

**ACLU v. CAPITOL SQUARE REVIEW AND ADVISORY BOARD:<sup>FN1</sup> IS THERE SALVATION FOR THE ESTABLISHMENT CLAUSE? “WITH GOD ALL THINGS ARE POSSIBLE”**

I. INTRODUCTION

Religious faith and expression are integral and necessary components of the private lives of many Americans.<sup>1</sup> The degree of importance of religion in one's private life strictly depends on that individual's conscience. In the public sector, the degree to which religion may play a part in governmental affairs is subject to the restrictions that the Establishment Clause imposes.<sup>2</sup> Convictions of legal scholars as to what those restrictions are create a lack of uniformity.<sup>3</sup> The absence of uniformity renders application of the Establishment Clause problematic and subjects its jurisprudence to controversy.<sup>4</sup> One of the many cases that courts have decided in the Establishment Clause quagmire<sup>5</sup> is the "Ohio State Motto" case.<sup>6</sup>

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<sup>FN1</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc). "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal." *Capitol Square*, 2000 WL 1016751, at \*1.

<sup>1</sup> Religion provides order in the lives of the faithful, grants explanations to matters that are otherwise incomprehensible, and furnishes protection from the psychic instability that would inevitably arise from a life devoid of meaning. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 278-79 (1989). "Religion provides man with a spiritual anchor, with a feeling of security such as he can find nowhere else." VICTOR E. FRANKL, *THE DOCTOR AND THE SOUL* xv (Richard Winston & Clara Winston trans., Alfred A. Knopf, Inc. 2d ed. 1972).

<sup>2</sup> The First Amendment of the Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

<sup>3</sup> See Note, *Reinterpreting the Religion Clauses: Constitutional Construction and the Conceptions of Self*, 97 HARV. L. REV. 1468, 1468 (1984). See also *infra* notes 11-42 and accompanying text.

<sup>4</sup> See *infra* notes 11-42 and accompanying text.

<sup>5</sup> One commentator has remarked that the only consensus reached in Establishment Clause jurisprudence is that everyone is displeased with the Court's approach in this area. William P. Marshall, *What Is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion In First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000).

<sup>6</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

Part II of this Note provides a cursory review of the evolution of Establishment Clause jurisprudence, and it particularly focuses on the primary tests for analyzing the Establishment Clause that the Supreme Court has promoted over the years.<sup>7</sup> Part III discusses the procedural history of the "Ohio State Motto" case with particular emphasis on the courts' decisions and their reasoning.<sup>8</sup> Part IV analyzes the decision by the Court of Appeals for the Sixth District and addresses some of the concerns that inhere in the decision.<sup>9</sup> Finally, Part V concludes the Note.<sup>10</sup>

## II. BACKGROUND

Ever since the Supreme Court applied the Establishment Clause of the First Amendment to the states through the Fourteenth Amendment,<sup>11</sup> Establishment Clause jurisprudence has been in a disconcerting state.<sup>12</sup> Much of the chaos has centered around the Supreme Court's unwillingness to adhere to one doctrinal perspective.<sup>13</sup> In analyzing Establishment Clause issues, the Supreme Court has used three separate and distinct doctrinal approaches: strict separation, accommodation, and flexible accommodation.<sup>14</sup>

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<sup>7</sup> See *infra* notes 11-42 and accompanying text.

<sup>8</sup> See *infra* notes 43-74 and accompanying text.

<sup>9</sup> See *infra* notes 82-143 and accompanying text.

<sup>10</sup> See *infra* notes 144-48 and accompanying text.

<sup>11</sup> E.g., *School Dist. v. Schempp*, 374 U.S. 203, 205 (1963); Michael J. Perry, *Freedom of Religion In the United States: Fin De Siecle Sketches*, 75 IND. L.J. 295, 316 (2000).

<sup>12</sup> Ralph W. Johnson III, *Lee v. Weisman: Easy Cases Make Bad Law Too — The Direct Coercion Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON INDEP. L. REV. 123, 124 (1993).

<sup>13</sup> Shahin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos In Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 506 (1990).

<sup>14</sup> *Id.* Separationists believe that the Establishment Clause commands federal and state governments to be completely religion-neutral. *Id.* at 508. Given the importance of religion in America, accommodationists argue that complete neutrality is implausible in today's society and that a certain level of religious "accommodation" is constitutional. *Id.* at 511-12. Flexible accommodationists believe that the Establishment Clause simply prohibits the government

In 1947, the Supreme Court decided *Everson v. Board of Education*<sup>15</sup> and announced that the Establishment Clause commands a “wall of separation”<sup>16</sup> between church and state.<sup>17</sup> Yet, after making this pronouncement, the *Everson* Court upheld a Board of Education resolution that provided tax-supported bus transportation to students of both public and parochial schools.<sup>18</sup> The decision was antithetical to the Court’s pronouncement.<sup>19</sup> To confuse matters more, almost five years later, in *Zorach v. Clauson*, the Court undermined its own foundational pronouncements for Establishment Clause analysis when it stated that the First Amendment does not require separation of church and state in “every and all respects.”<sup>20</sup>

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from instituting a common church. *Id.* at 521. *But see* Jennifer H. Greenhalgh, Notes and Comments, *The Establishment Clause and Government Religious Displays: The Court That Stole Christmas*, 15 *TOURO L. REV.* 1053, 1074-75 (referring to two distinct schools of thought: separationists and accommodationists).

<sup>15</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>16</sup> “Wall of separation” is a phrase that Thomas Jefferson first used in a reply letter to the Danbury Baptist Association. Roy S. Moore, *Religion In the Public Square*, 29 *CUMB. L. REV.* 347, 357 (1998-99).

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.

*Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson’s reply letter to a question posed by the Danbury Baptist Association).

<sup>17</sup> *Everson*, 330 U.S. at 16. Not only did the *Everson* Court command a “wall of separation” between church and state, it also emphasized that the “wall must be kept high and impregnable.” *Id.* at 18.

<sup>18</sup> *Id.* at 18.

<sup>19</sup> Rezai, *supra* note 13, at 511.

<sup>20</sup> *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The *Zorach* Court expressed the sentiment that complete separation of church and state would lead to alienation between the two systems, which would, in turn, lead to hostility. *Id.* The decision in *Zorach* opened the door to the less extreme accommodationist approach to Establishment Clause analysis. Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux As Illustrated By Lee v. Weisman*, 112 *S. Ct.* 2649 (1992) and *Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality*, 24 *PAC. L.J.* 401, 410 (1993).

It was not until 1963 that the Court in *School District of Abington v. Schempp* decided to transform Establishment Clause theory into a workable “purpose and effect” test.<sup>21</sup> The Court adopted and refined the “purpose and effect” test in *Lemon v. Kurtzman*<sup>22</sup> by adding a third prong to the analysis.<sup>23</sup> The “*Lemon* test,”<sup>24</sup> as it came to be known in the legal community, became the standard of Establishment Clause analysis.<sup>25</sup> However, the three-pronged *Lemon* test, that the 1. government action must have secular purpose;<sup>26</sup> 2. effect of government action must not principally inhibit or encourage religion; and 3. government action must not become excessively entangled with religion,<sup>27</sup> has lost support in the Court over the years and, thus has lost much of its efficacy.<sup>28</sup> As the *Lemon* test has progressively waned, the endorsement test<sup>29</sup> has advanced to the forefront.

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<sup>21</sup> *School Dist. v. Schempp*, 374 U.S. 203 (1963). The Court spoke of separation between church and state in terms of government neutrality toward religion and stated that the requirement of neutrality is met when government action advances a secular purpose and does not have a primary effect of favoring or inhibiting religion. *Id.* at 222.

<sup>22</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>23</sup> The third prong declares that the government action must not encourage excessive entanglement between church and state. *Id.* at 613.

<sup>24</sup> The *Lemon* test is basically an amalgam of the *School Dist. v. Schempp*, 374 U.S. 203 (1963) decision and the *Walz v. Tax Commission*, 397 U.S. 664 (1970), decision. The first two elements of the *Lemon* test are simply the “purpose and effect” tests that the Court announced in *Schempp*. See *supra* note 21. The third prong of the *Lemon* test derived from language in *Walz* expressing that it “must also be sure that the end result—the effect—is not an excessive government entanglement with religion.” *Walz*, 397 U.S. at 674. The *Lemon* test represents the strict separationist school of thought. Greenhalgh, *supra* note 14, at 1091.

<sup>25</sup> *Keiner*, *supra* note 20, at 415.

<sup>26</sup> The Court normally must grant deference to the legislature as to what the secular purpose is that is underlying the government action. See *Everson v. Board of Educ.*, 330 U.S. 1, 6 (1947). Invalidation of government action under the first prong of the *Lemon* test can only occur if the government action is devoid of any secular purpose and fully motivated by a religious objective. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). But see *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O’Connor, J., concurring) (stating that the purpose prong requirement is “not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes”); *Stone v. Graham* 449 U.S. 39, 41 (1980) (expressing that “no legislative recitation of a supposed secular purpose can blind us” in believing that there is a secular purpose to the posting of the Ten Commandments).

<sup>27</sup> *Lemon*, 403 U.S. at 613.

<sup>28</sup> On several occasions, the Court has commented that the *Lemon* test is only one approach in analyzing Establishment Clause cases. In fact, some members of the Court view the *Lemon* test as a dispensable approach and

The endorsement test is an attempt to apply the underpinnings of the *Lemon* test in a way that is more flexible and more cognizant of the particular circumstances of each case.<sup>30</sup> The two elements of the endorsement test are whether the government intended to endorse religion through its actions,<sup>31</sup> and whether the government sends a message of endorsement through its actions, regardless if the government intended to send the message.<sup>32</sup> The first time that a majority of the Court used the endorsement test exclusively<sup>33</sup> to analyze an Establishment Clause

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not a steadfast rule that needs to be strictly followed. *Lynch*, 465 U.S. at 679 (emphasizing that the Court is unwilling “to be confined to any single test or criterion in this sensitive area” of Establishment Clause jurisprudence); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating that the *Lemon* test is simply a “helpful signpost” in Establishment Clause analysis). *But see Lynch*, 465 U.S. at 695-96 (Brennan, J., dissenting) (suggesting that the Court needs to rigorously adhere to the *Lemon* test in all Establishment Clause cases).

<sup>29</sup> The endorsement test originated from Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*. Justice O’Connor extrapolated the “purpose and effect” prongs of the *Lemon* test and redefined them:

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

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

In another concurring opinion Justice O’Connor exemplified the flexibility of the endorsement test when she suggested that the government’s mere acknowledgement of religion in law or policy does not violate the Establishment Clause. *Wallace*, 472 U.S. at 70 (O’Connor, J., concurring). The endorsement test represents the accommodationist school of thought. Greenhalgh, *supra* note 14, at 1075.

<sup>30</sup> *Keiner*, *supra* note 20, at 417. Inquiry under the endorsement test is context-specific and should take into account history, effects of ubiquity on religious significance, and particular circumstances of each case. *Wallace*, 472 U.S. at 74, 76, 81 (O’Connor, J., concurring).

<sup>31</sup> A majority of cases applying the *Lemon* test used a deferential standard in gauging whether a secular purpose existed for the governmental action. *See supra* note 26. Under the endorsement test analysis, Justice O’Connor reemphasized the need to be “deferential and limited” in considering what the purpose of the legislature was in enacting the law. *Wallace*, 472 U.S. at 74-75 (O’Connor, J., concurring). However, she granted more leeway to the Court to inquire whether the secular purpose was “sincere” or a “sham.” *Id.* at 75.

<sup>32</sup> Justice O’Connor defined “endorsement” as sending “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.” *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring). In applying this definition, Justice O’Connor uses an informed observer standard and asks “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the government action] as a state endorsement of religion.” *Wallace*, 472 U.S. at 76 (O’Connor, J., concurring). *But see Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 807-08 (1995) (Stevens, J., dissenting) (suggesting that the objective observer test should utilize a person who is not knowledgeable in history or legislative text).

<sup>33</sup> In *School District v. Ball*, 473 U.S. 373 (1985), *overruled by*, *Agostini v. Felton*, 521 U.S. 203 (1997), the Court applied the *Lemon* test to invalidate the challenged governmental act but used Justice O’Connor’s endorsement test

case was in *County of Allegheny v. ACLU*.<sup>34</sup> Ironically, in the same case, Justice Kennedy introduced yet another alternative approach to Establishment Clause analysis in his dissenting and concurring opinion.<sup>35</sup> Justice Kennedy's alternative approach, the coercion test, would invalidate governmental action only where the government compels individuals to participate religiously or where the government's actions directly benefit a particular sect to such a dangerous extent so as to establish a state or federal religion.<sup>36</sup> The coercion test is theoretically distant, if not polarized, from the "separation of church and state" foundation that the Court laid in *Everson* in 1947.<sup>37</sup>

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definition as to what constitutes "effect." William P. Marshall, "*We Know It When We See It*": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 520, 521 (1986).

<sup>34</sup> *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). In *Allegheny*, the Court faced a constitutional challenge to a Christmas crèche display located inside the county courthouse and a Chanukah menorah display outside of the county building. *Id.* at 573. The Christmas crèche, which depicted the biblical nativity scene, was in an area of the courthouse that the Court felt was the "main," "most beautiful," "most public" part. *Id.* The 18-foot menorah was outside of the courthouse next to a Christmas tree that stood 45 feet in height. *Id.* In upholding the constitutionality of the menorah but finding the nativity scene unconstitutional, the Supreme Court looked to the particular physical setting of each display. *Id.* at 575-76. The Court articulated that the menorah is a primary symbol of Judaism and standing alone would be unconstitutional. *Id.* at 575. However, the menorah coupled with the Christmas tree, popularly held to be a secular symbol of Christmas, relays "a message of pluralism and freedom of belief during the holiday season." *Id.* The Court further held that a reasonable observer would not view the menorah display as endorsing Judaism. *Id.* at 575-76.

<sup>35</sup> *Id.* at 655-79 (Kennedy, J., concurring in part and dissenting in part).

<sup>36</sup> *Id.* at 659. Justice Kennedy would hold both displays in *Allegheny* constitutional using the newly proposed coercion test. *Id.* at 655. Proponents of the coercion test suggest that it carries out the original intent of the framers of the Constitution and the Establishment Clause. Johnson III, *supra* note 12, at 179-80. Proponents trace the development of the text of the Establishment clause to statements that James Madison made in the House of Representatives on June 8, 1789. *Id.* at 180-81. James Madison expressed that the "civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext, infringed." 5 THE FOUNDERS' CONSTITUTION 25 (Phillip B. Kurland & Ralph Lerner eds., 1987). Further, Madison understood the words of the Establishment Clause to preclude Congress from establishing a particular religion or from compelling individuals to worship in "a manner contrary to their conscience." *Id.* at 93. For further analysis of the framers original intent see generally Johnson III, *supra* note 12.

<sup>37</sup> The coercion test is a judicial "hands off" approach to the Establishment Clause. See Keiner, *supra* note 20, at 423. It represents the flexible accommodationist approach. See *supra* note 14. The coercion test recognizes that the United States is a representative democracy that allows the majority constituency to speak via the legislature. See Johnson III, *supra* note 12, at 191. Thus, the legislature may publicize the views of the majority without violating the Establishment Clause so long as it does not prohibit the minority from exercising its own conscience or directly compel the minority to adopt the beliefs of the majority. See *id.* at 192. By acting in a fashion that accommodates

Holding true to its proclamation that it is not bound by a single test in the sensitive Establishment Clause area,<sup>38</sup> the justices in *Marsh v. Chambers*<sup>39</sup> abandoned all three tests discussed above and conducted a historical analysis<sup>40</sup> into the challenged governmental practice.<sup>41</sup> To this day, 53 years after the application of the First Amendment to the states through the Fourteenth Amendment, the Supreme Court justices remain irreconcilably divided as to the proper meaning of, and approach to, the Establishment Clause.<sup>42</sup> As a result,

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the beliefs of one religious sect, the government does not impermissibly compel nonadherents to convert to that sect. *See Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part) (stating that neither a Christmas crèche nor Chanukah menorah compels nonadherents of Christianity or Judaism to adopt Christian or Jewish beliefs); *Board of Educ. v. Grumet*, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting) (intimating that creating a school district specifically for followers of the Satmar Hasidim religion does not rise to the level of establishing a religion and, thus, does not violate the Establishment Clause).

<sup>38</sup> *E.g.*, *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971).

<sup>39</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>40</sup> The history and tradition of a particular practice is not, in itself, a test with which to examine Establishment Clause cases, and “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . .” *Id.* at 790. *But see Books v. City of Elkhart*, 79 F. Supp. 2d 979, 989-93 (N.D. Ind. 1999) (reporting five separate Establishment Clause tests including the “Historical Precedent Test”). *See generally Moore, supra* note 16, at 372-73.

<sup>41</sup> Nebraska’s tradition of opening every legislative session with a publicly-paid chaplain’s prayer was the challenged practice in *Marsh. Marsh*, 463 U.S. at 784-85. The Supreme Court held:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

*Id.* at 792. Like the majority in *Marsh*, Justice Brennan would also inquire into the history of a particular government practice that is religious in nature to see if the practice has lost its religious meaning through ubiquitous use. E. Gregory Wallace, *When the Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1216 (1994). Religious practices that have become secularized pass muster under an Establishment Clause attack because they are a form of acceptable “ceremonial deism.” *Id.*

While I remain uncertain about these questions, I would suggest the such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form of a “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

*Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

<sup>42</sup> Keiner, *supra* note 20, at 459.

Establishment Clause jurisprudence continues its journey on a road paved with uncertainty, without a map or compass.

### III. STATEMENT OF THE CASE

In 1959, three years after Congress adopted “In God We Trust” as the national motto,<sup>43</sup> the Ohio State Legislature adopted the phrase, “With God All Things Are Possible,” as Ohio’s state motto.<sup>44</sup> Legislative history is lacking, but newspapers and other “contemporary documents” trace the enactment to the efforts of a 12-year-old boy<sup>45</sup> who chose the phrase from Matthew 19:26.<sup>46</sup> Since 1959, many government officials have been using the motto on official documents and other official forms.<sup>47</sup>

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<sup>43</sup> 36 U.S.C. § 302 (1998).

<sup>44</sup> OHIO REV. CODE ANN. § 5.06 (West 2000).

<sup>45</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176, 1177-78 (S.D. Ohio 1998), *rev’d*, 210 F.3d 703 (6th Cir. 2000). The boy, James Mastronardo, began petitioning the Ohio Legislature approximately three years prior to the adoption of the motto. *ACLU v. Capitol Square and Advisory Bd.*, 210 F.3d 703, 711 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. 2000) July 14, 2000 (en banc). Apparently, the boy was concerned that Ohio was the only state without a motto since the General Assembly of Ohio repealed the original motto, “Imperium in Imperio,” in 1867. *Capitol Square*, 20 F. Supp. 2d at 1177-78.

<sup>46</sup> *Capitol Square*, 210 F.3d at 711. Matthew 19:26 is a response of Jesus to a question that begins at Matthew 19:16. Matthew 19:16-26 reads:

And, behold, one came and said unto him, “Good Master, what good thing shall I do, that I may have eternal life?” And he said unto him, “Why callest thou me good? There is none good but one, that is, God: but if thou wilt enter into life, keep the commandments.” He said unto him, “Which?” Jesus said, “Thou shalt do no murder, Thou shalt not commit adultery, Thou shalt not steal, Thou shalt not bear false witness, Honour thy father and thy mother: and, Thou shalt love thy neighbour as thyself. The young man said unto him, “All these things have I kept from my youth up: what lack I yet?” Jesus said unto him, “If thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven: and come and follow me.” But when the young man heard that saying, he went away sorrowful: for he had great possessions. Then said Jesus unto his disciples, “Verily I say unto you, That a rich man shall hardly enter into the kingdom of heaven. And again I say unto you, It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God.” When the disciples heard it, they were exceedingly amazed, saying, “Who then can be saved?” But Jesus beheld them, and said unto them, “With men this is impossible; but *with God all things are possible.*”

*Matthew 19:16-26* (King James) (emphasis added).

<sup>47</sup> Successive Secretaries of State, the State Tax Commissioner, and other officials have used the motto on their official forms. *Capitol Square*, 210 F.3d at 710.

The constitutionality of the Ohio motto had gone unchallenged until 1996 when the ACLU of Ohio sought a declaratory judgment asking the District Court to find that “With God All Things Are Possible” is unconstitutional.<sup>48</sup> The ACLU also sought to enjoin the government from carrying out its plan<sup>49</sup> to inscribe the words of the motto in the Capitol Square Plaza, located outside of the state house.<sup>50</sup> The District Court refused to enjoin the inscription of “With God All Things Are Possible” on the state plaza, announcing that Ohio’s use of its official motto was constitutional.<sup>51</sup> However, in a bizarre dispositional order, the district court enjoined Ohio from crediting the origin of the motto to Jesus’ words found in Matthew 19:26.<sup>52</sup> In reaching this conclusion, the District Court primarily relied on the similarities between the national motto<sup>53</sup> and the Ohio motto.<sup>54</sup>

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<sup>48</sup> *Capitol Square*, 20 F. Supp. 2d at 1178.

<sup>49</sup> The plan originated with then-Governor of Ohio, George Voinovich. *Capitol Square*, 20 F. Supp. 2d at 1178. Upon returning from a trip to India where Governor Voinovich observed an inscription reading, “Government Work Is God’s Work,” he suggested the Advisory Board inscribe Ohio’s motto on the courthouse entrance. *Id.* The Advisory Board accepted the Governor’s proposal with variations. *Id.*

<sup>50</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 704-05 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc). Although the inscription of the motto on public grounds was what gave rise to the action, the ACLU challenged all uses of the Ohio state motto by the government. *Id.* at 705 n.2.

<sup>51</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176, 1185 (S.D. Ohio 1998), *rev’d*, 210 F.3d 703 (6th Cir. 2000).

<sup>52</sup> *Id.* The district court did not announce its reasons for doing so. *Id.*

<sup>53</sup> The national motto also has its origins in religious text, particularly the Hebrew Bible. *Id.* at 1179. “In God I have put my trust.” *Psalms* 56:11 (King James). Removed from their context, both the national and Ohio mottoes are “generically theistic.” *Capitol Square*, 20 F. Supp. 2d at 1179. When governmental speech is generically theistic, it is not an “endorsement” of a particular religion, and, thus, does not violate the Establishment clause. *See id.*

<sup>54</sup> *Capitol Square*, 20 F. Supp. 2d at 1180-84. Through its analysis, the court suggested that “With God, All Things Are Possible” has become a form of an acceptable “ceremonial deism.” *Cf.* *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that opening legislative sessions with a chaplain’s prayers has become part of the “fabric of our society”); *School Dist. v. Schempp*, 374 U.S. 203, 213 (1963) (alluding that the extensive use of official mottoes, oaths of office, and legislative practices with religious undertones are constitutional because they are interwoven into this country’s history and tradition).

The Court reasoned that, because the Supreme Court has spoken about the constitutionality of the national motto on several occasions in dicta,<sup>55</sup> the Ohio motto must also be constitutional.<sup>56</sup> Further, the Court articulated that the Ohio motto survives scrutiny under both the *Lemon* and endorsement tests.<sup>57</sup> The motto serves a legitimate secular purpose because it “inculcates hope, makes Ohio unique, solemnizes occasions, and acknowledges the humility that government leaders frequently feel in grappling with difficult public policy issues.”<sup>58</sup> Also, in a cursory fashion, the Court concluded that the Ohio motto satisfies the “effect and entanglement” prongs<sup>59</sup> of the *Lemon* test and the “endorsement” prong<sup>60</sup> of the endorsement test.<sup>61</sup>

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<sup>55</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting) (explaining that the words “In God We Trust” simply recognize the religious traditions of this country and do not constitute an official religion); *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring) (claiming that the national motto serves the “legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society”); *Schempp*, 374 U.S. at 303 (alluding that the words in the national motto may not offend the Establishment Clause because they are interwoven in the “fabric of society”) (Brennan, J., concurring).

<sup>56</sup> After assessing cases that refer to the constitutionality of the national motto, Pledge of Allegiance, and opening each day’s session of the Supreme Court with “God save the United States and this Honorable Court,” the district court in *Capitol Square* declared, “[i]f the various actions of the federal government reviewed above do not offend the Establishment Clause, there can be little doubt that Ohio’s motto ‘With God All Things Are Possible’ does not.” *Capitol Square*, 20 F. Supp. 2d at 1183.

<sup>57</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176, 1182-83 (S.D. Ohio 1998), *rev’d*, 210 F.3d 703 (6th Cir. 2000).

<sup>58</sup> *Id.* at 1182. The court’s list of reasons sufficiently satisfies the first prong of both the *Lemon* and endorsement tests. *Id.*

<sup>59</sup> “Viewed in the context of a long tradition of government acknowledgement of religion in mottoes, oaths, and anthems, the Ohio motto does not have the primary or principal purpose of advancing religion, and it does not foster excessive government entanglement with religion.” *Id.*

<sup>60</sup> The court notes that the Ohio motto is merely an admissible acknowledgement of religion and not an endorsement of religion much like other ubiquitous practices, such as assigning Thanksgiving as a national holiday, inscribing “In God we trust” on currency, opening legislative sessions with prayer, and opening sessions to the Supreme Court with “God save the United States and this Honorable Court.” *Id.* at 1183.

<sup>61</sup> *Id.* at 1182-83.

On appeal, the Court of Appeals for the Sixth Circuit reversed the lower court's decision and declared Ohio's use of its official motto unconstitutional.<sup>62</sup> The Court's analysis primarily depended on the "effects" prong of the *Lemon* test and the "endorsement" prong of the endorsement test.<sup>63</sup> In reaching its conclusion, the appeals court emphasized the need to analyze the Ohio motto under an "objective observer" standard.<sup>64</sup> An "objective observer" is one who is a well-informed member<sup>65</sup> of the community rather than a regular passerby.<sup>66</sup> When considering the objective meaning of a particular governmental act, the "objective observer" must look at the specific context of the act.<sup>67</sup> The Supreme Court has not had occasion to extend contextual

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<sup>62</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 727 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

<sup>63</sup> "We shall not discuss either the purpose or entanglement prongs of the *Lemon* test." *Id.* at 715. Also, the Sixth Circuit focused most of its attention on the motto's actual message conveyed to an objective observer, and did not analyze whether the motto contained a legitimate secular purpose. *Id.* at 725. The court analyzed the "effects" prong of the *Lemon* test under an objective observer standard, a technique unique to the endorsement test. *Id.*

<sup>64</sup> Justice O'Connor first introduced the objective observer test in *Lynch* in order to identify the objective meaning of the government's action. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). If the objective observer understands the government action to give a message to nonadherents that they are not members of the political community, then the government action is unconstitutional. *See supra* note 32 and accompanying text. The objective observer test does not apply to the first prong of the endorsement test because the first prong inquires into the subjective intent of the legislature. *See Lynch*, 465 U.S. at 690.

<sup>65</sup> *Capitol Square*, 210 F.3d at 725. The "endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither [should the hypothetical observer choose] the perceptions of the majority over those of a 'reasonable non-adherent . . . .'" *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

<sup>66</sup> This is the definition of objective observer that Justice Stevens has advanced. *Pinette*, 515 U.S. at 807-08 (Stevens, J., dissenting). *See supra* note 32.

<sup>67</sup> Context is a central consideration in the objective observer analysis. *See Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). "[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* "[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny v. ACLU*, 492 U.S. 630 (1989) (O'Connor, J., concurring). Contextual inquiry into cases involving displays should also include the locale of the display, secular character of accompanying symbols, government disclaimers of patronage to religious message, religious nature of display, secular aspects of religious holiday display, and nature of the government's involvement in the upkeep of display. Andrew Rotstein, Note, *Good Faith?: Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1803-04 (1993).

analysis beyond that of physical setting.<sup>68</sup> Thus, although the lower court addressed the textual origin of the Ohio motto, it did not give it much weight in its analysis.<sup>69</sup> In fact, the lower court analyzed the motto removed from its textual origin.<sup>70</sup>

On the other hand, the Court of Appeals for the Sixth Circuit proposed that “decontextualization” of the motto was improper.<sup>71</sup> The Court relied on non-establishment clause precedent in order to extend its contextual inquiry to encompass the textual origin of governmental speech.<sup>72</sup> The Court went on to define an “objective observer” as an individual not only knowledgeable of physical setting, but also of textual origin of words.<sup>73</sup> With this in mind, the Court held that an objective observer would know that the words of the motto were the words of Jesus, and would perceive the motto as advancing Christianity.<sup>74</sup>

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<sup>68</sup> The cases where the Supreme Court has addressed the context of the governmental act are “display” cases. *E.g.*, *Pinette*, 515 U.S. at 753 (evaluating context of a Ku Klux Klan cross on public grounds); *Allegheny*, 492 U.S. at 573 (addressing the context of a Christmas crèche as well as Chanukah menorah); *Lynch*, 465 U.S. at 668 (examining context of nativity scene in Christmas display). Contextual analysis of the physical setting of a particular display, the “Santa Clause test,” has been called into question because it fosters uncertainty in Establishment Clause jurisprudence since “communities will not know whether their holiday decorations are constitutional until the courts decide each case within its own factual context.” Rezai, *supra* note 13, at 533-34.

<sup>69</sup> *See* *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176, 1179 (S.D. Ohio 1998), *rev’d*, 210 F.3d 703 (6th Cir. 2000).

<sup>70</sup> *See id.* at 1185. The lower court went as far as to enjoin the government from attributing the motto’s origin to the Bible. *Id.* at 1185.

<sup>71</sup> *See* *ACLU v. Capitol Square and Advisory Bd.*, 210 F.3d 703, 724-25 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

<sup>72</sup> The Sixth Circuit relied on four Supreme Court cases that reviewed issues involving statutory language construction. *Id.* The court relied on the following cases: *Moskal v. United States*, 498 U.S. 103, 111 (1990) (asserting that “the meaning of language is inherently contextual”); *Deal v. United States*, 508 U.S. 129, 132 (1993) (recognizing that the meaning of words derives from the context that contains the words); *Smith v. United States*, 508 U.S. 223, 229 (1993) (observing that language must be interpreted in unison with its context); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (expressing that “[t]he meaning of statutory language, plain or not, depends on context”).

<sup>73</sup> *Capitol Square*, 210 F.3d at 725.

<sup>74</sup> *Id.* The court held that “With God, All Things Are Possible” is Jesus’s response to how one may receive salvation, a “uniquely Christian thought.” *Id.*

#### IV. ANALYSIS

In finding the Ohio motto unconstitutional, the Court of Appeals implicitly distinguished<sup>75</sup> Ohio's motto from the national motto.<sup>76</sup> The court implied that the national motto is a form of "ceremonial deism"<sup>77</sup> because of its rich history and tradition in public life, while Ohio's motto did not enjoy such history and tradition.<sup>78</sup> Distinguishing the two mottoes is imperative because the Supreme Court has always suggested, at least in dicta, that the national motto is a constitutional form of governmental speech.<sup>79</sup> However, the reasons for distinguishing the two mottoes that the court announced – or implied – seem to be illusory; they were results-driven and devoid of any practical standards to apply to future Establishment Clause analysis.<sup>80</sup> Additionally, the textually aware "reasonable observer" is a standard that can potentially limit governmental speech beyond what the Framers intended the Establishment Clause to address.<sup>81</sup>

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<sup>75</sup> Rather, the court conducts a historical review of legislative history and cases involving the national motto and the Pledge of Allegiance. *Id.* at 719-22. However, the court does not analyze how the Ohio motto and the national motto or Pledge of Allegiance are different in a manner resulting in the unconstitutionality of the former and constitutionality of the latter. *Id.* at 722-27. The Court of Appeals primarily bases its decision on the message that the Ohio motto conveys to an objective observer who is knowledgeable about the text and background of the text. *Id.* at 727. In reversing the lower court's decision, the Court of Appeals does nothing to dispel the lower court's position that the Ohio motto is fundamentally similar to the national motto and thus should be treated alike. *See Capitol Square*, 20 F. Supp. 2d at 1181-84.

<sup>76</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176 (S.D. Ohio 1998), *rev'd*, 210 F.3d 703 (6th Cir. 2000).

<sup>77</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F. Supp. 3d 703, 721-22 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc). For an explanation of what constitutes a "ceremonial deism," see *supra* notes 41 and 54 and accompanying text.

<sup>78</sup> *Contra Capitol Square*, 20 F. Supp. 2d at 1178 (stating that the Ohio motto has been used by Secretaries of State and other government officials since its adoption in 1959).

<sup>79</sup> *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *School Dist. v. Schempp*, 374 U.S. 203, 303 (1963); *Engel v. Vitale*, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting).

<sup>80</sup> *See infra* notes 82-143 and accompanying text.

<sup>81</sup> *See infra* notes 131-43 and accompanying text

A. *National Motto, Ohio Motto: Is there a Difference?*

The Court of Appeals' reversal of the District Court's ruling largely depended on the newly reconstructed "objective observer" standard.<sup>82</sup> In light of the fact that the District Court upheld Ohio's motto based on its similarities<sup>83</sup> to the national motto, the Court of Appeals did not satisfactorily explain how and why an "objective observer" would consider the Ohio motto differently than this "observer" would consider the national motto under the Establishment Clause.<sup>84</sup> The difference in treatment between Ohio's motto and the national motto be based solely on the textual origin of the Ohio motto because the national motto also has its origins in the Bible.<sup>85</sup> The religious significance and character of each motto may be one of the possibilities for the difference in treatment.<sup>86</sup> "With God All Things Are Possible" emanates from Jesus' words in the New Testament of the Christian Bible<sup>87</sup> and relays a "uniquely Christian

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<sup>82</sup> The Court of Appeals for the Sixth Circuit announced:

We believe that we are required to view the words of the motto as part of the text in which they are found and give to them, as reasonable observers, the meaning intended by Jesus when he addressed his disciples as reported by Matthew in the New Testament of the Christian Bible.

*ACLU v. Capitol Square Review and Advisory Bd.*, 210 F. Supp. 3d 703, 727 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc). *See also supra* note 72 for a list of cases that the Court of Appeals for the Sixth Circuit used to create this definition.

<sup>83</sup> *See supra* note 56 and accompanying text.

<sup>84</sup> Several Courts of Appeals have addressed the constitutionality of "In God we trust" as the national motto, and all have reached the conclusion that the motto is constitutional. *E.g.*, *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1978); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

<sup>85</sup> The national motto evolved from the Old Testament, "In God I have put my trust." *Psalms* 56:11 (King James). The Sixth Circuit Court of Appeals does not appear to place any value on the fact that the national motto originated from the Old Testament while the Ohio motto originated from the New Testament. *Capitol Square*, 210 F.3d at 703. The court does however distinguish the Ohio motto from other mottoes that reference "God" by the fact that the Ohio motto is a direct passage in the Bible. *Id.* at 711.

<sup>86</sup> *Capitol Square*, 210 F.3d at 728-30 (Merritt, J., concurring).

<sup>87</sup> *Matthew* 19:26 (King James).

thought.<sup>88</sup> However, Jesus was merely paraphrasing words that Job had vocalized in an earlier century.<sup>89</sup> The words were Job's and not Jesus' own.<sup>90</sup> The message conveyed cannot be "uniquely Christian" because Job is also a figure in the Hebrew Bible.<sup>91</sup>

Even if the words of the Ohio motto were Jesus' own, it is difficult to characterize the message conveyed to an "objective observer" as "uniquely Christian" because both Islamic and Jewish religious texts contain analogous verses.<sup>92</sup> The Court reasoned that although the decontextualized motto speaks generally about the omnipotence of God,<sup>93</sup> it speaks about salvation<sup>94</sup> when it is read in context of the biblical passage.<sup>95</sup> However, there are viable competing interpretations to the passage in question.<sup>96</sup> These interpretations are based on

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<sup>88</sup> *Capitol Square*, 210 F.3d at 725.

<sup>89</sup> "When Jesus said, 'With God all things are possible,' he was echoing the words spoken by Job centuries earlier . . . ." "I know that you can do all things, and that no purpose of yours can be hindered." - Job 42:1-2." Jeff Jacoby, *The ACLU and the G-Word*, BOSTON GLOBE, June 1, 2000, at A19. Similarly, the words of the national motto were those of King David, who is not an important figure only for Christians. *Psalms* 56:11 (King James).

<sup>90</sup> Jacoby, *supra* note 89, at A19.

<sup>91</sup> See *supra* note 89 and accompanying text and *infra* notes 92-96 and accompanying text.

<sup>92</sup> "Know you not that God is able to do all things?" Koran Cons 2:106; "Wheresoever ye are, God will bring you Together. For God Hath power over all things." Koran Cons 2:148; "Then Job answered the Lord and said: I know that you can do all things, and that no purpose of yours can be hindered." *Job* 42:1-2 (King James); "Is anything too hard for the Lord?" *Job* 42:2 (King James); "I know that thou canst do everything." *Jeremiah* 32:17 (King James).

<sup>93</sup> The court emphasized that the phrase, "With God, All Things Are Possible," is "generically theistic." *ACLU v. Capitol Square Review and Advisory Bd.*, 20 F. Supp. 2d 1176, 1179 (S.D. Ohio 1998), *rev'd*, 210 F.3d 703 (6th Cir. 2000).

<sup>94</sup> The Court of Appeals interprets salvation as strictly Christian in nature. *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 726 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc). That the motto conveys ideals regarding salvation is the crux of the Sixth Circuit's decision to render the motto unconstitutional. The court inherently concludes that salvation is a uniquely Christian concept. *Id. Contra* Ingber, *supra* note 1, at 279-81 (regarding the concept of salvation as a foundational element of most religions).

<sup>95</sup> The context of the motto includes verses 16-26 of chapter 19 from the book of Matthew. See *supra* note 46 and accompanying text.

<sup>96</sup> Pastor Peterson, a Presbyterian pastor and the plaintiff's expert, suggests that the scripture, Matthew 19:16-26, specifically refers to salvation. *Capitol Square*, 210 F.3d at 708. On the other hand, David Belcastro, associate

individual perspectives, belief systems, and perceptions.<sup>97</sup> Discourse on which interpretation is correct constitutes "theological dialogue" and has no place in court.<sup>98</sup> When a court chooses one viable religious interpretation over the other,<sup>99</sup> ironically, the court undermines the Establishment Clause's demand for government to remain neutral.<sup>100</sup> Consequently, the court cannot base its decision to treat the national motto differently from the Ohio motto on its own choice to favor an "unconstitutional" interpretation of what the motto conveys over a "constitutional" one.<sup>101</sup>

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professor at Capital University for the Religious Studies department and the defendant's expert, attests that the passage refers to discipleship. *Id.* at 709. Pastor Peterson concedes that the competing interpretations are both viable. *Id.* at 708.

<sup>97</sup> Interpretation of words and symbols is highly subjective. *See* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 266-70 (1920) (stating "[w]e live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it"). Perception is a physiological concept that refers to the organization of external data in the human brain. CAROLE WADE & CAROL TAVRIS, PSYCHOLOGY 183-87 (3d ed. 1993). Physiological perception is much like a video camera filming an event while psychological perception is how an individual assesses the significance of the data that the camera recorded. *Id.* Although the data collected is the same, each individual interprets it differently, especially when the data is ambiguous. *Id.* Since words and concepts that humans use are inherently confusing and ambiguous, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 321-22 (1987), psychological factors and cultural factors weigh in as to how one interprets data, WADE & TAVRIS, *supra*, at 183-87. A person's own needs, beliefs, expectations and emotions influence his or her interpretation of the world. *Id.* Since every person has needs, expectations, beliefs, and emotions that no other human being shares, every person's interpretation of the world, its symbols, or words will vary, at least slightly. *See id.* A perfect example of differing interpretations of the same data is when an apartment building in a French town experienced water damage and many people thought it a miracle because they thought that the water stain depicted the face of Jesus. *Id.*

<sup>98</sup> The expert for the plaintiff, Pastor Peterson, testified that discourse over what Matthew 19:16-26 means is theological discussion that "needs to be taking place in synagogues and churches and mosques around the state." *Capitol Square*, 210 F.3d at 708-09.

<sup>99</sup> For example, the Court of Appeals for the Sixth Circuit chose to accept that Matthew 19:16-26 refers to salvation rather than discipleship as the defendant's expert contended. *See Capitol Square*, 210 F.3d at 726.

<sup>100</sup> The effect of the Establishment Clause is to preclude the state from preferring one religion over the other. Wallace, *supra* note 41, at 1189. Both the endorsement test and the *Lemon* test advance that the principle of neutrality underlies the Establishment Clause. *Id.* at 1190. Neutrality requires the government to treat all religions equally and cannot prefer or disparage any religion, *School Dist. v. Schempp*, 374 U.S. 203, 215 (1963), and to treat religion and irreligion equally, *County of Allegheny v. ACLU*, 492 U.S. 573, 644 (1989) (Brennan, J., dissenting).

<sup>101</sup> In choosing an interpretation in a neutral fashion, the court must adhere to steadfast criteria for analysis. *See* Smith, *supra* note 97, at 328. Such criteria do not exist in Establishment Clause jurisprudence because there is no universal perspective through which an "objective observer" may evaluate government action. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 516-17 (1992). The pluralistic society of the United States exacerbates the implausibility of the objective observer test. *Id.* "Is the objective observer . . . a religious person, an agnostic, a separationist, a person sharing the predominant religious sensibility of the community, or one holding a minority view?" Marshall, *supra* note 33, at

Another basis for the contrasting treatment between the Ohio motto and the national motto may be the history and ubiquitous use of the national motto.<sup>102</sup> Although the Ohio motto may not have enjoyed the ubiquitous use that the national motto has, it has enjoyed significant use throughout the state of Ohio.<sup>103</sup> Since 1959, many Secretaries of State of Ohio have imprinted “With God All Things Are Possible” on their official forms and documents.<sup>104</sup> The State Tax Commissioner, as well as other government officials, have done likewise.<sup>105</sup> Nonetheless, the Court of Appeals for the Sixth Circuit did not consider the Ohio motto as ubiquitous as the national motto.<sup>106</sup> Conceding that the national motto enjoys great history and ubiquity while the Ohio motto does not, cannot by itself compensate for the difference in treatment.<sup>107</sup> History alone cannot protect an unconstitutional practice from the bite of the Establishment Clause.<sup>108</sup>

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537. In the absence of standardized criteria through which to assess Establishment Clause problems, the judge depends on his own predispositions and biases in reaching his decision. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 816 (1993).

<sup>102</sup> Extensive use of official mottoes, oaths of office, and legislative practices with religious undertones are constitutional because they are interwoven into this country’s history and tradition. *Schempp*, 374 U.S. at 213. Justice Brennan, one of the more liberal justices in the history of the Supreme Court, would uphold the national motto because he believes the motto has lost its religious significance through persistent use in the history of this nation. *Lynch v. Donnelly*, 465 U.S. 668, 716 (Brennan, J., dissenting) (terming “In God We Trust” an acceptable ceremonial deism). Other members of the Supreme Court would uphold the constitutionality of the national motto because the effect on religion is inconsequential or indirect. Donald L. Beschle, *The Conservative As Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151, 187 (1987).

<sup>103</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F. Supp. 3d 703, 710 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 725-26. The Court of Appeals does not explain why the Ohio motto is not ubiquitous and does not address the standard of gauging ubiquity. *Id.* By its decision, the court inherently suggests that Ohio’s motto is not part of the fabric of society. *See id.*

<sup>107</sup> Ceremonial deisms do not pass Establishment Clause scrutiny simply because of their “historical longevity.” *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring). History and ubiquity are relevant to Establishment Clause analysis because they are part of the context that an objective observer must

## *B. Neutrality and Secularism Are Not Interchangeable Concepts*

On many occasions, the Court has commanded that all governmental action must remain neutral in regards to religion.<sup>109</sup> However, the concept of neutrality is indeterminate in Establishment Clause jurisprudence.<sup>110</sup> To compensate for the lack of direction that the neutrality principle provides, the Court has emphasized that neutrality is achieved through strict adherence to secular values.<sup>111</sup> The Court of Appeals relied on the neutrality/secularism principle in rendering the Ohio motto unconstitutional.<sup>112</sup> However, reliance on secularism is inherently problematic.

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consider when evaluating whether the government's action conveys a message of endorsement. *Id.* at 630-31. However, history and ubiquity alone do not provide an "artificial exception" from the endorsement inquiry. *Id.* Therefore, if the Ohio motto and the national motto are similar in all other respects, the fact that the national motto enjoys extensive history does not make the motto constitutional. *See id.* at 630. On the other hand, the Court cannot hold the Ohio motto unconstitutional solely on the fact that it lacks ubiquity. *See id.*

<sup>108</sup> The Supreme Court, in *Walz v. Tax Commission*, expressed this idea most appropriately when it stated "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

<sup>109</sup> *E.g.*, *School Dist. v. Schempp*, 374 U.S. 203, 215 (1963). *See also supra* note 88 and accompanying text. For the unworkability of the neutrality concept, see generally Smith, *supra* note 97, at 313-32 (suggesting that the neutrality concept is "so indeterminate as to be almost meaningless").

<sup>110</sup> *See supra* note 101 and accompanying text. Although the concept of neutrality is inherently ambiguous, it is far more indeterminate in Establishment Clause jurisprudence. *See* Smith, *supra* note 97, at 326-32. This is so because the standard of gauging what is neutral depends on the untenable objective observer test. *Id.* Despite the fact that no one knows who is the objective observer, Marshall, *supra* note 33, at 516-17, the objective observer has to gauge whether the government's action has the effect of favoring or endorsing religion, Smith, *supra* note 97, at 329-32. Invariably the government will act in ways that indirectly favor or endorse religion or irreligion. *Id.* In order for neutrality to be a sound foundation for Establishment Clause analysis, the courts should focus on distinct and measurable criteria rather than the "objective" perception that the government is endorsing religion or irreligion. *Id.* at 328.

<sup>111</sup> The Court prefers the secular view because it does not favor atheism or an antireligious state. *Allegheny*, 492 U.S. at 610; Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 681-82 (1992) (noting that Establishment Clause jurisprudence privileges secularism while "marginalizing" religious beliefs). Secularism is "indifference to or rejection or exclusion of religion and religious considerations." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1056 (10th ed. 1993). Under the auspices of the Establishment Clause, secularism means that the state may only take a position when that position can be supported empirically and rationally. Gedicks, *supra*, at 693.

<sup>112</sup> *See* *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 725 (6th Cir. 2000), *reh'g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

Secular beliefs are many times adverse to religious views.<sup>113</sup> The goal of secularism in privatizing<sup>114</sup> religion fosters hostility toward religion.<sup>115</sup> Even if secular views are not contrary to religious ones, requiring the government to speak only in secular perspectives and to be completely silent<sup>116</sup> about religion belittles “religious views by making them seem irrelevant, outdated, or even strange.”<sup>117</sup> Belittling religion has the unmistakable effect of favoring “irreligion” over religion.<sup>118</sup> The Establishment Clause does not condone the government’s favoring irreligion over religion.<sup>119</sup>

One may argue that such hostility toward religion does not exist because no justice on the Supreme Court has ever advocated that the government remain completely silent as to religion.<sup>120</sup> In fact, the Court may never require complete silence because it privileges

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<sup>113</sup> For example, museums oftentimes contain displays portraying the "Big Bang" theory that is incongruous to the religious tenets of many religions. Wallace, *supra* note 41, at 1195. When such incongruity exists, adopting secular views fosters hostility toward religion. *Id.* at 1195-96.

<sup>114</sup> Privatization of religion refers to prohibiting the government from speaking on matters that are not objective or subject to reason such as religion. Gedicks, *supra* note 111, at 675. Supporters of this doctrine feel that religion is a private matter on which the government should not comment. *Id.* Government should only be able to comment on public matters. *Id.*

<sup>115</sup> The concept of keeping religion afar from public life, keeping it privatized, can never be neutral, because religion always takes positions on issues in public life. George W. Dent, *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 60. Thus, when the government speaks secularly, it always speaks against those religions that do not share the secular views. *See id.*

<sup>116</sup> The Supreme Court, or any of its members individually, has not promoted doing away with all religious content in government speech. Wallace, *supra* note 41, at 1202-03. However, the effect of keeping government’s completely secular comes dangerously close to forbidding the government from making any religious statements. *See Dent, supra* note 115, at 60.

<sup>117</sup> Wallace, *supra* note 41, at 1200.

<sup>118</sup> *See id.*

<sup>119</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 644 (1989) (Brennan, J., dissenting).

<sup>120</sup> Wallace, *supra* note 41, at 1202-03. Although some members of the Court have come close, no member has yet advocated for eradication of “all religious rhetoric, symbols, and other religious references from government speech.” *Id.*

governmental references to religion when the references are ceremonial deisms.<sup>121</sup> Of course, this reasoning is flawed because a practice is a ceremonial deism only when it has lost all of its religious significance through its longevity.<sup>122</sup> Consequently, only the ceremonial deisms that already exist may ever exist because any new religious practices that the government attempts to institute will not have the necessary longevity to constitute ceremonial deisms.<sup>123</sup> In essence, the government must be silent as to any practices that still retain religious connotations.<sup>124</sup> Such a requirement for silence fosters hostility toward religion, and because hostility toward religion is antithetical to the Framers' intent, secularism is not a proper foundation for Establishment Clause analysis.<sup>125</sup>

Even if secularism is not hostile to established religions, it may still be an improper constitutional foundation. Secular speech bears close affinity to secular humanist thought.<sup>126</sup>

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<sup>121</sup> See *supra* note 41 and accompanying text. One example is the national motto.

<sup>122</sup> *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). In essence, the argument is circuitous. The argument is that the government is not totally prohibited from speaking religiously, but the religious practice of which it speaks must have lost its religious significance through time. *Id.*

<sup>123</sup> See *id.* Any new religious practices that the government attempts to institute will fail constitutional muster because they lack the history and ubiquity that renders them secularized. Thus, if the practice cannot be instituted, it will never have a chance to lose its religious significance and can never be accepted as a ceremonial deism. For example, if Ohio's legislature attempted to institute a Bible reading at the opening of each session, the practice would be held unconstitutional because it has not lost its religious significance through ubiquitous use and history. Two hundred years from now, the practice will still be unconstitutional because it still lacks the requisite history since it could not be instituted.

<sup>124</sup> *But see id.* at 715 (asserting that certain governmental practices may retain their religious undertones so long as they are continued for their secular reasons).

<sup>125</sup> Justice Goldberg announced in *School Dist. v. Schempp*:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but a brooding and pervasive devotion to the secular and passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

*School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

<sup>126</sup> Compare *supra* note 111 and accompanying text to *infra* notes 129-31 and accompanying text.

Some legal scholars consider secular humanism to constitute a religion.<sup>127</sup> If so, secular humanism is subject to the reach of the Establishment Clause.<sup>128</sup> Because the concept of secularism favors secular humanism<sup>129</sup> over all other religions by allowing the government to speak only of those things that are scientifically verifiable,<sup>130</sup> neutrality and secularism are not proper underpinnings for Establishment Clause jurisprudence.

### *C. The Plethora of Religions Drastically Limits What the Government May Say*

Although the concept of religion is difficult to define,<sup>131</sup> commentators report that the number of religions is growing in the United States.<sup>132</sup> Not having a guide with which to identify

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<sup>127</sup> “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.” *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). In *Schempp*, Justice Stewart warned, “refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism . . . .” *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting); *Rhode Island Fed’n of Teachers v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980) (suggesting that secular humanism may constitute a religion); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (suggesting that secular humanism may constitute a religion).

<sup>128</sup> Secular Humanism falls under the auspices of the First Amendment. *See Torcaso*, 367 U.S. at 495 n.11.

<sup>129</sup> The concept of neutrality prohibits the government from speaking unless the content of which it speaks is empirically verifiable. *See supra* note 111 and accompanying text. In essence, the concept of neutrality advances secular humanist thought because secular humanists believe that nothing exists except that which is real or observable. *See infra* note 130 and accompanying text. Contrastingly, neutrality inhibits religious references since almost “all religions believe that reality extends beyond the confines of sensory experience.” Ingber, *supra* note 1, at 279.

<sup>130</sup> Among other beliefs, secular humanists believe that there is no God and that man is the ultimate power. Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 43-44 (1991-92). Secular humanists also believe that only things that can be empirically measured or observed are real. *Id.* This belief constitutes faith more than scientific reality because science has not proven that only observable things are real. *Smith v. Board of Sch. Comm’rs*, 655 F. Supp. 939, 982 (S.D. Ala. 1987), *rev’d*, 827 F.2d 684 (11th Cir. 1987) (overruling the decision without addressing the lower court’s classification of secular humanism as a religion). Because the belief relies on faith, secular humanism may constitute a religion. *Id.*

<sup>131</sup> Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 762 (1984). The concept of religion is so intricate that dictionaries are unable to reach a uniform definition. *Id.* at 762-63. One commentator suggests that in order to constitute religion a belief must not only be normative but it must also have a compulsive flavor to it. Note, *supra* note 3, at 1476-77. Others define religion based on its relation with the life of an individual, while others depend on its content or characteristics. *See, e.g.,* Austin, *supra* note 130, at 7. The Supreme Court has never officially defined religion. Greenawalt, *supra*, at 759.

<sup>132</sup> *See, e.g.,* Stephen J. Stein, *Religion/Religions In the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 52-54 (2000).

religious practices, courts have resorted to their own idiosyncratic tests in order to identify religious practices and to subject them to the Establishment Clause.<sup>133</sup> If the Establishment Clause forbids the government to speak from Christian text because such words “demonstrate a particular affinity toward Christianity,”<sup>134</sup> it must also forbid references from other religious texts.<sup>135</sup> Consequently, with the number of religions growing,<sup>136</sup> and with them the number of religious texts, there is a realistic fear that what the government “says” may be unconstitutional because it is contained in a certain religious text.<sup>137</sup> The government cannot take preventative measures by assessing the religious significance of what it says, because there is no standardized definition as to what constitutes religion.<sup>138</sup> Furthermore, the government cannot satisfactorily assess the constitutionality of its speech because of the unpredictability of the “objective observer” test.<sup>139</sup> Thus, with the growing number of religions and the lack of standards with

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<sup>133</sup> *E.g.*, *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) (holding that although a practice was religious in the past, it must have “current religious adherents to be considered religious); *Abdool-Rashaad v. Seiter*, 690 F. Supp. 598 (S.D. Ohio 1987) (holding that “Universalism,” a religion created in prison, is not a religion under the Establishment Clause because it lacks support outside the prison); *Remmers v. Brewer*, 361 F. Supp. 537 (S.D. Iowa 1973), *aff’d*, 494 F.2d 1277 (8th Cir. 1974) (holding that Eclatarianism is an established religion because its followers believe in Eclat, an inanimate and ultimate power much like the Christian God); *Wright v. Raines*, 571 P.2d 26 (Kan. App. 1977) (relying on a text that identified the requirements of a Sikh follower in construing Sikh Dharma to constitute an established religion).

<sup>134</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 727 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

<sup>135</sup> The concept of neutrality requires all religions to be treated equally and not to prefer or disparage any one religion. *School Dist. v. Schempp*, 374 U.S. 203, 215 (1963).

<sup>136</sup> *See Stein, supra* note 132, at 52-54.

<sup>137</sup> Whether the government knows of the origin of the words is relevant to the purpose prong of the *Lemon* test and the legislative intent prong of the endorsement test. *See supra* notes 26 and 29 and accompanying text. However, in the effect and endorsement prongs of the same tests, it is irrelevant whether the government knew the origins of the words so long as the words endorse religion when read in context. *See supra* notes 29 and 32 and accompanying text.

<sup>138</sup> *See supra* notes 130 and 133 and accompanying text.

<sup>139</sup> *See Rezaei, supra* note 13, at 533-34. *See supra* note 101 and accompanying text.

which to recognize them, the government runs the risk of violating the Establishment Clause any time it speaks.<sup>140</sup>

The risk is enhanced if courts are to measure the government's actions through the eyes of an uncertain objective observer who is aware of the meaning of the text from where the governmental speech derived.<sup>141</sup> In an attempt to comport with the Sixth Circuit's Establishment Clause analysis, the government would be wise to keep quiet on most matters.<sup>142</sup> This would have a chilling effect on governmental speech and it is certainly not what the Framers envisioned for the Establishment Clause.<sup>143</sup>

## V. CONCLUSION

In the darkness of Establishment Clause jurisprudence, the Court of Appeals for the Sixth Circuit had a chance to provide a guiding light with its decision in the “Ohio State Motto” case.<sup>144</sup> Unfortunately, the court reached its decision without announcing practical standards with which to guide future analysis of Establishment Clause issues. The Court simply relied on

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<sup>140</sup> As discussed earlier, the Establishment Clause demands the government to treat all religions equally, to not favor one religion over other religions. *See supra* note 100 and accompanying text. With the growing number of religions, it is clear that the government needs to be hypervigilant so as to not offend any of the religions, old or new. However, it is difficult to be hypervigilant when there is an aura of uncertainty as to what constitutes a religion. *See Rezai, supra* note 13, at 533-34.

<sup>141</sup> The Court of Appeals for the Sixth Circuit used such a standard with which to assess the constitutionality of the Ohio motto. *See supra* notes 71-74. With the Sixth Circuit's objective observer test, not only can the government not speak in terms that might advance or infringe a religion, but also it appears that the government cannot use phrases from texts that the court might interpret as sending a religious message. *See supra* notes 71-74 and accompanying text.

<sup>142</sup> *See supra* notes 129-33, 140 and accompanying text.

<sup>143</sup> History shows that the founders of the Constitution never meant for the government to remain speechless on religious matters. *See Wallace, supra* note 41, at 1231-54. Once they developed the language of the Establishment Clause, the founders continued to approve of legislative prayers, establishing certain days as official days of prayer, and myriad references to God or a higher being in official documents, presidential addresses, etc. *Id.*

<sup>144</sup> The court was faced with a question that the Supreme Court has never confronted: whether an objective observer is aware of the contextual origin of the government's speech. *See supra* note 68 and accompanying text. In holding that governmental speech must always be evaluated in light of its textual origin, the court impermissibly expanded

its own expansion of the hypothetical “objective observer” as an individual not only aware of the physical context of the government’s speech, but also of the textual context.<sup>145</sup> Now, in order for courts to assess the constitutionality of governmental speech, they have to make an initial inquiry as to the meaning of the original text.<sup>146</sup> Then, the courts have to inquire whether an “objective observer” would perceive the meaning of the speech to favor religion over irreligion or vice versa.<sup>147</sup> This further complication of Establishment Clause analysis does not illuminate its jurisprudence. The Court of Appeals for the Sixth Circuit failed to provide a measure – a light – with which to “distinguish between real threat and mere shadow.”<sup>148</sup> Consequently, darkness still prevails over Establishment Clause jurisprudence, thereby eliminating all shadows and rendering all governmental speech as a potential threat.

## **Theologos Verginis**

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the reach of the Establishment Clause, thereby, clouding the original boundary that the framers intended. *See supra* notes 131-43 and accompanying text.

<sup>145</sup> *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 725 (6th Cir. 2000), *reh’g granted*, No. 98-4106, 2000 WL 1016751 (6th Cir. July 14, 2000) (en banc).

<sup>146</sup> If there are no competing, viable meanings, the inquiry is harmless, but if there are competing and viable meanings, the court has to choose one meaning over the other, thereby, supporting one sectarian definition over the other. *See supra* notes 98-101 and accompanying text.

<sup>147</sup> This is the crux of Justice O’Connor’s endorsement test. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>148</sup> *School Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) (referring to what purpose the Establishment Clause of the First Amendment serves).