

## Constitutional Law II Post-Mortem Spring 2007

The exam questions are set forth below, followed in each case by some thoughts on the issues presented. These comments are not intended to be model answers. On the first question, many of you made much more of the procedural due process issue than it warrants. On the second question, many people divined a procedural due process issue where there is likely no real issue. After all, on the facts presented Kahn has nothing more than a unilateral expectation of tenure and the decision to deny tenure was made by a committee and the Dean, apparently following some investigation of Kahn's scholarly work. Even if Kahn had some property interest, under *Mathews* he probably received all the procedural guarantees to which he is constitutionally entitled.

### Question One

**Word Limit: 2000 words**

Arroyo, a state of the United States, has enacted a law that requires convicted sex offenders, following release from prison, to (1) be "monitored by a global positioning system for life," (2) prohibits any convicted sex offender, following release from prison, "to reside within 2000 feet of any public or private school, or park where children regularly gather," and (3) authorizes local governments to "further restrict the residency of any convicted sex offender." Sex offenders are defined to include "any person convicted of any crime involving contact with, or exhibition of genitalia, or any non-consensual sexual touching of any person." Please evaluate the constitutional validity of this law and explain your reasons.

*Because the facts do not posit any actual application of the law to any person, the law must be examined for facial validity. There are three major issues: whether the law violates substantive due process, either because it unjustifiably infringes upon a constitutionally fundamental liberty interest or because it is not rationally related to any legitimate state interest; whether the law denies those subject to it the equal protection of the laws; and whether the third clause, authorizing local governments to impose additional residency restrictions, is so vague that it violates due process. There is also a minor issue: whether the law operates to deprive convicted sex offenders of procedural due process.*

**Substantive Due Process.** *There are two possible fundamental rights at issue. Because Washington v. Glucksberg requires a "careful description" of the asserted right, it is important to phrase the possible rights with some specificity, at least as specific as the statute itself. First, the statute implicates a possible right of released sex offenders to be free of constant monitoring of one's location. Second, the statute implicates a possible right of released sex offenders to choose the location of one's residence without undue governmental interference.*

*The question with respect to each possible right is whether it is so deeply rooted in our national history and traditions that it must be ranked as constitutionally fundamental. Such rights may be infringed only when the government has proven that it is necessary to do so to achieve a compelling governmental objective.*

*The first claimed right – freedom from constant location monitoring – has existed*

throughout our national history, at least until quite recently. This is so because the technology that combines global positioning detection, wireless communications, and computers is so recent that the ability to engage in constant location monitoring has not existed until the end of the 20<sup>th</sup> century. However, the recent vintage of monitoring technology may not be sufficient to establish the claimed right as fundamental. One view of detecting fundamental rights, prominently associated with Justice Harlan the second, is that we must pay attention to the traditions from which we have broken as well as those to which we have adhered. While the advent of GPS monitoring represents a departure from prior traditions, Harlan's perspective would, ironically enough, counsel us to consider that departure. We can also examine practices that pre-dated the advent of GPS monitoring to see if there were any practices that might be roughly analogous to GPS monitoring. At least three such practices come readily to mind: the requirement that parolees report periodically to parole officers, the requirement imposed upon resident aliens to report periodically to government officials and keep government informed of their address, and the requirement imposed upon draft registrants that they keep their local draft boards informed of their residence address. Yet, the Arroyo statute goes much further than these early reporting requirements. GPS monitoring provides constant real-time information to governments of the location of the monitored person. If a person subject to the law should remove the GPS device, this would, by itself, violate the statute. The pre-GPS monitoring analogue would be constant surveillance by government officials, with penalties imposed for eluding such surveillance. There is no national history or tradition of such a practice, even for convicted but released sex offenders. Thus, the first claimed right may well be constitutionally fundamental.

If so, Arroyo will assert that constant GPS monitoring of released sex offenders is necessary to achieve its compelling objective of protecting the public from future sex crimes. It is well known that recidivism is extremely high among sex offenders, so it is highly likely that the asserted objective is a compelling state interest. However, the statutory means may not be necessary, or narrowly tailored, to the accomplishment of that end. The statutory definition of sex offenders is extremely broad; it covers cases of statutory rape (consensual sex involving a minor) and exhibition. Thus, two 17-year old high school students who mutually consent to sexual intimacies would be subject to this law, if convicted of statutory rape and subsequently released. So, too, would a person who, while responsibly walking home from a night of revelry, urinates in a public park at 2 am to relieve his or her bladder discomfort. The likelihood of such persons inflicting significant injury on the public is minimal. Arroyo surely intends to target pedophiles, rapists, and other incorrigible and dangerous sexual criminals, but the statute sweeps much further than that. However, a statute is not invalid on its face unless there is virtually no set of circumstances under which it may be validly applied. This is not the case here. Even if dangerous, highly recidivist sex offenders who have served their full prison sentences possess a constitutionally fundamental right to be free of GPS monitoring, such monitoring may be necessary to achieve Arroyo's compelling interest in preventing future sex crimes by such people. Awareness of the GPS device may deter some people from crime, and the presence of the device may enable some crimes to be prevented (e.g., a victim or witness of a crime in progress may report the event and police may use GPS data to dispatch officers to the scene). While the law is not facially void with respect to the first claimed right, under strict scrutiny it may be invalid with respect to some applications, such as those posed above.

Even if the first claimed right is not constitutionally fundamental the Arroyo statute may still be void as applied to some people. While governments have a legitimate interest in keeping

*track of the whereabouts of released sex offenders, and GPS monitoring is a rational means of doing so, the government may not have a legitimate interest in tracking the location of people who pose virtually no danger to society. The 17-year old high school students who engage in consensual sex are unlikely to be dangerous; it is irrational to think that simply because the drunken college student urinates outside his fraternity house he is likely to commit sex crimes.*

*The second claimed fundamental right – freedom to choose one’s residence – has a checkered historical pedigree. Following the French & Indian War, Great Britain forbade settlement west of the Appalachian spine, an edict that angered colonial Americans and that was widely ignored. Though morally repugnant, Americans imposed enormous residence restrictions upon African-Americans. Slaves, of course, had no personal freedom, but even free blacks faced such restrictions. Indians were repeatedly forcibly confined to reservation lands. We have, of course, departed from such odious traditions, but the twentieth century tradition of zoning regulations operates to hamper freedom of choice with respect to one’s residence. Arroyo’s statute, however, is a pointed form of zoning ordinance; it regulates sex offenders’ residence rather than regulating land use. We have largely broken from that tradition; thus, it may be that even sex offenders have a constitutionally fundamental right to choose their residence. If so, Arroyo may still be able to justify the infringement, by proving that the residence restriction is narrowly tailored to accomplish its compelling interest of protecting vulnerable children from sexual predators. The law forbids residency within 2000 feet of a school or park “where children regularly gather,” venues where children are concentrated and exposed. On its face, the law would appear to be valid, but it might well be void if applied to require a sex offender to vacate his current residence because of its location. That sort of requirement strips a person of his reasonable expectation that he may live where he has already chosen, not unlike the infamous “trail of tears” inflicted upon the Creeks and Cherokees in Andrew Jackson’s administration. Moreover, it may be that such a requirement constitutes a taking of private property, requiring just compensation. In any case, the Arroyo law may be void as applied to “sex offenders” who pose almost no risk to the public, as discussed above, or even with respect to more venal sex offenders who have no history of predation upon children. Psychological evidence may establish that sex offenders who prey on adults are not likely to molest children. If so, the residence restriction may not be narrowly tailored because it includes within its scope all sex offenders, without regard to the seriousness of their offense or their risk of inflicting future harm.*

*If the second claimed liberty is not fundamental, the law is valid on its face because the residence restriction is a rational way of attempting to prevent pedophiles from ready access to children, a legitimate interest of the state. The fact that is over-inclusive is of little concern under minimal scrutiny, although with respect to as-applied challenges this fact may assume greater significance. The more trivial the “sex offense” and the less risk of harm posed by the offender, the more likely that this over-inclusion would be perceived as an irrational way to protect children from the specific harm posed by pedophiles.*

**Equal Protection.** *The Arroyo law subjects only convicted sex offenders to its residency and monitoring restrictions, but classification by that trait – conviction of a sex offense – is neither a suspect (or quasi-suspect) category under existing law nor likely to be treated as such. Thus, minimal scrutiny should apply and the law, at least on its face, is valid.*

*However, the trait is immutable (at least until and unless a pardon is granted, even assuming that pardoned sex offenders are removed from the scope of the statute), there is a*

history of cultural fear and loathing of sex offenders (though perhaps not without reason), and there has been a lack of political power (in that convicted sex offenders often are stripped of the franchise and the group of organized sex offenders is so small as to be non-existent). This may not be enough, though, to establish this classification as suspect or quasi-suspect. Unlike sex or race, where irrational stereotyping is often the basis for the use of the classification, and where sex or race bears little relationship to whatever legitimate government objective may be at work, classification on the basis of conviction of a sex offense is much more relevant to the governmental objectives that lie behind the Arroyo statute. Although there is doubtless considerable prejudice against sex offenders, empirical evidence of the high rate of recidivism among such offenders makes that prejudice understandable.

Under minimal scrutiny, on their face the restrictions imposed on sex offenders are rational means of achieving the government's objectives, identified above. However, these restrictions might violate equal protection as applied to the trivial sex offender or the sex offender who poses a low risk of future harm. The success of such as-applied challenges is speculative, however. The law is over-inclusive, but over-inclusion rarely incites courts to search for actual governmental purposes that may be illegitimate. In any case, the actual governmental purpose seems apparent – keep track of convicted sex offenders and keep them away from children.

The only possible fundamental rights that this classification may impinge are those discussed in connection with substantive due process. To that extent, equal protection and due process analysis is congruent.

**Vagueness and Due Process.** The third section of the statute, which permits local governments to add additional residency restrictions, is precise in that the authorization extends only to residency restrictions. On its face, the provision is not so vague that an ordinary person could not understand it. The authorization itself is clear enough, but what local governments do with that authority is problematic. Should a local government use the authority to bar convicted sex offenders absolutely from the community, there is little doubt that this would violate a constitutionally fundamental liberty interest. Exile is not part of our constitutional tradition, despite Edward Everett Hale's literary effort in that direction: *The Man Without a Country*. Even sex offenders are entitled to live somewhere in their state of citizenship.

While the section is facially valid, the validity of the actions taken under its authority must be considered as they occur.

**Procedural Due Process.** The short answer to this question is to note that in *Conn. Dep't of Public Safety v. Doe*, the Court concluded that a state's maintenance of a public registry of convicted and released sex offenders did not violate any procedural due process rights of the sex offenders because they had been duly convicted in a trial, and thus had received all the procedural guarantees to which they were entitled. The only variation here is that the statutory limitations involve greater incursions upon liberty than those at issue in *Conn. Dep't of Public Safety v. Doe*. Despite that fact, these incursions are surely less than the incarceration that resulted from conviction. But in *Vitek* a person convicted of crime and incarcerated was able to assert a constitutional liberty interest in not being confined to a criminal mental institution. If *Vitek* controls here, *Arroyo* must provide some hearing to determine whether imposition of the residency restriction and GPS tracking device is appropriate. Perhaps the better avenue of attack (but which is outside the scope of our course) is to assert that the statute operates as an *ex post facto* punishment.

**Question Two**  
***Word Limit: 1100 words***

August Persona, a nationally known professor of law at Princeton Law School, has been a prominent public critic of the Iraq War. He has been particularly critical of Noah Kahn, an untenured professor of law at Kansas State University Law School, who has publicly endorsed the Iraq War and defended the Bush Administration's conduct of the war. Persona and Kahn have traded editorial essays in major American newspapers, in which they have sharply criticized each other's positions on the Iraq War.

In the fall of 2006 Kahn was considered for tenure, a key moment in any academician's life. An award of tenure means that the holder of tenure may not be discharged from his or her employment, save for extremely good cause, such as incompetence, dereliction of duty, or moral turpitude. Professor Persona sent a lengthy letter to the Kansas State Law School's tenure committee, in which he severely criticized Kahn's scholarship as "shoddy and poorly documented; an *oeuvre* that reeks of unsupported conclusions." Persona also stated: "Kahn lacks the academic integrity essential for an award of tenure. Moreover, his defense of the war brands him as a moral leper, utterly devoid of compassion, conscience, or even much in the way of intellect. He is an intellectual pygmy. There is no place for Kahn in the legal academy." Kansas State denied Kahn tenure, and his employment will end in May 2007. In communicating to Kahn its denial of tenure, Kansas State's Dean stated: "Our denial of tenure was heavily influenced by Professor Persona's appraisal of your work and character, provided to us in confidence. Indeed, but for Persona's comments, we would have awarded you tenure."

Kahn retained the law firm of Archer and Spade to represent him with respect to the denial of tenure. Kahn provided Miles Spade and Sam Archer, the partners of the firm, with all of his heavily and accurately footnoted academic work, including detailed demonstrations that his cited sources support his conclusions. Sam Archer has consulted you with respect to the constitutional aspects of the case. Archer tells you that he is considering suing Kansas State's Dean and tenure committee members, under 42 U.S.C. § 1983, and suing Persona for defamation and tortious interference with Kahn's prospective economic advantage. Archer tells you that he doesn't want any advice about the state law elements of those torts, as he is confident that he can prove Persona's liability, but he would like to know whether there are any constitutional impediments to imposition of such tort liability upon Persona. Archer says he also wishes you to appraise the merits of Kahn's § 1983 claim against Kansas State. Please advise Archer.

The relevant portion of 42 U.S.C. § 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*There are three principal issues presented: (1) Is there any constitutional protection afforded Persona for speech that causes tortious interference with another's prospective economic advantage? (2) What constitutional standard must be met in order to find Persona liable for defamation of Kahn? (3) Has Kansas State's law dean and its tenure committee violated Kahn's free speech rights?*

***Free Speech and Tortious Interference with Prospective Economic Advantage.***

*Assuming that Persona is otherwise liable for this tort, does the free speech guarantee, made applicable to the states via the due process clause of the Fourteenth Amendment, impose any limits upon such tort liability? Because this is a matter of first impression, guidance may usefully be sought from analogous situations. In *Hustler v. Falwell*, imposition of liability for intentional infliction of emotional distress, as applied to a harsh and wounding parody of a public figure, was conditioned upon proof of actual malice – the false statement of fact with knowledge of its falsity or reckless disregard for its truth or falsity. Because parody is inherently false, actual malice, as applied to parody, must mean proof of some false statement of fact, i.e., something that cannot reasonably be understood as parody, but as a serious statement of fact. Actual malice is, of course, the standard applicable to condition liability for defamation of public figures. The limitations upon tort liability for false statements of fact about public figures are based on several rationales: the need for uninhibited, robust debate about matters of public interest, the fact that public figures have greater access to media than private persons and thus have readier opportunity to rebut falsehoods with the truth, and the belief that public figures, by virtue of their celebrity, attract comment that shapes public discourse. In short, breathing room must be created for the speech that really matters.*

*The first question, in applying these principles to the tort liability that Archer is confident he will establish, is whether Kahn is a public figure. He has voluntarily thrust himself into the public eye, at least with respect to the Iraq War and also by publicizing his difference with Persona. His debate with Persona over the merits of the Iraq War has been carried out in "major American newspapers." For these purposes, Kahn is probably a public figure. The next question is whether it should matter that Kahn is a public figure. The real underlying issue is whether the comments made by Persona, on which Archer plans to found tort liability, are of public interest. A principal reason for limiting liability for defamation and emotionally wounding parody of public figures is to protect public discourse. Persona's comments were made to a tenure committee, and were not aired publicly. While the substance of those comments would likely be of public interest, given the public nature of their debate over the Iraq War, the fact is that the comments were "provided in confidence" and thus were not part of public discourse. That suggests that the actual malice standard is too high a bar to imposition of civil liability for statements that wrongfully interfere with prospective economic advantage. The problem is akin to that of trade libel, where ordinarily there is no constitutional barrier to the imposition of liability. Yet, as is true of trade libel, some tortious speech is of sufficient public concern that it ought to enjoy some measure of protection. Here, Persona's comments are mostly statements of opinion, though couched as ad hominem attacks. Yet, because Persona spoke confidentially, and the comments he made will not likely enter public discourse, the actual malice standard ought not apply. At most, the Gertz standard might apply here, with some modification. Akin to Gertz, compensatory damages should be available upon proof of the tort of interference with prospective economic advantage, but punitive damages should be conditioned upon proof of either actual malice (as the term is defined in *Sullivan*) or that*

*Persona acted solely with a malicious and vicious intent to destroy Kahn's professional livelihood.*

**Defamation.** *Most of Persona's comments are opinions, but there is no constitutional immunity for opinions. To the extent that an opinion might, in context, be treated as a statement of fact, defamation law (including the constitutional protections afforded to defamatory speech) apply. The only possible statements of fact made by Persona are that Kahn's work is "poorly documented; an oeuvre that reeks of unsupported conclusions," and that "Kahn lacks the academic integrity essential for an award of tenure." Evidently, Archer thinks that the heavily and accurately footnoted academic work produced by Kahn will be sufficient to establish the falsity of these statements. But, as discussed above, Kahn is likely a public figure for these purposes. Actual malice is the standard of culpability on Persona's part that Archer must prove. Evidence that Persona knowingly or recklessly made these false statements will mostly be circumstantial. Persona, as a prominent legal scholar, may be presumed to be conversant with the sources cited by Kahn. If those sources do in fact support Kahn's conclusions, and do so beyond cavil, Archer may be able to overcome the actual malice standard. But this will be difficult, if only because legal sources rarely lend themselves to a single interpretation. Archer should probably drop the defamation claim.*

**Section 1983 Claim.** *The Dean's letter states that but for Persona's comments, the school would have granted tenure to Kahn. That confirms that the school paid attention to and acted upon Persona's comments, but may not furnish adequate proof that KSU denied Kahn tenure because of Kahn's speech. However, the character slurs uttered by Persona – moral leper, intellectual pygmy, lacking compassion or conscience – are all connected to Kahn's support of the Iraq War and Persona's opposition to the war. It may thus be a reasonable inference that KSU's Dean and tenure committee acted as they did because they shared Persona's contempt for Kahn's viewpoint and desired to punish Kahn for his views by denying tenure to him. The standard that governs this question is that provided by Pickering, Connick, and Garcetti. Kahn is a public employee but his statements about the Iraq War are surely of public concern. There is no evidence here that his statements caused any disruption to the workplace or interfered in any way with the normal operation of teaching and studying law at Kahn's law school. But did Kahn speak in the course and scope of his employment? If so, Garcetti suggests that there is no constitutional protection afforded to such speech. First, one might contend that the "course and scope" of employment ought to be given narrow interpretation, particularly when we are considering speech uttered in public and widely publicized. Kahn is not hired to be a pundit, but to teach, study, and write about the law. While his legal views of the Iraq War fall within that last category, they are not uttered in an employment context. Still, a literal reading of Garcetti would support a conclusion that Kahn's speech has no constitutional protection. On the other hand, Garcetti expressly suggested that the rule developed in that case might not apply to academic speech. The tradition of academic freedom, coupled with the obvious public significance of Kahn's speech, counsels strongly against stripping Kahn of any constitutional protection for his speech.*

*However, if the only evidence available to prove the section 1983 claim is the inference that the tenure committee and Dean were motivated by dislike of Kahn's political views, it will be difficult to obtain a verdict and sustain it on appeal. The school will no doubt contend that it denied tenure to Kahn because it was persuaded of Kahn's unfitness by the allegedly false statements of fact made by Persona, and treated the character slurs as additional opinions of*

*Persona that merely gilded the lily of Persona's professional appraisal of the quality of Kahn's scholarship. On these facts, a trier of fact could reach either conclusion.*

### Question Three

Warren Harding High School, a public school, sponsors a student Glee Club, participation in which is entirely voluntary and earns no academic credit. The Glee Club, supervised voluntarily by a retired music teacher (who receives no compensation), practices in school facilities after school hours and performs, when invited, at school assemblies and a variety of venues away from school. The Glee Club changes its repertoire seasonally. For some time, it has performed a concert at the large and acoustically superb Unitarian Church on the third Saturday in December, entitled "Advent of Winter." Regularly appearing on this program are *Hark! The Herald Angels Sing*, *Rudolph the Red-Nosed Reindeer*, *O Come All Ye Faithful*, *I'm Dreaming of A White Christmas*, *O Little Town of Bethlehem*, *Santa Claus is Coming to Town*, *Silent Night*, *Jingle Bells*, *Angels We Have Heard on High*, *Deck the Halls*, *Joy to the World*, and *The Twelve Days of Christmas*. The "Advent of Winter" concert has been sold out for years even though the Glee Club charges a hefty admission fee. The proceeds from the concert provide around 75% of the annual cost of Glee Club operations, enabling the Club to travel to and perform at such events as the Broadway Festival, at which the Club sings all the great musical numbers from Rodgers and Hammerstein, Cole Porter, and others.

Harold, an atheist and an 18 year old senior at Warren Harding High School, is not a member of the Glee Club. Harold has brought suit in federal district court, seeking to enjoin further performances of the Glee Club's "Advent of Winter" concert as it is presently constituted because it is a forbidden establishment of religion. Leah, an observant Jew, and Ahmed, a devout Muslim, have also sued the high school in federal district court, claiming that the "Carols in Winter" concert constitutes a forbidden establishment of religion and denies them the free exercise of religion. Leah and Ahmed are each 18 year old seniors at Warren Harding High School who are not members of the Glee Club. All parties have agreed upon the foregoing facts. Harold, Leah, and Ahmed have moved for summary judgment. Warren Harding High School has also moved for summary judgment. You are the district judge. Please rule on the motions and explain your reasoning.

*All three plaintiffs claim on common grounds that the Glee Club's "Advent of Winter" concert is a prohibited establishment of religion. However, Leah and Ahmed assert an additional basis for contending that the concert as presently constituted is a religious establishment. I will consider the common establishment clause claim first, then discuss the establishment clause claim common to only Leah and Ahmed, and then examine the free exercise claims made by Leah and Ahmed.*

**Common Establishment Clause Claim.** *Harold, Leah, and Ahmed all contend that the "Advent of Winter" concert violates the establishment clause because it lacks a secular purpose, promotes religion as its primary effect, and is a governmental endorsement of religion.*

*The first pair of contentions are rooted in the Supreme Court's Lemon test for detecting forbidden religious establishments. According to Lemon, if the government's purpose for acting is solely religious, it has created a religious establishment. Put another way, if government action is supported by any genuine secular purpose, its action is not a forbidden establishment on that ground alone. (It may be a banned establishment, however, by reason of its effects, as I shall consider shortly.) The plaintiffs assert that the High School's purpose for sponsoring the Glee Club's performance of the "Advent of Winter" concert is entirely religious. They point to its location (the Unitarian Church), the substance of the program (consisting entirely of songs with a distinctly Christmas theme), the date of the performance (the third Saturday in December, occurring in 2007 on December 22, three days before Christmas), and the program's title ("Advent of Winter"), which they contend is none-too-veiled embrace of the Christian church calendar's period of Advent (the four Sundays before Christmas, that signify the coming birth of Jesus Christ). The High School responds that its purpose for sponsoring the Glee Club is entirely secular (to give students an opportunity to sing choral music of all kinds and to develop their musical appreciation and talent). More specifically, the High School contends that its purpose for sponsoring the Glee Club's "Advent of Winter" concert is to celebrate the end of term school recess, to provide a community service in the form of choral entertainment, and to raise money to support the Glee Club's other activities. The record reflects that the "Advent of Winter" concert is uncommonly successful as a fund raiser, enabling the Club to engage in its many other activities, particularly the Broadway Festival, which the court notes is a decidedly secular musical event. (When the nuns burst into song in The Sound of Music, for example, religious sentiment is not on display.) There is no requirement under Lemon that the government's secular purpose be the exclusive purpose; it is enough that the government have a genuine, plausible secular purpose. Such a purpose is present in this case.*

*To be sure, some cases, such as Edwards v. Aguillard, have suggested that if a religious purpose is the predominant purpose for government action, the action fails the first prong of Lemon. But even if that is so (and that conclusion is rebutted by almost all other Supreme Court applications of Lemon, which hold that any secular purpose is sufficient to satisfy Lemon's first prong) the High School has adequately demonstrated that these untested facts show that any religious purpose does not predominate. The location of the concert is explained by its size and superior acoustical qualities, both attributes that are well-suited to produce a financially and artistically successful concert. The date coincides with the end of the school term and is calculated to be of interest to the public, which apparently is an enthusiastic consumer of Christmas melodies. The program content is half religious and half secular, which may be a bit more religious than the holiday itself, but which is representative of the dual character of Christmas in our culture. Some bend their knees in worship; most bend their elbows in cheerful celebration. Almost everyone engages in an orgy of consumer gluttony. Such is Christmas in America in the early years of the 21<sup>st</sup> century. Nor is the concert title indicative of a paramount religious purpose. At most, the title is word play on the Christian Advent, the anticipation of Christ's birth. But the other half of that play on words is the invocation of the beginning of winter, which, of course, occurs very close to the third Saturday in December. The Glee Club's cleverness hardly demonstrates a predominant religious purpose.*

*Nor is the primary or principal effect of the concert to advance religion. The concert produces a number of disparate effects: It produces 75% of the Glee Club's annual budget; it entertains the public; it enables student singers to perform; and, yes, it celebrates the Christmas*

season. As noted before, Christmas is a mixed holiday. Vast segments of the holiday have nothing to do with Christ's birth: trees, wreaths, holly, candy canes, reindeer, jolly old Santa and his elves, to say nothing of egg nog and mulled wine, are all aspects of the secular holiday. Whatever sacred spell may be cast by Silent Night is soon broken by Jingle Bells. The mood cast by Isaac Watt's hymn of praise to his savior Christ, Joy to the World, is abruptly altered by Irving Berlin's wry parody of the rich Los Angeleno who is dreaming of a White Christmas. Moreover, the religious songs that are included in the concert are so well known that their melodies tend to overwhelm their religious content. Joy to the World, for example, has produced all manner of parodies, including the schoolchild's favorite, Joy to the World, Our Teacher's Dead. It strains credulity to conclude that the principal or primary effect of the "Advent of Winter" concert is to advance religion.

All three plaintiffs advance another theory to support their claim that the concert is a forbidden religious establishment. They contend that the concert is an endorsement of religion by government. The endorsement test asks whether the government intends, through its speech or exhibition of religious imagery, to endorse religion and whether that message of endorsement would be understood by an objective and well-informed observer. As noted above, the Glee Club's purpose in presenting the concert is not to endorse Christianity, but to entertain, the public, provide a musical forum for its students, and, not incidentally, to make some money. Christmas music seems to be a sure-fire way to make money, as attested by the success of countless performers, from Bing Crosby to Mannheim Steamroller. The Glee Club's intent does not seem to be to endorse Christianity. Indeed, if it were so, it is hard to fathom why they would include such blatantly secular songs as Rudolph, the Red-Nosed Reindeer. Moreover, that wonderfully mythical character, the objective well-informed observer, is unlikely to perceive endorsement of Christianity in the concert. What he will perceive is a traditional medley of music that is evocative of the season. That these plaintiffs perceive something different may only establish that they lack the objectivity the endorsement test requires.

**Leah's and Ahmed's Establishment Claim.** Leah and Ahmed contend, in addition, that the concert violates the establishment clause because it discriminates between religious sects. Citing *Larson v. Valente*, they argue that the Glee Club's failure to acknowledge Judaism or Islam by inclusion of melodies that evoke Hanukah and Ramadan renders the entire concert program an establishment clause violation. This contention is, at bottom, an argument that any governmental message that includes any religious content must include all possible religious content. It is a variant on the theme developed by the Supreme Court in the Allegheny County cases, in which the Court upheld the exhibition of a menorah because it was accompanied by symbols of other religious faiths. But these cases did not establish the principle that religious imagery of one faith must be accompanied by imagery of other faiths in order to be valid. *Lynch v. Donnelly* disproves that contention, by upholding Pawtucket's display of a creche. True, the creche was surrounded by secular symbols of the Christmas season, and inclusion of those symbols may be critical to its validity under either *Lemon* or the endorsement test. However, those tests have been satisfied here because of the inclusion of secular tunes. There is little difference between this case and *Lynch*.

The plaintiffs cannot compel the government to deliver its preferred message. That might be so if the government's message was religious, but then the concert would fail the endorsement test, if not *Lemon*. But, as discussed above, the government's message is not religious.

**Free Exercise Claim.** This claim fails because there is no coercion present. Nobody is

*forced to join the Glee Club. Nobody is forced to attend its concerts. The High School opens the doors of the Glee Club to all students, and permits them to volunteer or not, as they choose. The High School does nothing through its Glee Club to inhibit religious conduct. At most, the Glee Club prefers a medley of traditional Christmas music to other choices for its “Advent of Winter” concert, but that selection does not impinge on the freedom of students to engage in whatever religious conduct they choose. Nor is this claim a “hybrid” claim; there is no credible speech or associational right that is impinged by the Glee Club’s program selections. This claim is without merit.*

*Summary judgment on all claims shall be entered in favor of defendant Warren Harding High School and its Glee Club.*