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Context Is King: A Perception-Based Test for Evaluating Government Displays of the Ten Commandments

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Notes

CONTEXT IS KING: A PERCEPTION-BASED TEST FOR EVALUATING GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS

I. INTRODUCTION

From the moment Moses bore them down from the fiery pinnacle of Mt. Sinai, the Ten Commandments[1] played an omnipresent role in the development of law: first in the ancient Hebraic tradition and later in the modern Western one as well.[2] Since the beginning of the American na-

1. *See Exodus* 19:18-20:18 (King James) (laying out Ten Commandments). The full text of the Commandments found at Exodus 20:1-17 reads:

> And God spake all these words, saying, I am the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage.
>
> Thou shalt have no other gods before me.
>
> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; And shewing mercy unto thousands of them that love me, and keep my commandments.
>
> Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain.
>
> Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it.
>
> Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.
>
> Thou shalt not kill.
>
> Thou shalt not commit adultery.
>
> Thou shalt not steal.
>
> Thou shalt not bear false witness against thy neighbour.
>
> Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.

Id.; *see also Deuteronomy* 5:8-21 (stating alternative version of Commandments).

2. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion) (acknowledging that "[t]here is an unbroken history of official acknowledgment . . . of the role of religion in American life from at least 1789" (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984))); Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. PUB. POL'Y 609, 615 & nn.30-31 (listing authorities, including U.S. presidents,

tion, the stone-etched ideals of the Commandments have influenced the legal structures that govern both the religious and the nonreligious alike.[3] Paying homage to this heritage, over two hundred displays bearing the Commandments currently stand on public land throughout the United States.[4]

Yet as much as the Ten Commandments specifically—and religion generally—have molded Western civilization, so too have values of religious freedom driven the emergence of the modern legal conscience.[5] The value of religious freedom has enabled the growth of religious diversity.[6] Yet with this growth has risen a concern about the propriety of government-sponsored displays of the Commandments, particularly in a nation

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that have acknowledged importance of Decalogue to Western law). *See generally* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA (2003) (tracing religious influences on American society from Reformation through Puritan communities to early nineteenth century).

3. *See* LAMBERT, *supra* note 2, at 1 (summarizing commitment of New England Puritans to society founded on faith in God). Lambert notes that the Puritans of the Massachusetts Bay Colony drafted a constitution rooted in faith in the "Allmighty God." *See id.* (noting that Puritans believed that "the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Government established according to God"). Their neighbors in Connecticut drafted a similar document that created a "Christian Commonwealth" to be a "City upon a Hill." *See id.* (discussing what colony founders perceived as divine purpose of their settlement). Yet Lambert also notes that America's religious past extends as far back as the Reformation and the age of faith—and conflict—that emerged from it. *See id.* at 45 (describing how Reformation influenced religious groups that would later play central role in development of American heritage).

4. *See* Robert Preer, *Ten Commandments Get an Indiana Niche*, BOSTON GLOBE, July 31, 2005, at A6 (stating that Fraternal Order of Eagles donated many of over two hundred monuments to local governments). Interestingly, many displays were inspired by the 1956 movie *The Ten Commandments*. *See id.* (noting origin of displays).

5. *See* Abington v. Schempp, 374 U.S. 203, 214 (1963) (suggesting that history of religious persecution against forebears of American founders has deeply influenced development of modern society).

6. *See* Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2005 CATO SUP. CT. REV. 159, 176 (describing religious diversity in America since Founding). Even at the time of the Founding, Hamilton states, religious diversity was far from non-existent in America, with deists, Roman Catholics, Jews and numerous Protestant sects all well-represented by 1789. *See id.* (listing various religious groups present in America at Founding). Religious diversity did not necessarily equate to religious tolerance, however. *See id.* at 176-77 (noting that although many of religious groups present at time of Founding had come to America because they were oppressed in Europe, they did not govern their new settlements under attitude of religious tolerance). As the importance of both diversity and tolerance grew throughout American history, the Court has become more concerned with the religious protections secured by the Establishment Clause of the First Amendment. *See id.* at 177-78 (noting that rise in religious tolerance equated to rise in importance of Establishment Clause).

where anyone may freely worship or not worship, evangelize or not evangelize, believe in God or disbelieve.[7]

It was amidst these concerns that in June 2005 the Supreme Court issued opinions in *Van Orden v. Perry*[8] and *McCreary County v. ACLU*;[9] two cases challenging public displays of the Ten Commandments.[10] The decades prior to these decisions witnessed a series of First Amendment Establishment Clause cases advancing both abstract theories and practical approaches for determining the constitutionality of Ten Commandments displays and other religiously influenced government actions.[11] Despite arguable facial inconsistency, *Van Orden* and *McCreary* suggest a continuation of the trend toward contextual analysis as the primary consideration in Establishment Clause cases.[12] Together, these decisions suggest a two-part context-based test that focuses on the perceived religious message that the Commandments display communicates rather than an abstract examination of the government purpose behind it.[13]

This Note discusses Establishment Clause precedent as it applies to Ten Commandments cases and suggests a two-part context-based test to define the framework within which to evaluate Commandments displays.[14]

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7. *See* Jay Tolson, *Divided, We Stand*, U.S. NEWS & WORLD REP., Aug. 8, 2005, at 42 (observing that as of 2000, it is estimated twenty-nine million Americans espoused no religion, up from only fourteen million in 1990).

8. 125 S. Ct. 2854 (2005) (plurality opinion).

9. 125 S. Ct. 2722 (2005).

10. *See generally McCreary*, 125 S. Ct. at 2745 (requiring removal of Commandments displayed on wall of courthouse); *Van Orden*, 125 S. Ct. at 2864 (allowing Commandments monument to remain on grounds of state capitol complex).

11. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (announcing three-prong Establishment Clause test that considers government purpose, effect of challenged act and entanglement with religious organization when determining constitutionality of display); Hunt v. McNair, 413 U.S. 734, 741 (1973) (characterizing criteria of test announced in *Lemon v. Kurtzman* as "no more than helpful signposts" in Establishment Clause analysis); Lynch v. Donnelly, 465 U.S. 668, 688, 690 (1981) (O'Connor, J., concurring) (proffering endorsement test, which evaluates whether reasonable observer would perceive improper government endorsement of religion in display); Allegheny v. ACLU, 492 U.S. 573, 594 (1984) (adopting endorsement test when considering Establishment Clause issues); Zelman v. Simmons-Harris, 536 U.S. 639, 652-53 (2002) (holding that no Establishment Clause violation exists if individuals have private choice to avoid exposure to religious content).

12. *See* Ian Heath Gershengorn, *Lingering Uncertainty*, NAT'L L.J., Aug. 3, 2005, at 8 (observing that, although Ten Commandments cases are "highly contextual," there is little conflict among lower courts in applying context-based tests, as indicated by Supreme Court's affirmance of different courts of appeals in *Van Orden* and *McCreary*). *But see* Martha McCarthy, *The Ten Commandments on Trial*, 194 EDUC. L. REP. 473, 484 (2005) (suggesting that Supreme Court would have had to strike Texas monument as well as Kentucky courthouse displays in order to remain consistent with precedent).

13. For a discussion of the context-based test and arguments in favor of adopting it, see *infra* notes 151-82 and accompanying text.

14. For a discussion of the evolution of Establishment Clause decisions, see *infra* notes 19-110 and accompanying text. For an explanation of the context-

Part II of the Note summarizes the Establishment Clause precedent over the past forty years.[15] Part III describes the facts of *Van Orden* and *McCreary* and presents the Court's rationale in each case.[16] Part IV proposes a two-part context-based test for examining the constitutionality of Ten Commandments displays.[17] Part V examines the benefits of the context-based test and describes how it allows one to interpret *Van Orden* and *McCreary* as an extension of the Court's context-based approach to Establishment Clause issues.[18]

II. WHEN LIFE GIVES YOU LEMONS: THE ESTABLISHMENT CLAUSE TEST IN *LEMON V. KURTZMAN* AND THE COURT'S DIFFICULTY IN CONSISTENTLY APPLYING IT

A. *The* Lemon *Test*

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion."[19] In 1971, the

based test proposed by this note and its interaction with current precedent, see *infra* notes 151-67 and accompanying text.

15. For a discussion of Establishment Clause precedent, see *infra* notes 19-110 and accompanying text.

16. For a discussion of *Van Orden* and *McCreary*, see *infra* notes 111-50 and accompanying text.

17. For a description of the proposed context-based test, see *infra* notes 151-67 and accompanying test.

18. For analysis of the context-based test and its application to future Establishment Clause cases, see *infra* notes 168-82 and accompanying text.

19. U.S. CONST. amend. I. The Supreme Court has repeatedly held that the Establishment Clause requires the government to remain neutral toward religion. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) (acknowledging importance of neutrality in religion cases). *Rosenberger* held that a university's distribution of funds to a religious student organization for publication of a religious newsletter would be neutral toward religion because the university also provided similar funding to all student groups regardless of religious status. *See id.* at 824-26 (describing university's funding policy toward student groups). Thus any benefit conferred upon religion was merely incidental to the neutral allocation of funds. *See id.* at 843-44 (allowing governmental funding of practice that conferred only incidental benefit on religion); *cf.* Kiryas Joel v. Grumet, 512 U.S. 687, 690 (1994) (acknowledging role of neutrality in Establishment Clause analysis); Abington v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) (same); Everson v. Ewing, 330 U.S. 1, 15-16 (1947) (same).

This principle of neutrality essentially requires the government neither to inhibit nor to endorse a religious or irreligious creed. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (describing practical implication of principle of neutrality). *Epperson* further stated: "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.*; *cf.* Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (stating "the First Amendment embraces the right to select any religious faith or none at all"). *But see id.* at 83 (O'Connor, J., concurring) (questioning ability of government to ever be fully neutral as well as desirability of obtaining full neutrality even if possible); Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 407 (2000) (noting in essay on comparative religion law among several European nations and United States that, while religion-neutral government mini-

Supreme Court decided the seminal Establishment Clause case of *Lemon v. Kurtzman*.[20] *Lemon* was the Court's first significant attempt to create an elemental test for determining a violation of this Clause.[21]

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mizes conflict centered around religious sectarianism, such strict neutrality is difficult to create or maintain). Muehlhoff notes that the traditional American notion of strict separation of church and state is not synonymous with strict government neutrality toward religion, under which the "government would be forbidden to utilize religion as a standard for action or inaction because the religious clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." *Id.* at 412. (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 1155 n.1 (2d ed. 1988)). Strict neutrality that could be inferred from the Establishment Clause has never been instituted in the American governmental system because the Free Exercise Clause guarantees that the government will not restrict the practice of religion. *See id.* (explaining incompatibility of strict neutrality with American judicial system).

For a discussion of the interplay between the Establishment and Free Exercise Clauses, see *United States v. Means*, 858 F.2d 404, 407-08 (8th Cir. 1988) (outlining summary of Free Exercise Clause jurisprudence); Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 304-07 (1994) (articulating arguments that attempt to reconcile conflicting ideals of Free Exercise and Establishment Clauses and acknowledging challenges in doing so); Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686-90 (1992) (describing benefits of religious accommodation, theory that Religion Clauses require removal of impediments to religious expression without inducing religious observance); Thomas F. Lamacchia, Note, *Reverse Accommodation of Religion*, 81 GEO. L.J. 117, 127-28 (1992) (discussing interplay between Religion Clauses).

Yet beyond paying nominal homage to the principle of neutrality, the Court generally does not conduct an extensive analysis based upon it. *See* Lemon v. Kurtzman, 403 U.S. 602, 618 (1971) (acknowledging importance of neutrality but conducting Establishment Clause analysis based upon newly announced three-prong test). *But see, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 634, 653 (2002) (granting much weight to considerations of neutrality in Establishment Clause analysis); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) (same); *Rosenberger*, 515 U.S. at 839 (same). *Lemon* acknowledged that a challenged funding scheme that funneled government monies to private religious schools for religion-neutral use could not be administered with true neutrality. *See Lemon*, 403 U.S. at 606-08, 618 (explaining why challenged statutes ran afoul of Constitution). Yet the Court reached this holding not by undertaking an analysis of pure neutrality, but by announcing a test premised upon, *inter alia*, the government intent behind the statute and the effects of it. *See id.* at 612-13 (using standards from previous cases to create three-criterion Establishment Clause test). Thus, instead of adopting a pure neutrality based approach to Establishment Clause cases, Supreme Court precedent has instead developed a number of tests for adjudicating the constitutionality of a government act. *See infra* notes 19-110 and accompanying text (describing various Establishment Clause tests).

20. 403 U.S. 602 (1971).

21. *See* Dan Mbulu, *First Amendment: Extending Equal Access to Elementary Education in the Aftermath of* Good News Club v. Milford Central School, 16 REGENT U. L. REV. 91, 102 (2004) (noting that *Lemon* was first time Court articulated now-traditional three-part test used in Establishment Clause cases); Anne E. Stockman, Comment, ACLU v. Black Horse Pike Regional Board of Education: *The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1812 (1999) (same). The Court had, of course, considered establishment issues before. *See, e.g.*, Engle v. Vitale, 370 U.S. 421, 436 (1962) (invalidating state law mandating that prayer be held in public schools); McGowan v. Maryland., 366 U.S. 420, 452-53 (1961) (upholding

1. *The Facts of* Lemon v. Kurtzman

In *Lemon* the Court consolidated two cases involving challenges to education funding statutes.[22] Two state legislatures enacted laws allowing the state government to essentially compensate private schools for their educational services.[23] Religious schools were included among those institutions that received state funding from the program.[24] The two statutes spurred an Establishment Clause challenge despite provisions in both statutes that prevented public funds from supporting any expressly religious component of a private school's curriculum.[25]

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law requiring closure of retail stores on Sunday because purpose of law was to encourage day of rest and rejuvenation); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (upholding constitutionality of statute authorizing public school students to be released from class for purposes of religious instruction); Everson v. Ewing, 330 U.S. 1, 18 (1947) (upholding resolution of local school board to provide publicly funded busing of schoolchildren to parochial schools). Yet *Lemon* nonetheless represents the Court's first attempt to create a unified test for application of the Establishment Clause. *See* Stockman, *supra* at 1812-13 (declaring that *Lemon* represented first comprehensive test for Establishment Clause issues).

22. *See Lemon*, 403 U.S. at 606-08 (describing Pennsylvania and Rhode Island statutes that allowed public funds to be directed to both religious and nonreligious private schools).

23. *See id.* (outlining structure of challenged statutory programs). The state legislatures had chosen to provide funding because private schools relieved strain on the public education system by decreasing enrollment at public schools. *See id.* (noting purpose of statutes was to compensate private schools for benefit rendered to public education system).

24. *See id.* at 607-10 (noting that both religious and nonreligious institutions benefited from states' programs). Because many private schools in Rhode Island and Pennsylvania substantially eased the strain on the states' public education systems, the two states devised payment systems by which private schools, including religious ones, received state aid for their services. *See id.* at 607, 609. The Rhode Island statute permitted the state to supplement the salaries of teachers at private institutions that met a per-pupil expenditure criterion by up to fifteen percent of the teachers' salary. *See id.* at 607. The supplemental income was paid directly to the teachers; the schools themselves were never parties to the transaction. *See id.* In order to receive the salary supplement, the state required a teacher to refrain from teaching any course in religion for the duration that the teacher received the salary benefit. *See id.* at 608 (acknowledging that Rhode Island had attempted to prevent public funds from supporting religious activities).

Pennsylvania enacted a statute for similar purposes but instead made payments directly to the schools. *See id.* at 609. The schools could then use the funds for expenses such as teachers' salaries, textbooks and instructional materials. *See id.* Reimbursement was available only for certain courses traditionally taught in the public schools, such as mathematics, modern foreign language, sciences and physical education. *See id.* at 610. All materials purchased with state money required the approval of the state Superintendent of Public Education. *See id.* Like the Rhode Island statute, the Pennsylvania statute prohibited the schools from using state monies to fund any course containing "subject matter expressing religious teaching or the morals or forms of worship of any sect." *Id.* Both statutes included auditing provisions requiring the schools to submit accountability reports to the state. *See id.* at 620-21 (describing accountability structures imposed by statutes).

25. *See id.* at 610-11. (noting that teachers of courses with religious content were barred from both programs). Taxpayers challenged both statutes on Estab-

2. *Formulating a Test for Establishment Clause Violations: The Supreme Court's* Lemon *Opinion*

The Court devised a three-part test composed from standards used to decide previous Establishment Clause cases.[26] To comply with the Establishment Clause, a government action: (1) must have a secular legislative purpose, (2) must have a primary effect that neither advances nor inhibits religion and (3) may not create "'an excessive government entanglement with religion.'"[27]

Purpose, the first criterion of the *Lemon* test, examines the governmental intent underlying the enactment of a certain statute or the undertaking of a certain action.[28] Purpose includes the "avowed" intent stated by the government as well as the contextual appearance of intent determined by the circumstances surrounding the government's action.[29] A nominal governmental statement of secular purpose will not satisfy the criterion if circumstances indicate some other religious intent behind the display.[30] The purpose analysis is largely objective in nature, determined from the government's perspective of its intent in undertaking an action.[31] In *Lemon*, the Court found no improper purpose underlying the states' enactment of the funding schemes.[32]

The effect criterion of the test requires that the challenged government act have a primary effect that neither advances nor inhibits religion.[33] This does not mean that the government action may have no

lishment Clause grounds, arguing that the laws violated First Amendment principles of church-state separation. *See id.*

26. *See id.* at 612-13 (describing cases upon which Court predicated *Lemon*). The primary sources of the *Lemon* test are *Board of Education of Central School District v. Allen*, 392 U.S. 236 (1968) and *Walz v. Tax Commission*, 397 U.S. 664 (1970). *See Lemon*, 403 U.S. at 612-13 (noting precedent for *Lemon* ruling). For an explanation of how these cases relate to the *Lemon* test, see *infra* notes 31, 33, 37 and 39.

27. *Lemon*, 403 U.S. at 612-13 (quoting *Walz*, 397 U.S. at 674).

28. *See* Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) (describing purpose analysis under *Lemon* test).

29. *See id.* at 41 (holding that stated secular purpose is not sufficient to justify display of Ten Commandments where government act itself belies religious purpose). In *Stone*, Kentucky required display of the Ten Commandments in public school classrooms for the stated purpose of representing the Commandments' influence on the Western legal tradition. *See id.* at 39 n.1 (laying out challenged statutory provisions). Nevertheless, the Court identified the Commandments as an inherently religious text; therefore, the very display of them acted as a call to children and teachers to read and accept their religious dictates. *See id.* at 42 (holding that mere display of Commandments had religious effect).

30. *See id.* at 41 (1980) (holding that "an avowed secular purpose is not sufficient to avoid conflict with the First Amendment") (internal quotations omitted).

31. *See Allen*, 392 U.S. at 243 ("[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.").

32. *See Lemon*, 403 U.S. at 613 (noting that in *Lemon* there was "no basis for a conclusion that the legislative intent was to advance religion").

33. *See Allen*, 392 U.S. at 243 (explaining requirements of purpose and effect analysis, which Court included in *Lemon* test).

religious effect whatsoever; it simply means that the primary effect must be secular.[34] Incidental secondary benefits bestowed on religion will not give rise to an Establishment Clause violation.[35] In *Lemon*, the Court declined to reach the issue of whether the challenged statutes had the improper primary effect of aiding religion, instead focusing its analysis on the final criterion of its newly announced *Lemon* test.[36]

This final criterion requires that the government action create no excessive entanglement between governmental and religious institutions.[37] Under *Lemon*, government entanglement occurs in primarily two ways.[38] First, entanglement may result from continuous and oppressive government monitoring of religious organizations.[39] The Court held that the

34. *Cf.* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 843 (1995) (analogizing that government act may have effect of benefiting religious group so long as beneficial effect is not primary effect of statute).

35. *See* Wallace v. Jaffree, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("We have not interpreted the [purpose] prong of *Lemon* . . . as requiring that a statute has exclusively secular objectives.") (internal quotation and citation omitted); *cf. Rosenberger*, 515 U.S. at 843 (suggesting that if public university were to provide general access to printers and copiers and religious organizations utilized that service, no constitutional violation would occur because benefit received by religious organizations is incidental to legitimate secular purpose of providing means for expression of ideas).

36. *See Lemon*, 403 U.S. at 613 (declining to conduct effects analysis and instead focusing inquiry in *Lemon* on impermissible government entanglement with religion).

37. *See id.* at 613 (announcing entanglement prong of *Lemon* test); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (stating that to meet guarantees of Establishment Clause, government action may not constitute "excessive government entanglement" with religion); *cf.* Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (stating that only certain forms of entanglement are unconstitutional). *Lynch* stated that "[e]ntanglement is a question of kind and degree." *Id.* In order to rise to the level of unconstitutional entanglement under the Establishment Clause, the interaction between government and religious organizations must rise to the level of pervasive oversight or meddling. *See id.* Government interaction permitted under the first two criteria of the *Lemon* test will not become impermissible under the final criterion simply because the action creates public controversy; administrative intermingling between governmental and religious organizations must exist in order for the government act to run afoul of this element of the test. *See id.* (noting that more than public discord is necessary for finding of unconstitutional entanglement).

38. *See Lemon*, 403 U.S. at 620 (observing that rigorous and continual state inspection that would be necessary to administer funding programs would unconstitutionally entangle government oversight with activities of religious organizations); *see also* Agostini v. Felton, 521 U.S. 203, 233 (1997) (noting that "[i]nteraction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two"); Marsh v. Chambers, 463 U.S. 783, 798-99 (1983) (Brennan, J., dissenting) (stating that only overbearing government monitoring of religious organizations satisfies entanglement element of *Lemon* test).

39. *See Lemon*, 403 U.S. at 614-15 (describing entanglement); *see also Walz*, 397 U.S. at 674-75 (holding that in case challenging tax exemption granted to religious institutions, either upholding tax exemption or subjecting churches to government taxation involved some degree of entanglement, but that only administrative

statutes in *Lemon* violated this entanglement criterion by creating an unacceptable paradox.[40] Under the statutory schemes, the states could not provide funding to religious entities without also requiring oversight because such a lack of accountability would run the risk that the institutions would spend public funds on religious activities.[41] Yet neither could the states create an oversight system because doing so would excessively meddle in the affairs of religious organizations.[42]

The second way that government may violate the entanglement criterion of the *Lemon* test is by performing an action that creates the potential for political divisiveness.[43] Though the Court did not elaborate upon this form of political entanglement, its later decisions explain that unconstitutional divisiveness surpasses mere public difference of opinion over how the government acts.[44] The divisive entanglement required is institutional in nature.[45] Unconstitutional divisive entanglement requires excessive interaction between government and the administration of a religious organization causing intricate intertwining of the two institutions.[46] Public

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oversight necessary to tax churches rose to level of impermissible entanglement barred by First Amendment).

40. *See Lemon*, 403 U.S. at 619-21 (explaining how statutes violated Establishment Clause via government entanglement).

41. *See id.* at 620-21 ("[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state.").

42. *See id.* at 627 (Douglas, J., concurring) (acknowledging that unsupervised grants run unconstitutional risk of government monies being used for religious instruction and that supervision necessary to police such grants creates unconstitutional risk of excessive entanglement between religion and government).

43. *See id.* at 622 (suggesting that potential for political divisiveness is impermissible under entanglement prong of *Lemon* test). In determining whether entanglement has occurred, the Court noted that factors such as the "character and purposes of the institutions that are benefited, the nature of the aid that the [government] provides, and the resulting relationship between the government and the religious authority" are key to the entanglement analysis. *See id.* at 615. Further, the Court held that programs that could be construed as government-sanctioned funding of religion have the potential to create political sectarianism, an evil that the First Amendment sought to avoid. *See id.* at 622 (describing objectives of First Amendment). The Court noted: "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.*

44. *See* Agostini v. Felton, 521 U.S. 203, 233-34 (1997) (suggesting that political divisiveness must derive from institutional entanglement in order to render government act unconstitutional); Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (questioning whether political divisiveness without component of institutional entanglement is impermissible under *Lemon* test).

45. *See Agostini*, 521 U.S. at 233-34 (holding that "[u]nder our current understanding of the Establishment Clause, the [potential to create political divisiveness is] insufficient by [itself] to create an excessive entanglement") (internal quotation omitted).

46. *See Lynch*, 465 U.S. at 689 (O'Connor, J., concurring) ("[T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.").

controversy alone is not sufficient to declare an act of government unconstitutional under *Lemon*.[47]

3. *Application of the* Lemon *Test*

Theoretically, a statute or government action must meet all three of the *Lemon* criteria to avoid violating the Establishment Clause.[48] In reality, however, the Court has sometimes applied the complete test, sometimes applied only the purpose criterion and sometimes used various combinations of the *Lemon* criteria in examining Establishment Clause cases.[49] In the years since *Lemon*, the Court has applied the test in several significant

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In recent years the Court has altered the *Lemon* test slightly by acknowledging that entanglement and effect are really two blades of the same sword. *See Agostini*, 521 U.S. at 233 (observing that Establishment Clause inquiry is simplified by folding entanglement criterion into effect criterion of *Lemon* test). Since *Agostini*, many lower courts that have applied the *Lemon* test have considered entanglement an indication that the effect of a particular government act may be primarily religious and therefore unconstitutional. *See, e.g.*, Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1284-85 (11th Cir. 2004) (analyzing entanglement as subcomponent of effect issue); Steele v. Indus. Dev. Bd., 301 F.3d 401, 415 (6th Cir. 2002) (same); Freedom from Religion Found. v. Bugher, 249 F.3d 606, 611 (7th Cir. 2001) (same); DeStefano v. Emergency Hous. Group, 247 F.3d 397, 406, 413-14 (2d Cir. 2001) (noting that *Agostini* fused entanglement and effects prongs of *Lemon* test and remanding case for further determination of whether public funds were used improperly to support religiously influenced Alcoholics Anonymous program); Keonick v. Felton, 190 F.3d 259, 265 n.6 (4th Cir. 1999) ("*Agostini* also suggests that in some contexts the entanglement inquiry be considered an aspect of the second 'effect' prong."); ACLU *ex rel.* Lander v. Schundler, 168 F.3d 92, 97-98 (3d Cir. 1999) (stating that injunction preventing Christmas display based solely on political divisiveness was improper in light of *Agostini*'s merged effects/entanglement analysis); Stark v. Indep. Sch. Dist., 123 F.3d 1068, 1073 (8th Cir. 1997) (conducting *Lemon* analysis under merged effect/entanglement question).

47. *See Lynch*, 465 U.S. at 689 (1984) (O'Connor, J., concurring) (proffering rule that excessive entanglement must be institutional—not merely popular—in nature before Establishment violation arises). In *Lynch*, Justice O'Connor distinguished between popular and institutional entanglement. *See id.* (describing various kinds of entanglement). While popular controversy over a decision may contribute to the determination of whether a government act is constitutional, such controversy alone will not render such a holding. *See id.* (noting that political controversy alone cannot create constitutional violation).

48. *Cf.* Mueller v. Allen, 463 U.S. 388, 390-408 (1983) (upholding Minnesota statute allowing parents to deduct educational expenses related to their children's attendance at religious schools after noting that challenged statute had met all three elements of *Lemon*); Mayweathers v. Newland, 314 F.3d 1062, 1068-69 (9th Cir. 2002) (conducting complete three-part *Lemon* analysis).

49. *See* Dokupil, *supra* note 2, at 623 (noting Establishment Clause cases over past twenty years have tended toward effect-only analysis); Paul Earl Pongrace, III, *Justice Kennedy and the Establishment Clause: The Supreme Court Tries the Coercion Test*, 6 U. FLA. J.L. & PUB. POL'Y 217, 217 & n.2 (1994) (noting that *Lemon* test has been inconsistently applied and providing examples of illogical results thereof).

As Dokupil notes, the Court has consistently drifted away from the purpose-based analysis of government intent toward an effect-only analysis and more recently toward conducting the analysis of the reasonable observer. *See* Dokupil, *supra* note 2, at 622-23 (observing that Court's focus on effects test in *Lynch* and *Allegheny* calls into question continuing validity of *Lemon*). For a discussion of the

cases.[50] Yet as often as the Court has applied the test, it has expressed equal ambivalence with the test's helpfulness on other occasions.[51] In fact, the Court has sometimes forgone a *Lemon* analysis altogether.[52]

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importance of the reasonable observer in more recent Establishment Clause cases, see *infra* notes 53-110 and accompanying text.

50. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56-60 (1985) (holding that statute requiring moment of silence at beginning of public school day violated purpose criterion of *Lemon* because legislature acted with intent to encourage prayer and religious meditation); *Mueller*, 463 U.S. at 390-408 (upholding tax deduction for educational expenses related to children's attendance at religious schools); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (per curiam) (holding that *Lemon* required removal of Ten Commandments displays from public school classrooms).

Stone was the most recent Supreme Court decision addressing Ten Commandments issues prior to *Van Orden* and *McCreary*. The case, in which the Court summarily reversed the court of appeals without granting oral argument or allowing the parties to brief the merits of the case, concerned a Kentucky statute requiring the display of the Ten Commandments in public school classrooms. *See Stone*, 449 U.S at 39 n.1 (supplying text of challenged statute). The statute required the posting of privately funded displays whenever the state received sufficient voluntary contributions to purchase them. *See id.* (noting that displays were technically privately funded). The Court held that the Commandments "do not confine themselves to arguably secular matters" and that posting them on classroom walls could serve only to induce meditation on their religious message. *See id.* at 41-42 (holding that Commandments were inherently sacred in nature). The displays therefore violated the purpose element of the *Lemon* test, and the Court mandated that they be removed. *See id.* at 42-43.

51. *See* Santa Fe Indep. Sch. Dist v. Doe, 530 U.S. 290, 319-20 (2000) (Rehnquist, C.J., dissenting) (observing that *Lemon* has had "checkered career" in subsequent Establishment Clause cases); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (expressing frustration that Court continues to apply *Lemon* despite precedent indicating that Establishment Clause jurisprudence has become controlled by other tests); Hunt v. McNair, 413 U.S. 734, 741 (1973) (describing *Lemon* elements as "no more than helpful signposts" in Establishment Clause analysis). In *Lamb's Chapel*, Justice Scalia colorfully explained his distress over *Lemon*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . Over the years . . . no fewer than five of the [then] currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

Lamb's Chapel, 508 U.S. at 398 (Scalia, J., concurring).

52. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (employing neutrality analysis to find constitutional program that compensated parents in failing school districts for tuition paid to send children to religious or other private institution); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114-15 (2001) (engaging in neutrality analysis to hold that denial of after-school access to classrooms to Christian instruction program for children was unconstitutional because district program permitting private organizations to use school facilities maintained neutrality toward religion); Marsh v. Chambers, 463 U.S. 783, 790-93 (1983) (forgoing *Lemon* analysis and relying on historical justification for upholding state salary paid to Presbyterian chaplain who opened each legislative day with prayer); Larson v. Valente, 456 U.S. 228, 252 (1982) (refusing to apply *Lemon* because statute at issue favored specific denomination and explaining that *Lemon* applied only

B. *The Endorsement Test: Justice O'Connor Revises the* Lemon *Approach*

Against a spotty application of the *Lemon* doctrine, Justice O'Connor's concurrence in *Lynch v. Donnelly*[53] first proposed an alternative Establishment Clause analysis that would later become a significant rival to *Lemon*.[54] In *Lynch*, the city of Pawtucket, Rhode Island, sponsored a crèche, which was seasonally erected in a privately owned park in the city's downtown district.[55] Other secular holiday décor, such as Christmas trees, candy canes and reindeer, appeared alongside the crèche.[56]

After recognizing that no bright lines exist in the area of Establishment Clause law, the majority stated that *Lemon* attempts to impose some broad boundaries in the midst of this ambiguity.[57] Yet the majority applied only the purpose and entanglement criteria of the *Lemon* test, leaving effect issues unaddressed.[58] In further breaking with *Lemon*, the majority evaluated the context of the display, determining that it communicated no message of government endorsement of a religious creed and was therefore acceptable.[59]

1. *The Advent of the Endorsement Test: Justice O'Connor's Concurrence in* Lynch v. Donnelly

In her *Lynch* concurrence, Justice O'Connor expressed discontent with *Lemon*, noting that it had been difficult both to apply the abstract

to acts that provided uniform benefit to all religions); *cf.* McCarthy, *supra* note 12, at 484 (noting that majority of Supreme Court justices at time of publication of article had questioned continued applicability of *Lemon* test).

53. 465 U.S. 668 (1984).

54. *See id.* at 687-88 (O'Connor, J., concurring) (laying out factors of endorsement test).

55. *See id.* at 671 (describing challenged display). The city had owned the nativity display for over forty years and had annually sponsored it. *See id.* The nativity featured traditional figures, including the infant Christ, Mary, Joseph, shepherds, Magi, angels and stable animals. *See id.* The figures ranged in height from five inches to five feet. *See id.* The city incurred costs of about twenty dollars per year setting up and removing the display and the nominal cost of lighting it at night. *See id.*

56. *See id.* (noting contents of display). The court described the extent of the challenged display in the following way:

> The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here.

Id.

57. *See id.* at 678-79 ("In each [Establishment Clause] case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed.").

58. *See id.* at 681-84 (discussing at length purpose and entanglement issues implicated by display but leaving effects unaddressed).

59. *See id.* at 680 (determining that evidence was insufficient to warrant conclusion of improper governmental purpose).

criteria of the test and to explain the relationship between the purpose/effect/entanglement analysis and the values of religious freedom in the First Amendment.[60] Though Justice O'Connor proposed a revision of the *Lemon* test, she first made several observations about the nature of government acts barred by the Establishment Clause.[61] These observations would later provide a base for the development of the endorsement test.[62]

Establishing the foundation for later endorsement test jurisprudence, Justice O'Connor stated that improper government establishment of religion can take two primary forms.[63] First, the establishment may constitute an excessive government entanglement with religion, which may compromise the independence both of the interfering government organization and of the religious institution subject to meddling.[64] Second, government may more directly interfere with religion by actively communicating an endorsement or disapproval of a religious or irreligious creed—the foundational premise of the endorsement test.[65]

The endorsement test is measured by the standard of a reasonable observer.[66] According to Justice O'Connor, "[e]ndorsement sends a mes-

60. *See id.* at 688-89 (O'Connor, J., concurring) (noting that logical relationship (if one exists) between *Lemon* test and First Amendment values has been difficult for Court to explain).

61. *See id.* at 688 (discussing nature of Establishment Clause challenges to government action). For a description of Justice O'Connor's observations, see *infra* note 66.

62. *See* Allegheny v. ACLU, 492 U.S. 573, 594-600 (1989) (adopting endorsement test in plurality section of Court's opinion and reasonable observer inquiry in section of opinion joined by majority).

63. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (stating manner in which impermissible government establishment with religion can occur).

64. *See id.* (describing impermissible government *interaction* with religion).

65. *See id.* (discussing impermissible government *endorsement* of religion).

66. *See Allegheny*, 492 U.S. at 620 (stating that "constitutionality of [a display's] effect must . . . be judged according to the standard of a 'reasonable observer'") (internal quotations omitted); *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (suggesting that establishment inquiry should be conducted based on message government act sends to observers). Although most of Justice O'Connor's opinion proposed revisions to the *Lemon* test, consideration of the nonadherent's *perception* represents a significant shift in the approach to Establishment Clause issues. *See* Steven A. Seidman, County of Allegheny v. American Civil Liberties Union*: Embracing the Endorsement Test*, 9 J.L. & RELIGION 211, 226 (1991) (declaring that *Lynch* shifted focus away from awkward *Lemon* test and toward endorsement test, which could be more consistently and uniformly applied). Previously, the Court had overwhelmingly applied either the *Lemon* test or a neutrality analysis, both of which focus largely on governmental intent or an objective analysis of whether the government's action benefits or deters religion—essentially an effect analysis. *See supra* note 19 (discussing principle of neutrality and its effect on Establishment Clause jurisprudence); *see also* Seidman, *supra* at 217-19 (describing history of Establishment Clause cases decided before *Lemon*).

In support of this shift in perception, Justice O'Connor cited *Abington v. Schempp*, 374 U.S. 203, 205 (1963). *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (citing *Schempp* as precedent for principles undergirding endorsement test). In *Schempp*, two states required mandatory Bible readings at the beginning of each school day. *See Schempp*, 374 U.S. at 205 (describing provisions of statutes

sage to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[67] Unlike the *Lemon* test, which focuses on the government's *purpose* in acting and the effects thereof, the endorsement test shifts the focus to the *perspective* of those witnessing the government espousal of religion.[68]

Justice O'Connor's *Lynch* concurrence did not actually suggest that the endorsement test replace *Lemon* as the primary mode of Establishment analysis, though some commentators have observed that this is in practice what has happened.[69] Instead, Justice O'Connor essentially used this endorsement commentary as a prologue to a proposed revision of the *Lemon* test.[70] Yet her suggested *Lemon* revisions had a relatively minor effect on

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requiring Bible reading). The statutes faced an Establishment Clause challenge. *See id.* The Court held that statutory provisions allowing students to leave the room during the scripture readings could not mitigate the governmental establishment of religion that took place during those readings. *See id.* at 224-25 (holding opt-out provision provided no defense to unconstitutional statutory scheme). In deciding the case, the Court conducted a traditional analysis: though *Lemon* had not yet been issued, the *Schempp* Court announced its decisions by relying on a neutrality/purpose/effect inquiry. *See id.* at 222 (stating analytical framework for finding of unconstitutionality). The Court would later announce the latter two principles as formal components of the *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Yet *Schempp*, while not direct precedent for the endorsement test, nonetheless indicates that even before Justice O'Connor's *Lynch* concurrence, the Court expressed sensitivity to individuals who might feel like outsiders because of government intermeddling with religion. *See Schempp*, 374 U.S. at 224-25 (holding that statutes mandating Bible reading were "in direct violation" of plaintiffs' rights).

67. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (laying foundation for inquiry that would later become known as endorsement test).

68. *Cf. Allegheny*, 492 U.S. at 595-97 (using perception of reasonable observer rather than government purpose to evaluate nativity display).

69. *See* Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 290 n.60 (1998) (observing that *Lemon* has been replaced by endorsement test); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499, 508 (2002) (suggesting that, in practice, Court has abandoned *Lemon* test as "defunct" and that endorsement is becoming preferred inquiry).

70. *See Lynch*, 465 U.S. at 688 n.* (O'Connor, J., concurring) (admitting that Justice O'Connor intended to revise *Lemon* test by writing concurrence in *Lynch*). Justice O'Connor's discontent with the *Lemon* test sprung from the inability of over a decade of case law to describe how the purpose/effect/entanglement inquiry relates to and safeguards the values of religious freedom enshrined in the Establishment Clause. *See id.* at 688-89 (explaining why *Lemon* required revision).

Justice O'Connor's clarified version of *Lemon* sought to remedy this logical disconnect by altering the *Lemon* analysis in several ways. *See id.* at 689 (summarizing proposed reform to *Lemon* test). First, impermissible entanglement must be limited only to institutional entanglement between the administrations of government and religion. *See id.* at 689. Mere potential for political divisiveness is not sufficient to constitute entanglement unless accompanied by excessive institutional interaction between government and religion. *See id.* Second, purpose must focus on whether the government intends to "convey a message of endorsement or dis-

the Court's analysis of Establishment Clause cases.[71] Her commentary on the endorsement of religion, however, spawned an entirely new mode of analysis that has become an often-applied test in establishment cases.[72]

2. *Endorsement Endorsed:* Allegheny v. ACLU *and the Rise of the Reasonable Observer*

The official adoption of the endorsement test came in 1989 with the issuance of the Court's opinion in *Allegheny v. ACLU.*[73] *Allegheny* involved challenges to two Christmas holiday displays on government-owned property.[74] The first display was a privately owned nativity erected by Allegheny County, Pennsylvania, in the foyer of the Grand Staircase in its county courthouse.[75] The display stood alone and functioned as a staging area

approval of religion." *Id.* at 691. This involves both objective analysis of the government's stated purpose as well as subjective analysis of the circumstances surrounding the challenged government act. *See id.* at 690. Finally, the crucial effect inquiry is whether the government practice has the effect of *communicating* a message of endorsement or disapproval of religion, which is different than the message itself having a religious effect. *See id.* at 691-92 (refining effect test to state that effect of display that does not communicate endorsement is not relevant to *Lemon* inquiry). An effect that incidentally renders a benefit to a religious group would be acceptable under Justice O'Connor's revised *Lemon* test provided that the message itself does not communicate approval or disapproval of religion. *Accord* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 843-44 (1995) (suggesting that benefit conferred on religion incidental to otherwise proper government act is not unconstitutional).

71. *See generally* Allegheny v. ACLU, 492 U.S. 573, 594-600 (1989) (adopting Justice O'Connor's formulation of endorsement test rather than her proposed revisions to *Lemon* test). Since the advent of the endorsement test, the federal courts of appeals have embraced it, applying the test in a variety of cases. *See, e.g.*, Buono v. Norton, 371 F.3d 543, 548 (9th Cir. 2004) (acknowledging relevance of endorsement test); Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 259 (3d Cir. 2003) (same); ACLU v. McCreary County, 354 F.3d 438, 446 (6th Cir. 2003) (same), *aff'd*, 125 S. Ct. 2722 (2005); Glassroth v. Moore, 335 F.3d 1282, 1297 (11th Cir. 2003) (same); Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2001) (same).

72. *See* Choper, *supra* note 69, at 505-08 (describing evolution of endorsement test into major analytical approach in Establishment Clause cases).

73. 492 U.S. 573 (1989).

74. *See id.* at 578 (noting that displays had been erected in courthouse in Allegheny County, Pennsylvania, and outside building shared by Allegheny County and City of Pittsburgh).

75. *See id.* at 579 (describing location of display). The display was owned and maintained by the Holy Name Society, a Roman Catholic religious organization. *See id.* (noting that county did not officially own display). A sign accompanied the display indicating its ownership. *See id.* at 580. Though the county did not own the crèche, the county provided red and white poinsettias, an evergreen tree and a fence to cordon the display from public access. *See id.* (stating that county had made several additions to church-owned parts of display). No figures or icons representing the secular dimensions of the Christmas holiday were present. *See id.* at 580-81 (commenting on non-secular nature of display). Together, the nativity, plants, and fence occupied a substantial amount of room around the Grand Staircase. *See id.* (observing that crèche commanded attention of all who walked past Great Staircase).

for the county's lunchtime Christmas carol program, which invited various musical groups to perform during the holiday season.[76] Residents, aided by the ACLU, challenged the constitutionality of the crèche displayed on publicly owned property.[77]

The second display challenged in *Allegheny* sat on property jointly owned by Allegheny County and the City of Pittsburgh.[78] Every year, the city placed a large Christmas tree outside a building shared by the two governments.[79] A sign accompanied the tree and bore the title "Salute to Liberty."[80] The display also included an eighteen-foot tall menorah in celebration of the Jewish holiday of Hanukkah.[81] The plaintiffs specifically challenged the constitutionality of the menorah in this display.[82]

a. The Plurality Opinion

A majority of the *Allegheny* Court agreed that the nativity display was improper.[83] But the majority could not agree on the proper analysis by

76. *See id.* at 581 (describing uses of Grand Staircase). The Staircase was the "most beautiful and most public" part of the courthouse. *Id.* at 579 (internal quotations omitted). The caroling program took place over the lunch hour each weekday for a three-week period. *See id.* at 581 (detailing uses to which county put area around crèche display). The plaintiffs did not challenge the constitutionality of the caroling program. *See id.* at 588 n.37 (noting scope of plaintiffs' constitutional challenges). The county dedicated the caroling program to world peace and to families of prisoners-of-war and soldiers missing in action from the war in Southeast Asia. *See id.* at 581 (recounting dedication attached to display).

77. *See id.* at 588 (summarizing plaintiffs' claim to permanently enjoin county from displaying crèche).

78. *See id.* at 581-82 (describing location of Christmas tree and menorah display). The display was situated outside the city's section of the building; however, the opinion does not indicate that the county was in any way involved with this display. *See id.*

79. *See id.* at 581-82 (noting that Christmas tree was approximately forty-five feet in height).

80. *See id.* at 582 (describing display). The "Salute to Liberty" sign read: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.*

81. *See id.* at 587. At eighteen feet in height, the menorah measured approximately half the size of the Christmas tree and was placed directly beside it. *See id.* The tree, menorah and sign composed the full extent of the display. *See id.* at 581-82 (noting that no other components were featured as part of holiday décor).

82. *See id.* at 587-88 (noting that plaintiffs sought to permanently enjoin city from displaying menorah). The plaintiffs did not challenge the constitutionality of the city's display of the Christmas tree. *See id.* at 588 n.37 (summarizing scope of plaintiffs' constitutional challenges).

83. *See id.* at 599-600 (holding that "by permitting 'the display of the crèche in this particular physical setting' . . . , the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message" (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)). Although Justice Blackmun could not muster a majority of the Justices to subscribe to his section of the opinion applying the endorsement test, a majority of the Court did agree that "[n]o viewer could reasonably think that [the crèche] occupies [its position on the Grand Staircase] without the support and

which to reach that determination.[84] In his opinion announcing the judgment of the Court, Justice Blackmun applied the endorsement test, as articulated by Justice O'Connor in *Lynch*.[85] Employing a similar context analysis, a majority allowed the tree and menorah display to remain.[86] In so holding, the Court, though not by a conclusive majority, placed its seal of approval on the endorsement test.[87]

b. Justice O'Connor's *Allegheny* Concurrence

In a concurring opinion in *Allegheny*, Justice O'Connor described with more specificity than the plurality the role of the reasonable observer and the display's context in the endorsement test analysis.[88] Stating that government endorsement depends on the specific context of each case, Justice O'Connor noted that, under certain circumstances, the government may constitutionally acknowledge religion.[89] Nevertheless, acknowledge-

approval of the government." *See id.* (finding majority support for proposition that reasonable observer would be incapable of believing that county did not impermissibly endorse religion by displaying nativity).

84. *See id.* at 593-97 (plurality opinion) (discussing plurality's application of Justice O'Connor's endorsement test to challenged display).

85. *See id.* (applying endorsement test to context to conduct analysis of crèche). Justice Blackmun opined:

> [T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. . . . [W]e must ascertain whether the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Id. at 597 (internal quotations omitted).

86. *See id.* at 620 (majority opinion) (upholding display outside building shared by city and county governments). A majority of the Court held that individuals were not "sufficiently likely" to perceive the tree and menorah display as a government establishment of religion. *Id.* (discussing rationale of Court's ruling). As such, the display was permitted to remain. *See id.* at 621.

87. *See id.* at 596-97 (plurality opinion) (acknowledging importance of endorsement test and display context in Establishment Clause cases).

88. *See id.* at 630-31 (O'Connor, J., concurring) (opining that reasonable observer is aware of history and religious implications of symbols incorporated in display). Though the Court had considered the reasonable observer in the past, *Allegheny* represents the seminal application of the Court's reasonable observer analysis. *See* Seidman, *supra* note 66, at 230-31 (describing evolution that took place when Justice Blackmun's plurality opinion in *Allegheny* recognized significance of reasonable observer).

89. *See Allegheny*, 492 U.S. at 629-30 (O'Connor, J., concurring) ("To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins."). Justice O'Connor specifically noted that the government acknowledgement of religion is particularly appropriate where the acknowledgement solemnizes a public occasion. *See id.* at 630 (affirming importance of allowing government and religion to interact under certain circumstances). Appropriate solemnization includes government practices such as the Court opening its session

ment becomes improper when a reasonable observer would conclude that the "challenged governmental practice conveys a message of endorsement of religion," provided that the observer was aware of the secular undertones of the specific display, the unique history of the specific display and the popular social attitudes toward religion.[90]

Addressing the oft-raised justification of historical acceptance of a given governmental display, Justice O'Connor stated that history is one of many relevant components of the endorsement inquiry.[91] Yet history alone cannot justify a challenged governmental action; instead history holds relevance insofar as it forms part of the social and cultural fabric of which the reasonable observer is aware when determining whether a display communicates a message of endorsement.[92]

3. *The Reasonable Observer Becomes Culturally Conscious: Developments Since* Allegheny

Since *Allegheny*, the scope of the reasonable observer's experience—and arguments over it—has grown substantially.[93] *Wallace v.*

with the phrase "God save the United States and this honorable Court" and public prayers at the opening of legislative sessions. *See id.* (illustrating constitutional methods by which religion adds solemnity to public events). For a more thorough catalogue of the appropriate use of religious symbolism to solemnize governmental actions, see *Van Orden v. Perry*, 125 S. Ct. 2854, 2862-63 (2005) (enumerating federal buildings in which Ten Commandments or religious symbols are incorporated into architectural design); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2750 (2005) (listing governmental uses of religious symbolism in general society, including Pledge of Allegiance and national motto "In God We Trust").

90. *See Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring) (suggesting that when determining whether government action conveys message of endorsement, reasonable observer is aware of religious and cultural history as well as specific history of challenged government act).

91. *See id.* at 631 (suggesting that reasonable observer understands that many originally religious symbols have come to hold secular meaning).

92. *Cf. id.* (stating that reasonable observer would not perceive public Thanksgiving holiday as communicating message of endorsement because observer is aware that, although holiday has religious roots, it has come to be understood as celebration of patriotic values rather than religious belief).

93. *See infra* notes 97-110 and accompanying text (outlining disagreement about scope of reasonable observer's experience between Justice O'Connor and Justice Stevens in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995)). Justice O'Connor suggests that the reasonable observer possesses general knowledge about the nature, history and site of a religious display on government property. *See infra* notes 104, 107 (delineating reasonable observer's experience as defined by Justice O'Connor). On the other hand, the reasonable observer created by Justice Stevens possesses minimal knowledge outside that which can be ascertained by simply observing the display. *See infra* notes 101, 108 (outlining Justice Stevens's arguments for relatively narrow scope of reasonable observer's experience).

While Justices Stevens and O'Connor's positions encapsulate the debate over the reasonable observer on the Court, academics have also sparred over the scope of the reasonable observer's experience. *Compare* Choper, *supra* note 69, at 526-27 (faulting use of tort law reasonableness in adjudicating Establishment Clause questions because, unlike in negligence law, challenged violations of Establishment

Jaffree[94] involved a challenge to three Alabama statutes collectively requiring a moment of silence at the beginning of each public school day for the express purpose of silent prayer.[95] Concurring in the Court's invalidation of the statute, Justice O'Connor attributed to the reasonable observer knowledge of the text, legislative history and implementation of the statute, in addition to the cultural history imputed to the observer in *Allegheny*.[96]

Perhaps the greatest disagreement over the breadth of the reasonable observer's experience came in *Capitol Square Review and Advisory Board v. Pinette*.[97] The case challenged the constitutionality of allowing the Ku Klux Klan (KKK) to place unattended crosses on state-owned property.[98] The majority upheld the display because the KKK had privately created the crosses and had placed them in a public forum traditionally used for the open expression of ideas.[99]

Clause seldom—if ever—appear manifestly unreasonable to community in which they appear), *and* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506-07 (2005) (summarizing scholarly criticism of Court in neglecting to define whether observer is member of religious mainstream or religious minority and suggesting that religious offense based on reasonableness is too subjective to constitute constitutionally redressable injury), *with* Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 216, 256-57 (2004) (arguing that reasonable observer provides consistent and coherent framework within which to evaluate Establishment Clause issues but proffering revisions to method Court uses to prescribe remedies upon finding constitutional violation), *and* Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?*, 38 CREIGHTON L. REV. 815, 832-33, 866-70 (2005) (describing usefulness of contextual analysis under endorsement test when evaluating whether public school choirs should be permitted to perform religious music).

For a novel analysis of the use of context in Establishment Clause challenges, see Hill, *supra* (examining Establishment Clause cases through post-modern linguistic theory). Hill suggests that subjectively perceived interpretations of a display's meaning and context have led to ad hoc Establishment Clause decisions. *See id.* at 514-15 (drawing on writings of post-modern philosophers Jacques Derrida and J.L. Austin to suggest that meaning is inherently dependent on context, which itself is inherently unstable). Hill further argues that a presumption against religious displays on government property would add a degree of clarity absent in present jurisprudence even though it would not fully resolve the issue. *See id.* at 539-44 (explaining benefits of presumption of invalidity of religious displays in Establishment Clause cases).

94. 472 U.S. 38 (1985).

95. *See id.* at 40. (quoting statutes' language indicating moment of silence was for "meditation or voluntary prayer"). One of the statutes also allowed "teachers to lead 'willing students' in a prescribed prayer to 'Almighty God . . . the Creator and Supreme Judge of the world.'" *Id.* (omission in original).

96. *See id.* at 76 (O'Connor, J., concurring) (defining scope of reasonable observer's knowledge).

97. 515 U.S. 753 (1985).

98. *See id.* at 758-59 (describing displays proposed by Ku Klux Klan (KKK)).

99. *See id.* at 770 ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.").

The heart of the controversy over the reasonable observer's experience in *Pinette* took place between the dissenting and concurring opinions of Justices Stevens and O'Connor, respectively.[100] Justice Stevens argued that the reasonable observer must be understood as a nonmember of the religious creed advanced by the display.[101] Further, in his formulation of the reasonable observer, the observer possesses only information available from physically viewing the display.[102] Using these standards, Justice Stevens suggested that "[i]f a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display."[103]

In her concurrence, Justice O'Connor maintained that a reasonable observer has a more extensive scope of experience than suggested by Justice Stevens.[104] Justice O'Connor eschewed the notion that the endorsement test protects particular individuals and defined the reasonable observer more broadly: "[T]he applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[105] Given this "collective social judgment," Justice O'Connor concluded that the reasonable observer is at least aware of the general history of the site of the display as well as the history and context of the community in which the display sits; this inherently indicates that the observer possesses awareness of information beyond what appears in the display itself.[106]

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100. *See id.* at 778-81 (O'Connor, J., concurring) (arguing in favor of imputing broad experience to reasonable observer); *id.* at 799-801 (Stevens, J., dissenting) (arguing that reasonable observer's experience should be relatively narrow).

101. *See id.* at 800 n.5. (Stevens, J., dissenting) (suggesting narrow scope of experience for reasonable observer). Justice Stevens argued that, while imputing a broad knowledge base to the reasonable observer may protect "ideal" well-informed, educated individuals, this standard does not consider the perceptions of those whose knowledge falls below this "ideal" level. *See id.* (arguing that Establishment Clause should be construed to protect even those without extensive knowledge of community moorings and ideals). According to Justice Stevens, to protect the rights of all individuals the reasonable observer should be imputed with relatively little knowledge. *See id.* (justifying narrow scope of reasonable observer's experience).

102. *See id.* (describing rationale for narrow scope of reasonable observer's experience).

103. *Id.* at 799-800 (stating that government should not be permitted to use its property in any way that communicates endorsement of religion to individual with relatively little information about display).

104. *See id.* at 781 (O'Connor, J., concurring) (arguing that reasonable observer is equivalent of informed member of community, who would have knowledge significantly beyond that garnered solely from viewing display).

105. *Id.* at 779-80 (quoting W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984)) (suggesting similarity between reasonable observer and tort law's reasonable person).

106. *See id.* at 780-81 (explaining scope of reasonable observer's experience).

With such information included in the realm of the reasonable observer's experience, authority exists to conclude that the scope of the reasonable observer includes the following: the social and cultural heritage of American society; the religious history of the American culture; the historical and cultural significance of the religious icon on display; the history and significance of the site on which the display sits; and the text, legislative history and implementation of the statute or government act that caused the display to be created.[107] This extensive scope of experience caused Justice Stevens to suggest that Justice O'Connor's reasonable observer "comes off as a well schooled jurist" rather than a reasonable representation of American society.[108] Precedent expanding the experience of the reasonable observer and confusion involving the continued relevance of *Lemon* have led some commentators to express frustration with inconsistencies in Establishment Clause jurisprudence.[109] Likewise, the varied scope of the reasonable observer's knowledge combined with the numerous tests for constitutionality have made the issue of Ten Commandments displays on public property an unsettled and contentious area of law.[110]

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107. *See id.* at 779-81 (arguing that reasonable observer is aware of social and cultural significance of object displayed as well as historical context of site of display); Allegheny v. ACLU, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring) (suggesting that reasonable observer is aware of general religious and cultural history as well as specific history of display); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (stating that reasonable observer is aware of text, legislative history and implementation of statute). This Note does not argue that all of the information Justice O'Connor imputes to the reasonable observer should actually be accorded to the observer. *See infra* notes 156-60 (suggesting factors that influence extent of experience and knowledge that should be imputed to reasonable observer). The extensive citations to Justice O'Connor's opinions do, however, indicate the extent to which her concurrences have affected the direction of Establishment Clause jurisprudence. *See* Neal R. Stoll & Shepard Goldfein, *Antitrust Trade and Practice; The Adventures of Antitrust and Harriet (Miers)*, N.Y.L.J., Oct. 18, 2005, at 3 (observing that, with her retirement, "Justice O'Connor will leave behind a legacy defined by the key votes she cast on . . . Establishment Clause [issues]").

108. *See Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting) (objecting to Justice O'Connor's formulation of reasonable observer because "[h]er 'reasonable person' comes off as a well-schooled jurist, a being finer than the tort-law model").

109. *See* Choper, *supra* note 69, at 513-14 (noting that "ad hoc" approach to reasonable observer's experience has sacrificed predictability in Supreme Court's Establishment Clause cases (quoting Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 478-79)). *But see* Gershengorn, *supra* note 12, at 8 (observing that, in area of context-based Establishment Clause tests, "there is little to suggest mass confusion in the lower courts . . ., which seem generally to be able to separate the permissible from the impermissible"). For a description of the extent of knowledge that various courts of appeals have imputed to the reasonable observer, see Julie Van Groningen, Note, *Thou Shalt Reasonably Focus on Its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219, 220 (2004) (listing approaches of several circuit courts of appeals toward endorsement test). *See also supra* note 71 (listing courts of appeals that have adopted endorsement test).

110. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (conceding that approach under *Lemon* "sacrifices clarity and predict-

III. THE CAPITOL AND THE COURTHOUSE: THE CONTEXT-BASED OUTCOMES OF *VAN ORDEN* AND *MCCREARY*

A. *Affirming the Texas Capitol Commandments Monument:* Van Orden v. Perry

1. *Facts of* Van Orden

In *Van Orden*, a citizen challenged the propriety of a Ten Commandments monument at the Texas state capitol complex.[111] Donated by the Fraternal Order of Eagles in 1961, the monument displayed the Commandments along with religious and patriotic symbols.[112] The monument, positioned on the northwestern side of the mall between the capitol and state supreme court buildings, was one of seventeen monuments and twenty-one historical markers on the capitol complex grounds.[113] Despite the number of monuments, no consistent artistic or architectural design unified the memorials into a common aesthetic theme.[114] Nevertheless,

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ability for flexibility"); Choper, *supra* note 69, at 513 (arguing that lack of "clear consensus" on scope of reasonable observer's knowledge and religious convictions has contributed to inconsistency in Establishment Clause cases).

111. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005) (plurality opinion) (describing procedural posture). Petitioner Thomas Van Orden, a native Texan and attorney, had encountered the monument repeatedly since 1995 while visiting the capitol complex to use the law library in the Texas Supreme Court building. *See id.* (describing plaintiff's exposure to monument). Justice Thomas noted that the only alleged injury sustained by Van Orden was the offense he took to the monument:

> The only injury to [Van Orden] is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life.

Id. at 2865 (Thomas, J., concurring).

112. *See id.* at 2858 (plurality opinion) (noting that monument measured approximately six feet in height and three and one-half feet in width). In addition to the Ten Commandments, the monument depicted an eagle clutching the American flag, an Eye of Providence or All-Seeing Eye, the carving of two stone tablets, two Stars of David and the Greek letters Chi and Rho, the initials of Christ. *See id.* (listing engravings on monument). The bottom of the monument recognized its donor and was carved with the message "Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961." *Id.* For a picture of the challenged monument, see *id.* at 2891 (Stevens, J., dissenting) (Appendix to Opinion of Stevens, J.), *available at* http://www.tspb.state.tx.us/spb/gallery/MonuList/10.htm.

113. *See id.* at 2858 (plurality opinion) (describing geographic location of monument). For a map showing the precise location of the monument, see *id.* at 2873 (Breyer, J., concurring) (Appendix B to Opinion of Breyer, J.), *available at* http://www.tspb.state.tx.us/SPB/Plan/FloorPlan/pdf/Grounds.pdf.

114. *See id.* at 2895 (Souter, J., dissenting) (stating that although Texas argued monuments must be interpreted as unified group of symbols, "anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass"). The State commissioned the first monument, which was erected in 1891; the most recent addition to the monument displays was dedicated in 1999. *See* State Preservation Board: Caretakers of the Texas

according to the State, the series of monuments and historical markers commemorated the "people, ideals, and events that compose Texan identity."[115] *Van Orden* was the first challenge to the monument in its forty-year history.[116] The United States District Court for the Western District of Texas conducted a reasonable observer analysis and allowed the monument to remain.[117] The United States Court of Appeals for the Fifth Circuit affirmed.[118]

2. *The Court's Rationale in* Van Orden

The *Van Orden* plurality discussed the applicability of the *Lemon* test, noting that it has been spottily applied.[119] The Court also restated its earlier ambivalence with *Lemon*, suggesting that the decision provides little more than "helpful signposts" on the road toward reaching a decision in an Establishment Clause case.[120] The plurality further stated that *Lemon* is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[121]

The plurality also forwent an endorsement analysis, instead relying on a historical framework and suggesting that "our analysis is driven both by the *nature of the monument* and by *our Nation's history*."[122] Because Texas

Capitol, Online Gallery Monument Guide, http://www.tspb.state.tx.us/spb/gallery/MonuList/MonuList.htm (follow "Texas Peace Officers Memorial" hyperlink) (last visited Oct. 19, 2005) (providing information on monuments on Texas capitol grounds).

115. *See Van Orden*, 125 S. Ct. at 2858 (plurality opinion) (quoting H. Con. Res. 38, 77th Leg. (Tex. 2001)) (restating monument's propriety as representative of cultural and social ideals).

116. *See id.* at 2870 (Breyer, J., concurring) (summarizing history of monument by stating that "[forty] years passed in which the presence of this monument, legally speaking, went unchallenged").

117. *See* Van Orden v. Perry, No. A-01-CA-833-H, 2002 WL 32737462, at *5 (W.D. Tex. Oct. 2, 2002) (employing reasonable observer analysis to conclude "[n]either the location nor the physical characteristics of the Ten Commandments monument would lead a reasonable observer to conclude that the State is seeking to advance, endorse or promote religion by permitting its display"), *aff'd*, 351 F.3d 173 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

118. *See* Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003) (holding that "we are persuaded that Texas does not violate the First Amendment by retaining a forty-two-year-old display of the decalogue"), *aff'd*, 125 S. Ct. 2854 (2005).

119. *See Van Orden*, 125 S. Ct. at 2861 (plurality opinion) (citing examples of cases declining to apply the *Lemon* test, including Zelman v. Simmons-Harris, 536 U.S. 639 (2002), and Good News Club v. Milford Central School, 533 U.S. 98 (2001)). For a summary of *Zelman*, *Milford* and other cases foregoing a *Lemon* analysis, see *supra* note 52.

120. *See Van Orden*, 125 S. Ct. at 2860 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)) (noting that elements of *Lemon* test "are no more than helpful signposts" in Establishment Clause analysis).

121. *See id.* at 2861 (noting uncertainty in future applicability of *Lemon* after noting that much of its history has involved governmental attempts to establish religion—including prayer—in public schools).

122. *See id.* at 2861-63 (illustrating historical acceptance of commingling religious doctrine with formation of government law and policy) (emphases added).

treated its capitol monuments as representative of state history, the Court determined that the display had a "dual significance, partaking of both religion and government."[123] The secular significance of the Commandments, the Court held, did not violate the Establishment Clause.[124]

In a concurring opinion, Justice Breyer noted that clear Establishment Clause cases, such as those involving government coercion, are easy to decide but rarely arise.[125] It is borderline cases that present a difficulty.[126] Indeed, Justice Breyer noted, in such cases, there is no "test-related substitute for the exercise of legal judgment."[127] He stressed that "legal judgment" does not mean the personal values of judges; rather, it requires an analysis faithful to the context of the challenged government act and of the Framers' intent in adopting the Establishment Clause.[128] In the case of the Texas monument, which, Justice Breyer noted, stood for more than forty years, the challenged display would also have satisfied the more formal *Lemon* test, had the plurality chosen to apply it.[129]

Specifically cited examples of historical acceptance of the interwoven role of religion in government include President George Washington's Thanksgiving Day Proclamation, the statues of Moses and the Apostle Paul displayed in the rotunda of the Library of Congress's Jefferson Building and the sculpture depicting the Ten Commandments and a cross outside the federal courthouse of the United States Court of Appeals and District Court for the District of Columbia. *See id.* (listing examples of appropriate meshing between government and religion).

123. *Id.* at 2864.

124. *See id.* (allowing Commandments monument to remain on Texas state capitol grounds).

125. *See id.* at 2869 (Breyer, J., concurring) (stating that "[i]f the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases").

126. *See id.* (noting difficulty of determining what approach is neutral). In such cases, neutrality alone is not sufficient to guide the judgment of government action because "it is sometimes difficult to determine when a legal rule is 'neutral.'" *See id.* (acknowledging one difficulty with neutrality analysis). Justice Breyer also noted that an overly zealous attempt to remain devoted to the principle of neutrality may, in fact, create a system adverse or hostile to religion by essentially favoring passive and irreligious belief systems to religious ones. *See id.* (explaining potential danger of neutrality-only analysis).

127. *Id.* Justice Breyer delineated limits on the scope of the legal judgment of which he wrote, explaining that it is not unbridled personal judgment, but judgment soundly rooted in accepted legal theory. *See id.* (suggesting that "in all constitutional cases, [judgment] must reflect and remain faithful to the underlying purposes of the [Religion] Clauses, and it must take account of context and consequences measured in light of those purposes").

128. *See id.* (noting relevancy of context as well as recognition of original intent behind Religion Clauses to inquiry into display's constitutionality). *But cf. id.* at 2865 (Thomas, J., concurring) (suggesting that coercion-only approach to Establishment Clause issues would simplify analytical task and more faithfully realize intent of Framers).

129. *See id.* at 2871 (Breyer, J., concurring) (proffering that more formal *Lemon* rubric would not have required removal of monument). Justice Breyer noted that the display was located on the capitol grounds rather than in view of schoolchildren, "where, given the impressionability of the young, government must exercise particular care in separating church and state." *See id.* (observing

B. *Removing the Kentucky Courthouse Displays:* McCreary County v. ACLU

1. *Facts of* McCreary

In *McCreary County v. ACLU*, two Kentucky counties posted gold-framed copies of the Ten Commandments on the hallway walls of their courthouses.[130] The displays were readily visible to citizens entering the courthouse for administrative and judicial purposes.[131] The ACLU sued to enjoin the displays of the Commandments, alleging they violated the Establishment Clause.[132] The trial court granted a preliminary injunction requiring removal of the displays pending the outcome of the litigation.[133]

Before issuance of the injunction, the counties revised the displays in an attempt to create collages that would meet constitutional requirements.[134] While the first set of displays featured solely the Ten Command-

that Court has exercised especially close scrutiny of statutes that arguably establish religion in public schools because of risk of indoctrinating impressionable children). He also stated that the monument's existence at the complex had not bred Establishment Clause issues at any time during its decades-long history. *See id.* at 2870-71 (suggesting that forty years during which monument stood unchallenged suggested that visitors to capitol understood monument as part of moral and historical context). Therefore, Justice Breyer concluded: "I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily 'advanc[ing]' or 'inhibit[ing] religion,' and not creating an 'excessive government entanglement with religion,'—might satisfy this Court's more formal Establishment Clause tests." *Id.* at 2871 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)) (alteration in original).

130. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2728 (2005) (describing location of displays).

131. *See id.* (noting that citizens had to pass display to reach offices where they could obtain or renew driver's licenses, apply for various permits, register vehicles, pay taxes and register to vote).

132. *See id.* at 2729 (noting parties to suit). Defendants in the case were the Kentucky Counties of McCreary and Pulaski. *See id.* at 2728 (noting counties' first created displays in summer 1999).

133. *See* ACLU v. McCreary County, 96 F. Supp. 2d 679, 691 (E.D. Ky. 2000) (ordering that "the Ten Commandments display shall be removed from the McCreary County Courthouse IMMEDIATELY" and that no county officials "shall erect or cause to be erected similar displays"), *supp. prelim. injunction granted*, 145 F. Supp. 2d 845 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005); ACLU v. Pulaski County, 96 F. Supp. 2d 691, 703 (E.D. Ky. 2000) (ordering same with respect to Pulaski County), *supp. prelim. injunction granted sub nom.*, ACLU v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

134. *See McCreary*, 125 S. Ct. at 2729-31 (recounting that, after institution of suit, legislative institutions of each county authorized revisions to the displays). The district court granted the preliminary injunction against the second set of displays. *See id.* at 2729 (noting that district court granted preliminary injunction within one month of filing of suit). Rather than removing the displays, the counties revised them a second time. *See id.* at 2730 (noting that this constituted third set of displays sponsored by counties within one year). The court issued a supplemental injunction requiring removal of these third displays despite their expanded content. *See id.* at 2731 (summarizing that district court granted ACLU's motion to supplement preliminary injunction to enjoin these new displays).

ments, the second pair incorporated several other documents representing the state's "precedent legal code."[135] The Ten Commandments hung at the center of the second display in the gold frames used for the first display, which were larger than those that held the other documents.[136] All of the documents chosen for inclusion featured references to the existence of God.[137] The counties later changed the displays again, featuring the Ten Commandments along with eight other equally sized documents.[138] This final pair of displays contained some—but not all—of the same documents from the previous revision.[139] The Court of Appeals

135. *See id.* at 2729 (describing second set of displays).

136. *See id.* at 2728-30 (describing contents of display). The second displays retained the large gold-frame posters of the Ten Commandments from the King James Version of the Bible. *See id.* at 2729 (noting that Ten Commandments were larger than all other documents in second set of displays). In addition, the displays contained the following:

> [T]he "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

Id. at 2729-30 (second alteration in original).

137. *See id.* at 2730 (quoting district court's observation that "the 'Count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity'").

138. *See id.* at 2729-31 (describing third and final set of displays). The final displays, entitled "The Foundations of American Law and Government Display," featured the Ten Commandments along with "framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice." *Id.* at 2731. Accompanying each document was a description of its significance in the American legal tradition. *See id.* (describing components of display). The Ten Commandments commentary read:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Id.

139. To compare the content of the second and third sets of displays, see *supra* notes 136, 138. The trial court extended its original preliminary injunction to include a supplemental injunction requiring removal of the altered displays. *See* ACLU v. McCreary County, 145 F. Supp. 2d 845, 853 (E.D. Ky. 2001) (quoting district court's opinion, which stated that "IT IS ORDERED that the plaintiff's motion to extend the preliminary injunction to the current displays is GRANTED [and that] the displays shall be removed from the McCreary and Pulaski County

for the Sixth Circuit affirmed the grant of the preliminary injunction.[140]

2. *The Court's Rationale in* McCreary

The *McCreary* majority gave greater deference to the *Lemon* test than did the plurality in *Van Orden*.[141] The Court acknowledged that neutrality between religion and nonreligion has always guided Establishment Clause analysis.[142] It then examined whether the counties' displays indicated governmental intent to favor one faith over another, essentially conducting the purpose analysis of the *Lemon* test.[143]

Yet despite its discussion of intent, the majority did not specifically consider the purpose criterion as part of a *Lemon* analysis.[144] Instead, responding to the petitioner counties' argument that government scienter is

courthouses . . . IMMEDIATELY"), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

140. *See* ACLU v. McCreary County, 354 F.3d 438, 462 (6th Cir. 2003) (affirming district court's grant of injunction requiring removal of displays), *aff'd*, 125 S. Ct. 2722 (2005).

141. *Compare McCreary*, 125 S. Ct. at 2732-35 (discussing *Lemon* test and engaging in purpose analysis from perspective of reasonable observer), *with* Van Orden v. Perry, 125 S. Ct. 2854, 2860-61 (2005) (plurality opinion) (describing *Lemon* criteria as "helpful signposts" in Establishment Clause analysis and pursuing historical analysis for determining propriety of challenged monument).

142. *See McCreary*, 125 S. Ct. at 2733 (describing neutrality between religious and nonreligious sects as "touchstone" of First Amendment religious analysis).

143. *See id.* ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)) (internal quotations omitted and alteration in original).

144. *See id.* at 2734-35 (conducting purpose analysis, but pursuing such inquiry from purpose *perceived* by reasonable observer rather than *government intent*, as prescribed by *Lemon* test). The counties argued for the abandonment of the purpose criterion because governmental purpose is ultimately unknowable. *See id.* at 2734 (rejecting counties' argument against purpose inquiry). The counties suggested that, just as one can never truly discern the thoughts in the mind of another, so too is one incapable of determining governmental purpose in carrying out an official governmental act. *See id.* (ignoring counties' assertion that purpose analysis is "merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent").

Though the Court was ultimately unconvinced by the counties' argued irrelevance of the purpose inquiry, it characterized the argument as "seismic." *See id.* (acknowledging validity of counties' argument). The Court reaffirmed governmental purpose as a "staple of statutory interpretation that makes up the daily fare of every appellate court in the country" and as a "key element" of the Establishment Clause analysis. *See id.* (affirming importance of governmental intent to evaluation of counties' displays). Though the Court never expressly admitted the difficulty of discerning the actual purpose behind the counties' display of the Commandments, it impliedly conceded the validity of this argument by converting the purpose analysis into a reasonable observer test. *See id.* (conducting purpose analysis from perspective of reasonable observer but failing to note difficulty inherent in same inquiry when conducted from perspective of discerning government intent).

ultimately unknowable, the Court reaffirmed the propriety of inquiring into the governmental purpose behind the displays.[145] Rather than a traditional examination of government scienter, however, the Court held that the reasonable observer provides the proper perspective from which to conduct the purpose analysis: "The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act."[146]

Invoking this equivalent of the endorsement test, the Court upheld the injunction requiring removal of the displays.[147] The Court noted that throughout the counties' revisions, the documents selected for inclusion consistently contained religious references and that the counties excluded documents that they might have more relevantly displayed.[148] Given the nature of the counties' selections and the specific history of multiple revisions to the particular displays, the Court determined that the reasonable observer would perceive that the counties had a primary purpose of dis-

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Faced with the difficulty of subjectively determining governmental purpose, the Court held that "scrutinizing purpose . . . make[s] practical sense . . . where an understanding of official objective *emerges from readily discoverable fact* . . . . The eyes that look to purpose belong to an *objective observer*." *Id.* (emphases added). In so holding, the Court essentially merged the *Lemon* inquiry with the endorsement test, affirming that the most logical perspective from which to conduct establishment analyses is that of the reasonable observer. *See id.* (conducting purpose analysis of *Lemon* test through eyes of reasonable observer of endorsement test).

145. *See id.* (noting that scrutiny of purpose is possible through objective analysis of reasonable observer). While it may be objectively true that, in the cognitive sense, government cannot formulate intent in the same way as individuals, the Court held that the context of government actions provides sufficient information to allow courts to make objective determinations of government intent. *See id.* (declining counties' invitation to forgo purpose analysis and noting "[t]here is . . . nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause").

146. *Id.* (internal quotations and citations omitted).

147. *See id.* at 2741 ("[If] the [reasonable] observer had not thrown up his hands [after considering the counties' displays], he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.") (footnote omitted). To compare the Court's reliance on the reasonable observer with Justice O'Connor's original formulation of the endorsement test, see *supra* text accompanying note 67 (laying foundation for endorsement test).

148. *See McCreary*, 125 S. Ct. at 2740-41 (questioning consistency of counties' selection of documents with their avowed purpose of representing foundational documents of American law and government). As an illustration of the incongruity of the counties' labeling of the chosen documents as "foundational" to the American governmental system, the Court noted that the counties' copy of the Magna Carta of 1215 displayed the provision that "fish-weirs shall be removed from the Thames" but did not include copies of the Constitution of the United States nor of the Fourteenth Amendment to it, two of the most essential documents in the development of American jurisprudence. *See id.* at 2740 (observing that counties' stated purpose was irreconcilable with their actions).

playing documents of religious significance.[149] Rejecting the counties' contention that the displays were hung on the walls of the courthouse to educate citizens about the foundational legal history of America, the Court found that they violated the Establishment Clause and upheld the preliminary injunction requiring their removal.[150]

IV. IN THE EYE OF THE BEHOLDER: THE CONTEXT TEST AS DERIVED FROM THE *VAN ORDEN* AND *MCCREARY* HOLDINGS

When understood in light of precedential decisions such as *Lemon*, *Lynch*, *Allegheny*, *Pinette* and others, *Van Orden* and *McCreary* propose a context-based extension of the endorsement test.[151] Together, *Van Orden* and *McCreary* state that government may constitutionally display the Ten Commandments where the geographic, physical and cultural context indicates that the reasonable observer would not perceive a government attempt to endorse religion.[152] Nevertheless, even if these objective criteria superficially indicate a lack of government endorsement, the display may still be unconstitutional if the reasonable observer possessing knowledge of the display's specific history of existence would conclude that the government erected the display to endorse or advance religion.[153]

149. *See id.* at 2740-41 (noting that reasonable observer would likely have been puzzled by strange mélange of documents included in counties' foundations displays).

150. *See id.* at 2745 (affirming court of appeals, which had affirmed district court's grant of injunction).

151. For a description of the context test and its relation to the endorsement test, see *infra* notes 152-67 and accompanying text.

152. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion) (stating that Establishment Clause analysis in Ten Commandments cases is conducted in light of context, including nation's history and nature of display); *see also* Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989) (employing reasonable observer analysis to determine constitutionality of nativity and Christmas tree/menorah displays).

153. *See McCreary*, 125 S. Ct. at 2741 (holding that reasonable observer would suspect that counties had revised displays in order to place documents in courthouse "required to embody religious neutrality").

The holdings of *Van Orden* and *McCreary* provide further support for the movement in Establishment Clause jurisprudence away from the purpose/effect/entanglement *Lemon* test toward a perception-based analysis that focuses on whether the reasonable observer would perceive such an establishment actually occurring. *See, e.g.*, ACLU v. Plattsmouth, 419 F.3d 772, 776-77 (8th Cir. 2005) (reversing judgment of district court, which required removal of Ten Commandments monument from city-owned park, because court found context of monument indistinguishable from that of similar monument in *Van Orden*); Card v. Everett, 386 F. Supp. 2d 1171, 1176-77 (W.D. Wash. 2005) (granting city defendant's motion for summary judgment, thereby allowing Ten Commandments monument to remain on grounds of city hall complex, in part because "a casual observer with knowledge of the monument's history that, when given the opportunity, the City purposely reduced the prominence of this overtly religious monument" would conclude that monument communicated no improper religious message); Russelburg v. Gibson County, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, at *2 (S.D. Ind. Sept. 7, 2005) (allowing Ten Commandments monument

From the holdings in *Van Orden* and *McCreary* emerges the following two-part context test for adjudicating the constitutionality of Ten Commandments displays: (1) From the perspective of the reasonable observer, does the display's geographic, physical and cultural context—the combination of which this Note will label "geocultural context"—indicate an improper religious purpose?[154] (2) If not, is the unique history of the specific display so well-known and publicly disseminated in the community that the reasonable observer living in the community would be aware of that history and conclude that it belied a government intent to unconstitutionally endorse religion?[155]

A. *Geocultural Context*

By beginning with the geocultural context of a display, the first criterion of the context test focuses on information available both from the immediate surroundings of the display and the general knowledge of the cultural context in which the display appears.[156] This approach assumes a generally well-informed reasonable observer who possesses a cursory understanding of the cultural history surrounding the display.[157] Thus, at

to remain on grounds of county courthouse because geographic context was similar to that of monument in *Van Orden* and monument had no contentious history similar to displays in *McCreary*). The difference between the *Lemon* test and more recent Establishment Clause analyses is one of perspective: the Court's earlier cases require an examination of government scienter and/or purpose; the later cases indicate an objective analysis of the message sent without focus on government intent. *See generally* Allegheny v. ACLU, 492 U.S. 573, 593-97 (1989); Lynch v. Donnelly, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring). Indeed, in *McCreary*, the Court noted that even if government purposefully intends to establish religion, no constitutional violation occurs unless the attempted establishment is actually perceived as such. *See McCreary*, 125 S. Ct. at 2735 (suggesting that, for constitutional purposes, improper governmental purpose in displaying Commandments is significant only if reasonable observer would perceive that improper purpose).

Lynch and *Allegheny* began the evolution of this process by first proposing and then adopting the endorsement test. *See supra* notes 53-92 and accompanying text (discussing holding and application of *Lynch* and *Allegheny*). Yet, as with much Establishment jurisprudence, the endorsement test has been inconsistently applied; sometimes standing alone, sometimes within a *Lemon* analysis, sometimes tacked on to the principle of neutrality. *See* Pongrace, III, *supra* note 49, at 217 (observing doctrinal fluctuations in Establishment Clause cases and noting emergence of tests in addition to *Lemon* for evaluating challenged government action).

154. For a description of the elements of the geocultural context element of the context test, see *infra* notes 156-60 and accompanying text.

155. For a description of the elements of the specific history element of the context test, see *infra* notes 161-67 and accompanying text.

156. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (stating that reasonable observer is knowledgeable of physical surroundings and historical context in which display appears); *see also Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring) (suggesting that reasonable observer possesses awareness of cultural context of display).

157. *See Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring) (defining characteristics of reasonable observer); *id.* at 800 n.5 (Stevens, J., dissenting) (arguing

the very least, the reasonable observer knows all facts that can be perceived through viewing the display and reading any markings on it.[158] This assumption also provides that the observer is aware of the nature of the property on which the display sits.[159] Lastly, the reasonable observer possesses knowledge derived from the social milieu of the American culture, such as the knowledge that the Ten Commandments represent a religious tradition that has influenced the development of American life and history since before the country's founding.[160]

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that scope of reasonable observer's experience should be less than that of model "ideal" citizen); Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 259 (3d Cir. 2003) (affirming Third Circuit's adoption of Justice O'Connor's formulation of reasonable observer). Although various opinions may disagree with the precise scope of the reasonable observer's experience, they agree almost unanimously that, at the very least, the observer is aware of that which the observer can directly perceive. *See, e.g.*, Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 772-73 (7th Cir. 2001) (suggesting that reasonable observer has knowledge only of information that can be sensorially perceived through government act).

158. *See, e.g.*, *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting) (suggesting that reasonable observer possesses all information observed from display).

159. *See, e.g.*, *id.* at 781 (O'Connor, J., concurring) (proffering that "our hypothetical observer also should know the general history of the place" in which challenged government display is situated).

160. *See id.* (arguing that reasonable observer is generally informed member of relevant community). Not all opinions agree that the element of knowledge of social moors should be attributed to the reasonable observer. *See id.* at 800 n.5 (Stevens, J., dissenting) (expressing discontent with Justice O'Connor's well-informed observer). Nevertheless, the reasonable observer should be imputed with cursory social knowledge because the goal of the context test is to evaluate the Commandments display from the perception of a reasonable person. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2740 (2005) (invalidating counties' courthouse displays because no reasonable observer could believe that counties lacked objective of religious endorsement). Although many of the Establishment Clause analyses undertaken by the Court may be abstract in nature, the challenged violations themselves rarely are: these displays are monuments that people pass every day on their way to work, that judges and attorneys walk past regularly in the courthouse, that people see their government holding forth as a representation of its constituency. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005) (plurality opinion) (describing monument challenged in that case precisely because of its commanding physical presence at Texas state capitol). In this way, Establishment Clause cases differ from more philosophical issues such as determining what rights compose due process or whether probable cause exists for a seizure. *See Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part) (noting deficiency of cases prior to *Allegheny* for their inability to provide "concrete answers to Establishment Clause questions"). Where the Ten Commandments are concerned, people are able to directly see, touch or hear the challenged display. *Cf. McCreary*, 125 S. Ct. at 2735 (suggesting that no establishment violation would exist where government created display to advance religion if advancement could not actually be perceived). Therefore, the crux of any establishment analysis must focus on whether reasonable individuals are likely to perceive an inappropriate commingling between government and religion. *See id.* (noting irrelevance of improper government act if it is not perceived as such by individuals). The reasonable observer must possess knowledge of the development of American history and culture because to hold otherwise would be to replace the *reasonable* person with an *ignorant* one, thereby subjecting the perception of the larger population to that of a small group of individuals with a narrow knowledge base in this area. *See*

B. *Specific History*

The second criterion of the test essentially determines whether the unique history of the specific display should be considered in determining whether a reasonable observer would deem the display unconstitutional.[161] The second element asks: Is the unique history of the specific display so well-known and so publicly discussed in the community that the reasonable observer—if the observer lived in the community—would be aware of it?[162] In order to fall within the reasonable observer's scope of knowledge, the specific history of the display must receive actual notoriety through media coverage, public discussion or other similar means.[163]

If the unique history of the specific display has obtained widespread notoriety, the latter criterion of the test asks whether that history indicates such an egregious and overbearing attempt by the government to endorse

Pinette, 515 U.S. at 779 (O'Connor, J., concurring) (suggesting that point of reasonableness inquiry is to reflect collective social ideals).

161. *See McCreary*, 125 S. Ct. at 2740-41 (suggesting that, in cases such as *McCreary*, reasonable observer would possess awareness of specific history of display to conclude improper endorsement had taken place).

162. *See id.* at 2738-40 (including within reasonable observer's experience knowledge of repeated revision to specific challenged display); *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring) (stating that reasonable observer is aware of "history and context of the community and forum in which the religious display appears"). Although Justice O'Connor's reasonable observer possesses more extensive knowledge than the reasonable observer for which this Note argues, her *Pinette* concurrence indicates that the scope of the reasonable observer extends at least to include the specific history of the display if that history is widely publicized. *See id.* at 781 (observing that reasonable observer would be aware that public park was used by private speakers of various types in exercise of free speech).

163. *See, e.g.*, Andrew Powell, *Thou Shall Not to McCreary Commandments Display*, MCCREARY COUNTY VOICE, June 30, 2005, *available at* http://www.tmcvoice.com/Archives/063005/story3.html (reporting Court's upholding of injunction requiring removal of displays in story that would satisfy specific history component of context test). In *McCreary*, the Ten Commandments display received such notorious infamy. *See generally* Joseph Gerth, *Grayson Officials Ordered to Remove Commandments*, COURIER-J. (Louisville, Ky.), May 17, 2002, at 01B (publicizing repetitious district court orders requiring removal of displays from courthouses in McCreary and Pulaski Counties); *Nation in Brief*, WASH. POST, May 18, 2000, at A28 (recounting district court order mandating removal of Commandments displays pending outcome of litigation); *Nation in Brief/Kentucky; Ten Commandments Ordered Removed*, L.A. TIMES, May 6, 2000, at A1 (reporting that district court ordered removal of Commandments displays); Andrew Powell, *Comandments [sic] Fight Not Over, Turns towrd [sic] ACLU*, MCCREARY COUNTY VOICE, July 7, 2005, *available at* http://www.tmcvoice.com/Archives/070705/cis.html (documenting response of proponents of Commandments displays to ruling in *McCreary* upholding order requiring removal of displays); Shannon Tangonan, *Kentucky ACLU Director Vessels Is Leaving; Organization Grew and Became More Visible During His Tenure*, COURIER-J. (Louisville, Ky.), Mar. 19, 2003, at 1B (describing litigation to remove courthouse Commandments displays as high profile case). Given such extensive public awareness, the context test's reasonable observer would have had sufficient reason to conclude, as the Court did, that the displays in *McCreary* represented an attempt by the government to establish religion. *See McCreary*, 125 S. Ct. at 2741 (holding that counties had attempted to endorse religion on "the walls of courthouses constitutionally required to embody neutrality").

a religious creed that the reasonable observer would believe that the display's specific history alone communicates an endorsement—even if not communicated through the geocultural context of the display.[164] A requirement of substantial media attention to the display ensures that the observer remains as true as possible to a representation that reflects a sample of the population that is as large as possible.[165] This high standard for considering specific history is necessary in order for the reasonable observer's experience to reflect the common experience of a broad sample of the American population.[166] If the reasonable observer is to accurately reflect the American public, the observer must be imputed only with knowledge to which a large segment of that public is likely to have access.[167]

V. THOU SHALT (NOT) DISPLAY THE COMMANDMENTS: APPLYING THE CONTEXT TEST

In her *Lynch* concurrence, Justice O'Connor noted that the problem with *Lemon* is the difficulty of logically connecting concrete Establishment Clause principles of preventing improper government endorsement of religion with the theoretical elements of the test itself.[168] The context test avoids this conundrum by focusing exclusively on issues of *perceived* establishment through the eye of the reasonable observer.[169] Further, it avoids the semantic challenge of attempting to define inherently cloudy issues

164. *See McCreary*, 125 S. Ct. at 2741 (noting that reasonable observer would "throw[ ] up his hands" upon learning of multiple revisions to counties' displays).

165. *See Pinette*, 515 U.S. at 779 (O'Connor, J., concurring) (suggesting that "the endorsement test creates a more *collective standard* to gauge the objective meaning of the [government's] statement in the community") (alteration in original and internal quotation omitted) (emphasis added).

166. *See id.* (noting that Establishment Clause inquiry should rest on broad community standards).

167. *See id.* at 800 n.5 (Stevens, J., dissenting) (suggesting that Establishment Clause should be construed so as to "extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement"). *But cf. id.* at 779 (O'Connor, J., concurring) (disagreeing with statement that "the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge").

168. *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (noting disjuncture between *Lemon* and practical concerns of Establishment Clause).

169. *See* Seidman, *supra* note 66, at 230-31 (describing experience of reasonable observer throughout observer's evolution in Establishment Clause cases).

such as entanglement.[170] It also renders unnecessary the difficulty of inquiring into institutional scienter to divine governmental purpose.[171]

Elements of the previous tests remain components of the analytical framework of the context test, but only by way of the concert of messages that they send to the reasonable observer.[172] Rather than a bifurcated analysis of several abstract components, the elements of the *Lemon* test are relevant if they either alone or in consort communicate a message of endorsement.[173] For instance, in *Van Orden*, the context test justifies the

170. *See* Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring) (noting that criteria of *Lemon* analysis are generally not effective in providing concrete direction on Establishment Clause issues); *see also* Hunt v. McNair, 413 U.S. 734, 741 (1973) (describing *Lemon* as merely "helpful signposts" for analysis).

171. *See* Dokupil, *supra* note 2, at 623-27 (noting inconsistent roles that government purpose has played in analyses). In *Lynch* and *Allegheny*, no direct evidence of secular purpose was available to the Court, but it inferred government purpose from the context, eventually recognizing a legitimate secular purpose for any display or government commingling with religion undertaken for the purpose of "solemnizing public occasions . . . and encouraging recognition of what is worthy of appreciation." *Id.* at 622 (internal quotation omitted) (arguing that these exceptions essentially render purpose analysis meaningless because almost any government action respecting religion can qualify for exception). This holding essentially "broadened the definition of secular purpose to the point where nearly any display should meet it." *Id.* Yet since the Court's decision in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), which held that the Ten Commandments were inherently sacred and display of them belied a religious purpose, the purpose analysis has become increasingly scattered. *See* Dokupil, *supra* note 2, at 628-29 (arguing that in *Stone*, Court confronted "unique mixture of the sacred and secular in the Ten Commandments," which fueled arguments of both those seeking to allow and to ban Commandments in public sphere). *Stone* allowed lower federal courts to "use secular purpose (or lack of it) as a vehicle for implementing their own judgment as reasonable observers," resulting in many displays being found unconstitutional despite a total lack of government expression of religious purpose. *See id.* at 630 (observing inconsistent effects of *Stone*). This parsing of the purpose analysis has rendered it ineffective as a consistent determiner of the limits of constitutionality. *Cf. id.* at 633 (suggesting that purpose inquiry should be eliminated from Establishment Clause inquiry).

172. *Cf.* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 361 ("The end of *Lemon* as such does not eliminate [the] significance [of] precedents, though it may shake the foundations of some [precedential cases].").

173. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48 (noting that Establishment Clause jurisprudence "would seem to be the sole doctrinal field in which intent, divorced from results, can lead to a finding of unconstitutionality"). Admittedly, McConnell's statement is not as ironclad at it once was, especially since the rise of the endorsement test. *Cf.* McCreary County v. ACLU, 125 S. Ct. 2722, 2734 (conducting academic purpose inquiry from perspective of reasonable observer). Yet even in the era of the endorsement test, the Court has sometimes found it difficult to unite its academic analysis with events or perceptions that make a government act unconstitutional. *See, e.g.*, *Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring) (noting disconnect between academic Establishment Clause inquiry and First Amendment values of religious freedom). The context test avoids this problem by beginning with the facts known to the reasonable observer and then discerning whether those facts comport with the broader question of whether an establishment has occurred. *See supra* notes 156-67 and

Ten Commandments monument on the grounds of the Texas capitol because the reasonable observer would not perceive, given the geocultural context of the monument among other historical markers on the capitol grounds, that the government was attempting to improperly establish religion when it accepted the monument from the Fraternal Order of Eagles.[174] In contrast, as the Court noted in *McCreary*, even though observation of the counties' final display may have not raised the ire of the reasonable observer, the observer nonetheless would have perceived an improper governmental purpose behind the displays through knowledge gained by the widespread public discussion and media coverage.[175]

Admittedly, the context test does not dissolve all murkiness from the Establishment Clause analysis; indeed, the Court has repeatedly admitted that the subject inherently resists clarification.[176] Yet the benefit of the context test is that it contains all analytical ambiguity within the boundaries of the reasonable observer.[177] Under the context test, the only area in which courts must confront ambiguity is determining the scope of the reasonable observer's experience.[178] This containment is desirable for two reasons: first, it preempts the need to broadly define the limits of the pur-

accompanying text (describing geocultural context component of context test). This is a shift from prior analysis, which attempted to define Establishment Clause principles and then determine whether a factual scenario complied with those ideals. *Compare* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (beginning with academic ideals of *Lemon* test and subsequently evaluating facts of case against them), *with McCreary*, 125 S. Ct. at 2734 (beginning analysis with perspective of reasonable observer in order to evaluate ideals of government purpose), *and* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion) (beginning Establishment Clause analysis with contextual considerations of national history rather than abstract standards of purpose or effect).

174. *See Van Orden*, 125 S. Ct. at 2864 (opining that Texas capitol grounds represented state values in historical context and, therefore, Ten Commandments monument did not run afoul of Establishment Clause).

175. *See McCreary*, 125 S. Ct. at 2740 ("No reasonable observer could swallow the claim that the Counties had [in later displays] cast off the [religious] objective so unmistakable in the earlier displays.").

176. *See, e.g.*, *Lemon*, 403 U.S. at 612 ("[W]e can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.").

177. *See, e.g.*, Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004) (acknowledging that scope of information imputed to reasonable observer is unclear). Admittedly, the scope of the reasonable observer is not defined by a brightline test. *See* Lisa M. Kahle, Comment, *Making "Lemon-Aid" from the Supreme Court's* Lemon*: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 367-68 (2005) (noting difficulty of defining experience and knowledge of reasonable observer). Yet some ambiguity is inherent in an Establishment Clause analysis; a reasonable observer test benefits the inquiry by confining that ambiguity within a single analytical point. *See Lemon*, 403 U.S. at 612 (noting that lines in this sensitive area of law can only be "dimly perceive[d]").

178. *See* Seidman, *supra* note 66, at 234-38 (describing judicial role in Establishment Clause evaluation based upon reasonable observer). Specifically, Seidman suggests that "[t]he task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances." *Id.* at 236 (internal quotations omitted).

pose, effect and entanglement criteria of the *Lemon* test.[179] Second, containing the analysis within the reasonable observer standard allows the courts to focus their energies on one specific part of Establishment Clause jurisprudence, thereby allowing them to, over time, create a body of law that delineates the experience of the reasonable observer, similar to the judicial experience defining the scope of the reasonable person in tort law.[180] This essentially frees courts from having to explain broad abstract components of a difficult test in favor of attempting to delineate the scope of a single concept.[181] The context test, with its focus on the perception of the reasonable observer, would allow for the development of a more consistent Establishment Clause jurisprudence in determining the constitutionality of Ten Commandments displays.[182]

VI. CONCLUSION

The context test's approach to Establishment Clause issues respects the value of religious pluralism in modern American society while simultaneously allowing the government to acknowledge religious displays in con-

179. *See id.* at 238-40 (observing that despite inherent difficulty of defining scope of reasonable observer's experience, federal courts of appeals initially met endorsement test with enthusiasm and had little difficulty applying it with consistent results).

180. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring) (suggesting that reasonable observer is similar to reasonable person in tort law who is collective personification of community ideals). *But see* Choper, *supra* note 69, at 510-31 (faulting endorsement test on several grounds); Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 724 (2001) (questioning whether reasonable observer standard is capable of providing clarity to Establishment Clause jurisprudence).

Among the weaknesses cited by Choper is the difficulty of defining the scope of the reasonable observer, which he distinguishes from tort law's reasonable person. *See* Choper, *supra* note 69, at 526 (distinguishing constitutional analysis under Establishment Clause from tort inquiry of reasonableness). He argues that, to recover for tortious emotional distress, the plaintiff must prove that the defendant intentionally engaged in extreme or outrageous conduct. *See id.* at 526-27 (stating premise of tort law). Under the endorsement test, however, the plaintiff must prove only reasonable feelings of alienation resulting from government actions that frequently lack not only an element of outrageousness, but that are undertaken precisely because they represent the common values of a large segment of society. *See id.* at 527 (distinguishing goals of constitutional analysis from those of tort analysis).

181. *Cf.* Greenawalt, *supra* note 172, at 361 (suggesting that "[w]hat courts and lawyers should do . . . is focus on narrower principles relevant for particular circumstances, drawing these principles partly from the very Supreme Court cases decided under the *Lemon* test").

182. *See* Gershengorn, *supra* note 12 (observing that, in practice lower federal courts have been able to consistently apply tests that involve context-intensive analysis). For a discussion of the scope of the context test, see *supra* notes 151-82 and accompanying text.

texts that represent the development of the American nation.[183] Admittedly, the context test, like other Establishment Clause tests, is not perfect.[184] But in a world of complex and questioned religiosity, it may be the best we can hope for.[185]

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183. *See supra* note 160 (arguing that context test is intended to reflect American values of religious freedom). For an interesting snapshot of the religious landscape in modern American society, see PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., AMERICANS STRUGGLE WITH RELIGION'S ROLE AT HOME AND ABROAD 49 (2002), *available at* http://pewforum.org/publications/reports/poll2002.pdf (publishing statistics detailing American's views on religion, political issues and correlation between them). The Pew Research Center study surveyed over two thousand adults nationwide and found that in 2001 over eighty percent of individuals identified their religious preference as "Christian." *See id.* (reporting survey's findings). At least one percent of respondents also identified with Judaism, atheism or agnosticism. *See id.* Ten percent expressed no religious preference. *See id.* Though these numbers may seem to superficially indicate a trend toward homogenous Christianity, data from the Gallup Poll collected in April 2005 indicates that significant numbers of American Christians identify with at least nine different denominations, including Roman Catholicism. *See* GALLUP ORG., GALLUP POLL, RELIGION (2005), *available at* http://poll.gallup.com (follow "Poll Topics A to Z" hyperlink; then follow "Religion" hyperlink) (site membership or trial subscription required to access poll data) (detailing poll respondents who identified with various Christian denominations).

184. *See* Greenawalt, *supra* note 172, at 359-61 (declaring that *Lemon* has ceased to operate as unified test and describing various approaches that have arisen to fill void left by its decline); *see also supra* notes 177, 180 (noting faults of context test).

185. For a statistical and historical description of the modern American religious climate, see *supra* notes 3-6, 183. In addition to the above referenced examples, the past five years alone have seen several attempts to both bring religion onto the public floor and wipe religion from it. *See, e.g.*, Preer, *supra* note 4 (discussing recent challenges to religious displays). For example, Alabama Chief Justice Roy Moore roused the issue by clandestinely placing the Commandments in the lobby of his courthouse in 2001. *See* Edward Walsh, *Alabama's Chief Justice Defies Court Order; Moore Refuses to Remove Ten Commandments Monument from State Building*, WASH. POST, Aug. 15, 2003, at A02 (describing colorful history of Moore's actions). The United States District Court for the Middle District of Alabama issued an order requiring removal of the two-and-one-half ton monument. *See* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1319 (M.D. Ala. 2002) (issuing order requiring removal of monument), *aff'd*, 335 F.3d 1282 (11th Cir. 2003). Moore defied the order, and was suspended from the bench. *See* Bill Rankin, *'Ten Commandments Judge': Chief Justice Is Out in Alabama*, ATLANTA J.-CONST., Nov. 14, 2003, at 1A (reporting Moore's refusal to remove monument). The monument was removed on August 27, 2003. *See* Alan Cooperman & Manuel Roig-Franzia, *Debate Lingers as Monument Is Removed from View; Commandments Display Put in Storage in Ala. Courthouse*, WASH. POST, Aug. 28, 2003, at A03 (recounting later removal of monument).

Several other states are also presently discussing Ten Commandments issues or have recently done so. *See* Preer, *supra* note 4 (listing various Ten Commandments challenges around nation). In Indiana, several politicians have called for the return of a Commandments monument on state capitol grounds despite a pre-*Van Orden* court order requiring removal of the monolith. *See id.* (describing controversy over monument in Indiana). Activists, headed by the Washington-based Christian Defense Coalition, are undertaking a campaign in Boise, Idaho, to rein-

state a Commandments monument in a public park and promise to do likewise in other states. *See* Steven Kreytak, *Capitol Religious Display May Stay; Ten Commandments Monument Has Historical Value, U.S. High Court Holds*, AUSTIN AM.-STATESMAN (Austin, Tex.), June 28, 2005, at A1 (describing lobbying efforts in Idaho). Officials in Michigan have considered whether to institute a Commandments monument on their state grounds. *See* Preer, *supra* note 4 (describing Michigan controversy). In Haskell County, Oklahoma, local officials have decided to allow churches to place an eight-foot-high Ten Commandments monument on the courthouse lawn. *See* David Zizzo, *Battle Over Monument Could Become Burden for Haskell County*, DAILY OKLAHOMAN, July 2, 2005, at 22A (reporting institution of monument). And the city of Pleasant Grove, Utah, is fighting two Establishment Clause challenges to a monument in a publicly owned park: one challenging the constitutionality of the monument and another, filed by the minority religion of Summan, seeking permission to display the group's Seven Aphorisms alongside the display. *See* Angie Welling, *10 Commandments Up in Air in Pl. Grove*, DESERET MORNING NEWS (Salt Lake City, Utah), Aug. 2, 2005 (reporting challenge to religious display in Utah).