importantly, the doctrinal mess handed down to those lower courts, as Justice Thomas once noted, “raises the further concern that either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.”\textsuperscript{169} Giving credence to these criticisms, \textit{Wirtz} highlights the dangers of a body of precedent that offers little in the way of definitive guidance to the lower courts. At best, the opinion of the District Court for the Northern District of Indiana represents the erroneous application of the endorsement test to a situation for which it was wholly unsuited. At worst, the opinion represents, as Justice Thomas feared, a judge standing in the place of the reasonable observer and ruling on a dispute on the basis of his closely held personal beliefs.

While the Supreme Court would do well to offer a more definitive standard by which to decide Establishment Clause cases, courts and practitioners are, at least for now, forced to make the best of what they have. As such, the constitutionality of economic development land transfers to religious institutions must necessarily be decided within the confines of the Court’s modern precedent. This can be accomplished by looking to the Supreme Court’s recent jurisprudence in aid cases for a guiding principle of formal neutrality. Therefore, if it can be shown that a government transfer was initiated absent intent to benefit or burden religion, such a transfer should be able to move forward without violating the Establishment Clause. The proposed standard offered by this Note, should a court choose to adopt it, embraces formal neutrality and provides an avenue for resolution of land transfer disputes that respects the Establishment Clause and avoids imposing unfair burdens on religious institutions and municipalities seeking to revitalize the local economy. If, on the other hand, courts choose to follow a similar path to that charted by the District Court in \textit{Wirtz}, inconsistency and arbitrary

\textsuperscript{168} See Gey, supra note 1, at 726. Gey states, “It is by now axiomatic that the Supreme Court’s Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.” See also Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (characterizing Establishment Clause jurisprudence as being in a state of “hopeless disarray”).

decision-making will continue to plague Establishment Clause jurisprudence, and communities will be deprived of the benefits realized by effective development planning.