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# With God All Things Are Possible, Including Finding Ohio's State Motto Constitutional under the Establishment Clause of the First Amendment

Christopher Pierre

# "WITH GOD ALL THINGS ARE POSSIBLE," INCLUDING FINDING OHIO'S STATE MOTTO CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT



*'Again I say to you, it is easier for a camel to go through the eye of a needle, than for a rich man to enter the kingdom of God.' When the disciples heard [this,] they were very astonished and said, 'Then who can be saved?' And looking at [them] Jesus said to them, 'With people this is impossible, but* ***with God all things are possible****.'*

Matthew 19: 24-26 (emphasis added)

## I. INTRODUCTION

Religion and religious symbols that are attributable to government expression can be easily found in public places, forums, and venues. Religious affirmations are spoken in our public schools every time the pledge of allegiance is recited to our nation "under God."[1] Our national motto, "In God We Trust," is displayed on every piece of U.S. currency. Federal law has provided for the observance of a "National Day of Prayer" since the time of the Constitutional framers.[2] Chaplains, paid with federal funds, are employed by our legislature. Even in our Supreme Court, a religious painting of "Moses the Lawgiver" is displayed over the bench and reverberates with the cry of "God save the United States and this Honorable Court" at the opening of every session. These are just a few of a great many examples of religion and religious ideas and symbols that seem to be a form of government expression.

These expressions of religious themes and ideas are nothing new. Our nation was founded on values which flow from a belief in a Supreme Being.[3] The Declaration of Independence speaks of all men being "created equal" and "endowed by their Creator, with certain unalienable rights."[4] The First Congress urged the President to declare "a day of public thanksgiving and prayer" to "Almighty God."[5] However, these same men who honored the presence of religion in government were wary of the type of church-state government against which they had just revolted. For protection from such a government, the First Congress passed the Establishment Clause of the First Amendment to the Constitution barring Congress from making any "law respecting the establishment of a religion."[6]

With the prevalence of so many religious symbols, phrases and images in our public forum, the obvious question that arises is: When do these religious "expressions" violate the Establishment Clause? Judges, lawyers and scholars have been trying to answer that question in a clear and authoritative way since the passage of the First Amendment. The Establishment Clause of the First Amendment has been a "vortex of controversy" for decades.[7] Disputes over its interpretation and application arise over a wide variety of situations; from prayer in public schools to nativity scenes and monuments on public land. The Supreme Court is in perpetual disagreement over the interpretation and application of the Establishment Clause.

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[1]The Pledge of Allegiance was amended in 1954 to include the phrase "under God." See H.R. Rep. No. 1693, 83d Cong., 2d Sess. 1 (1954), reprinted in 1954 U.S.C.C.A.N. 2339. The House Report states that "the inclusion of God in our pledge . . . acknowledges the dependence of our people and our Government upon the moral directions of the Creator." 1954 U.S.C.C.A.N. at 2340.

[2]36 U.S.C. 169h (1988).

[3]ACLU v. Capitol Square Advisory Bd., 20 F. Supp. 2d 1176, 1184 (1998).

[4]THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[5]Lynch v. Donnely, 465 U.S. 668, 675 (1984).

[6]U.S. CONST. amend. I §1.

[7]Andrew Rotstein, *Good Faith? Religious-Secular Paralellelism and the Establishment Clause*, 93 COLUM. L. REV. 1763 (1993).

The Court has adopted and abandoned various tests and settled on ambiguous and flawed options.

The current battle over Ohio's state motto, "With God All Things Are Possible," has brought the debate over the meaning and application of the Establishment Clause to the Sixth Circuit and sparked deep feelings on both sides of the issue. The most recent decision of the Sixth Circuit Court of Appeals improperly held, using the *Lemon* and endorsement tests, that Ohio's state motto was an unconstitutional violation of the Establishment Clause. The history and jurisprudence of the Establishment Clause support the government's use of generalized, respectful references to God, as found in the Ohio state motto. When properly applied, the Ohio state motto passes both the *Lemon* and endorsement tests, even though these tests are so fundamentally flawed that they ought to be abandoned in favor of the United States Supreme Court's original Establishment Clause test: the coercion analysis.

Part II of this Note will examine the history and jurisprudence surrounding the Establishment Clause of the First Amendment. This brief survey will reveal the continuing disagreements over the interpretation and application of the Establishment Clause while showing that history supports generalized references to God by the federal and state government. Part III will introduce the background and procedural history of the current case *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board*,[8] in which the Ohio state motto is being attacked as a violation of the Establishment Clause. Part IV will briefly analyze the *Lemon*, endorsement, and coercion tests used in Establishment Clause jurisprudence and then apply each test to Ohio's motto. The result of this discussion will show that history, jurisprudence and logic support upholding Ohio's state motto as constitutional under the Establishment Clause of the First Amendment of the U.S. Constitution.

## II. THE ESTABLISHMENT CLAUSE : OVERVIEW AND ARGUMENTS OF INTERPRETATION

The current battle over Ohio's state motto starts with the perpetual battle over the meaning or "the original intent" of the Establishment Clause. The Establishment Clause makes up the first ten words of the First Amendment: "Congress shall make no law respecting an establishment of religion, . . ."[9] The next six words, "or prohibiting the free exercise thereof," are referred to as the Free Exercise Clause.[10] Together, these clauses are known as "the religion clauses."

On their face, these clauses express two concerns: "the prohibition of an establishment of religion and the guarantee of the free exercise of religion."[11] These clauses also express "a tradition of freedom *of* religious exercise and a tradition of freedom *from* religious exercise."[12]

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[8]ACLU, 20 F. Supp. 2d at 1176.

[9]U.S. CONST. amend. I.

[10]*Id*.

[11]DEREK DAVIS, ORIGINAL INTENT 46 (1991).

[12]Jonathan K. Van Patten, *The Partisan Battle Over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification*, 70 MARQ. L. REV., 391-92 (1987).

Most debate over the framers' intent in the wording of the religion clauses focuses on the Establishment Clause.[13] The only point on which there is full agreement is the fact that the Establishment Clause was intended to ban the establishment of a state church or religion.[14] The purpose of the Free Exercise Clause is relatively clear compared to that of the Establishment Clause. In the words of John Locke, the Free Exercise Clause was intended to preserve the rights of a citizen to believe "according to the dictates of his own Conscience," free from civil coercion.[15]

Generally speaking, the Establishment Clause is interpreted in one of two mutually exclusive ways: the narrow interpretation or the broad interpretation.[16] The narrow interpretation, favored by those who have been labeled as "accomodationists" and "nonpreferentalists,"[17] "holds that the framers intended for the Establishment Clause to prevent governmental establishment of a single sect or denomination of religion above others."[18] Extreme accomodationists hold that the clause bans *only* the establishment of a state church or religion.[19] A "nonpreferentialist," a less extreme subset of "accomodationists," believes that government may assist religion in a variety of ways as long as such aid is imparted without discrimination; that is, if the government support does not favor one denomination or sect over others.[20] Those who hold to this narrow view conclude that the framers "intended only to remove religious requirements for public office, prevent the creation of a national church or religion, protect freedom of conscience in matters of religion against invasion by the national government, and leave the states to deal with questions of religion as they saw fit."[21] Robert Cord, a prominent scholar who subscribes to the accomodationist point of view, writes:

> There appears to be no historical evidence that the First Amendment was intended to preclude Federal government aid to religion when it was provided on a non-discriminatory basis. Nor does there appear to be any

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[13]*See* DAVIS, *supra* note 11, at 46.

[14]*Id.*

[15]John Locke, *A Letter Concerning Toleration* (1685), reprinted in MAIN CURRENTS OF WESTERN THOUGHT, ed. Franklin Le Van Baumer, 4th ed. (1978), 355.

[16]LEONARD W. LEVY, THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IN RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 43 (James E. Wood, Jr. ed., 1985).

[17]LEONARD LEVY, THE ESTABLISHMENT CLAUSE 91 (1986).

[18]DAVIS, *supra* note 11, at 48.

[19]Thomas Peters, *Bnet: Overview of Church and State Separation Debate*, (Jan. 5, 2001) *available at* <http://thomasash.hypermart.net/bnet/items/00022.html>.

[20]*See* LEVY, *supra* note 17, at 91.

[21]*See* DAVIS, *supra* note 11, at 49.

> historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state.[22]

These nonpreferentialist views, and especially the view that there is "no wall of separation" between the church and the state, are shared by the Chief Justice of the Supreme Court, William Rhenquist. He writes in his dissent in *Wallace v. Jaffree*:[23]

> It would seem that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in Everson. . . . The 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[24]

Other cited proponents of the nonpreferentialist view today include Supreme Court Justices Antonin Scalia and Clarence Thomas, and in the past included John Cotton and Patrick Henry.[25]

In contrast to the narrow view that the First Amendment bans only the establishment of a state church and preferential treatment between religious sects,[26] the broad interpretation of the Establishment Clause, also known as the "separationist" or "no aid" approach, holds that there is a strict "wall of separation" between government and religion.[27] The separationist believes the First Amendment prohibits the government from having anything to do with religion and claims that "no church or religious group should receive any form of governmental aid."[28] This broad interpretation of the Establishment Clause was first advanced in 1947 by Justice Hugo Black in the landmark case of *Everson v. Board of Education.*[29] Justice Black, writing for a five-to-four majority stated that:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion over another. Neither can

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[22]ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982).

[23]472 U.S. 38 (1985).

[24]DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, VOL. II, CIVIL RIGHTS AND CIVIL LIBERTIES 701 (1991).

[25]Larry Pahl, *Establishing the History of the Establishment Clause*, (Jan. 5, 2001), *available at* <http://members.aol.com/LarryPahl/estab1.htm>.

[26]Peters, *supra* note 19.

[27]*See* DAVIS, *supra* note 11, at 48.

[28]*See* DAVIS, *supra* note 11, at 48.

[29]330 U.S. 1 (1947); *see also* DAVIS, *supra* 11, at 47.

> force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by laws was intended to erect a 'wall of separation between church and State.'[30]

The separationists generally believe that the "First Amendment was intended to reaffirm that the Constitution granted no power to the federal government over religion."[31] Separationists hold that government support of any religious belief or practice is a violation of the First Amendment, even if such promotion favors no particular sect or religion.[32] Their interpretation of the First Amendment is said to be an outgrowth of the views held by Thomas Jefferson and James Madison.[33] Separationists often cite Jefferson's 1779 "Bill for Establishing Religious Freedom", Jefferson's famous "wall of separation" metaphor in an 1802 letter to the Danbury Baptist Association of Connecticut, and Madison's "Memorial and Remonstrance."[34]

Even though the narrow and broad interpretations of the Establishment Clause are in disagreement, both sides make arguments citing the framers' original intent. Both the separationist and the accomadationist may argue that the framers' original intent supports their position because unclear and often incomplete records make the framers' original intent very difficult to ascertain.[35] In addition, examination of the history often reveals varying purposes behind the Amendment.[36] Clues into the framers' actual intent can be found upon a brief examination of the political atmosphere at the time of the ratification of the Establishment Clause, the legislative history of the Establishment Clause, and the action taken by the original framers after the institution of the Establishment Clause.

### *A. Federalism and the Establishment Clause*

It has been well established that the states, at the time of the ratification of the Constitution and its Amendments, jealously guarded their sovereign rights and were very suspicious of federal authority.[37] This is clearly seen in the Constitution's

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[30]Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

[31]*See* Peters, *supra* note 19.

[32]*Id.*

[33]*See* DAVIS, *supra* note 11, at 48.

[34]*See* Pahl, *supra* note 25; 16 Const. Comm 627, 1.

[35]*See* DAVIS, *supra* note 11, at 50.

[36]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §14-3 (1978).

[37]Tom Peters, *Bnet: What the founders believed about separation of church and state* (Jan 5, 2001) <http://thomasash.hypermart.net/bnet/items/00024.htm>.

provision for a national government of strictly delegated, limited, and enumerated powers.[38] Those matters not entrusted to the federal government were reserved by the states.[39] This mode of political organization which unites independent states within a larger political framework, while still allowing each state to maintain its own political framework, is known as "federalism."[40] In the words of scholar Mark Dewolfe Howe, the Constitution, "made national disability the rule and national power the exception."[41] Because affirmative power in the religious sphere had not been delegated to the national government in the Constitution, "it was acknowledged that authority over religious matters was not extended to the federal regime, and the states were free to maintain their own church-state arrangements and policies."[42]

When the proposed constitution was being considered by the state-ratifying conventions, there was a strong fear that its "centralizing tendencies would crush the rights of states and individuals."[43] Because of this fear, and in an attempt to secure certain liberties, many states agreed to accept the new document only if a Bill of Rights was included.[44] The religious clauses of the First Amendment which imposed restrictions specifically on "Congress," affirmed by implication that the states retained the power to determine their own church-state policies within their jurisdictions.[45]

The separationist would argue from these facts that the framers believed that the national government and religion are completely separate and that Congress was powerless to enact laws that aided religion, even in the absence of the First Amendment.[46] The nonpreferentialist would argue that these facts simply emphasize that the framers' main motivation behind the First Amendment was to prohibit a church-state government.

### *B. The Wording of the Establishment Clause*

James Madison did not want to add a bill of rights to the Constitution and argued that such an addition was unnecessary.[47] He agreed with the words of Alexander Hamilton in the Federalist: "For why declare the things that shall not be done which

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[38]U.S. CONST. amend. X.

[39]*Id.*; James Madison observed that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . ." THE FEDERALIST 45, THE FEDERALIST PAPERS 288, 292-3 (1961).

[40]ENCYCLOPEDIA BRITANNICA, 1994, vol. 4, p.712.

[41]MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 19-20 (1965).

[42]Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "wall of Separation" Metaphor*, 16 CONST. COMMENTARY 627, 650 (1999).

[43]*See* DAVIS, *supra* note 11, at 52.

[44]*Id.* at 53.

[45]*See* Dreisbach, *supra* note 42, at 649.

[46]*See* DAVIS, *supra* note 11, at 52.

[47]*Id.* at 53.

there is no power to do?"[48] However, because many states had ratified the new Constitution with the understanding that there would be forthcoming amendments to safeguard certain human and state rights from encroachment by the national government, Madison felt "bound in honor" to propose a Bill of Rights.[49] The first version of the amendment was introduced by Madison to the House of Representatives in 1789[50] and read:

> The civil rights of none shall be abridged on the account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner or any pretext be infringed.[51]

Proponents of a narrow interpretation of the Establishment Clause view the use of the word "national" as proof that Madison simply intended a prohibition against forming a state church.[52] However, proponents of the broad view would point out that only a few years earlier, Madison spoke out against a bill in the Virginia legislature "calling for the general tax assessment for the support of, not one, but all Christian [sects]."[53] He later referred to this bill as "an establishment of religion."[54] What is agreed, is that it is difficult to know just what Madison meant by prohibiting the establishment of a "national religion."

The word "national" was quickly edited out of the proposal by the House subcommittee; and after many other proposals and much debate, the House approved the following broader amendment: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[55]

The Senate began debates, conducted in secrecy, on the House Amendments on September 3, 1789.[56] The only record of these debates that exists is the sparse account of motions and votes in the *Senate Journal*.[57] According to that record, three alternatives to the House amendment were proposed and defeated.[58] Each of these defeated "motions restricted the ban in the proposed amendment to establishments

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[48]THE FEDERALIST NO. 84 at 481 (James Madison) (Clinton Rossiter ed., 1961).

[49]1 ANNALS OF CONG. 441 (Joseph Gales ed., 1834); *reprinted in* Kurland and Lerner, THE FOUNDER'S CONSTITUTION, 5: Bill of Rights, No. 11, 21-32.

[50]*See* Peters, *supra* note 37.

[51]*See supra* note 49, at 434.

[52]*See* DAVIS, *supra* note 11 at 55.

[53]8 THE PAPERS OF JAMES MADISON, 298-306 (Robert A. Rutland, ed., 1976).

[54]*Id.*

[55]*See* Peters, *supra* note 37.

[56]*See* LEVY, *supra* note 17, at 81.

[57]*Id.* at 82.

[58]The three proposed and defeated amendments were as follows: "Congress shall make no law establishing one religious sect or society in preference to others," "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society," "Congress shall make no law establishing any particular denomination of religion in preference to another." *Id.*

preferring one sect above others."[59] Instead, the Senate adopted the broader language of the House: "Congress shall make no law establishing religion." Some have argued that this proves "that the Senate intended something broader than merely a ban on preference to a sect."[60] However, the Senate altered the Amendment six days later; the alteration which, like the previously defeated motions, "had the unmistakable meaning of limiting the ban to acts that prefer one denomination over others or that, to put it simply, established a single state church."[61] It read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion. . . ."[62] The Senate's narrow version of the Amendment was then sent to the House where it was rejected.[63]

Because the House and the Senate had approved different versions of the Bill of Rights, a conference committee was proposed to resolve the differences.[64] On September 25, 1789, a compromise Amendment was agreed upon which stated: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[65] The committee left no records of their deliberations.[66]

What little record that is available of the deliberations behind the drafting of the Establishment Clause only adds to the confusion over its meaning. Both narrow and broad proposed amendments were debated and rejected. As has been shown, the Establishment Clause of the First Amendment can be interpreted both ways. However, a brief look at the actions taken by the framers after its passage may shed some light on its true meaning.

### *C. The Actions of the Original Framers of the Establishment Clause*

Studying how those who drafted the Establishment Clause used and applied the Amendment is one of the best ways to determine their intent in its passage. The actions of the framers of the Establishment Clause do not comply with the separationists claim that the Amendment was intended "to create a state of complete independence between religion and government."[67] Instead, the actions of the framers reveal a government that both tolerates and embraces the presence of religion.

One of the most blatant examples of the framers' acknowledgment of religious ideas in government lies in the fact that the first House of Representatives proposed the Establishment Clause one day and then proposed a Presidential proclamation of

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[59] *Id.*

[60] *Id.*

[61] *See* LEVY, *supra* note 17, at 82.

[62] DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1:166 (Linda Grant DePauw, ed. 1971).

[63] *See* DAVIS, *supra* note 11, at 60

[64] *See* LEVY, supra note 17, at 83.

[65] *See supra* note 48, at 913.

[66] *See* DAVIS, *supra* note 11, at 60.

[67] *See* CORD, *supra* note 22, at 50

"Thanksgiving and Prayer" the very next day.[68] President George Washington's first "National Thanksgiving Proclamation" acknowledges "the providence of Almighty God" and calls for the people of the United States to offer "prayers and supplications to the great Lord and Ruler of Nations."[69] Many of those who voted for the First Amendment apparently saw no conflict with the Thanksgiving Day Proclamation and voted for its passage.[70] Even Madison himself did not object to the resolution requesting the Thanksgiving Day Proclamation.[71] In fact, he issued at least four proclamations calling for a day of "public thanksgiving and prayer" during his presidency.[72] These do not seem like the actions of men who intended the complete separation of government and religion.

Another example lies in the existence of chaplains in both the Continental Congress and the First Congress. Again, Madison was a member of the Congressional Committee that recommended that Congressional Chaplains be elected.[73] The First Congress also authorized the President, with the advice and consent of the Senate, to appoint a chaplain for "Military Establishments of the United States."[74] This statute was advanced by the Second and Third Congresses.[75]

Clues into the original framers' view of the relationship between religion and the government can also be seen in some of this nation's earliest treaties with the Native Americans. The Establishment Clause did not stop Jefferson from providing money to build a church and other religious needs to the Kaskaskia Indians in an 1803 treaty.[76] Other early American presidents who joined Jefferson in committing federal money to build churches through treaty agreements include George Washington, James Monroe, Andrew Jackson and Martin Van Buren.[77] Federal money was also used to support religion, missionary teachers, and church schools in a campaign "to civilize" the Native Americans.[78] Although it may be argued that these events were merely the product of the culture at that time, if the Establishment Clause was meant to prohibit the national government from having anything to do with religion, then its original framers surely violated their own intentions with their actions. It is logical to conclude from these actions taken by the framers of the First Amendment that the

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[68]*Id.* at 51.

[69]JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 1:64 (1901).

[70]*See* CORD, *supra* note 22, at 51.

[71]*See supra* note 49, at 949-50.

[72]*See* CORD, *supra* note 22, at 53.

[73]*Reports of Committees of the House of Representatives,* First Sess. Of the Thirty Third Congress, in three vols., (A.O.P. Nicholson, Printer. 1854), Vol. II, House of Representatives Document 124.

[74]*See* CORD, *supra* note 22, at 54.

[75]*Id.*

[76]LEO PFEFFER, CHURCH, STATE, AND FREEDOM, 67-79 (rev. ed. 1967).

[77]*See* CORD, *supra* note 22, at 59.

[78]*Id.* at 63.

Establishment Clause was not intended to completely separate religion and government.

*D. The Supreme Court's Working Interpretation of the Establishment Clause*

While the debate still rages over the meaning of the Establishment Clause, a working line of jurisdictional precedent has been established. In order to determine whether the Ohio State Motto, "With God All Things Are Possible," violates the Establishment Clause, it is important to look to the Supreme Court's jurisprudence with respect to this issue. An examination of these cases will reveal that although a few tests find general acceptance, the Supreme Court is deeply divided over how to apply the Establishment Clause to government action that expresses or affirms religion.[79]

While earlier Establishment Clause cases were heard by the Supreme Court, *Everson v. Board of Education*[80] is generally considered to be "the first case . . . in which the Court really came to grips with the question of applying the First Amendment's [E]stablishment [C]lause."[81] In this case, Everson, a district taxpayer, challenged a New Jersey statute which authorized the reimbursement of transportation expenses to parents of children in both parochial and public schools.[82] Everson argued that the statute forced him to help support and maintain schools dedicated to the Catholic Faith and was, therefore, a "law respecting an establishment of religion."[83] The Court found that the statute did not violate the Establishment Clause and held that state or federal government practice could neither "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."[84] The Court also held that "[n]o person [could] be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[85] The form of analysis used by the Court here has come to be known as the "coercion analysis."[86] This mode of analysis, influenced by the writings of Madison and Jefferson, "require[s] a specific finding of government coercion for a state or federal practice to be considered a violation of the Establishment Clause."[87] Under the coercion analysis, "[g]overnment must have coerced or compelled an individual to religious practice or belief for a constitutional violation to have occurred."[88] In *Everson*, the Court held

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[79]E. Gregory Wallace, *When Government Speaks Religiously,* 21 FLA. ST. U. L. REV. 1183, 1185 (1994).

[80]330 U.S. 1 (1947).

[81]M. GLENN ABERNATHY, CIVIL RIGHTS UNDER THE CONSTITUTION 173 (6th ed. 1992).

[82]Everson, 330 U.S. at 1, 5.

[83]*Id*. at 8.

[84]*Id.* at 15-16.

[85]*Id.*

[86]Kristen J. Graham, *Comment: The Supreme Court Comes Full Circle as the Touchstone of an Establishment Clause Violation*, 42 BUFF. L. REV 147 (1994).

[87]*Id*. at 149.

[88]*Id*.

that to strike down the statute and to disallow transportation for children attending parochial schools, would both allow the government to, in effect, "force [students] . . . to remain away from church against [their] will" and punish taxpaying citizens "for entertaining or professing religious beliefs."[89] The Supreme Court continued to use the coercion analysis in questions of religious establishment in the years following *Everson*.[90]

In the 1962 case *Engel v. Vitale,*[91] the Court began to reject the coercion analysis, the basis on which prior case law in this area had been decided. The Court, in dicta, eliminated the coercion analysis from its Establishment Clause jurisprudence stating:

> [T]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether [the] laws operate directly to coerce non-observing individuals or not.[92]

One year after Engel, in *Abington School District v. Schempp*,[93] the Court again rejected the coercion analysis, declaring that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[94] Because Engel diverted from the precedent of the coercion analysis, the Court began to develop new ideas and theories in Establishment Clause doctrine that would ultimately be combined to create a new test.

The issue set before the Court in *Schempp* was whether a state could statutorily require Bible readings or recitations of the Lord's prayer in public school classrooms.[95] The Court found that this law required religious exercise and was therefore a violation of the Establishment Clause based on the concept of strict neutrality.[96] The Court explained this concept by declaring that the "[g]overnment [must] maintain strict neutrality [by] neither aiding nor opposing religion."[97] Writing for the majority, Justice Clark wrote that this "neutrality" stems from the historical fear of a state-church and stated that the Establishment Clause mandates that all legislation must have a secular purpose and a "primary effect" that neither advances nor inhibits religion.[98] However, Justice Goldberg warned in his concurring opinion

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[89]*Id.* at 156 (citing *Everson*, 330 U.S. at 15-16)..

[90]*See* Illinois ex. rel. McCollum v. Board of Education, 333 U.S. 203 (1948); *see also*, Zorach v. Clauson, 343 U.S. 306 (1952).

[91]370 U.S. 421 (1962).

[92]*Id.* at 430.

[93]374 U.S. 203 (1963).

[94]*Id.* at 223.

[95]*Id*.

[96]*Id.* at 225.

[97]*Id.*

[98]The test is: "what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

that the concept of neutrality could be taken too far when he stated that "untutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" which is "not only not compelled by the Constitution but . . . [is] prohibited by it."[99]

A few years later the Court in *Waltz v. Tax Commissioner*[100] expounded on the test in *Schempp* by adding a third component: that the "end result," or "effect' of the legislation, "is not an excessive government entanglement with religion."[101] These three components were formally articulated by the Court in *Lemon v. Kurtzman*[102] and have come to be known as the "*Lemon* test."[103] The Court very clearly articulated this three-pronged test based on the previously discussed cases: "First, the statute must have a secular legislative purpose; Second, its principal or primary effect must be one that neither advances nor inhibits religion; [Third], the statute must not foster 'an excessive government entanglement with religion.'"[104] The Court clarified the application of the *Lemon* test in *Stone v. Graham*[105] when it said that "[i]f a statute violates any of these three principles, it must be struck down under the Establishment Clause."[106]

Although the *Lemon* test has been widely used and accepted as *the* test to determine violations of the Establishment Clause, it has also been criticized by scholars, lawyers and even Justices of the Supreme Court.[107] Application of the *Lemon* test has been called "unclear and unpredictable" because of its fluctuating meaning.[108] Justice Rehnquist's dissent in *Wallace v. Jaffree*[109] stated that the *Lemon* test "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."[110] In *Allegheny v. American Civil Liberties Union,*[111] Justice Kennedy wrote that he did "not wish to be seen as advocating, let alone

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power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Schempp,* 374 U.S. at 222.

[99]*Id.* at 306.

[100]397 U.S. 664 (1970).

[101]*Id.* at 674.

[102]403 U.S. 602 (1971).

[103]*Id.*

[104]*Id.* at 612-13.

[105]449 U.S. 39 (1980).

[106]*Id.* at 39-40.

[107]*See* Graham, *supra* note 85, at 165.

[108]Timothy V. Franklin, *Squeezing the Juice Out of the Lemon Test*, 72 EDUC. L. REP.1, 3 (1992). Franklin says that "[t]he literal language of *Lemon* has remained intact but the meaning attached to each of the three test questions has fluctuated depending on which Justice wrote the Court's decision." *Id.* at 2.

[109]472 U.S. 38 (1985).

[110]*Id.* at 110 (Rehnquist, J., dissenting) (referring to Madison's "wall of separation.").

[111]492 U.S. 573 (1989).

adopting, [the *Lemon*] test as [the] primary guide in this difficult area."[112] Justice Scalia has likened the *Lemon* test to "some ghoul in a late-night horror movie" which "after being repeatedly killed and buried . . . stalks our Establishment Clause jurisprudence."[113] As many as five of the Justices currently sitting on the Supreme Court have, in their own opinions, criticized *Lemon* and a sixth has joined an opinion doing so.[114]

In order to eliminate the *Lemon* test's "tendenc[y] toward subjectivity and formalism," Justice O'Connor's concurrence in *Lynch v. Donnely*[115] proposed a modification to *Lemon* that has come to be known as the "endorsement test."[116] In Justice O'Connor's opinion, the Establishment Clause prohibits government from "making adherence to religion relevant, in reality or in public perception, to [a person's] standing in the political community."[117] She believes "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[118] The test of whether a governmental act actually does endorse a religion was clarified by Justice O'Connor in *Capital Square Review and Advisory Board v. Pinnette*[119] when she stated that the question to ask is whether a "reasonable observer" would perceive the government practice as endorsing religion.[120]

Justice O'Connor's endorsement test was met with approval from those who saw the need to modify the *Lemon* test.[121] However, it, too, has met with much criticism.

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[112]*Id.* at 655 (Kennedy, J., concurring in part, dissenting in part).

[113]Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993); *See also* Edwards v. Aguillard, 482 U.S. 578, 613 (Scalia dissenting). Justice Scalia writes: "In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it 'sacrifices clarity and predictability for flexibility.' … I think it time that we sacrifice some 'flexibility' for 'clarity and predictability.' Abandoning *Lemon's* purpose test . . . would be a good place to start." *Id.* at 639-40.

[114]*See, e.g.,* Board of Educ. v. Grumet, 512 U.S. 687, 718-21 (1994); Lee v. Weisman, 505 U.S. 577, 644 (1992); *Allegheny*, 462 U.S. at 655-57; Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 573 (1989); *Jaffree*, 472 U.S. at 107-113; Sch. Dist. Of Grand Rapids v. Ball, 473 U.S. 373, 400 (1985). Widmar v. Vincent, 454 U.S. 263, 282 (1981); New York v. Cathedral Academy, 434 U.S. 125, 134-135 (1977); Justice White stated in *Roemer v. Board of Public Works*: "I am no more reconciled now to *Lemon* . . . than I was when it was decided. . . . The threefold test of *Lemon*…imposes unnecessary, and . . . superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes." 426 U.S. 736, 768 (1976) (White, J., concurring).

[115]465 U.S. 668 (1984). The *Lynch* majority upheld a creche display as constitutional because of the holiday environment in which it was displayed.

[116]Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1770 (1993).

[117]*Lynch*, 465 U.S. at 687.

[118]*Id.*

[119]515 U.S. 753; 115 S. Ct. 2440 (1995).

[120]*Id.* at 777 (O'Conner, J., concurring).

[121]*See* Graham, *supra* note 86, at 168.

One of the major criticisms is the difficulty of defining "endorsement." The concept of having an Establishment Clause violation based on the "reasonable observer's" perception of endorsement "ultimately depends on the eye of the beholder."[122] "For this reason, 'endorsement' cannot be defined in a way that is both generally acceptable and useful."[123] Justice O'Connor has distinguished permissible "acknowledgements" of religion from "endorsement," but most of the widely accepted usages she mentioned seem to be more than a mere acknowledgement of religion.[124]

Although the *Lemon* test and the endorsement test have serious ambiguities and problems, they are still being used today. However, some have argued that the Supreme Court is showing signs of moving back to the coercion analysis. Justice Kennedy "revitalized" the coercion analysis, which had been neglected by the Court for so many years, in *County of Allegheny v. American Civil Liberties Union*.[125] He stated that "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[126] Kennedy's statement reveals a view that coercion is of primary importance in determining Establishment Clause violations.

Just as separationists and nonpreferentialists are in disagreement about how to define the Establishment Clause, the U.S. Supreme Court is in disagreement about how to apply the Establishment Clause. Interpretation and application of the Establishment Clause seems to be as organic as the Constitution itself. Generally speaking, most courts today will look to the *Lemon* test or to the endorsement test to determine if a violation of the Establishment Clause has occurred. Such was the case in determining whether the Ohio state motto constitutes a violation of the Establishment Clause of the First Amendment.

## III. THE OHIO STATE MOTTO CASE: ACLU v. CAPITAL SQUARE REVIEW & ADVISORY BD.

### *A. Background*

In 1865, the General Assembly of Ohio adopted the motto "Imperium in Imperio" which is Latin for "An empire within an empire."[127] However, the motto was repealed two years later because it "smacked too much of royalty."[128] Ohio was without a motto for 90 years until a Cincinnati school boy, troubled that the state of Ohio was without a motto, suggested that the state adopt the phrase "With God all

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[122]*See* Wallace, *supra* note 79, at 1220.

[123]*Id.*

[124]A few of the examples of "permissible acknowledgments of religion" mentioned by Justice O'Connor include the national motto "In God We Trust" and opening Court sessions with "God save the United States and this Honorable Court." *Id.*

[125]492 U.S. 573 (1989).

[126]*Id.* at 662.

[127]*ACLU*, 20 F.Supp. 2d at 1178.

[128]*Id.*

Things Are Possible," drawn from Matthew 19:26.[129] On October 1, 1959 the phrase was adopted as the official state motto by an Act of the General Assembly of Ohio.[130] Later, a distinctive design was created which portrayed the motto inscribed on a ribbon-like device and combined with the state seal.[131] Since the motto's adoption, it has been used by the state and state officials in a variety of ways.[132]

In May of 1996, then-Governor George Voinovich recommended to the Capital Square Advisory Board that the state motto be inscribed on the grounds of the Capitol Square.[133] Governor Voinovich was inspired to make this recommendation after a trip to India where he observed the use of the motto "Government Work Is God's Work" inscribed on a public building. In December of 1996, the Board voted unanimously to engrave the state seal and motto on a granite plaza at the west entrance of the statehouse.[134] On July 31, 1997, The American Civil Liberties Union of Ohio, Inc. [hereinafter referred to as "the ACLU"] and the Reverend Matthew Peterson filed an action against the Capital Square Advisory Board, Governor Voinovich, Secretary of State Bob Taft, Tax Commissioner Roger W. Tracy, Senator Richard H. Finan and two Capital Square officials.[135] The ACLU sought "a declaratory judgment declaring the Ohio state motto unconstitutional and a permanent injunction enjoining the defendants from displaying the motto on the Capital Square Plaza and from using it in any official way in the future."[136]

### *B. District Court Decision*

On September 1, 1998, the United States District Court for the Southern District of Ohio denied the ACLU's request to declare the Ohio state motto unconstitutional or enjoin the defendants from displaying the motto.[137] However, the Court did enjoin the state from attributing the words of the motto to the text of the Christian New Testament.[138]

The court came to this conclusion for many reasons. First, the court did not agree with the Plaintiff's argument that because Ohio's motto is taken directly from the

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[129]Matthew 19:24-26. 'Again I say to you, it is easier for a camel to go through the eye of a needle, than for a rich man to enter the kingdom of God.' When the disciples heard {this,} they were very astonished and said, 'Then who can be saved?'. And looking at {them} Jesus said to them, 'With people this is impossible, but **with God all things are possible**.'" (New American Standard)

[130]OHIO REV CODE ANN. § 506(5) (Anderson 1959).

[131]*ACLU*, 20 F. Supp. 2d at 1178.

[132]Brief of Defendant-Appellees at 4, ACLU v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000) (No.98-4106).

[133]*ACLU*, 20 F. Supp. 2d at 1178.

[134]*Id.*

[135]*Id.* at 1177

[136]*Id.* at 1178

[137]*Id.* at 1185.

[138]*ACLU*, 20 F. Supp. 2d at 1185.

words of Jesus Christ in the Christian New Testament, it is sectarian and endorses the Christian religion over other religions.[139] The court stated that "removed from their . . . New Testament context, the words of the motto do not suggest a denominational preference" as they "do not state a principle unique to Christianity."[140] Second, the court rejected the plaintiff's argument that the motto constitutes a governmental preference of religion over nonreligion, which violates the Establishment Clause.[141] The court relied heavily on *Marsh v. Chambers*,[142] which held that certain "acknowledgment[s] of religion . . . regarded as part of the 'fabric of our society' are permitted by the Constitution."[143] The court, citing many examples such as our national motto "In God We Trust" and the language "One Nation Under God" in the pledge of allegiance, found that Ohio's state motto was both "embedded in [the] history and tradition of this country" and was a constitutional acknowledgment of religion.[144]

The district court also concluded that this case is, like *Marsh*, an exception to the rule of *Lemon v. Kurtzman*.[145] The Court noted that even if the *Lemon* test did apply to this case, the result would not change, because the motto passes all three prongs of the *Lemon* test. The district court also concluded that Ohio's motto passes Justice O'Connor's endorsement test because the motto fits into the category of "acknowledgments" of religion.[146] The district court noted from a historical interpretation of the Establishment Clause that it is proper for the federal government to acknowledge religion in various ways.[147]

### *C. Sixth Circuit Court of Appeals*

Plaintiffs appealed the decision of the district court and the case was argued before the United States Court of Appeals for the Sixth Circuit on November 4, 1999.[148] The decision that came down five months later reversed the decision of the district court and remanded it for entry of a permanent injunction enjoining the state of Ohio and its agents from using the words "With God All Things Are Possible" as the official state motto.[149] This court disagreed with the district court's view that in determining whether there is a violation of the Establishment Clause, the Ohio state motto should be viewed out of the context of the Christian New Testament from

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[139]*Id.* at 1178.

[140]*Id.* at 1179.

[141]*Id.* at 1183.

[142]463 U.S. 783 (1983).

[143]*Id. ACLU*, 20 F. Supp.2d at 1180 (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[144]*ACLU*, 20 F. Supp. 2d at 1180.

[145]403 U.S. 602 (1971); *ACLU*, 20 F. Supp. 2d at 1182.

[146]*ACLU*, 20 F. Supp. 2d at 1183.

[147]*Id.* at 1184.

[148]ACLU v. Capitol Square Review & Advisory Bd., 210 F.3d 703 (6th Cir. 2000).

[149]*Id.* at 727.

which it is drawn.[150] The court cited many cases which stress the importance of using context to determine the meaning of words.[151] The Court of Appeals interpreted the words of Jesus used for the Ohio state motto as "explaining to [the disciples] what was needed of them to enter heaven and achieve salvation."[152] They held that, viewed in that context, the "reasonable observer" of the endorsement test would see an advancement of the Christian religion and a violation of the Establishment Clause.[153] The court also felt that the words of the motto, interpreted this way, violate the second prong of the *Lemon* test in that the motto "advances the Christian religion."[154] Consequently, the court determined that Ohio's state motto was unconstitutional.

However, a majority of the judges of the United States Court of Appeals for the Sixth Circuit later voted to rehear this case *en banc*.[155] Under Sixth Circuit Rule 35(a) the effect of this hearing *en banc* will be to vacate their previous opinion and judgment and to restore the case on the docket sheet as a pending appeal.[156] The *en banc* hearing took place on December 6, 2000, and the decision of the court is still pending.

## IV. AN ANALYSIS OF ESTABLISHMENT CLAUSE JURISPRUDENCE AND HOW IT AFFECTS THE OHIO STATE MOTTO

The decision of the Sixth Circuit Court of Appeals finding Ohio's state motto unconstitutional is based on a misapplication of the faulty tests that have been accepted under the jurisprudence of the Establishment Clause. The *Lemon* and the endorsements tests generally used by the courts to determine violations of the Establishment Clause should be abandoned. However, Ohio's state motto is found to be constitutional under the First Amendment of the Establishment Clause even when these problematic tests are properly applied.

### *A. Strict Neutrality: The Illusory Foundation of the Lemon Test*

The *Lemon* test should not be used to determine whether the motto of the state of Ohio is a violation of the Establishment Clause and should be abandoned all together. As stated above, the concept of "strict neutrality" is the basis behind the first two prongs of the *Lemon* test.[157] Secular speech is considered "neutral," if "it favors neither theism nor atheism and encourages neither belief nor disbelief."[158]

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[150] *Id.* at 724.

[151] *Id.*

[152] *Id.* at 725.

[153] *ACLU*, 210 F.3d at 727.

[154] *Id.*

[155] ACLU v. Capitol Square Review & Advisory Bd., 222 F.3d 268, 2000 U.S. App. LEXIS 16276 (6th Cir. Jul. 14, 2000).

[156] *Id.*

[157] The *Lemon* test states that "[f]irst, the statute must have a secular legislative purpose; second, it's principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster (an excessive government entanglement with religion)." *Lemon,* 403 U.S. at 612-13.

[158] *See* Wallace, *supra* note 79, at 1191.

Therefore, to a "strict neutralitist," a complete ban on religious speech and symbolism is seen not as a discrimination against religion but as "proper treatment" under the Establishment Clause.[159]

There are two main problems with this "strict neutrality" view of the Establishment Clause upon which the *Lemon* test is based. First, as has been shown above, the history and wording of the Establishment Clause demonstrates that it was never meant to create a purely secular state.[160] The founders forbade government, not from making any law "advancing religion" or even "respecting religion," but only from making any law "respecting an establishment of religion."[161] Further, the Establishment Clause does not specifically forbid official expression of religious ideas or symbolism that do not reach the level of an "establishment."[162] Indeed, the actions of the framers discussed above, expressed religious ideas and sentiments in many facets of the government. The Ohio state motto fits into such historically accepted general references to God.

Second, the claim of neutrality is "illusory because secular or nonreligious speech is not always 'neutral' toward religion."[163] To prohibit religious speech in any facet of the government in favor of secular speech would privilege an atheistic view of reality over a religious or theistic view of reality because the atheist and agnostic must necessarily speak in secular terms.[164] "Secular language need not be openly antagonistic toward religion to conflict with it; it need only affirm the contrary."[165] For example, a public school science teacher may not openly teach religious views on the origin of the universe and the beginning of life, but the secular perspective on the subject (the only perspective a public school teacher is allowed to teach) is irreconcilable with the tenets of many religious groups.[166] Therefore "to mandate 'official agnosticism,' . . . is not necessarily to mandate 'official neutrality' between theism and atheism."[167] As Walter Mobley puts it:

> [I]t is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly

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[159]*See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199 (1992).

[160]*See* Wallace, *supra* note 79, at 1192.

[161]U.S. CONST. amend. I. § 1.

[162]*Id.*

[163]*See* Wallace, *supra* note 79, at 1192.

[164]*Id.* at 1195.

[165]*Id.*

[166]In his concurrence in *Illinois ex rel. McCollum v. Board of Education*, Justice Jackson expressed his reservations about whether it was possible or desirable "completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction" because "nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences." 333 U.S. 203, 235-36 (1948).

[167]Wallace, *supra* note 79, at 1195.

> and explicitly . . . [but] insinuate it silently, insidiously, and all but irresistibly.[168]

The point of this discussion is, in the words of scholar E. George Wallace, "not that secularization of the public order [in the name of strict neutrality] is wrong because it amounts to an establishment of a secular 'religion.' Rather, it is wrong because it allows the state to disregard or disparage religion, but not to speak favorably of it."[169] This is not true neutrality nor the kind that was intended to be promoted by the Establishment Clause. Therefore, because the first two prongs of the *Lemon* test are based on the illusory concept of strict neutrality, the test should be abandoned and not be used to determine whether the Ohio state motto violates the Establishment Clause.

### *B. The Ohio State Motto Under the Lemon Test*

Although the Supreme Court has pointed out some of these major flaws in the *Lemon* test[170] and has stated that it is not the exclusive test or criterion in Establishment Clause cases,[171] it is still often used by courts in Establishment Clause cases. But even when Ohio's state motto, "With God All Things Are Possible," is applied to *Lemon*, it passes all three prongs of the test.

First, the motto of the state of Ohio, "With God All Things Are Possible," clearly has a secular purpose as required by the first prong of the *Lemon* test. As stated by the district court, citing the Defendant's memorandum in *ACLU v. Capital Square*, "[The Ohio state motto] inculcates hope, makes Ohio unique, solemnizes occasions, and acknowledges the humility that government leaders frequently feel in grappling with difficult public policy issues."[172] The Supreme Court says that such a "government assertion of a legitimate secular purpose is entitled to deference"[173] and that it is "reluctan[t] to attribute unconstitutional motives to the States" on the first prong of the *Lemon* test.[174] For these reasons, the motto of the state of Ohio easily passes the *Lemon*'s prong.

Ohio's motto passes the second prong of *Lemon* in that it does not have the primary effect of advancing religion. Acknowledgments of the generalized presence of God have been historically embraced by the federal government, have been upheld under the Establishment Clause of the Constitution, and do not primarily advance religion.[175] As has been shown above such acknowledgments of God are

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[168] *Id.* at 1200 (*citing* WALTER MOBLEY, THE CRISIS IN THE UNIVERSITY 56 (1949)).

[169] *See* Wallace, *supra* note 79, at 1199.

[170] At least five members of the Supreme Court have criticized the *Lemon* decision. *See supra* note 110.

[171] *Lynch*, 465 U.S. at 679.

[172] 20 F. Supp 2d 1176 at 1182 (citing Memorandum Contra Plaintiff's Motion for Preliminary Injunction at 21).

[173] Chaudhuri v. State of Tennessee, 130 F.3d 232, 236 (6th Cir. 1997).

[174] Mueller v. Allen, 463 U.S. 388, 394 (1983), *cert. denied*, 118 S.Ct. 1308 (1998).

[175] Gaylor v. United States, 74 F.3d 214, 216 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211 (1996).

"deeply embedded in the history and tradition of this country".[176] The Ohio state motto, is consistent with the national tradition of making respectful references to God and does not primarily advance religion. The example most applicable to the Ohio motto case is found in the accepted Constitutional acknowledgment of God in the United States national motto, "In God We Trust."[177] Each time the constitutionality of the national motto has been challenged, it has been found to be acceptable under the Establishment Clause of the First Amendment.[178] In the most recent case, the Tenth Circuit concluded that the statutes establishing the use of the national motto "easily meet the requirements of the *Lemon* test."[179] The national motto and the Ohio state motto are very similar. Both mottos can be found in the Bible. The Ohio state motto comes from Matthew 19:26 and the national motto can be found in Psalms 16:1 and Psalms 56:11.[180] Both mottos mention God, but the national motto speaks to how we, as American people, *relate* to God and implies something about God's trustworthiness. The Ohio state motto simply makes a statement *about* God. Dr. Thomas P. Kasulis, Chair of the Division of Comparative Studies at The Ohio State University, put it another way when he testified before the district court that the words of the U.S. motto suggests a shared national faith that all Americans accept, while the Ohio motto is a mere "statement about God, not about . . . how we should feel about God."[181] If the national motto, which speaks to the way Americans relate to God, does not have as its primary effect the advancement of religion, then neither does the Ohio state motto, which merely makes a statement about God. The national motto is no more "neutral" between theism and atheism than is the Ohio state motto. This is even more evidence that the Establishment Clause does not require strict neutrality between a religious and agnostic viewpoints. The national motto, along with the pledge of allegiance, legislative prayers, and many of the other examples of generalized governmental references to God and religion mentioned previously, do not primarily advance religion and do not violate the Establishment Clause. The Ohio state motto is such an accepted, generalized reference to God.

The Ohio motto also passes the third prong of the *Lemon* test in that it does not foster excessive entanglement between government and religion. Those who would say that the motto constitutes an excessive entanglement suggest that the motto creates "the involvement of government in Christian theology."[182] However, as

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[176]Marsh v. Chambers, 463 U.S. 783, 786-88 (1983).

[177]36 U.S.C. § 302 (2000).

[178]*See* Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211(1996); O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930 (1979); and Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).

[179]*Gaylor*, 74 F.3d at 216.

[180]Psalm 16:1 (King James) reads: "Preserve me, O God, for in Thee do I put my trust"; Psalm 56:11 (NASB) reads: "In God I have put my trust, I shall not be afraid. What can man do to me?"

[181]*See supra* note 132, at 28 (citing Defs' Ex. F Par. 13, JA. 817; Tr. 155-56, JA 234-35).

[182]Brief of Plaintiff-Appellants at 20, ACLU v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000) (No.98-4106).

discussed above, generic references to "God" have long been held constitutional and "accepted as both a reflection of the nation's religious heritage, and as a means of inspiring and uniting citizens professing a multitude of faiths."[183] The phrase "With God All Things Are Possible" is not unique to the Christian religion alone. Some religious authorities have gone so far as to say that virtually all religions acknowledge a similar power in their god or gods.[184] Statements similar to Ohio's motto can be found in most of the world's major religions. Under Judaism, the writer of Genesis asks "Is there anything too hard for the Lord?"[185]; and Job says of his God that "Thou canst do all things."[186] The Muslim can read in the Koran that "surely God has power over all things."[187] The Hindu scriptures say of the Hindu divinity that, "the whole universe is ever in his power."[188] Ohio's motto is even similar to the words of the ancient Greek philosopher Homer, who wrote in *The Odyssey*, "To the gods all things are possible,"[189] as well as to Sophocles in *Ajax*, who wrote, "When a god works, all is possible."[190] From these few examples, it is clear that the idea behind the phrase "With God All Things Are Possible" is not unique to Christianity alone and the use of such a motto by the State of Ohio does not constitute an excessive entanglement of the government with Christian theology.

In recent years, federal courts have upheld the use of many religious symbols, phrases and activities that seem to carry a far greater risk of entanglement than that which could be perceived to come out of the Ohio state motto.[191] As has been previously discussed, the actions of the framers and of modern legislatures and courts show that the Establishment Clause does not require that all references to

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[183]*See supra* note 132, at 24.

[184]*Id*. at 18 (citing Defs' Ex. F, ¶ ¶ 3-7. JA 813-15; Tr. 151-52. JA 230-31).

[185]*Genesis* 18:14.

[186]*Job* 42:2.

[187]*Koran Sura* 2:148.

[188]Svetasvatara Upanishad 6.

[189]HOMER, THE ODYSSEY, Book X, Chapter 1, verse 306 (c. 8th century B.C.).

[190]SOPHOCLES, AJAX (c. 496-406 B.C.).

[191]*See, e.g., Chaudhuri,* 130 F.3d 232 (upholding the offering of nonsecterian prayers or moments of silence at public university functions), Hawley v. City of Cleveland, 24 F.3d 814 (6th Cir. 1994) (allowing Catholic church to operate a chapel at city airport); Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990) (upholding display of nativity scene on public property); ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir. 1990) (upholding display of rustic stable on state capitol grounds during Christmas holiday season); Elewski v. City of Syracuse, 123 F.3d 51 (2d Cir. 1997) (upholding city-owned nativity scene display in public park during Christmas holiday season), *cert. denied,* 118 S. Ct. 1186 (1998); Sherman v. Community Consolidated Sch. Dist., 980 F.2d 437 (7th Cir. 1992) (upholding daily recital of Pledge of Allegiance in public schools), *cert. denied*, 508 U.S. 950 (1993); Doe v. Louisiana Supreme Ct., 1992 U.S. Dist. LEXIS 18803 (E.D. La. 1992) (upholding the use of "in the year of our Lord" on Louisiana law licenses and notarial commissions); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991) (upholding city insignia displaying Christian cross), *cert. denied,* 505 U.S. 1219 (1992); Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988) (upholding establishment of a prayer room in the Illinois State Capitol).

religion be stripped from the affairs of government and that general references to God, such as found in the Ohio state motto, do not constitute an excessive entanglement between the government and religion. For these reasons, whether the *Lemon* test is abandoned or not, the Ohio motto does not violate the three-part *Lemon* test.

### *C. The Ambiguous "Reasonable Observer" of the Endorsement Test*

Ohio's motto also withstands the endorsement test even though the test is vulnerable to observer bias and is ambiguous in definition. As such, it should also be abandoned. As stated previously, under this test, the standard for assessing whether a government practice endorses religion is whether "the reasonable observer" would view the practice as an endorsement.[192] This begs the question: Who is the reasonable observer? Justice O'Connor tried to answer this question in *Pinette*:

> [T]he applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.' . . . [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.[193]

This definition of a fictitious objective observer "falsely assumes that there is a single impartial perspective from which to judge whether government has 'endorsed' religion."[194] Does someone who is the "personification of a community ideal of reasonable behavior" share the predominant religious sensibilities of his or her community or hold to a minority view? Is this mystery person religious, agnostic, separationist, or nonpreferentialist? In a nation that is as religiously diverse as the United States, there is no uniform perspective from those who are "outside" or "inside" religion.[195] In the end, the only perceptions that count seems to be those of the judges.[196] Some have gone so far as to say that the endorsement test is merely a "cloaking device" to "obscur[e] intuitive judgments made from the individual judge's own personal perspective."[197] Such an ambiguous measurement for a violation of the Establishment Clause is not reliable and should be abandoned.

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[192]*Gaylor*, 74 F.3d at 217 (citing Capitol Square v. Pinette, 515 U.S. 753, 770-76 (1995) (O'Conner, J., concurring).

[193]*Pinette*, 515 U.S. at 779 (citing W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

[194]*See* Wallace, *supra* note 79 at 1220.

[195]*Id.* (citing 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); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 537 (1986)).

[196]*Id.* at 1221.

[197]Michael S. Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 816 (1993).

### *D. The Ohio State Motto Under the Endorsement Test*

Although the endorsement test has met with much criticism,[198] it is still used by many courts today and has been applied to the Ohio state motto.[199] Ohio's motto does not violate the endorsement test. As has been discussed above, the relevant question is whether "the reasonable observer" would view the Ohio state motto as an endorsement. The ACLU claims that the reasonable, informed observer would see Ohio's state motto as an endorsement of religion because such an observer "would know . . . that the Ohio motto consists of the words of Jesus Christ as quoted in the Gospel of Matthew" and that these words purportedly refer to "the salvation of souls."[200]

This statement makes two claims. First, that words or concepts that appear in the Bible or that are the words of Jesus Christ are "off limits" to the government, even if (as in this case) the words or concepts appear in multiple religious and non-religious texts. This claim presupposes that the words of the motto retain the same meaning that they had 2,000 years ago when they were spoken by Jesus Christ, although removed from their original context and put into a new one. Second, the claim is that the words of the Ohio state motto actually do refer solely to "the salvation of souls." There are problems with each of these claims.

Words or concepts that appear in the Bible, whether spoken by Jesus Christ or not, are not banned from use by public officials in the public arena. Again, the historical and modern use of Biblical words and concepts in many facets of the government cries out against this claim.[201] As brought out by the district court, "[m]any aphorisms which are part of our common vocabulary have their origin in the Hebrew Bible or the Christian New Testament."[202] If words found in the Bible or spoken by Jesus Christ were truly banned from use in the public sector, then innumerable changes would have to be made in our government. Historically accepted, governmental acknowledgments of God such as our national motto, based on passages from the Psalms, would have to be struck down as unconstitutional. Also, familiar sayings and proverbs such as the golden rule, "Do unto others as you would have them do unto you,"[203] and "Love your neighbor as yourself"[204] could never be held up by government officials as ideals worthy of following. Such a drastic step was never the intention of the framers and is surely not the practice of our government today.

The context of the Ohio state motto does not constitute an endorsement of religion. While it is true that the Supreme Court has consistently found that "the

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[198]*See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351 (1991); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 537 (1986).

[199]*ACLU*, 210 F.3d 703; *see also, ACLU*, 20 F. Supp. 2d 1176.

[200]*See supra* note 182, at 8, 17.

[201]*See supra* notes 178, 182.

[202]*ACLU*, 20 F. Supp. 2d at 1179.

[203]*Luke* 6:31

[204]*Matthew* 22:39; *Mark* 12:31.

meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used,"[205] it is not necessarily true that the meaning of words or phrases must be drawn from their original context. Once the words "With God All Things Are Possible" were removed from the gospel of Matthew and codified as the Ohio state motto in Ohio Rev. Code § 5.06 alongside other state symbols such as the Ohio state flower[206] and the state bird,[207] and once those words were placed under the seal of the state of Ohio and displayed on various forms and buildings, they obtain a new context from which to draw their meaning. As the district court writes "[r]emoved from their Christian New Testament context, the words of the motto do not suggest a denominational preference."[208] Neither do they "state a principle unique to Christianity."[209]

The Ohio motto, like other statements used by the government, potentially operates on two levels.[210] For example, the words of Jesus found in John 8:32, "Ye shall know the truth and the truth shall set you free," adorn the Ohio State University College of Law and also serve as the motto for the United States Central Intelligence Agency [hereinafter "CIA"].[211] A brief glimpse into other passages of the Bible reveal what Jesus originally meant when he spoke of "the truth" and being "set free." Later in the same gospel, Jesus makes another statement about truth: "I am the way, the truth, and the life. No one comes to the Father except through Me."[212] And the apostle Paul said in Romans 6:22 that to be "set free" means that being "set free from sin . . . you have . . . everlasting life."

From these passages it can be deduced that when Jesus was speaking of "the truth" he was really speaking of himself, and the freedom of which he spoke was the freedom from the bondage of sin unto salvation. On one level, the phrase, "Ye shall know the truth and the truth shall set you free," speaks directly to the salvation of souls through Jesus Christ. On another level, and in the new context of being associated with the study of law at Ohio State or the enforcement of law at the CIA, the phrase speaks to the secular purpose of "advocating the liberating pursuit of truth (whether religious or not) in the practice [and enforcement] of law."[213] It is obvious to the "reasonable observer" that the motto of the CIA is not meant to convey the message of salvation through Jesus Christ because it is not the purpose of the CIA to proclaim that message. Rather, the reasonable and informed observer would know that the job of the CIA is to search for and find the truth in its investigations so that justice might be served and America's freedoms protected. With this knowledge, the

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[205]Deal v. United States, 508 U.S. 129 (1993).

[206]OHIO REV CODE ANN. § 5.021 (Anderson 1959).

[207]*Id.* at §5.02.

[208]*ACLU*, 20 F. Supp. 2d at 1179.

[209]*Id.*

[210]*See supra* note 132, at 3.

[211]*Id.*

[212]*John* 14:6.

[213]*See supra* note 132, at 3.

reasonable observer would know that despite the phrase's source and original meaning, it obtains a new meaning in its new context.

This leads to the ACLU's second claim: that Ohio's motto refers solely to "the salvation of souls." Just as the CIA's motto, "Ye shall know the truth and the truth shall set you free," works on two levels, so does the Ohio state motto, "With God All Things Are Possible." The court of appeals in Ohio's motto case held that they were "required to view the words of the motto as part of the text in which they are found and give them . . . the meaning intended by Jesus when he addressed his disciples as reported by Matthew in the New Testament of the Christian Bible."[214] The court, claiming to come at this issue with strict neutrality, took on the very "un-neutral" role of Biblical interpreter and found that the words of the motto speak to salvation and show a "particular affinity" for Christianity.[215] James Madison spoke to such actions by the court when he said that any notion that "the Civil Magistrate is a competent Judge of Religious Truth" is an "arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."[216] The issue of whether courts should be involved in Biblical interpretation aside, the court is only partly correct in its conclusions. The words "With God All Things Are Possible" were indeed used to answer the question, "[w]ho then can be saved,"[217] posed by the disciples after Jesus had told them how difficult it is for a rich man to enter the kingdom of heaven.[218] However, the "reasonable observer" can plainly see that the statement is not limited only to salvation. The phrase does not say "With God *Salvation* Is Possible," but rather "With God *All Things* Are Possible." "All things" does indeed include salvation, but it must, by definition, include everything else. "All things" can arguably include secular goals such as balancing the budget, ending domestic violence, or breaking down organized crime and drug trafficking rings; the heavy tasks of the state that seem impossible to man. Even in its original context, Ohio's motto does not speak to *how* a man is to be saved but only that such salvation is possible. According to the Christian faith, a soul can only be saved by grace, through faith in Jesus Christ and His propitiatory work on the cross.[219] The reasonable observer "aware of the history and context of the community and forum in which the [motto] appears"[220] would understand these things and accept the Ohio state motto as a constitutional acknowledgment of God that inculcates a message of hope as citizens face the seemingly impossible tasks of State government. For these reasons, the Ohio state motto does not violate the endorsement test.

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[214] *ACLU*, 210 F.3d at 724.

[215] *Id.* at 725.

[216] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS 5 (June 20, 1785, reprinted in 1 Founders' Constitution 27, 82 (Philip B. Kurland & Ralph Learner eds., 1987).

[217] *Matthew* 19:25.

[218] *Matthew* 19:26.

[219] *Acts* 4:12; *Ephesians* 2:8-9

[220] *Pinette*, 515 U.S. at 880.

*E. A Return to the Supreme Court's Original Test: The Coercion Analysis*

Although the Ohio state motto passes both the *Lemon* test and the endorsement test, these tests are so flawed, ambiguous, and cumbersome that they should be abandoned in this inquiry in favor of the Supreme Court's original tool in Establishment Clause jurisprudence: the coercion test. As stated above, the Supreme Court began its Establishment Clause jurisprudence in *Everson v. Board of Education* in which the coercion analysis was developed.[221] As stated by Justice Kennedy, "the Establishment Clause contains two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to a religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so."[222] The coercion analysis is linked to the framers' original resolve against any type of state church which would rule with an iron fist over its citizens. The coercion analysis is also easier to apply to the wide variety of Establishment cases than the cumbersome *Lemon* test and the ambiguous endorsement test. A "coercion" by the state takes place where there is a real threat of harm if there is not an act of compliance by the citizen.[223] For these reasons, the coercion test should be used to analyze whether the Ohio state motto constitutes a violation of the Establishment Clause.

*F. The Ohio State Motto Under the Coercion Analysis*

The Ohio motto does not "coerce anyone to support or participate in any religion or its exercise," but merely makes a statement *about* God in a generalized, respectful and historically constitutional way.[224] It is as constitutional as the national motto, which not only mentions "God" but makes a statement about how we, as Americans, are to *relate* to Him. Use of the Ohio state motto does not amount to a coercion because it demands no act of compliance from which a citizen might experience a real threat of harm.[225] Ohio's state motto does not punish citizens of Ohio "for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[226] Ohio's motto does not establish a state religion or even uphold the Christian religion above others. As has been shown the words of the Ohio state motto comply with the world's major religions and fall under the category of a constitutionally accepted, generalized, reference to God. For all of these reasons, Ohio's state motto is found to be constitutional under the coercion analysis. It has been shown that the Ohio state motto stands up under the skewed scrutiny of the *Lemon* and endorsement tests even though the flaws in these tests call for their abandonment. In light of this, the Court of Appeals for the Sixth Circuit should turn to the coercion analysis, the original test used by the Supreme Court, the test supported by the history and jurisprudence of the Establishment Clause, and reverse

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[221]330 U.S. 1 (1947).

[222]*Allegheny*, 492 U.S. at 659 (quoting *Lynch*, 465 U.S. at 678).

[223]*See* Wallace, *supra* note 78, at 1257-1262.

[224]*Allegheny*, 492 U.S. at 659.

[225]*See* Wallace, *supra* note 78, at 1257-1262.

[226]*Everson*, 330 U.S. at 15-16.

their decision to find the Ohio state motto constitutional under the Establishment Clause.

## V. CONCLUSION

Although over two hundred years old, the Establishment Clause continues to be a hot bed of debate today. The discussion above has only given a brief glimpse into some of the arguments that rage over its history, interpretation, and application. But no matter what agreement can be found in relation to the Establishment Clause, a constitutional standard will never be derived that eliminates religious strife from political life. However, this is not necessarily a "bad" thing. As Madison saw it, "division and opposition among multiple religious sects would make overbearing majorities unlikely."[227] And protection from an "overbearing [religious] majority" is something about which all interpreters of the Establishment Clause agree. All reference to religion and God need not be banned in fear of a state-church. That was not the intention of the framers and that is not the practice today. As the Supreme Court stated in *Lynch,*[228] "our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[229] The Ohio State motto, "With God All Things are Possible" is one such historically accepted, embraced, and constitutional acknowledgment of the Divine.

## VI. EPILOGUE

Since this paper was written, the Sixth U.S. Circuit Court of Appeals, in a nine to four decision, affirmed the judgment of the District Court and concluded that the Ohio state motto does not violate the Establishment Clause.[230]

The court reached this decision by acknowledging that, historically speaking, "the prohibition against enactment of laws establishing religion or paving the way for an establishment of religion was not understood to be a prohibition against fostering or protecting religion, nor was it understood to be a prohibition against employing generalized religious language in official discourse."[231] Citing many historical figures, events and cases, the Court acknowledged that the Ohio motto does not constitute an establishment of religion as the original framers understood the First Amendment.[232]

The Court further acknowledged that "coercion" was a central element to the original understanding of an establishment of religion.[233] In light of this fact, the Court began with a coercion analysis and found that the Ohio "motto involves no coercion."[234] Rather, they found the motto to be "merely a broadly worded

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[227]THE FEDERALIST NO. 10, at 54 (James Madison) (Clinton Rossiter ed., 1961).

[228]465 U.S. at 675.

[229]*Id.*

[230]ACLU v. Capitol Square Advisory Bd., 243 F.3d 289, (2001).

[231]*Id.* at 298.

[232]*Id.* at 293-299.

[233]*Id.* at 299.

[234]*ACLU*, 243 F. 3d at 299.

expression of a religious/philosophical sentiment that happens to be widely shared by the citizens of Ohio."[235]

The Court went on to analyze the Ohio motto through the eye of the "reasonable observer" of the endorsement test.[236] The Court found "that no well-informed observer could reasonably take Ohio's motto to be an official endorsement of the Christian religion."[237] This conclusion arose from the Court's acknowledgment that a well-informed observer would be aware, from sentiments similar to Ohio's motto found in other historical, religious and secular contexts, that there is "nothing uniquely Christian about the thought that all things are possible with God."[238]

Finally, the Court turned its attention to *Lemon* and concluded that "Ohio's motto easily passes the *Lemon* test."[239] The Court found that because "the company in which Ohio Rev. Code § 5.06 finds itself tends to undermine the thesis that § 5.06 somehow represents a first step in the direction of 'an establishment of religion'" and because "the government's assertion of a legitimate secular purpose is entitled to deference,"[240] the statute adopting the Ohio motto has a secular purpose and meets the first prong of the *Lemon* test.[241] The Court felt that Ohio's motto met the second prong of the *Lemon* test and held that the motto does not have the primary purpose or the primary effect of advancing religion.[242] The Court stated that they "do not believe that a state advances religion impermissibly by adopting a motto that provides no financial relief to any church but pays lip service to the puissance of God."[243] The Court also felt that because "[t]he primary effect of the national motto is not to advance religion, …it clearly follows that the primary effect of the state motto is not to advance religion either."[244] Finally, the Court found that the Ohio motto passed the third prong of the *Lemon* test by acknowledging that no institutional entanglement with the government is evident.[245]

The Sixth Circuit Court of Appeal's emphasis of coercion as a "central element" to the original understanding of the Establishment Clause, coupled with their use of the coercion analysis as the first test in determining whether Ohio's motto violates the Establishment Clause, are evidence of the movement toward revitalization of the original coercion analysis in Establishment Clause jurisprudence. While the coercion analysis alone could have justified the Court's findings, because of past reliance on

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[235]*Id.* at 299-300.

[236]*Id.* at 302.

[237]*Id.* at 305.

[238]*ACLU*, 243 F. 3d at 303.

[239]*Id.* at 306.

[240]Brooks v. City of Oak Ridge, 222 F.3d 259, 265 (6th Cir. 2000) (quoting *Chaudhuri,* 130 F.3d at 236).

[241]*ACLU*, 243 F. 3d at 306.

[242]*Id.* at 308.

[243]*Id*.

[244]*Id*.

[245]*ACLU*, 243 F. 3d at 308.

the flawed endorsement and *Lemon* tests, this Court was wise to justify the Ohio motto under these tests as well. The Court, basing their decision on logic, history, and jurisprudence, rightly held that Ohio's state motto does not violate the Establishment Clause but rather constitutes a historically accepted and constitutional acknowledgment of the Divine.

CHRISTOPHER PIERRE