

**Language and the Limits of *Lemon*:
A New Establishment Clause
Analysis of *Catholic League for
Religious and Civil Rights v. City of
San Francisco***

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High-profile issues involving sexual orientation remain at the forefront of public debate, and rhetoric on both sides remains emotionally charged, even inflammatory — no more so than in the case of Catholic League for Religious and Civil Rights v. City and County of San Francisco. In 2006, following a directive from the Catholic Church to stop placing children for adoption in same-sex households, the San Francisco Board of Supervisors responded by unanimously passing Resolution No. 168-06, a vehement condemnation of the Church for its position on same-sex adoption. Although the Ninth Circuit rejected a Catholic civil rights organization's case against the City and the Supreme Court denied certiorari, the constitutionality of the Resolution under the First Amendment's Establishment Clause remains unsettled: the Ninth Circuit split evenly on the merits, reflecting the muddled state of the Supreme Court's Establishment Clause jurisprudence. This Note analyzes this checkered jurisprudence — focusing on the Court's inconsistent application of the Lemon and endorsement tests — and proposes an analytical framework for expressive government action to find for the Resolution's constitutionality.

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I. INTRODUCTION

The Catholic Church's hostility to homosexuality is as enduring and well known as the City and County of San Francisco's championing of gay rights. Neither side has shied away from confrontation over its beliefs, nor hesitated to wield the most powerful language at its disposal to make its point, culminating most recently in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*.¹ Four days after the Catholic Church announced that it would stop placing children in need of adoption with same-sex households in San Francisco,² the San Francisco Board of Supervisors, the legislative body of the City and County, unanimously passed non-binding Resolution No. 168-06, vehemently condemning the Catholic Church for its position on same-sex adoption.³ In response, the Catholic League for Religious and Civil Rights — the nation's largest Catholic civil rights organization — and two Catholic residents of San Francisco sued the city for violating the Establishment Clause of the First Amendment.⁴

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion,"⁵ and is applicable to the states under the Due Process Clause of the Fourteenth Amendment.⁶ Although the Supreme Court has developed a number of tests to interpret and apply the Establishment Clause to government action, and no one test has controlled in every case, the most prominent among them remains the test articulated in *Lemon v. Kurtzman*.⁷ Under *Lemon*, a government action, to be consistent with the Establishment Clause, "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits

1. 464 F. Supp. 2d 938 (N.D. Cal. 2006), *aff'd en banc*, 624 F.3d 1043 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011).

2. Wyatt Buchanan, *Archdiocese Halts Same-Sex Adoptions at Catholic Charities*, S.F. CHRON., Mar. 21, 2006, available at http://articles.sfgate.com/2006-03-21/bay-area/17286860_1_catholic-charities-adoptions-same-sex-couples.

3. S.F., Cal., Bd. of Supervisors Res. No. 168-06 (Mar. 21, 2006).

4. Complaint at 1, 3, 11, *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 464 F. Supp. 2d 938 (N.D. Cal. 2006) (No. C 06-2351).

5. U.S. CONST. amend. I.

6. *Everson v. Bd. of Ed. of Ewing Twp*, 330 U.S. 1 (1947).

7. 403 U.S. 602 (1971). The Court has turned to and validated the use of the *Lemon* test as recently as 2005 in *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

religion,” and it “must not foster an excessive government entanglement with religion.”⁸

But the Court has also turned, at times, to the endorsement test to assess the constitutionality of a state action that is expressive and often non-regulatory,⁹ such as the non-binding resolution at issue in *Catholic League*. First proposed by Justice Sandra Day O’Connor in her concurring opinion to *Lynch v. Donnelly*,¹⁰ the endorsement test is a context-specific inquiry that asks whether a reasonable observer, knowing of the facts and history of a government practice, would consider that practice to be an endorsement or disapproval of religion, thus making religion relevant to a person’s standing in the political community in violation of the Establishment Clause.¹¹

Both the U.S. District Court of the Northern District of California and a three-judge panel of the Ninth Circuit granted San Francisco’s motion to dismiss, expressly applying the *Lemon* test — and relying to varying degrees on the endorsement test — to find that Resolution No. 168-06 did not violate the Establishment Clause.¹² After voting to rehear the case en banc,¹³ a majority of the Ninth Circuit’s divided eleven-judge panel affirmed its earlier ruling, but based its decision on a combination of standing and the merits, splitting evenly on the question of whether the resolution violated the Establishment Clause.¹⁴ The Supreme Court denied certiorari.¹⁵

Catholic League merits attention for three reasons. First, few Establishment Clause cases concern government disapproval, as

8. *Lemon*, 403 U.S. at 612–13 (internal quotation marks omitted).

9. See *infra* Part III.

10. 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

11. *Id.*

12. *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 464 F. Supp. 2d 938 (N.D. Cal. 2006), *aff’d en banc*, 624 F.3d 1043 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011); *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595 (9th Cir. 2009), *vacated*, 624 F.3d 1043 (9th Cir. 2010). This Note refers to the district court’s ruling as *Catholic League I* and the Ninth Circuit’s three-judge opinion, later vacated en banc, as *Catholic League II* when cited in short form.

13. *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 586 F.3d 1166 (9th Cir. 2009).

14. *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 624 F.3d 1043 (9th Cir. 2010). This Note refers to the Ninth Circuit’s en banc opinion as *Catholic League III* when cited in short form.

15. Petition for Writ of Certiorari, *Catholic League III*, 131 S. Ct. 2875 (2011) (No. 10-1034).

opposed to endorsement, of religion.¹⁶ Second, the Catholic League, San Francisco, the district court, and both panels of the Ninth Circuit expressly applied a hybrid of the *Lemon* and endorsement tests in their arguments and analyses, but not the same hybrid, leaving unsettled the appropriate Establishment Clause analysis for expressive behavior by a state that allegedly disapproves of a religion for holding a particular belief. Third, as the number of states recognizing same-sex marriage increases and the question of its constitutionality winds its way through the courts, high-profile issues involving sexual orientation are certain to remain at the forefront of public debate.¹⁷ Clarification is needed regarding the rules of engagement for church and state concerning issues that are simultaneously the subject of religious belief and a matter of secular public policy.

This Note proposes an alternative formulation of the *Lemon*-endorsement test consistent with the Supreme Court's jurisprudence, and finds for Resolution No. 168-06's constitutionality under this proposed framework. Part II provides background to the dispute in *Catholic League*: a brief overview of the positions taken by the Catholic Church and San Francisco on same-sex adoption, and the procedural history of the case. Part III considers the Supreme Court's interpretation of the Establishment Clause to date, focusing on the *Lemon* test and the influence of the endorsement test on *Lemon*'s three prongs of purpose, effect, and entanglement. Part IV presents the Ninth Circuit's analysis of the Establishment Clause in two cases predating, and relied upon by the courts in, *Catholic League*, also involving alleged instances of government disapproval of religion, and summarizes the district court's and Ninth Circuit's Establishment Clause analysis in *Catholic League*. Finally, Part V proposes and applies a formulation of the tripartite *Lemon* test, as influenced by the endorsement test; finds for the constitutionality of the Resolution under

16. "We have not found another Establishment Clause case brought by people whose religion was directly condemned by their government. . . . The only recent Court decision on government hostility to a particular religion that we have found is the free exercise decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*." *Catholic League III* 624 F.3d at 1054 (Kleinfeld, J., dissenting) (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 523 (1992)).

17. See, e.g., *Same-Sex Marriage News*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last visited Nov. 30, 2011).

this alternative framework; and discusses some of the implications of this proposal and suggests guidelines on its application.

II. THE CATHOLIC CHURCH, SAN FRANCISCO, AND SAME-SEX ADOPTION

Part II provides the necessary factual background to the dispute in *Catholic League*. Part II.A presents the Catholic Church's position on same-sex adoption and its recent efforts to halt such adoption in San Francisco. Part II.B counters with San Francisco's posture, including the Resolution. Part II.C provides the procedural history to the litigation.

A. THE CATHOLIC CHURCH

The Catholic Church's hostility to homosexuality is more than a matter of politics or policy: it reflects a Scripture-based¹⁸ understanding of human life and human sexuality¹⁹ that underpins the Church's positions in other areas, such as prostitution, pornography, and masturbation.²⁰ According to the Church, God fashioned

18. Congregation for the Doctrine of the Faith, *Letters to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (Oct. 1, 1986) [hereinafter *Letters to the Bishops*], available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html. After the fall and the introduction of original sin, the men of Sodom are considered sinners partly due to their homosexual relations. *Genesis* 19:1–11. Meanwhile, those who behave in a homosexual fashion are excluded from the rank of the Chosen People. *Leviticus* 18:22, 20:13. The apostle Paul confirms that those who engage in such behavior shall not enter the Kingdom of God in *1 Corinthians* 6:9, and refers to it as a kind of blindness overcoming mankind in *Romans* 1:18–32.

19. Although this Note describes the Church's opposition to homosexuality as a religious belief, such opposition may be non-religious in nature. Natural law theorists, such as Thomas Aquinas, claim "an objective moral truth discoverable by reason," and believe homosexuality to be immoral because it "frustrate[s] the natural purposes, or teleology, of sexual acts and sexual organs." Kent Greenawalt, *How Persuasive is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1647, 1666 (2000).

20. "Sexuality affects all aspects of the human person in the unity of his body and soul. . . . Everyone, man and woman, should acknowledge and accept his sexual identity." Catechism of the Catholic Church, 2332–2333, available at http://www.vatican.va/archive/ENG0015/_P84.HTM. "Chastity means the successful integration of sexuality within the person and thus the inner unity of man in his bodily and spiritual being." Catechism, 2337, available at http://www.vatican.va/archive/ENG0015/_P85.HTM. Offenses against chastity include lust, fornication, masturbation, pornography, and prostitution, Catechism, 2351–2355, and homosexual persons are called to chastity, Catechism, 2359.

man and woman in His own image and likeness.²¹ Since men and women are works of God, they are called upon to reflect the “inner unity of the Creator” through their “complementarity,” and must cooperate with God in the “transmission of life” by “a mutual donation of the self to the other.”²² Homosexual conduct, which is not rooted in this complementarity, thus defies the natural law and annuls “the rich symbolism and meaning, not to mention the goals, of the Creator’s sexual design.”²³ Such conduct is considered a self-indulgent, “intrinsically disordered” act of “great depravity.”²⁴ Although homosexual *persons* must be accepted with respect, compassion, and sensitivity, under no circumstances may homosexual *acts* be approved.²⁵

According to the Church, “there are areas in which it is not unjust discrimination to take sexual orientation into account” because homosexuality is an “objective disorder” which “evokes moral concern,” making it unlike race and ethnicity.²⁶ Although homosexual persons have the same rights as all other persons, including the right not to be treated in a manner that offends their personal dignity, these rights are not absolute.²⁷ Rather, the exercise of these rights may be — and in some cases should be — legitimately curbed in the name of the common good.²⁸ The Church’s responsibility is not to endorse or remain neutral towards legislation friendly to homosexuality, but to oppose such efforts because they defy fundamental moral values and in doing so jeopardize family life and the public morality of the entire civil society.²⁹

Given these beliefs, it is not surprising that the Church has publicly spoken out against the placement of children for adop-

21. *Genesis* 1:26–27.

22. *Letters to the Bishops*, *supra* note 18.

23. *Id.*

24. Catechism of the Catholic Church, 2357, *supra* note 20 (“The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity.”).

25. *Id.*

26. Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons* (July 23, 1992), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html.

27. *Id.*

28. *Id.*

29. *Id.*

tion or foster care in the homes of same-sex couples. In 2003, the Congregation for the Doctrine of the Faith (“Congregation”), the body in the Vatican responsible for promoting and safeguarding Catholic Church doctrine,³⁰ issued a document titled “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons.”³¹ This document states that “allowing children to be adopted by persons living in [homosexual] unions would actually mean doing violence to these children,” and that the absence of “sexual complementarity” in same-sex unions “creates obstacles in the normal development of children who would be placed in the care of such [homosexual] persons.”³² Consistent with earlier doctrinal documents of the Church,³³ the Considerations describes homosexuality, its unions, and its acts as “troubling moral and social phenomen[a],” “against the natural moral law,” “serious deprivit[ies],” “intrinsically disordered,” “immoral,” and “evil.”³⁴ And it makes clear the moral obligation of all Catholics, specifically Catholic politicians, to oppose the legal recognition of homosexual unions.³⁵

Following the Considerations, on March 9, 2006, Cardinal William Joseph Levada, former Archbishop of San Francisco and then head of the Congregation, issued a directive to the Archdiocese of San Francisco to stop placing children in need of adoption with homosexual households.³⁶ On March 17, 2006, Archbishop of San Francisco George Niederauer announced that Catholic Charities in San Francisco would stop placing children in same-sex households.³⁷ Although Catholic Charities is an agency of the San Francisco Archdiocese, it operates as an independent organiza-

30. The Congregation is the body in the Vatican responsible for promoting and safeguarding Catholic Church doctrine. See Pope John Paul II, Apostolic Constitution, *Pastor Bonus*, Art. 48 (June 28, 1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-roman-curia_en.html.

31. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (July 31, 2003) [hereinafter *Considerations*], available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

32. *Id.*

33. The Catholic Church had released two earlier doctrinal documents on homosexuality. See *supra* notes 18, 26.

34. *Considerations*, *supra* note 31.

35. *Id.*

36. Buchanan, *supra* note 2.

37. *Id.*

tion to provide, both directly and through partner organizations, social services to at-need populations.³⁸ Since Cardinal Niederauer's announcement, Catholic Charities has ceased providing full adoption services to homosexual couples and severed its relationship with an adoption agency that focuses on placing children with these couples.³⁹

B. THE CITY AND COUNTY OF SAN FRANCISCO

A progressive "city upon a hill,"⁴⁰ the City and County of San Francisco ("City") has been known for its alternative sexuality since its Gold Rush Days.⁴¹ By the 1960s, San Francisco had grown into a flourishing community for gay and lesbian rights,⁴²

38. *Changing Lives Every Day*, CATHOLIC CHARITIES CYO, <http://community.cccyo.org/Page.aspx?pid=236> (last visited Nov. 11, 2011).

39. Patricia Wen, *Calif. Charity Ends Full Adoptions*, BOS. GLOBE, Aug. 3, 2006, available at http://www.boston.com/news/local/articles/2006/08/03/calif_charity_ends_full_adoptions/. Although Catholic Charities no longer directly places children in households with gay or lesbian parents, it educates interested couples on the adoption process, identifies children for adoption, and provides referrals to the state's Department of Social Services and a statewide adoption exchange that matches foster children with families (and both entities may place a child with a gay or lesbian couple). Cicero Estrella, *Catholic Charities Scaling Back Its Role in Adoption Services*, S.F. CHRON., Aug. 3, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/03/BAG29KADKB1.DTL>.

40. *Matthew* 5:14. In this passage, Jesus tells his listeners "[y]ou are the light of the world. A city that is set on a hill cannot be hidden." *Id.* The phrase was made famous by John Winthrop's sermon *A Model of Christian Charity*, in which he wrote "we must consider that we shall be as a city upon a hill. The eyes of all people are upon us." JOHN WINTHROP, *A MODEL OF CHRISTIAN CHARITY* (1630), available at <http://religiousfreedom.lib.virginia.edu/sacred/charity.html>. San Francisco's championing of LGBT rights fits within its broader progressive politics, also exemplified by its modern day leadership on providing universal health care. See Richard C. Schragger, *The Progressive City*, ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE L. SCH. (2008), available at <http://www.law.yale.edu/Schragger.pdf>. This is the reputation and identity evoked by the Resolution's use of language like "all San Franciscans," "this great City's existing and established customs and traditions," "the citizenry of San Francisco," and "the people of San Francisco and the values they hold dear." See S.F., Cal., Bd. of Supervisors Res. No. 168-06 (Mar. 21, 2006).

41. Alyssa Cymene Howe, *Queer Pilgrimage: The San Francisco Homeland and Identity Tourism*, 16 *CULTURAL ANTHROPOLOGY* 35, 38 (2001) ("San Francisco served as a crucible for subversive identities dating back to the city's boom era in the mid-1800s. The discovery of gold in the northern reaches of the state ushered in an age of pioneering men in search of fortune. The gold rush lured a huge, predominantly male population to San Francisco Tales of the city's early days, in the 1850s, refer to the absence of women This much disseminated 'origin story' of the city is one rooted in a nearly single-gendered population with a taste for decadence.")

42. See, e.g., *LGBT — Queer SF*, S.F. CHRON., <http://www.sfgate.com/gay/queersf/> (last visited Nov. 11, 2011).

and today it boasts one of the largest gay and lesbian populations among large American cities⁴³ and the highest percentage of same-sex households of any American county.⁴⁴ More recently, it has served as ground zero for the same-sex marriage debate. In 2004, then-Mayor Gavin Newsom began issuing marriage licenses regardless of the applicants' genders;⁴⁵ in the summer of 2010, Chief Judge Vaughn Walker of the United States District Court for the Northern District of California struck down Proposition 8, a 2008 ballot initiative recognizing only opposite-sex marriages in the state of California,⁴⁶ from a courthouse in downtown San Francisco.⁴⁷

In keeping with this longstanding tradition, the San Francisco Board of Supervisors, the legislative body of the City and County, has persistently, actively, and vocally denounced discriminatory statements and conduct against homosexuality. Since 2000, the Board has passed at least forty-one resolutions criticizing the anti-homosexual sentiment of parties such as the Mayor of Moscow, former U.S. Secretary of Education Margaret Spellings, and the public relations director of the San Francisco 49ers football team.⁴⁸ Unsurprisingly, the Board's response to Cardinal Levada's directive was swift and assertive. On March 21, 2006, it unanimously passed non-binding Resolution No. 168-06 ("Resolution"):

Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San

43. GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 9 (2006), available at <http://escholarship.org/uc/item/8h08t0zf>.

44. DAVID M. SMITH & GARY J. GATES, GAY & LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 6 (2001).

45. Rachel Gordon, *S.F. Defies Law, Marries Gays*, S.F. CHRON., Feb. 13, 2004, available at http://articles.sfgate.com/2004-02-13/news/17413655_1_same-sex-couples-marriage-licenses-state-law-defining-marriage.

46. Although Proposition 8 passed statewide with 52.46% of the vote, it was supported by just 23.51% of San Francisco voters. See *Gay Marriage Ban: A Tale of Two Votes*, L.A. TIMES, <http://www.latimes.com/news/local/politics/cal/la-2008election-prop8prop22,0,6153805.htmlstory> (last visited Nov. 11, 2011).

47. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

48. Brief of Appellees at 7, *Catholic League III*, 624 F.3d 1043 (No. 06-17328).

Francisco stop placing children in need of adoption with homosexual households.

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

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

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

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

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

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

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of

the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.⁴⁹

The Catholic Church's response was prompt: on April 4, 2006, the Catholic League for Religious and Civil Rights ("Catholic League"), the nation's largest Catholic civil rights organization, and two Catholic residents of San Francisco sued the City and County of San Francisco ("San Francisco"), claiming that the Resolution was "anti-Catholic" and violated the First and Fourteenth Amendments, specifically the Establishment Clause as applied to the states.⁵⁰

C. PROCEDURAL HISTORY TO *CATHOLIC LEAGUE V. SAN FRANCISCO*

On November 30, 2006, the United States District Court of the Northern District of California dismissed the Catholic League's lawsuit for failure to state a claim upon which relief could be granted, holding that the Resolution did not violate the Establishment Clause under the *Lemon* test.⁵¹ The Catholic League appealed the verdict, and the United States Court of Appeals for the Ninth Circuit initially affirmed the district court's dismissal and holding⁵² before voting to rehear the case en banc.⁵³

On October 22, 2010, a divided eleven-judge panel of the Ninth Circuit affirmed the district court's dismissal of the Catholic League's case but on different grounds than its earlier ruling, with the judges splitting evenly 3-3 on the merits.⁵⁴ Although eight judges voted to grant San Francisco's motion to dismiss, five dismissed on standing grounds⁵⁵ without reaching the merits of the case, and three dismissed on the basis of the merits.⁵⁶ Six

49. See S.F., Cal., Bd. of Supervisors Res. No. 168-06 (Mar. 21, 2006).

50. Complaint, *Catholic League I*, 464 F. Supp. 2d 938 (N.D. Cal. 2006) (No. C 06-2351).

51. *Catholic League I*, 464 F. Supp. 2d 938 (N.D. Cal. 2006), *aff'd en banc*, 624 F.3d 1043 (9th Cir. 2010).

52. *Catholic League II*, 567 F.3d 595 (9th Cir. 2009), *vacated*, 624 F.3d 1043 (9th Cir. 2010).

53. *Catholic League for Religious & Civil Rights v. City & County of S.F.*, 586 F.3d 1166 (9th Cir. 2009).

54. *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010).

55. This Note does not address the standing issue.

56. *Catholic League III*.

judges concluded that the plaintiffs had standing and three believed the plaintiffs should have prevailed on the merits.⁵⁷ On May 2, 2011, the Supreme Court denied the Thomas More Law Center's⁵⁸ petition for writ of certiorari, declining to review the matter.⁵⁹

III. THE ESTABLISHMENT CLAUSE AND THE *LEMON* AND ENDORSEMENT TESTS

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion,”⁶⁰ and is applicable to the states under the Due Process Clause of the Fourteenth Amendment.⁶¹ At a minimum, the Establishment Clause forbids the state from setting up a church, passing laws that aid one religion or all religions, preferring one religion over another, forcing or influencing a person to attend or refrain from attending church, forcing a person to profess a belief or disbelief in any religion, punishing a person for professing religious beliefs or non-beliefs or for attending or not attending church, levying a tax to support any religious activities or institutions to teach or practice religion, or participating in the affairs of any religious organizations or groups.⁶² Nor, at the other end of the continuum, may the state establish a “religion of secularism,” “affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe.”⁶³

The Supreme Court has developed several tests to interpret and apply the Establishment Clause to government action, none of which have been controlling in every case. Although various Justices and at times a majority of the Court itself have turned to coercion, neutrality, and context as standard-bearers, the most

57. *Id.*

58. The Thomas More Law Center represented Catholic League and the two Catholic residents of San Francisco in their petition. Petition for Writ of Certiorari, *Catholic League III*, 131 S. Ct. 2875 (2011) (No. 10-1034).

59. *Id.*

60. U.S. CONST. amend. I.

61. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947).

62. *Id.* at 15–16.

63. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (internal quotation marks omitted).

prominent test continues to be the one developed in *Lemon v. Kurtzman*,⁶⁴ though it has not been consistently applied and has been criticized by legal scholars and the Justices themselves.⁶⁵ In *Lemon*, the Court addressed the constitutionality of two state statutes providing state aid to “church-related” elementary and secondary schools.⁶⁶ A Pennsylvania law had authorized the state to reimburse nonpublic schools for expenditures like secular textbooks, secular instructional materials, and the salaries of teachers who taught secular material, so long as the school identified “the separate cost of the secular educational service” for reimbursement.⁶⁷ Meanwhile, a Rhode Island law had authorized the state to supplement the salaries of teachers who taught secular subjects using secular materials at nonpublic elementary schools where “the average per-pupil expenditure on secular education [was] less than the average in the State’s public schools during a specified period.”⁶⁸ The Court found both statutes to be violations of the Establishment Clause because “the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”⁶⁹ In doing so, the Court articulated what is now known as the *Lemon* test: a government action, to be consistent with the Establishment Clause, (1) “must have a secular legislative purpose,” (2) “its principal or primary effect must be one that neither advances nor inhibits religion,” and (3) it “must not foster an excessive government entanglement with religion.”⁷⁰ All three prongs must be met to avoid violating the Establishment Clause.

The Catholic League, San Francisco, the district court and both panels of the Ninth Circuit all deferred to the *Lemon* test in their arguments and analyses, but relied to varying degrees on the endorsement test as well. Distinct from the *Lemon* test, the endorsement test was first proposed by Justice O’Connor in her

64. 403 U.S. 602 (1971); *see also supra* note 7 and accompanying text.

65. For example, Justice Scalia likened the *Lemon* test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting).

66. *Lemon*, 403 U.S. at 606.

67. *Id.* at 609–10 (internal quotation marks omitted).

68. *Id.* at 607.

69. *Id.* at 613–14.

70. *Id.* at 612–13 (internal quotation marks omitted).

concurring opinion in *Lynch v. Donnelly*.⁷¹ The test is a context-specific inquiry into whether a reasonable observer would consider the government action in question to be an endorsement or disapproval of religion, thus making religion relevant to a person's standing in the political community in violation of the Establishment Clause.⁷² A reasonable observer, "aware of the history and context of the community and forum in which the religious display appears,"⁷³ provides a "more collective standard to gauge the 'objective' meaning of the [government's] statement in the community,"⁷⁴ compared to the "actual perception of individual observers, who naturally have differing degrees of knowledge."⁷⁵ If the reasonable observer perceives an endorsement, such an endorsement "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," while "[d]isapproval sends the opposite message."⁷⁶

The Court has sometimes turned to a hybrid of the *Lemon* and endorsement tests to assess cases in which the state was engaged in an expressive, often non-regulatory activity, such as prayer in schools,⁷⁷ religion in school curriculum,⁷⁸ or holiday displays on government property.⁷⁹ In *Lynch*, O'Connor suggested reworking *Lemon* so that future courts would engage in a two-step examination: first examining institutional entanglement, and then looking into endorsement or disapproval.⁸⁰ *Lemon's* purpose and effect prongs would fold into the endorsement or disapproval analysis: a court would ask whether the government's actual purpose was to endorse or disapprove of religion, and whether the government action in fact conveyed a message of endorsement or

71. 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

72. *Id.*

73. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

74. *Id.* at 779 (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

75. *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring).

76. *Lynch*, 465 U.S. at 688 (O'Connor, J. concurring).

77. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

78. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

79. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

80. *Lynch*, 465 U.S. at 689 (O'Connor, J. concurring).

disapproval.⁸¹ In practice, however, the Court has done the reverse and folded the endorsement test into the *Lemon* test, engaging in *Lemon*'s three-step analysis and, within a step, inquiring about endorsement or disapproval.⁸² Although the substantive analysis remains the same regardless of which test is folded into which, the Court's choice means *Lemon* remains the predominant test and O'Connor's endorsement language a gloss, instead of the reverse being true.

The next sections present the three prongs of the *Lemon* test and, where applicable, describe their endorsement test variations. Part III.A discusses the "secular legislative purpose" requirement, Part III.B analyzes the "principle or primary effect" inquiry, and Part III.C explores the meaning of "excessive government entanglement."

A. ADEQUATE SECULAR PURPOSE

Under *Lemon*'s first prong, a government action must have an "adequate secular purpose," which in practice has evolved to mean a secular purpose that is both primary and sincere. Initial-

81. For example, in *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), Justice Brennan, writing for the Court, adopted O'Connor's endorsement logic in finding that a school district's shared time and community education programs failed *Lemon*'s effect prong because "the symbolic union of church and state . . . is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *Id.* at 390. In *Allegheny*, the Court, holding that a crèche but not a menorah violated the Establishment Clause, explicitly adopted O'Connor's concurring opinion in *Lynch* as a "sound analytical framework for evaluating governmental use of religious symbols," and then looked to see if the government's use of religious symbolism had the effect of endorsing religious beliefs. 492 U.S. at 595.

82. In *Wallace*, Justice Stevens, writing for the majority, ruled that an Alabama school prayer and meditation statute violated the Establishment Clause because it failed the purpose prong of the *Lemon* test, and echoed O'Connor in asking "whether government's actual purpose is to endorse or disapprove of religion." 472 U.S. at 56. In *Edwards*, Justice Brennan, writing for the majority, held that Louisiana's Creationism Act violated the Establishment Clause because it, too, failed *Lemon*'s purpose prong as defined, again, by O'Connor in *Lynch*. 482 U.S. at 585. Finally, a majority of the Court joined Justice Blackmun in *Allegheny* where he noted that "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." 492 U.S. at 593-94 (internal quotation marks omitted). Most recently, in *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005), the Court evoked O'Connor's endorsement test language in its discussion of *Lemon*'s purpose prong: "[t]he purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."

ly, the *Lemon* Court did not elaborate on whether the secular purpose needed to be the exclusive or primary purpose.⁸³ Thirteen years later, in *Lynch*, four members of the Court suggested that a secular purpose would suffice.⁸⁴ Justice O'Connor, the fifth vote, disagreed, stating that the secular purpose requirement was not satisfied "by the mere existence of *some* secular purpose, however dominated by religious purposes."⁸⁵ As recently as 2005, the Court has agreed with O'Connor's interpretation, indicating that the secular purpose must be primary or predominant in order to be adequate.⁸⁶

Although the Court has given considerable deference to a government's stated secular purpose behind an action, it has reserved the right to scrutinize the sincerity of that purpose. In *Lemon*, the Court was fairly deferential, observing that "the statutes themselves clearly state that they are intended to enhance the quality of the secular education" and that "[t]here is no reason to believe the legislatures meant anything else."⁸⁷ The Court later clarified that while it was "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."⁸⁸ Recently, the Court has emphasized that the secular purpose must be genuine.⁸⁹

Application of the endorsement test adds a third consideration: "whether government's actual purpose is to endorse or disapprove of religion."⁹⁰ Assuming that a variety of purposes may motivate a single government act, the Court has not been explicit in addressing whether *any* purpose to endorse or disapprove of religion automatically violates the Establishment Clause, or whether such a purpose is constitutionally tolerable so long as it is not the *primary* purpose.⁹¹ In *Edwards v. Aguillard*, the Court,

83. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

84. *Lynch*, 465 U.S. at 681.

85. *Id.* at 690–91 (O'Connor, J., concurring) (emphasis added).

86. *McCreary*, 545 U.S. at 865 ("But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one.")

87. *Lemon*, 403 U.S. at 613.

88. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

89. *McCreary*, 545 U.S. at 846, 865.

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

91. In *Wallace*, the Court found no secular purpose. 472 U.S. 38, 56 (1985). In *Allegheny*, the Court focuses on the effect prong in evaluating the holiday displays, 492 U.S.

addressing an Establishment Clause challenge to Louisiana's "Creationism Act," suggested the latter was the case.⁹² The Creationism Act prohibited the teaching of evolution in public elementary and secondary schools unless accompanied by instruction in "creation science"; while it did not require schools to teach either theory, it did require that if either was taught, then the other would be.⁹³ Observing that there was no clear secular purpose for the statute, the Court concluded that "because the *primary* purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause."⁹⁴ In other words, the hybrid *Lemon*-endorsement test, which subsumes the endorsement test into the *Lemon* test, maintains its *Lemon* requirements of adequacy — namely, primacy and sincerity.

To determine the actual purpose of a government action, a court must assume the eyes of an "objective observer," that is, "one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act."⁹⁵ The use of such an objective observer's perspective allows a court to scrutinize purpose "without any judicial psychoanalysis of a drafter's heart of hearts," and to instead rely upon "an understanding of official objective [that] emerges from readily discoverable fact."⁹⁶

B. PRINCIPAL OR PRIMARY EFFECT

The second prong of the *Lemon* test requires that a government action's "principal or primary effect . . . be one that neither advances nor inhibits religion."⁹⁷ Although the Court in *Lemon* did not perform an analysis under this prong,⁹⁸ it has since clarified that a government action that produces merely "incidental"

573, 598–602, 613–21 (1989). In *McCreary*, only O'Connor in her concurring opinion relies on the endorsement test in her analysis. 545 U.S. at 883–84.

92. 482 U.S. 578.

93. *Id.* at 581.

94. *Id.* at 594 (emphasis added).

95. *McCreary*, 545 U.S. at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (internal quotation marks omitted)).

96. *McCreary*, 545 U.S. at 862 (citing *Wallace*, 472 U.S. at 74).

97. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

98. The Court found that the government action violated the excessive entanglement prong and so did not perform an analysis of the action's effects. 403 U.S. at 613–14.

benefits to religion satisfies this requirement.⁹⁹ Arguably, by analogy, the same is true for government actions that produce merely incidental costs to religion. As with the purpose prong, to determine the effects of a particular government action, a court must rely on the perspective of a reasonable person and evaluate a government action within the context in which it occurred.¹⁰⁰

Under the endorsement test variation, a government action must not have an effect that communicates a message of government endorsement or disapproval of religion, to the extent that this endorsement or disapproval makes religion relevant to one's status in the political community. A government action is not invalidated for merely *causing* an advancement or inhibition of religion.¹⁰¹ Instead, "what is crucial . . . is that a government practice not have the effect of *communicating a message of government endorsement or disapproval of religion.*"¹⁰² The Court has not explicitly addressed whether *any* message of endorsement or disapproval is itself sufficient to render a government action unconstitutional, or whether such a message must be the principal or primary effect.¹⁰³ In *Allegheny*, the Court suggested the former:

Lynch teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, *nothing more is required* to demonstrate a violation of the Establishment Clause.¹⁰⁴

99. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 762–63 (1994) ("We rejected the defense because the forum created by the State was open to a broad spectrum of groups and would provide only incidental benefit to religion.").

100. See *id.* at 779–81 (1995) (O'Connor, J., concurring).

101. *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (O'Connor, J., concurring).

102. *Id.* at 692 (O'Connor, J., concurring).

103. Both *Wallace* and *Edwards* focus on purpose, see *supra* note 82, and the endorsement test is not a major part of the majority's analysis under *Lemon*.

104. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601–02 (1989) (emphasis added).

However, this interpretation would be inconsistent with the Court's history of subsuming the endorsement test under *Lemon*,¹⁰⁵ which requires that the "principal or primary effect" advance religion.¹⁰⁶ It would also be inconsistent with the Court's requirement of a primary — not any — secular purpose, to avoid constitutional infirmity.¹⁰⁷ Presumably, it would make more sense to interpret the second prong under the *Lemon*-endorsement test as invalidating a government action when the principal or primary effect is to communicate a message of government endorsement or disapproval of religion.

C. EXCESSIVE ENTANGLEMENT

Finally, *Lemon* prohibits a government action from fostering "an excessive government entanglement with religion."¹⁰⁸ Since total separation between church and state is impossible and some relationship between government and religious organizations is inevitable, the objective of the Establishment Clause is "to prevent, as far as possible, the intrusion of either into the precincts of the other."¹⁰⁹ To determine whether such an intrusion has overstepped its bounds, *Lemon* suggests that a court examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."¹¹⁰ Administrative entanglement is another relevant consideration, and entails the extent to which the state must intervene to ensure that its funds are being used for permissible secular purposes or must work closely with a religious organization.¹¹¹ *Lemon* suggests that excessive entanglement also includes the potential for a particularly aggravated brand of political divisiveness

105. See *supra* note 82 and accompanying text.

106. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

107. See *supra* Part III.A.

108. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

109. *Id.* at 614.

110. *Id.* at 615.

111. See also *Lemon v. Kurtzman*, 411 U.S. 192, 202 (1973) ("There is no present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight — now an accomplished fact — assures that state funds will not be applied for any sectarian purposes.").

along religious lines, “one of the principal evils against which the First Amendment was intended to protect,”¹¹² though the Court clarified that such divisiveness is not itself sufficient to invalidate otherwise permissible conduct.¹¹³ Finally, in *Lemon*, the need for a “comprehensive, discriminating, and continuing state surveillance” proved to be fatal to the program at issue.¹¹⁴

Although *Lemon* treats the excessive entanglement inquiry as separate from the effect prong, at least on one occasion the Court has treated the former as an aspect of the latter.¹¹⁵ Regardless of whether the third prong of *Lemon* stands alone or becomes collapsed into the second, however, the considerations used to assess excessive entanglement remain the same.¹¹⁶

IV. THE NINTH CIRCUIT’S ANALYSIS OF THE ESTABLISHMENT CLAUSE

Part IV presents the Ninth Circuit’s analysis of the Establishment Clause. Part IV.A describes *Vernon v. Los Angeles* and *American Family Ass’n v. San Francisco*, two Establishment Clause cases predating *Catholic League* that also involved alleged instances of government disapproval of religion and were relied upon by the district and appellate courts in *Catholic League*. Part IV.B summarizes the Establishment Clause analysis in *Catholic League*.

A. THE NINTH CIRCUIT’S PAST ARTICULATIONS OF *LEMON*: *VERNON AND AMERICAN FAMILY*

The district court and both Ninth Circuit opinions in *Catholic League* rely on two earlier Ninth Circuit cases in their analyses: *Vernon v. Los Angeles*¹¹⁷ and *American Family Ass’n v. City &*

112. *Lemon*, 403 U.S. at 622.

113. *Lynch v. Donnelly*, 465 U.S. 668, 669 (1984).

114. *Lemon*, 403 U.S. at 619.

115. *Agostini v. Felton*, 521 U.S. 203, 205–06 (1997) (“It is simplest to recognize why entanglement is significant and treat it — as the Court did in *Walz* — as an aspect of the inquiry into a statute’s effect.”); see also *Mitchell v. Helms*, 530 U.S. 793 (2000) (“[W]e therefore recast *Lemon*’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect.”) (plurality opinion).

116. *Agostini*, 521 U.S. at 205–06.

117. 27 F.3d 1385 (9th Cir. 1994).

County of San Francisco.¹¹⁸ Like *Catholic League*, both cases are unusual for Establishment Clause jurisprudence because they concern the constitutionality of government action that allegedly disapproves of religion.¹¹⁹ In both cases, the Ninth Circuit observed that the *Lemon* test accommodated cases involving government approval as well as disapproval of religion.¹²⁰ Moreover, in both cases, the Ninth Circuit applied the *Lemon* test with endorsement test coloration, to find that the government action under review did not violate the Establishment Clause.¹²¹ In neither case did the Ninth Circuit explain why it turned to a modified construction of *Lemon*.

1. *Vernon v. Los Angeles*

In *Vernon*, assistant police chief of the Los Angeles Police Department (LAPD) Robert L. Vernon sued the City of Los Angeles for investigating whether his religious views had an impermissible effect on his on-duty performance, claiming that the city's conduct before and during the investigation constituted a violation of the Establishment Clause.¹²² The Ninth Circuit upheld the district court's grant of summary judgment for the city, rejecting Vernon's Establishment Clause claim after applying a hybrid *Lemon*-endorsement test.¹²³ The appellate court found that the city's investigation satisfied the purpose prong because it had a valid secular purpose: "to determine whether there was any basis to the allegations that Vernon's religious views were affecting his job performance in such a way as to violate either LAPD policies and regulations or the civil and constitutional rights of both police officers and citizens."¹²⁴ Although the court noted that *a* — and not *a primary* — secular purpose was all the test required, it also noted that the Supreme Court had articulated "a slightly more stringent test" requiring that the "actual or primary purpose" be secular — but that this higher standard did not change

118. 277 F.3d 1114 (9th Cir. 2002).

119. See *supra* note 16.

120. *Am. Family*, 277 F.3d at 1121; *Vernon*, 27 F.3d at 1396.

121. *Am. Family*, 277 F.3d at 1121–22; *Vernon*, 27 F.3d at 1396, 1398.

122. *Vernon*, 27 F.3d at 1390.

123. *Id.* at 1401.

124. *Id.* at 1397.

the outcome in this case.¹²⁵ Next, the court relied on an endorsement test-like interpretation of *Lemon's* effect prong to consider “whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion,”¹²⁶ and concluded that while “one may infer possible city disapproval of Vernon’s religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation.”¹²⁷ Finally, the court found that the investigation did not result in excessive administrative or political entanglement with religion, as it only collaterally affected Vernon’s church, did not entail continuing or systematic investigation of his religious beliefs, and did not result in political divisiveness.¹²⁸

Vernon and *Catholic League* are distinguishable on at least two fronts, which cautions against importing wholesale the Ninth Circuit’s modified *Lemon* analysis. First, to the extent it can be argued that Los Angeles’s investigation focused on Vernon’s religious beliefs, the focus was on the *impact* of his beliefs on his job performance — not on his beliefs *per se*, or the beliefs of his church or religion.¹²⁹ Second, the city’s conduct related to the investigation was not explicitly hostile to Vernon’s beliefs. In fact, at least two city officials stated that Vernon was “entitled to his personal religious and political views,” a right that the city would “vigorously protect and defend.”¹³⁰ At best, the city’s disapproval of Vernon’s religious beliefs was attenuated and indirect. In contrast, San Francisco’s resolution was an explicitly hostile disapproval of the public statements of the Catholic Church regarding homosexuality and adoption by same-sex couples, which were also its religious beliefs.

125. *Id.*

126. *Id.* at 1398.

127. *Id.* at 1398–99.

128. *Id.* at 1399–1401.

129. *Id.* at 1390 (“According to Chief Gates, the investigation focused entirely on Vernon’s on-duty conduct.”).

130. *Id.* at 1389–90 (quoting letters from city officials) (internal quotation marks omitted).

2. American Family Ass'n., Inc. v. City & County of San Francisco

In *American Family*, a Christian non-profit organization joined other religious groups in sponsoring a full-page advertisement in the San Francisco Chronicle as part of a nationwide advertising campaign that proclaimed God's hatred of homosexuality and offered to help homosexual persons reject "self-destructive behavior," such as homosexual conduct and its associated risks of sexually-transmitted diseases, alcohol and drug abuse, and physical and emotional violence.¹³¹ In response, the San Francisco Board of Supervisors sent a letter to the organization¹³² stating, "Supervisor Leslie Katz denounces your hateful rhetoric," and linking the organization's discriminatory message to "the horrible crimes committed against gays and lesbians."¹³³ The Board also adopted two resolutions.¹³⁴ The first condemned an Alabama murder involving an unwanted gay sexual advance, urged Alabama lawmakers to include offenses related to sexual orientation in hate crimes legislation, and "call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which . . . open[s] the door to horrible crimes"¹³⁵ The second resolution declared that "defamatory and erroneous" advertising campaigns against gays and lesbians were "full of lies" and created an atmosphere "which validates oppression of gays and lesbians and encourages maltreatment of them," and then urged local television stations not to broadcast such campaigns.¹³⁶

131. *Am. Family Ass'n v. City & Cnty. of S.F.*, 277 F.3d 1114, 1119 (9th Cir. 2002).

132. The letter was also addressed to Newt Gingrich, Trent Lott, and Jesse Helms. *Id.* at 1119 & n.1.

133. *Id.* at 1119. The rest of the letter reads:

Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people. What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment. It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.

Id.

134. *Id.* at 1119–20.

135. *Id.*

136. *Id.* at 1120 (internal quotation marks omitted).

The American Family Association sued San Francisco, alleging various federal and state constitutional violations, including a violation of the Establishment Clause because the city's acts disapproved of a particular religion.¹³⁷ The district court granted the city's motion to dismiss for failure to state a claim, and the Ninth Circuit affirmed under *Lemon*.¹³⁸ Starting with the purpose prong, the Ninth Circuit, echoing O'Connor's concurring opinion in *Lynch*, explained that "the purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion."¹³⁹ Citing *Vernon*, the court agreed that *any* secular purpose, no matter how minimal, would pass *Lemon*'s purpose requirement, despite the Supreme Court's more rigorous standard.¹⁴⁰ It then agreed with the district court that the letter and resolutions may have appeared to attack the plaintiff's religious views on homosexuality, but that there was also a "plausible secular purpose in the [city's] actions — protecting gays and lesbians from violence"¹⁴¹

Again relying on *Vernon*, the court next turned to the effects inquiry. It concluded that the primary effect of the first resolution was to denounce hate crimes and urge the Alabama legislature to act, and not to inhibit religion.¹⁴² The primary effect of the letter and second resolution, though a closer call, was to encourage equal rights for gays and discourage hate crimes, and the effects of disapproval were incidental and ancillary at best.¹⁴³ Lastly, the court easily dispensed with the excessive entanglement prong, determining that even if the American Family Association was correct that the city's actions encouraged political divisiveness along religious lines, this was insufficient to constitute excessive entanglement.¹⁴⁴

137. *Id.*

138. *Id.* at 1118.

139. *Id.* at 1121 (quoting *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (internal quotation marks omitted)).

140. *American Family*, 277 F.3d at 1121.

141. *Id.*

142. *Id.* at 1122.

143. *Id.*

144. *Id.* at 1123.

Compared to *Vernon*, *American Family* is much closer to *Catholic League*.¹⁴⁵ In both *American Family* and *Catholic League*, San Francisco criticized the beliefs of a religious group by passing resolutions critical of the group and its efforts to disseminate its beliefs.¹⁴⁶ However, the resolutions differed in a few key respects. The *American Family* resolutions did not target any particular religion by name but implicated the Religious Right, the coalition behind the advertisement campaign, and the organizations in the coalition, including the American Family Association,¹⁴⁷ a non-profit affiliated with conservative Christian values;¹⁴⁸ by contrast, the *Catholic League* resolution targeted the Catholic Church, Catholic officials, and a Catholic organization.¹⁴⁹ The language was far less inflammatory in the *American Family* resolutions: it linked anti-homosexual rhetoric to “a climate of mistrust and discrimination,” maltreatment of gays and lesbians, and anti-gay violence and hate crimes, and called the advertisements “erroneous and full of lies.”¹⁵⁰ Comparatively, the *Catholic League* resolution strongly condemned the Vatican, its officials, and their anti-homosexual rhetoric.¹⁵¹ Finally, the *American Family* resolutions were targeted at non-religious entities: they urged the Alabama legislature to expand hate crime legislation to include sexual orientation, the Religious Right to “take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians,” and local television stations not to broadcast anti-homosexual advertising campaigns.¹⁵² The *Catholic League* resolution addressed religious figures: it urged a Cardinal to withdraw a directive and an Archbishop to defy the Church.¹⁵³

145. In *American Family*, the San Francisco Board of Supervisors responded by sending a letter and passing two resolutions. *Id.* at 1119. Since the letter is non-public and holds itself out as being from one supervisor, this Note compares only the resolutions in *American Family* and *Catholic League*.

146. *Id.* at 1119–20; S.F., Cal., Bd. of Supervisors Res. No. 168-06 (Mar. 21, 2006).

147. *American Family*, 277 F.3d at 1119.

148. *About AFA*, AM. FAMILY ASS'N, <http://www.afa.net/Detail.aspx?id=31> (last visited Nov. 11, 2011).

149. Res. No. 168-06.

150. *American Family*, 277 F.3d at 1119–20 (internal quotation marks omitted).

151. Res. No. 168-06.

152. *American Family*, 277 F.3d at 1119 (internal quotation marks omitted).

153. Res. No. 168-06.

B. THE NINTH CIRCUIT'S *LEMON* ANALYSIS IN *CATHOLIC LEAGUE V. SAN FRANCISCO*

The district court and both Ninth Circuit decisions granted San Francisco's motion to dismiss the Catholic League's complaint for failure to state a claim on which relief can be granted.¹⁵⁴ All three opinions observed that the *Lemon* test was appropriate in an Establishment Clause analysis of government conduct that allegedly disapproved of religion,¹⁵⁵ and all turned to a version of the test that incorporated endorsement test language into the second prong.¹⁵⁶

1. *Purpose*

In its original complaint, the Catholic League argued that the Resolution lacked a secular purpose;¹⁵⁷ later, in its appellate brief, it argued that the actual objective was "to officially attack and criticize the Catholic Church, Catholic religious leaders, and Catholic religious beliefs, and to meddle in Church affairs"¹⁵⁸ San Francisco countered that "[n]o reasonable observer could possibly conclude that the predominant purpose of the Board's resolution was to inhibit Catholicism"; rather, "its purposes were to denounce discrimination against same-sex couples, and to try to preserve for San Francisco children the opportunity to be placed for adoption with qualified families without regard to sexual orientation."¹⁵⁹

154. *Catholic League I*, 464 F. Supp. 2d 938 (N.D. Cal. 2006), *aff'd en banc*, 624 F.3d 1043 (9th Cir. 2010); *Catholic League II*, 567 F.3d 595 (9th Cir. 2009), *vacated*, 624 F.3d 1043 (9th Cir. 2010); *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010). See *supra* notes 12–14 and accompanying text.

155. *Catholic League I*, 464 F. Supp. 2d at 942; *Catholic League II*, 567 F.3d at 599; *Catholic League III*, 624 F.3d at 1060 (Silverman, J., concurring). Because of the way the Ninth Circuit, sitting en banc, split on the decision, the three judges prevailing on the merits wrote in concurrence and that opinion is the one cited; however, the three judges dissenting on the merits also agreed that *Lemon* applied. *Catholic League III*, 624 F.3d at 1054–55.

156. *Catholic League I*, 464 F. Supp. 2d at 944–45; *Catholic League II*, 567 F.3d at 604; *Catholic League III*, 624 F.3d at 1057. In the en banc opinion, the three dissenting judges evoked the endorsement test in discussing the Resolution's effects, *Catholic League III*, 624 F.3d at 1057, but the three concurring judges did not. *Id.* at 1061.

157. Complaint at 11, *Catholic League I*, 464 F. Supp. 2d 938 (No. C 06-2351).

158. Opening Brief of Appellants at 35, *Catholic League III*, 624 F.3d 1043 (No. 06-17328).

159. Brief of Appellees at 15, *Catholic League III*.

Both the district court and the initial Ninth Circuit decision agreed that the Resolution passed the purpose prong of the *Lemon* test.¹⁶⁰ Both dispensed with the *American Family* articulation of the prong requiring “any secular purpose, no matter how minimal, [to] pass the test,” and, consistent with Supreme Court precedent, demanded that the secular purpose be not “merely secondary to a religious objective.”¹⁶¹

The district court went on to hold that a predominant secular purpose of promoting same-sex equality and adoption by these couples was evident from the wording of the Resolution.¹⁶² The court dismissed the City’s incendiary language condemning the Church’s leadership and doctrinal statements as presented within, and limited to, the context of same-sex adoption, and thus merely secondary to the primary purpose of the Resolution.¹⁶³ It also characterized the Resolution’s reference to the Vatican as a foreign country as an “explicit attempt” to characterize the City’s disagreement against a political entity and not a religious organization.¹⁶⁴

In its first opinion, the Ninth Circuit agreed that the actual language of the Resolution supported a finding of a secular purpose and also added that the timing of the Resolution confirmed this conclusion: although it was passed after the Congregation’s doctrinal document, it was passed directly in response to Cardinal Levada’s directive, and thus reacted not against Catholicism *per se* but to “a public action that would affect both its gay and lesbian constituents” and children in its jurisdiction.¹⁶⁵ Critically, the court also observed that same-sex adoption is both a secular issue to the Board and a religious issue to Catholics.¹⁶⁶ “[I]f consistency with religious beliefs is not endorsement of religion, inconsistency is not hostility to it,” for “[a]ny other approach would

160. *Catholic League I*, 464 F. Supp. 2d at 944; *Catholic League II*, 567 F.3d 595, 601 (9th Cir. 2009).

161. *Catholic League I*, 464 F. Supp. 2d at 943 (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (internal quotation marks omitted)); see also *Catholic League II*, 567 F.3d at 600 n.5 (“*McCreary County* clarifies, however, that the inquiry is whether the government acted with a ‘predominantly’ religious purpose.”).

162. *Catholic League I*, 464 F. Supp. 2d at 944.

163. *Id.*

164. *Id.*

165. *Catholic League II*, 567 F.3d at 601–02.

166. *Id.* at 602.

stymie government's ability to take action on all potentially religious issues¹⁶⁷

Upon rehearing en banc, the three judges who sided with San Francisco on the merits agreed that the predominantly secular purpose of the Resolution was “to promote equal rights for same-sex couples in adoption and to place the greatest number of children possible with qualified families” — especially given the context of San Francisco’s “well-known and lengthy history of promoting gay rights.”¹⁶⁸ The three judges dissenting on the merits acknowledged a secular purpose but also saw an expressed anti-Catholic purpose on the face of the Resolution, observing that its title paragraph, five of the “Whereas” clauses, and the “Resolved” language target the Catholic Church and not same-sex couples.¹⁶⁹ Nothing about the Resolution’s context — the Board’s other resolutions condemning discrimination based on sexual orientation, the sponsoring councilman’s Catholicism, nor San Francisco’s history of promoting gay rights — negated the facially discriminatory, anti-Catholic Resolution.¹⁷⁰

2. Effect

Adopting the language of the endorsement test, the Catholic League claimed that the Resolution conveyed an explicit message of government disapproval of the Catholic religion, in violation of the Establishment Clause.¹⁷¹ In its complaint and appellate brief, the organization argued that the Resolution’s hostility “sends a clear message to . . . adherents to the Catholic faith that they are outsiders, not full members of the political community,” and “an accompanying message that those who oppose the Catholic Church . . . particularly with regard to homosexual unions and adoptions by those who are in such unions, are insiders, favored members of the political community”¹⁷² To support its argu-

167. *Id.* at 603–04 (internal quotation marks omitted).

168. *Catholic League III*, 624 F.3d 1043, 1050 (9th Cir. 2010) (Silverman, J., concurring).

169. *Id.* at 1055.

170. *Id.* at 1056.

171. Opening Brief of Appellants at 38, *Catholic League III*, 624 F.3d 1043 (No. 06-17328).

172. Complaint at 11–12, *Catholic League I*, 464 F. Supp. 2d 938 (N.D. Cal. 2006) (No. C 06-2351); see also Opening Brief of Appellants at 4, *Catholic League III*.

ment, the Catholic League pointed to the language of the Resolution, which invoked “all San Franciscans,” and “the citizenry of San Francisco,” to suggest that the Resolution on its face regarded Catholics as political outsiders.¹⁷³ Relying on Justice O’Connor’s concurring opinion in *Lynch*, the Catholic League’s brief seemed to suggest that *any* message of disapproval was sufficient to fail the effect prong, and hostility did not need to be the *primary* effect of the Resolution to offend the Establishment Clause.¹⁷⁴

Interestingly, San Francisco agreed with the Catholic League’s endorsement test variation of *Lemon*’s second prong, but argued that no reasonable observer could have concluded that the Resolution had the primary effect of disapproving of Catholicism.¹⁷⁵ The City made a context-based defense: the Board had a long history of criticizing those who discriminated against homosexuality, and both the sponsoring councilman of the Resolution and the Mayor who signed it were Catholic.¹⁷⁶ San Francisco also pointed out that, contrary to the Resolution, Cardinal Levada did not withdraw his directive and Catholic Charities stopped placing children for adoption with same-sex couples, showing that the Resolution had no effect at all on the Catholic religion.¹⁷⁷

The district court and the initial Ninth Circuit opinion likewise adopted the endorsement test variation of the effect prong articulated in *Vernon* and then in *American Family*, inquiring whether the primary effect was a message of disapproval. The district court conceded that the Resolution was explicitly hostile towards Catholic views regarding homosexuality and adoption by same-sex couples, but reasoned that “hostility alone, however, is not fatal to the Resolution’s constitutionality unless the hostility is the *primary* effect of the resolution.”¹⁷⁸ It went on to hold that the primary effect of the Resolution was to foster non-

173. Opening Brief of Appellants at 39, *Catholic League III* (internal citations and quotation marks omitted).

174. *Id.* (arguing that the requirement that hostility toward a religion be the primary effect of the Resolution is “erroneous as a matter of law” and all that is required by the effect prong is that the Resolution “in fact conveys a message of hostility toward religion” (internal citations and quotation marks omitted)).

175. Brief of Appellees at 15, *Catholic League III*.

176. *Id.* at 1–2.

177. *Id.* at 20.

178. *Catholic League I*, 464 F. Supp. 2d 938, 945 (N.D. Cal. 2006).

discrimination and to promote adoption by same-sex couples, given its timing and narrow scope on same-sex adoptions, and the City's history of similar resolutions.¹⁷⁹

The initial Ninth Circuit opinion added that the Resolution must be examined as a whole, rather than by its component parts, and that, on the whole, the secular dimensions of the Resolution overwhelmed the religious ones, and any hostility conveyed towards particular Catholic tenets was secondary at best.¹⁸⁰ The court also pointed to the Resolution's non-binding nature, which "imposes no regulation or obligation," though it conceded that "Establishment Clause cases . . . regularly turn on symbolism" and a non-binding resolution can "convey a message."¹⁸¹ Importantly, the court highlighted the Catholic League's error in arguing that *any* message of hostility towards religion violated the Establishment Clause.¹⁸²

In the en banc opinion, although the three judges agreeing with San Francisco on the merits couched the effect prong in terms of *Lemon* and not the endorsement test, the dissenting judges adopted an endorsement-like interpretation, agreeing with the Catholic League that "a mere message of disapproval . . . suffices for an Establishment Clause violation under *Lemon*."¹⁸³ To those judges, since the Resolution explicitly denounced a Catholic doctrine and the Catholic Church, it failed the effect prong, making the Resolution unconstitutional.¹⁸⁴

3. *Entanglement*

Defining excessive entanglement as a government action "which may interfere with the independence of the institutions," the Catholic League argued that the Resolution used the government's official position, status, and power to improperly "interfer[e] with the independence of the Catholic Church and Catholic organizations on a matter of Church doctrine."¹⁸⁵ Furthermore,

179. *Id.* at 945–46.

180. *Catholic League II*, 567 F.3d 595, 605–06 (9th Cir. 2009).

181. *Id.* at 605 n.10.

182. *Id.*

183. *Catholic League III*, 624 F.3d 1043, 1057 (9th Cir. 2010).

184. *Id.* at 1057.

185. Opening Brief of Appellants at 43, *Catholic League III*, 624 F.3d 1043 (No. 06-17328).

the Catholic League contended that without distinguishing among matters that are purely secular, purely religious, or a mix of both, “a formal resolution in which the government takes an official position on religious doctrine or takes sides in a religious matter fosters the sort of entanglement that is prohibited by the Establishment Clause.”¹⁸⁶ In contrast, San Francisco defined excessive entanglement as government involvement that is “a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement,” easily excluding a one-time, non-binding Resolution.¹⁸⁷

Consistent with *Vernon* and *American Family*, both the district court and initial Ninth Circuit opinion defined excessive entanglement as having both administrative and political dimensions: the former dimension involved “comprehensive, discriminating and continuing state surveillance of religion,” and the latter involved engendering political divisiveness, though not itself sufficient to constitute a constitutional violation.¹⁸⁸ The district court agreed with San Francisco that the Resolution was a non-binding, non-regulatory exercise of free speech rights by duly-elected office holders.¹⁸⁹ The notion of provocation was relevant. Because the Catholic Church had provoked the debate, elected officials were free to respond with their constituency’s views.¹⁹⁰ The court also described the Catholic League’s broad reinterpretation of the excessive entanglement prong as radical, since it “would mean that any religiously-initiated debate even on a political issue could not be joined by a publicly-elected body’s response without resulting in excessive entanglement.”¹⁹¹ The three-judge panel of the Ninth Circuit added that the Board had simply “expressed its secular view in a non-binding resolution on a matter of public policy.”¹⁹²

186. *Id.*

187. Brief of Appellees at 21, *Catholic League III* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970)).

188. *Catholic League I*, 464 F. Supp. 2d 938, 946 (N.D. Cal. 2006) (quoting *Vernon v. City of L.A.*, 27 F.3d 1385, 1399 (9th Cir. 1994) (internal quotation marks omitted)).

189. *Catholic League I*, 464 F. Supp. 2d at 948; see also *Catholic League II*, 567 F.3d 595, 607 (9th Cir. 2009).

190. *Catholic League I*, 464 F. Supp. 2d at 948.

191. *Id.* at 947.

192. *Catholic League II*, 567 F.3d at 608.

The agreeing judges sitting en banc called the Resolution an “isolated, non-binding expression” without the potential to interfere with “the inner workings of the Catholic Church.”¹⁹³ But the dissenting judges on the issue believed that the Resolution “explicitly entangle[d] itself in church governance” and the development of Catholic religious doctrine.¹⁹⁴

V. AN ALTERNATIVE ESTABLISHMENT CLAUSE TEST

In the Ninth Circuit’s initial ruling in *Catholic League*, Judge Berzon wrote a separate concurring opinion in which he stated:

I do find the result troublesome In particular, I am acutely aware that “the Constitution assures religious believers that units of government will not take positions that amount to the establishment of a policy condemning their religious belief” and that resolutions such as the ones in *American Family* and the one in this case are near — if not at — the line that separates establishment of such a policy.¹⁹⁵

Moreso than the resolutions in *American Family*, Resolution No. 168-06 is, at times, an open and unabashed condemnation of the Catholic Church, Catholic officials, and Catholic doctrine. But whether and how the Resolution in its entirety¹⁹⁶ offends the Establishment Clause is a close call that turns on what test — *Lemon*, endorsement, or a hybrid between the two (and, if so, which hybrid) — should be and is applied.

Using *Lemon* as a starting point,¹⁹⁷ the threshold inquiry is whether the appropriate Establishment Clause analysis of the

193. *Catholic League III*, 624 F.3d 1043, 1061 (9th Cir. 2010) (Silverman, J., concurring).

194. *Catholic League III*, 624 F.3d at 1057 (Kleinfeld, J., dissenting).

195. *Catholic League II*, 567 F.3d at 609 (Berzon, J., concurring) (quoting *Am. Family Ass’n v. City & Cnty. of S.F.*, 277 F.3d 1114, 1126 (9th Cir. 2002) (internal citations omitted)).

196. *Catholic League II* correctly points out that the Resolution must be considered as a whole, rather than as discrete parts. *Catholic League II*, 567 F.3d at 605. Catholic League’s suit challenges the constitutionality of the Board’s “anti-Catholic resolution,” not its individual parts. Complaint, *Catholic League I*, 464 F. Supp. 2d 938 (No. C 06-2351).

197. This Note does not consider the application of alternative Establishment Clause tests used by the Court, such as coercion, neutrality or context. See *supra* Part III.

Resolution should involve a version of *Lemon* colored at all by the endorsement test and, if so, how.¹⁹⁸ The Court has turned to the endorsement test in cases where the state was engaged in expressive activities.¹⁹⁹ Meanwhile, in *Catholic League*, the district court, the three-judge panel of the Ninth Circuit, and the dissenting judges in the en banc Ninth Circuit opinion all applied a version of the *Lemon* test, but only expressly incorporated the endorsement test in discussing the effect prong.²⁰⁰

Although *Catholic League* does not fit neatly into existing Establishment Clause jurisprudence,²⁰¹ the Resolution is nevertheless best characterized as expressive conduct subject to the endorsement test.²⁰² The Resolution is not a form of support rendered by the government to a religious organization, either di-

Though much maligned, *Lemon* remains the predominant Establishment Clause test, used by the Court as recently as 2005 in *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005). See *supra* note 7. It is the test used by the parties in *Catholic League*, and the district court and the Ninth Circuit in their analyses. See *supra* note 12. “Although the *Lemon* test is perhaps most frequently used in cases involving government allegedly giving preference to a religion, the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory as well.” *Am. Family*, 277 F.3d at 1121. Thus, the fact that *Catholic League* involves a rare case of government disapproval does not render *Lemon* inapplicable or ineffective.

198. Neither the district court nor the Ninth Circuit note or explain in their opinions their reliance on an endorsement test formulation of *Lemon*.

199. See *supra* notes 77–79 and accompanying text.

200. See *supra* note 156. However, the Ninth Circuit did use endorsement test language in describing the state’s obligations under the Establishment Clause. *Catholic League II*, 567 F.3d at 599 (“government conduct towards religion ‘must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.’” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984))); *Catholic League III*, 624 F.3d 1043, 1053–54 (Kleinfeld, J., dissenting) (“Government runs afoul of the Establishment Clause through ‘endorsement or disapproval of religion.’” (quoting *Lynch*, 465 U.S. at 687)). Additionally, the Ninth Circuit has used endorsement test language to describe the *Lemon* test, though without invoking the endorsement test. *Catholic League II*, 567 F.3d at 599 (“We apply the three-part *Lemon* test to determine whether government conduct – either through endorsement of religion or hostility towards it – violates the Establishment Clause.”); *Catholic League III*, 624 F.3d at 1054 n.42 (Kleinfeld, J., dissenting). In describing the *Lemon* test as “much criticized,” Judge Kleinfeld’s dissent, interestingly, cites Justice Kennedy’s concurrence in *Cnty. of Allegheny v. ACLU*, and quotes in a parenthetical Kennedy’s statement that “the endorsement test is flawed in its fundamentals and unworkable in practice.” *Catholic League III*, 624 F.3d at 1055 n.42 (Kleinfeld, J., dissenting) (citing *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring)).

201. See *supra* note 16 (describing *Catholic League* as an unusual Establishment Clause case because it involves a challenge to a government action that allegedly disapproves of religion).

202. As Judge Berzon notes in his concurrence, the Resolution is “purely speech, albeit governmental speech.” *Catholic League II*, 567 F.3d 595, 609 (9th Cir. 2009) (Berzon, J., concurring).

rectly in the form of tax benefits,²⁰³ payments,²⁰⁴ or other public resources, or indirectly through vouchers first allocated to individuals;²⁰⁵ it does not resemble a regulation of public education²⁰⁶ or business regulation;²⁰⁷ and it does not fit within the small subset of longstanding traditions rooted in our nation's history that are given judicial deference, such as prayer at the start of a legislative session.²⁰⁸ Instead, the Resolution is non-regulatory, non-binding, and passive. It is the kind of expressive activity that has been traditionally subjected to endorsement test treatment.²⁰⁹

Concluding that the Resolution and other official expressive activity should be analyzed under the *Lemon* and endorsement tests, the next inquiry is what such a test should look like. Part V proposes an alternative formulation of the *Lemon* test in which the endorsement test is incorporated into both the purpose and effect prongs, and the analysis under the purpose prong is amended to accommodate the need for evenhandedness in rhetorical disagreements between church and state over issues that can be characterized as either religious or secular (or both). It then

203. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (holding constitutional under the Establishment Clause a New York tax statute exempting property owned by a religious organization for religious purposes).

204. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding unconstitutional under the Establishment Clause, Pennsylvania and Rhode Island statutes providing state aid to nonpublic schools, because they involved excessive entanglement between government and religion).

205. See, e.g., *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding unconstitutional under the Establishment Clause a New York statute providing maintenance and repair grants to non-public, mostly sectarian schools, and tuition reimbursement grants and income tax benefits to parents sending children to these schools, because it violates *Lemon's* effect prong).

206. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding unconstitutional under the Establishment Clause a Louisiana statute banning the teaching of evolution in public elementary and secondary schools unless accompanied by teaching in "creation science").

207. See, e.g., *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (holding unconstitutional under the Establishment Clause a Massachusetts statute granting churches the ability to object to the issuance of liquor licenses for premises within a 500-foot radius).

208. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding unconstitutional under the Establishment Clause the Nebraska legislature's practice of opening each legislative session with a prayer offered by a chaplain paid for by taxpayers).

209. There are at least two cases in which the Court has expressly refused to apply the *Lemon* test in analyzing the constitutionality of expressive behavior, both of which involved religious displays: the crèche in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the statute of the Ten Commandments on state property in *Van Orden v. Perry*, 545 U.S. 677 (2005). But in both cases a plurality, not a majority, declined to do so. *Van Orden*, 545 U.S. at 685–86; *Lynch*, 465 U.S. at 679.

discusses the larger implications of this proposed framework and suggests guidelines on its application. Consistent with the Court's Establishment Clause jurisprudence, a court analyzing the constitutionality of a state's expressive behavior should inquire: (1) whether it has an adequate secular purpose that is both primary and sincere and, under the endorsement test, is not to disapprove of religion; (2) whether its principal and primary effect is not to inhibit religion and, under the endorsement test, does not communicate a message of disapproval of religion; and (3) whether it does not involve excessive administrative or political entanglement of government and religion. Failure to meet any of these prongs renders the state action constitutionally infirm.

A. ADEQUATE SECULAR PURPOSE

To satisfy *Lemon's* first prong, the Resolution must have an adequate secular purpose, and adequacy requires both primacy and sincerity.²¹⁰ Under the endorsement test, the primary and actual purpose may not be disapproval of religion.²¹¹ This determination is made using the eyes of an objective observer who considers the Resolution's text, legislative history, and implementation.²¹²

The San Francisco Board of Supervisors website defines a resolution as "[a] policy statement to express approval or disapproval."²¹³ At least two purposes may have animated the Resolution: a secular or political purpose to denounce discrimination on the basis of sexual orientation and to approve of adoption by same-sex couples, and a religious purpose to disapprove of the members and tenets of the Catholic Church that profess otherwise²¹⁴ — both of which are consistent with San Francisco's larger progressive tradition. Upon first blush, the relevant question seems to be which of these purposes predominates, given the language of

210. See *supra* Part III.A.

211. The district court and initial Ninth Circuit opinion in *Catholic League* are correct to require that the actual secular purpose be primary or predominant, consistent with *McCreary Cnty v. ACLU of Ky.*, 545 U.S. 844 (2005). See *supra* Parts III.A, IV.B.1.

212. See *supra* note 95.

213. *Resolutions*, CITY & CNTY. OF S.F., BD. OF SUPERVISORS, <http://www.sfbos.org/index.aspx?page=9505> (last visited Nov. 11, 2011).

214. See *supra* Part IV.B.1.

the Resolution and the context in which it was passed. The problem with articulating the question in this manner is that the answer turns out to be neither, or both.

1. *The Case for a Religious Purpose*

On its face, the language of the Resolution supports a strong inference that its primary motivation was religious: to disapprove of a particular belief of the Catholic Church. The preamble and conclusion, which are identical, describe the Resolution as one “urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.”²¹⁵ Unlike the resolutions in *American Family*, which urged a specific course of action upon Alabama lawmakers, the Religious Right, and a coalition of religiously-affiliated organizations, the Resolution’s persuasive power is targeted at a religious official: “Cardinal William Levada”;²¹⁶ in his religious capacity, “as head of the Congregation”;²¹⁷ and concerning a religious decree, “his discriminatory and defamatory directive to Catholic Charities.”²¹⁸

Of the six “Whereas” clauses, the first three are openly hostile towards the Catholic Church’s position on homosexuality, as expressed in both the Church’s Considerations doctrinal document and the directive itself, describing it as “an insult,” meddling, a negative influence, “absolutely unacceptable,” “hateful and discriminatory,” “insulting and callous,” and showing “a level of insensitivity and ignorance.”²¹⁹ Notably, the fourth “Whereas” clause concerns only adoption by same-sex couples and does not mention Catholicism,²²⁰ suggesting that if the Board had really wanted to draft a resolution whose primary purpose was to censure discrimination and promote same-sex adoption, it could have done a better, or at least a constitutionally less infirm, job of

215. S.F., Cal., Bd. of Supervisors Res. No. 168-06 (Mar. 21, 2006).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

doing so. The fifth “Whereas” clause, while failing to mention same-sex adoption, presumably refers to it in declaring that Cardinal Levada is “a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear.”²²¹ The sixth and final “Whereas” clause urges Archbishop Niederauer and Catholic Charities “to defy all discriminatory directives of Cardinal Levada.”²²² Since the Cardinal issued only one directive concerning same-sex adoption, the use of the word “all” suggests either that a Catholic official and Catholic organization defy the sole existing and all future directives concerning the same subject, or that they defy any discriminatory directives issued by the Cardinal. Taken as a whole, the Resolution’s repeated, insistent, and continuous references to the Catholic Church — the Vatican, its officials, its affiliated organizations, and its official doctrine — support a reading that the Resolution was religiously-minded.

On the other hand, the limited scope of the City’s reproach provides some counterweight to the Catholic League’s claim of religious purpose and, more powerfully, to its claim of religious effect.²²³ The first three “Whereas” clauses explicitly limit their criticism to the scope of same-sex adoption. The fourth “Whereas” clause is wholly secular in nature. It can be assumed that the fifth and sixth “Whereas” clauses, while omitting any mention of same-sex adoption, is nevertheless limited to the subject matter at hand, given the broader context of the Resolution.

2. *The Case for a Secular Purpose*

Were the language of the Resolution all that was before the court, the Catholic League may have had the better argument, but the context of the Resolution’s passage weighs heavily in favor of San Francisco. The Board passed the Resolution three years after the release of the Considerations document but just four days after Cardinal Levada’s directive.²²⁴ Had the Board passed the Resolution immediately after Considerations, the Catholic League would have a more compelling argument that

221. *Id.*

222. *Id.*

223. *See infra* Part V.B.

224. *See supra* Part II.B.

the City was, on its own initiative, taking a position on an official matter of Catholic doctrine, indicating a religious purpose behind the Resolution to disapprove of a Catholic tenet. But the timing suggests otherwise. The City was responding to a perceived attack on its abiding progressive tradition and public policy of promoting equal rights for gays and lesbians — a purpose that is undoubtedly secular. Moreover, the Catholic League is not alone in being targeted by the City. Since 2001, the Board has passed forty-one other resolutions condemning parties for expressing anti-homosexual sentiment,²²⁵ suggesting that, for the Board, it is not the speaker who is relevant but the speech, and the fact that the speech is contrary to the City's values. As San Francisco states, "just because some of the persons the Board has denounced as discriminatory *happen* to be religious, this does not mean the Board has acted *because* of their religion."²²⁶

Although San Francisco also points to the fact that the sponsoring supervisor of the Resolution and the Mayor who signed it were Catholic to underscore its claim that "no reasonable observer could conclude that the [Resolution] had the primary effect of disapproving Catholicism,"²²⁷ the identities of the elected officials involved are immaterial. An individual who identifies as a Catholic may nevertheless seek to disapprove of Catholicism in whole or in part. Even if these officeholders' identification with Catholicism immunizes them from having religious motivations, the ten other Board members who voted for the Resolution's passage may have had a different, constitutionally prohibited reason for their votes.

3. *A New Deference*

Which purpose predominates: the secular or religious, the approval or disapproval? *Lemon* requires a court to decide, but such a decision may seem unsatisfactory, possibly even arbitrary. A better way to frame the analysis would be to concede that both purposes motivated the Resolution equally, or in such a close and intertwined manner that neither purpose predominates. Deter-

225. Brief of Appellees at 17, *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010) (No. 06-17328).

226. *Id.* at 19.

227. *Id.*; *supra* notes 175–76 and accompanying text.

mining that one purpose or the other predominates becomes a hair-splitting exercise at best. Here, the secular and religious purposes are two sides of the same coin, and approval of something entailed the disapproval of the reverse.²²⁸

In cases like *Catholic League* where a government action is motivated by both secular and religious purposes and it is not clear which purpose predominates, a court should defer to the secular purpose. A court should do so for two reasons: first, the government's hands should not be unduly handcuffed when it wishes to engage in expressive or even regulatory behavior on a particular issue of public policy, by the mere fact that a religious organization has waded into the policy morass; and second, deferring to the secular purpose is consistent with the judicial tradition of giving considerable deference to a legislature's stated purpose behind an action in Establishment Clause cases.²²⁹

When a court is faced with such a close call, deferring to the secular purpose is necessary to avoid turning the Establishment Clause into a shield for the church against the state on issues that could be fairly characterized as both secular and religious. As the Ninth Circuit has observed in its Establishment Clause jurisprudence, "it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine."²³⁰ Same-sex adoption is just one such example of an estuary where both church and state may stake a claim: it is both a secular public policy to San Francisco and the subject of religious belief for the Catholic Church.²³¹

228. Of course, it is not necessary that approval and disapproval go hand in hand. For example, San Francisco might have chosen to pass a Resolution explaining why same-sex couples are as qualified as heterosexual couples to parent adopted children without any mention of the Catholic Church; the City's earlier resolutions in *American Family* as well as the Resolution's fourth "Whereas" clause show that the Board was capable of drafting language free from possible constitutional infirmity. But in this case it chose not to, and, believing its policies were under attack, it excoriated the Catholic Church, its beliefs, and its officials in the strongest language possible.

229. See *supra* Part III.A.

230. *Catholic League II*, 567 F.3d 595, 608 (9th Cir. 2009) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (internal citations and quotation marks omitted)).

231. Other issues may be similarly characterized, including abortion, alcohol use, welfare, gay marriage, and the death penalty.

But as the Ninth Circuit has further stated, “invalidating government action where this *incidental* overlap is present would create chaos . . . and cripple the government’s ability to take action that affect[s] [all] potentially religious issues.”²³² Which is to say, application of the *Lemon* test that would tend to invalidate government action where the issue is arguably secular and religious and when the purpose prong is a close call, would, as San Francisco argues, give religious individuals or entities “an extraordinarily privileged position in the marketplace of ideas.”²³³ Such an application would turn the Establishment Clause into a shield *for the speaker* against official criticism *targeted at the speech*. This would lead to the situation where a religious group could rely on the Constitution to immunize itself against official criticism for saying or doing something identical to a non-religious group that incurred the same official criticism; here, with respect to the Resolution, the Catholic Church could count on a court to restrain San Francisco from speaking out — even though the City had “treated the church as it [had treated] every other member of the political community,” namely, the forty-one other groups whose discriminatory statements against same-sex couples were met by a resolution from the City.²³⁴ Furthermore, as the *Lemon* Court noted, “[a]dherents of particular faiths and individual churches frequently take strong positions on public issues [and] we could not expect otherwise, for religious values pervade the fabric of our national life.”²³⁵ Given the extent to which religion is deeply embedded in American life and the willingness of religious groups to jump into the political fray, for a court to rule, in close calls, that a government’s response fails the purpose prong and violates the Establishment Clause, would hopelessly straightjacket the government from acting by speech or regulation upon a vast terrain of issues.

Of course, this is not to say that there are no limits at all on the government’s speech: its ability to engage with these issues is

232. *Catholic League II*, 567 F.3d at 608 (quoting *Wallace*, 472 U.S. at 69, and *American Family Ass’n v. City & Cnty. of S.F.*, 277 F.3d 1114, 1123 (9th Cir. 2002)) (emphasis added) (alteration in original) (internal citations and quotation marks omitted).

233. Brief of Appellees at 22, *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010) (No. 06-17328).

234. *Id.* at 22–23.

235. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 670 (1970)).

still properly limited by the Establishment Clause as well as the Free Exercise Clause,²³⁶ and religion receives its constitutional protections.²³⁷ Nor is this the same as saying, as San Francisco argues, “government officials are free to criticize policy positions advocated by particular groups, whether or not those groups happen to be religious.”²³⁸ The government is not quite free; although the First Amendment extends its free speech protections to elected officials, it does not extend such protections to government itself.²³⁹ The Resolution is not an off-hand remark or speech made by an individual officeholder, but an official policy statement made by the city and county government of San Francisco. Nevertheless, even if the government cannot claim constitutional protection for its speech, the dangers of turning the Establishment Clause into a muzzle for government speech should weigh in favor of construing the *Lemon* test in the government’s favor.

Second, deferring to the adequacy of the secular purpose in cases like *Catholic League* is consistent with the judicial tradition of giving considerable deference to a legislature’s stated purpose behind an action in Establishment Clause cases.²⁴⁰ Courts in such cases proceed with “extreme caution” in order to respect a state’s police power to legislate for the public welfare,²⁴¹ and judicial review of a legislature’s purpose in enacting a law is “deferential and limited.”²⁴² “A court has no license to psychoanalyze the legislators,”²⁴³ and should defer to whatever plausible secular purpose is expressed by the legislature in either the text of the statute or its legislative history.

Adopting this rule of decision, the actual and primary purpose of the Resolution was secular: to denounce discrimination against

236. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”) (emphasis added).

237. See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”) (alteration in original).

238. Brief of Appellees at 2, *Catholic League III*.

239. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

240. See *supra* Part III.A.

241. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 6 (1947).

242. *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985).

243. *Id.* at 74.

gays and lesbians, and to maintain the opportunity for same-sex couples to adopt or foster children.

B. PRINCIPAL OR PRIMARY EFFECT

Having satisfied *Lemon's* first prong, the Resolution's principal or primary effect must not be to inhibit religion.²⁴⁴ Furthermore, under the endorsement test, the Resolution may not principally or primarily communicate a message of government disapproval of religion, making religion relevant to one's status in the political community.²⁴⁵ As under the purpose prong, a reasonable observer evaluates the government act within its context.²⁴⁶ But unlike purpose, the courts give no particular deference to the government's articulation of the effects.

The principal or primary effect of the Resolution is not to inhibit Catholicism or communicate a message of the City's disapproval of religion. The Resolution's actual effect on the Catholic Church was negligible, due to its non-binding nature: Cardinal Levada did not withdraw his directive and Catholic Charities stopped placing children for adoption with same-sex parents.²⁴⁷ Its actual effect on adherents to the Catholic faith was similarly minimal. Although the Resolution was posted to the Board's website along with all other resolutions passed by the Board since 2000,²⁴⁸ it was not otherwise publicly displayed and received minimal coverage by the press.²⁴⁹ There is no indication that most San Franciscans, with the exception of those whose antennae were especially tuned to issues involving gay rights or the Catholic Church, were even aware that such a Resolution was ever passed.²⁵⁰

244. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

245. *See supra* Part III.B.

246. *Lemon*, 403 U.S. at 612.

247. *See supra* notes 39, 177 and accompanying text.

248. *Resolutions 2006*, CITY & CNTY. OF S.F., BD. OF SUPERVISORS, <http://www.sfbos.org/index.aspx?page=2297> (last visited Nov. 11, 2011) [hereinafter *Resolutions 2006*].

249. A Google News search for press coverage about the Resolution, not the lawsuit that brought attention to it, came up with fewer than ten articles from local news sources and sources exclusively interested in the Catholic Church or LGBT issues.

250. In addition to the minimal press coverage, the Board of Supervisors passed 725 resolutions in 2006 alone, making such resolutions not an infrequent occurrence and unlikely to warrant attention from the community. *Resolutions 2006*.

As for its symbolic effect, if the Resolution's effect is to send a message of government disapproval, it is disapproval of anyone who opposes equal treatment of same-sex couples seeking to foster or adopt children — not disapproval of Catholics in particular. Looking to the text of the Resolution, its hostility towards Catholicism is focused, either explicitly within each clause or contextually within the broader resolution, on Catholicism's posture *towards same-sex adoption*,²⁵¹ sending a stronger signal that the Board is more concerned with same-sex adoption and not Catholicism. Looking to the Resolution's context, which is required under the effect prong,²⁵² a reasonable observer knowing of the forty-one similar resolutions passed by the Board since 2001,²⁵³ or, at the very least, familiar with San Francisco's national and international reputation as a progressive beacon and vanguard for LGBT rights,²⁵⁴ would reasonably interpret the Resolution as fitting within that secular context. On the other hand, it would be far-fetched to argue, in the words of the Catholic League, that the primary effect of the Resolution is to "send[] a clear message to . . . adherents to the Catholic faith that they are outsiders . . . and an accompanying message that those who oppose the Catholic Church . . . are insiders"²⁵⁵

Thus, the principal and primary effect of the Resolution is to foster non-discrimination of and promote adoption by same-sex couples, consistent with the Board's other resolutions and San Francisco's long-standing crusade for gay rights.

C. EXCESSIVE ENTANGLEMENT

Finally, under *Lemon's* third prong, the Resolution must not foster an excessive government entanglement with religion.²⁵⁶ Excessive government entanglement may be administrative or political.²⁵⁷

251. See *supra* Part V.A.1.

252. See *supra* note 100 and accompanying text.

253. See *supra* note 225 and accompanying text.

254. See *supra* notes 40–42 and accompanying text.

255. Opening Brief of Appellants at 4, *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010) (No. 06-17328).

256. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

257. The entanglement analysis normally requires an examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State

Having passed *Lemon's* first two hurdles, the Resolution most easily clears the last. It is conceivable that the Resolution may, in some way, entangle San Francisco with the internal affairs of the Catholic Church, when an official body of government with all its imprimatur urges one Catholic official to rescind a religious directive and another Catholic official and Catholic organization to defy the Church. But it strains the limits of credibility to say that this is excessive entanglement. The Resolution is an example of government speech that is non-binding, non-regulatory, and one-time,²⁵⁸ foreclosing the possibility of administrative entanglement between San Francisco and the Catholic Church — the government simply has no power to enforce its viewpoints on the Church in this case. Clearly, this is not a case, as in *Lemon*, of comprehensive, discriminating, and continuing state surveillance.²⁵⁹ The Resolution is rhetoric, and, as far as the Catholic Church is concerned, unpersuasive at that.²⁶⁰ Nor did the Catholic League present evidence that the Resolution prompted political divisiveness along religious lines. Even assuming the Resolution did prompt such divisiveness, such divisiveness is not itself sufficient to invalidate the Resolution.²⁶¹

It would be a radical rereading of Supreme Court and Ninth Circuit Establishment Clause jurisprudence to adopt the Catholic League's definition of excessive entanglement as anything "which may interfere with the independence of the institutions,"²⁶² or to agree with the Catholic League's assertion that "a formal resolution in which the government takes an official position on religious doctrine or takes sides in a religious matter fosters the sort of entanglement that is prohibited by the Establishment Clause."²⁶³ The Catholic League neglects to define what consti-

provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. However, this examination is not relevant here because the act in question is not an instance of state aid to a religious organization, but rather state speech disapproving of a religion.

258. See *supra* notes 202–09 and accompanying text (discussing the categorization of the Resolution as expressive behavior).

259. See *supra* note 114 and accompanying text.

260. See *supra* note 39 and accompanying text (stating that Catholic Charities ceased direct involvement in placing children with gay or lesbian couples).

261. See *supra* note 113 and accompanying text.

262. Opening Brief of Appellants at 42, *Catholic League III*, 624 F.3d 1043 (9th Cir. 2010) (No. 06-17328) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984)).

263. Opening Brief of Appellants at 43, *Catholic League III*.

tutes interference with a religious institution's independence. If the organization defines this as the government commenting, even harshly, on an issue that has both secular and religious dimensions, it would too easily trigger an Establishment Clause violation and render the government unable to engage with most issues.²⁶⁴ While the Catholic League's assertion regarding the formal resolution is facially attractive, its generous interpretation of "religious doctrine" and "religious matter" would similarly handcuff the government's ability to issue a formal resolution on issues that are both a matter of public policy as well as the subject of religious doctrine.

Thus, the Resolution does not excessively entangle the City and County government of San Francisco with the Catholic Church.

D. IMPLICATIONS AND GUIDELINES FOR APPLICATION

It is worth pausing to consider whether the proposed formulation of the *Lemon* and endorsement tests unduly favors the state. The proposed formulation supports the constitutionality of a resolution that is openly and unabashedly critical of the Catholic Church and a Catholic official for their position on same-sex adoption, and urges disobedience on the part of another Catholic official and a Catholic organization.²⁶⁵ One could conceive of any number of statements by a state or federal governmental entity that even more aggressively condemn a religion and advocate for defiance on the part of its believers, but that are careful to do so through the pinhole of a policy issue in order to stay within the limits of the proposed framework. Government conduct that is purely expressive will rarely lead to a principal or primary effect of inhibiting religion since it is less likely to have a manifest or conspicuous effect, or to excessive administrative or political entanglement in the absence of binding regulations. Meanwhile, the proposed deference in favor of a state's purported secular purpose gives the government an incentive to carefully craft the context in which it censures.

264. See *supra* Part V.A.3.

265. See *supra* note 49 and accompanying text.

A court applying the proposed *Lemon*-endorsement test hybrid should do so with an eye towards mitigating this potential bias in favor of the state. First, the alternative formulation expressly invokes the endorsement test in the *Lemon* test's purpose and effect prongs, thus emphasizing the endorsement test's overall objective of ensuring that religion is not relevant to a person's standing in the political community.²⁶⁶ The stronger the state's condemnation of a religion, the more likely it will be that such conduct sends a message to adherents of that religion that they are outsiders and not favored members of the political community — in violation of the Establishment Clause. Second, the deference in favor of a secular purpose should be narrowly construed so that it is only applied when it is truly unclear whether a secular or religious purpose motivated a government action.²⁶⁷ The Establishment Clause should not be used by the church as a shield against the state, but nor should it be used by the state as a sword against the church. Third, such deference may be offset by the requirement that a secular purpose be "sincere and not a sham."²⁶⁸ Fourth, a court analyzing a government's expressive conduct should pay special attention to the symbolic effects of such conduct.²⁶⁹

VI. CONCLUSION

The debate over the legal recognition of same-sex unions continues: as of this Note's publication, six states as well as the District of Columbia have passed laws legally recognizing same-sex marriage.²⁷⁰ In the case of California's Proposition 8, the California Supreme Court ruled that proponents of the proposition have legal standing to challenge Judge Walker's decision overturning

266. See *supra* notes 72–76 and accompanying text.

267. See *supra* Part V.A.3.

268. See *supra* notes 88–89 and accompanying text.

269. See *supra* notes 101–02 (describing the invalidation of a government action under the Establishment Clause if such an action has no effect other than to communicate a message of government endorsement or disapproval of religion).

270. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited November 30, 2011).

the proposition, after the state's governor and attorney general declined to defend its constitutionality.²⁷¹

Both sides will continue to trade rhetorical fire in this and other battles of the culture wars. Although the Supreme Court elected not to grant certiorari in *Catholic League*, the *Lemon* test remains a much maligned and, ultimately, unsatisfactory way for courts to referee these disputes when they cross the line into Establishment Clause territory. This is especially the case for disputes over matters that religious groups may consider doctrinal but the government may consider secular. With respect to at least expressive behavior, this Note proposes a formulation of the *Lemon* and endorsement tests that grants wider latitude for government speech while retaining First Amendment protections for religion, and in relying on this proposal, finds for the constitutionality of the Resolution at issue in *Catholic League*. It is worth cautioning, however, that a license to engage in heated dialogue need not be a license to push this dialogue to or beyond the limits of civility or the boundaries of constitutionality. In the future, the state, with all the weight of its authority and legitimacy, may find it prudent — as an act of good faith and to set the tone for future discourse — to take the first step in pulling some of the poison from its pen.

271. Adam Nagourney & John Schwartz, *Backers of Proposition 8 Can Challenge Court Ruling*, N.Y. TIMES, Nov. 18, 2011, at A19, available at <http://www.nytimes.com/2011/11/18/us/backers-of-proposition-8-can-challenge-court-ruling.html>.