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Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause - Commentary on Measured Endorsement

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POLLING ESTABLISHMENT: JUDICIAL REVIEW, DEMOCRACY, AND THE ENDORSEMENT THEORY OF THE ESTABLISHMENT CLAUSE—COMMENTARY ON *MEASURED ENDORSEMENT*

JAMIN B. RASKIN*

INTRODUCTION

How do we know when a government-produced holiday display crosses a constitutional line and impermissibly endorses religion? Shari Seidman Diamond and Andrew Koppelman argue that courts should rely on the techniques and methodologies of public opinion polling to survey the public and determine whether such displays endorse religion and therefore violate the Establishment Clause.[1] The authors support the point by developing an analogy to litigation under the Lanham Act, where courts regularly use evidence from public opinion poll results to determine whether there is legally salient "consumer confusion" in a trademark dispute.[2]

The theoretical problem with this analogy is that the issue at stake under the Lanham Act is whether there is a likelihood of *actual consumer confusion* being generated by the use of a particular name brand or logo.[3] But the issue at stake under an Establishment Clause endorsement analysis is not whether citizens will actually *perceive* there to be an endorsement of religion, but whether there *is* an endorsement of religion.[4] This inquiry, properly understood, requires the court to determine primarily whether the government has a religious or secu-

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1. *See* Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 716 (2001) (proposing that "in cases involving allegations that the Establishment Clause has been violated, a systematic assessment of reactions from members of the community to the display or symbol at issue can assist courts in determining whether the particular display conveys a message of religious endorsement").

2. *Id.* at 736-56.

3. 15 U.S.C. § 1125(a)(1) (1998) ("Any person who . . . uses in commerce any word, term, name, symbol, or device . . . which is likely to cause confusion . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.").

4. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (characterizing actual government endorsement of religion as a "direct infringement" of the Establishment Clause); *id.* at 694 ("Every government practice must be judged in its unique circumstances to determine whether it *constitutes* an endorsement or disapproval of religion." (emphasis added)).

lar purpose for its display.[5] When the government provides something of monetary value to a religious entity, and the provision is not part of a universal program (like the distribution of police, fire, or sewage services), it constitutes an impermissible subsidy.[6] Similarly, when the government selectively appropriates something of a symbolic value to a religious entity, this also constitutes an impermissible endorsement.[7] This legal finding ultimately turns, I will argue, not on the subjective perceptions of either a majority or minority faction within the population, but on the Court's objective understanding of the purpose and function of the government's conduct. If the purpose and function of the government's policy is to traffic and take sides in the realm of divine mystery, magic, theological faith, religious belief, and theological organization—as opposed to human perception, reasoned inquiry and debate, the scientific method, and logic—then the Establishment Clause, an indispensable component of our Enlightenment Constitution, is violated. The purpose of the Establishment Clause is to require government to act within the dictates and realm of reason rather than superstition and metaphysics.

The Establishment Clause's purpose-based inquiry has little, formally, to do with future public opinion or perception, but everything to do with the objective purpose and function of the government's display, as determined through an inquiry that should focus on answering the following question: given everything we know about the historical and social context, what is the most plausible reason for the

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5. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court combined criteria that it had developed over several years for evaluating Establishment Clause cases and spelled out a three-pronged test for evaluating alleged government endorsement of religion: "First, the statute must have a secular legislative purpose; second, its 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." *Id.* at 612-13 (citations and internal quotation marks omitted). I would try to collapse, or at least narrow, the first two prongs by reformulating them to say that an enactment must have a *secular purpose* and a *secular function*. If we look at a statute or policy from a holistic and omniscient distance, its *purpose* and *function* in society will appear to be roughly the same.

6. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) ("[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' . . . ." (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment))).

7. *See* County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (holding symbolic endorsement of religion invalid because it "'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'" (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring))).

government placing particular religious elements in a public holiday display? The effects-based inquiry under the Establishment Clause similarly requires us to determine, according to Justice O'Connor, "what viewers may fairly understand to be the *purpose* of the display."[8] This part of the analysis is probably redundant, because it invites the Court to examine the same issue once again: what is a fair understanding of the *purpose* of a governmental enactment or display? In any event, a better statement of the effects test will be "what viewers may fairly understand to be the purpose of *the government's placement of religious elements* in the display."

At any rate, even if we keep the effects prong as a separate part of Establishment Clause analysis, the effects test, as read by Justice O'Connor, clearly must also be based on a standard of *objective reasonableness.* Contra Diamond and Koppelman, neither a majority nor a minority's actual perception of secular-ness or religiosity should be, or can be, controlling of whether or not illicit endorsement has taken place. And if the public's actual perceptions are not controlling—that is, if *the court itself* must determine the constitutional meaning of the semiotics of a government-erected display, as I will insist—then it is hard to see how the actual perceptions of a certain randomly assembled group of citizens are even *relevant* to the endorsement analysis. It is more likely to be distracting and misleading.

Nonetheless, the authors have offered us a creative and useful thought experiment that concentrates the mind and advances our understanding of what Establishment Clause jurisprudence—and also, importantly, as we shall see, Equal Protection jurisprudence—should really concern.

I. THE PURPOSE OF GOVERNMENTAL ACTION AS THE CENTRAL ISSUE

The authors seem to believe, and I would agree, that an important meaning of the Establishment Clause is captured by Justice O'Connor's endorsement test.[9] But they want to use the emergence of the endorsement test to abolish doctrinal focus on the *purpose* of governmental action, which I believe must be the central concern of Establishment Clause jurisprudence. They assert that the "central issue should be what message is *actually communicated.*"[10] They reject Justice O'Connor's view under which "laws would be condemned if

8. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

9. *See* Diamond & Koppelman, *supra* note 1, at 726 ("We think that the endorsement test has a sound basis in the Establishment Clause, and that it can be operationalized in a clear way.").

10. *Id.* at 743 (emphasis added).

they were enacted with the intention of endorsing religion. Aside from the notorious difficulties of discerning governmental intent, none of the harms that the Establishment Clause seeks to prevent are contingent on a decisionmaker's intent."[11]

But here the authors invite us to shift our focus by misstating what the purpose test is really about. The question is not whether the decisionmaker, in his or her own mind, intended to endorse religion, but whether the government has enacted a policy or display that can most plausibly be understood as having the purpose and function of endorsing religion. This purpose inquiry is the essential interpretive methodology not just in Establishment Clause jurisprudence, but in free speech and Equal Protection jurisprudence as well. In the Establishment Clause context, the purpose is determined by asking, given everything we know about the historical and social context, what is the most plausible purpose for the government having placed religious elements in a symbolic display.[12]

It is Justice O'Connor's apparent straddling of the line between an objective and subjective analysis that leads the authors to zero in on the subjective element of "audience" interpretations and discard the objective purpose analysis altogether. They say we should turn the focus away from the purpose of a challenged governmental action or decision because of "the notorious difficulties of discerning governmental intent,"[13] and because "[a]n endorsement test that invalidates laws that have a religious meaning to their enactors would deny to religious people their right to participate in politics."[14]

Neither of these claims about purpose-based analysis is convincing. Consider the Supreme Court's most recent Establishment Clause decision, *Santa Fe Independent School District v. Doe*.[15] The *Santa Fe* ma-

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11. *Id.* at 742-43 (footnote omitted).

12. The Establishment Clause effects test seems unnecessary because it is redundant in the context of the holiday display analysis. If the purpose analysis here is defined as the purpose of the government display in the eyes of a reasonable person, and the effects analysis of a display is defined as "what viewers may fairly understand to be the purpose of the display," *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring), then it seems as if the purpose and effects tests collapse into one. In both cases we are asking how a reasonable person would interpret, given all relevant facts and contexts, a governmental entity's decision to incorporate religious elements into a holiday display. Of course, whether the effects test plays a more meaningful and independent role under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in cases of arguably unconstitutional *material* subsidies is an analytically distinct question. At any rate, even under Justice O'Connor's statement of the doctrine, the effects analysis in a display case must relate to *reasonable perceptions of governmental purpose*—"what viewers may fairly understand to be the purpose of the display."

13. Diamond & Koppelman, *supra* note 1, at 742-43.

14. *Id.* at 743.

15. 530 U.S. 290 (2000).

jority, which invalidated a Texas law allowing elective prayer over the loudspeaker at high-school football games, found the "evolution of the current policy" to be most striking[16] and identified the parties' stipulation that students were voting to determine "'whether a student would deliver prayer at varsity football games'"[17] as a key fact. Moreover, the majority found that the language of the actual policy "by its terms invite[d] and encourage[d] religious messages."[18] This evidence compelled a judicial inference that "the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'"[19]

There does not seem to be, in fact, much difficulty with the majority's straightforward linguistic and contextual analysis of the governmental purpose behind the football prayers. But Diamond and Koppelman's belief in the ultimate inscrutability, indeterminacy, and plasticity of governmental purpose is apparently shared by Chief Justice Rehnquist, who dissented in *Santa Fe* because he viewed the evolution of the football prayer policy as merely reflecting the school system's intent "to come within the governing constitutional law."[20]

But Chief Justice Rehnquist's reading of the prayer policy completely misses the point of a purpose-based constitutional analysis. We can cheerfully concede that the Texas authorities intended to "come within" the First Amendment when it wrote its most recent and unconstitutional draft of a policy to allow prayer at football games. We can even hypothesize that every governmental authority that has *ever* violated the Constitution was, at the time, trying in good faith to "come within the governing constitutional law." But a decisionmaker's determination to avoid conflict with a constitutional barrier in passing a law tells us nothing about the actual purpose of the specific governmental action or whether a constitutional barrier was actually crossed. "Purpose" here refers to what Matthew Adler helpfully calls "sentence-meaning," that is, the purposes that underlie and render meaningful the actual language of a public enactment or policy itself.[21] The purpose of a rule saying that "students may elect a

16. *Id.* at 309.

17. *Id.* at 310 (quoting App. at 65).

18. *Id.* at 306.

19. *Id.* at 309 (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

20. *Id.* at 323 (Rehnquist, C.J., dissenting).

21. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1384 (2000) (explaining that "the 'sentence-meaning' of an official action is its meaning pursuant to the very same kind of rules and conventions that assign meaning to a well-formed English sentence" (footnote omitted)).

fellow student to solemnize a game"[22] is to promote prayer or, if you disagree with that, to promote secular solemnities at football games. But it literally would be nonsense to say that the purpose of a policy allowing students to elect a fellow student to "solemnize" a football game was to "come within the governing constitutional law." Coming within the governing constitutional law is, in this sense, never the legislative purpose behind public policy because there is no content or direction to such a purpose. Of course, one hopes that conforming to the Constitution is always a *side consideration* taken into account when public policy or legislation is being drafted, but this is different from it being the law's *purpose.*

Diamond and Koppelman's misunderstanding of the purpose requirement is most obvious when they follow Justice Scalia down a similar path of skepticism about invalidating laws based on impermissible religious purposes. The authors say that their turn away from an intent standard is reinforced by the danger that it will threaten to undermine the legitimacy of political participation by religious people:

> Some citizens are religious. If those citizens participate in politics, their political actions will inevitably reflect their religious views. . . . An endorsement test that invalidates laws that have a religious meaning to their enactors would deny to religious people their right to participate in politics.[23]

They go on to quote Justice Scalia, who states in *Edwards v. Aguillard,*[24] that

> [o]ur cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.[25]

But, in trying to relax judicial scrutiny of improper religious purposes in legislation, Justice Scalia has committed a basic fallacy, now repeated by Diamond and Koppelman: the confusion of individual legislators' *personal and subjective motivations for supporting a law* and the

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22. The policy that permitted prayer at Texas high-school football games was similar to the one that allowed prayer at high-school graduations. *Santa Fe,* 530 U.S. at 297. The latter permitted students to "elect . . . students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies." *Id.* at 296 (internal quotation marks omitted) (quoting Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 811 (5th Cir. 1999)).

23. Diamond & Koppelman, *supra* note 1, at 743.

24. 482 U.S. 578 (1987).

25. *Id.* at 615 (Scalia, J., dissenting); Diamond & Koppelman, *supra* note 1, at 743.

objective purpose of the legislative enactment itself. The authors worry, as does Justice Scalia, that if we use purpose or intent to determine whether legislation violates the Establishment Clause, then laws providing food for the poor, school lunches, homeless shelters, and so on, might be invalidated if the legislators voting for such laws happened to be motivated by private (or perhaps even constituent) religious views.[26]

But what matters in Establishment Clause analysis, and constitutional analysis generally, is not why a particular legislator favors a bill, or even why all legislators favor a bill (this is what we would call speaker-meaning), but what the legislative purpose (or sentence meaning) of the enactment is. Thus, the purpose behind an ordinary school lunch bill is the perfectly secular one of providing a nutritional mid-day meal to all public school students—even if all of the legislators voting for it openly professed, on the floor of Congress, to vote for it out of personal religious concerns. Even if people subjectively perceived the school lunch bill as religious in character, it simply would not be, because its existence is most plausibly understood as answering to a secular and empirically demonstrable problem: hunger during the school day.

Similarly, even if every state legislator makes a speech about the Ten Commandments during a debate over homicide laws, the law against murder does not violate the Establishment Clause. This is because, whatever the legislators' personal motivations, murder laws have a clearly definable secular legislative purpose: to protect human life. The audience's perception that the law against homicide is a declaration of religious truth would be wholly irrelevant to analyzing its constitutionality.

Conversely, secular motivations on the part of legislators cannot rescue or sanitize laws or policies that are fundamentally religious in character. Thus, assume that 100 United States senators vote to erect crosses and statues of Jesus on all federal properties on Christmas Day, but all do so for essentially secular personal reasons—for example, to accommodate the wishes of a majority of the public, to guarantee their reelection, to prevent legislation that would sweep further to erect such displays all year-round, and so on. Despite their completely secular personal motivations in supporting the law, the law itself would violate the Establishment Clause because the only remotely

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26. *See* Diamond & Koppelman, *supra* note 1, at 743 (quoting Justice Scalia's dissent in *Aguillard* and asserting that "[a]n endorsement test that invalidates laws that have a religious meaning to their enactors would deny to religious people their right to participate in politics").

plausible and coherent *legislative purpose* behind it is to promote and endorse a religious practice and belief. The subjective desires or thoughts of the legislators are irrelevant.

Diamond and Koppelman's audience-based account of endorsement falls of its own weight and cannot begin to replace a purpose analysis. A standard objection to their audience-based argument is that the public, or some part of it, could give an eccentric, irrational, or indefensible reading to a government action. An intolerant religious majority could easily interpret governmental accommodation of minority religious practices—providing Jewish or Muslim public school students kosher foods, letting Hindu members of the armed services or police wear turbans, and so on—as unlawful governmental endorsements of religious practices. Conversely, a majority supportive of an establishmentarian practice by government—say, placing a Christmas nativity scene at city hall—could and would (either in good faith or bad faith) perceive this display simply as a normal recognition of seasonal community celebration. It is hard to see why the exact same governmental action in two different towns—say, posting the twenty-third psalm with a picture of Jesus Christ on the door of city hall—should be either permissible or impermissible depending only on the reaction of the local community. Indeed, on this theory, it is hard to see how we would ever have any operative Establishment Clause precedent that we could consult for guidance, because we would never know whether a display is constitutional or not until the live audience *actually perceives its present meaning*. There is simply no way to escape from the intractable problems of subjectivity inherent in a "subjective group perception" test applied to the Establishment Clause. The purpose analysis provides us with the theory we need.

II. REFINING THE ENDORSEMENT TEST IN THE HOLIDAY DISPLAY CASES

The authors canvass the rather raggedy doctrine in this field and assert that, given continuing controversy about the social meaning of government action, what is needed in Establishment Clause adjudication—and Equal Protection as well—"is an authoritative way to resolve disputes about social meaning."[27] But the term "social meaning" is ambiguous here. It could mean either *the objective meaning of an enactment in society*—this is the inquiry I favor—or it could mean *society's perception of the meaning of the enactment*, which the authors favor.

But we do not actually need a more authoritative way to resolve disputes about the social meaning of challenged government religious

27. *Id.* at 736.

displays in the first sense. Constitutional adjudication by judges enforcing Establishment Clause values can work in a perfectly adequate way.

It is true that we would appear to need such a guide, given the almost comic hair-splitting by the Court in the Christmas crèche cases. In *Lynch v. Donnelly*,[28] for example, the Court upheld the city of Pawtucket, Rhode Island's inclusion of a Christmas crèche in its annual holiday display.[29] But in *Allegheny County v. ACLU*,[30] the Court invalidated a crèche display on the Grand Staircase of the Allegheny County Courthouse in Pennsylvania.[31] The critical difference in the treatment of the two nativity scenes was the relative proportion of religious and secular symbols and figures in the two displays. While the Allegheny display featured only Jesus, Mary, Joseph, and the Wise Men, in the manger scene in Bethlehem,[32] the Pawtucket scene included not only the baby Jesus and the Wise Men, but also a Santa Claus House with Santa distributing candy, a "SEASONS GREETINGS" sign, a clown, an elephant, and a teddy bear.[33] To Justice O'Connor, these added secular elements changed "what viewers may fairly understand to be the purpose of the display," and therefore "negate[d] any message of endorsement" of "the Christian beliefs represented by the crèche."[34]

The semiotic gamesmanship invited by this mode of analysis—add two more candy canes, a reindeer, and some giant snowflakes to offset those shepherds!—could be easily avoided by a more precise doctrinal test for purpose and effect. Justice O'Connor's articulated method for ascertaining whether the deployment of an object with religious meaning has the effect of impermissibly endorsing religion is to ask "what viewers may fairly understand to be the purpose of the display."[35] Thus, in Pawtucket, she concluded that the robust mixture of religious and secular symbols refuted any fair understanding that the purpose of the display was a religious one.[36] But this formulation of the effects prong of the endorsement test—what viewers may fairly understand to be the purpose of a display—is far too broadly stated.

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28. 465 U.S. 668 (1984).
29. *Id.* at 685.
30. 492 U.S. 573 (1989).
31. *Id.* at 578-79, 620-21.
32. *Id.* at 580.
33. *Lynch*, 465 U.S. at 671; *see also id.* (noting that the display in Pawtucket was similar to those found in "hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season").
34. *Id.* at 692 (O'Connor, J., concurring).
35. *Id.*
36. *See id.*

The real inquiry in determining whether there is an impermissible purpose or effect of endorsement of religion in such a holiday scene should require us to ask not merely "what viewers may fairly understand to be the purpose of the display," but also "what viewers may fairly understand to be the purpose *of the government's placement of religious elements* in the display." That is, what counts for Establishment Clause scrutiny is not the semiotics of the whole scene, but the semiotic meaning of adding particular religious elements to it.

Thus, even a display that may appear one hundred percent religious—say, Michelangelo's *Pieta* sculpture of Mary and the infant Jesus Christ in a New York City museum—would pass Establishment Clause scrutiny because the purpose of including the religious sculpture in the museum would not be a religious one in the sense of promoting irrational faith or mystery over reason. It would presumably be to display one object of art expressing one artistic vision in a continuum of artistic visions represented in the museum.

However, returning to Pawtucket, *the most plausible purpose* for taking the reindeer, robots, dancing bears, snowflakes, and candy canes—signifiers that already amply express holiday spirit—and adding to them the Christmas nativity characters of Jesus, Mary, Joseph, and the Wise Men would be precisely to endorse and promote the particular religious faith and practice represented by these figures: Christianity. Even if one claims that the purpose is simply to acknowledge the religious preferences of the majority, such a selective recognition has no rational secular purpose other than to endorse the practices of a religious group. After all, why does the majority need to have its preferences honored in this way?

Thus, if we keep our focus on governmental purpose, but amend Justice O'Connor's test by asking not about the semiotics of the whole display but about the purpose of injecting particular religious elements into it, the courts would not have much interpretive difficulty analyzing the objective social meaning of challenged holiday displays. As long as there is a recognizably religious element in such a display, it constitutes an impermissible endorsement. The difference between a museum display and a holiday nativity scene display is the difference between teaching about the history of religions in a high school "world religions" class and posting the Ten Commandments above the blackboard. From a public vantage point, religion can be a perfectly valid object of rational inquiry, empirical study, and artistic expression, but it can be no part of state-imposed dogma. This is not a complicated principle to implement. Thus, I reject the authors'

"difficulty" thesis suggesting the need for a new interpretive methodology for ascertaining purpose.

III. THE PARADOXES OF POLLING ESTABLISHMENT

There is, no doubt, a difficulty, and probably an intractable one, in ascertaining "social meaning" in the sense the authors use it: the meaning of a display or enactment in the subjective perception of society or particular group factions within it.[37] Basing their endorsement analysis on this kind of social meaning—how people actually experience an arguably religious government-sponsored display—the authors recommend use of modern polling methodology and technology to determine whether respondents actually perceive a challenged display or practice to be (1) governmentally sponsored, and (2) a religious endorsement.[38] They would borrow from the evidentiary techniques of determining consumer confusion in trademark law under the Lanham Act.[39] But, in the final analysis, this creative analogy to trademark polling simply ends up demonstrating the incoherence and indefensibility of relying on actual audience response to prove religious endorsement and, even more dramatically, Equal Protection violations.

The essential problem is that basing constitutional injuries and rights on the results of public opinion polling undermines the antimajoritarian underpinnings of the Bill of Rights. It goes without saying that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[40] If we would never want to put rights to a vote, we certainly would not want to put them to a poll, where there are even fewer procedural protections and the results are even more subject to manipulation. If a majority's perceptions should not be allowed to dictate the existence of rights in an election, a majority's perceptions should not be allowed to dictate the existence of rights in a poll.

One of the two main issues the authors would poll on is "whether the government is seen as sponsoring or promoting the display."[41] But let us imagine that a local government creates an indisputably

37. *See* Diamond & Koppelman, *supra* note 1, at 733-36, 736 (discussing "[t]he problem of social meaning").

38. *Id.* at 736-56.

39. *See id.* at 736-38.

40. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

41. Diamond & Koppelman, *supra* note 1, at 749.

religious display—say, Jesus Christ on the cross below a banner stating, "He died for your sins"—and places it in an empty park lot that had been privately owned for decades, but is now suddenly owned by the government because of a tax forfeiture (to almost no one's knowledge in the general public). Now, assume polling respondents overwhelmingly find that the display conveys a religious message, but also overwhelmingly reply that they do not perceive the government to be sponsoring or promoting the display. According to Diamond and Koppelman, there would presumably be no impermissible governmental endorsement of religion, because people do not perceive it to be a problem. But this hypothetical underscores the fact that what should count is the objectively understood *purpose* of government in mounting a religious display and, if we keep the formality of the effects test analysis in this context, what a reasonable person might reasonably perceive the actual purpose of government to be when all of the relevant facts are taken into account.

Yet the authors might object that poll respondents in their plan are not voting on the existence of the underlying rights, but rather are participating in a survey that will objectively show whether the public perceives a governmental religious endorsement to have taken place. That is, the poll respondents are just helping to establish evidence of endorsement. But if polling evidence is going to be the controlling and determinative factor in whether endorsement exists, as the authors seem to suggest, then this mobilization of polling evidence does become tantamount to a delegation of the Establishment analysis to the public, or some portion of it, through a pollster. This judicial deputizing to a polling group seems fundamentally irrational and at odds with the vesting of the judicial power in the judicial branch. We do not have to rely on people who have imperfect information—for example, telephone polling respondents who do not know that the government actually owns the property where a religious scene is being displayed—because we have a decisionmaker in the judiciary who will have all of the relevant information that is available.

Moreover, to the extent that most Establishment problems present issues of majoritarian imposition of religious practices on minorities, it seems odd to return to the majority itself to determine whether some practice constitutes endorsement. For example, a local born-again Christian community that erects an *Allegheny County*-style Christmas scene at city hall is not going to perceive it to be an impermissible endorsement, because most people do not view themselves as disregarding constitutional values. Leaving aside the deeply problematic issue of strategic and deceptive answers—a problem that is flagged by

the authors[42]—the unsolvable problem here is that majorities imposing religious endorsements on the rest of society view themselves as upholding both their moral codes *and* American constitutionalism. Conversely, such majorities would be much more inclined to find that a minority religious symbol, even one that the Court has allowed, like the menorah near the Christmas tree in *Allegheny County*, is in fact an impermissible endorsement. In other words, the polling methodology reproduces the problem of majoritarian religious bias that the endorsement theory is designed to counteract.

Now, the authors might object that this critique is inaccurate because their approach does not credit the *majority's* perception of a secular character in a challenged practice, but rather seeks out a *minority's* perception of a governmental religious endorsement. What would count in this theory is the perception of some undefined "substantial portion" of the polling group of a religious endorsement.

But the vagaries of this plan just give the game away. For if we are not going to rely on a suspect majority's impressions of secularism (and surely the authors are right for *Barnette* reasons to reject that tautology), then we are going to rely on a minority's impressions of religiosity. But if no particular percentage of the polled public is required to find religious endorsement in order to strike it down, then what is the utility of even having such a threshold requirement at all? We already know from the fact that some plaintiffs have gone to court to sue that there are *at least some* citizens who perceive a religious endorsement to be taking place. But adding the knowledge that another five percent of the public agrees is like adding an amicus brief without any legal analysis on behalf of those citizens. But the purpose of an amicus brief is not to "vote" for the party's views, but to present novel and original legal arguments or facts to facilitate the court's deliberations.[43] If the authors are not going to commit themselves to a particular percentage threshold at which the perception of endorsement becomes a binding force on the judicial determination of an Establishment Clause violation, then the court preserves discretion to decide. But what should the content of that discretion consist of? And if it works in some cases, then why not in all of them?

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42. *See id.* at 752-53.

43. *Cf.* SUP. CT. R. 36.3 (explaining that "[w]hen consent to the filing of a brief of an amicus curiae . . . is refused by a party to the case, a motion for leave to file . . . may be presented to the Court" and stating that "[t]he motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case").

If the authors do not actually go all the way to the end zone and declare that a certain percentage in the polls will automatically operate to invalidate a challenged government display, then it is hard to see how they are truly forwarding an audience theory of endorsement. If they do go all the way and assert that ten percent is the magic number (a percentage they seem to flirt with[44]), at this point we should consider that an *actual election* is a more exact mechanism for determining public opinion than a poll, which is famously subject to manipulation. Why not have one election to determine whether we should have a crèche at city hall and then a separate one later to ask citizens whether they view the crèche as a governmental endorsement of religion? If ten percent see it that way, it will be struck down, although it is hard to believe that the election results will be any different in the two elections. There are not many people who will take the position that having the government display a Christmas crèche is a good policy idea but an Establishment violation or, conversely, that displaying a Christmas crèche is a bad idea yet constitutionally permissible. This is one place where judges and justices should earn their salaries, as they are taught to distinguish between their political and constitutional values.

IV. POLLING EQUAL PROTECTION VIOLATIONS

The same problem is even more striking when we take up the authors' rather dangerous example of polling in Equal Protection Clause and racial segregation cases.[45] They state that in *Plessy v. Ferguson*,[46] "Justice Harlan tried to respond to the Court's obliviousness" about the racism intrinsic to segregation "by pointing to what 'every one knows'" to be true about the real purposes of Jim Crow.[47] In his dissenting opinion, Harlan stated that "[*e*]*very one knows* that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[48] But surely this was his nineteenth century way of stating that *any reasonable person* would understand this to be the objective purpose

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44. *See* Diamond & Koppelman, *supra* note 1, at 753 (citing *Henri's Food Products Co. v. Kraft, Inc.*, 717 F.2d 352 (7th Cir. 1983), which noted that ten percent had been deemed an acceptable level of consumer confusion in an earlier trademark case while nine percent had been deemed a questionable level of confusion).

45. *See id.* at 756-60.

46. 163 U.S. 537 (1896).

47. Diamond & Koppelman, *supra* note 1, at 759 (quoting *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting)).

48. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (emphasis added).

and function of segregation in Louisiana's railcars; indeed, "[n]o one would be so wanting in candor as to assert the contrary."[49] This was not idle assertion, as the authors imply,[50] but rather an effort to expose the majority for its hypocrisy and bad faith in denying what any rational and honest person would have to believe and understand.

The authors suggest that Justice Harlan's problem "was that he had no way to prove what he thought that everyone knew. It is, however, possible to compile such evidence, and such evidence can be helpful . . . ."[51] Their rather astonishing suggestion, if I understand it correctly, is that public opinion polling might have helped the Court to determine the existence of Equal Protection violations in *Plessy*. But it would be hard to find a more perfect demonstration of the fallacy of using polling to define constitutional injuries. Is there any doubt that public opinion polls taken at the time of *Plessy* would have demonstrated that huge majorities of the population did *not* regard race segregation as affixing a stigma or disability on African-Americans? The polls would have shown that the white majority saw segregation as fostering racial harmony, codifying healthy customs and mores, treating the races alike, keeping social peace, and so on—anything but imposing white supremacy and racial stigma on the population. The "audience perception" method would have thus rejected a stigma-based interpretation of segregation. The authors seem to forget that, in many crucial constitutional contexts, two key ones being race segregation and symbolic endorsements of religion, the Supreme Court has *defied* majority perceptions and attitudes and *changed* existing public opinion by fashioning new constitutional norms.[52]

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49. *Id.*

50. *See* Diamond & Koppelman, *supra* note 1, at 733-34.

51. *Id.* at 759.

52. This was certainly the history of *Brown v. Board of Education*, 347 U.S. 483 (1954), which toppled segregated schools (at least in theory), and *Engel v. Vitale*, 370 U.S. 421 (1962), which terminated the enormously popular practice of teachers conducting organized prayer in public schools. However, if the suggestion is, for example, that public opinion polls in *Plessy* or *Brown* would have shown that *African-Americans* saw segregation as demeaning and stigmatizing, it is hard to see what this fact would have added to the Court's understanding: these cases were already brought by African-Americans who had overwhelming support in the black community, including, in the latter case, the support of organized civil rights groups. *See, e.g.*, Susan Carle, *Race, Class, and Legal Ethics in the Early NAACP*, 20 L. & HIST. REV. (forthcoming 2002). The point is that we need Supreme Court justices who are able to take into account the full breadth of society in envisioning the meaning of public action for the purposes of constitutional analysis. Identifying and confirming such justices requires serious political action, but this is another story.

CONCLUSION

At this point, we have arrived at the underlying tautology and irrationality of polling to settle constitutional conflicts—a startling suggestion which reflects not only the saturation of polling technology and ideology in American society at the dawn of the twenty-first century, but also some deep loss of confidence in the ability of courts to make reasoned decisions about the purposes of governmental action. At a time when the conservative majority running the Supreme Court is backing away from principled commitment to interracial progress and is on a wavering edge about keeping church and state separate, it is understandable for talented scholars like Diamond and Koppelman to look for sources of interpretive authority other than "oblivious judges."[53] Indeed, if a majority on the Supreme Court is going to act like a group of impulsive partisans in the nation's most important election contest,[54] we can honor the attempt to reduce constitutional adjudication to a series of audience survey questions directed at a broader and more representative segment of the public. But we cannot assign the task of constitutional adjudication to the audience unless we want—and believe—the Constitution to be nothing more than a popular Rorschach test and running crapshoot. The logic of this approach will, of course, be the emergence of widespread television advertising designed to convince people of what is and what is not an Establishment Clause violation. If Constitutional boundaries are all a matter of temporary subjective perception, the First Amendment surely protects the right to change people's subjective perceptions of those boundaries.

The solution to the admittedly serious problem of "oblivious judges" is to nominate and confirm judges who have profound historical and social consciousness, wisdom, judgment, and a sense of the deep values of the Constitution. We academics should certainly use polls to figure out the state of the public's constitutional consciousness and to help educate people and legislators about constitutional values.[55] But poll results—either of the majority or the minority—cannot settle constitutional conflicts and, in a democratic society committed to the rights of minorities, we should not want them to.

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53. Diamond & Koppelman, *supra* note 1, at 759.

54. *See* Bush v. Gore, 121 S. Ct. 525, 542 (2000) (Stevens, J., dissenting) (noting that what has been lost as a result of the majority's decision "is the Nation's confidence in the judge as an impartial guardian of the rule of law").

55. *See generally* JAMIN B. RASKIN, WE THE STUDENTS (2000) (attempting to forward the process of public constitutional education with great emphasis on Establishment Clause values).