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Trump v. Hawaii 138 S. Ct. 2392 (2018)

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I. INTRODUCTION

The principle of religious neutrality in the laws of the United States comes as a tenet from the Establishment Clause of the Constitution.[1] The command of the Establishment Clause is that "Congress shall make no law respecting any establishment of religion."[2] The Supreme Court was recently tasked with balancing Establishment Clause jurisprudence and foreign affairs deference in *Trump v. Hawaii*. [3] Just what the Establishment clause guarantees and how it should be interpreted and reviewed has been a challenge for the Supreme Court.[4] What seems consistent throughout the Supreme Court's review of Establishment Clause claims is its interpretation that the government cannot demonstrate a preference for any religion nor favor adherents of one religion collectively over others.[5] In this case, Plaintiffs challenged President Donald Trump's Presidential Proclamation which restricted entry to the United States from six Muslim majority countries after making numerous denigrating comments along his campaign trail calling for a shutdown of Muslim immigration.[6] The Proclamation was challenged on statutory grounds and Establishment Clause grounds.[7] Lower courts granted a nationwide injunction on statutory grounds.[8] The Supreme Court granted certiorari.[9] In resolving the Establishment Clause claim, Chief Justice Roberts, writing for the majority, applied the rational basis standard of review and determined there was not a violation of the Establishment Clause.[10]

Typically, when there is a violation of the Establishment Clause alleged, the Court has applied a variation of what is known as the *Lemon* test, and has in some instances applied Justice O'Connor's "endorsement test," which is a variant of the *Lemon* test aimed at ensuring that the government does not

1. U.S. CONST. amend. I.
2. *Id*.
3. 138 S. Ct. 2392, 2419-20 (2018).
4. Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Sotomayor J., Dissenting) ("In all the years of its effort, the Court has developed no single test [for Establishment Clause claims] of constitutional sufficiency.").
5. *See* Larson v. Valente, 456 U.S. 228, 245 (1982).
6. *Trump*, 138 S. Ct. 2392 at 2417.
7. *Id*. at 2406.
8. *Id*.
9. *Id*. at 2407.
10. *Id.* at 2420.

endorse or disfavor any religion.[11] This standard of review would have asked "whether a reasonable observer, presented with all of the 'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading to it, would conclude that the purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country.'"[12] The dissent pointed out over twenty instances along President Trump's campaign and after taking his oath of office where he made inflammatory statements about Islam and referred to "a total and complete shutdown of Muslims entering the United States."[13] Both dissents concluded there was sufficient evidence of religious animus to rise to the level of a violation of the Establishment Clause and would have left the injunction in place.[14] [15] This article takes the position that a more stringent standard of review should have been applied and suggests a variation of the *Lemon* test and endorsement tests for alleged Establishment Clause violations against broad-sweeping entry policies.

II. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Facts

In January 2017, President Donald Trump passed Executive Order No. 13769 entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." (EO-1).[16] It directed the Department of Homeland Security (DHS) and other intelligence agencies to conduct a worldwide review of the adequacy of information provided by each country's government about its nationals seeking entry into the United States.[17] Pending review, entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen were

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11. Douglas Shimonek, Comment, *Using the Lemon Test as Camouflage: Avoiding the Establishment Clau*se, 16 WM. MITCHELL L. REV. 835, 836 (1990); Lemon v. Kurtzman, 403 U.S. 602 (1971).

12. *Trump*, 138 S. Ct. at 2438, (quoting *McCreary Cty. v. American Civil Liberties Union of Ky.*, 545 US 844 at 862-863 (2005)).

13. *Id.* at 2435-38.

14. *Id.* at 2433. (Breyer J., dissenting)

> If the Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside.

Id. at 2445. (Sotomayor J., dissenting) ("As the foregoing analysis makes clear, plaintiffs are likely to succeed in their Establishment Clause claim.").

16. Exec. Order No. 13769, 82 Fed. Reg 8977 § 3(a) (January 27, 2017) (hereinafter EO-1).

17. *Id.* at § 3(a).

suspended.[18] The District Court for the Western District of Washington entered a temporary restraining order blocking the restrictions and the Ninth Circuit upheld the restraining order.[19] The President responded by revoking EO-1 and replaced it with Executive Order No. 13780 (EO-2) which still directed the worldwide review and temporarily restricted the entry of nationals from the same countries, except Iraq, for 90 days pending the review.[20] The District Courts of Hawaii and Maryland entered nationwide preliminary injunctions barring enforcement of the restrictions, which were upheld by the Courts of Appeals.[21]

After the worldwide review, President Trump issued Presidential Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[22] The Proclamation described a baseline for vetting procedures and information required from foreign governments to confirm the identity of individuals seeking entry into the United States and to determine whether they posed a security threat.[23]

The DHS evaluated data from all foreign governments. It identified sixteen countries whose information-sharing practices were deficient, and thirty-one countries at risk of failing to meet the baseline.[24] After a fifty-day period of diplomatic efforts to encourage foreign governments to improve their practices, the Secretary of Homeland Security concluded that Chad, Iran, Iraq, North Korea, Venezuela, and Yemen were still deficient in willingness to provide adequate information and recommended the President impose entry restrictions on all except Iraq.[25] Further, entry restrictions on certain Somalian nationals remained in place because of Somalia's terrorist presence and information management deficiencies, despite meeting the baseline criteria.[26] The President adopted the recommendations invoking his authority under § 1185(a) and § 1182(f) of the Immigration and Nationality

18. *Id*. at § 3(c).

19. Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (*per curiam*).

20. Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017) (hereinafter EO-2).

21. International Refugee Assistance Project (IRAP) v. Trump, 857 F.3d 554, 635 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 785 (9th Cir. 2017) (*per curiam*).

22. Proclamation No. 9645, 82 Fed. Reg. 45161(September 24, 2017).

23. *Id*. at § 3(c). The baseline had three components. The first, "identity management information," focused on whether a foreign government ensures the integrity of travel documents. The second focused on the extent to which each country discloses information on criminal history, suspected terrorist links, and whether it provides the U.S. Government with travel exemplars and information on passengers and crews traveling to the U.S. The third weighed national security risk factors, such as whether the country refuses to receive returning nationals after final orders of removal from the U.S.

24. *Id*. at § 1(e).

25. *Id*. at §§ 1(g), (h). Iraq was excepted because of its government's cooperative relationship with the U.S. government and Iraq's commitment to fighting ISIS.

26. *Id*. at § 2(h).

Act (INA) and the Proclamation said that restrictions would help encourage cooperation while protecting the United States.[27]

The restrictions placed on the respective countries varied based on their unique circumstances.[28] Iran, North Korea, and Syria, which do not cooperate with the U.S. in identifying security risks, had entry suspended for all nationals except Iranians seeking nonimmigrant student and exchange-visitor visas.[29] For Chad, Libya, and Yemen, only entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas were restricted, because these countries were considered valuable counterterrorism partners.[30] The Proclamation suspended entry of Somalian nationals seeking immigrant visas and required additional scrutiny of nationals seeking nonimmigrant visas.[31] Venezuela refused to cooperate in information sharing, but because there were alternative means to identify its nationals, entry was suspended only for certain government officials and their families on nonimmigrant business or tourist visas.[32] Lawful permanent residents and foreign nationals who had been granted asylum were exempt from the Proclamation, and a case-by-case waiver program was described in the Proclamation which would apply for foreign nationals who demonstrated undue hardship, that their entry is in the national interest, and who would not pose a threat to public safety.[33] Further, the Proclamation directed DHS to assess whether the restrictions should be modified every 180 days.[34] After the first review period, restrictions on Chad were lifted because it had improved its practices.[35]

B. Procedural history

There were three plaintiffs in this case: three U.S. citizens or lawful permanent residents with family from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas, the State of Hawaii as operator of the University of Hawaii systems which recruits students and faculty from the designated countries, and the Muslim Association of America, a nonprofit organization that operates a mosque in Hawaii.[36] They challenged the Proclamation, except as applied to North Korea and Venezuela, arguing that the Proclamation ran contrary to provisions of the Immigration and

27. Proclamation No. 9645, 82 Fed. Reg. 45161§ 1(h).
28. *Id.*
29. *Id*. at §§ 2(b), (d), (e).
30. *Id*. at §§ 2(a), (c), (g).
31. *Id*. at § 2(h).
32. *Id*. at § 2(f).
33. Proclamation No. 9645, 82 Fed. Reg. 45161§ 3(c)(i).
34. *Id*. at § 4.
35. Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 83 Fed. Reg. 15937 (April 10, 2018).
36. *Trump*, 138 S. Ct. at 2406.

Nationality Act (INA) and that it violated the Establishment Clause of the First Amendment because it was motivated by religious animus toward Islam rather than legitimate national security interests.[37]

The district court granted a nationwide preliminary injunction because it found that the Proclamation violated § 1182(f) of the INA, as the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the interests of the United States and § 1152(a)(1)(A) because the policy discriminated against visa applications on the basis of nationality.[38] The Ninth Circuit granted a partial stay allowing enforcement of the Proclamation only to foreign nationals who "lack a bona fide relationship with the United States."[39] The Supreme Court stayed the injunction in full, pending disposition of the government's appeal.[40] The Ninth Circuit affirmed, holding that the Proclamation exceeded the President's grant of authority under § 1182(f) because it only allows for temporary suspension of entry in response to specific fast-breaking exigencies.[41] The court said that the Proclamation conflicted with the comprehensive regulatory scheme already provided for by Congress with the INA.[42] The court did not address the Establishment Clause claim.

The Supreme Court granted certiorari.[43] Chief Justice Roberts wrote for the majority in a five to four decision reversing the injunction as an abuse of discretion and remanding the case to the District Court.[44] Five holdings emerged. The Court held that the President fulfilled the requirement of the INA provision by finding that entry of aliens from covered countries would be detrimental to interests of U.S.[45] The Court held that the INA provision that prohibits national origin discrimination in issuing immigrant visas (8 USC § 1152(a)(1)(A)) does not limit the President's authority to suspend entry by aliens or classes of aliens.[46] The Court held that rational basis review would be applied to an Establishment Clause claim concerning entry of foreign nationals.[47] The Court held the Proclamation did not violate the Establishment Clause.[48] Finally, the Court officially overruled the holding of

37. *Id*.
38. *Hawaii v. Trump*, 265 F. Supp.3d 1140, 1155-59 (D. Haw. 2017).
39. *Trump,* 138 S. Ct. at 2406.
40. *Id.*
41. *Hawaii v. Trump,* 878 F.3d 662, 688 (9th Cir. 2017).
42. *Id*. at 689-90.
43. *Trump*, 138 S. Ct. at 2407.
44. *Id*. at 2403.
45. *Id*. at 2407.
46. *Id*. at 2408.
47. *Id*. at 2420.
48. *Trump,* 138 S. Ct. at 2423.

Korematsu v. United States.[49] Justice Kennedy and Justice Thomas wrote separate concurring opinions, Justice Breyer wrote a dissent that Justice Kagan joined, and Justice Sotomayor wrote a dissent that Justice Ginsburg joined.[50]

III. COURT'S DECISION AND RATIONALE

A. MAJORITY OPINION BY CHIEF JUSTICE ROBERTS

In relevant part, § 1182(f) says:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[51]

The Court held that the President did not exceed his authority under § 1182(f) because the provision vests the President the authority to impose limitations, including in response to circumstances that might affect the vetting system.[52] The Court held that it was a valid exercise of Presidential authority because the plain text of the statute, affords the President broad discretion to determine whose entry would be detrimental, whose entry to suspend, when to suspend, for how long, and on what conditions.[53] This was done, the Court said, because he ordered agencies to conduct comprehensive reviews to create a risk assessment baseline to determine whose entry would be detrimental, then set out country-specific restrictions to apply until each country's inadequacies improved.[54] The Court also said that even if some form of judicial review on the persuasiveness of the reasoning for the Proclamation were appropriate, it was more detailed than any prior order a President has issued under §1182(f) and, moreover, that the inquiry to the persuasiveness of the President's justifications is inconsistent with the broad

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49. *Id.* (In *Korematsu*, the Court upheld an exclusion order that forcibly relocated Japanese American citizens to internment camps. The majority abrogated the decision in this case because Justice Sotomayor's dissent drew parallels between the Court's rationale in *Korematsu* and the majority's holding here. Chief Justice Roberts wrote, "the forcible relocation of U.S. citizens to concentration camps, solely and explicitly on basis of race, is objectively unlawful and outside the scope of Presidential authority.") *See also Korematsu*, 323 U.S. at 223-24.

50. *Id*. at 2424.

51. 8 U.S.C. § 1182(f).

52. *Trump*, 138 S. Ct. at 2408.

53. *Id*.

54. *Id.* at 2408-09.

statutory text and traditional deference afforded the President within the sphere of foreign affairs.[55]

The Court said the Proclamation supplemented the INA, and did not attempt to supplant it as Plaintiffs argued, because it ensured that consular officers would receive accurate information in the vetting process.[56] The Court said there was no conflict with the existing Visa Waiver system which allows travel without a visa for short term visitors from countries in a security partnership with the United States and eligibility for the partnership requires broad assessments of the countries' security operations and those governments undergo a comprehensive evaluation of how well they enforce security standards.[57] The Court said Congress did not solve "the exact problem" with the existing program because Congress did not attempt to determine whether high-risk countries provide a minimum baseline of information to adequately vet their nationals.[58] The Court did not accept Plaintiffs' argument that based on previous presidential practice, suspension orders under § 1182(f) have either targeted discrete groups deemed harmful by the immigration laws or banned entry of entire nationalities as a response to diplomatic emergencies that the immigration laws did not address.[59]

The Plaintiffs' other statutory argument was that the suspension violates 8 U.S.C. § 1152(a)(1)(A) because it should be interpreted to prohibit nationality-based discrimination throughout the immigration process, both to the question of a visa applicant's eligibility for admission and the subsequent question of whether the holder may enter the country.[60] Section 1152(a)(1)(A), in relevant part, reads: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[61]

The Court rejected this argument, as it explained that § 1182(f) and § 1152(a)(1)(A) operate in different spheres; section 1182 defines the universe of aliens eligible to receive a visa and § 1152 prohibits the allocation of immigrant visas based on nationality and other traits.[62] In other words, the Court said that § 1152 does not apply to admissibility but is limited to visa

55. *Id*.
56. *Id*. at 2410.
57. *Trump*, 138 S. Ct. at 2411-12. (Furthermore, the Court pointed to the Visa Waiver Program's special exemptions for citizens of countries that maintain exemplary security standards and offer reciprocal privileges to U.S. citizens but noted it did not address what requirements should govern the entry of nationals from countries that fall short of those standards, and the Proclamation supplements the Program in that way.)
58. *Id*.
59. *Id.* at 2413.
60. *Id.* at 2413-2414.
61. 8 USC § 1152(a)(1)(A).
62. *Trump,* 138 S. Ct. at 2414.

issuance after the admissibility determination has been made.[63] Furthermore, the Court said that § 1152 has never been treated as a constraint on admissibility.[64]

Arguably the more controversial claim in this case was the second issue the Court faced, which was whether the Proclamation was issued for the unconstitutional purpose of excluding Muslims.[65] The Court first stated that in cases arising from alleged violations of the Establishment Clause a plaintiff must show that he is "directly affected by the laws and practices against which his complaints are directed."[66] This was an issue because the entry restrictions applied to noncitizens.[67] The Court said the three individual plaintiffs asserted a concrete interest because "a person's interest in being united with his relatives is sufficiently concrete and particularized for the basis of an Article III injury in fact."[68]

The majority first recognized "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[69] The Plaintiffs alleged that the primary basis for the proclamation was religious animus and the stated concerns about vetting protocols and national security were pretexts for discrimination.[70] The majority listed several examples of the President's statements both during his campaign trail and after being elected to office where he referred to the dangers of Islam, shared his plan to ban entry of Muslim people, and once even retweeted anti-Muslim propaganda videos while sitting as President.[71]

The Court emphasized that the issue here, though, was reviewing a presidential directive that was neutral on its face which addressed a matter within the core of executive responsibility.[72] Accordingly, the majority

63. *Id.*

64. *Id.* at 2415 (The majority then compared the present proclamation to Regan's Executive Order 5517 which suspended entry of all Cuban nationals and Carter's Executive Order 12172 which revoked visa issuance from all Iranian nationals. The Court said that those orders would have been inadmissible based on the Plaintiff's reading of § 1152, as would the restrictions on North Korea by the Proclamation, which were not challenged by the plaintiffs.) *Id*.; (The Court also said that there is no textual basis to suggest that Congress intended to create an implicit exception for presidential actions which would limit § 1152(a)(1)(A) to specific fast breaking exigencies because this would require courts to determine whether a foreign government's conduct rises to the level that would trigger a fast breaking exigency and 1152(a)(1)(A) does not give any standards that would enable courts to assess which situations justify entry restrictions). *Id.*

65. *Trump*, 138 S. Ct. at 2415.

66. *Id.* at 2416. (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 (1963)).

67. *Id.*

68. *Id.*

69. *Id.* at 2417. (quoting *Larson*, 456 U.S. at 244).

70. *Trump*,138 S. Ct. at 2417.

71. *Id*. at 2417-18.

72. *Id.* at 2418.

applied the rational basis standard of review.[73] The opinion went on to say that the policy would be upheld as long as it could "reasonably be understood to result from a justification independent of unconstitutional grounds."[74] The Court said the only way that the policy would be upended was if the law at issue lacked any purpose other than a "bare desire to harm a politically unpopular group."[75] The majority opined that standards of review generally applied to Establishment Clause claims would be inappropriate to apply in this situation, because of deference due to the President within this context.[76]

The Court went on to say that under rational basis review, the Proclamation did not violate the Establishment Clause because it was expressly premised on legitimate purposes: namely preventing entry of nationals who could not be adequately vetted and inducing other nations to improve their practices, and because the text of the Proclamation itself said nothing about religion.[77] The Court stated that the policy covered just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.[78]

The Court said it was not in the position to substitute an assessment for the Executive's predictive judgments and that the page count of the review, which was seventeen pages, offered little insight into the substance of the report.[79] The plaintiffs sought to discredit the findings of the review for deviations from the baseline such as including Somalia and omitting Iraq, but the Court said that the Proclamation justified such deviations because it explained that the determinations were based upon distinct conditions in each country's circumstances.[80]

The Court pointed to three additional features of the entry policy which supported a legitimate national security interest.[81] The first was that since it was introduced in January 2017, Sudan, Iraq, and Chad had been removed from the list.[82] The second was that the Proclamation had exceptions for categories of foreign nationals.[83] The third was the Proclamation's waiver program, which was open to all covered foreign nationals seeking entry as

73. *Id.* at 2420.
74. *Id.*
75. *Trump,* 138 S. Ct. at 2420. (quoting Dep't. of Agriculture v. Moreno, 413 U.S. 528, 553 (1973)).
76. *Id.* at 2419-20.
77. *Id*. at 2421.
78. *Id.*
79. *Trump,* 138 S. Ct. at 2421.
80. *Id.*
81. *Id.* at 2421.
82. *Id.* at 2422.
83. *Id.*

immigrants and nonimmigrants.[84] Pursuant to the Proclamation, consular officers were to consider in each admissibility determination whether the alien demonstrated that denying entry would cause undue hardship, entry would not pose a threat to public safety, and that entry would be in the interest of the United States.[85] Notably, in addressing points made by the dissent, the Court formally overruled the decision in *Korematsu,* the exclusion order upheld by the Court in 1944 which called for the internment of Japanese-American citizens.[86] In abrogating that decision, Chief Justice Roberts said, "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[87]

B. CONCURRING OPINION BY JUSTICE KENNEDY

Justice Kennedy wrote a concurring opinion in which he noted that because of the substantial deference that must be accorded to the Executive with respect to foreign affairs, it was unclear whether it would be proper for judicial proceedings to continue, although this would be addressed on remand.[88] He pointed out that if proceedings continued, discovery and preliminary matters must not intrude on the foreign affairs power of the President.[89] Justice Kennedy also called upon government officials to speak and act with due regard to the Constitution and the rights it gives and protects, even if those statements and actions are not subject to judicial scrutiny.[90]

C. CONCURRING OPINION BY JUSTICE THOMAS

Justice Thomas wrote separately. He noted § 1182(f) could not have set judicially enforceable limits to constrain the President because he has inherent authority to exclude aliens from the country.[91] He said that the Establishment Clause does not create an individual right to free people of laws that a reasonable observer views as religious or antireligious.[92] Justice Thomas' real concern was the propriety of universal injunctions, which prohibit the Executive Branch from applying a law or policy against anyone.[93] He doubted that they are consistent with the historical limits on equity and

84. *Trump,* 138 S. Ct. at 2422.
85. *Id*.
86. *Korematsu*, 323 U.S. at 223-24.
87. *Trump,* 138 S. Ct. at 2423.
88. *Id.* at 2424.
89. *Id*.
90. *Trump*, 138 S. Ct. at 2424.
91. *Id.*
92. *Id.* at 2525.
93. *Id.*

judicial power and expressed skepticism that district courts have the authority to issue this sort of injunction.[94] He said that they take a toll on the federal courts by encouraging forum shopping and making cases a national emergency for the courts and the Executive branch.[95] He emphasized that if they continue to be issued, the Court will be duty-bound to adjudicate the authority of courts to do so.[96]

D. DISSENTING OPINION BY JUSTICE BREYER (WITH JUSTICE KAGAN)

Justice Breyer's dissent noted that if the government was not applying the system of exemptions and waivers that the Proclamation contained, then its argument for the Proclamation's lawfulness became significantly weaker.[97] It pointed out that denying visas to Muslims who meet the Proclamation's security terms would support the view that the government excludes them based upon their religion.[98] He examined evidence that were not judicial fact findings but statistics regarding entry since the Proclamation that supported the possibility that the government was not applying the Proclamation as it was written. [99] Justice Breyer said he would leave the injunction in effect while the matter is litigated, but without further litigation, he would find evidence of antireligious bias which would give a sufficient basis to set the Proclamation aside.[100]

E. DISSENTING OPINION BY JUSTICE SOTOMAYOR (WITH JUSTICE GINSBERG)

Justice Sotomayor's dissent said regardless of the merits of Plaintiffs' complex statutory claims**,** the Proclamation violates the Establishment Clause's guarantee of religious neutrality.[101] She would have applied a more

94. *Id.*
95. *Trump,* 138 S. Ct. at 2525.
96. *Id*. at 2430.
97. *Id.*
98. *Id.* at 2431.
99. *Id.* at 2433. (Justice Breyer said the Proclamation requires the Secretary of Homeland Security to "coordinate to adopt guidance," pursuant to § 3(c)(ii) of the Proclamation, but that to his knowledge no guidance has issued. He looked at publicly available statistics which showed that during the Proclamation's first month, two waivers out 6,555 eligible applicants were approved. And while 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018, though the Proclamation is not to be applied to asylum seekers or refugees. Statistics also showed that the 2018 student visa issuance has been less than a quarter of the volume compared to those issued in 2016. Justice Breyer further examined anecdotal evidence from amicus briefs. This dissent acknowledged that these sources of evidence are not judicial fact findings, and that the Government has not had an opportunity to respond.)
100. *Trump,* 138 S. Ct. at 2434.
101. *Id*. at 2434-35.

stringent standard of review typically applied to Establishment Clause claims.[102] In doing so, she said

> the dispositive and narrow question here was whether a reasonable observer, presented with all 'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country.[103]

This dissent then cited over twenty instances along the campaign trail and after taking office where President Trump and his advisers spoke about banning Muslims and the dangers of Islam.[104] For instance, the dissent pointed out that the day President Trump signed EO–1, he said "[w]e all know what this means," and later explained to media that under that Order, Christian refugees from Syria would be given priority for entry over Muslim refugees.[105] This dissent said that there was no explanation or precedential support for the Court to limit its review to rational-basis scrutiny.[106] In Justice Sotomayor's opinion, however, even under rational-basis review, the Proclamation should have failed because the asserted national-security rationale was nothing more than a sham.[107] The dissent submitted that the minor restrictions on North Korea and Venezuela were subtle efforts to avoid looking biased toward Muslims, pointing out that North Korea was already restricted by a prior sanctions order and the restrictions on Venezuela only affected government officials.[108] Justice Sotomayor questioned the review process, pointing out that the government refused to make it publicly available and that at least one individual in the review process exhibited anti-Muslim bias.[109]

She then discussed the INA. She said, "Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation."[110] and that the government did not give a national security interest not addressed by the INA.

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102. *Id.*
103. *Id*. at 2435-38.
104. *Id.* at 2436.
105. *Trump*, 138 S. Ct. at 2441.
106. *Id*. at 2441-42. ("That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.")
107. *Id.* at 2442.
108. *Id.* at 2443.
109. *Id*. at 2443-45.
110. *Trump*, 138 S. Ct. at 2444-45.

[111] Further, she noted that several former national-security officials have advised that the Proclamation did not advance national-security interests, but did serious harm to them.[112] This dissent posited that the Proclamation's waiver program was a sham, noting that "the remote possibility of obtaining a waiver pursuant to an "ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security."[113] The dissent compared the Proclamation to the order in *Korematsu*, stating that "the exclusion order in *Korematsu* was similarly rooted in dangerous stereotypes about, *inter alia,* a particular group's supposed inability to assimilate and desire to harm the United States."[114]

Justice Sotomayor went on to say that the Plaintiffs could obtain a preliminary injunction.[115] The dissent concluded that "[i]n holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the past, and denies countless individuals the fundamental right of religious liberty."[116]

IV. ANALYSIS AND DISCUSSION

A. INTRODUCTION

The Court made several holdings in this case that warrant discussion and will continue to have future effect. The overruling of *Korematsu* is certainly laudable, but it is collateral to the focus of the case. The holding this discussion will focus on is that a rational basis review should be applied to an Establishment Clause claim concerning entry of foreign nationals.[117] The discussion will explain standards of review generally used for foreign affairs and will discuss why rational basis review is problematic for Establishment Clause claims, even in a foreign affairs context like this one. It will then discuss some of the standards of review the Court has used for Establishment

111. *Id*. at 2445.
112. *Id*. at 2447.
113. *Id.* at 2445-46.
114. *Id.* at 2446.
115. *Trump*, at 2445-46. (Sotomayor J., dissenting) (She said they can get an injunction because they have shown "likelihood of irreparable harm" without relief for being separated from family members and diminished membership of the Muslim Association and recruitment to the University of Hawaii. The "balance of equities tips in their favor" because the government only refers to nebulous national security interests whereas the Plaintiffs have concrete allegations of harm. The injunction would be "in the public interest" because it negatively affects higher education, national security, healthcare, artistic culture, the technology industry, and the economy. (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008))).
116. *Id.* at 2446.
117. *Id.* at 2420. This holding is the primary focus of this article.

Clause claims and suggest that a hybrid of the *Lemon* test and endorsement test would be a more appropriate standard of review for Establishment Clause claims regarding broad-sweeping entry policies.

B. STANDARD OF REVIEW FOR FOREIGN POLICY AND EXECUTIVE ACTION

The challenge the Court faced in deciding which standard of review to apply was no small matter. The deference due to the President in the arena of foreign affairs makes rational basis review seem logical at first glance.[118] The President and Congress have inherent authority to exclude aliens and this determination is generally not questioned or disputed in courts.[119] The Court has said,

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[120]

It is a tradition dating back to the founding of this country that the President is to be trusted with foreign affairs (at least with respect to treaties and foreign negotiations) without question.[121] The nature of this

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118. *Id*. at 2420. This however, is arguable. The dissent emphasized that the majority had no precedential support to apply rational basis review to an Establishment Clause claim**.** (*Id*. at 2441. (Sotomayor J., dissenting)).

119. U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *But see* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650–51 (2000).

> [T]he Supreme Court's explanations for deference in this area have been characterized by sweeping and unconvincing generalities, such as its description of the executive branch as the 'sole organ of the federal government in the field of international relations.' Its explanations also have relied too heavily on a bright-line distinction between "foreign" and 'domestic'—a distinction that appears increasingly less tenable in this age of globalization.

(quoting *U.S. v. Curtiss-Wright Exp. Corp*., 299 U.S. 304, 320 (1936)).

120. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Galvan v. Press, 347 U.S. 522 (1954)).

121. *Message to the House Regarding Documents Relative to the Jay Treaty (March 30, 1796)*, Yale Law School Lillian Goldman Law Library, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/gw003.asp (last visited September 25, 2018) (As George Washington said in his *Message to the House Regarding Documents Relative to the Jay Treaty*:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making

Proclamation, national security, is a bolster to the majority's opinion that deference should be given—in fact, ordinarily in this arena, the Court would apply what is known as the *Mandel* standard, a standard even more deferential than rational basis review.[122] *Mandel* says, "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification."[123]

The extraordinary complexity in this case, however, came with the Establishment Clause claim and its nature and interpretations, in tandem with the Proclamation. What should the Court do when faced with a President who expresses plans to ban entry of a class of aliens, explaining that the religion they practice is dangerous to the United States, who preliminarily bans several of those nations, subsequently conducts a publicly unavailable review which he says confirms that their entry would be unsafe, and then writes a facially neutral Proclamation keeping the ban in place? The Government conceded that a more stringent inquiry than *Mandel* would be proper in this case. [124] It is arguable, however, that rational basis review as it was applied was not any more deferential than *Mandel* would have been—the majority quickly acknowledged, "[g]iven the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[125]

The Court said that so long as "the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes," the Proclamation would be upheld.[126] The Court's review focused on the text of the Proclamation, the fact that a worldwide review was conducted, the fact that three countries were removed from the list, and the exemptions and waiver program contained in the Proclamation.[127] This focus would have unquestionably been proper if the claim itself did not arise from statements made outside of the Proclamation. If the President had not made the comments he did about Islam, there would not likely have been an Establishment Clause claim that made its way to the Supreme Court.[128]

> treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

122. *Mandel*, 408 U.S. 753, 770 (1972).
123. *Id.* at 770.
124. *Trump*, 138 S. Ct. 2392 at 2420; *Id*. at 2440. (Sotomayor J., dissenting).
125. *Id*. at 2420.
126. *Id.*
127. *Id*. at 2421-22.
128. *Trump*, 138 S. Ct. at 2439 (Sotomayor J., dissenting). ("Given President Trump's failure to correct the reasonable perception of his apparent hostility to the Islamic faith, it is unsurprising that the

The Plaintiffs' allegations were that that the stated purpose of improving vetting procedures was a sham, and this claim was based on comments about its purpose made outside the Proclamation.[129] Considering that those statements are the foundation of the plaintiffs' claim, those statements should have been a serious part of the judicial review, especially, as discussed below, considering jurisprudence and previous interpretations of the Establishment Clause. Instead, the majority pointed out less than half of the examples of denigrating comments made by the President and said, "[t]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."[130]

C. STANDARDS OF REVIEW FOR ESTABLISHMENT CLAUSE CLAIMS

The challenge the Court faced was made more complex when Establishment Clause jurisprudence is viewed historically. To understate, courts have had trouble deciding the proper standard to use when addressing these claims, even without the added confusion of deferential review on Executive action.[131] The Court has been reticent to commit to any test or standard for Establishment Clause claims because each tends to depend on the circumstances at play.[132]

There are several standards of review that courts have used for Establishment Clause claims, in part, because there are two schools of thought about the Establishment Clause's purpose. One view is strict separationism, which relies on the Jeffersonian view of separation of church and state.[133] It demands an interpretation of the Establishment Clause that the Government must protect free exercise of religion, prohibit the state and federal governments from organizing a national church, and provide no aid to any religion over another.[134] The second view is the accommodationist approach which takes the view that the Framers did not intend neutrality toward religion, but that the Government cannot attempt to adopt one religion for the country nor pass laws that differentiate between religions.[135] These differences sound subtle, but the devil is in the details when these claims are

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President's lawyers have, at every step in the lower courts, been unable to launder the Proclamation of its discriminatory taint.")

129. *Id.* at 2417.

130. *Id*. at 2418.

131. *Mitchell*, 530 U.S. at 793.

132. Meek v. Pittenger, 421 U.S. 349, 359 (1975).

133. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947).

134. *Id.*

135. David W. Cook._*The Un-Establsihed Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. L. REV. 71, 78 (2004).

reviewed. This article will put its focus on just a few of the tests that the Court has applied over the years.

One test courts have used is the "coercion test," which seems to focus literally on the word "establish," looking only to whether the government has coerced anyone into adhering to religious practices by governmental action (i.e. establishing a national religion).[136] Coercion is sufficient to constitute an Establishment Clause claim, but precedent holds it is not essential; it is only that if there has been coercion, the inquiry is over.[137] Another standard courts have used is a neutrality principle, which looks at whether governmental action favors one religion over another.[138] This standard has been criticized as being difficult to apply on its own.[139] The neutrality principle seems to be an underlying tenet of many of the Court's opinions but does not seem to function effectively as a test on its own.

Courts have most consistently applied the *Lemon* test, which has three components: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . finally, the statute must not foster an excessive entanglement with religion."[140] The first component, that the legislative purpose must have a secular purpose, has further been interpreted to mean the motives of the Government actors, and the stated purposes supporting action, must not be a sham.[141] That "the principal purpose or primary effect must be one that neither promotes nor inhibits religion" has been further interpreted to mean that the government has not advanced religion through governmental action and influence.[142] The excessive entanglement prong looks to how much the State aids or benefits "the character and purposes of the institutions. . . the nature of the aid that the State provides, and the resulting relationship between the government and the resulting religious authority."[143]

Noting that the *Lemon* test seemed to confuse courts, Justice O'Connor wrote a concurring opinion in *Lynch v. Donnelly* suggesting a helpful clarification on the analytical framework of the *Lemon* test which has come to be known as the endorsement test, and has gained some favor with the Court as providing a framework for *Lemon.*[144] She said that what the *Lemon*

136. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

137. *Id*.

138. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

139. Frank S. Ravitch, *A Funny Thing Happened On the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 500 (2004).

140. *Lemon,* 403 U.S. 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

141. Edwards v. Aguillard, 482 U.S. at 586-87 (1987); Wallace v. Jaffree, 472 U.S. at 64 (1985).

142. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

143. *Lemon*, 403 U.S. at 615.

144. Lynch v. Donnelly, 465 U.S.668, 687-88; *See also* Cty of Allegheny v. ACLU, 492 U.S. 573, 594-95 (1989). (Justice Blackmun adopted Justice O'Connor's Endorsement test for the first time in a

test is trying to convey is that a government action cannot have the effect of creating the actual effect, or the public perception of governmental endorsement or disfavor.[145] The endorsement test says that the Establishment Clause could be violated either by excessive entanglement or by endorsing or disfavoring a religion. For the first component of the *Lemon* test, that the legislation must have a secular purpose, the endorsement test asks "does the government action intend to 'convey a message of endorsement or disapproval of religion"[146] For the second component, the principal or primary purpose must not promote nor inhibit religion, she would ask "does the action communicate or convey a message of government endorsement or disapproval" of religion.[147] According to Justice O'Connor, an affirmative answer to either of the first two should render the challenged law invalid.[148]

D. APPLYING AN APPROPRIATE STANDARD

The foregoing should have made clear that the meaning of Establishment Clause is contested. There have been paradigm shifts in reviewing Establishment Clause claims, simmering atop competing views on how the Establishment Clause should be interpreted and exactly what it demands. This note seeks to combine the *Lemon* test and the endorsement test and suggests a hybrid framework of the two that attempts to give deference to the Executive action in a context like this one, while also giving weight to the merits of plaintiff's claims.

If the first *Lemon* test prong were applied, it would demand the order have a secular purpose that is not a sham.[149] The Court in *Trump* did point to the stated secular purpose but did not consider the evidence presented to show that it was a sham; it only looked to the face of the Proclamation in concluding that it was not a sham.[150] This is consistent with rational basis review, but it is problematic in this case. It is no surprise that the order was facially neutral—one of the pieces of evidence submitted by the plaintiffs was a public comment from one of the President's advisers that said, "[w]hen the

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majority opinion in stating that religious endorsement is invalid because it, "sends a message to nonadherents that they are outsiders, not full members to the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," and "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion.") (quoting *Lynch*, 465 U.S. at 691 (O'Connor J., concurring)).

145. *Lynch*, 465 U.S. at 687. (O'Connor J., concurring). ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.")

146. *Id*. at 691.

147. *Id*. at 692.

148. *Id*. at 690.

149. *McCreary*, 545 U.S. at 864.

150. *Trump*, 138 S. Ct. at 2421-23.

President 'first announced it, he said "Muslim ban." He called me up. He said, "Put a commission together. Show me the right way to do it legally."'"[151] Even more problematic, however, is that with regard to the Establishment Clause, the Court has said "facial neutrality is not determinative."[152]

Had the *Lemon* test been applied, it would have looked at the surrounding circumstances to glean insight to actual motives to determine if the stated secular purposes were a sham.[153] That is where the rational basis review diverges from *Lemon*—rational basis scrutiny simply does not consider actual motives, nor does it look beyond four corners into surrounding circumstances if there is a legitimate reason for the act under review.[154] The "intent" part of this analysis, moreover, would also be a problematic line of questioning. First of all, it is important that the Court does not engage in "judicial psychoanalysis of a drafter's heart of hearts."[155] Second, questioning the intent of the Executive on an executive foreign policy might raise red flags in the mind of even a novice to Supreme Court precedent.[156]

If the endorsement test, on the other hand, were applied to *Trump* it would first ask: "Did the Government intend to convey a message of endorsement or disapproval of religion with the Presidential Proclamation?"[157] This is problematic here, because it raises the same issues. However, the test has further been refined to be asked from the standpoint of "a reasonable observer, presented with all of the 'openly available data,' the text and 'historical context,' and the 'specific sequence of events' leading to it."[158] This would be somewhat more appropriate than a judicial inquiry into the mind of the President.[159] However, considering the delicate nature of foreign affairs deference, this note submits that rather than looking at whether the Government intended to send the message, it should look at whether a reasonable observer would perceive a message of Government disapproval or

151. *Id*. at 2417.

152. Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

153. *Id*.

154. F.C.C. v. Beach Commc'n Inc., 508 U.S. 307, 313-15 (1993).

155. *McCreary*, 545 U.S. at 862

156. However, it is worth noting that determining executive intent on a proclamation or executive order is less problematic than determining legislative intent, because these are unilateral actions that do not go the rigors of bicameralism and presentment. *See* Andrew M. Wright, *Presidential Executive Orders*, 52-SUM. ARK. LAW. 30, 32 (2017) (discussing the unilateral nature of Presidential Proclamations and Executive Orders).

157. *Lynch*, 465 U.S. at 691.

158. *McCreary*, 545 U.S. at 862; *but see* William P. Marshall, "*We Know it When We See It" The Supreme Court Establishment*, 59 S. CAL. L. REV 495, 533-34 (1986) (noting the difficulty with the reasonable observer standpoint in the context of religion, in that determining what may be religious or antireligious can create perceptual problems; essentially, when considering that what a reasonable Christian may view as having religious significance may vary widely from a person who holds different religious values., and there is difficulty in determining whose view should govern.)

159. *Id*.

endorsement of religion in the implementation of the policy. In other words, to combine the two: Would a reasonable observer, presented with all of the openly available data, the text and historical context, and the specific sequence of events leading the policy, perceive that it is founded on religious animus or favoritism?

This would not end the inquiry. The second question the *Lemon* test asks whether the principal purpose or primary effect of the government action either promoted or inhibited religion, such that the government advanced religion through governmental action and influence.[160] The endorsement test clarified that wording to mean: Does the government action communicate a message of endorsement or disapproval of religion? [161] This takes it out of the realm of what was perceived and looks at what the action communicates. To combine and rephrase the basic structure of the purpose and effects prong without doing violence to these interpretations, this note submits that the question could be rephrased for the entry policy context: Is the purpose of the policy (the government act), as written and applied (communication and effect), to target one particular faith or denomination (favor, inhibit, or disapprove)?

Justice O'Connor's idea of the endorsement test would say that an answer to either one of these questions indicates a violation of the Establishment Clause.[162] However, this note suggests that within the foreign affairs context, the analysis should not stop if the answer to the first question is "yes." The first question should be a consideration to be weighed against the second. The first looks at the evidence surrounding the allegation, and the second looks at the foreign policy's implementation. The second prong should be looked at much like the neutrality principle—are people of all faiths from the restricted areas affected similarly?[163] If the answer is that it does target one denomination over others, with the exception of terrorist organizations involved in religious extremism, then the policy would be unconstitutional. However, if the answer to the first question is yes, and the answer to the second question is no, a balancing must come into play. If the policy has a legitimate purpose in the foreign affairs context, and does not discriminate between religions, it may outweigh the first. This would require looking at other factors, such as if it furthers or protects an interest that is not already provided for in established immigration law or other foreign policies.[164]

To recapitulate, the questions as phrased for *Trump* would be:

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160. *Lemon*, 403 U.S. at 612; *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 337.

161. *Lynch*, 465 U.S. at 692.

162. *Id*. at 690.

163. *Helms*, 530 U.S. at 809.

164. *See Wallace*, 472 U.S. 38, 59 (1985).

1. Would a reasonable observer, presented with the text, legislative history, and implementation of the Proclamation, perceive that the Proclamation was founded on animus toward the Islamic faith?

2. Is the purpose of the policy, as it is written and applied, to deny entry to those of the Islamic faith?[165]

This note does not attempt to answer these questions, nor does it attempt to presume how the Court would have ruled if they applied a similar standard or another higher scrutiny standard—it only laments that it should have, for reasons discussed briefly below.

V. DISCUSSION

This note concedes that an extraordinary level of deference is generally appropriate within the arena of foreign affairs. However, where a President repeatedly and publicly expresses xenophobic viewpoints that single out a minority for the religion they practice, then promises to soothe the public's fears with a sweeping policy that will limit entry to persons of that minority faith, those statements should be considered under the Court's review. If the Court does not look beyond the face of the orders, it cannot determine whether the stated secular purpose was designed to, and in effect does, target a particular religion. Establishment Clause claims should be treated with more demanding scrutiny, even in this context.

One reason for this is that the Establishment Clause is advances important Constitutional values. The clause that follows it is the Free Exercise clause, which creates the individual right for American citizens to exercise their own religion.[166] The Establishment Clause and the Free Exercise Clause work in tandem with each other. The first protects the second. Official statements of disapproval of a religion along with binding foreign policy allegedly targeted at restricting those individuals may not infringe on the individual right to exercise the religion within the country, but they have the undeniable effect of suppressing the citizens who do.[167] If the Government expresses that it does not want a particular religion to enter the country, it simultaneously sends a message to citizens who practice that faith that they are also

165. *See* Wis. v. Yoder, 406 U.S. 205, 215 (1972) ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); The author of this note concedes that it may seem odd to reformulate the endorsement test, considering that it is already a clarification in itself of the *Lemon* test. However, this author feels that this test appropriately captures the essence of what should be looked at, and prevented, when reviewing Establishment Clause claims.

166. U.S. CONST. amend. 1.

167. Bowen v. Roy, 476 U.S. 693, 703 (1986).

unwelcome.[168] These detrimental psychosocial implications should not be ignored.

VI. CONCLUSION

The Supreme Court set up a dangerous precedent in this decision by deciding that rational basis review will be applied to claims like this, because it gives free-reign to the Executive to close off borders on a pretext of even absolute discrimination with essentially no judicial check. This opens the door to tyranny at worst. At best, it breeds feelings of fear and inhibits citizens who practice that religion within United States, and breeds distrust against those citizens by people who do not.[169] Often those people targeted will be a minority, who feel that they cannot turn to the democratic process to protect themselves because of their minority.[170] Now the Court has decided that when religious restrictions start at the borders, these citizens cannot turn to the Constitution either. A more stringent standard of review should apply, if not only for the sake of the principles of tolerance and fairness.

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168. *Lynch*, 465 U.S. at 688.
169. *Id*. at 688.
170. Shimonek, s*upra* note 11 at 858-59 (1990).

> In effect, the Eighth Circuit conclusion implies that a minority which feels it is subjected to the religious views of the majority should not look to the Constitution, or the courts, for protection. Rather, they should attempt to enforce the Constitution themselves through the democratic process. Minorities may find little comfort in this proposition. It is because they are minorities that the majority is able to impose its beliefs on them. The politically powerless minorities, therefore, are left with little or no protection.