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

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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, 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).

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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\(^4\) 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).


\(^6\) 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. Perry8 and McCready 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 McCready 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

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).
10. See generally McCready, 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).
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 affirmation of different courts of appeals in Van Orden and McCready). 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. Part III describes the facts of Van Orden and McCreary and presents the Court’s rationale in each case. Part IV proposes a two-part context-based test for examining the constitutionality of Ten Commandments displays. 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.

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.” In 1971, 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.\(^21\)

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).


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).


1. The Facts of Lemon v. Kurtzman

In Lemon the Court consolidated two cases involving challenges to education funding statutes. Two state legislatures enacted laws allowing the state government to essentially compensate private schools for their educational services. Religious schools were included among those institutions that received state funding from the program. 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.

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


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

\(^{28}\) See *id.* at 41 (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 v. Graham*, 449 U.S. 39, 40-41 (1980) (per curiam) (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.\textsuperscript{34} Incidental secondary benefits bestowed on religion will not give rise to an Establishment Clause violation.\textsuperscript{35} In \textit{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 \textit{Lemon} test.\textsuperscript{36}

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

\begin{itemize}
  \item \textsuperscript{34} Cf. \textit{Rosenberger} v. \textit{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).
  \item \textsuperscript{35} See \textit{Wallace} v. \textit{Jaffree}, 472 U.S. 38, 64 (1985) (Powell, J., concurring) ("We have not interpreted the [purpose] prong of \textit{Lemon} ... as requiring that a statute has exclusively secular objectives.") (internal quotation and citation omitted); \textit{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).
  \item \textsuperscript{36} See \textit{Lemon}, 403 U.S. at 613 (declining to conduct effects analysis and instead focusing inquiry in \textit{Lemon} on impermissible government entanglement with religion).
  \item \textsuperscript{37} See \textit{id.} at 613 (announcing entanglement prong of \textit{Lemon} test); \textit{Walz} v. \textit{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); \textit{cf. Lynch} v. \textit{Donnelly}, 465 U.S. 668, 684 (1984) (stating that only certain forms of entanglement are unconstitutional). \textit{Lynch} stated that "[e]ntanglement is a question of kind and degree." \textit{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. \textit{See id.} Government interaction permitted under the first two criteria of the \textit{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. \textit{See id.} (noting that more than public discord is necessary for finding of unconstitutional entanglement).
  \item \textsuperscript{38} See \textit{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); \textit{see also Agostini} v. \textit{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"); \textit{Marsh} v. \textit{Chambers}, 463 U.S. 783, 798-99 (1983) (Brennan, J., dissenting) (stating that only overbearing government monitoring of religious organizations satisfies entanglement element of \textit{Lemon} test).
  \item \textsuperscript{39} See \textit{Lemon}, 403 U.S. at 614-15 (describing entanglement); \textit{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. 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. Yet neither could the states create an oversight system because doing so would excessively meddle in the affairs of religious organizations.

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. 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. The divisive entanglement required is institutional in nature. Unconstitutional divisive entanglement requires excessive interaction between government and the administration of a religious organization causing intricate intertwining of the two institutions. Public 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.


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

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).


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. Yet as often as the Court has applied the test, it has expressed equal ambivalence with the test’s helpfulness on other occasions. In fact, the Court has sometimes forborne a Lemon analysis altogether.

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


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 first proposed an alternative Establishment Clause analysis that would later become a significant rival to Lemon. 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. Other secular holiday décor, such as Christmas trees, candy canes and reindeer, appeared alongside the crèche.

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. Yet the majority applied only the purpose and entanglement criteria of the Lemon test, leaving effect issues unaddressed. 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.

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).


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.

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. 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. These observations would later provide a base for the development of the endorsement test.

Establishing the foundation for later endorsement test jurisprudence, Justice O'Connor stated that improper government establishment of religion can take two primary forms. 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. 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.

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


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, 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. 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.

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. Allegheny involved
challenges to two Christmas holiday displays on government-owned prop-
erty. The first display was a privately owned nativity erected by Allegheny
County, Pennsylvania, in the foyer of the Grand Staircase in its county
courthouse. 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 gov-
ernment 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 re-
visions 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 endorse-
ment 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).


74. See id. at 578 (noting that displays had been erected in courthouse in Alle-
gheny 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 rep-
resenting 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 Stair-
case. 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
which to reach that determination. In his opinion announcing the judgment of the Court, Justice Blackmun applied the endorsement test, as articulated by Justice O'Connor in Lynch. Employing a similar context analysis, a majority allowed the tree and menorah display to remain. In so holding, the Court, though not by a conclusive majority, placed its seal of approval on the endorsement test.

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. 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. 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\(^9\) 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: Remediying 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).

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).
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. Justice Stevens argued that the reasonable observer must be understood as a nonmember of the religious creed advanced by the display. Further, in his formulation of the reasonable observer, the observer possesses only information available from physically viewing the display. 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."

In her concurrence, Justice O'Connor maintained that a reasonable observer has a more extensive scope of experience than suggested by Justice Stevens. 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.'" 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.

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

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).

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

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,
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 “[f]orty 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." The secular significance of the Commandments, the Court held, did not violate the Establishment Clause.

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. It is borderline cases that present a difficulty. Indeed, Justice Breyer noted, in such cases, there is no "test-related substitute for the exercise of legal judgment." 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. 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.

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. The displays were readily visible to citizens entering the courthouse for administrative and judicial purposes. The ACLU sued to enjoin the displays of the Commandments, alleging they violated the Establishment Clause. The trial court granted a preliminary injunction requiring removal of the displays pending the outcome of the litigation.

Before issuance of the injunction, the counties revised the displays in an attempt to create collages that would meet constitutional requirements. While the first set of displays featured solely the Ten Commandments, 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).


2. 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).

3. 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).


5. 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.” 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. All of the documents chosen for inclusion featured references to the existence of God. The counties later changed the displays again, featuring the Ten Commandments along with eight other equally sized documents. This final pair of displays contained some—but not all—of the same documents from the previous revision. 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 ‘Counts’ 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.

2. The Court’s Rationale in McCreary

The McCreary majority gave greater deference to the Lemon test than did the plurality in Van Orden. The Court acknowledged that neutrality between religion and nonreligion has always guided Establishment Clause analysis. 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.

Yet despite its discussion of intent, the majority did not specifically consider the purpose criterion as part of a Lemon analysis. 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).


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 implicitly 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 governmental intent).
ultimately unknowable, the Court reaffirmed the propriety of inquiring into the governmental purpose behind the displays. Rather than a traditional examination of government scenter, 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."

Invoking this equivalent of the endorsement test, the Court upheld the injunction requiring removal of the displays. 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. 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-

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. 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.

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. 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. 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.

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

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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
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

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 McCrary 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. McCrary, 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, McCREEARY 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, Commandments [sic] Fight Not Over, Turns toward [sic] ACLU, McCREEARY 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 Crew 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{168} The context test avoids this conundrum by focusing exclusively on issues of perceived establishment through the eye of the reasonable observer.\textsuperscript{169} Further, it avoids the semantic challenge of attempting to define inherently cloudy issues

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{166}. See id. (noting that Establishment Clause inquiry should rest on broad community standards).

\textsuperscript{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"). \textit{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").


\textsuperscript{169}. See Seidman, \textit{supra} note 66, at 230-31 (describing experience of reasonable observer throughout observer's evolution in Establishment Clause cases).
such as entanglement. It also renders unnecessary the difficulty of inquiring into institutional scienter to divine governmental purpose.  

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. 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. 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).  
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. 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.

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. Yet the benefit of the context test is that it contains all analytical ambiguity within the boundaries of the reasonable observer. Under the context test, the only area in which courts must confront ambiguity is determining the scope of the reasonable observer's experience. 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. Admittedly, the context test, like other Establishment Clause tests, is not perfect. But in a world of complex and questioned religiosity, it may be the best we can hope for.

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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 A1A (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).