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GOVERNMENT DISAPPROVAL OF RELIGION

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Government Disapproval of Religion

Jay Wexler*

The Supreme Court's "Endorsement Test" for evaluating the constitutionality of government sponsored symbols, displays, and messages regarding religion is notoriously controversial and has engendered enormous scholarly attention. In addition to government "endorsement" of religion, however, the test also prohibits the government from sending a message of "disapproval" of religion. The disapproval side of the Endorsement Test has not been subject to almost any scholarly discussion, which is not surprising given that until recently the courts have had no reason to entertain, much less sustain, challenges to alleged government disapproval of religion. In the last few years, however, due to a variety of social and cultural phenomena, several cases alleging disapproval have made it to the federal courts. This, then, is a good time to begin consideration of what the disapproval portion of the Endorsement Test should prohibit. In this Article, I defend the idea that courts apply an "explicit negative reference" test to determine if the government has unconstitutionally disapproved of religion. After explaining and defending that test, the Article applies the test to the cases of alleged disapproval that courts have been asked to consider. The Article concludes by suggesting that the increasing importance of the disapproval portion of the Endorsement Test weighs strongly in favor of courts keeping the Endorsement Test despite the departure of its creator, Justice O'Connor, and the continued criticism leveled at it from courts and commentators.

I. Introduction

From its inception, the Supreme Court's so-called "endorsement test" for determining the constitutional validity of government symbols, displays, and other messages that allegedly support religion has engendered extensive commentary and controversy.¹ The test requires courts to consider whether a "reasonable observer" would believe that the government has sent "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."² Justice O'Connor first fashioned the test in her concurrence in the

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¹ For a very selective sampling of this vast literature, see, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); William P. Marshall, "We Know It When We See It:" *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL'Y 499 (2002).

² *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

crèche plus reindeer and elephant case of *Lynch v. Donnelly* in 1984,³ and five members of the Court subsequently subscribed to the test five years later in the giant Christmas tree next to a medium-sized menorah case of *County of Allegheny v. ACLU*.⁴ Critics of the test have been vociferous in their condemnation of the doctrine, arguing that it is hopelessly indeterminate, inconsistent with the original meaning of the Constitution, and biased toward majority faiths.⁵ Opponents also contend that the test wrongly elevates mere offense to a constitutionally cognizable injury and makes the federal courts look foolish.⁶ Defenders of the endorsement test occasionally concede the silly-seemingness of the doctrine⁷ but generally argue that its flaws are outweighed by its strengths, most notably its furtherance of the primary goals of the Establishment Clause—keeping civil peace, respecting individual conscience, and protecting religion from the dangerous effects of state support.⁸ Although the Supreme Court continues to apply the endorsement test in relevant situations, there is no doubt that Justice O'Connor's retirement in 2004 has left the test in a highly precarious position.⁹

In all this hubbub about endorsement, it can be easy to forget that the endorsement test is actually the endorsement slash *disapproval* test. The Court has always maintained that government may send neither a message of endorsement *nor* a message of disapproval of anyone's religion or of religion in general. As Justice O'Connor wrote in *Lynch*: "What is crucial is that a government practice not have the effect of communicating a message of government endorsement *or disapproval* of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."¹⁰ Again, Justice O'Connor in *Allegheny*: "An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs *or convey a message of disapproval to others*, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."¹¹ Although there is no controversy over whether the test, as a formal matter, in fact prohibits the government from disapproving of religion, and although pretty much every scholarly treatment of the endorsement test mentions disapproval

³ *Id.* (holding that the town of Pawtucket had not violated the Establishment Clause by sponsoring a Christmas display involving a crèche of baby Jesus along with various secular objects like an elephant, clowns, and reindeer).

⁴ 492 U.S. 573 (1989) (holding unconstitutional a state-sponsored display of a crèche standing alone but refusing to strike down a display with a Christmas tree next to a menorah).

⁵ For a discussion of the prominent critiques of the endorsement test, see Jay D. Wexler, *The Endorsement Court*, 21 Wash. U. J. L. & Pol'y 263, 271-77 (2006).

⁶ *See id.*

⁷ At least I do. *See id.* at 287 (saying that the test is widely perceived as "downright goofy").

⁸ For a defense of the endorsement test against the most prominent critiques, see *id.* at 277-287.

⁹ *See, e.g.,* Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135.

¹⁰ *Lynch*, 465 U.S. at 692 (emphasis mine).

¹¹ *Allegheny*, 492 U.S. at 593 (emphasis mine).

as part of the test, it is very rare to encounter any independent treatment of the disapproval side of the endorsement/disapproval test (which is what I will call the test from here on in, though I'll abbreviate it as "the E/D test"). Indeed, I know of no scholarly article that is devoted solely to the disapproval side of the E/D test.

This lack of academic attention to government disapproval of religion is not surprising. Until 2009, no court had ever relied on a disapproval theory to strike down a government symbol, display, message, or other action, and claims of disapproval were exceedingly rare.¹² Recently, however, things have begun to change. The past few years have seen several serious claims of government disapproval of religion arrive in the federal courts, and on at least two occasions, these courts have held government action unconstitutional on this theory.¹³ In 2009, a district court in California held that a public school teacher had violated the Establishment Clause by referring to religion as "superstitious nonsense."¹⁴ The following year, a closely divided en banc Ninth Circuit rejected a challenge to San Francisco's condemnation of the Catholic Church's position on gay adoption;¹⁵ three judges would have found that condemnation unconstitutional under the E/D test.¹⁶ Finally, this past year a district court in Oklahoma struck down a state constitutional amendment banning the use of Sharia law in state courts because the amendment "convey[ed] a message of disapproval of [the] plaintiff's faith."¹⁷

These cases make clear the importance of paying newfound attention to the disapproval portion of the E/D test. Writing in 1992, Professor (later Judge) Michael McConnell, in what might be the most prominent discussion of disapproval prior to this article, suggested in a total of two pages that the reason no court had ever found a government disapproval of religion up to that point had to do with the "structure of the Religion Clauses."¹⁸ According to McConnell, when the government appears to be disapproving of religion, it generally has a "secular purpose for its action" and "there is no 'religion' that is being 'established.'"¹⁹ What

¹² I should note that I am talking here about independent claims of disapproval rather than disapproval claims that are inherently linked with claims of endorsement. For example, the crèche in *Allegheny* was struck down as an endorsement of Christianity, but it's probably accurate to say that the Court thought the display was also a disapproval of non-Christian religions. In those cases, the question of disapproval is coextensive with the question of whether there is an endorsement. The kinds of cases that have not existed (until recently) are cases in which the court is asked to strike down a government action solely because that action disapproves of a religion without at the same time endorsing some other religion.

¹³ In addition to the cases described below, see also *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (rejecting challenge to university statute allegedly disapproving of Catholicism); *CAPEEM v. Noonan*, 600 F. Supp. 2d 1088 (E.D. Cal. 2009) (analyzing claims that California's Board of Education adopted textbooks denigrating Hinduism).

¹⁴ *C.F. v. Capistrano Unified School Dist.*, 615 F.Supp.2d 1137, 1146 (C.D. Cal. 2009).

¹⁵ *Catholic League for Religious and Civil Rights v. San Francisco*, 624 F.3d 1043 (9th Cir. 2010).

¹⁶ *Id.* at 1053-57.

¹⁷ *Awad v. Ziriax*, 754 F.Supp.2d 1298 (W.D. Okla. 2010).

¹⁸ Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 152 (1992).

¹⁹ *Id.*

the recent cases demonstrate, however, is that the lack of disapproval cases prior to recent years can be explained primarily by the existence of socio-cultural forces that dissuaded government from expressing its official disapproval of religion and not by anything having to do with the “structure of the Religion Clauses.” With the rise of post 9/11 anti-Islamic sentiment,²⁰ the growth of the so-called “New Atheism” movement,²¹ and the growing willingness of government units in predominantly liberal locales to stand up for gay rights in the presence of conservative religious opposition,²² it has recently become more socially and politically acceptable in certain contexts for government to actively criticize religious faiths. For this reason, it is now a good time to begin a scholarly conversation about what constitutes an unconstitutional disapproval of religion and what role the anti-disapproval norm should play in overall Religion Clause jurisprudence.

In this Article, I begin this conversation in earnest. In Section II, I examine what the anti-disapproval test should prohibit and propose what I call the “explicit negative reference” test for evaluating disapproval claims. I suggest that the Free Exercise Clause, rather than the E/D test, is the appropriate framework for evaluating discriminatory government activity that imposes a substantial burden on religious believers. I also argue that government messages expressing views about social, political, scientific, or other issues that do not explicitly refer to religion but are nonetheless offensive to religious believers are also not unconstitutional disapprovals, because if they were, the government would be unable to function. This leaves statements, displays, symbols, and other messages that do explicitly refer to and condemn religion as subject to disapproval analysis, a task that will be, in many cases, as difficult and controversial as typical endorsement analysis but equally as important to keeping the government from taking explicit positions on religious truth or value. Several specific issues are likely to arise with some frequency in disapproval analysis, such as the importance of context and the question of whether government can critique the social views of specific religious groups, and the Article addresses these issues in particular. I conclude that the set of cases subject to

²⁰ See, e.g., Lisa Wangsness, *Religious Leaders Decry Anti-Muslim Sentiment*, Bos. Globe, Sept. 7, 2010, http://www.boston.com/news/local/breaking_news/2010/09/religious_lead.html (noting a recent increase in anti-Muslim sentiment); *'Islamophobia' Felt 5 Years After 9/11*, ABC News, Sept. 9, 2006, <http://abcnews.go.com/GMA/story?id=2413473&page=1>.

²¹ See, e.g., Simon Hooper, *The Rise of the New Atheists*, CNN, Nov. 8, 2006, http://articles.cnn.com/2006-11-08/world/atheism.feature_1_new-atheists-new-atheism-religion?_s=PM:WORLD.

²² See, e.g., Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. Times, June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html> (New York legislature passed gay marriage bill despite opposition from Catholic bishops and other religious objections); Tim Craig, Nikita Stewart & Michelle Boorstein, *Washington Mayor Fenty Signs Same-Sex Marriage Bill*, Wash. Post, Dec. 19, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/18/AR2009121801789.html?nav=emailpage&sid=ST2009121802673> (noting that the mayor of D.C. signed a gay marriage bill into law despite threats from the Catholic Church to end social services contracts with the city if the bill passed).

disapproval analysis is relatively small but potentially quite significant given recent trends.

After examining the three specific cases mentioned above in Section III of the Article, with an eye toward further clarifying the reach of the disapproval test, I conclude in Section IV with this observation about the state of Establishment Clause doctrine: Given that the anti-disapproval test is necessary to keep the government from casting explicit harmful aspersions on religion, and given that the disapproval test is inherently linked to the endorsement test, the Supreme Court would be wise to retain the E/D test despite Justice O'Connor's departure from the Court and the continuing stream of criticism aimed at the test. Without the E/D test, no legal doctrine will exist to keep the government from explicitly criticizing religious belief, a phenomenon that seems likely to become more and more prevalent as religious diversity in the United States continues to increase.

II. What Is Government Disapproval of Religion?

Professor McConnell's discussion of disapproval provides a nice starting point to consider the proper scope of the doctrine. McConnell was writing about disapproval as part of his comprehensive critique of the E/D test; point #3 of his argument against the test was its "bias against religion."²³ His argument basically proceeds in two parts. First, he argues that courts have never used, and will likely never have reason to use, the disapproval prong of the E/D test because when the government does something that sends a message of disapproval of any given religion, it will typically not be establishing any other religion and will typically have a secular purpose for sending this message of disapproval.²⁴ McConnell's example involves public schools that want to train their students to use condoms. Such training clearly disapproves, according to McConnell, of a "tenet of the Roman Catholic Church," but it won't count as an unconstitutional disapproval because "there is no 'religion' of condom advocacy on the other side—nothing but a particular secular view regarding public health and sexual hygiene."²⁵ Thus, McConnell concludes: "When the government prefers secular ideas to religious ideas, it does not violate the Establishment Clause, no matter how strong the 'message of disapproval.'"²⁶ Second, McConnell contends that while "the appearance of disapproval more plausibly violates the Free Exercise Clause," courts have refused to find free exercise violations in the absence of some specific burden placed upon believers by government action, and these same courts have been extraordinarily stingy when deciding whether some action has in fact imposed such a

²³ McConnell, *supra*, n. 18, at 152.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

burden.²⁷ As his example here, McConnell uses the famous *Mozert* case,²⁸ in which the Sixth Circuit refused to find unconstitutional a school district's policy of teaching from textbooks that included material offensive to the religious beliefs of some parents. McConnell believes that *Mozert* is inconsistent with the Court's crèche cases. "Why is compelled exposure to governmental messages denigrating one's religion unconstitutional," McConnell wonders, "while avoidable exposure to governmental messages favorable to another religion is not?"²⁹

Understanding why McConnell's argument is flawed is key to figuring out what role the disapproval prong of the E/D test should ideally play in reviewing government action that appears contrary to some particular religious belief or tradition. Starting with McConnell's second critique—the one involving the Free Exercise Clause—I would argue that while the critique is correct to challenge the specific result in *Mozert*, it actually has nothing to do with delineating the proper scope of the disapproval prong. Requiring students to study viewpoints or information that is deeply offensive to their religious beliefs or the religious beliefs of their parents (in *Mozert* the material was alleged to be offensive for many reasons, including its emphasis on sexual equality and its insistence on evolution's truth³⁰) should count as an actionable burden on religious belief, requiring the government to pass strict scrutiny to avoid a free exercise violation. This is not the law under current doctrine, but it should be.³¹ However, the *remedy* for a free exercise violation is to grant an exemption to the plaintiff, not to prohibit the government from taking the action altogether. Thus, the remedy in *Mozert* would have been to exempt the relevant students from studying the challenged lessons. This is the only remedy that makes any sense, because if the government were unable to present information to *anyone* that is religiously offensive to *someone*, simply because the information was inconsistent with someone's religious belief, it is hard to see how the public schools could function at all, given the extreme variety of religious views on almost every imaginable issue. They certainly could not teach evolution, the big bang theory, or the notion that the earth is a sphere.³² They couldn't serve beef or pork in their

²⁷ *Id.*

²⁸ *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

²⁹ McConnell, *supra* n. 18, at 153.

³⁰ See *Mozert*, 827 F.2d at 1062.

³¹ See *id.*; see also *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that even a substantial burden placed on religious believers will not require a free exercise exemption if that burden is imposed by a neutral law of general application).

³² See Terry Mortenson, *Systematic Theology Texts and the Age of the Earth: A Response to the Views of Erickson, Grudem, and Lewis and Demarest*, 2 *Answers Research Journal* 175 (2009), available at http://www.answersingenesis.org/contents/379/arj/v2/Systematic_theology_Erickson_Grudem_Lewis.pdf (arguing that the earth is only 6,000 years old and rejecting evolution as the origin of life); The Flat Earth Society, <http://theflatearthsociety.org/cms/> (last visited July 8, 2011).

cafeterias.³³ They couldn't teach such widely shared values as sexual and racial equality, tolerance, or nonviolence.³⁴

This insight answers McConnell's question about the difference between *Mozert* and the crèche cases.³⁵ *Mozert* is rightly conceived of as posing a free exercise question, with an exemption as the possible remedy, while the crèche cases pose an establishment issue, with the potential remedy being an injunction of the challenged display. It would make no sense to conceive of the crèche display as a free exercise issue because how could a court possibly grant an exemption to a nonbeliever (and here, recall, a nonbeliever includes not only nontheists but Jews, Buddhists, Hindus, Taoists, and other non-Christians) from having to look at the display? Moreover, it is not the case that the government would cease to function if it could not specifically endorse any religious belief. Could the government continue if it were unable to display a Menorah or a Buddha or the Ten Commandments or even a Christmas Tree on public property? Of course it could.

All this is to say only that government actions which actually impose a burden on religious believers, in the sense of compelling them to do something that offends their religious beliefs or prevents them from engaging in their religious practices in a way that it would potentially make sense to exempt them from the government requirement, should be considered under the Free Exercise Clause rather than the Establishment Clause. These actions are therefore analytically distinct from government messages, symbols, displays, and other actions for which exemptions make no sense as a remedy; these latter actions are more appropriately treated as establishment issues, and are therefore the only ones that should be subject to endorsement or disapproval analysis.

So, condoms. Given the above analysis, it would be helpful to distinguish two analytically different aspects of a public school policy to train students to use condoms to prevent pregnancy and venereal diseases. On the one hand is the part of the policy requiring students to actually undergo the training—to listen to a lecture about the importance of condom use, to hear the teacher say “when you have sexual intercourse, use a condom,” to practice putting a condom on something, etc. This is rightly conceived of as a free exercise problem—if it constitutes a burden on the students' religion (which I think it probably would), then the students should be exempt from the lesson under the Free Exercise Clause. But McConnell is saying that in addition to this specific compulsion, the condom policy also sends a general message to the relevant population that the government thinks condom use is

³³ See *What is Halal?*, Islamic Food and Nutritional Council of America, <http://www.ifanca.org/halal/> (last visited Jul. 8, 2011) (stating that members of the Islamic faith do not eat pork).

³⁴ See, e.g., *Aryan Nations/Church of Jesus Christ Christians*, Anti-Defamation League, http://www.adl.org/learn/ext_us/Aryan_Nations.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=an (last visited Jul. 8, 2011) (describing the Church of Jesus Christ Christians as a religious group that believes god created only the “white race” and calls for the destruction of all other races).

³⁵ See McConnell, *supra* n. 18, at 153.

appropriate. Under McConnell's view, this message presumably constitutes a disapproval of religion and should be enjoined by the courts as an Establishment Clause violation if those courts are serious about applying an evenhanded E/D test.³⁶

Now we're really starting to get to the heart of the issue. Does such a message, standing alone—"condom use is good"—constitute a disapproval of religion? For clarity's sake, it might help to disaggregate the issues going on with the classroom example and imagine examples that do not involve compulsion. Imagine instead a public school principal giving a public speech where he or she announces to the community that the school should teach condom use because condoms promote public health. Or maybe a city council issuing a resolution to the same effect. These examples involve no compulsion (nobody is required to practice putting a condom on anything, or indeed even to attend the speech or read the resolution) and therefore do not raise free exercise issues. But are they unconstitutional disapprovals under the Establishment Clause?

To understand why they are not requires returning to the point made earlier about how the public schools could not function if every message they sent could be challenged for implicitly disapproving of somebody's religious beliefs. What's true for the public schools is just as true for government in general. Given the vast diversity of religious beliefs held by Americans, the variety of viewpoints held by these religions on almost every imaginable issue, and the plethora of ways that the government sends messages through its actions on a daily basis, government would cease to function if messages like "condom use is good" could be enjoined by religious believers.³⁷ Should a Quaker pacifist be able to challenge the President's speech explaining the need for military vigilance against global enemies? Should an Orthodox Jew be able to challenge the government's support for "the other white meat" or a particularly strict Jain be able to challenge the FDA's support for a diet high in vegetables. Should a religious polygamist be able to challenge the mayor's praise of monogamous marriages? Some religious believers object on the basis of their religion to values so widely shared and held dear by most Americans as loyalty to the country, equality of all citizens, and tolerance of diverse viewpoints.³⁸ Surely, it cannot count as a disapproval of religion for the government to expressly support these values.

Therefore, if we agree that the government must continue, we must concede that general messages that implicitly disapprove of views held by one or more religious believers cannot count as unconstitutional disapprovals under the E/D test.

³⁶ *See id.* at 152.

³⁷ I've made this point several times elsewhere. *See, e.g.,* JAY WEXLER, *HOLY HULLABALOO: A ROAD TRIP TO THE BATTLEFIELDS OF THE CHURCH/STATE WARS* 214-15 (2009).

³⁸ *See n. 34, supra; see also* Jerry Bergman, *The Modern Religious Objection to Mandatory Flag Salute in America*, 39 *J. Church & St.* 215, 226 (1997) (stating that some Mennonite groups object to saluting the American flag).

But this just brings us right back to McConnell's essential objection. Isn't McConnell right that this is unfair and demonstrates the lopsidedness (and thus worthlessness) of the E/D test? If the government cannot send a message that endorses religion, why should it be able to send a message that disapproves of it?³⁹

For this claim of unfairness to be persuasive, a strong analogy has to exist between the type of message claimed to be a disapproval ("condom use is good") and the type of messages or displays that courts have held to be unconstitutional endorsements (a stand-alone cross or crèche on public property). The analogy, however, does not work. The stand-alone cross refers explicitly to religion, while the condom message only implicitly disapproves of religion. This difference is crucial, because the government rarely ever has to explicitly refer to religion, either to endorse it or to disapprove it, while the government (if it is to function at all) must be given the power to take and communicate positions that happen to implicitly either endorse or disapprove of some religious viewpoint. The proper analogy, then, to the "condom use is good" example is not the crèche or cross, but rather to a governmental message that is consistent with a particular religious belief but does not explicitly refer to it or rely upon it for support—in other words, something like "abstinence is good." No court has held nor likely will ever hold that a policy of teaching abstinence (which, after all, has been supported by vast amounts of government funding as of late⁴⁰) constitutes a constitutional endorsement of religion, even though many people surely perceive that policy as endorsing a particular orthodox religious viewpoint. The government takes positions all the time that are consistent with specific religious beliefs and may likely be perceived by certain nonbelievers as a statement of support for that religious viewpoint. Consider, for instance, the following: refusing to publicly fund abortions, prohibiting late-term abortions, engaging in wars that are considered "just," outlawing adultery and theft, providing welfare to the poor, and taxing vices like liquor and cigarettes. From somebody's perspective, all of these things are likely to be perceived as endorsements of religion, in the same way that McConnell perceives "condom use is good" as a disapproval of religion, but finding them to be unconstitutional endorsements would make government largely impossible.

On the other hand, the government rarely if ever needs to explicitly endorse or disapprove of religion in general or a specific religion in particular. Thus, the proper analogy to the stand-alone cross is not "condom use is good" but rather something that explicitly criticizes a condom-disapproving religion—for example, a display of a cross with an "X" through it or an official statement to the effect of: "The Catholic Church is Wrong. Condom Use is Good." With respect to the latter statement, if the government is free (as it must be) to say that condom use is good, what possible need would it have to add the part condemning the Catholic Church?

³⁹ See McConnell, *supra* n. 18, at 152-53.

⁴⁰ See John E. Taylor, *Family Values, Courts, and Culture War: The Case of Abstinence-Only Sex Education*, 18 William & Mary Bill of Rights J. 1053, 1062-66 (2010) (observing that "roughly 1.5 billion federal dollars" has gone to abstinence only education).

It is the addition of these few words that turns a constitutionally acceptable statement into one that violates the disapproval prong of the E/D test.

The “explicit negative reference” test, as I’ll christen it here (so to speak), has several features to recommend it. For one thing, by allowing the government to take positions on important public issues so long as it does not explicitly refer to religion in a derogatory fashion, the test ensures that government can continue to function effectively. Secondly, by outlawing only explicit negative references to religion, the test focuses on the government action that is most harmful to religion and most likely to make believers feel like outsiders in the political community. Third, framing the test in this way creates a fair parallel with the Court’s current endorsement analysis; far from the test being lopsided, as McConnell asserts, the test actually prohibits the government from sending analogous messages on both sides of the endorsement/disapproval divide. Finally, although it will certainly not always be easy for a court to decide if the government has disapproved of religion under the “explicit negative reference” test, the test at least attempts to provide some relatively clear guidance regarding what the government may say and what it may not.

Another example. Some religious believers—for instance, at least some members of the Christian Science Church—believe that sick people should pray for help and seek the care of a religious healer rather than going to a traditional medical doctor.⁴¹ Assume that some federal study showed that fewer people were going to see medical doctors than they should, and that this was costing lives and perhaps draining the economy as well (perhaps because people were waiting until they got really sick to see a doctor). The government knows about Christian Scientists, and it also knows that some people refuse to go to doctors for other reasons unrelated to religion. Imagine that the Secretary of Health and Human Services then issues an announcement to try and convince people to go see doctors when they get sick. Boiled down to their basic message, we might imagine four different types of announcements, as follows:

- (1) If you are sick, then you should go to see a medical doctor.
- (2) If you are sick, then the only thing you can do is to see a medical doctor; no other option will help.
- (3) Prayer will not help you. If you are sick, go see a medical doctor.
- (4) Christian Science doctrine is false. If you are sick, go see a medical doctor.

⁴¹ See About Christian Science: Your Questions and Answers, available at <http://christianscience.com/questions-and-answers/2007/10/18/your-questions-and-answers> (last visited June 24, 2011).

In a sense, of course, all four of these statements express disapproval of a central tenet of the Christian Science faith, just as “condoms are good” expresses disapproval, as McConnell explains, of a central tenet of the Catholic faith. In my view, however, only statements (3) and (4) should be held unconstitutional under the E/D test, statement (3) for explicitly disapproving of an inherently religious activity (prayer), and statement (4) for explicitly disapproving of a specific faith. Because statements (1) and (2) do not explicitly refer to religion, they should not be held unconstitutional, even though they are certainly not neutral with respect to the central beliefs of the Christian Science tradition. To the obvious retort that the test I am suggesting is essentially arbitrary, I would concede that it is to an extent, but that it is nonetheless advantageous for the reasons just provided.⁴²

The test is certainly formalistic, in that it looks to the content of the utterance or message or display itself to determine if there is an explicit negative reference to religion. What if, as may occasionally be the case (we’ll see a real world example in Section II⁴³), the government says something like statement (1) or (2) in direct response to a private religious individual or group’s statement to the contrary? Imagine, for instance, that a Christian Science group launches an advertising campaign in a town that urges citizens to consider forgoing medical help and to rely on religious healers instead. For whatever reason, many citizens of the town find themselves persuaded by the religious message. The mayor of the town is worried, and he sends the following message, perhaps through a speech or a counter-advertising campaign:

- (5) A Christian Science group has urged citizens not to see medical doctors for their health problems. The government urges you instead to seek the advice of medical doctors if you become ill. Seeking the advice of a medical doctor is the only safe way to deal with a serious illness.

In my view, this message is constitutional, because although it clearly responds to a position held by a religious group, it does not explicitly condemn that religious group or its viewpoint. The courts must allow government to make a statement like (6), because if they do not, the government will not be able to usefully put forth divergent views on important social and cultural issues whenever those issues are initially raised by a religious group. Although the government could put forth its own views without referring to the views of the religious group first, such a requirement would make it unduly difficult for the government to get its message across effectively by placing it in context. Many listeners may have no idea why suddenly the government is counseling its citizens to seek medical advice if they become ill. The question is close, but I think the need for the government’s messages to be understood in context should outweigh the slightly increased sense of disapproval felt by religious believers who have attracted the government’s criticism.

⁴² See text accompanying notes 40-42, *supra*.

⁴³ See text accompanying notes 49-68, *infra*.

On the other hand, the government will rarely, if ever, have a need to go further, by explicitly condemning the religious idea, as it has in this hypothetical statement:

- (6) A Christian Science group has urged citizens not to see medical doctors for their health problems. The group's message is wrong and harmful. Please seek the advice of a medical doctor if you become ill.

The government's message is fully and adequately communicated by statement (5). All statement (6) adds to statement (5) is an explicit criticism of the religious group, with no attendant benefit. Such a statement should therefore be found unconstitutional. But what about statement (7)?

- (7) A Christian Science group has urged citizens not to see medical doctors for their health problems. *We disagree.* The government urges you instead to seek the advice of medical doctors if you become ill. Seeking the advice of a medical doctor is the only safe way to deal with a serious illness.

This may be the most difficult case. Does the benefit of adding something like “we disagree” to the government's message here outweigh the additional harm to the religion that the explicit statement of disagreement adds? It's hard to say. My inclination is to allow statement (7) as being more analogous to statement (5) than statement (6), since the statement lacks an explicit criticism of Christian Science doctrine, but reasonable minds may surely differ.

At this point, a possible objection to the explicit negative reference test could be that it actually gives the disapproval side of the E/D test more force than the endorsement side in one important sense, in that it prohibits the government from saying anything explicitly critical of a religion's social views or practices but does not prohibit the government from saying something explicitly complementary about a religion's social views or practices. For instance, the government may clearly approve of or congratulate or compliment or point to as a model some religious group or church or organization that provides benefits to the community. Such a message—for example, “we are deeply proud of the services that X church has provided to the poor citizens of our commonwealth”—would never be held to be an unconstitutional endorsement of the church. Why, therefore, should the government not be able to make a statement like (6) above or to say “we condemn this church for the harm it has brought upon the children of the commonwealth”? The reason is that the two messages are not really analogous. Praise of one religion for doing something good for society (I'm not talking here about the truth or inherent value of the religious tradition) does not send a message to other religions and nonreligious people that they are disfavored, unless perhaps those other people and groups have done something obviously exactly the same as the praised group but have not received the same governmental support. Such instances (e.g., a Christian Church and the next-door Hindu Temple provide the exact same services for the

poor, but the mayor singles out the Church for praise and not the Temple) are likely extremely rare. In the typical case of praise, then, no negative message is being sent to nonbelievers. In a typical case of explicit disapproval, however, the negative message to believers is obvious.

Still, though, this difference in how the doctrine applies to endorsements and disapprovals makes me slightly uncomfortable, and for that reason (as well as because it makes sense to move incrementally in difficult areas of law⁴⁴), I would suggest that the courts at least tentatively apply a strict scrutiny standard to disapprovals rather than striking them down automatically (automatic invalidation is the norm for endorsements). If the government can show that the explicit referral to religion is absolutely necessary to fulfill a compelling interest, then perhaps the disapproval should be allowed. One could imagine a situation arising where the government has to explicitly condemn a particular religious group to communicate its message effectively, perhaps in an emergency where the government finds itself in direct violent conflict with the group. The cases where this would arise should be extremely rare, but the doctrine should allow for the possibility, at least until it becomes clear to courts that the extremely narrow exception is unnecessary.

By proposing what might appear to be a single factor test for evaluating alleged governmental disapprovals of religion, I certainly do not mean to imply that application of the test will be at all simple or straightforward. Quite the contrary. Indeed, given that the test occupies the other side of the coin from the notoriously indeterminate endorsement inquiry, I would expect application of the disapproval standard to be equally difficult. For one thing, it may be hard in some cases for courts to determine if a reference to religion is explicit. Likely more difficult will be the question of whether any given message constitutes a “disapproval.” As with the question of endorsement, courts will have to give nuanced consideration to all the relevant circumstances to figure out the meaning of any given message, symbol, or display.⁴⁵ Finally, some cases—for example, when a public school or museum seeks to explain or illustrate how some people feel about a particular religious tradition or school within a religion or religion in general—will raise the issue of who is actually sending the message, the government itself or the person or persons whose message the government is trying to explain. As we will see in the next Section of the Article, many of these difficult issues are raised by the three disapproval cases that have reached the federal courts in recent years and that I mentioned in the Introduction. Investigation of these cases will provide a fuller understanding of the disapproval inquiry and the “explicit negative reference” test, while also demonstrating that the

⁴⁴ See, e.g., Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 309 (1998).

⁴⁵ And, of course, the disapproval inquiry raises all of the familiar doctrinal and theoretical issues that are perennially raised by the endorsement question—e.g., who is the reasonable observer, what should courts assume about the reasonable observer’s understanding of historical context, etc. etc. Clearly these are difficult issues, and I make no attempt to address them here. For my views on some of these issues, see Wexler, *supra* n. 5, at 282-85.

E/D test's disapproval prohibition plays an important role in enforcing key values furthered by the First Amendment's Religion Clauses.

III. The Courts Encounter Disapproval

A. *Catholic League for Religious and Civil Rights v. San Francisco*

In 2003, the Catholic Church's Congregation for the Doctrine of the Faith, sitting in the Vatican, issued its official view that Catholics around the world should oppose efforts to legalize or promote gay marriage or to allow gay couples to adopt children. Cardinal William Levada, the head of the Congregation, specifically ordered the Archdiocese of San Francisco not to place children for adoption with gay couples. The San Francisco Board of Supervisors responded by passing the following resolution ("Resolution 168-06"):

Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

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WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.⁴⁶

Following the issuance of the Resolution, two devout Catholics living in San Francisco, along with a Catholic civil rights organization, sued the city, claiming that the Resolution violated the Establishment Clause because it sent a message of disapproval of the Catholic Church. The district court found no Establishment Clause violation,⁴⁷ and the Ninth Circuit affirmed the district court's dismissal.⁴⁸ The Ninth Circuit then granted rehearing en banc.⁴⁹

In a complicated set of opinions issued in October of 2010, the en banc Ninth Circuit affirmed the dismissal of the complaint.⁵⁰ The court split on both the merits of the plaintiffs' challenge and on the question whether the plaintiffs had standing. In an opinion written by Judge Graber, five judges concluded that the plaintiffs lacked standing.⁵¹ In an opinion written by Judge Silverman, three judges concluded that although the plaintiffs did have standing, they lost on the merits.⁵² Finally, in an opinion written by Judge Kleinfeld, three judges found that the plaintiffs had standing and succeeded on the merits. Put altogether, then, the court voted 8-3 to affirm the district court's dismissal.⁵³ The standing question is, of course, quite difficult and important. Here, however, I will focus only on the merits of the disapproval claim, upon which the court evenly split 3-3, with five judges reaching no opinion on the matter.

⁴⁶ *Catholic League*, 624 F.3d at 1047.

⁴⁷ *Catholic League for Religious and Civil Rights v. San Francisco*, 464 F.Supp.2d 938 (N.D. Cal. 2006).

⁴⁸ *Catholic League for Religious and Civil Rights v. San Francisco*, 567 F. 3d 595 (9th Cir. 2009).

⁴⁹ *Catholic League for Religious and Civil Rights v. San Francisco*, 586 F.3d 1166 (9th Cir. 2010).

⁵⁰ *Catholic League*, 624 F.3d at 1046.

⁵¹ *Id.* at 1062-82.

⁵² *Id.* at 1060-62.

⁵³ *Id.* at 1046-60.

Judge Silverman’s opinion finding that the city’s Resolution did not violate the Establishment Clause rested on the view that the government is free to criticize the secular positions taken by religious individuals and organizations so long as this criticism is motivated by a secular purpose. Here, according to the three judges who subscribed to this view, the city had merely expressed its longstanding secular views about the acceptability of placing children for adoption with same-sex couples, and the fact that these views were accompanied by critiques of a religious organization made no difference to the result. It was key for these three judges that the city had expressed its view on a secular issue (adoption by same-sex couples) as opposed to a theological one. “We would have a different case on our hands,” wrote Judge Silverman, “had the defendants called upon Cardinal Levada to recant his views on transubstantiation. . . .”⁵⁴ According to the judges, public officials have every right to speak out in their official capacities on matters of secular concern to their constituencies, even if their statements offend the religious feelings of some. . . .⁵⁵ If the “mere fact that a resolution calls out a church or clergyman”⁵⁶ were enough to turn government speech into a constitutional violation, then “the Establishment Clause would gag secular officials from responding to religious entities even when those entities have chosen to enter the secular fray.”⁵⁷

The three judges who came out the other way on the merits saw things quite differently. Beginning with the observation that “[w]e have not found another Establishment Clause case brought by people whose religion was directly condemned by their government,”⁵⁸ and citing a Free Exercise Clause decision of the Court⁵⁹ for the “principle that government has no legitimate role under the Establishment Clause in judging the religious beliefs of the people—either by praise or denunciation,”⁶⁰ these three judges found that the city had expressed a clear and explicit message of disapproval of the Catholic Church. Although the city would have been fine if it had limited itself to the fourth “whereas” in the Resolution—the one stating that same-sex couples are just as qualified to be parents as heterosexual couples—it had gone too far in the rest of the Resolution.⁶¹ “The message . . . is explicit,” concluded the judges, “a Catholic doctrine duly communicated by the part of the Catholic church in charge of clarifying doctrine is ‘hateful,’ ‘defamatory,’ ‘insulting,’ ‘callous,’ and ‘discriminatory,’ showing ‘insensitivity and ignorance,’ . . . This is indeed a ‘message of disapproval.’”⁶² The three judges on this side of the merits issue were expressly concerned with issues of fairness and practicality. With regard to matters of practicality, the judges cited possible “serious consequences” that could ensue when the government sends a message of disapproval—everything

⁵⁴ *Id.* at 1061.

⁵⁵ *Id.* at 1060.

⁵⁶ *Id.* at 1061.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1054.

⁵⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 532 (1992).

⁶⁰ *Catholic Charities*, 624 F.3d at 1054.

⁶¹ *Id.* at 1055.

⁶² *Id.* at 1057.

from vandalism to religious discrimination in the workplace to having one's car "keyed in the parking lot."⁶³ On fairness, the judges were concerned that the Establishment Clause's anti-disapproval standard be enforced just as strongly as its anti-endorsement rule. As judge Kleinfeld put it: "No practical or fair reading could construe the Establishment Clause as prohibiting only government endorsement and not government condemnation of religion."⁶⁴

I chose to discuss this case first among the three cases in this Section because it follows closely on the issues raised in Section II. Here we have a government entity directly responding to the pronouncement of a religious organization on an issue that is legitimately important to the government. Taken as a whole, the city's Resolution presents a fairly straightforward example of the explicit negative reference test, for exactly the reasons given by the Kleinfeld opinion. The Resolution explicitly singles out the Cardinal, the Congregation, and the Vatican and directs a series of negative epithets in their direction. The Resolution is analogous to statement (6) above and—the issue of standing aside—was unconstitutional.

What about Judge Silverman's attempted distinction between government comments on social or policy issues on the one hand and theological issues on the other hand? Might this work as an alternative test for determining if a government message of some sort constitutes an unconstitutional disapproval of religion? Should we allow the government to criticize a religion as directly and effusively as it wants with respect to that religion's views on secular matters but prohibit the government from attacking in any way the religion's theological positions.

At first glance, this test has some appeal. It would, for example, go some way toward addressing the issue raised earlier regarding the government's freedom to praise religious individuals and organizations for their secular achievements, like providing food or shelter for those in need.⁶⁵ Silverman's test would provide balance, allowing the state either to praise religion or criticize it for its so-called secular pursuits. And, of course, Silverman is right that the government has no business criticizing a religion's view about the nature of ultimate reality or anything else that would appear to be clearly theological. We surely wouldn't want the government to be able to make theological judgments like "There is no Tao" or "Transubstantiation is a Lie" or "The Eightfold Path to End Suffering Actually Has Nine Steps Not Eight."⁶⁶

The reason, however, that the government cannot make pronouncements about the Tao or transubstantiation or the eightfold path has nothing to do with whether those concepts are theological from the perspective of the religion in question. It would be a mistake to assume that any religion sees a clear line (or,

⁶³ *Id.* at 1059.

⁶⁴ *Id.*

⁶⁵ See text accompanying notes 43-45, *supra*.

⁶⁶ On the eightfold path, see WALPOLA RAHULA, *WHAT THE BUDDHA TAUGHT* 45-51 (1959).

indeed, any line) between what it sees as its theological teachings and what it sees as its ethical, moral, social, or political teachings. Are the Catholic Church's views on abortion or gay marriage unrelated to its theology? When a Taoist supports the Endangered Species Act because he believes that all beings are interrelated through the Tao, is that judgment separate from the Taoist's theology? As the existence of the field of "theological ethics" suggests, the relationship between theology and ethics is inseparable. At the very least, enabling courts to determine which aspects of a religion's teachings count as "secular" and which count as "theological" would be fraught with danger and directly at odds with the Establishment Clause's anti-entanglement norm.⁶⁷

The reason that we allow government to speak on some issues but not on others when it comes to religion has to do with our views about what issues government in the United States can properly concern itself with, rather than our views on what parts of a religion's dogma can reasonably be described as "theological." We want government to be able to comment on issues relating to abortion or gay marriage or welfare or nutrition or the justness of some military endeavor because those issues are related to the proper role of government in a way that the question of whether Christ is really present in the communion is not. But government already has the authority to speak its mind on any of these secular (for lack of a better term) issues. It can put forth its view that abortion should be legal but not promoted by the state or that gay marriage should (or should not) be allowed or that the government should provide (or not provide) welfare to those in need or that people should eat many servings of vegetables or that we should (or should not) invade Iraq. Nobody questions the government's authority to speak on these questions; the only issue when it comes to disapproval under the Establishment Clause is whether it can accompany these statements with explicit criticisms of a religious individual, group, or tradition that disagrees with the government's views. And, as I've suggested above, the government will almost never need to attack a religion to make its views on a secular issue known to its citizens.⁶⁸ San Francisco could have sufficiently achieved its goals of supporting adoption by gay couples by issuing a Resolution putting forth its views about that matter and supporting those views with whatever data or moral argumentation it wished (analogous to statement #5). It could even have made it clear that it was responding to the Vatican's position by referring to that position and stating simply its disagreement without attacking the Vatican itself (statement #7). Anything more than that should be considered disapproval in violation of the First Amendment.

It is probably worth considering what kinds of government statements the Silverman test would allow. Remember, the rule would basically immunize the government from saying anything it wants about any religion so long as it does so in the context of critiquing the religion's viewpoints on "secular" issues. Do we really

⁶⁷ On entanglement, see, e.g., Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J. L. & PUB. POL'Y 1, 35-38 (2002).

⁶⁸ See text accompanying notes 40-42, *supra*.

want the government to be able to lash out at religion like this? Imagine a city's resolution stating that the leaders of a religious group hostile to stem cell research are a "bunch of evil, small-brained, hateful morons, intent on destroying the lives of millions of sick Americans," or that an atheist group opposed to a proposed military operation is filled with "godless, soulless shells of people with no moral sense and the hearts of mice." I could go on here, though I won't (use your imagination), but the key point should be clear—we should have some doctrinal mechanism for preventing the government from engaging in all out attacks on religion if we want a country where religious groups feel free to reflect on moral and political issues and engage their views on these matters in public without the fear of official persecution.

This analysis provided here also answers the other key contention raised by Judge Silverman's opinion—the notion that government officials would be "gagged" from responding to religious entities that have taken a public position if those officials are not allowed to attack the religious entity itself. This is simply untrue. The government may put forth its affirmative arguments for the position it favors as strongly and as comprehensively and as often as it wants. It can use its money and access to the media and other inherent advantages to express and disseminate its affirmative views whenever it chooses. The only way in which the Establishment Clause limits the government's authority to speak in this context is by prohibiting it from leveling explicit attacks on the religious individuals and groups who take a contrary position. This is hardly a gag. Rather, it represents a fair balance between the need for government to govern effectively with the protection that the First Amendment provides for religion.

B. *Awad v. Ziriax*

For what are surely complicated social, cultural, and political reasons, in the past few years a large number of states have begun considering laws and constitutional amendments to prohibit their courts from using "Sharia Law."⁶⁹ As of early 2011, at least forty measures in at least twenty states have been introduced that would, in one way or another, prohibit the use of Sharia law within the state.⁷⁰ Some of these proposals specifically name Sharia law, while others seek to prohibit in some way the use of "foreign" law, which would include Sharia law as well as the laws of other religious traditions.⁷¹ A handful of proposals have in fact been enacted into law, the most notorious of which is Oklahoma's "Resolution 1056," entitled the

⁶⁹ See *The Law of the Land*, ABA Journal, April 2011, at 14.

⁷⁰ See Bill Rattery, *Bans on Court Use of Shariah and/or International Law*, Gavel to Gavel, <http://gaveltogavel.us/site/2011/06/03/bans-on-court-use-of-shariainternational-law-38-of-47-bills-died-or-rejected-this-session-only-1-enacted-into-law/> (last visited June 30, 2011).

⁷¹ An example of this kind of law is Arizona H.B. 2064, signed by the Governor in April, 2011. See http://www.azleg.gov/Documents/ForBill.asp?Bill_Number=hb2064&Session_Id=102 (last visited June 30, 2011).

“Save Our State Amendment.” Resolution 1056 proposed to amend Section 1 of Article VII of the state constitution by prohibiting the use of Sharia Law within Oklahoma as follows:

The Courts provided for in subsection A of this section when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.⁷²

Although State Representative Rex Duncan, the sponsor of Resolution 1056, conceded that no Oklahoma court had ever used Sharia law,⁷³ he, along with other legislators who supported the measure, were outspoken in their criticism of Muslims in general and Sharia law specifically in their statements connected to the law.⁷⁴

The resolution was voted on directly by the voters of Oklahoma in a November, 2010 election and was approved of overwhelmingly.⁷⁵ Before the amendment became effective, however, it was challenged in federal district court by a plaintiff who claimed, among other things, that the law’s “official condemnation will result in a stigma attaching to his person, relegating him to an ineffectual position within the political community, and causing him injury.”⁷⁶ The district judge assigned the case agreed and issued a preliminary injunction enjoining the state from certifying election results and thus implementing the constitutional amendment.⁷⁷ Judge Miles-LaGrange’s Establishment Clause analysis was brief and straightforward. In response to the defendant’s contention that the amendment was “merely a choice of law provision,” the court found instead that the amendment, by singling out Sharia Law for special negative treatment, had conveyed “a message of disapproval

⁷² Oklahoma Enrolled House Joint Resolution 1056, at 2, *reprinted in* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010).

⁷³ *See* Brief of Amici Curiae The American Jewish Committee, et al., Awad v. Ziriax, No. 10-6273 (10th Cir.), filed 5/16/2011, at p. 29 (reporting that having been asked whether any court in Oklahoma had ever decided a case using Sharia Law, responded “Not yet, and you know what, there won’t be any with passage of [the amendment]”).

⁷⁴ *See id.* at p. 9-11 (reporting, among other things, that “days before Oklahomans voted on [the amendment], Duncan noted in a public appearance that Sharia law’s prevalence in the United Kingdom was ‘a cancer upon the survivability of the UK’”).

⁷⁵ *See Awad*, 754 F. Supp. 2d, at 1302 (stating that 70.08% of voters approved of the measure).

⁷⁶ *Id.* at 1303.

⁷⁷ *Id.* at 1308.

of plaintiff's faith."⁷⁸ The judge buttressed her view by relying on evidence presented demonstrating that Sharia law "is not actually 'law', but is religious traditions that provide guidance to plaintiff and other Muslims regarding the exercise of their faith."⁷⁹ As a result, the court concluded that "plaintiff's religious traditions and faith are the only non-legal content subject to the judicial exclusion set forth in the amendment."⁸⁰ The decision is currently on appeal in the Tenth Circuit.

In my view, the judge's conclusion here was correct, although this is clearly a different type of case from the San Francisco case. The main difference is that in the San Francisco case, both the reference to religion and the disapproval were explicit, whereas here the reference to religion is explicit,⁸¹ but the disapproval is probably best described as implicit rather than explicit. This is a good place, then, to make it clear that the "explicit" in "explicit negative reference" refers to the identification of the religion in question rather than to the disapproval. A message of disapproval, like a message of endorsement, can be sent in all sorts of ways, from the direct ("X religion" is "wrong" or "evil" or "callous" or "ignorant") to the implied.

Here, the state has not—at least in the Resolution itself—explicitly disapproved of Sharia law by condemning or criticizing it. Rather, it has simply forbidden its use by state courts without explicitly articulating why this would be a good idea. Nonetheless, in my judgment, given all of the circumstances (and the exercise of judgment given the totality of the circumstances is what is called for by the E/D test⁸²), the state has sent a message of disapproval here. The judge had it exactly right by focusing on the "singling out" aspect of the Oklahoma amendment. True, the amendment mentioned "the legal precepts of other nations" and "international law" as well as "Sharia Law," but by not mentioning any other

⁷⁸ *Id.* at 1306.

⁷⁹ *Id.*

⁸⁰ *Id.* The judge also found that the plaintiff had standing. *See id.* at 1303 ("Plaintiff has sufficiently set forth a personal stake in this action by alleging that he lives in Oklahoma, is a Muslim, that the amendment conveys an official government message of disapproval and hostility toward his religious beliefs . . ."). Furthermore, the judge also believed the plaintiff had made out a sufficient showing for a free exercise violation based on his claim that the amendment would make it difficult for the state to probate his will and for Muslim plaintiffs to bring religious liberty claims based on their beliefs in the future. *See id.* at 1307. I do not discuss these aspects of the court's decision here.

⁸¹ I suppose there is a colorable claim here that the amendment's reference to "Sharia Law" is not a reference to religion. I believe the judge was correct, however, to conclude that "Sharia Law" is inherently religious, and I will not discuss the point further here. *See also* Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs From Generally Applicable Laws*, 9 HUMAN RIGHTS LAW REVIEW 603-06 (2009) ("To believing Muslims, it is something deeper and higher, infused with moral and metaphysical purpose. At its core, *shariah* represents the idea that all human beings--and all human governments-- are subject to justice under the law?").

⁸² *See, e.g.*, David Goldberger, *Capital Square Review and Advisory Board v. Pinette: Be Aware of Justice Scalia's Per Se Rule*, 6 GEORGE MASON L. REV. 1, 4 (1997) (noting that the endorsement test requires a "careful assessment of the totality of all relevant facts and inferences in the record to determine whether there is an impermissible government endorsement of religion").

analogous systems of religious law (and there are many of these systems⁸³), the amendment conveys that Sharia law is uniquely disfavored among systems of religious law. Particularly when combined with the “Save our State” title, the Resolution clearly sends a message of disapproval of Sharia law to any reasonable believer or observer.

What about the statements that were made by the sponsor and other supporters in favor of the amendment? According to an amicus brief filed in the Tenth Circuit in favor of the district court’s decision,⁸⁴ Representative Duncan and other supporters of the Resolution focused their support for the law on the need to stop Sharia Law from making headway into Oklahoma.⁸⁵ These supporters did not focus on any “legal precepts of other nations” that posed a danger to the state, and they made clear their disdain for Sharia Law. For instance, Representative Duncan argued that the newfound popularity of Sharia law in England had become “a cancer upon the survivability of the UK”⁸⁶ and that the Oklahoma Resolution would “constitute a pre-emptive strike against Sharia law coming to Oklahoma.”⁸⁷ “While Oklahoma is still able to defend itself against this sort of hideous invasion,” Duncan continued, “we should do so.”⁸⁸

Should courts consider statements like these when deciding whether some particular legal action is an unconstitutional disapproval of religion? The question is an important one that is likely to recur in other cases, so it’s worth commenting on here even though in this case the Resolution by itself sends a message of disapproval, thereby making it unnecessary for the courts to consider any external supporting statements.⁸⁹ Statements like these may be relevant to a disapproval challenge, in my opinion, not because they evidence an unconstitutional governmental purpose,⁹⁰ but rather because they can, under certain circumstances, contribute to conveying an objective message of disapproval. In a case, for example, where the law on its face

⁸³ See, e.g., FRANK S. RAVITCH, LAW AND RELIGION, A READER: CASES, CONCEPTS, AND THEORY 881-955 (2008) (discussing, with materials, Jewish Law, Islamic Law, Buddhist Law, Hindu Law, and Christian Law).

⁸⁴ See n. 74, *supra*. The amici brief was filed on behalf of the following organizations: The American Jewish Committee, Americans United for Separation of Church and State, The Anti-Defamation League, The Baptist Joint Committee for Religious Liberty, The Center for Islamic Pluralism, Interfaith Alliance, and The Union for Reform Judaism.

⁸⁵ See Brief of Amici Curiae, *supra* n. 73, at 9-12.

⁸⁶ *Id.* at 9. (quoting Gale Courey Toensing, *Oklahoma Lawmakers Aim to Ban International and Sharia Law from State Courts*, Indian Country Today, Oct. 27, 2010).

⁸⁷ *Id.*

⁸⁸ *Id.* at 10.

⁸⁹ The district court did not point to any supporting statements in favor of its conclusion. Because I do not think these statements are necessary to support a finding of unconstitutionality, I have not engaged in any independent research or analysis regarding them.

⁹⁰ Courts, of course, continue to use purpose analysis in Establishment Clause challenges, see, e.g., *Anad*, 1298 F. Supp. 2d at 1305-06. I find purpose analysis unsatisfying and potentially overly restrictive on the free speech rights of legislators, but I also think that the same evidence which can show a religious purpose can often be used to show that a message will objectively be received as promoting or disapproving of religion.

may or may not be understood as sending a message of disapproval (for instance, with those laws that ban Sharia law as one aspect of “foreign law”⁹¹), evidence that the sponsors of the law made public statements that themselves expressed disapproval can go a long way toward showing that the law itself would be understood by a reasonable observer as conveying a similar message.⁹²

C. *C.F. v. Capistrano Unified School District*

This case involves a challenge to certain alleged statements made by a teacher named James Corbett in his Advanced Placement European History course at the Capistrano Valley High School in southern California. A student in the class, Chad Farnan (referred to as “C.F.” in court documents), sued the school district and the teacher, claiming that many of Corbett’s statements violated the Establishment Clause by disapproving of religion and Christianity. James Selna, the district court judge hearing the case, held for the school district on all of Farnan’s challenges except for one.⁹³ On that one claim, the judge nonetheless found that the school district could not be held liable for Corbett’s statements.⁹⁴ In later proceedings, the judge also found that Corbett could not be held liable for money damages because the right he had violated was not “clearly established” as required for a finding of section 1983 liability.⁹⁵ Both parties appealed, and the case is currently being considered by the Ninth Circuit.

Four of Corbett’s comments challenged by Farnan are of particular interest for the purposes of the Article:⁹⁶

(1) “Abstinence-only policies do not work.”⁹⁷

(2) “I will not leave John Peloza [a teacher who sued Corbett for advising a school newspaper that claimed Peloza taught religion in his science classroom] alone to propagandize kids with this religious, superstitious nonsense.”⁹⁸

⁹¹ See text accompanying note 71, *supra*.

⁹² I’ve made this point the context of endorsement before. See Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WILLIAM & MARY L. REV. 1253-54 & n. 361 (2002).

⁹³ *C.F. v. Capistrano*, 615 F. Supp. 2d, at 1153.

⁹⁴ *Id.* at 1154-55.

⁹⁵ *C.F. v. Capistrano Unified School Dist.*, 656 F. Supp. 2d 1190 (C.D. Cal. 2009).

⁹⁶ Actually, many of Corbett’s comments, and the court’s responses to the comments, are interesting from the perspective of what constitutes disapproval, but for the sake of relative brevity, I will confine my analysis to these four, because they are the most interesting.

⁹⁷ *Capistrano*, 615 F.Supp. 2d at 1142. This quotation is paraphrased.

⁹⁸ *Id.* at 1146.

(3) “What was it that Mark Twain said? ‘Religion was invented when the first con man met the first fool.’”⁹⁹

(4) “[C]onservatives don’t want women to avoid pregnancies. That’s interfering with God’s work. You got to stay pregnant, barefoot, and in the kitchen and have babies until your body collapses. All over the world, doesn’t matter where you go, the conservatives want control over women’s reproductive capacity. Everywhere in the world. From conservative Christians in this country to, um, Muslim fundamentalists in Afghanistan. It’s the same. It’s stunning how vitally interested they are in controlling women.”¹⁰⁰

The court ruled for the plaintiff with respect to comment (2) but against him on the other three comments. The court described comment (1) as an example of a statement that “does not touch upon or mention religion”¹⁰¹ and found that such statements “do not violate the Establishment Clause merely because a particular religious group may find the official’s position incorrect or offensive.”¹⁰² Otherwise, the judge observed, teachers would have to “tailor [their] comments so as not to offend or disagree with any religious group,”¹⁰³ something that would be “unworkable given the number of different religious viewpoints on various issues.”¹⁰⁴ On comment (2), however, the court found that Corbett lacked any legitimate secular purpose for stating his “unequivocal belief that creationism is ‘superstitious nonsense,’”¹⁰⁵ and had sent a “message of disapproval of religion or creationism.”¹⁰⁶ According to the judge: “Corbett could have criticized Pelozo for teaching religious views in class without disparaging those views.”¹⁰⁷

Though the court found comments (1) and (2) to pose relatively easy questions, it found that comments (3) and (4) were somewhat more difficult. With regard to the Mark Twain quotation from comment (3), the court noted that it required “close scrutiny.”¹⁰⁸ Although the court conceded that the Twain’s quotation was “biting,”¹⁰⁹ it nonetheless found that Corbett’s invocation of it passed constitutional muster for at least two reasons: because “[t]he remark comes as part of a historical discussion of the tension between religion and science,”¹¹⁰ and because it was “not clear that Corbett was espousing Twain’s view rather than merely quoting

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1150.

¹⁰¹ *Id.* at 1142.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1146.

¹⁰⁶ *Id.* at 1149.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1146.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

it.”¹¹¹ Thus, the court concluded that the primary purpose of the comment was not “to disparage”¹¹² and that its effect “was not to disapprove”¹¹³ of religion. Finally, on comment (4), the court said this:

Corbett is primarily giving his opinion that women should have control over reproductive choices. As discussed above, even if certain religious groups find Corbett’s position on the political issue offensive or incorrect, there is no violation of the Establishment Clause. The Court recognizes, however, that Corbett is also expressing disapproval of certain religious positions on the issue. However . . . it seems that the statements from which disapproval can be inferred are only incidental and ancillary to Corbett’s primary political point regarding reproduction.¹¹⁴

The court reached the correct result with regard to comments (1) and (2). Because the comment about abstinence-only policies did not expressly refer to religion, it does not run afoul of the explicit negative reference test and is therefore not unconstitutional. I would take slight issue with the court’s use of the phrase “not touching upon religion,” however. What distinguishes the comment is that it does not explicitly mention religion; it is harder to say whether it “touches upon religion.” One might plausibly say that it does touch upon religion by implying that certain religious views about education do not work. Certainly somebody who strongly believes because of her religion that schools should teach abstinence and that abstinence education works would think that the comment “touches” upon her religion. Likewise, the court was right to condemn the “superstitious nonsense” comment; this is as clear a violation of the explicit negative reference test as one can imagine. The government has no business declaring that somebody’s religious beliefs are nonsense.

Comments (3) and (4) indeed pose more difficult questions. On the Mark Twain quotation, the key question is whether the teacher was simply using the quote to illustrate what some people have said about religion, or whether the teacher was in fact expressing his own view through the quotation. If, for example, Corbett had said something like, “Is religion something a reasonable person believes in? Well, what is it that Mark Twain said...” and then gave the quote, the argument would become quite strong that the teacher had sent a message of disapproval. On the other hand, if Corbett’s remark was more on the manner of “In the past 150 years, many people have questioned the validity of religious belief. One of those people

¹¹¹ *Id.* at 1147.

¹¹² *Id.*

¹¹³ *Id.* at 1149.

¹¹⁴ *Id.* at 1150 (citing *American Family Association, Inc. v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002) (finding that a resolution disparaging anti-gay ads supported by a religious group was not unconstitutional because “any statements from which disapproval can be inferred [were] only incidental and ancillary”)).

was Mark Twain, who once said...,” then the quotation becomes constitutionally acceptable. The distinction is essentially the one between teaching religion, on the one hand, and teaching about religion on the other hand.¹¹⁵ The government may, and indeed should, teach students about religion to create citizens who can understand our most difficult public issues, and this entails teaching them about prominent historical and current critiques of religion, but the government should not, and cannot, teach students that religion (or any particular religion) is good, bad, true, or false. Without access to more facts (a transcript of the class, for instance), it is hard to evaluate the court’s analysis of this issue, but at least one of the questions it asked (whether Corbett was “espousing” Twain’s view) gets pretty close to the central issue. It’s worth observing, however, that the court’s other key point—that the remark came as part of a “historical discussion”—is not by itself meaningful. If the teacher espoused the Twain view, then he acted unconstitutionally, even if he espoused it in the context of a historical discussion.

Finally, there are the comments about religion and reproduction. The matter is surely close, but from the information provided by the opinion, it appears that the court got this issue wrong. The teacher clearly identified religion as one of the sources of his displeasure, not only naming “conservative Christians” and “Muslim fundamentalists” but also invoking “God’s work.” And there’s no question that his diatribe expresses disapproval of the positions of these believers. The key sentence expressing this disapproval is: “You got to stay pregnant, barefoot, and in the kitchen and have babies until your body collapses.” On the other hand, it may well be true that, taken as a whole, the main message of the teacher’s comments is that women should have control over their reproductive choices. So the question is whether one or two negative remarks about religion can be unconstitutional if embedded within a larger message that is unquestionably valid. The court says no, citing an earlier Ninth Circuit case for the proposition that if negative statements are “incidental” and “ancillary” to a larger message, then they are insulated from constitutional attack. I disagree. It’s one thing if the overall context of the statement makes it clear that the isolated comments about religion are really not disapproving (for example, if the context made it clear that the statements were made in jest or sarcastically), but there’s no reason why the government should be able to make statements disapproving of religion so long as it makes them in the context of a bigger discussion that is not about religion. If the anti-Catholic resolution in San Francisco, for example, had ten “Whereas” clauses, and only one of them disapproved of Catholicism, why should that one clause be immunized? The real issue is why that one clause had to be there in the first place. It adds nothing legitimate to the rest of the message, and it imposes a significant harm upon religious believers. Likewise with the comments about reproduction. The teacher was free to communicate his

¹¹⁵ For a comprehensive discussion of this issue, see generally Wexler, *supra* n. 92. See also Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J. Law & Politics 329 (2002).

beliefs that women should be given control over reproductive choices, but he went over the line by throwing in unnecessary derogatory comments about religion.¹¹⁶

III. Conclusion: Disapproval's Future

Claims that government has disapproved of religion are not exactly threatening to clog the court system, but as I have tried to show in this Article, such claims are completely consistent with the structure of the Religion Clauses and have in fact made it to the federal courts on several occasions. The claims seem to be coming more frequently, and with both religious diversity and nonbelief on the rise in the United States, there is reason to think that disapproval controversies will increase over time rather than decrease. The anti-disapproval side of what I've termed the E/D test, then, will continue to play an important role in limiting the government's ability to openly denigrate the strongly held religious beliefs of the nation's citizens. Deciding what counts as disapproval and what does not count as disapproval will not be an easy task. I have proposed a test here, called the "explicit negative reference test," that seeks to provide a workable and reasonable line to distinguish constitutional government statements, messages, displays, and symbols from unconstitutional ones, but the test is by no means automatic or simple to apply. Others may, of course, propose competing tests that either reach further or are more limited than my own. No matter what, however, one would expect that any test seeking to enforce the anti-disapproval norm of the Establishment Clause would make some non-negligible set of government utterances hostile to religion off limits in order to protect the rights of religious believers.

Before bringing this argument to a close, however, it is worth recalling that the anti-disapproval rule, whatever its specific content may turn out to be, is only one side of the larger E/D test. Disapproval, for better or worse, is joined at the hip with endorsement. If the endorsement side of the E/D test goes, so too goes the disapproval side. The E/D test (or "the endorsement test," as it's always been known) has always had its naysayers, both in the courts and in the academy, and with the recent departure of the test's creator, Justice O'Connor, and her replacement with conservative justices Roberts and Alito, some have speculated that the test may end up leaving the court with her.¹¹⁷ This would be a terrible shame. Not only does

¹¹⁶ One might counter here that this interpretation of the disapproval prong of the E/D test is inconsistent with the way that courts have applied the endorsement side of that test, since courts have held that the government can de-religion-ify a religious display (like a creche) by surrounding it with non-religious figures (like a clown or elephant). See *Lynch*, 466 U.S., at 475. I'm not sure if these cases are truly inconsistent with what I'm saying here (it's not clear to me if a display is the same as a stated message), but I would also note that I think the courts have not been nearly tough enough when applying the endorsement side of the E/D test. Government endorsements of religion should not be tolerated simply because the government surrounds those endorsements with secular messages.

¹¹⁷ See, e.g., Ian Bartum, Salazar v. Buono: *Sacred Symbolism and the Secular State*, 104 Northwestern Univ. L. Rev. 1653, 1659-60 (2010) ("For the most part, Justice O'Connor's approach has maintained

the E/D test protect non-believers from having to endure official government messages that mark them as second-class citizens, it also—as I’ve shown here—protects believers from having to endure the same kinds of messages. Those anti-religion messages have been rare up until now, but they may not remain rare forever. Without the E/D test, courts will possess no doctrinal weapon to prevent the government from lashing out against religious views. The Supreme Court would be wise to keep the E/D test as it stands, and to use it to protect all the nation’s citizens, regardless of what religion they believe in, and even if they believe in no religion at all.

the support of a tenuous majority since 1992,⁴⁵ but with her retirement in 2006, it was unclear whether the test would long survive.”); Eugene Volokh, *Is the Endorsement Test Up For Grabs in New Supreme Court Case?*, <http://volokh.com/posts/1235406739.shtml> (Feb. 23, 2009) (“My guess is that there are now 5 votes on the Court rejecting the endorsement test: Justices Scalia, Kennedy, and Thomas, who have criticized the test in the past, and Chief Justice Roberts and Justice Alito, who I suspect (based on the jurisprudential camp from which they come) would agree with the other conservatives.”).