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## An Inconsistent Truth: The Various Establishment Clause Tests as Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today

Emily Fitch

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I.	INTRODUCTION AND BRIEF HISTORY OF THE FIRST AMENDMENT	

*Religion.* The word alone makes some people shiver in fear or cringe with repulsion. After all, “religion” has been charged with causing wars, coercing men and women to murder, and convincing individuals to isolate themselves from family and friends.<sup>1</sup> Yet organized religion has been practiced throughout the world since 2400-2300 BCE, if not earlier.<sup>2</sup> There are over two billion believers in Christianity (including Catholics, Protestants, Anglicans, and Orthodox), approximately 1.5 billion believers in Islam, nearly one billion Hindus, and almost half a billion Buddhists.<sup>3</sup> Of just these four major religions, the number of religious peoples constitutes approximately 76.7% of the world’s population of over seven billion humans.<sup>4</sup> In addition, religion has created some of the most philanthropic, community-oriented, and peace-promoting organizations in the entire world.<sup>5</sup>

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1. *E.g.*, DAVID G. BROMLEY & J. GORDON MELTON, *CULTS, RELIGION, AND VIOLENCE* (2002).

2. *See* SALOMON REINACH, *ORPHEUS: A GENERAL HISTORY OF RELIGIONS* 26 (Florence Simmonds trans., 1909). *See also* KAREN FARRINGTON, *THE HISTORY OF RELIGION* (1998).

3. *See* *The World Factbook*, CENTRAL INTELLIGENCE AGENCY (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>.

4. *See id.*

5. *See, e.g.*, DOROTHY M. BROWN & ELIZABETH MCKEOWN, *THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE* 151 (1997). *See also* MARY J. OATES,

When the First Amendment of the United States Constitution was ratified in 1791, most Americans at the time, including James Madison, agreed that the federal government must not identify one specific religion and provide it financial and legal support, as had occurred in most European countries.<sup>6</sup> In a letter to the Danbury Baptists in 1802, Thomas Jefferson wrote that, “religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions . . . .”<sup>7</sup> The United States of America was founded, in large part, due to the heavy influence of the Church of England in people’s lives and the Church’s influence and power over Great Britain and its territories, which led to the persecution of numerous religious peoples.<sup>8</sup> Jefferson seemed to be noting his awareness of this fact by stating that religion is not a matter of one’s relationship between himself, his country, and his God.<sup>9</sup> Rather, Jefferson noted, religion is a relationship between an individual and God.<sup>10</sup> It was in this same letter that Jefferson referred to the newly enacted First Amendment as having created a “wall of separation between Church & State.”<sup>11</sup> While some interpreters understand this language literally to mean that there should be no overlap between any government act and any religious act or display, there are others who find that complete separation is not realistically possible and that Jefferson was merely referring to the First Amendment’s protection against one power having control over the other.<sup>12</sup>

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THE CATHOLIC PHILANTHROPIC TRADITION IN AMERICA (1995); TIMOTHY PATRICK JACKSON, *THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE* (2003).

6. James Madison, *Holograph Notes for a Speech Introducing the Bill of Rights*, in LIBRARY OF CONGRESS MANUSCRIPT DIVISION (June 8, 1789), available at <http://www.loc.gov/exhibits/religion/rel06.html>.

7. Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

8. See 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1874 (Melville M. Bigelow ed., 5th ed. 1891) (1833). See also *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947) (“A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches.”).

9. Jefferson, *supra* note 7.

10. *Id.*

11. *Id.*

12. See, e.g., Shanin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 507 (1990) (citing 14 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb ed., 1904) (declaring that religious matters belong solely “between man and God”)). See also Phillip Marbury, *Audience Maturity and the Object of the Establishment Clause*, 6 LIBERTY U. L. REV. 565, 577-78 (2012) (describing the view that the religious clauses are constantly in tension); J. Clifford Wallace, *Framers’ Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755, 764-67 (2001) (discussing actions by the framers which indicate that they did not intend to create a complete separation of church and state).

The establishment and free exercise clauses in the First Amendment articulate in pertinent part that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>13</sup> The two clauses are both complementary and conflicting.<sup>14</sup> The establishment clause restricts the government while the free exercise Clause seems to focus more on the individual liberty to freely express one’s beliefs.<sup>15</sup>

The United States Supreme Court has struggled over the years to create a balance between governmental interference with people’s religious beliefs and people’s freedom to exercise those beliefs.<sup>16</sup> Over the years, the Supreme Court has defined numerous tests to create a more “cut-and-dry” view of these First Amendment clauses.<sup>17</sup> For example, tests applied in the contexts of governments requiring oaths of fidelity to a faith, or tithing or giving financial support to churches tend to have more predictable, straight-forward results.<sup>18</sup> However, the Court has struggled, and continues to struggle, to define a fine line with regard to public displays of religious symbols. After all, in most cases, no citizen has been required or coerced to support such symbols.<sup>19</sup> Nevertheless, these displays may be more than simply passive representations of our country’s heritage and traditions.<sup>20</sup> Perhaps these religious symbols demonstrate a governmental endorsement of religion, which could possibly be construed as some form of psychological coercion.<sup>21</sup>

Regardless of whatever views one may have in regard to religion in general, a particular faith, or the establishment clause, there has been little argument among the Supreme Court justices that it is necessary to apply a definite test to cases involving religion in order to create a level of constitu-

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13. U.S. CONST. amend. I.

14. See CONSTITUTIONAL LAW 1275 (Kathleen M. Sullivan & Gerald Gunther eds., 17th ed. 2010) (“[The clauses] protect overlapping values, but they often exert conflicting pressures.”).

15. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression.”).

16. See *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535 (2012) (“This Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity . . .”).

17. E.g., *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (creating the first establishment clause analysis).

18. See CONSTITUTIONAL LAW, *supra* note 14, at 1318.

19. See, e.g., *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part). One exception to this statement is *Stone v. Graham*, in which Kentucky passed a law requiring all public schools to post the Ten Commandments in every classroom. 449 U.S. 39 (1980). The Supreme Court found this law to be unconstitutional because it not only established a religion, but also inhibited free exercise. See *id.*

20. See CONSTITUTIONAL LAW, *supra* note 14, at 1340.

21. See *id.* at 1352.

tional stability and clarity.<sup>22</sup> The underlying question is which test, if any, of the many that have evolved in recent years should apply, or if a new test is necessary.

The scope of this Comment focuses exclusively on Supreme Court tests used in regard to establishment clause cases involving public displays of religious symbols.<sup>23</sup> It argues for a single test to be applied solely within the specific context of cases involving the public display of religious symbols. Part II introduces the main establishment clause tests.<sup>24</sup> Part III takes an in-depth look at the problems with each of the tests, and how each test will or will not work in religious display cases. Part IV suggests that the coercion test may be best applied in religious display cases because religious displays, as passive objects, should not be subjected to the same level of scrutiny as other religious actions with active government involvement. Part V proposes a few minor changes to the current coercion analysis in order to achieve the fairest and most just results.

## II. SEMINAL CASES INSTITUTING THE VARIOUS ESTABLISHMENT CLAUSE TESTS, AS APPLIED TO RELIGIOUS DISPLAYS

### A. *LEMON V. KURTZMAN* (“LEMON TEST”)

In 1971, the Court decided *Lemon v. Kurtzman*, a case which involved Pennsylvania and Rhode Island statutes that provided state aid to parochial elementary and secondary schools.<sup>25</sup> The Court held that both statutes were violations of the establishment clause.<sup>26</sup> Writing for the Court, Justice Burger laid out a three-part test with the intention of drawing a fine line as to the constitutionality of government acts in relation to religion.<sup>27</sup> “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster ‘an excessive government entanglement

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22. *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting) (“It is difficult to imagine an area of the law more in need of clarity . . .”).

23. *Van Orden v. Perry*, 545 U.S. 67 (2005); *Cnty. of Allegheny*, 492 U.S. 573; *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

24. *Van Orden*, 545 U.S. 67 (introducing the *Van Orden* test); *Cnty. of Allegheny*, 492 U.S. 573 (introducing the coercion test); *Lynch*, 465 U.S. 668 (introducing the endorsement test); *Lemon*, 403 U.S. 602 (introducing the *Lemon* test).

25. *Lemon*, 403 U.S. at 606.

26. *Id.* at 607.

27. *Id.* at 612 (“In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”) (internal quotation marks omitted).

with religion.”<sup>28</sup> This infamous test set some of the groundwork for a single analysis that courts could apply to all religion cases. However, the *Lemon* test has since been modified and highly criticized over the years as being overly restrictive of religion.<sup>29</sup>

#### B. *LYNCH V. DONNELLY* (“ENDORSEMENT TEST”)

Several years later, in 1984, the Supreme Court decided a case that involved the public display of a crèche (nativity scene) among other Christmas-related figures and decorations at a public park.<sup>30</sup> The other items in the Christmas display included such secular decorations as Santa Claus, reindeer, Christmas trees, and a sign that read “SEASONS GREETINGS.”<sup>31</sup> The Court, choosing not to apply the *Lemon* test, upheld the constitutionality of the crèche display, noting that the occasional advancement of religion due to governmental actions is not always unconstitutional.<sup>32</sup> Citing *Lemon*, the Court recognized that it must create a balance between the establishment and free exercise clauses in order to prevent the “unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible.”<sup>33</sup> The Supreme Court added that the district court erred in finding the crèche unconstitutional, because it focused solely on the crèche and did not take into context the fact that the religious display was surrounded by purely secular symbols.<sup>34</sup> As such, the government’s purpose in allowing the display of the crèche was not to subtly advocate a particular religious message, but rather to simply celebrate the holidays, which was a legitimate secular purpose since a crèche has considerable historical significance in relation to the Christmas holiday.<sup>35</sup>

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28. *Id.* at 612-13.

29. *See, e.g., Van Orden*, 545 U.S. at 686 (finding that the *Lemon* test was not useful in the Court’s analysis); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (noting that the three prongs in *Lemon* were “no more than helpful signposts”). *See also* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (criticizing the majority’s use of the *Lemon* test and its modifications as “ratchet[ing] up the Court’s hostility to religion”); Rezaei, *supra* note 12, at 519. (“For all practical purposes, the *Lemon* test has lost its vitality and effectiveness.”).

30. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

31. *Id.* at 671.

32. *Id.* at 683.

33. *Id.* at 672. *See also Lemon*, 403 U.S. at 614 (“[T]otal separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”).

34. *Lynch*, 465 U.S. at 680.

35. *See id.* at 680-81.

It was in Justice O'Connor's concurrence that a new test evolved.<sup>36</sup> She explained that there are two ways that a government can violate the establishment clause, generally: (1) "excessive entanglement with religious institutions," and (2) "government endorsement or disapproval of religion."<sup>37</sup> Justice O'Connor stated that the effects of governmental endorsement of a particular religion make nonparticipants feel like outsiders to the political community, and make participants feel like they are insiders and favored members of society, while governmental disapproval of religion sends the opposite effect.<sup>38</sup> The Court has, since then, applied this endorsement test using the reasonable person standard.<sup>39</sup>

In an attempt to clarify the *Lemon* test, Justice O'Connor explained that the secular purpose prong of the test asks whether the government's purpose is to endorse or disapprove of religion.<sup>40</sup> She added that the effect prong of *Lemon* (to neither advance nor inhibit religion) asks whether, regardless of the governmental purpose, the practice "conveys a message of endorsement or disapproval."<sup>41</sup> In order to determine whether a government activity endorses religion, a court must take into consideration, but not solely focus on, historical facts.<sup>42</sup> A court must also take into account the social context of the situation, namely its particular physical setting.<sup>43</sup> Since a crèche is a traditional holiday symbol commonly displayed with other strictly secular symbols, and because in this case the crèche was displayed with other secular holiday decorations, this did not show any government endorsement of religion.<sup>44</sup>

C. *ALLEGHENY COUNTY V. GREATER PITTSBURGH ACLU*  
("COERCION TEST")

A few years later in 1989, the Supreme Court adopted and applied Justice O'Connor's endorsement test to decide a case involving the public dis-

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36. *Id.* at 687-94 (O'Connor, J., concurring).

37. *Id.* at 687-88.

38. *See id.* at 688.

39. *See Lynch*, 465 U.S. at 680. *See also* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer."); *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 401 (3d Cir. 2004) (applying the endorsement test through the reasonable observer standard).

40. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

41. *Id.* at 690.

42. *Id.* at 693.

43. *See id.* at 692, 694 ("[T]he question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.")

44. *See id.* at 692-93.

play of a crèche and a menorah.<sup>45</sup> The crèche was placed at the county courthouse on the main staircase.<sup>46</sup> It had several poinsettia plants and a small evergreen tree surrounding it along with a sign that read “*Gloria in Excelsis Deo*” (Latin for “Glory to God in the Highest”).<sup>47</sup> The Chanukah menorah was located just outside the city-county building with a large Christmas tree and a sign that said “Salute to Liberty” right next to it.<sup>48</sup> Distinguishing the crèche in this case from *Lynch*, the Court found distinct differences.<sup>49</sup> The nativity scene in *Lynch* was surrounded by numerous purely secular holiday decorations while the crèche in this case stood alone as the central display.<sup>50</sup> The floral display and evergreen tree were not secular symbols of equal stature with Santa Claus and Christmas trees; in fact, the Court argued that the floral display actually contributed to the endorsement of Christianity conveyed by the crèche.<sup>51</sup> In addition, the Court noted that the staircase where the crèche was displayed was not open to all religions on an equal basis, so the government was favoring sectarian religious expression.<sup>52</sup>

The menorah, on the other hand, was found to be constitutional.<sup>53</sup> Justice Blackmun, who wrote for the Court, noted that by placing the menorah next to a large Christmas tree, both the Christmas (Christian) and Chanukah (Jewish) holidays were represented; however, this fact alone was not sufficient to make the menorah constitutional because if the purpose was to support both Christianity and Judaism, then this was effectively endorsing these religions.<sup>54</sup> The Court explained that the Chanukah was more significant as a cultural rather than religious holiday, which elevated its secularity.<sup>55</sup> Due to the large size of the Christmas tree (forty-five feet) in contrast to the much smaller menorah (only a few feet in height), and in conjunction with a sign that said the City of Pittsburgh supported liberty, the Court held that the display did not endorse any religion.<sup>56</sup> Justice Blackmun also added that the Christmas tree was a religious *and* secular symbol, so putting this tree

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45. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

46. *See id.* at 578.

47. *Id.* at 580.

48. *Id.* at 578, 582.

49. *Id.* at 598-602.

50. *See Cnty. of Allegheny*, 492 U.S. at 598.

51. *See id.* at 599 (“The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche.”).

52. *See id.* at 599-600.

53. *See id.* at 621.

54. *See id.* at 614-16.

55. *See Cnty. of Allegheny*, 492 U.S. at 586-87 (“This socially heightened status of Chanukah reflects its cultural or secular dimension.”).

56. *See id.* at 617-20.

near a courthouse showed no endorsement of the Christian faith.<sup>57</sup> The overall display merely promoted the city's "secular recognition of different traditions for celebrating the winter-holiday season."<sup>58</sup>

In his concurring and dissenting opinion, Justice Kennedy sharply criticized the majority's decision, arguing that the crèche should also have been found constitutional.<sup>59</sup> He condemned the Court's application of Justice O'Connor's endorsement test as a mere modification of the *Lemon* test, stating that both tests were too restrictive of religious liberty.<sup>60</sup> Justice Kennedy added that the Court should not have applied Justice O'Connor's test because it came from a concurring opinion, which according to him should not have taken precedence over the majority opinion in *Lynch*.<sup>61</sup>

As an alternative to the endorsement test, Justice Kennedy proposed a new test known as the "coercion test."<sup>62</sup> He denoted two principles limiting government's role in religion:

[1] [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and . . . [2] may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a (state) religion or religious faith, or tends to do so.'<sup>63</sup>

Justice Kennedy explained that the coercion need not be as direct as a tax aiding a specific religion or a requirement of an oath to religion, but it may be so subtle as simply an accommodation or recognition of a faith, in

57. *See id.* at 616-17 ("The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.").

58. *Id.* at 620.

59. *See id.* at 655 (Kennedy, J., concurring in part and dissenting in part) ("This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents . . . The crèche display is constitutional.").

60. *See Cnty. of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part) ("[T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion.").

61. *See id.* at 668 ("It has never been my understanding that a concurring opinion . . . could take precedence over an opinion joined in its entirety by five Members . . . [S]tare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explanations of the governing rules of law.").

62. *See id.* at 629, 659.

63. *Id.* at 659 (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

an extreme case.<sup>64</sup> A passive or symbolic display will, in most cases, not infringe upon religious liberty unless the “symbolic recognition or accommodation advances religion to such a degree that it actually establishes a religion or religious faith, or tends to do so.”<sup>65</sup> Any non-coercive governmental action within this realm will not violate the establishment clause, Justice Kennedy stated, unless the action directly benefits a religion in such a way that is more extensive than past practices.<sup>66</sup> Applying his test to the facts of the case, Justice Kennedy found that the crèche and menorah were “purely passive symbols of religious holidays,”<sup>67</sup> both of which had acquired secular meaning. Therefore, since, according to Justice Kennedy there was no coercion or benefit to religion involved, both displays should have been found constitutional.<sup>68</sup>

Justice Kennedy’s proposal of his coercion test was highly criticized by his colleagues as they strongly refuted his arguments in their majority and concurring opinions.<sup>69</sup> Justice Blackmun defended the Court’s position,

64. *See id.* at 661 (giving an example that the establishment clause forbids “the permanent erection of a large Latin cross on the roof of city hall . . . not because government speech about religion is per se suspect . . . but because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion”).

65. *Cnty. of Allegheny*, 492 U.S. at 662 (internal quotation marks omitted).

66. *See id.* at 662-63 (“Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”).

67. Justice Kennedy stated that:

If government is to participate in its citizens’ celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate the religious aspects of the holiday as well.

*See id.* at 663-64.

68. *See id.* at 665-67.

69. Justice Blackmun responded to Justice Kennedy’s concurrence and dissent, stating:

Although Justice Kennedy repeatedly accuses the Court of harboring a “latent hostility” or “callous indifference” toward religion, nothing could be further from the truth, and the accusations could be said to be as offensive as they are absurd. Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.

stating that the majority decision was not discriminatory against religion.<sup>70</sup> Justice Blackmun attempted to justify the Court's position, arguing that the Constitution requires the government to remain secular but clarified that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed."<sup>71</sup> Justice O'Connor also addressed Justice Kennedy's newly created test in her concurring opinion.<sup>72</sup> While Justice Kennedy had criticized Justice O'Connor's test for its lack of clarity and decisiveness in its application, Justice O'Connor pointed out the same in Justice Kennedy's coercion test, stating that his test still involved judgment and hard choices and was not as "cut-and-dry" as he might have thought.<sup>73</sup> Justice O'Connor agreed that it was an important obligation of the Court to draw lines as to the constitutionality of religious displays but that no test could be so perfect as not to face any issues in its application.<sup>74</sup>

#### D. *VAN ORDEN V. PERRY* ("VAN ORDEN TEST")

In 2005, the Supreme Court granted certiorari to a unique case involving the public display of a monument of the Ten Commandments, and upheld the religious symbol under a newly created analysis.<sup>75</sup> In 1961, a largely secular and patriotic organization known as the Fraternal Order of Eagles donated a monument which consisted of an eagle grasping the American flag, the eye inside a pyramid, and two small tablets with ancient script meant to represent the Ten Commandments along with signs representing the tablets' religious significance.<sup>76</sup> The monument was placed on the grounds of the Texas state capitol among numerous other monuments.<sup>77</sup>

Chief Justice Rehnquist found the application of the *Lemon* test (or any test for that matter) unhelpful in the Court's analysis and chose instead

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*Id.* at 610.

70. *See Cnty. of Allegheny*, 492 U.S. at 610.

71. *Id.* at 610-11 ("[C]onfining the government's own celebration of Christmas to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance . . .").

72. *Id.* at 627 (O'Connor, J., concurring).

73. *See id.* at 629.

74. *See id.* at 629-30 (inquiring of Justice Kennedy's test, "[w]ould the Christmas-time display of a crèche inside a courtroom be 'coercive' if subpoenaed witnesses had no opportunity to 'turn their backs' and walk away? Would displaying a crèche in front of a public school violate the Establishment Clause under Justice Kennedy's test?").

75. *Van Orden v. Perry*, 545 U.S. 677 (2005).

76. *Id.* at 681-82. The religious signs included Stars of David (Jewish symbols) and Greek letters, which represent Christ. *Id.*

77. *Id.* at 681.

to look at the context of the monument and the United States' history and heritage for his analysis.<sup>78</sup> Justice Rehnquist acknowledged the issue that had plagued the Court since the inception of the First Amendment: that one goal of the Supreme Court is to create stability in separation of the church and state but not to the detriment of religious peoples or the heritage of the United States.<sup>79</sup> The Court could not deny the fact that the Ten Commandments have religious significance; however, the Court noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."<sup>80</sup> The purpose behind the monument's public display was merely to acknowledge the role that these ten laws played in our nation's heritage and also in the history and traditions of Texas.<sup>81</sup> Texas utilized its capitol grounds as a means of recognizing the state's political and legal history.<sup>82</sup> This "dual significance," as the Court called it, contributed to the separate goals of both religion and government.<sup>83</sup> The passive display of the monument was shown to represent the state's heritage and traditions, and its context of being exhibited with other secular monuments was sufficient to be found constitutional.<sup>84</sup>

Oftentimes in these religious cases, the Supreme Court has, for whatever reason, decided not to apply any of the several proposed and commonly used tests.<sup>85</sup> *Van Orden v. Perry* is one such case, and the several concurrences point out the majority's failure to apply any sort of test in its analysis.<sup>86</sup> Justice Thomas wrote that he was in complete agreement with the Chief Justice's majority opinion, but discussed in his concurrence the problems with the tests the Court had applied over the years.<sup>87</sup> Justice Thomas expressed a desire to "return to the basics," that is, to apply the original intent of the establishment clause; he argued that deciding religious cases in

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78. See *id.* at 686 ("Instead, our analysis is driven both by the nature of the monument and by our Nation's history.").

79. See *Van Orden*, 545 U.S. at 683-84 ("Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions . . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.").

80. *Id.* at 690.

81. See *id.* at 687-90.

82. See *id.* at 691.

83. *Id.* at 692.

84. See *Van Orden*, 545 U.S. at 691-92.

85. See, e.g., *id.* at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument . . .").

86. See *Van Orden*, 545 U.S. 677 (Scalia, J., concurring) (Thomas, J., concurring) (Breyer, J., concurring in judgment).

87. See *id.* at 692-93 (Thomas, J., concurring) ("[The Chief Justice] properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history.").

this manner would be much simpler than attempting to apply any specific test.<sup>88</sup> He explained that the framers of the Constitution understood the word “establishment” to mean some form of legal coercion, typically by “force of law and threat of penalty,”<sup>89</sup> since that is what had happened in the European countries controlled by the Catholic Church.<sup>90</sup> While he never explicitly referenced Justice Kennedy’s concurring and dissenting opinion in *County of Allegheny*, Justice Thomas nevertheless seemed to be expressing some support for Justice Kennedy’s coercion test. He demonstrated this by claiming that the plaintiff, Mr. Van Orden, had never actually been compelled (or coerced) to do anything; he was simply a mere passerby of a monument that he found offensive.<sup>91</sup> Justice Thomas argued that the Court’s analysis in future cases would be much simpler if it were to adopt coercion “as the touchstone for our Establishment Clause inquiry.”<sup>92</sup>

Justice Breyer, in a separate concurrence, somewhat agreed with Justice Thomas’s argument that past tests were ineffective in establishment clause analyses but seemed to agree more with Chief Justice Rehnquist’s analysis in the majority opinion which did not apply any specific test.<sup>93</sup> Justice Breyer acknowledged that there is no clear way by which to determine a religious display’s constitutionality.<sup>94</sup> He explained that the goal of most establishment clause tests is to maintain some level of government neutrality but that it is difficult to determine what exactly is “neutral.”<sup>95</sup> No test can substitute for pure legal analysis.<sup>96</sup> This legal judgment, Justice Breyer continued, must stay true to the purposes of the religion clauses and must take into account the “context and consequences measured in light of

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88. *Id.* (“[O]ur task would be far simpler if we returned to the original meaning of the word ‘establishment’ than it is under the various approaches this Court now uses.”).

89. *Id.* at 693 (citing *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

90. See CAROLYN M. WARNER, CONFESSIONS OF AN INTEREST GROUP: THE CATHOLIC CHURCH & POLITICAL PARTIES IN EUROPE 203 (2000), available at <https://www.ulib.niu.edu:9443/login?url=http://site.ebrary.com/lib/niu/Doc?id=1003190>. See also THOMAS E. WOODS, HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION (2005).

91. See *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring) (“The mere presence of the monument along [Van Orden’s] path involves no coercion and thus does not violate the Establishment Clause.”).

92. *Id.* at 697.

93. See *id.* at 698-705 (Breyer, J., concurring).

94. See *id.* at 698.

95. See *id.* at 699 (explaining that “tests designed to measure ‘neutrality’ alone are insufficient”).

96. See *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (“[O]ne will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment.”).

those purposes.”<sup>97</sup> In certain contexts, a display may convey a religious message, a secular moral message, a historical message, or any combination of the three.<sup>98</sup> Justice Breyer concluded that, since the Ten Commandments monument communicated a secular message in conjunction with its religious connotations, the display would have been constitutional even under the scrutiny of the *Lemon* test.<sup>99</sup> Nevertheless, Justice Breyer warned that, in these religious display cases, it is important to “distinguish between real threat and mere shadow,” concluding that this case was merely a shadow.<sup>100</sup>

### III. CRITICISMS OF THE VARIOUS TESTS AND WHY ALL EXCEPT THE COERCION TEST DO NOT WORK FOR RELIGIOUS DISPLAYS

Every establishment clause test has been highly criticized by judges and scholars, while also being highly acclaimed by others.<sup>101</sup> Each test has both good and bad aspects to its analysis, and some tests have been altered and improved over time. Yet within this messy, discombobulated establishment clause jurisprudence, the coercion test stands above the other tests in its straightforward applicability to religious display cases.

#### A. CRITICISMS, CONUNDRUMS, AND CLARIFICATIONS OF THE *LEMON* TEST

Since *Lemon v. Kurtzman*, the Supreme Court and lower courts have rarely applied the *Lemon* test, although the test still appears in court opinions occasionally.<sup>102</sup> Also since *Lemon*, the Supreme Court and many lower courts have continued to modify and improve the *Lemon* test.<sup>103</sup> The test,

97. *Id.* at 700.

98. *See id.* at 701.

99. *See id.* at 703-04.

100. *Id.* at 704 (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

101. *E.g.*, Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006) (noting the flaws in each of the Supreme Court's establishment clause tests); Kevin M. Detroy, Note, *A Coherent Standard, if You Please: The Supreme Court's Failure to Adhere to a Consistent Standard in Establishment Clause Cases and Why a Revision of Justice O'Connor's Endorsement Test May Be Just What Is Needed*, 33 N. KY. L. REV. 571 (2006) (criticizing other establishment clause tests but supporting endorsement).

102. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying the *Lemon* test to a voucher program for parochial schools); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (failing to apply the *Lemon* test in the Court's analysis).

103. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 206 (1997) (explaining “[i]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect,”

though well intended, has been applied arbitrarily, which has created confusion within the court system.<sup>104</sup> Not only has the *Lemon* test slowly faded out of usage, but it has also been highly criticized.<sup>105</sup> Justice Scalia expressed his distaste for the *Lemon* test (including the revised version in the form of the endorsement test) when he described it as “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 [board] attorneys . . . .”<sup>106</sup>

Although the Court seems to have intended the *Lemon* test to be a uniform tool of analysis for all establishment clause cases, the Court has since recognized that, although the test may be useful, it is not binding.<sup>107</sup> The Court indicated that this test provides “no more than helpful posts.”<sup>108</sup> Even Justice Burger, who wrote the majority opinion for *Lemon v. Kurtzman*, later wrote that all establishment clause standards “should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.”<sup>109</sup> The *Lemon* test was a starting point for establishment clause jurisprudence, but as this area of the law has developed and there have been many more cases, the flaws in this test have become more visible.

### 1. *Lemon Poses Serious Problems in its Application*

The *Lemon* test has been criticized for its hostility toward religion as well as its secular and separationist leaning when applied.<sup>110</sup> To those ac-

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rather than following the *Lemon* test and treating entanglement as a separate prong); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (applying the first two prongs of the *Lemon* test, but not the entanglement prong).

104. Rezaei, *supra* note 12, at 507 (noting that courts have “manipulated, or even ignored, the *Lemon* standard in order to impose a different doctrinal viewpoint”).

105. See *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 773 (8th Cir. 2005) (criticizing the *Lemon* test). See also Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 108 (2007) (“Not only did the [C]ourt largely ignore the *McCreary* decision, it went so far as to hold that the *Lemon* test was inapplicable in cases involving public displays containing religious symbolism.”).

106. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

107. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (demonstrating that, despite *Lemon*’s usefulness, the Court was unwilling “to be confined to any single test or criterion in this sensitive area.”).

108. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

109. *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

110. See Gey, *supra* note 101, at 732-33 (criticizing *Lemon* for its restrictiveness of religion).

comodationists of religion, the test is inherently restrictive of religious liberty.<sup>111</sup>

The secular purpose prong of *Lemon* is difficult to apply to cases involving public displays of religious symbols because these symbols are all, without doubt, religious in some facet.<sup>112</sup> Although the Supreme Court has acknowledged that a display can have a religious meaning and a secular purpose simultaneously,<sup>113</sup> courts have struggled to balance the government's stated secular purpose against the implicit religious purpose behind the display in deciding its constitutionality.<sup>114</sup> The purpose prong has also been criticized for preventing judges from exercising their legal judgment, effectively limiting their power.<sup>115</sup>

Much confusion has also arisen from the effect prong of the *Lemon* test, which provides that government involvement should neither advance nor inhibit religion.<sup>116</sup> Without using Justice O'Connor's reasonable person standard (yet), this prong seems wholly subjective. It is much easier to show that an act of monetary donation to a religious organization is advancing religion than it is to say that the display of a religious monument on government property is advancing religion. A key difference is that, in giving money, the government is making an affirmative act; it is actively and openly supporting a religious cause which in effect advances religion in some respect as the funds are used to further those religious objectives.<sup>117</sup> In contrast, the display of a religious symbol is a passive act in which the dis-

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111. See Jennifer H. Greenhalgh, Comment, *The Establishment Clause and Government Religious Displays: The Court That Stole Christmas*, 15 *TOURO L. REV.* 1053, 1076 (1999) (noting the difference in views between accomodationists and separationists).

112. *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance.").

113. *Id.* at 690-92.

114. See Amy J. Alexander, Comment, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 *PHOENIX L. REV.* 641, 656-58 (2010) (explaining that "in both *Lynch v. Donnelly* and *Lamb's Chapel v. Center Moriches Union Free School District*, the Court simply searched for any secular purpose," but "[o]n the other hand, at times the Court has followed *Stone* and invalidated state actions with merely pretextual secular justifications").

115. See *Gey*, *supra* note 101, at 733.

116. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See also *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1178 (Dist. Colo. 2009) (noting that *Lemon* has been criticized but still remains controlling law); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008) (interpreting the effect prong of the *Lemon* test in light of Justice O'Connor's endorsement analysis).

117. See *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 612 (7th Cir. 2001) ("[R]egardless of whether schools are pervasively sectarian or not, states may not make unrestricted cash payments directly to religious institutions . . . . The Supreme Court has recognized that special Establishment Clause dangers exist where the government makes direct money payments to sectarian institutions.") (internal quotations omitted).

play simply remains in its location without actively promoting the religion of any group.<sup>118</sup> However, the *Lemon* Court did not distinguish between actively or passively advancing religion, which seems to have hurt its analysis.<sup>119</sup>

If a government did not allow the display of any religious symbols at any time on any public property, would it effectively be “inhibiting” religion? Under current case law, this refusal to display any religious symbol would not inhibit religion within the meaning of the establishment clause because the government would be treating religion the same.<sup>120</sup> Although courts have upheld many governmental acts supporting religion,<sup>121</sup> this effect prong of *Lemon* is inherently strict and limits nearly any government involvement with religion.<sup>122</sup>

Justice O’Connor somewhat clarified the final prong of *Lemon*, explaining that “excessive entanglement” is limited to “institutional entan-

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118. See *Van Orden*, 545 U.S. at 691.

119. See Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1156-57 (2010) (explaining that “members of the Court have more recently suggested that the passive quality of a display is constitutionally significant without explaining how that passive quality is to be identified or what constitutional significance such a factor has”).

120. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that a school program neutral toward religion in funding would not violate the establishment clause). In *Rosenberger*, Justice Kennedy wrote that “[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. *Id.* at 842. This “inhibiting religion” aspect of *Lemon* appears to extend into the free exercise clause, which typically comes into play when dealing with public forums. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (noting that since the university had “created a forum generally open for use by student groups [the university was required to] justify its discriminations and exclusions under applicable constitutional norms”).

121. See, e.g., *Kong v. Scully*, 341 F.3d 1132 (9th Cir. 2003) (noting that “[a]ccommodation of a religious minority to let them practice their religion without penalty is a lawful secular purpose”); *Pelphrey v. Cobb Cnty., Ga.*, 547 F.3d 1263 (11th Cir. 2008) (upholding the practice of prayer before county planning commission meetings).

122. Some people may wonder why it even matters that this test has been criticized for being too restrictive of religion. As mentioned in the introduction, there are two religion clauses, one which limits government involvement with religion (establishment clause) and the other which ensures that the government does not restrict individual religious freedom (free exercise clause). See CONSTITUTIONAL LAW, *supra* note 14, at 1275 (“[The clauses] protect overlapping values, but they often exert conflicting pressures.”). As such, *Lemon* tends to be so strict as to inhibit religious freedom. This, of course, is violative of the First Amendment, and is unacceptable. While most scholars and citizens have not gone so far as to state that the *Lemon* test is unconstitutional, the test itself allows for application that would effectively limit religious freedom. Consequently, new tests were needed so as to improve upon the *Lemon* test.

gument.”<sup>123</sup> This simply disallows “extensive government intrusion into the affairs of a religious enterprise.”<sup>124</sup> It is difficult to imagine a government intruding into religious affairs when it simply allows a private group to display a religious symbol on or in government property. This passive act hardly seems to meet the level of *excessive* entanglement. It seems more fitting to classify the public display of religious symbols as constituting *minimal* entanglement, as the government is not making an active effort to promote a religion.

What is commonly disliked about the *Lemon* test is not its difficulty in application (as most have found it to be rather straightforward) but rather that, if strictly applied, most governmental programs or acts would be found unconstitutional.<sup>125</sup> Perhaps the use of this test should be limited to cases involving overt governmental acts interspersed with religion (e.g., granting of funds) rather than cases involving public displays of religious symbols. Situations involving overt governmental action run a higher risk of violating the establishment clause, so these cases should be subjected to higher levels of scrutiny, perhaps, via the *Lemon* test. Contrastingly, passive religious displays do not run such a risk, so such cases should not be subjected to the scrutiny of the *Lemon* test, regardless of the social context of the display. In its original form, *Lemon* has been largely abandoned, but it became commonly used after it was re-introduced in the form of Justice O’Connor’s endorsement test.<sup>126</sup>

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123. *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring) (“The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.”).

124. *Gey*, *supra* note 101, at 762.

125. *See id.*; *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (finding a supper prayer at the Virginia Military Institute to be a violation of the First Amendment under the *Lemon* test); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011) (holding that a state judge’s Ten Commandments poster in his courtroom violated the establishment clause under the *Lemon*-endorsement test). *See also* 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, 363 (2005) (“[A]ll three prongs of the *Lemon* test contain inherent flaws that prevent the test from being practically workable in a satisfactory manner. Application of the *Lemon* test in actual cases has also failed.”); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (failing to provide government neutrality with respect to religion in application of the *Lemon* test).

126. *Smith*, *supra* note 105, at 107 (“While most courts have concluded that *Lemon* may apply in some circumstances and has not been expressly overruled, the lower courts have largely ignored it.”). Another scholar noted that:

When O’Connor first proposed the endorsement test, she claimed to be merely suggesting a clarification of *Lemon*. Yet, if it were a clarification, it would simply be a more detailed explanation of the *Lemon* test and not alter the basic direction of *Lemon*’s inquiry. Instead, the endorsement test replaces the foci of the *Lemon* test with foci of its own, thereby altering the test considerably; how state action affects religion is no longer

## B. CRITICISMS, CONUNDRUMS, AND CLARIFICATIONS OF THE ENDORSEMENT TEST

The endorsement test has been commonly applied in most recent establishment clause cases.<sup>127</sup> This is perhaps because courts find it to be a fair and just middle ground between the overbearing restrictiveness of the *Lemon* test and the overt leniency of the coercion test.<sup>128</sup>

### 1. *Lemon-Endorsement, Applied*

In 2010, the Sixth Circuit decided a case in which the court applied a modified version of the *Lemon* test for its analysis.<sup>129</sup> In *ACLU of Kentucky v. Grayson County*, the county approved the hanging of the Ten Commandments in the courthouse along with other displays to acknowledge the foundations of American law and government.<sup>130</sup> The court applied a modified version of the 1971 *Lemon* test, which involved clarifications by the Supreme Court in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.<sup>131</sup> In *McCreary County*, the Supreme Court further explained the “secular purpose” prong of the *Lemon* test by stating that the secular reason for putting up a religious display must be “genuine, not a sham, and not merely secondary to a religious objective.”<sup>132</sup> The Sixth Circuit also added that this purpose must be determined from the perspective of the reasonable observer.<sup>133</sup> The court held the “secular purpose of en-

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important. Rather, the endorsement test focuses on how people perceive the relationship between the state and religion. The endorsement and *Lemon* tests are different approaches that often yield divergent results.

Joel S. Jacobs, *Endorsement As “Adoptive Action:” A Suggested Definition of, and an Argument for, Justice O’Connor’s Establishment Clause Test*, 22 HASTINGS CONST. L.Q. 29, 35 (1994).

127. *E.g.*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010); *Ritell v. Vill. of Briarcliff Manor*, 466 F. Supp. 2d 514 (S.D.N.Y. 2006) (holding that the village’s display of a menorah during the holiday season appeared to endorse the Jewish faith in violation of the establishment clause); *Milwaukee Deputy Sheriffs’ Ass’n v. Clarke*, 588 F.3d 523 (7th Cir. 2009).

128. *See* R. George Wright, *Why a Coercion Test Is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2011) (arguing that the coercion test provides no definite answers in religion cases); Jacobs, *supra* note 126, at 72 (“‘Coercion’-type tests, regardless of how formulated, are inadequate because they are vague, and ultimately either too harsh or too lax.”).

129. *See* *ACLU of Ky. v. Grayson Cnty.*, 591 F.3d 837 (6th Cir. 2010).

130. This included the Declaration of Independence, Magna Carta, the Bill of Rights, and other displays. *Grayson Cnty.*, 591 F.3d at 841.

131. *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844 (2005).

132. *Id.* at 865. *See also* *Grayson Cnty.*, 591 F.3d at 844.

133. *See* *McCreary Cnty.*, 545 U.S. at 862; *Grayson Cnty.*, 591 F.3d at 848.

hancing civic morality rather than an explicitly religious purpose” was the true motivation for putting up the Ten Commandments.<sup>134</sup> In addition to the purpose prong, the court also applied the reasonable observer standard to the effect prong of the *Lemon* test, as it was introduced by Justice O’Connor in her concurrence in *Lynch v. Donnelly*.<sup>135</sup> The court did not use the last prong of the *Lemon* test in its analysis, but instead just used the first two prongs to determine that there was not “excessive entanglement.”<sup>136</sup> Purporting to have applied *Lemon*, the court essentially applied the endorsement test, though it never stated that it did so.

## 2. Problems Defining the “Reasonable Observer”

The endorsement test, or “*Lemon*/endorsement test” as it is also known,<sup>137</sup> is simply a modification or clarification of the *Lemon* test. Justice O’Connor, in her concurring opinion in *Lynch v. Donnelly*, likely did not intend to create a new test.<sup>138</sup> Her re-interpretation of the *Lemon* test was an improvement, as it was not so hostile toward and restrictive of religion.<sup>139</sup> Interestingly, with regard to holiday display cases, Justice O’Connor indicated no opposition to permitting the government to celebrate religion publicly.<sup>140</sup> This showed that, at least in this specific context, she would apply her endorsement test less strictly.

Although the endorsement test is an improvement of the *Lemon* test in many respects, it still falls short in some areas. Scholars have denoted three fundamental flaws within the endorsement test as well as the *Lemon* test:

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134. *Grayson Cnty.*, 591 F.3d at 850.

135. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). *See Grayson Cnty.*, 591 F.3d at 854.

136. *Grayson Cnty.*, 591 F.3d at 856. *See* Denise Mashburn, Note, *ACLU v. Grayson County*, 43 URB. LAW. 628, 629 (2011).

137. *See, e.g.*, *Utah Highway Patrol Ass’n. v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting) (describing Justice O’Connor’s test as the “*Lemon*/Endorsement test”).

138. *See Lynch*, 465 U.S. 668 (O’Connor, J., concurring) (“I write separately to suggest a clarification of our Establishment Clause doctrine.”). *See also* Marbury, *supra* note 12, at 572-73 (“Despite its somewhat frequent use, this [endorsement] test, in many ways, is nothing more than a re-worked version of the *Lemon* test—a derivative of the first (secular purpose) and second (primary effect) prongs of *Lemon*.” (internal quotations omitted)).

139. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (adopting the endorsement test even though the *Lemon* test was controlling law at the time); Kahle, *supra* note 125, at 365 (“The endorsement test is also commendable because it allows the government to make certain accommodations for both minority and mainstream religions.”).

140. *See Lynch*, 465 U.S. at 693 (noting that the city’s display of a Christmas crèche “d[id] not have the effect of communicating endorsement of Christianity”). *See also* Gey, *supra* note 101, at 738 (“In the holiday display cases . . . [Justice O’Connor] indicated that she had no problem with permitting the government to celebrate religion publicly.”).

(1) uncertainty as to who is the relevant person to judge the effect of the government act, (2) malleability of results reached by the application of the test due to its inherent subjectivity and heavy factual dependence, and (3) inability of the test to account for past decisions of the Court.<sup>141</sup>

Justice Kennedy added, in his opinion in *County of Allegheny*, that the endorsement test produces results inconsistent with the history and tradition of the establishment clause.<sup>142</sup>

Regarding the first of the fundamental flaws, the mechanism of using the objective observer standard has provided more problems than solutions and has been criticized as being an unhelpful aspect of the test.<sup>143</sup> Although this standard is similar to that which is commonly used in tort law,<sup>144</sup> its application in establishment clause cases has created more problems than it likely has in tort law. The concern is that the reasonable observer will never be fully objective.<sup>145</sup> Although a judge may try to determine what a reasonable person might believe in regards to religious displays, he will nevertheless be influenced by his own background and knowledge, thus causing the standard to have subjective tendencies.<sup>146</sup> As a result, a judge in one part of the country deciding a case on the issue of whether the Ten Commandments may be hung in a courthouse may decide differently than a judge residing in a different part of the country deciding a factually identical case.<sup>147</sup>

141. *The Supreme Court, 1988 Term, Government-Sponsored Religious Displays*, 103 HARV. L. REV. 228, 234 (1989).

142. *See Cnty. of Allegheny*, 492 U.S. at 670 (“Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.”).

143. *See, e.g., Marbury, supra* note 12, at 572-73; Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139 (2006); Gey, *supra* note 101, at 738-39.

144. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring in the judgment) (noting that the reasonable 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’” (quoting W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 175 (5th ed. 1984))).

145. Gey, *supra* note 101, at 738-39 (“The problem with the reasonable observer mechanism is that the observer will never be truly objective.”).

146. *Id.* at 739 (“The results a judge obtains from applying the reasonable observer analysis therefore will depend entirely on what background knowledge and cultural assumptions the judge feeds to the observer.”).

147. *See Marbury, supra* note 12, at 565-67. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (upholding the display of a nativity scene in a city in Rhode Island); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 578-79 (1989) (striking down display of nativity scene in front of county courthouse in Pennsylvania).

This is not to suggest, however, that a subjective test would be any better.<sup>148</sup> In fact, it would likely lead to more inconsistent results than found currently. In *Capitol Square Review and Advisory Board v. Pinette*, Justice O'Connor stated that the beliefs of the reasonable person can change with the context of the case, but generally, the reasonable observer must be "deemed more informed than the casual passerby" and "aware of the history and context of the community and forum in which the religious display appears."<sup>149</sup> The problem is that courts have not more clearly defined what the knowledge and beliefs of the reasonable person are in regards to religious displays, and even if they had, the standard would still be challenging in practice simply because judges cannot help being human in nature.<sup>150</sup> Humans are influenced by any number of factors—prejudice, culture, background, personal experience, knowledge, etc.—and it is not in a human's capacity to be wholly objective.<sup>151</sup> Courts have questioned what the religious knowledge and beliefs of this objective observer are.<sup>152</sup> Is this observer religious? Is this person an atheist? An agnostic? The Supreme Court would likely conclude that this reasonable observer is none of the above; however, knowing that the Court would not give a definite description of a reasonable person's beliefs provides no guidance for a lower court's analysis.<sup>153</sup>

What distinguishes the endorsement test from its predecessor, the *Lemon* test, is not only its use of the reasonable person standard but also the context-specific nature of the test.<sup>154</sup> This deference to the context of the

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148. Smith, *supra* note 105, at 106 ("[T]he objective test is arguably easier to administer than a fact-intensive subjective test . . .").

149. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part).

150. See Kosse, *supra* note 143, at 149 ("The inherent vagaries associated with the reasonable observer test in current First Amendment jurisprudence does not provide any clear guidance to courts regarding this fundamental freedom of the non-Establishment of religion.").

151. See *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 302-03 (6th Cir. 2001); James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991) (arguing about the subjectivism of objectivity).

152. See *Skoros v. City of New York*, 437 F.3d 1, 23-24 (2d Cir. 2006) ("[W]e do not think the intended recipient of a display necessarily defines the objective observer.").

153. See, e.g., *Pinette*, 515 U.S. at 755 ("In this context, the 'reasonable observer' is the personification of a community ideal of reasonable behavior, determined by the collective social judgment, whose knowledge is not limited to information gleaned from viewing the challenged display, but extends to the general history of the place in which the display appears.").

154. See Gey, *supra* note 101, at 739. See also *Detroy*, *supra* note 101, at 607 ("Again, the focus of the endorsement test is on the sentiments of actual persons, not imaginary characters presumed to know everything related to a particular piece of legislation and its context.").

case “introduces an unfortunate level of uncertainty” that makes it difficult for courts and government officials to determine at what point the government is “endorsing” religion.<sup>155</sup> It is not so much that context is a terrible factor to use in analysis but merely that, because the endorsement test relies so heavily on context, it essentially uses context as the sole factor in decision-making.<sup>156</sup> In effect, this contextual aspect of the endorsement test causes many cases to be decided on an individual case-by-case analysis, with little regard for precedent.<sup>157</sup>

### 3. Defining “Endorsement”

According to a thesaurus, synonyms of the word “endorsement” include the words “sanction” and “advocacy.”<sup>158</sup> When something is sanctioned, it is being approved or permitted.<sup>159</sup> These words indicate some sort of passive involvement, rather than any affirmative act.<sup>160</sup> On the other hand, when something is advocated for, there is more active involvement and a sense of desire to promote whatever is being supported.<sup>161</sup> These words, all synonyms of “endorsement,” are somewhat conflicting. What does it mean to “endorse” religion? Perhaps “endorsement” is similar to the

155. Gey, *supra* note 101, at 739.

156. *Id.*

157. *E.g.*, *Modrovich v. Allegheny Cnty.*, 385 F.3d 397 (3d Cir. 2004) (finding that the display of a plaque of the Ten Commandments affixed to the county courthouse did not violate the establishment clause under the endorsement test); *Freethought Soc'y of Greater Philadelphia v. Chester Cnty.*, 334 F.3d 247 (3d Cir. 2003) (holding that display of Ten Commandments plaque on county courthouse was not an endorsement of religion); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (finding that monument with Ten Commandments inscribed on it would endorse religion if the monument were placed on state capitol grounds); *ACLU of Tennessee v. Rutherford Cnty.*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002) (holding that display of Ten Commandments in courthouse lobby violated the establishment clause).

158. *Endorsement Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/endorsement> (last visited Feb. 21, 2014). *See also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 382 (10th ed. 1994).

159. *Advocate Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/advocate> (last visited Feb. 21, 2014). *See also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 18 (10th ed. 1994).

160. Think, for example, of a case involving the display of a nativity scene. The government's allowance of the crèche's display was more of a passive act, but the display of the crèche as an exercise of free speech required more active involvement. *See Smith v. Lindstrom*, 699 F. Supp. 549 (W.D. Va. 1988) (“Although the Court in *Lynch* referred to the crèche as a ‘passive symbol,’ the effect of well-crafted symbolic speech is anything but passive, quiet, or ineffective.”).

161. *Advocate Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/advocate> (last visited Feb. 21, 2014). *See also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 18 (10th ed. 1994).

“beyond a reasonable doubt” standard which many courts have refused to define or clarify for juries in order to avoid confusing jurors any more than necessary.<sup>162</sup> After all, the word “endorse,” in itself, is not a complicated word until someone finds conflicting meanings.

The Supreme Court has, however, taken some steps to define “endorsement” beyond Justice O’Connor’s original explanation. In *Wallace v. Jaffree*, Justice O’Connor noted in her concurring opinion that a government may endorse religion when it conveys a message that “religion or a particular religious belief is favored or preferred.”<sup>163</sup> Beyond equating endorsement with favoritism or preference, the Court also referred to endorsement as being “closely linked to the term ‘promotion.’”<sup>164</sup> By associating “endorsement” with other words such as “promotion,” “favoritism,” or “preference,” the Court seems to have accepted the more proactive interpretation of the word which requires more government involvement.<sup>165</sup>

#### 4. *The Endorsement Analysis and Religious Displays*

If the Court were to apply the “sanction” definition of “endorsement,” then no religious display or governmental act involving religion in the slightest would be found constitutional. Since the Supreme Court has in

162. As one writer notes:

The lack of any explanation by Justice O'Connor as to the dangers of alienating religious minorities ultimately undermines the legitimacy of the endorsement test. Moreover, Justice O'Connor's adoption of the “objective observer” criteria fails to take account of relevant perceptions, leaving the fate of an endorsement claim squarely within the purview of nothing more than a legal fiction.

Detroy, *supra* note 101, at 605. See also *United States v. Glass*, 846 F.2d 386, 386 (7th Cir. 1988) (“‘Reasonable doubt’ must speak for itself. Jurors know what is ‘reasonable’ and are quite familiar with the meaning of ‘doubt.’ Judges’ and lawyers’ attempts to inject other amorphous catch-phrases into the ‘reasonable doubt’ standard . . . only muddy the water . . .”).

163. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring).

164. See *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989).

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Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person's standing in the political community.”

*Id.* at 593-94 (citing *Lynch v. Donnelly*, 465 U.S., at 687 (O’Connor, J., concurring)).

numerous instances allowed the government to have some involvement with religion,<sup>166</sup> and because Justice O'Connor herself conceded that the public celebration of religion through the display of religious symbols under her endorsement analysis was constitutional,<sup>167</sup> the Court likely did not mean for "endorse" to be synonymous with "sanction." This is further proof that the Court's interpretation of the endorsement analysis was not meant to apply in situations involving submissive government action.

Therefore, in all establishment clause cases applying the endorsement test, only when the government is actively taking part in advocating particular religions does the constitutionality of religious displays even come into question. Religious displays are passive in nature; there is no active government involvement.<sup>168</sup> Rather, the government is merely "authorizing" the use of public property for the display of a religious symbol. Hence, it is important to distinguish between governmental *authorization* of the public display of a religious symbol and governmental *advocacy* for a particular religion. It appears under these definitions, therefore, that Justice O'Connor's endorsement analysis is not wholly applicable to cases involving the public display of religious symbols.

As mentioned earlier, Justice O'Connor stated that the establishment clause cannot only be violated when the government endorses religion but also when the government "disapproves" of religion.<sup>169</sup> The word "disapprove" has been defined as "rejecting" or holding an "unfavorable opinion about something."<sup>170</sup> Although these definitions provide a stronger sense of dislike and disfavor, they are less in conflict with each other and seem to cause fewer, if any, problems with regard to what it means to "disapprove" of a religious symbol. Let us again ask the question earlier mentioned when discussing *Lemon*: if the government refuses to allow the display of a religious symbol on public property, is it "disapproving" of religion? Again, the answer is probably "no." The government is "rejecting" religion, but so long as there is an opportunity to display the religious symbol elsewhere

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166. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state cannot require citizens to have the state motto, which promoted a religious ideology, on license plates under endorsement); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (holding that the school could not exclude Christian clubs under endorsement).

167. See *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring).

168. See *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005).

169. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

170. *Disapprove Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/thesaurus/disapprove> (last visited Feb. 21, 2014). See also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 329 (10th ed. 1994); *Disapprove Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/definition/american\\_english/disapprove?q=disapprove](http://oxforddictionaries.com/definition/american_english/disapprove?q=disapprove) (last visited Feb. 21, 2014).

(perhaps on private property), the religious display is not being “rejected” in its entirety.<sup>171</sup>

If the question is reversed, and the local government *does* permit the display of a religious symbol, for example, a copy of the Ten Commandments, to be hung in a government building, would this cause an objective observer to feel like an outsider to the political community?<sup>172</sup> This question is more difficult to answer and would probably provoke some heated debate. However, it may be more difficult to accept that an objective observer would be so shocked or offended by this symbol with inherently religious meaning that this person would begin to question whether they fit in with society. On the other hand, a mandatory prayer observing a specific religion in a public school would much more likely cause students not adherent to that religion to feel like political outsiders.<sup>173</sup> There are acute differences between these two scenarios: in one scene, the government is merely allowing a symbol with religious meaning to be located on public property, while in the other situation, the government is actively involved in promoting a religion.<sup>174</sup> The endorsement test, though more favorable to religious freedom than *Lemon*, is still inadequate in its analysis for situations involving the public displays of religious symbols, which are uniquely different than other establishment clause cases.

### C. CRITICISMS, CONUNDRUMS AND CLARIFICATIONS OF THE COERCION TEST

#### 1. *Criticisms of Coercion*

There are essentially three main elements of the coercion analysis. A government directly coerces an individual when it:

- (1) intentionally
- (2) forces him or her to make a choice between religion and nonreligion (or between one religion and another) and
- (3) weights that choice with an express

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171. See *Disapprove Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/thesaurus/disapprove> (last visited Feb. 21, 2014). The “disapproval” aspect of the endorsement analysis adheres more to the free speech clause. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that the school district violated the free speech clause by denying a church access to school premises).

172. *Lynch*, 465 U.S. at 680-81.

173. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down the act of prayer at graduation ceremonies).

174. Another inquiry would be to question whether causing an objective observer to feel like a political outsider to the community would constitute an “injury” which would grant a party standing to sue under Article III of the Constitution, but that is not within the scope of this Comment to be further discussed.

negative sanction (such as a legally imposed fine or other punishment) for choosing in a way that the state does not approve.<sup>175</sup>

More concisely said, coercion involves a forced choice, threat of sanction, and coercive intent.<sup>176</sup> Coercion may also occur indirectly, as noted in *Santa Fe Independent School District v. Doe*, a case involving student-led prayer prior to school-sponsored football games.<sup>177</sup> This test has been criticized as producing “so few limits on government involvement with religion that it leaves the Establishment Clause in tatters.”<sup>178</sup> Some scholars have interpreted the word “coercion” very narrowly, arguing that coercion prohibits “only the most egregious and overt government actions benefitting or advancing religion.”<sup>179</sup> The term “coercion” is most commonly understood as an act of persuasion by use or threat of force or putting a party under duress.<sup>180</sup> Under this definition, few government actions would be understood to be “coercing” individuals to participate in religious activity against their will.<sup>181</sup>

The coercion test, like most other tests, also somewhat depends on contextual matters in that the recognition of the presence or absence of coercion depends on the context and circumstances surrounding the situation, which some scholars have considered a quandary.<sup>182</sup> Another impediment to applying the coercion test to religious display cases is that many lower courts assume that this analysis is only applicable in cases involving school-sponsored religious activity.<sup>183</sup> One such case is *Lee v. Weisman*,

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175. Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1659-60 (2006).

176. *See id.* at 1643 (“Coercion occurs when one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose.” (internal quotations omitted)).

177. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (The “choice between whether to attend these [football] games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice on students.”).

178. Gey, *supra* note 101, at 740.

179. *Id.* at 743.

180. *See Coercion Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/thesaurus/coercion> (last visited Feb. 21, 2014). *See also* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 222 (10th ed. 1994); *Coercion Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/coercion?q=coercion> (last visited Feb. 21, 2014); Gey, *supra* note 101, at 740.

181. *See* Gey, *supra* note 101, at 740.

182. *See* Wright, *supra* note 128, at 203 (noting that “coercion, or the absence of coercion, is typically a contextual matter”).

183. *See, e.g.,* *Borden v. Sch. Dist. of East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) (not finding the coercion test applicable); *Briggs v. Mississippi*, 331 F.3d 499, 505

where the test was used to hold that a prayer by a clergyman at a high school graduation ceremony was unconstitutionally coercive.<sup>184</sup> Justice Scalia noted in *Lee v. Weisman* that “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”<sup>185</sup> Most notably, however, is that many scholars and judges agree that the coercion analysis is far too lenient and strongly favors religion over court neutrality and secularity.<sup>186</sup>

## 2. *Refuting the Criticisms of Coercion*

While there have been concerns about the seemingly deferential level of review of the coercion test, Justice Kennedy refuted this argument by noting that coercion may be as subtle as simply accommodating a faith and that, in extreme cases, passive displays would not pass the scrutiny of the coercion test.<sup>187</sup> Justice Kennedy, when he introduced his test, expanded the dictionary definition of “coercion,”<sup>188</sup> which had originally only recognized direct, not-so-subtle coercive acts.<sup>189</sup> In addition, it is inaccurate to assume that the coercion test is only meant to apply in school-sponsored religious activity cases because, after all, Justice Kennedy introduced his test in a case where the facts involved public displays of religious symbols,<sup>190</sup> and Justice Thomas expressed support for Justice Kennedy’s coercion test in another factually similar case involving religious displays.<sup>191</sup> As such, this does not mean that the coercion test cannot be applied to cases with facts involving religious displays but rather that the test should apply to these types of cases since that is where some Supreme Court justices have held it should apply. In truth, when the coercion test is actually applied to religious

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(5th Cir. 2003) (quoting *Freiler v. Tangipahoa Parish Bd.* 185 F.3d 337, 343 (5th Cir. 1999)) (stating that the coercion test “analyzes school-sponsored religious activity in terms of the coercive effect that the activity has on students. That test is facially inapplicable here”). Note that regardless of whether courts continue to use the coercion test in school-sponsored religious activity cases, this Comment merely argues that religious display cases are best fitted by the coercion test, and not that the coercion test may not be used for other religion cases. Such an argument is beyond the scope of this Comment.

184. *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

185. *Id.* at 640 (emphasis omitted).

186. *See, e.g.*, Wright, *supra* note 128.

187. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661-62 (1989) (Kennedy, J., concurring in part and dissenting in part).

188. *See id.* at 659-63.

189. *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 222 (10th ed. 1994).

190. *Cnty. of Allegheny*, 492 U.S. at 659-67 (Kennedy, J., concurring in part and dissenting in part).

191. *Van Orden v. Perry*, 545 U.S. 677, 693-97 (2005) (Thomas, J., concurring).

display cases, it stands above the other tests as the most easily applicable analysis, providing the fairest and most just results.

### 3. *The Coercion Test, Applied*

Most, if not all, judges and scholars who have criticized the coercion test have failed to consider that there may not necessarily be one single test for all establishment clause jurisprudence,<sup>192</sup> but the coercion analysis may apply to one specific area within cases involving religion. That area is the public display of religious symbols.<sup>193</sup>

Imagine again that a local government has refused to let a private group display a religious symbol (say, a plaque of the Ten Commandments) on the inner walls of the county courthouse. This scenario would probably not invoke the usage of the coercion test, but may cause other issues involving the free exercise clause, which is not within the scope of this Comment. However, if the situation is again reversed and the local government allows a small plaque of the Ten Commandments to be displayed inside the main lobby of a county courthouse, would this amount to unconstitutional coercion? First, there has been no threat of penalty, nor any act to persuade individuals to choose between religion and non-religion or do something against their will. By simply hanging the plaque on the wall, there has been no coercive action by the government. Thus, under the coercion test, the hanging of the Ten Commandments would probably not violate the establishment clause.

#### D. CRITICISMS, CONUNDRUMS, AND CLARIFICATIONS OF THE *VAN ORDEN* TEST

The biggest problem with the *Van Orden* test is that most courts do not recognize it as an actual test in and of itself, and few scholars, if any, ever discuss *Van Orden* as a form of analysis when discussing establishment clause jurisprudence.<sup>194</sup> Only when the facts in a case are similar to *Van Orden* has this “test” been applied.

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192. See *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). See also Michele Hyndman, *Tradition Is Not Law: Advocating a Single Determinative Test for Establishment Clause Cases*, 31 T. MARSHALL L. REV. 101 (2005) (promoting a single test to apply to all establishment clause cases).

193. While other religious tests may better apply in other religious contexts, the scope of this Comment is limited to discussing the benefits of applying *only* the coercion test to *only* cases involving the public display of religious symbols.

194. E.g., Daniel O. Conkle, *Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, but not Indifference*, 13 IND. J. GLOBAL LEGAL STUD. 417 (2006).

In *ACLU Nebraska Foundation v. City of Plattsmouth*, the Eighth Circuit applied the *Van Orden* analysis, noting the factual similarity between the two cases.<sup>195</sup> Like the monument in *Van Orden*, the Eighth Circuit noted the monument containing the Ten Commandments was also a “passive—and permissible—use of the text of the Ten Commandments to acknowledge the role of religion in our Nation’s heritage.”<sup>196</sup> The greatest weakness for *Van Orden* is that it has hardly been recognized as an establishment clause test. Yet while *Van Orden* may not be widely applied as a common establishment clause test like the others, it still retains strong precedential value within specific factual scenarios.<sup>197</sup>

#### IV. WHY THE COERCION TEST IS THE BEST FOR RELIGIOUS DISPLAY CASES

##### A. THE GOVERNMENT GENERALLY ACTS PASSIVELY

It has been mentioned several times throughout this Comment that religious displays are passive symbols. This has been noted many times by Supreme Court justices.<sup>198</sup> These displays are passive, because the government is making no active effort to support religion.<sup>199</sup> It merely allows a private group to display a religious symbol on public property, or the governmental body itself displays such a symbol usually for reasons involving history and tradition.<sup>200</sup> On the other hand, in non-religious display cases, there is a keen difference. During a prayer at graduation given by a single religious leader, graduates and attendees are, in a sense, obligated to attend and participate.<sup>201</sup> Contrastingly, religious displays, for the most part, require no such active involvement by citizens or by the government. A religious symbol may sit on the ground or hang on a wall, but it will create no obligation to look at it, to acknowledge it, or to adhere to its religion. A passerby may simply ignore the religious monument.<sup>202</sup>

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195. *ACLU Nebraska Found. v. Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

196. *Id.* at 776-77.

197. *See generally Plattsmouth*, 419 F.3d 772.

198. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 663-64 (1989) (Kennedy, J., concurring in part and dissenting in part).

199. *See Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (Thomas, J., concurring).

200. *See id.* at 687-90.

201. *See Lee v. Weisman*, 505 U.S. 577, 586 (1992) (“State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies . . . [and] attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory . . .”). It is important to note, however, that not all prayer has been held unconstitutional, but again, this determination depends on the context and circumstances. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983).

202. *See Van Orden*, 545 U.S. at 694 (Thomas, J., concurring).

Holiday religious displays are even less likely to violate the Establishment Clause because they are temporary displays, not permanent. After all, even Justice O'Connor conceded that holiday displays may be constitutional under her endorsement test, which provides for a more stringent analysis than the coercion test.<sup>203</sup> The holidays are unique times in which non-religious folk are celebrating what have originally been religious holidays.<sup>204</sup> It would be difficult to argue under the coercion test that the government would be coercing citizens to accept Christianity through the display of a symbol such as the Christmas tree, which, although often recognized as a secular symbol, still celebrates a Christian holiday.<sup>205</sup>

While religious displays usually do not require or entail such a high level of government involvement as in other religion cases (i.e., granting of funding to religious programs), there are still situations in which a religious display may violate the establishment clause. Imagine, for instance, a state has passed a law requiring the Ten Commandments to be posted in every classroom in every public school within the state.<sup>206</sup> This act by the government is coercive for several reasons. First, the government is not acting passively; the legislature took an active initiative to promote Judeo-Christian beliefs, both of which recognize the Ten Commandments as a part of their Old Testament scriptures.<sup>207</sup> There would not only have been direct coercion on the teachers and students, but the coercion would have been even more direct on school administrations that had no choice in the matter. Finally, and most importantly, this law would be coercive because there was a "force of law and threat of penalty"<sup>208</sup> since refusing to comply would have resulted in a violation of state law. Such was the exact scenario previously depicted in the 1980 Supreme Court case, *Stone v. Graham*.<sup>209</sup>

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203. See *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

204. See *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) ("Similarly, the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs.").

205. *Id.* at 616 ("The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.").

206. *E.g.*, *Stone v. Graham*, 449 U.S. 39 (1980). Note that this case was decided before the inception of the coercion test in 1989 in *Cnty. of Allegheny*, 492 U.S. 583.

207. See *Stone*, 449 U.S. at 41 ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992))).

208. See *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (emphasis omitted).

209. *Stone*, 449 U.S. 39 (1980).

This was a rather extreme case<sup>210</sup> of government involvement with religion, in which a state legislature effectively “established” a state religion.<sup>211</sup>

Hopefully this Comment has illustrated to you, dear reader, that religious symbols are unlike other government acts involving religion, because these displays are passive in nature. There exists a great deal of historical art containing undisputed religious themes; however, the required study of such art has never been considered unconstitutional.<sup>212</sup> Similarly, as religious displays are passive in nature, there is a lower likelihood of violating the establishment clause. As such, religious displays should be subject to a more lenient standard of review, which has been best exemplified in the form of the coercion test. The coercion test, while criticized for its leniency, is not deferential, as the paragraphs above have elucidated. There are additional reasons that the coercion test may be the best choice for analyzing religious display cases.

#### B. THE PURPOSE OF THE ESTABLISHMENT CLAUSE IS BEST FULFILLED BY THE COERCION TEST

The establishment clause, as earlier stated, says that “Congress shall make no law respecting an *establishment* of religion . . . .”<sup>213</sup> If we look closely at the words, it is simple to see that the coercion test most accurately represents the original intent and meaning of the establishment clause. To “establish” means to institute, to show something to be true, to bring into existence, or to found something.<sup>214</sup> “Endorsement” does not have the same meaning as “establishment,” and the endorsement test goes beyond the original meaning of the establishment clause.<sup>215</sup> Justice Thomas argued in an earlier case that the Court should return to the original meaning of the establishment clause,<sup>216</sup> while hinting that the coercion test may best fulfill

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210. See *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

211. See *id.* at 659 (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

212. Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 757 (2012) (“Great art with religious themes may also bring students to God, but studying such art is not unconstitutional.”).

213. U.S. CONST. amend. I (emphasis added).

214. See *Establish Definition*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY 397 (10th ed. 1994); *Definition of Establish in English*, OXFORD DICTIONARIES: LANGUAGE MATTERS, <http://oxforddictionaries.com/definition/english/establish?q=establish> (last visited Feb. 21, 2014). See also *Establish Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/establish> (last visited Feb. 21, 2014).

215. See *Endorsement Definition*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY 382 (10th ed. 1994); *Endorsement Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/endorsement> (last visited Feb. 21, 2014).

216. See *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

the original purpose of the establishment clause.<sup>217</sup> Furthermore, when Justice Kennedy introduced the coercion test, he even used the word “establish” as part of the test’s analysis.<sup>218</sup>

### C. SECULARISM CAN STILL BE ACCOMPLISHED

When the Supreme Court decides establishment clause cases, the Court examines whether there is a secular purpose or effect in a religious display.<sup>219</sup> This is examined even when applying the coercion test.

“Secularism” has been defined as indifference to, rejection or exclusion of, or having no connection to religion.<sup>220</sup> Yet even having the dictionary definition of “secularism” does not provide a clear and helpful answer as to what exactly “secular” means. Scholars have observed that it is “not entirely clear what is meant by secularism.”<sup>221</sup> One author has described two traditional meanings and uses of secularism: the first is “an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that endeavours to provide a neutral framework capable of accommodating a broad range of religions and beliefs,” and the second is “an ideological position that is committed to promoting a secular order.”<sup>222</sup>

Most people today would associate the word “secular” to mean “non-religious.”<sup>223</sup> This, however, is an inaccurate interpretation of the word.<sup>224</sup> Professor Zachary Calo of the Valparaiso University School of Law pro-

217. *See id.* at 697.

218. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in part).

219. *See id.* at 610.

220. *See Secular Definition*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1056 (10th ed. 1994); *Definition of Secular in English*, OXFORD DICTIONARIES: LANGUAGE MATTERS ,

[http://oxforddictionaries.com/definition/english/secular?q=secularity#secular\\_\\_23](http://oxforddictionaries.com/definition/english/secular?q=secularity#secular__23) (last visited Feb. 21, 2014). *See also Secularism Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/secularism> (last visited Feb. 21, 2014).

221. Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 31 (Rajeev Bhargava ed., Oxford University Press 2005).

222. Brett G. Scharffs, *Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism*, 6 *RELIGION & HUM. RTS.* 109, 110-11 (2011), available at [http://www.iclrs.org/content/blurb/files/RHRS\\_006\\_02\\_109-126.pdf](http://www.iclrs.org/content/blurb/files/RHRS_006_02_109-126.pdf).

223. Iain T. Benson, *That False Struggle Between Believers and Non-Believers* 22-25 (Soc. Sci. Research Network, Working Paper No. 1803246, 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1803246](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803246).

224. *See id.* at 22 (noting that “[t]he idea that ‘secular’ means ‘non-religious’ is a departure from its original meaning and challenges the idea that religion has a place in the public sphere”).

poses in his article a third way of defining secularism.<sup>225</sup> He calls this new idea “higher law secularism.”<sup>226</sup> This higher law secularism rests on the principle that “secular is not to be equated with the absence or negation of religion.”<sup>227</sup> Essentially, judges may not have to worry about choosing between religion or nonreligion when deciding religious display cases.<sup>228</sup>

In essence, though never stating so bluntly, Professor Calo presents the idea that religious displays are, for all intents and purposes, secular symbols.<sup>229</sup> The Supreme Court has acknowledged that many religious symbols, namely those that have been upheld by the Court, may have religious and secular purposes without violating the establishment clause.<sup>230</sup> Yet Professor Calo explains that under his higher law secularism, the Court may simply call such religious displays “secular” under his more moderate definition of secularism.<sup>231</sup> In his concurring opinion in *Van Orden*, Justice Scalia made an argument that echoed the basic themes of higher law secularism by stating “that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”<sup>232</sup> Thus,

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225. See generally Zachary R. Calo, *Higher Law Secularism: Religious Symbols, Contested Secularisms, and the Limits of the Establishment Clause*, 87 CHI.-KENT L. REV. 811 (2012).

226. *Id.* at 812.

227. *Id.* at 826.

228. Professor Calo added that,

[i]n particular, rather than asking whether law should advance or delimit religious influence in public life, higher law secularism considers how law can direct religion to shape and support the architecture of a secular political order. In other words, higher law secularism is premised on the idea that the binary shaping Establishment Clause jurisprudence rests on the false premise that law must either defend the goods of religion or the goods of the secular state.

*Id.*

229. *Id.* at 826-27 (“The secular and the religious are historically and intellectually tethered, and higher law secularism seeks to reconstruct this genealogical point of contact in a new form.”).

230. *Van Orden v. Perry*, 545 U.S. 677, 690, 692 (2005).

231. Professor Calo noted that,

[o]pening secular space to religious symbols, particularly if they advance plural forms of higher law meaning, need not involve the privileging of faith over the secular, but might rather represent a way of continuing the dialectal process through which the secular is given meaning. Viewed in this light, higher law secularism should be understood to at least potentially create space for public religious symbols.

Calo, *supra* note 225, at 830.

232. *Van Orden*, 545 U.S. at 692.

following this “higher law secularism” may help legitimize a court’s decision in upholding a government’s display of religious symbols.

In addition, many religious symbols and other formerly religious acts have attained secular meaning over time.<sup>233</sup> For example, the phrase “under God” in the Pledge of Allegiance is a simple recognition of the fact “that, [f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God,” and reciting the pledge was not a religious exercise but a patriotic one.<sup>234</sup>

#### D. COURT NEUTRALITY TOWARD RELIGION CAN STILL BE ACHIEVED

Another goal of the Court in deciding establishment clause cases is to achieve neutrality.<sup>235</sup> Professor Bruce Ledewitz argues in his article for a “meaning-full” neutrality that does not favor any particular religious or non-religious group.<sup>236</sup> Similar to the higher law secularism, this “meaning-full” neutrality argues that when a court upholds the public display of some religious symbol, it is not favoring religion over non-religion and not being neutral.<sup>237</sup> Rather, the court would be upholding the government’s commitments to history and morals.<sup>238</sup> Professor Ledewitz gives two reasons to

233. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984) (“The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”); *Van Orden*, 545 U.S. at 688-90 (“Such acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America . . . . The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments . . . . These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.”).

234. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 7 (2004) (citing H.R. REP. NO. 83-1693, at 2 (1954)).

235. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”). See also *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (“That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account.”).

236. See Ledewitz, *supra* note 212, at 727-28.

237. See *id.* at 745-48.

238. Professor Ledewitz explained:

[s]o, what I mean by a meaning-full neutrality is a C.S. Lewis type view of public life that is open to, and indeed relishes, a comprehensive understanding of human flourishing and states its claims about these matters expressly in public creeds and in pedagogical commitments. That public activity would include spending taxpayer money in support of such substantive moral

support this “meaning-full” neutrality: (1) although many Supreme Court justices agree that religious displays are, for the most part, constitutional, the justices disagree as to why;<sup>239</sup> and (2) this new understanding of neutrality would reduce political conflict.<sup>240</sup> Supporting a form of neutrality that does not ban the public display of religious symbols would not weaken a court’s analysis should it decide to apply the coercion test. Similar to the “higher law secularism,” using this “meaning-full” neutrality would allow the Court to uphold religious displays more easily without a fear of not appearing to act in a neutral manner.

#### E. CONTEXT STILL MATTERS EVEN UNDER THE COERCION ANALYSIS

In nearly every establishment clause case, the context of the display has ultimately determined its constitutionality.<sup>241</sup> Courts have decided cases differently based on the particular public property location of the display,<sup>242</sup> the nature of the display,<sup>243</sup> the source of sponsorship (public vs. private funds),<sup>244</sup> and the length of the display (temporary vs. permanent).<sup>245</sup>

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and historical claims and subsidizing groups that promote such claims.

*Id.* at 747.

239.

[W]hile the Court seems currently settled on upholding most so-called nonsectarian religious imagery used by government . . . there is no agreement . . . as to why such religious imagery is constitutional. These actual and potential rulings are not stable in the way they would be if doctrine in the field were settled.

*Id.* at 758.

240. *Id.* at 759.

241. *E.g.*, *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (ultimately determining the constitutionality of a menorah and crèche display based on the specific context and circumstances).

242. *E.g.*, *Suhre v. Haywood Cnty.*, 55 F. Supp. 2d 384 (W.D. N.C. 1999) (finding a display of the Ten Commandments in a county courtroom to be constitutional); *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff’d on other grounds*, 173 F.3d 568 (6th Cir. 1999) (holding that crucifix within courtroom was unconstitutional).

243. *See, e.g.*, *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (holding that large white cross that stood at war memorial violated establishment clause); *Murray v. City of Austin, Tex.*, 947 F.2d 147 (5th Cir. 1991) (finding that the city’s insignia containing a cross was constitutional, and did not constitute subtle coercion).

244. *E.g.*, *Knights of Columbus, Council No. 94 v. Town of Lexington*, 272 F.3d 25 (1st Cir. 2001) (finding an impermissible use of private funds); *Freedom from Religion Found. v. City of Marshfield, Wis.*, 203 F.3d 487 (7th Cir. 2000) (finding there was a permissible use of private funds).

Accordingly, even the coercion test, though seemingly more straightforward in application, still requires that a court consider the context and circumstances of the religious display.<sup>246</sup> Many people may fear the coercion test is simply a way for religion to ease into government affairs and activities or vice versa. Granted, the coercion test may appear more lenient than the *Lemon*/endorsement analysis, but the test is stricter than it appears because context still matters. However, as the endorsement test has been criticized for its overly contextual analysis, which would lead to inconsistent precedent,<sup>247</sup> the coercion test does not solely rely on context to decide constitutionality. While context is still a factor taken into consideration, it is not the sole factor. Thus the coercion test will produce more consistent results.<sup>248</sup>

Imagine again the scenario given above when discussing the passivity of the government action.<sup>249</sup> This time, however, the details, meaning the *context*, are altered slightly.<sup>250</sup> In this instance, the plaque of the Ten Commandments is not small and paper-sized (eight-by-ten inches) but it is poster-sized (thirty-six-by-sixty inches). Engraved in large font at the bottom of the plaque is a verse from the Bible. The plaque sits on an ornate pedestal rather than being hung on the wall and is located in the main lobby of the courthouse right in front of the entrance so that all who enter the courthouse will notice the plaque. Tour guides and security personnel direct visitors to look at the plaque. The display is still somewhat passive in nature, but the level of indirect coercion has elevated to the point where it may violate the establishment clause. In this specific context, the plaque appears to “advance[] religion to such a degree that it actually establishes a religion or religious faith, or tends to do so.”<sup>251</sup> Passersby would have difficulty ignoring the strong message indicated and may attribute any religious coercion to the government. Although the governmental act itself may be subtle, the display is not, and the intent is much less subtly trying to persuade individ-

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245. See, e.g., *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997) (finding a temporary display of a crèche constitutional); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (finding that temporary display of a menorah was unconstitutional).

246. See *Cnty. of Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring in part and dissenting in part). See also *id.* at 659 (Kennedy, J., concurring in part and dissenting in part).

247. See Gey, *supra* note 101, at 739.

248. See *Cnty. of Allegheny*, 492 U.S. at 659-62 (Kennedy, J., concurring in part and dissenting in part).

249. See *supra* Part IV.A.

250. The following scenario follows the basic principles as laid out in *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844 (2005).

251. *Cnty. of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part) (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

uals. This is an example of how context would be taken into account when applying the coercion test.

#### F. POLICY REASONS SUPPORT THE COERCION ANALYSIS

On December 4, 2012, the management of a retirement complex in Los Angeles, California ordered the removal of all Christmas trees and menorahs in common areas because they claimed them to be religious symbols.<sup>252</sup> This story is only one example among many others where local citizens and government officials have not been fully apprised of the complexity of establishment clause jurisprudence regarding religious displays. In order to protect themselves and prevent any potential lawsuits, they err on the side of caution and favor a non-religious approach.

Adoption of the coercion analysis for use in religious display cases would have several benefits. Not only would it assist the courts in their decision-making, but it would also help local citizens and government officials to decide whether to publicly display an allegedly “religious” symbol. The coercion analysis would be easier for lay folk to understand and apply as compared to the other more complicated establishment clause tests. Governments would be able to grant the display of such religious symbols without fear of violating the establishment clause. Local government officials would also know when to refuse to grant the display a religious symbol due to the overtly coercive context and circumstances. Following a single analysis for this particular set of cases would provide consistency in court decisions and would lead to social and political stability, at least in this arena of the law. In addition, caseloads for courts would be reduced because the standard for violating the establishment clause would be much higher, so the number of petty lawsuits would be reduced.

Imagine that a small Jewish menorah sits against a wall on a small display table within an official county building. There is a small plaque near the menorah that acknowledges that a Jewish group made a large donation to complete the construction of this county building. A local citizen who works in the county building claims that the year-round display of the menorah violates the establishment clause. Under the coercion test, the display of the menorah would not likely violate the establishment clause. There is no direct or indirect coercion. The local government is neither attempting to establish a religion nor appearing to do so. The county has merely displayed

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252. Maricar Mendoza, *Seniors Decry Ban on Christmas Tree in Their Complex in Newhall*, DAILY NEWS, last updated Dec. 4, 2012, [http://www.dailynews.com/ci\\_22133907/seniors-decry-ban-christmas-tree-their-complex-newhall](http://www.dailynews.com/ci_22133907/seniors-decry-ban-christmas-tree-their-complex-newhall).

the menorah as a small “thank you” to the Jewish group for its generous donation.

The coercion test does not overly favor the religious but rather creates a more fair and just “fighting ground” between the religious and non-religious (and all those in between). Governments and courts should not have to live in fear of violating the establishment clause simply by allowing passive displays of allegedly “religious” symbols on public property. Oftentimes, even the non-religious person or someone of a different faith will support a religious display because the symbol is merely a part of history and tradition.<sup>253</sup> Luckily, there is still hope for all who seek consistency and clarity in establishment clause jurisprudence for religious displays. Just days after the order by management to remove all Christmas trees and menorahs from common areas, residents of the retirement complex in Los Angeles, after much protesting, were able to save their Christmas trees and menorahs and keep them in the common areas.<sup>254</sup>

## V. PROPOSED ALTERATIONS TO THE COERCION ANALYSIS

The Federal Rules of Evidence is a code created by Congress to regulate the admission of facts in federal civil and criminal cases. Federal Rule of Evidence 807 states that under certain circumstances, a hearsay statement may not be excluded even if the statement is not specifically mentioned in the other hearsay exception rules.<sup>255</sup> This is known as the “residual exception” or the catch-all.<sup>256</sup> As a safeguard, it is important for rules to have exceptions and additional catch-all rules to apply under unique circumstances that were not taken into consideration or even thought of when the rules were made.

Similarly, even the coercion test should have a safeguard catch-all analysis to use only when absolutely necessary or when the coercion test would not be helpful to apply in religious display cases (although it is difficult to imagine such a situation). *Van Orden* adequately provides the necessary catch-all test.<sup>257</sup> The reason is because the *Van Orden* Court did not

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253. *Id.* (“Frances Schaeffer, who is Jewish, said she doesn’t understand the property management company’s stance. ‘This tree is a symbol of reverence that we can all enjoy regardless of our religious beliefs,’ she said.”).

254. Susan Abram & Mariecar Mendoza, *Seniors Save Christmas Tree at Apartment Complex in Newhall*, DAILY NEWS, last updated Dec. 6, 2012, [http://www.dailynews.com/ci\\_22140598](http://www.dailynews.com/ci_22140598).

255. *See* FED. R. EVID. 807 (“Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804.”).

256. *Id.*

257. *See generally* *Van Orden v. Perry*, 545 U.S. 677 (2005).

apply any specific “test”<sup>258</sup> but simply exercised its legal judgment.<sup>259</sup> Legal analysis is nearly always a safe gamble because it allows a court to take into account the heritage, traditions, and other circumstances of that community without being limited by any test.<sup>260</sup> The coercion test is still better than *Van Orden* with regard to religious display cases because it does place limitations on the courts and provides clear factors to follow which will, in turn, provide for a greater level of consistency.<sup>261</sup> Nonetheless, there are always anomalous cases, and it is necessary for a court to be prepared to analyze such a case.

When the coercion test is simply inapplicable, or when the court finds that no coercion has occurred, but still feels that there may be a violation of the establishment clause, the *Van Orden* analysis, like an extra pair of eyes searching for a lost item, may assist the court. *Van Orden* should only be applied in absolutely unusual and rare cases. The coercion test is meant to provide stability, but applying the *Van Orden* test will not contradict or hurt the usage of the coercion test, and because it will rarely be applied, it will have low precedential value outside factually identical cases.<sup>262</sup> Also, unlike the *Lemon* or endorsement tests, the *Van Orden* test is not so limiting in its analysis and will allow a court to exercise its wisdom and discretion when needed.<sup>263</sup>

## VI. CONCLUSION

Religious displays are unlike other governmental acts involving religion because displays are passive in nature.<sup>264</sup> Since the government does not make any affirmative act to coerce citizens or establish a religion when it allows religious symbols to be displayed, public displays should be subject to a lower standard of review than other governmental religious acts (e.g., prayer or granting of funding) in which the government is actively involved with religion. This lower level of scrutiny is best illustrated in the form of the coercion test, which fulfills the purposes of the establishment clause while still continuing to achieve secularism and court neutrality.

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258. *See id.* at 682.

259. *See id.*

260. *See id.* at 698 (Breyer, J., concurring).

261. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting in part) (noting the limiting principles of the establishment clause as laid out in the coercion test).

262. *Van Orden*, 545 U.S. 677.

263. *Id.*

264. *See Cnty. Of Allegheny*, 492 U.S. at 663-64 (Kennedy, J., concurring in judgment in part and dissenting in part).

Religious displays, as argued under higher law secularism and by several Supreme Court justices, have both secular and religious meaning. As these displays have attained historical and moral significance over time, their meaning has become more secular.<sup>265</sup> Under “meaning-full” neutrality, a court should not have to be concerned about issues of neutrality when it allows religious symbols to be publicly displayed. Additionally, the *Van Orden* analysis should be instituted as a catch-all test to use only in rare and unique circumstances when the coercion test would not be applicable in specific religious display cases. Courts have been wary in recent months of taking on religious cases; the Supreme Court has denied certiorari,<sup>266</sup> and other courts have simply decided religious display cases on the basis of standing.<sup>267</sup> Now is the time for courts to stand up and make a change.

If courts were to apply these proposed changes to religious display cases, this would be one step in the direction toward achieving stability and consistency in establishment clause jurisprudence. These changes would also assist governmental officials in their decisions to display allegedly “religious” symbols and would ultimately lead to more social and political stability. Americans currently live in a society that is so concerned about secularism, neutrality, and “separation of church and state,”<sup>268</sup> that society has actually become somewhat hostile toward religion in order to not appear hostile toward the non-religious. The changes proposed above may not only alter future legal analyses but may change the way society views the relationship between religion and government, ultimately for the betterment of all.

Justice Scalia noted in his dissenting opinion in *McCreary County* that excluding religion from the public forum “is not, and never was, the model adopted by America.”<sup>269</sup> Religion, whether liked or not, is not only part of this great country’s heritage, but is also part of its identity.<sup>270</sup> Religion’s presence has stretched into adopting Thanksgiving as a national holiday in

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265. *See id.* at 586-87.

266. *See, e.g., Utah Highway Patrol Ass'n. v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

267. *See, e.g., ACLU of Florida v. Dixie Cnty.*, 690 F.3d 1244 (11th Cir. 2012).

268. *E.g., Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 1 (1947).

269. *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (continuing to describe the many ways in which religion has seeped into society and governmental affairs without issue). *See also Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (“There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”).

270. Justice Scalia wrote in a dissenting opinion that, “[i]n vocation of God despite [polytheists’] beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the Religion Clauses of the First Amendment, but because governmental invocation of God is not an establishment.” *McCreary Cnty.*, 545 U.S. at 899-900 (Scalia, J., dissenting).

order to give thanks to God,<sup>271</sup> having prayer begin each session of Congress as well as the Supreme Court,<sup>272</sup> and finally, displaying an emblem of the Ten Commandments, located in the very chamber where our Supreme Court justices decide the constitutionality of such religious displays.<sup>273</sup>

To accept that religion is part of American heritage and traditions does not favor religion over nonreligion; indeed, it creates a balance where there is no conflict between the establishment and free exercise clauses. Modifying legal jurisprudence can help us achieve these objectives. James Wilson, a Founding Father and signer of the United States Constitution, once wrote:

Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both.<sup>274</sup>

EMILY FITCH\*

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271. *Id.* at 886.

272. *See id.* at 895.

273. *See id.* at 906.

274. 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 106 (Philadelphia, Bronson & Chauncey 1804).

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