Endorsement, Legal Reason and the Misguided Quest for Reasonableness

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Almost thirty years ago, Justice Sandra Day O'Connor tried to cut through the confusion of American Establishment Clause jurisprudence. Her analysis was intended to respond to the challenge of minority religious rights in a pluralistic nation and to put the Establishment Clause to work in the service of equality. It asked whether a challenged act should reasonably be interpreted to send "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."

O'Connor's "endorsement" test has been influential. But it has also been widely criticized. My paper situates the test and its failings in the broader context of developments in American law and culture.

The "endorsement" test reflects a modern infatuation with the psychological and the subjective and a pervasive culture of aggrievement that treats "offense" as at least or more serious than other harms. And by then superimposing a "reasonableness" requirement on a subjective substrate, the "endorsement" test ends up being both opaque and unstable.

Even if the "endorsement" test's focus on the psychological made sense, the test ignores the cultural context in which psychology is embedded. Understandings of inclusion and equality are culturally constructed. Indeed, the "endorsement" test could not even begin to make sense of the English context, in which a Chief Rabbi could adamantly argue that the very existence of an Established Church helps make members of minority of religions "feel at home."

More deeply, the psychological thrust of "endorsement" analysis effaces the counter-psychological values of the Establishment Clause. As Justice Black put it, echoing James Madison and the other authors of the distinctive theology of the American church-state dispensation, the most "immediate purpose" of the Establishment Clause "rested on the belief," which has little to do with psychological feelings, "that a union of government and religion tends to destroy government and to degrade religion."

The "endorsement" test suggests a form of secularization that fails to comprehend some of the old Madisonian insights. But it also reflects changes in the American jurisprudential

temper, including a skepticism about the law's ability to discover any deeper principles beyond the empirical. The test ultimately evinces a jurisprudentially freighted mistake: allowing the methods appropriate to deciding borderline cases in a particular area of law to take over the larger normative inquiry, failing to understand that borderline cases often require both situation-sense and casuistry that connects only in complicated ways to underlying governing principles.

The endorsement test demonstrates too little confidence in the principles at the heart of the religion clauses and too much confidence in the ability of a single empirical metric to both frame the normative field and resolve an entire range of specific fact-driven disputes. This mistake disserves not only constitutional doctrine, but also the properly-understood interests of religious minorities themselves. And it is only by identifying the error that we can formulate a better affirmative vision of religious equality and the treatment of religious minorities.

Note: This proposal fits most obviously into two of the Conference's sub-themes: "Religious pluralism and treatment of religious minorities" and "Religion and anti-discrimination norms." The paper's discussion of the psychological focus of modern religion and law jurisprudence also relates it directly to the sub-theme on "Hate speech, hate crimes, and religious minorities."