Maryland Law Review

Volume 79 | Issue 3 Article 7

American Legion v. American Humanist Ass'n: Exempting Longstanding Governmental Religious Displays from Establishment Clause Scrutiny and How the Endorsement Test Could Have Prevented It

M. Allison Hyde

Note

AMERICAN LEGION V. AMERICAN HUMANIST ASS'N: EXEMPTING LONGSTANDING GOVERNMENTAL RELIGIOUS DISPLAYS FROM ESTABLISHMENT CLAUSE SCRUTINY AND HOW THE ENDORSEMENT TEST COULD HAVE PREVENTED IT

M. ALLISON HYDE*

In *American Legion v. American Humanist Ass'n*[1] the United States Supreme Court considered whether a large monument in the shape of a Latin cross on government land ("the Cross") and maintained by the government violated the Establishment Clause. The Court's decision turned on whether commemorating World War I ("WWI") veterans was a purpose sufficiently secular to overcome the cross's Christian association. Part I of this Note will discuss the history of the Cross and the lower courts' litigation of the challenge to government ownership. Part II will discuss the enactment of the Establishment Clause and Supreme Court case law on governmental displays of religious expression leading up to *American Legion*. Part III will discuss the decision in *American Legion*, which held that longstanding religious monuments are presumptively constitutional and the Cross is constitutional as a longstanding symbol possessing a legitimate secular meaning.[2] In Part IV, this Note will argue that although the Court's holding was consistent with relevant precedent,[3] its opinion unnecessarily created an exemption from Establishment Clause scrutiny for longstanding governmental religious displays.[4] Instead, the Court should have invoked its endorsement test as the most appropriate existing test for evaluating religious displays.[5] Finally, this

* J.D. Candidate, 2021, University of Maryland Francis King Carey School of Law. The author wishes to thank all of her *Maryland Law Review* editors, especially Grace O'Malley, Bianca Spinosa, and Gina Bohannon, as well as her advisor, Professor Mark Graber, for their thoughtful feedback throughout the writing and editing process. The author would also like to thank her family, especially her sister, mother, father, and grandmother, whose constant support and encouragement were critical to this endeavor.

1. 139 S. Ct. 2067 (2019).
2. *Id.* at 2089–90.
3. *See infra* Section IV.A.
4. *See infra* Section IV.B.
5. *See infra* Section IV.C.

Note will argue that a modified version of the endorsement test should be adopted for analyzing such displays in the future.[6]

I. THE CASE

In 1918, a group of Prince George's County residents formed a committee to construct a memorial for the county's fallen WWI soldiers.[7] The committee decided the memorial would be a cross and would stand at the end of the National Defense Highway (another WWI memorial)[8] in the median of a three-way intersection owned by the Town of Bladensburg, Maryland.[9] The committee sought donations with a form reading:

> We, the citizens of Maryland, trusting in God, the Supreme Ruler of the Universe, Pledge Faith in our Brothers who gave their all in the World War to make [the] World Safe for Democracy. Their Mortal Bodies have turned to dust, but their spirit Lives to guide us through Life in the way of Godliness, Justice and Liberty.
>
> With our Motto, "One God, One Country, and One Flag" We contribute to this Memorial Cross Commemorating the Memory of those who have not Died in Vain.[10]

The local post of the American Legion took over the project in 1922 and completed construction of the monument in 1925.[11] At its dedication ceremony, a Catholic priest offered the invocation and a Baptist pastor offered the benediction.[12] The keynote speaker, United States Representative Stephen W. Gambrill, called the Cross "symbolic of Calvary,"[13] and reporters described it as "[a] mammoth cross, a likeness of the Cross of the Calvary, as described in the Bible," "a monster [C]alvary cross," and a "huge sacrifice cross."[14] The Cross is approximately forty feet tall and an American flag

---

6. *See infra* Section IV.D.

7. *Am. Legion*, 139 S. Ct. at 2076. Among this group were the mothers of ten deceased WWI soldiers. *Id.*

8. *Id.* at 2077.

9. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 201 (4th Cir. 2017), *rev'd*, 139 S. Ct. 2067 (2019); Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373, 377 (D. Md. 2015), *rev'd*, 874 F.3d 195 (4th Cir. 2017), *rev'd*, 139 S. Ct. 2067 (2019).

10. *Am. Legion*, 139 S. Ct. at 2076–77 (alteration in original). Another fundraising flyer read:

> [T]hose who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicate[] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

Am. Humanist Ass'n, 147 F. Supp. 3d at 377 (second alteration in original).

11. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 377–78.

12. *Am. Legion*, 139 S. Ct. at 2077.

13. *Id.*

14. *Id.* at 2109 (Ginsburg, J., dissenting) (alterations in original).

currently flies at its side.[15] It has the American Legion's emblem at its center on both sides, and bears a plaque at its base that reads "Dedicated to the heroes of Prince George's County, Maryland who lost their lives in the Great War for the liberty of the world," and lists the names of forty-nine fallen county soldiers.[16]

Since its dedication, the site of the Cross has been used for events honoring members of the military, such as Veterans Day, Memorial Day, and Independence Day,[17] which have often included prayer.[18] The Cross has also been the site of three documented Sunday worship services, all occurring in August 1931.[19] Monuments honoring veterans of other conflicts have been added as part of what has become known as Veterans Memorial Park.[20] The nearest of these monuments is 200 feet from the Cross and no other monument is as tall as the Cross.[21] There are no other religious symbols in the park.[22]

In 1961, the Maryland-National Capital Park and Planning Commission ("Commission") acquired the Cross and accompanying land "in order to preserve the monument and address traffic-safety concerns."[23] The American Legion reserved the right to use the site for ceremonies.[24] By 2014, the Commission had spent $117,000 in public funds to maintain the Cross and land and had set aside an additional $100,000 for renovations.[25] In 1985,

15. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 201 (4th Cir. 2017), *rev'd*, 139 S. Ct. 2067 (2019).

16. *Am. Legion*, 139 S. Ct. at 2077 (majority opinion). The Fourth Circuit noted "bushes have historically obscured" the part of the Cross containing the plaque, and "the plaque is badly weathered, rendering it largely illegible to passing motorists." *Am. Humanist Ass'n*, 874 F.3d at 201. The words "valor," "endurance," "courage," and "devotion" are also inscribed on the bases. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 376.

17. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 379.

18. *Am. Humanist Ass'n*, 874 F.3d at 201.

19. *Id.* at 217 (Gregory, C.J., concurring in part and dissenting in part). The Fourth Circuit noted: "Nothing in the record indicates that any of these services represented any faith other than Christianity." *Id.* at 201 (majority opinion).

20. *Am. Legion*, 139 S. Ct. at 2077.

21. *Am. Humanist Ass'n*, 874 F.3d at 202. No other monuments are taller than ten feet. *Id.*

22. *Id.*

23. *Am. Legion*, 139 S. Ct. at 2078. In 1935, the Maryland state legislature directed the State Roads Commission to investigate ownership of the land out of traffic safety concerns and to acquire it by purchase or condemnation. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 378. The record is unclear as to when and what land was transferred, but, to resolve any ambiguities, the American Legion local post "transfer[ed] and assign[ed] to [the Commission] all of its right, title and interest in and to the Peace Cross . . . and the tract upon which it is located." *Id.* (alterations in original).

24. *Am. Legion*, 139 S. Ct. at 2078.

25. *Am. Humanist Ass'n*, 874 F.3d at 201.

the Cross was rededicated to honor "'the sacrifices made [in] all wars,' . . . by 'all veterans.'"[26]

In 2014, the American Humanist Association ("AHA")[27] and three non-Christian residents[28] of Washington, D.C. and Maryland[29] brought an action under Title 42, section 1983 of the United States Code in federal district court against the Commission claiming the Cross's location on publicly owned land and its maintenance by a public agency violated the Establishment Clause of the First Amendment.[30] Plaintiffs sought relocation, demolition, or at least the removal of the Cross's arms.[31] The American Legion chose to intervene as a defendant.[32] The United States District Court for the District of Maryland granted summary judgment for the defendants, holding that under either of the Supreme Court's two approaches for deciding Establishment Clause cases—the test established in *Lemon v. Kurtzman*[33] ("*Lemon* test") and the approach applied in *Van Orden v. Perry*[34]—the Cross was constitutional.[35] Finding disagreement among the courts (within the Fourth Circuit and the Supreme Court jurisprudence), the district court found it unnecessary to determine which test to use, since "[b]oth tests 'require the [c]ourt to inquire into the nature, context, and history' of the Monument and lead to the same result" of finding the Cross constitutional.[36] Applying the *Lemon* test, the court reasoned the government's purpose for ownership and maintenance of the Cross and surrounding property was predominantly

26. *Am. Legion*, 139 S. Ct. at 2104 (Ginsburg, J., dissenting) (alteration in original) (citation omitted).

27. "[AHA] is a nonprofit organization that advocates to uphold the founding principle of separation of church and state." *Am. Humanist Ass'n*, 874 F.3d at 202.

28. *Id.*

29. Complaint at 2–4, Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373 (D. Md. 2015) (No. cv-14-550).

30. *Am. Humanist Ass'n*, 147 F. Supp. at 380.

31. *Am. Humanist Ass'n*, 874 F.3d at 202, n.7.

32. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 380.

33. 403 U.S. 602 (1971). "Per *Lemon*, to comply with the Establishment Clause, a challenged government display must (1) have a secular purpose; (2) not have a 'principal or primary effect' that advances, inhibits, or endorses religion; and (3) not foster 'an excessive entanglement between government and religion.'" *Am. Humanist Ass'n*, 874 F.3d at 204 (quoting Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 269–73 (4th Cir. 2005)). "If a state action violates even one of these three prongs, that state action is unconstitutional." *Id.* (quoting Koenick v. Felton, 190 F.3d 259, 265 (4th Cir. 1999)).

34. 545 U.S. 677 (2005). The test from the narrowest grounds opinion in *Van Orden* involves analyzing "the circumstances surrounding the monument's placement, its physical setting, and the length of time it remains unchallenged." *Am. Humanist Ass'n*, 874 F.3d at 205 (quoting *Van Orden*, 545 U.S. at 698, 700–03 (Breyer, J., concurring)).

35. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 389.

36. *Id.* at 382 (second alteration in original) (quoting Hewett v. City of King, 29 F. Supp. 3d 585, 611 (M.D.N.C. 2014)).

secular rather than religious.[37] The court held, under the second prong of the *Lemon* test, the primary effect of the Cross on a reasonable observer was not to imply government endorsement of religion, but to commemorate veterans.[38] Under the final prong, the court held the Cross had not created an "'excessive entanglement' between government and religion."[39] In applying the approach used from *Van Orden*, the court held that the context and history of the Cross evinced a more secular than religious purpose and effect.[40]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed, holding the Cross violated the Establishment Clause[41] and remanded the case for determination of a proper remedy.[42] The Fourth Circuit analyzed the Cross under the *Lemon* test, "with due consideration given to the *Van Orden* factors."[43] In applying the *Lemon* test, the Fourth Circuit also found the Commission had legitimate secular purposes for

37. *Id.* at 384–85. The court found the Commission's purpose in obtaining the Cross was based on traffic safety concerns and the government's responsibility to maintain highway medians, as well as preserving and maintaining a "'historically significant war memorial' that has honored fallen soldiers for almost a century." *Id.* (quoting Trunk v. City of San Diego, 629 F.3d 1099, 1108 (9th Cir. 2011)).

38. *Id.* at 386–87. The court considered that the Cross is adorned with secular elements such as the American Legion's emblem, the plaque, and four non-religious words at the base; its longstanding, express function as a war memorial; its placement amidst other secular war memorials; the predominant use of the site for commemorative, non-religious events celebrating Memorial Day and Veterans Day; and a cross's mental evocation of the rows of small crosses marking the graves of fallen American servicemen overseas, and particularly in the case of the Cross, which lists the names of forty-nine fallen World War I soldiers. *Id.*

39. *Id.* at 387 (quoting Lambeth v. Bd. of Comm'rs of Davidson Cty., 407 F.3d 266, 272–73 (4th Cir. 2005)). The court found the Cross did not have "the effect of advancing or inhibiting religion" by much the same analysis it performed for the second prong of the *Lemon* test, reasoning that the Cross and the adjoining park are "secular war memorials that host numerous commemorative events," and that the government's maintenance of the land is "for traffic safety and commemorative purposes." *Id.* at 387–88.

40. *Id.* at 388–89. The court focused on the commemorative purpose of the Cross's construction, the Cross's secular adornments, its location amidst other secular war memorials, its use for secular events commemorating veterans, and the fact that the Cross had "gone unchallenged for decades." *Id.*

41. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 212 (4th Cir. 2017), *rev'd*, 139 S. Ct. 2067 (2019). The Commission and the American Legion also argued AHA and the individual plaintiffs lacked standing because they had not "forgone any legal rights." *Id.* at 203. The Fourth Circuit held AHA and the individuals did have standing, reasoning that "[a]n establishment clause claim is justiciable even when plaintiffs claim noneconomic or intangible injury," and "in religious display cases, 'unwelcome direct contact with a religious display that appears to be endorsed by the state' is a sufficient injury to satisfy the standing inquiry." *Id.* (quoting Suhre v. Haywood City, 131 F.3d 1083, 1086 (4th Cir. 1997)).

42. *Id.* at 212, n.19.

43. *Id.* at 205. The Fourth Circuit disagreed with the District Court's doubt of *Lemon*'s applicability, saying that Justice Breyer's concurrence in *Van Orden* is controlling as the narrowest ground upholding the majority, which clarifies that the *Lemon* test is still a "useful guidepost" in Establishment Clause cases analyzing "monuments with both secular and sectarian meanings." *Id.* (quoting Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring)).

ownership and maintenance of the land, such as maintaining traffic safety and preserving a WWI memorial.[44] However, the court held the Cross violated the second prong of the test, because its irredeemably Christian association and physical prominence implied government endorsement of Christianity.[45] The court also found a violation of the *Lemon* test's third prong, excessive entanglement between government and religion, based on the government's greater than de minimis spending on maintenance of the Cross.[46] The court made brief reference to *Van Orden*, noting only that "the *Van Orden* factors are unsupportive of Appellees' position in this case."[47] Chief Judge Gregory dissented in part, asserting the majority erred by placing too much emphasis on the Cross's size to conclude its prominence overshadowed its secular elements.[48] The Chief Judge opined that such elements could not be obscured for a reasonable observer, because a reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears."[49] He would have held that, given the "overwhelmingly secular history and context" of the Cross, it did not violate the Establishment Clause.[50]

The Fourth Circuit then denied Appellees' request for rehearing en banc.[51] The Supreme Court granted certiorari to determine whether the Cross's location on government property and its maintenance using government funds violated the Establishment Clause.

II. LEGAL BACKGROUND

For much of the past fifty years, the Supreme Court has struggled with the preliminary issue of whether to apply the *Lemon* test.[52] The Court's selective use of the test when analyzing governmental religious displays[53] in particular reveals a pattern: When the Court applied the *Lemon* test, it held the display unconstitutional, but when the Court ignored the test, it embraced

44. *Id.* at 206.

45. *Id.* at 207–10.

46. *Id.* at 211.

47. *Id.* at 212.

48. *Id.* at 220 (Gregory, C.J., concurring in part and dissenting in part).

49. *Id.* (quoting Capitol Square v. Pinette, 515 U.S. 753, 779–80 (1995)).

50. *Id.*

51. *Id.* at 117. The order denying the request opined that holding the Latin cross could lose its predominantly sectarian meaning through the adornment of secular elements, as the Commission posited, would "amount to the state degradation of religion that the Framers feared and sought to proscribe." *Id.* at 120.

52. *See infra* Section II.C.

53. In this Note, the phrase "religious displays" refers to both tangible monuments of religion, such as statues or paintings, and overt expressions of religion, such as a prayer practice.

a more contextual approach that deferred to history to ultimately uphold the display.

This Part discusses cases where the government itself is communicating (intentionally or effectively) a potentially religious message, either by a physical object or verbal speech.[54] Section II.A. discusses the early American history that motivated the drafting of the Establishment Clause, its enactment, and its eventual application to States. Section II.B. discusses the earliest challenges to governmental religious displays decided by the Supreme Court and concludes with a review of *Lemon v. Kurtzman* in 1971. Section II.C. details the Supreme Court's largely consistent application of the *Lemon* test to religious displays for the subsequent two decades. Section II.D discusses the Court's analysis of religious display cases thereafter, where it largely shifted away from application of *Lemon* and toward other analytical approaches. This Section concludes with the Court's most recent religious display decisions preceding *American Legion v. American Humanist Ass'n*.

A. Enactment of the Establishment Clause

The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[55] These two clauses are known as the "Religion Clauses"; the first is the "Establishment Clause," and the second is the "Free Exercise Clause." Though the Court has long recognized the ambiguous nature of each clause on its own,[56] it has distinguished their prohibitions based on the element of government coercion: The Free Exercise Clause "depend[s] upon [a] showing of direct governmental compulsion," while the Establishment Clause does not, and "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[57]

The Establishment Clause was enacted in response to the "bondage of laws which compelled [citizens] to support and attend government-favored churches," from which many early settlers had sought to escape in Europe.[58] That same practice had been transplanted to the new country by colonial

54. With the exception of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Note will not detail the myriad challenges to material assistance provided by the government to religious institutions, such as subsidies or tax exemptions, or special protections and accommodations conferred to religious groups.

55. U.S. CONST. amend. I.

56. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute.").

57. Engel v. Vitale, 370 U.S. 421, 430 (1962).

58. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

charters "granted by the English Crown to . . . erect religious establishments which all, whether believers or non-believers, would be required to support and attend."[59] At the time of the Revolutionary War, the Church of England was the established church in Maryland, Virginia, North Carolina, South Carolina, Georgia, and possibly[60] New York and New Jersey. [61] The Congregationalist Church was the established religion in Massachusetts, New Hampshire, and Connecticut.[62] The result was a society filled with "hatred, disrespect and even contempt of those who held contrary beliefs"[63]:

> Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hated against dissenters.[64]

The colony of Virginia took the lead in defining the separation of church and state.[65] In 1776 the Virginia Convention adopted a Declaration of Rights, which included the article considered the precursor to the Religion Clauses.[66] It read, in part, "all men are equally entitled to the free exercise of religion."[67] James Madison wrote his *Memorial and Remonstrance against Religious Assessments*, arguing that religion and law should be separate, since actual religion need not rely on governmental support, and men's minds should be

59. *Id.* at 8, 9 n.6 (citing various state charters and the express permission granted to establish churches). Laws requiring support of the established religion involved taxes and tithes to the church and prohibitions on the expression of disbelief in the views of ministers or the religious doctrines themselves. *Id.* at 9.

60. *Engel*, 370 U.S. at 428–29, 428 n.10 ("There seems to be some controversy as to whether [the Church of England] was officially established in New York and New Jersey but there is no doubt that it received substantial support from those States." (citing SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 338, 408 (1902))).

61. *Id.*

62. *Id.*

63. *Id.* at 431.

64. *Everson*, 330 U.S at 10 (footnotes omitted).

65. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 787 n.5 (1983); *Everson*, 370 U.S. at 11.

66. *Marsh*, 463 U.S. at 787 n.5 (citing 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 231–36 (1971); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491–92 (1970)).

67. VA CONST. art. I, § 16 .

free to decide upon their own beliefs.[68] Madison asserted that state establishment of Christianity over the previous fifteen centuries had led to "[m]ore or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."[69] He argued that teachers of every Christian sect would agree the religion "appeared in its greatest lustre" in "the ages prior to its incorporation with Civil policy."[70]

Also in 1786, Virginia enacted the "Virginia Bill for Religious Liberty," written by Thomas Jefferson,[71] as well as a statute reading: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ."[72] Other states were also passing religious freedom legislation (albeit less drastic).[73] Three years later the First Congress agreed on the final language of the Bill of Rights.[74]

Once the federal government was prohibited from passing laws that established religion, most states enacted similar protections in their constitutions.[75] Other states, however, maintained religion-focused laws for nearly fifty years afterward.[76] In 1940, in *Cantwell v. Connecticut*,[77] the Court officially made such state action impermissible by holding the Establishment Clause was incorporated against the states through the Fourteenth Amendment.[78]

68. *Everson*, 370 U.S. at 12 (citing 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PUBLISHED 183 (Gaillard Hunt ed., 1906)).

69. Engel v. Vitale, 370 U.S. 421, 431 n.14 (1962) (quoting THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PUBLISHED 183, 187 (Gaillard Hunt ed., 1906)).

70. *Id.*

71. *Everson*, 370 U.S. at 12.

72. *Id.* at 13 (citing 12 WILLIAM WALLER HENING, THE STATES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 84 (1823); H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 123 (3d ed. 1944)).

73. *Engel*, 370 U.S. at 428–29 (citing S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 482–509 (1902)).

74. Marsh v. Chambers, 463 U.S. 783, 788 (1983) (citing S. JOURNAL, 1st Cong., 1st Sess., 10, 88 (1820); H.R. JOURNAL, 1st Cong., 1st Sess., 26, 121 (1826)).

75. *Everson*, 330 U.S. at 13–14.

76. *Id.* at 14. For instance, "Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818." *Id.* at 14 n.17.

77. 310 U.S. 296 (1940).

78. *Id.* at 303.

B. Early Religious Display Cases Laid the Foundation for the Lemon *Test*

The Supreme Court's first religious display case after *Cantwell* was a challenge to New York public schools' practice of daily prayer in *Engel v. Vitale*.[79] The Court invalidated the practice as a clear instance of establishing religion.[80] Challenges to prayer in public schools would prove to be far more straightforward than almost all other display challenges the Court would face.

A clear precursor to the *Lemon* test came the following year in *School District of Abington v. Schempp*,[81] where the Court evaluated state actions requiring daily Bible readings in public schools.[82] The Court drew on its analysis in previous Establishment Clause cases to lay out a test for analyzing challenged laws or practices: "[T]here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[83] The Court held the Bible readings unconstitutional since they lacked a secular purpose.[84]

Eight years later in *Lemon v. Kurtzman*[85] the Court formalized the test referenced in *Schempp*. The case involved consolidated challenges to Rhode Island and Pennsylvania statutes providing supplemental pay to teachers of secular subjects in nonpublic elementary schools[86] and reimbursement to nonpublic schools for teachers' salaries, instructional materials, and secular textbooks.[87] The majority of beneficiary schools under both statutes were affiliated with the Roman Catholic Church.[88] The Court acknowledged its use of three main inquiries in Establishment Clause cases, all of which must be satisfied for the challenged action to survive: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[89]

The Court invalidated both statutes, finding each gave rise to an excessive entanglement between government and religion.[90] The Court explained that ensuring teachers were not imposing religious teachings in

79. 370 U.S. 421, 424 (1962).

80. *Id.* at 430.

81. 374 U.S. 203 (1963).

82. *Id.* at 205.

83. *Id.* at 222 (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420 (1961)).

84. *Id.* at 223–24.

85. 403 U.S. 602 (1971).

86. *Id.* at 607.

87. *Id.* at 609.

88. *Id.* at 608, 610.

89. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

90. *Id.* at 613–14.

secular subjects would require "comprehensive, discriminating, and continuing state surveillance."[91] It also found Pennsylvania's provision of financial aid directly to religious schools "would be a relationship pregnant with involvement and . . . could encompass sustained and detailed administrative relationships."[92] Finally, the Court reasoned the likelihood that sectarian schools would continue to grow and require increasingly larger grants meant the future of the required surveillance would be indefinite, and the program would cause political divisiveness since the grants would benefit few religious groups.[93] The *Lemon* test would be adopted in most cases in the following years, but disagreement within the Court would ensue early on as to when and how rigidly to apply the test.

C. The Two-Decade Aftermath of Lemon*: The Court Consistently Applied the Test and Invalidated Religious Displays, Except in Challenges to Time-Honored Practices*

The Court consistently applied the *Lemon* test to Establishment Clause challenges generally and religious display cases specifically (with two notable exceptions[94]) over the next two decades.[95] Yet even from the test's early days, the Court cautioned it could serve only as guidance and not a bright-line test.[96]

In 1980, the Court faced its first religious display challenge since *Lemon* in *Stone v. Graham*.[97] The Court invalidated a statute requiring the posting of the Ten Commandments in every Kentucky public school classroom,

91. *Id.* at 619.

92. *Id.* at 621 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970)). The Court distinguished this arrangement from those it had found permissible, where aid was paid to students and their parents rather than the religious schools. *Id.*

93. *Id.* at 623.

94. See *infra* notes 100–103 and accompanying text for a discussion of the first exception, *Marsh v. Chambers*, 463 U.S. 783 (1983), and *infra* notes 108–110 and accompanying text for a discussion of the second exception, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

95. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 16–17 (1989); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485 (1986); Thornton v. Calder, 472 U.S. 703, 708 (1985); Mueller v. Allen, 463 U.S. 388, 394 (1983); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982); Widmar v. Vincent, 454 U.S. 263, 271 (1981); Wolman v. Walter, 433 U.S. 229, 235–36 (1977); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 772–73 (1973); Hunt v. McNair, 413 U.S. 734, 741 (1973).

96. *Hunt*, 413 U.S. at 741 (applying *Lemon* "[w]ith full recognition that these are no more than helpful signposts"); *Nyquist*, 413 U.S. at 773 n.31 (restating Chief Justice Burger's position that the *Lemon* criteria should be "viewed as guidelines" (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971)); *Mueller*, 463 U.S. at 394 (applying *Lemon* with the "caveat in mind" that "it provides 'no more than [a] helpful signpost[t]' in dealing with Establishment Clause challenges" (quoting *Hunt*, 413 U.S. at 741)); *Lynch*, 465 U.S. at 679 (explaining after introducing the *Lemon* test, "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area").

97. 449 U.S. 39 (1980) (per curiam).

having found under the *Lemon* test that the statute had no secular legislative purpose.[98] This was also the first Establishment Clause challenge since *Lemon* where the Court found the state action to have an impermissible purpose.[99]

The Court's decision just three years later in *Marsh v. Chambers*[100] marked the start of the Court's selective use of *Lemon*. The Court avoided mention of *Lemon* entirely and upheld Nebraska's practice of opening legislative sessions with prayer, led by a chaplain paid with public funds.[101] The Court based its holding on the longstanding nature of the practice.[102] The Court also reasoned the First Congress must not have intended for the Establishment Clause to forbid legislative prayer, since it voted to appoint and pay a chaplain for each chamber in the same week it voted to submit the First Amendment to the states for approval.[103]

The *Lemon* test was, however, brought up in the dissenting opinion, written by Justice Brennan and joined by Justice Marshall.[104] The dissent asserted the majority had effectively exempted legislative prayer from the Establishment Clause on the basis of its "unique history," rather than having reshaped Establishment Clause doctrine.[105] The dissent found evidence of this in the majority's failure to apply any of the Court's "formal 'tests'" or "settled doctrine" for evaluating such challenges, citing the *Lemon* test as "the most commonly cited formulation."[106] The dissent concluded that had the Court applied the *Lemon* test, it would have found the legislative prayer at issue to be a "clear violation" of the Clause, failing each of the three prongs.[107]

The approach of relaxing *Lemon* to uphold government action continued in the Court's next display case, *Lynch v. Donnelly*.[108] In a plurality opinion written by Chief Justice Burger, the Court upheld a city's inclusion of a

98. *Id.* at 41. The Court reasoned the Commandments' pre-eminent religious nature could not be overcome by any legislative statement of a secular purpose for their posting. *Id.* at 39. The Court concluded the "[p]osting of religious text on the wall serves no such educational function," unlike using the Bible for "study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42. Rather, if the postings had any effect on schoolchildren, it would be to induce them to follow the Commandments, which is not a secular objective. *Id.*

99. McCreary Cty. v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 859 n.9. (2005).

100. 463 U.S. 783 (1983).

101. *Id.* at 784.

102. *Id.* at 790–91. Nebraska had opened legislative sessions with prayer for over a century. *Id.*

103. *Id.* at 790.

104. *Id.* at 796–97 (Brennan, J., dissenting).

105. *Id.* at 795–96.

106. *Id.* at 796.

107. *Id.* at 796.

108. 465 U.S. 668 (1984).

nativity scene (a "crèche") in its annual Christmas display.[109] The opinion effectively relaxed *Lemon*'s purpose prong by concluding the city's purpose (to celebrate the holiday and depict its origins) was legitimate, because it was not *wholly* motivated by religious considerations.[110]

In a concurring opinion, Justice O'Connor articulated what would become known as the "endorsement test," which assigned a more specific focus to the *Lemon* inquiries.[111] She described the effect prong as asking whether the government action conveyed endorsement of religion, considering the "objective" view of members of the display's audience, taking into account the words used themselves and the context of the display, rather than subjective intent of the government.[112] The following year she would clarify that assumed view: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of religion.[113] The endorsement test gained traction in a few subsequent cases, and the concept of the viewpoint assumed by the test would be a source of controversy among the Justices.[114]

The Court reverted to its practice of invalidating a governmental display when applying the *Lemon* test in its next two display challenges, *Wallace v. Jaffree*[115] and *Edwards v. Aguillard*.[116] These cases marked the second and third instances of all Establishment Clause cases where the Court found an impermissible government purpose under *Lemon*.[117] Although neither majority opinion applied the endorsement test, the *Wallace* Court cited to Justice O'Connor's *Lynch* concurrence in describing the purpose inquiry as "whether government's actual purpose is to endorse or disapprove of

109. *Id.* at 687.

110. *Id.* at 681, 681 n.6. The plurality reasoned that such a "passive" symbol of a "particular historic religious event" was not enough to taint the entire exhibit "engendering a friendly community spirit of goodwill in keeping with the season." *Id.* at 685–86.

111. *Id.* at 690 (O'Connor, J., concurring). Justice O'Connor noted the endorsement test was consistent with the purpose and effects prongs of the *Lemon* test. *Id.*

112. *Id.* Justice O'Connor applied her test to conclude the display could be objectively perceived to celebrate a public holiday, and that the community would not take the declaration of a public holiday to be a government endorsement of religion. *Id.* at 692. Rather, the display amounted to a permissible "acknowledgement" rather than an endorsement of religion. *Id*. at 692–93.

113. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

114. *See infra* notes 123–131, 139–142, 166, 174, 179 and accompanying text.

115. 472 U.S. 38 (1985). The Court invalidated a statute authorizing a period of silence for meditation or prayer in all public schools due to its non-secular purpose. *Id.* at 40, 56.

116. 482 U.S. 578 (1987). The Court invalidated a statute that forbid the teaching of evolution in public schools unless accompanied by instruction in "creation science" and vice versa, finding it had no legitimate secular purpose. *Id.* at 581, 586.

117. McCreary v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859 n.9 (2005).

religion."[118] And Justice O'Connor applied the test in her *Wallace* concurrence. [119]

Through this period, the Court's application of *Lemon* had been used invariably to strike down religious displays by the government. In the two cases where the Court avoided strict (or any) application of the test, *Marsh* and *Lynch*, it upheld the challenged expression.[120]

D. The Court Shifts Away from Lemon *and Toward More Deferential Analyses to Uphold Religious Displays*

Beginning in 1989, the Court's Establishment Clause opinions—across all types of challenges, and those evaluating religious displays specifically—took a marked turn away from application of the *Lemon* test.[121] This shift toward more deferential approaches relying on context permitted more religious displays.[122] The Court rarely invoked *Lemon* or relied on previous cases decided under its application. But when it did, it invalidated the challenged actions.[123]

The first case of this period, *County of Allegheny v. American Civil Liberties Union Ass'n*,[124] marked the beginning of the Court's turn toward a more contextual approach to religious display challenges. The Court adopted Justice O'Connor's endorsement test in lieu of *Lemon*, finding it provided a sensible, concrete approach for evaluating religious displays.[125]

---

118. *Wallace*, 472 U.S. at 56 n.42 (citing Lynch v Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

119. *Id.* at 76–77 (O'Connor, J., concurring).

120. *See supra* notes 100–110 and accompanying text.

121. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("In many cases, this Court has either expressly declined to apply the test or has simply ignored it." (citing Trump v. Hawaii, 138 S. Ct. 2392 (2018); Town of Greece v. Galloway, 572 U.S. 565 (2014); Hosanna-Tabor v. EEOC, 565 U.S. 171 (2012); Van Orden v. Perry, 545 U.S. 677 (2005); Cutter v. Wilkinson, 544 U.S. 709 (2005); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Capitol Square v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993))).

122. See discussion of *Capitol Square v. Pinette*, 515 U.S. 753 (1995), *infra* notes 135–143; *Van Orden v. Perry*, 545 U.S. 677 (2005), *infra* notes 144–160; *Salazar v. Buono*, 559 U.S. 700 (2010), *infra* notes 174–175; and *Town of Greece v. Galloway*, 572 U.S. 565 (2014), *infra* notes 176–180.

123. Justice Scalia articulated the Court's selective use of the *Lemon* test as early as 1993, explaining, "When we wish to strike down a practice [*Lemon*] forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely." Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (internal citations omitted).

124. 492 U.S. 573 (1989).

125. *Id.* at 595–97. The Court noted although the *Lemon* test "ha[d] been applied regularly in the Court's later Establishment Clause cases," its "subsequent decisions further . . . refined the definition of governmental action that unconstitutionally advances religion" to action "that has the purpose or effect of 'endorsing' religion." *Id.* at 592.

Without acknowledging it was doing so, the Court redefined the endorsement test's viewpoint from that of a singular, all-knowing observer, to dual perspectives considering the views of both adherents and nonadherents of the controlling religious denomination.[126] The Court applied that methodology to the challenged displays: The county courthouse's crèche display and a menorah included in a display outside the city council.[127] The Court considered factors such as the prominence of the crèche and menorah in each display, whether the objects were capable of communicating a religious message on their own, whether there were other features of the displays, and if so, whether they furthered a secular or religious theme.[128] The Court found there were no mitigating secular features to overcome the crèche's religious nature, and that its prominent placement by the main staircase in the county building communicated a message of government approval of religion.[129] In contrast, the Court concluded the overall message of the display containing the menorah was secular.[130] The Court considered the menorah's significance not only as a religious symbol, but as a symbol for a holiday with "religious and secular dimensions," [131] the display's more prominent inclusion of a Christmas tree, and its inclusion of a sign reading "during the holiday season the city salutes liberty."[132] The *Allegheny* Court's definition of the reasonable observer appeared to have raised the bar for a religious display to survive, in that it specifically inquired about the view of nonadherents, and consequently, struck down one of the displays. The varying definitions of the reasonable observer would continue to impact the outcome in cases decided by the endorsement test.

In *Lee v. Weisman*[133] the Court continued the trend of avoiding formal application of the *Lemon* test, but nonetheless relied on cases that had been decided under the test to invalidate the practice of nonsectarian prayer at middle and high school graduation ceremonies.[134]

126. *Id.* at 597 (explaining the court "must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices'").

127. *Id.* at 578.

128. *Id.* at 598–99.

129. *Id.* at 599–600, 611–20. However, because the court of appeals had found the menorah to have an impermissible purpose, it did not assess the purpose or entanglement prongs. *Id.* at 620–21. Upon finding a permissible secular purpose, the Court remanded that part of the case for determination of whether the menorah violated those prongs. *Id.*

130. *Id.* at 620.

131. *Id.* at 614.

132. *Id.* at 619.

133. 505 U.S. 577 (1992).

134. *Id.* at 586–87. The Court relied on its analyses of previous challenges to religious expression in public secondary schools, such as *School District of Abington v. Schempp* and *Engel v. Vitale*. *Id.* at 590, 592.

Although *Capitol Square v. Pinette*[135] involved private expression in a forum available for public use (rather than governmental speech),[136] it contained Justice O'Connor's most detailed explanation of the endorsement test's "reasonable observer," as well as an opposing view by Justice Stevens. In the plurality opinion authored by Justice Scalia, the Court upheld state action permitting the Ku Klux Klan to display an unattended cross on state capitol grounds.[137] The plurality ignored *Lemon* and applied a distinct analysis for cases of private expression,[138] rejecting the petitioners' urging that the Court should apply the endorsement test.[139]

Justice O'Connor authored a concurring opinion to express her view of the "reasonable, informed observer."[140] In stark contrast to the notion underlying the *Allegheny* Court's reasonable observer, she asserted that in Establishment Clause challenges, the Court's "concern is with the political community writ large," and so "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe."[141] From this, she concluded the reasonable observer should be similar to the "reasonable person" in tort law, whose behavior is deemed ideal by members of the community.[142] Most critically, she opined the reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears," and the observer's knowledge should not be confined merely to what one can observe from looking at a display.[143] These discrepancies in reasonable observer definitions demonstrate the impact the viewpoint has on the outcome of the endorsement test.

In *Van Orden v. Perry*,[144] the plurality, in an opinion written by Chief Justice Rehnquist, broadened the scope of permissible religious displays on government property by eschewing *all* bright-line tests for evaluating "passive monuments."[145] The Court explained that over the past twenty-five

135. 515 U.S. 753 (1995).

136. *Id.* at 760–61.

137. *Id.* at 770.

138. *Id.* at 762–63. Because it is not contemplated that the Cross in *American Legion* amounts to private expression, the analysis employed by the Court is not relevant to this Note.

139. Capitol Square v. Pinette, 515 U.S. 753, 763–65 (1995).

140. *Id.* at 772–73 (O'Connor, J., concurring).

141. *Id.* at 779.

142. *Id.* at 779–80.

143. *Id.* at 880.

144. 545 U.S. 677 (2005).

145. *Id.* at 686. The Court never expressly defined "passive," but the Court's comparison of the monument at issue to the Ten Commandments postings in *Stone* suggest it refers to the *Van Orden* monument's out-of-the-way location and non-imposing nature:

years of Establishment Clause cases, it sometimes looked to *Lemon*, but more recently had opted not to use it.[146] The Court expressly avoided discussion of the test's future and simply stated, "[W]e think [the *Lemon* test] not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[147]

The Court upheld a monument inscribed with the Ten Commandments on Texas state capitol grounds.[148] The monument had been donated to the State forty years prior by the Eagles ("a national social, civic, and patriotic organization"),[149] and the state land on which the monument was located "contain[ed] [seventeen] monuments and [twenty-one] historical markers commemorating the 'people, ideals, and events that compose Texan identity.'"[150] The Court focused on "the nature of the monument" and the "Nation's history" of acknowledging the role of religion in life,[151] to conclude the monument bore significance to both religion and government.[152] As such, the monument was an appropriate inclusion in the capitol grounds monuments, which "represent[] the several strands in the State's political and legal history."[153]

Justice Breyer's concurrence in the judgment—the narrowest grounds opinion[154]—acknowledged that prior tests, including *Lemon*, "provide useful guideposts—and might well lead to the same result the Court reach[ed]," but "no exact formula can dictate a resolution" to borderline, fact-intensive cases,

> The placement of the Ten Commandments monument on the Texas Statute Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit.

Id. at 691.

146. *Id.* at 686 (noting that "[m]any of [the Court's] recent cases simply have not applied the *Lemon* test," while "[o]thers have applied it.").

147. *Id.* The plurality made no mention of the endorsement test either.

148. *Id.* at 681.

149. *Id.* at 682.

150. *Id.* at 681 (quoting Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001)).

151. *Id.* at 686. As an example of this, the Court pointed out the posting of the Ten Commandments in other public places such as in its own courtroom. *Id.* at 688.

152. *Id.* at 691–92.

153. *Id.*

154. As the narrowest grounds opinion, Justice Breyer's opinion is considered the holding of *Van Orden*. Under the *Marks* doctrine, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977). Since the plurality and dissenting opinions in *Van Orden* were each joined by four Justices, Justice Breyer's opinion, as the only concurrence in the judgment, is the narrowest grounds opinion. *Van Orden*, 545 U.S. at 677–78; *see also* Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 205 (4th Cir. 2017), ("Justice Breyer's concurrence, however, is controlling because it is the narrowest ground upholding the majority."), *rev'd*, 139 S. Ct. 2067 (2019).

such as the instant case.[155] Justice Breyer opined that when dealing with a monument on public land, the Court should not focus on the text alone, but should look at "how the text is *used*" by "consider[ing] the context of the display."[156] Justice Breyer then considered the Eagles's donation as the means by which the display was erected, the display's placement among many other monuments with secular purposes, and that the monument had never before been challenged in its forty years of existence, to conclude that: (1) the state's purpose was to promote a predominantly secular message,[157] (2) the public did not interpret the monument's presence as governmental endorsement of any particular religion or of religion over nonreligion,[158] and thus (3) the monument was "unlikely to prove divisive."[159] Justice Breyer suggested that finding otherwise could "lead the law to exhibit a hostility toward religion" and "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[160]

The very same day in *McCreary County v. American Civil Liberties Union of Kentucky*,[161] in stark contrast to *Van Orden*, the Court applied the *Lemon* test to hold another display of the Ten Commandments on government property violated the Establishment Clause.[162] In an opinion written by Justice Souter, the Court held the posting of the text of the Commandments in the county courthouse evinced a predominant purpose of advancing religion.[163] It dismissed the county's argument that *Lemon*'s purpose inquiry should be retired, emphasizing that "[e]xamination of purpose" is a cornerstone practice for evaluating governmental action,[164] and "scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts."[165] The Court further rejected the county's argument that only evidence of the government's most recent purpose should be assessed.[166] With an implicit nod to the endorsement test, the Court referenced the "reasonable observer" several times to emphasize the previous point: "Reasonable observers have reasonable memories, and [the Court's]

155. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).
156. *Id.* at 701.
157. *Id.* at 701–02.
158. *Id.* at 702 (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 305 (1963)).
159. *Id.* at 704.
160. *Id.*
161. 545 U.S. 844 (2005).
162. *Id.* at 850, 859.
163. *Id.* at 881.
164. *Id.* at 861.
165. *Id.* at 862.
166. *Id.* at 866.

precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[167]

Van Orden's casting off of *Lemon* was referenced only in the dissenting opinion of *McCreary*, written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas.[168] The dissent argued the principle underlying the *Lemon* analysis—that the "First Amendment mandates governmental neutrality between . . . religion and nonreligion"[169]—was based only on "the Court's own say-so,"[170] and had been effectively discredited by the Court itself:

> [A] majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.[171]

Van Orden and *McCreary* signaled the height of the Justices' disagreement on *Lemon*. These were also the final two religious display cases[172] Justice O'Connor would hear before leaving the Court in 2006.[173]

The Court disregarded the *Lemon* test and applied a more deferential, context specific analysis to rule in favor of the challenged religious displays in the two display cases following *Van Orden* and *McCreary*. In *Salazar v. Buono*,[174] the plurality, in an opinion written by Justice Kennedy, concluded the district court erred in invalidating a cross on public land based on its religious symbolism alone, ignoring history and context that supported a

167. McCreary Cty. v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 866 (2005) (second alteration in original).

168. *Id.* at 890 (Scalia, J., dissenting).

169. *Id.* at 889 (quoting *id.* at 860 (plurality opinion)).

170. *Id.*

171. *Id.* at 890 (citations omitted).

172. Van Orden v. Perry, 545 U.S. 677 (2005); *McCreary*, 545 U.S. 844.

173. Lawrence Hurley, *Trail-blazing Retired U.S. Justice O'Connor Says She Has Dementia*, REUTERS (Oct. 23, 2018), https://news.yahoo.com/trail-blazing-retired-u-justice-oconnor-says-she-142057501.html ("O'Connor . . . was appointed to the nine-member court by Republican former President Ronald Reagan during his first year in office and she retired in 2006.")

174. 559 U.S. 700 (2010). The Court addressed a challenge to a federal statute that would transfer a cross and the public grounds on which it stood to a private party but did not formally decide on the constitutionality of the cross since it was not raised on appeal. *Id.* at 706. The challenge to the statute was based on the contention that the statute was a "sham aimed at keeping the cross in place," after the district court had found its placement on public land to be unconstitutional. *Id.* at 710. The Court ultimately remanded the case for determining whether there was a less drastic form of relief than striking down a congressional act. *Id.* at 721–22.

secular purpose.[175] Similarly, in *Town of Greece v. Galloway*,[176] the Court did not apply the *Lemon* test and deferred to history to uphold the town's legislative prayer practice.[177] In a plurality opinion written by Justice Kennedy, the Court relied on *Marsh* as the most on point case,[178] explaining its teaching that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings'"[179] and that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[180] *Buono* and *Town of Greece* bolstered the Court's flexibility to uphold a governmental religious act where it has been historically accepted.

III. THE COURT'S REASONING

In *American Legion v. Humanist Ass'n*, a six-Justice plurality held that the location of the Cross on public land and its maintenance by a public agency did not violate the Establishment Clause. In an opinion written by Justice Alito, the plurality grounded its holding in the Cross's longstanding existence as a monument commemorating WWI,[181] the lack of evidence that a cross was selected for the memorial to express exclusion of other religions,[182] and that the removal or alteration of the Cross would be seen by many as an act of hostility toward religion rather than an act of neutrality.[183]

175. *Id.* at 721. The Court cited to Justice Breyer's *Van Orden* concurrence in the judgment to posit the complete context of a monument must be considered and stated the reasonable observer test would require "the message conveyed by the cross [to] be assessed in the context of all relevant factors." *Id.* (citing *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring)). The Court concluded a Latin cross was not just a symbol of Christianity, but also a symbol commemorating heroes, and that in the instant case, the cross evoked the scene of fields of crosses overseas, marking the graves of fallen American soldiers. *Id.*

176. 572 U.S. 565 (2014).

177. *Id.* at 587, 591–92. The Court did, however, quote Justice Breyer's concurrence in the judgment in *Van Orden*, saying, "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Id.* at 577 (quoting *Van Orden*, 545 US. at 702–04 (Breyer, J., concurring)).

178. *Town of Greece*, 572 U.S. at 575–77.

179. *Id.* at 576 (quoting Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

180. *Id.* at 577. As an apparent afterthought, the Court referenced the endorsement test to bolster its holding, explaining:

> It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.

Id. at 587.

181. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

182. *Id.* at 2089–90.

183. *Id.* at 2090.

In determining how to analyze the Cross, the Court reasoned that in cases of longstanding religious monuments or practices, application of the *Lemon* test is inappropriate due to four key obstacles [184]: (1) it can be difficult if not impossible to discern the original purpose of a monument or practice that was created long ago; (2) such purposes associated with a monument or practice can change or multiply over time so as to no longer be religious; (3) the effect of a monument or practice on observers can similarly change over time, such as when an originally religious monument evolves into a historic landmark; and (4) removal of such established monuments or practices may not appear to be neutral acts but instead evidence of the government's hostility toward religion.[185] The Court concluded that those considerations give rise to a "strong presumption of constitutionality" for "established, religiously expressive monuments, symbols, and practices."[186]

The Court found that each of the four obstacles was present in the case of the Cross.[187] First, because of the passage of time, it is impossible to determine whether a cross's association with WWI was the sole or dominant reason for its inclusion in every WWI memorial that features it.[188] Second, the purposes of maintaining the Cross and surrounding lands have changed as the government is motivated by concerns of traffic safety and the additional preservation of other monuments nearby.[189] Lastly, "an alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross—would be seen by many as profoundly disrespectful."[190]

The Court cited to *Marsh v. Chambers* and *Town of Greece v. Galloway*, emphasizing its decision to ignore the *Lemon* test and take "a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[191] In those cases, the Court was persuaded by the longstanding nature of the prayer practice, as well as its view "that the Framers considered legislative prayer a benign acknowledgement of religion's role in society."[192] The Court had deduced in these cases that the Framers intended the Establishment Clause to center on respecting a diversity of religions and promoting their peaceful coexistence.[193]

The Court attributed significant weight to the Cross's secular function. It explained that crosses took on secular meaning for commemorating WWI,

184. *Id.* at 2081–82.
185. *Id.* at 2082–84.
186. *Id.* at 2085.
187. *Id.*
188. *Id.*
189. *Id.* at 2085–86.
190. *Id.* at 2086 (citation omitted).
191. *Id.* at 2087.
192. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).
193. *Id.* at 2089.

and the Cross itself began with that meaning[194] and acquired historical importance in the community and as other commemorative monuments were added nearby.[195] The Court noted there was no evidence other religions or persons of other races were excluded in the construction of the monument.[196] The Court also considered that because it is "natural and appropriate" for commemorative monuments to "invoke the symbols that signify what death mean[s]" for those whom they honor, it is appropriate for a cross to be the feature of the memorial, since it "marks the graves of so many of [the fallen soldiers'] comrades near the battlefields where they fell."[197] The Court concluded that although the cross is a Christian symbol, the symbolism is not enough to overshadow all the secular meanings associated with the Cross.[198] Finally, it noted that any destruction or removal of the Cross would not be seen by many as an act to maintain neutrality.[199]

Five Justices took part in concurring opinions. Justice Breyer, joined by Justice Kagan,[200] authored a concurring opinion that argued "[t]he case would be different . . . if there were evidence that the organizers had 'deliberately disrespected' members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I."[201] Justice Kavanaugh wrote a concurring opinion to emphasize the inapplicability of the *Lemon* test both to the present and past Establishment Clause cases and to point out that those who object to the Cross have recourse outside of the courts through the Maryland Legislature.[202] Justice Kagan wrote a concurrence in part arguing (1) the *Lemon* test's focus on purposes and effects is still "crucial" for evaluating Establishment Clause cases, even if "rigid application" of the test is not always useful; and (2) the role of history in evaluating Establishment Clause cases should be decided on a case-by-case basis.[203]

194. *Id.* ("Due in large part to the image of the simple wooden crosses that originally marked the graves of American soldiers killed in the war, the cross became a symbol of their sacrifice, and the design of the Bladensburg Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.").

195. *Id.*

196. *Id.* at 2089–90. The Court found "no evidence" that "the names of any Jewish soldiers from the area were deliberately left off the list on the memorial" or that "the names of any Jewish soldiers were included on the Cross against the wishes of their families," and the Court did "know that one of the local American Legion leaders responsible for the Cross's construction was a Jewish veteran." Additionally, the names listed on the Cross included both black and white soldiers. *Id.*

197. *Id.* at 2090.

198. *Id.*

199. *Id.*

200. *Id.* at 2090–91 (Breyer, J., concurring).

201. *Id.*

202. *Id.* at 2092–94 (Kavanaugh, J., concurring).

203. *Id.* at 2094 (Kagan, J., concurring).

Justice Thomas authored a concurrence in the judgment, asserting the Establishment Clause should not be incorporated against the States, and even if it were, the Cross "does not involve the type of actual legal coercion"—such as mandating church attendance or levying taxes for church revenue—"that was a hallmark of historical establishments of religion."[204] Justice Thomas also would have overruled the use of the *Lemon* test in all contexts, and did not join the plurality because "it does not adequately clarify the appropriate standard for Establishment Clause cases."[205] Justice Gorsuch joined by Justice Thomas, also wrote a concurrence in the judgment.[206] Justice Gorsuch contended the present suit and similar challenges should be dismissed for lack of standing, because the "offended observer" theory of standing has no basis in law, since "offense"—the only injury alleged by plaintiffs in this case—has never been held to satisfy injury-in-fact.[207]

The dissent, written by Justice Ginsburg and joined by Justice Sotomayor, would have held the Cross an unconstitutional endorsement of religion.[208] The dissent disagreed with the plurality on three main grounds, concluding: (1) the foundation of the Cross's secular associations claimed by the plurality were actually rooted in religion; (2) even if those secular meanings were legitimate, the religious meaning of a cross cannot be overcome by secularity; and (3) the Establishment Clause requires government neutrality between religion and nonreligion, meaning the government cannot take action recognizing any particular religion. The dissent began by stating the Court recognized long ago that the Establishment Clause demands not only "neutrality among religious faiths"—just as the plurality emphasized—but also neutrality "between religion and nonreligion."[209] Justice Ginsburg argued the Cross's prominence on public land, given crosses' indisputably Christian association, "elevates Christianity over other faiths, and religion over nonreligion."[210]

The dissent described the cross not only as the principal symbol of Christianity around the world but also as an exclusively Christian symbol,[211] "embodying the 'central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life.'"[212] The dissent asserted this

204. *Id.* at 2094–96 (Thomas, J., concurring).
205. *Id.* at 2097–98.
206. *Id.* at 2098 (Gorsuch, J., concurring).
207. *Id.*
208. *Id.* at 2105 (Ginsburg, J., dissenting).
209. *Id.* at 2104.
210. *Id.*
211. *Id.* at 2107.
212. *Id.* at 2104 (citing Brief for Baptist Joint Comm. for Religious Liberty et al. as Amici Curiae supporting Petitioners).

background is precisely the reason that crosses have been used to mark the graves of *Christian* soldiers, and because of this, "using the cross as a war memorial does not transform it into a secular symbol, as the Courts of Appeals have uniformly recognized."[213] In relation to the Cross specifically, the dissent noted that the religious context under which it was constructed was apparent as early as the dedication ceremony, where the keynote speaker and reporters used religious analogies.[214] All of these facts, the dissent suggested, invalidated the Commission's argument that crosses became a "'universal symbol' of World War I sacrifice," transcending religious lines.[215]

Finally, the dissent opined that holding the Cross unconstitutional would not "inevitably require the destruction of other cross-shaped memorials throughout the country,"[216] since the appearance of religious symbols associated with individuals in a cemetery is not akin to, and thus not problematic like their general appearance on publicly owned grounds.[217] The dissent also argued that holding unconstitutional a monument's existence on publicly owned property would not necessarily require destroying the monument, but rather that the remedy should be "context[-]specific" and can include relocation to private land or transfer of ownership to a private party.[218]

IV. ANALYSIS

This Note argues that although the outcome of *American Legion v. American Humanist Ass'n* is consistent with relevant precedent,[219] the Court's analysis set a dangerous standard by disregarding all of its existing tests and effectively exempting longstanding religious displays from Establishment Clause scrutiny.[220] It was unnecessary for the Court to take this new path to hold the Cross constitutional; the most appropriate means for analyzing the Cross would have been the endorsement test.[221]

213. *Id.* To support this point, Justice Ginsburg recounted that when the War Department was deciding on the headstones to be used for fallen American soldiers in Europe, there was never any debate that the cross and Star of David were "sectarian gravemarkers, and therefore appropriate only for soldiers who adhered to those faiths." *Id.* at 2110.

214. *Id.* at 2109; *see supra* notes 13–14 and accompanying text.

215. *Id.* at 2111–12.

216. *Id.* at 2112 (quoting Brief for Petitioner Md.-Nat'l Capital Park and Planning Comm'n at 52).

217. *Id.*

218. *Id.*

219. *See infra* Section IV.A.

220. *See infra* Section IV.B.

221. *See infra* Section IV.C.

This Note also argues the Court should apply a "modified" endorsement test in future display cases to better serve the Establishment Clause goal of preventing political divisiveness along religious lines.[222] This test would assign to the "reasonable observer" only the knowledge surrounding a display possessed by those persons most frequently coming into contact with it.[223] This approach would have held the Cross unconstitutional, since most persons coming into contact with the Cross are likely not aware of its secular history and cannot see its secular features.[224]

A. Averting the Lemon *Test and Holding the Cross Constitutional Was Consistent with Relevant Case Law*

The Court's decision to uphold the Cross was consistent with its most relevant religious display cases—particularly *Van Orden v. Perry*—in avoiding application of the *Lemon* test and deferring to history to uphold the challenged monument. In the face of seemingly conflicting decisions from *Van Orden* and *McCreary County v. American Civil Liberties Union of Kentucky*,[225] the *American Legion* Court reasonably followed more closely in the analytical footsteps of *Van Orden* as the more factually similar case.[226] *Van Orden* evaluated a longstanding religious display that had gone unchallenged for forty years, and was erected by a private organization on public property.[227] In contrast, the displays in *McCreary* were posted in 1999 and challenged only months later, and the idea to post them came directly

222. *See infra* Section IV.D.1.

223. *Id.*

224. *See infra* Section IV.D.2.

225. *See* Edith Brown Clement, *Public Displays of Affection . . . for God: Religious Monuments after* McCreary *and* Van Orden, 32 HARV. J.L. & PUB. POL'Y 231, 246 (2009) ("Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*, yet this conclusion has not come without a struggle."); Frank J. Ducoat, *Inconsistent Guideposts:* Van Orden, McCreary County, *and the Continuing Need for a Single and Predictable Establishment Clause Test*, 8 RUTGERS J. L. & RELIGION 14, 12–15 (2007) (arguing that either *Van Orden* or *McCreary* could be applied to religious display cases after the day of those decisions, and a review of lower court decisions on religious displays on public grounds in the two terms following the decisions showed the courts were choosing either case, and with no consistency); Brett B. Larsen, *No Closer to Clarity: The Establishment Clause and the Supreme Stumble in* Van Orden v. Perry, 90 MARQ. L. REV. 155, 170 (2006) ("[I]f *Lemon* or its descendents [sic] are 'not useful' enough to even be applied in two cases on the same day, they should be overturned and replaced, not ignored." (footnotes omitted)).

226. See CYNTHIA BROUGHER, CONG. RESEARCH SERV., RS22223, PUBLIC DISPLAY OF THE TEN COMMANDMENTS 1, 5 (2008) for an explanation reconciling *Van Orden* and *McCreary* on their distinguishable facts. Brougher notes the displays in *McCreary* were created by county officials, whereas the Texas state legislature was uninvolved in the creation of the monument in *Van Orden*. *Id.* She also emphasizes that the *McCreary* displays were posted in government buildings and promoted by county officials, while the *Van Orden* monument was placed in a more "passive" location, among dozens of other monuments. *Id.*

227. Van Orden v. Perry, 545 U.S. 677, 681–82 (2005).

from government officials.[228] Like the monument in *Van Orden*, the Cross had been around for decades, and the plan to erect it originated with individual citizens and was completed by a private organization.[229] *Van Orden* was the more on-point case for analyzing the Cross.

Not only were the facts surrounding the Cross more similar to those of the *Van Orden* display, but the Court's general treatment of religious displays has erred on the side of deference when the display is longstanding and/or when the display has at least some secular aspects or purposes. As the Congressional Research Service observed in 2008, "Generally, the Court has upheld public displays of religious symbols where the display is set in diversified context."[230] In the Court's decisions in *Salazar v. Buono* and *Town of Greece v. Galloway*, the two display cases following *Van Orden* and *McCreary*, it did not apply the *Lemon* test and deferred to the historical acceptance of a longstanding religious monument[231] and a legislative prayer practice.[232] Relying on *McCreary* and/or applying the *Lemon* test in *American Legion* would have run counter to the relevant case law.[233] *Van Orden* marked a clear shift away from *Lemon* and toward an even more deferential review for longstanding religious displays, and the *American Legion* Court was faithful to that precedent.

B. The "Presumption of Constitutionality" Effectively Exempts Longstanding Religious Displays from Establishment Clause Scrutiny and Weakens Establishment Clause Protections

The Court's creation of a "presumption of constitutionality" is effectively an exemption for longstanding religious displays from Establishment Clause scrutiny. The Court's discussion of four characteristics of the Cross—also described as obstacles in the analysis of longstanding monuments—formed the crux of its analysis.[234] The Court did not explain how the presumption of constitutionality could be overcome,[235] making its logic essentially circular: Four obstacles present in cases of longstanding monuments lead to a presumption of constitutionality, which therefore applies to the Cross. And because those four obstacles are present in the case

228. McCreary v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 851–52 (2005).

229. *See supra* Part I.

230. BROUGHER, *supra* note 226 at 6.

231. *See supra* notes 174–175 and accompanying text.

232. *See supra* notes 176–180 and accompanying text.

233. *See Leading Cases*, American Legion v. American Humanist Ass'n, 133 HARV. L. REV. 262, 271 (2019) ("[T]he Court was right to reject *Lemon* . . . .").

234. *See supra* notes 184–186 and accompanying text. The Court runs through these factors a second time in reaching its holding. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089–90 (2019).

235. *Am. Legion*, 139 S. Ct. at 2085.

of the Cross, it is constitutional. Thus, if a monument or practice is longstanding, it is exempt from substantive analysis under the Establishment Clause.

As evidence of this presumption, the takeaway by lower courts, scholars, and advocates for both sides of the debate on separation of church and state, has been that longstanding monuments are exempted, rather than shielded by a rebuttable presumption of constitutionality.[236] In a subsequent case in which the Third Circuit upheld a county seal with a large cross at its focal point, the court relied on *American Legion* to say that "the presumption applies to all 'established, religiously expressive monuments, symbols, and practices,'" and that the county's seventy-five-year-old seal "checks those boxes."[237] University of Virginia School of Law professor Douglas Laycock agreed with the holding, characterizing such longstanding symbols as "protected by a grandfather clause for things adopted or erected long ago."[238] Advocates of the separation of church and state echoed this takeaway in lamenting the Third Circuit's holding and its reliance on *American Legion*: "The judges act like the only way a Christian cross on a government product can be *illegal* is if everyone in government gets together, holds hands, sings a hymn, and publicly announces how the symbol will honor the Son of God. Everything else gets a free pass."[239] And those celebrating the decision have proclaimed: "In light of the [*American Legion*] decision, all government officials should recognize that it's permissible to continue on with religious traditions, practices or displays that have been used in our country's history."[240] Thus, *American Legion* will lead courts to uphold any longstanding governmental religious display or practice without subjecting it to any scrutiny.[241]

236. *See infra* notes 237–240 and accompanying text.

237. Freedom From Religion Found., Inc. v. County of Lehigh, 933 F.3d 275, 282 (3d Cir. 2019).

238. P.J. D'Annunzio, *Cross on Lehigh County Seal and Flag Not Discriminatory, Third Circuit Says*, LAW.COM (Aug. 08, 2019), https://www.law.com/thelegalintelligencer/2019/08/08/cross-on-lehigh-county-seal-and-flag-not-discriminatory-third-circuit-says/.

239. Hemant Mehta, *Appeals Court: Christian Logo for Lehigh County (PA) Doesn't Promote Religion*, FRIENDLY ATHEIST (Aug. 8, 2019), https://friendlyatheist.patheos.com/2019/08/08/appeals-court-christian-logo-for-lehigh-county-pa-doesnt-promote-religion/.

240. Jorge Gomez, *First Test: SCOTUS' Landmark Bladensburg Decision Helps Restore Fallen Police Officer Memorial*, FIRST LIBERTY (Aug. 9, 2019), https://firstliberty.org/news/police-officer-memorial/.

241. *See* Garret Epps, *Why Is This Cross-Shaped Memorial Constitutional?*, ATLANTIC (Feb. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/02/aha-v-american-legion-maryland-peace-cross-stake/583024/ ("The answer [to why the Cross is constitutional] will shape how courts around the country respond to monuments, official and 'voluntary' public prayer, and other official and semiofficial manifestations of popular faith and belief.").

This effective exemption is not a positive development in Establishment Clause jurisprudence.[242] While it may simplify adjudication, it permits the Court to ignore evolving societal views and circumstances in its analysis. This is because such deference to history is founded on the assumption that practices in effect and unchallenged for a long time must be constitutional.[243] But our nation's history provides the glaring counterargument. As Professor Arnold Lowey explained, "Nobody asked blacks about segregated schools, and nobody asked nontheists about the invocation."[244] The fact that such a practice has occurred for so long does not mean it does not communicate government endorsement of religion.[245] *American Legion*'s "presumption of constitutionality" absolves the Court from having to consider this reality.

C. The Court Should Have Used the Endorsement Test to Analyze the Cross

The most appropriate test for analyzing governmental religious displays—including those like the Cross—is the endorsement test, since it expressly addresses the chief risk posed by such displays: communication of government endorsement of religion. Accordingly, this Section explains why the *American Legion* Court should have analyzed the Cross under the endorsement test. Of the Court's existing tests, this test most directly addresses the issue of government endorsement of religion communicated by a display,[246] and the impression of government endorsement of religion was the central claim giving rise to the lawsuit.[247] This Section then explains how under the "reasonable observer" viewpoint currently embedded in the

242. Notably, this development is in direct contrast to other Justices' and scholars' suggestion that there should be a strong presumption *against* religious displays on government property. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105–06 (2019) (Ginsburg, J., dissenting) ("[W]hen a cross is displayed on public property, the government may be presumed to endorse its religious content."); Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part) ("[T]he Establishment Clause should be construed to create a strong presumption against the display of religious symbol on public property."); Van Orden v. Perry, 545 U.S. 602, 708 (1971) (Stevens, J., dissenting) ("In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property."); Larsen, *supra* note 225, at 165–66.

243. *See* 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, 50 (1994) ("Endorsement of religion should be prohibited regardless of how long the particular endorsement has been tolerated. Courts have generally upheld long-standing religious state practices, even when they represented an obvious confluence of religion and the state.")

244. *Id.* at 50–51 (quoting Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1057 (1986)).

245. Jacobs, *supra* note 243, at 50.

246. *See infra* Section IV.C.1.

247. *See infra* Section IV.C.2.

endorsement test, the Cross still would have been held constitutional, since the observer would be aware of context and history that evince the secular purpose of the private citizens who erected the Cross, as well as the government's secular purpose in acquiring and maintaining the Cross.[248]

1. The Endorsement Test Is the Court's Most Appropriate Test for Religious Displays

In challenges to governmental religious displays, the Establishment Clause issue most strongly implicated is the question of whether the display communicates government endorsement of religion.[249] Displays are typically physical things that do not involve significant material assistance to religious organizations;[250] yet unlike subsidies or legal protections, displays are often easily detected by most of the public. The most pertinent question is therefore whether observers infer the government favors religion. The endorsement test, originally articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*[251] and adopted shortly thereafter by the Court in *County of Allegheny v. American Civil Liberties Union Ass'n*,[252] most directly addresses this issue[253] by examining not only what the government intends to convey, but the message actually conveyed.[254] Determinative in the outcome of the test is the "reasonable observer" viewpoint it assumes.[255] Justice O'Connor defined this as a person "deemed aware of the history and context of the community and forum in which the

248. *See infra* Section IV.C.3.

249. *See* Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 597 (1989) ("[O]ur present task is to determine whether the display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs."); Lynch v Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche.").

250. Admittedly—and as is true in the case of the Cross—the government's maintenance of a religious display might require the use of public funds. *See supra* note 25 and accompanying text. However, this use of public funds is distinguishable from subsidy programs because the religious organization is not the recipient of the funds.

251. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("The second and more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").

252. *Allegheny*, 492 U.S. at 595.

253. *Id.* at 628 (O'Connor, J., concurring) ("[T]he endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols."); *see also* Elliott M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 COLUM. J. L. & SOCIAL PROBLEMS 1, 25 (1991) ("Perhaps the greatest proof that the endorsement test is workable in practice is that several circuit courts have employed it in considering challenges to public displays.").

254. *Lynch*, 465 U.S. at 690.

255. Capitol Square v. Pinette, 515 U.S 753, 780 (1995) (O'Connor, J., concurring).

religious display appears,"[256] and "familiar with 'implementation of' government action."[257]

Although the Court has used the endorsement test only a few times since *Allegheny*,[258] "[l]ower federal courts and state courts have applied the test in hundreds of cases to evaluate the constitutionality of many types of religious symbols and displays."[259] Importantly, unlike the *Lemon* test, the endorsement test takes into account whether government action *communicates* endorsement, even if the government's action does not actually advance religion[260] or expressly endorse it. Even in the days of *Lemon*'s routine application, the Court appeared to recognize the importance of the *impression* of government endorsement of religion.[261] For instance, the Court's early holdings sometimes hinged on the methods through which the government executed the challenged policies, perhaps because different methods, although achieving the same result, would have conveyed more or less problematic impressions of the government's view of religion.[262] But the *Lemon* test—"which focus[ed] on the objective purpose and effect of a statute"—could not have explained such a distinction when neither the government's purpose nor the effect of its policy differed between various means of execution.[263]

Additionally, the endorsement test considers the history of a display, as compared to *Lemon* and other tests that cannot explain decisions upholding longstanding religious practices by the government.[264] Because the

256. *Id.*

257. McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 866 (2005) (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

258. The test appears to have been applied or invoked since *Allegheny* in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *Capitol Square*, 515 U.S at 753, and *McCreary*, 545 U.S. at 844. Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 269, 269 n.42, 270 (2006).

259. *See* Wexler, *supra* note 258, at 264 (footnote omitted).

260. *See* Jacobs, *supra* note 243, at 35 (explaining that under the endorsement test, as opposed to the *Lemon* test, "how state action affects religion is no longer important. Rather, the endorsement test focuses on how people perceive the relationship between the state and religion").

261. Berman, *supra* note 253, at 10–12.

262. For example, in *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court upheld a statute requiring public school districts to loan books to children attending private schools, emphasizing the loans were made directly to students, rather than to the parochial schools—even though the final objective effect of either arrangement (parochial school students receive free textbooks thanks to public school district funds) would have been the same. Berman, *supra* note 253 at 10–11.

263. Berman, *supra* note 253, at 10–12.

264. *See id*. at 17 ("Under the pure *Lemon* test, history should not influence whether or not a statute passes constitutional muster. The fact that a statute has been on the books for many years does not affect whether its objective purpose or effect advances religion, or whether it creates excessive entanglement with religion. Under the endorsement test . . . the importance of history is

endorsement test takes account of what observers know of the context of a display, that analysis will often include its history.[265] Thus, the test allows the Court to stick to a course of analysis even when evaluating extremely old practices or displays, rather than adding more confusion to the jurisprudence and further infuriating opponents by simply expressing a decision to exempt an action because it has been in practice for a long time. Of course, the reverse is true as well: When the test results in the removal or alteration of a longstanding monument based on its history, supporters may find it unfair when the monument had also assumed communal significance by virtue of its long existence. However, the community may decide to erect a new monument in its place not burdened by the original's problematic history.[266] Accordingly, the appropriate test for an Establishment Clause challenge to a religious display, and particularly a longstanding one like the Cross, is the endorsement test.[267]

2. American Legion *Is About Implied Government Endorsement of Religion*

Since the very beginning of the AHA's lawsuit challenging the Cross, the implication of government endorsement of religion, and Christianity specifically, was the driving force of arguments from the plaintiffs,[268]

---

evident because when a reasonable observer judges a government action, the tradition or novelty of the act is central to his or her analysis." (footnotes omitted)).

265. Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."); *see* Wexler, *supra* note 258, at 269 ("The various opinions in *Allegheny* . . . make clear that the entire context of the challenged display, particularly its historical context, is important for evaluating the display's constitutionality.").

266. For arguments challenging the merits of this position, see *supra* notes 242–243 and accompanying text. See also Maha Hilal, *Confederate Statutes Aren't About History*, US NEWS (Aug. 21, 2017), https://www.usnews.com/opinion/civil-wars/articles/2017-08-21/confederate-statues-honor-americas-racist-past-and-present, for an argument against the 'historic' value of Confederate monuments. "Monuments aren't textbooks meant to teach history: They're structures erected to valorize individuals and the values for which they stood. . . . [T]hey're cultural artifacts that exist as a testament to whose contributions we value and whose we don't." *Id.*

267. *See* Capitol Square v. Pinette, 515 U.S 753, 772 (1995) (O'Connor, J., concurring) ("In my view, 'the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols.'" (quoting *Allegheny*, 492 U.S. at 628); Marci A. Hamilton, *The Endorsement Factor*, 43 ARIZ. ST. L.J. 349, 355 (2011) ("It is my view that 'endorsement' is a new factor . . . and that it is visionary and crucially important in this era of religious terrorism and triumphalism."); Jacobs, *supra* note 243, at 72 ("The line . . . between what is likely to communicate and what is not, is represented by the endorsement test . . . . Other tests do not adequately protect the values at issue in the Establishment Clause."); Wexler, *supra* note 258, at 277 ("[T]he endorsement test . . . generally asks the correct question about the constitutional propriety of religious symbols and displays.").

268. For example, in his complaint to the district court, Mr. Lowe states that he "believes that the Bladensburg Cross associates a Christian religious symbol with the State and gives the

organizations supporting them,[269] and members of the media believing the Cross to be unconstitutional.[270] It was also on endorsement grounds the Fourth Circuit held the Cross unconstitutional, as well as the grounds for disagreement between the majority and dissenting opinions of the appeals court.[271]

Additionally, the implication of governmental endorsement of religion was the primary reason Justice Ginsburg disagreed with the Court and would have held the Cross unconstitutional.[272] As she explained in the dissent, "when a cross is displayed on public property, the government may be presumed to endorse its religious content."[273] She further explained the presumption could be overcome by a setting that "negates any message of endorsement of that content," such as a museum, or a history teacher covering the Protestant Reformation, but that the Cross was in no such setting.[274]

Finally, in the Court's past religious display cases, the primary issue was whether the displays communicated the government's endorsement of religion. For instance, in *Lynch*, the Court addressed whether the city's display of a crèche communicated its endorsement of Christianity.[275] In

impression that the State supports and approves of Christianity, as opposed to other religions, and that the state may even prefer Christians and Christianity over other religions." Complaint at 3, Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373 (D. Md. 2015) (No. cv-14-550). In its Brief to the Fourth Circuit, AHA emphasized the Cross's "enormous" size and prominent location in asking whether "the court err[ed] in concluding [the] Cross does not have the effect of endorsing Christianity." Brief of Appellant at *1, Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 201 (4th Cir. 2017) (No. 15-2597).

269. Organizations filing amici briefs in support of AHA argued the Cross "'conveys a strong message of exclusion and secondary status' to 'members of minority faiths.'" Thomas R. Ascik, *Does a War-Memorial Cross Violate the Establishment Clause?*, NAT'L REV. (Feb. 25, 2019), https://www.nationalreview.com/2019/02/peace-cross-supreme-court-case-establishment-clause-2/.

270. *Editorial: The Supreme Court Shouldn't Bless a Giant Cross on Public Property*, L.A. TIMES (Feb. 28, 2019), https://www.latimes.com/opinion/editorials/la-ed-scotus-cross-20190228-story.html ("The right question for the court is whether a religious symbol on public property endorses one religion over others. The Peace Cross clearly does."); S.M., *Cross in Maryland–Does a Memorial to Fallen Soldiers Breach the Church-State Wall?*, ECONOMIST (Mar. 6, 2018), https://www.economist.com/democracy-in-america/2018/03/06/does-a-memorial-to-fallen-soldiers-breach-the-church-state-wall ("Drivers . . . might be forgiven for wondering if Christianity is the official religion of Bladensburg. At a busy intersection in the town (population 9,148) stands a chunky 40-foot concrete cross. . . . The words 'valour', 'devotion' and 'courage' are inscribed on the sides of the cross, but they are not easily visible from the road. There is no church in sight.")

271. *See supra* notes 45, 48–50 and accompanying text.

272. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105–06 (2019) (Ginsburg, J., dissenting) ("In cases challenging the government's display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the effect of endorsing religion. . . . As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content." (citation omitted)).

273. *Id.*

274. *Id.* at 2106–07.

275. *See supra* notes 108–110 and accompanying text.

Allegheny, the Court addressed whether the county's display of a crèche and a menorah communicated endorsement of Christianity and Judaism.[276] In *Capitol Square v. Pinette*, the Court determined whether a private group's display of a cross on state grounds communicated the state's endorsement of Christianity.[277] In *Van Orden* and *McCreary*, the Court analyzed whether Ten Commandments displays on state capitol grounds and in a county courthouse, respectively, communicated endorsement of Christianity.[278] These cases further demonstrate that the potential Establishment Clause violation inherent in governmental religious displays—including the Cross—is communication of the government's endorsement of religion.

3. Justice O'Connor's Endorsement Test Would Uphold the Cross

Under the endorsement test, as an alteration of the *Lemon* test, the issue of governmental purpose in acquiring and maintaining the Cross and the land on which it stands would be quickly disposed. According to Justice O'Connor in *Lynch*, the proper inquiry for this prong is "whether the government intends to convey a message of endorsement or disapproval of religion."[279] Just as Justice O'Connor easily found that the city in *Lynch* included the crèche in its display only as part of an effort to celebrate a public holiday and did not intend to promote religion,[280] the Court could conclude that the Commission's intention in acquiring and maintaining the Cross was not solely or predominately to promote religion or Christianity. The government acquired the property out of its concerns for maintaining traffic safety.[281] And unlike cases like *McCreary*, where the Court found an impermissible purpose based on a record of the government's unadulterated effort to promote Christian doctrine,[282] in *American Legion*, evidence of a predominant secular purpose—commemoration of WWI veterans—appears

276. *See supra* notes 124–132 and accompanying text.

277. *See supra* notes 135–143 and accompanying text.

278. *See supra* notes 144–167 and accompanying text.

279. Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). This is consistent with the guidance on the purpose prong provided in *McCreary*, explaining that action passes the "purpose" inquiry of the *Lemon* test when it has a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 864 (2005); Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (explaining the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred").

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

281. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2078 (2019).

282. *McCreary*, 545 U.S. at 851. For instance, the Ten Commandments display in one of the companion cases was originally posted in isolation, unaccompanied by any secular writings or displays, and hung in a ceremony presided over by a Judge-Executive "who recounted the story of an astronaut who became convinced 'there must be a divine God' after viewing the Earth from the moon." *Id.* "The Judge-Executive was accompanied by the pastor of his church, who called the Commandments 'a creed of ethics' . . . .'" *Id.*

as early as the very idea to erect the Cross.[283] Furthermore, even the Fourth Circuit—the only court to hold the Cross unconstitutional—found the government's purpose was secular and therefore permissible.[284]

The government's ownership and maintenance of the Cross would also pass the effect prong of the endorsement test when analyzed through the eyes of Justice O'Connor's "reasonable observer." The all-knowing reasonable observer of the Cross would know the monument was originally paid for and erected by private citizens and a private organization seeking to commemorate fallen WWI soldiers.[285] The observer would know that the fundraising and celebration of the Cross by those citizens was in fact often accompanied by religious expression.[286] But the observer would be just as aware that the Commission acquired the property and the Cross several decades later, due to its concerns for traffic safety. Although the observer cannot be blinded to the physical prominence of the Cross, he or she, in light of the evidence, would likely not interpret the government's purpose in acquiring the land and maintaining the display to be the promotion of Christianity at the exclusion of other religions.[287] On the ground that the government has a secular purpose and the all-knowing reasonable observer would not perceive governmental endorsement of religion, or Christianity to the exclusion of other religions, the Cross would not be held to violate the Establishment Clause.

The difference between the dissent's position and the finding of constitutionality that would result under the endorsement test is the consideration of the "reasonable observer"—a concept entirely absent from the dissenting opinion. The reasonable observer would have considered the secular meaning taken on by the cross (despite its Christian origins and

283. *See supra* notes 7–11 and accompanying text.

284. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 874 F.3d 195, 206 (4th Cir. 2017), *rev'd*, 139 S. Ct. 2067 (2019).

285. This presumed knowledge follows from Justice O'Connor's description of the reasonable observer as "deemed aware of the history and context of the community and forum in which the religious display appears," Capitol Square v. Pinette, 515 U.S 753, 780 (1995) (O'Connor, J., concurring), and "familiar with 'implementation of'[the] government action," McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 866 (2005) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

286. *See supra* notes 10, 12, 18–19, and accompanying text.

287. *See* Salazar v. Buono, 559 U.S. 700, 721 (2010) ("The District Court did not attempt to reassess the findings . . . in light of the policy of accommodation that Congress had embraced. . . . [A] Latin cross is not merely a reaffirmation of Christian beliefs. . . . Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten."); Jacobs, *supra* note 243, at 72 (providing support for the proposition that, assuming traffic safety is a "central function" of local government, individuals who know the Commission acquired the Cross and its property due to traffic safety concerns will understand its action does not to constitute an endorsement of religion).

retained Christian association), as well as the government's secular purpose for acquiring the Cross and the accompanying land.[288] Meanwhile, the dissent did not evaluate the viewpoint of any particular observer.[289] Instead, it applied a presumption that religious symbols on government property convey government endorsement.[290] The result under the endorsement test, therefore, is controlled by the observer viewpoint (if any) assumed by the Court.

D. The Court Should Apply a Modified Endorsement Test to Future Religious Display Challenges

As expressed above, given that the issue at the heart of challenges to governmental religious displays is the implication of governmental endorsement, and the endorsement test's focus on that issue, the test provides the best means of analysis for such cases.[291] However, this Note proposes that the endorsement test would better serve a key Establishment Clause purpose if the viewpoint assumed was changed from that of the all-knowing observer to an ordinary or typical observer, who knows only what persons most commonly observing the monument know.

1. The Court Should Impute the Perspective of an Ordinary Observer to the Reasonable Observer

The "reasonable observer" standard as it currently stands contains two major shortcomings. First, the standard is flawed substantively, because its failure to reflect the perspectives of *actual* observers disserves the anti-political division goal of the Establishment Clause.[292] Second, the standard is practically flawed, since it fails to provide guidance for what the observer should know.[293]

Adopting the perspective of a person that knows *all* relevant facts surrounding the history and context of a display simply does not reflect the reality of most observers.[294] In fact, Justices on both sides of the Court have

288. *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) (explaining the reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears").

289. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting).

290. *Id.*

291. *See supra* Sections IV.C.1–C.2.

292. *See infra* notes 302–303 and accompanying text.

293. *See infra* note 303 and accompanying text.

294. *See* S.M., *supra* note 270 ("Yet the judges on both sides of this dispute focus their analysis on imaginary people—purportedly objective reasonable observers—who neither live in the town nor pass by the monument."); Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPPERDINE L. REV. 1273, 1283 (2013) (describing the result of Justice

taken issue with the concept of the "reasonable observer" due to its inapplicability to the real members of a display's audience.[295] Justice Thomas described the observer as "unusually informed," and criticized the perspective as "not fully satisfying to . . . nonadherents or adherents" of the demonstrated religion.[296] Justice Scalia challenged the idea of attributing all-knowing views to the reasonable observer in his *McCreary* dissent, arguing the county's Ten Commandments displays should have been upheld because a reasonable observer would *not* have known the backstory unveiling the government's true purpose of promoting religion.[297] Justice Stevens also criticized the omniscient viewpoint in his *Capitol Square* dissent, where he argued a reasonable observer *would* perceive government endorsement of religion based on the presence of a religious symbol on its property.[298] He relegated Justice O'Connor's all-knowing reasonable observer to a "legal fiction,"[299] writing:

> The ideal human Justice O'Connor describes knows and understands much more than meets the eye. Her "reasonable person" comes off as a well-schooled jurist, a being finer than the tort-law model. . . . [This standard] strips of constitutional protection every reasonable person whose knowledge happens to fall below some "ideal" standard.[300]

This all-knowing observer standard is problematic, because accounting for the impressions of only the most informed members of a community undercuts one of the purposes of the Religion Clauses: preventing political divisiveness based on religion.[301] Professor Richard Garnett has pointed out that the very concern Justice O'Connor purported to address with the endorsement test—casting nonadherents as outsiders in the political community—"seems consonant with, if not equivalent to, asking whether

---

O'Connor's endorsement test in *Lynch* as "problematic, because such a position is utterly divorced from actual perceptions").

295. *See infra* notes 296–300 and accompanying text.

296. Van Orden v. Perry, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

297. McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 911 (2005) (Scalia, J., dissenting) ("[I]t is unlikely that a reasonable observer *would even have been aware* of the resolutions, so there would be nothing to 'cast off.'").

298. Capitol Square v. Pinette, 515 U.S. 753, 801–02 (1995) (Stevens, J., dissenting).

299. *Id.* at 800 n.5.

300. *Id.*

301. *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) (explaining the Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike" (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting))); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969))).

that same state action does or could cause political divisiveness."[302] And yet as Professor Mark Strasser explained, Justice O'Connor's test "seems much more concerned about the feelings of the hypothetical observer and much less concerned that some members of the community might reasonably and actually feel like insiders and outsiders respectively because of a particular display."[303] Divisiveness between persons and institutions of different religious beliefs and between religious and non-religious persons and institutions may still result if persons possessing the more "standard" level of knowledge regarding a display do not perceive government endorsement of religion.

A secondary, practical flaw of this reasonable observer standard is that it fails to provide any firm guidance on the type of person in the community whose perspective it reflects.[304] In the absence of clear guidance, the Court is left to its own subjective devices to determine what a "reasonable" person would know.[305] The Court is thus confined to the fiction that "reasonable" persons could not possibly disagree on whether a display communicates government endorsement of religion.[306] Therefore, the prevailing view of the

302. Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1700 (2006).

303. Strasser, *supra* note 294, at 1293.

304. *See Capitol Square*, 515 U.S. at 768, n.3 ("[I]f further proof of the invited chaos is required, one need only follow the debate between the concurrence [written by Justice O'Connor] and Justice Stevens' dissent as to whether the hypothetical beholder who will be the determinant of 'endorsement' should be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or (what Justice Stevens accuses the concurrence of favoring) the 'ultrareasonable' beholder."); *Leading Cases*, 103 HARV. L. REV. 137, 234 (1989) ("[T]he endorsement test, as the Court presents it [in *Allegheny*], suffers from three basic flaws: (1) uncertainty as to who is the relevant person to judge the effect of the governmental act . . . ."); Strasser, *supra* note 294, at 1289 ("[M]embers of the Court have had some difficulty in specifying just what or how much the reasonable observer should know before making a judgment about whether something promotes or undermines religion.").

305. *See Leading Cases*, *supra* note 304, at 235 ("Without any stated constraints, it is most likely that 'a person will assume the objective observer to be him or herself rather than employ an external standard.' Thus, because the standard does not depend upon the perception of real human beings, and the inquiry is undertaken devoid of any explicitly stated perspective, . . . it seems inevitable that results will depend largely on the personal perceptions of the individual Justices." (footnote omitted)); Wexler, *supra* note 258, at 265 ("[T]he test favors majority religious traditions over minority ones, because the judges who must decide whether a symbol or display sends a forbidden message are themselves generally adherents of a majority tradition."); Richard Wolf, *Does a 40-foot Latin Cross Honoring World War I Veterans Violate the Constitution? The Supreme Court Will Decide.*, USA TODAY (Feb. 20, 2019), https://www.usatoday.com/story/news/politics/2019/02/20/cross-shaped-war-monument-puts-supreme-court-crosshairs/2792388002/ (explaining in 2010, while serving on a federal appeals court, future Justice Gorsuch ruled the reasonable observer was "biased, replete with foibles and prone to mistake").

306. Strasser, *supra* note 294, at 1300–01 ("Rather than decide whether Establishment Clause guarantees are violated or instead respected when some reasonable observers would infer endorsement and others would not, members of the Court instead pretend that reasonable observers

"reasonable observer" will likely be whatever scope of knowledge resonates with the majority of Justices.[307] This ascribes no ill will to the members of the Court, but recognizes that such an approach would only be human nature. In fact, in applying such a standard, spectators succumb to the same tendency to use their own subjective views to determine what a "reasonable" person would believe.[308]

In light of these shortcomings, the Court should adopt a new definition of the "reasonable observer" that assumes the viewpoint of an *ordinary* observer of the display. This modified definition of a reasonable observer finds support in the "reasonable man" standard at the center of negligence in tort law.[309] Just as the "reasonable man" in tort would possess the "intelligence, knowledge, and experience" of an ordinary person in like circumstances,[310] the reasonable observer of a religious display should possess the same level of contextual knowledge as most (i.e., ordinary) persons who come into contact with the display. This idea is arguably the natural consequence of the Court's logic in *McCreary*, where, although not purporting to alter Justice O'Connor's reasonable observer standard, it stated "reasonable observers have reasonable memories."[311] The Court argued that an observer would not be able to ignore the government's initial, but still recent, religion-oriented actions and purposes in posting the Ten Commandments displays.[312] Although the effect of that reasoning was still to assume the viewpoint of an observer aware of the complete history of the displays, the Court's expression of "reasonable memories" begs the question whether it would have attributed that same omniscience to the reasonable observer had those initial government actions taken place ninety years prior.

The ordinary observer's scope of knowledge would not be fixed across all cases. This distinguishes the proposed approach from Justice O'Connor's test, where the observer knows *all* relevant context,[313] and from Justice

---

could not disagree. Such an approach is especially disappointing, given the numerous cases in which presumably reasonable members of the Court could not themselves agree about whether a particular practice constitutes state endorsement.").

307. *Id.*

308. *See, e.g.*, Kelly Shackelford, *Ruling Threatens Md. 'Peace Cross' and Other Veterans Memorials*, BALT. SUN, (Jan. 2, 2019), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0103-peace-cross-20190102-story.html ("There is no reasonableness in an observer who would have hurt feelings over the simple presence of a cross-shaped veterans memorial on public property.")

309. RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

310. *Id.* § 283, cmt. d.

311. McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 866 (2005).

312. *Id.*

313. Capitol Square v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

Ginsburg's approach, where observers are presumed to know *nothing* that would mitigate an implication of government endorsement.[314] Just as in tort law, the reasonable observer's knowledge depends on the facts in each case.[315] For instance, the Court's assessment of what the reasonable observer knows would consider where the monument is located: Is it in a secluded park, meaning only persons intending to closely observe the monument and learn of its history will see it? In that case, a person visiting the park will be the reasonable observer. Or is the display in unobstructed view in a heavily frequented area, such as on the side of a major highway, so that persons not seeking out the monument will see it anyway? The reasonable observer in that instance might be a person driving by on the highway who possesses no background knowledge of the display. Depending on the type of highway, the reasonable observer may be from out of town, which would further limit their presumed knowledge. The Court would also consider how readily available any mitigating information is to reasonable observers. Is there a visible sign accompanying the monument that makes apparent a secular purpose or meaning, or that makes clear the monument was originally erected by private persons rather than the government? Or is there no information present when viewing the monument from that observer's physical position? Such inquiries would provide a more practical approach that considers the perspectives of the persons most likely to be affected by the display's presence.

This line of inquiry would also give way to more concrete means for parties to support their arguments in court. Proponents of a display could provide evidence of any information readily available to the public that shows the display is not part of a governmental effort to endorse religion and present proof of the extent to which reasonable observers are aware of such mitigating history and context.[316] Opponents may point to the lack of such

314. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting).

315. RESTATEMENT (SECOND) OF TORTS § 283, cmt. d ("The qualities of a reasonable man which are of importance differ with the various situations in which the phrase is used. . . . [T]he qualities . . . are those which are necessary for the perception of the circumstances existing at the time of his act or omission and such intelligence, knowledge, and experience as are necessary to enable him to recognize the chance of harm to others involved therein.").

316. For general support of the idea that information about the origins of a governmental religious display, when accessible, may reasonably impact observers' perceptions of whether the government endorses religion, see Alan Garfield, *Opinion: Does a Cross Memorializing Soldiers Violate the Separation of Church and State?*, DEL. ONLINE (Feb. 20, 2019), https://www.delawareonline.com/story/opinion/contributors/2019/02/20/opinion-cross-public-property-unconstitutional/2927129002/. "Like Breyer in the Texas case, I'm willing to give the 100-year-old Peace Cross a pass (although there should be a more visible marker to clarify that it is a war memorial)." *Id.*; *see also Capitol Square*, 515 U.S. at 769 ("If Ohio is concerned about misperceptions [about government endorsement of religion], nothing prevents it from requiring all

information and show proof that the observer population is largely unaware of any secular history and context.[317] If it turns out the type of person most often and ordinarily coming into contact with the display would not be aware of enough "mitigating" information to conclude that the government is not seeking to endorse religion, then the display must be held invalid.[318] And of course, if no mitigating history or context exists, the display would more readily be deemed invalid.

The remedies for certain displays that fail this test could also be less drastic than those that fail under the *Lemon* test. In the case of longstanding religious displays that have mitigating secular histories and purposes unknown to the reasonable observer, the Court might order a remedy that does not require tearing down the display but making those mitigating aspects more readily apparent.[319] For instance, the Court might require a large sign to accompany the monument, explaining its origins and the government's purpose for maintaining it.[320] This idea was proffered by Justice O'Connor herself in *Capitol Square*, as a way to "remove doubt about state approval of respondents' religious message" in the case of the unattended cross standing near to government buildings.[321] Of course, this may only be practical for displays where observers have time to safely read the sign, making such a remedy imperfect for a display on a highway where the history requires a lengthy explanation. Nonetheless, the burden of coming up with a safe, practical and effective remedy can fall on the parties.

None of this is to say that even a modified reasonable observer standard would be without flaws. The task of determining what a reasonable person would know has some fuzziness, just as identifying the theoretical behavior

---

private displays in the Square to be identified as such. That would be a content-neutral 'manner' restriction that is assuredly constitutional.")

317. *Capitol Square*, 515 U.S. at 769.

318. *See id.* at 776–77 (O'Connor, J., concurring) ("I disagree [with the plurality] that '[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement.' On the contrary, when the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid." (citation omitted)).

319. *See* Jacobs, *supra* note 243, at 57–58. Jacobs argues that in the case of public forums, funds, or projects made available or accessible to private persons or entities, it is permissible for such resources to go a religious entity "so long as the criteria for selection are apparent and purely secular." *Id.* Transparency matters because "although imputing meaning is in some ways subjective, to the extent that we can identify common interpretive patterns, we can more precisely define what the action reasonably communicates." *Id.*

320. *See supra* note 316.

321. *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring) ("I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community. This factor is important because . . . certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message, particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings.").

of the reasonable man in tort law.[322] And methodologies that require the Court to assume the viewpoints of community members have been criticized for perpetuating "majoritarian norms and neglect[ing] the real needs of religious minorities."[323] Despite the admitted force of these criticisms, an endorsement test that does not attempt to consider *any* viewpoint cannot possibly address the very concern that a government action, although perhaps not actually advancing religion, has the effect of communicating endorsement. A test not attempting to emulate any person's viewpoint would, by definition, measure objective effect only. And consensus that religion has been objectively "established" would likely only be reached for the bluntest of government actions, such as the naming an official religion, or the institution of prayer practice in public schools—scenarios which have already been deemed unconstitutional.[324] Anything less egregious would be difficult to strike down as an objective establishment of religion, since, as Justice O'Connor has acknowledged, "[r]easonable minds can disagree about how to apply the Religion Clauses in a given case."[325]

Alternatively, a test purporting not to adopt a particular viewpoint would employ a presumption for or against endorsement. But any means of overcoming the presumption would still necessarily assess a viewpoint, as evidenced by Justice Ginsburg's suggestion for overcoming a presumption of endorsement: Considering whether the setting of a display is free of signs of government endorsement nonetheless must assume *someone's* point of view.[326] Essentially, an endorsement test worthy of its name will require an attempt to emulate *some* observer's viewpoint.

---

322. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST. 1965) ("[T]his standard of the reasonable man . . . enables the triers of fact . . . to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being. The standard provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonably affect the conduct required. . . .").

323. Jacobs, *supra* note 243, at 76–77.

324. *See supra* notes 79–84.

325. McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 882 (2005) (O'Connor, J., concurring). Justice O'Connor disagreed, however, with the notion that this truth should be control Establishment Clause analysis. *Id.* She followed this statement by saying, "But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society." *Id.*

326. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2106–07 (2019) (Ginsburg, J., dissenting).

2. Applying the Modified Reasonable Observer Standard Would Deem the Cross a Violation of the Establishment Clause

The proposed reasonable observer standard would have led to holding the Cross unconstitutional. This is because the modified reasonable observer's level of knowledge will vary given objective factors of the display, and such observers of the Cross would not know all the relevant details of its history.

The type of person most commonly coming into contact with the Cross is almost certainly a driver on an adjacent highway, rather than a pedestrian setting out to visit the monument. This is likely given the Cross's location at the busy intersection of Baltimore Avenue and Bladensburg Road,[327] with Bladensburg Road providing a direct six mile route to Washington, D.C.[328] Not only is the Cross observed daily by an abundance of drivers, but it is not readily accessible to pedestrians. Because the Cross is surrounded on all sides by highway, there is no convenient (and arguably, safe) parking.[329] Persons who wish to view the monument up close must park elsewhere and cross traffic by foot.[330]

Many of those persons who drive by the Cross likely know or assume it stands on government property since it is in the median of a busy highway.[331] But those persons probably do not know of the Cross's history and those details that evince a more secular purpose: that the Cross was erected by private citizens and the American Legion, and only taken over by the government years later out of its concern for traffic safety.[332] If most people coming into contact with the Cross are not aware of that history, they likely assume the government has erected and maintains the monument, and

327. GOOGLE MAPS, https://www.google.com/maps (type in the field in the upper left hand corner "Peace Cross"; then click on the "+" icon in the bottom right corner of the page to zoom in until road names are visible) (last visited Mar. 28, 2020).

328. GOOGLE MAPS, https://www.google.com/maps (click on the arrow icon in the upper left hand corner for "directions"; then type in the top field for origin "Peace Cross" and "Washington, D.C." in the bottom field for destination) (last visited Mar. 28, 2020).

329. GOOGLE MAPS, https://www.google.com/maps (type in the field in the upper left hand corner "Peace Cross"; then click on the square at the bottom left corner of the page that says "satellite"; this provides a bird's eye view of the monument and closely surrounding roads) (last visited Mar. 28, 2020).

330. *See* Transcript of Oral Argument at 67, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (No. 17-1717) ("There are no walkways, by the way, to the cross. You have to risk life and limb to get over the—the lanes of traffic.").

331. *See* S.M., *supra* note 270; Garfield, *supra* note 316.

332. *See* Garfield, *supra* note 316 ("If we stop to explore the island, you'll realize that the cross is a war memorial . . . . But if we cruise past the monument, as most people do, your only takeaway is of a giant cross on a public highway median."); S.M., *supra* note 270 ("[V]ery few of the thousands of drivers passing through the area will have a clue that the gargantuan cross commemorates fallen soldiers at all, or that it has been adorning Bladensburg byways for nearly a century. For them, the cross may well appear to poke a hole in America's church-state wall.").

therefore approves of its religious message.[333] Drivers would also notice the Cross is at least four times as tall as the other monuments in the park, the nearest of which is 200 hundred feet away.[334] Those observers may interpret the monument's prominence as an indication of the government's support for Christianity, and perhaps even an intent to encourage support for Christianity in the community.[335] Thus, the Cross would violate the Establishment Clause.

The remedy for this violation would not require tearing down or altering the structure of the Cross itself. Because the perspective of this modified reasonable observer hinged on the uninformed interpretations of persons driving by the Cross, the remedy could instead focus on supplying the lack of common, public knowledge regarding the secular aspects of the Cross's origins and purpose.[336] The Commission could have been ordered to erect a large sign accompanying the Cross, noting it was erected by private citizens and the American Legion in 1925 as a WWI memorial.[337]

V. CONCLUSION

In *American Legion v. American Humanist Ass'n*, the Supreme Court held that longstanding religious monuments on government property are presumptively constitutional and not subject to formal Establishment Clause scrutiny.[338] In doing so, the Court formalized what was a rarely used, albeit tacit constitutional exemption for the government's longstanding religious

333. *See* Harry Litman, *Why the Peace Cross Case Is So Important*, WASH. POST (Mar. 1, 2019), https://www.washingtonpost.com/opinions/2019/03/01/why-peace-cross-case-is-so-important/ (noting that upon driving by the Cross, "[u]ninformed passersby might conclude that they have driven into a very pious Christian community"); Ian Millhiser, *The Religious Right Is Getting Played by the Supreme Court*, THINK PROGRESS (June 20, 2019), https://thinkprogress.org/peace-cross-religious-right-supreme-court-fbd678e96079/ (countering Justice Alito's argument that Bayer and other corporations' use of the cross as a logo evidences its secularity, saying, "If you were driving down the street and saw the image at the top of this column [a picture of the Cross], would you believe you were looking at a symbol of Christianity or a symbol of aspirin?"); *see also* Capitol Square v. Pinette, 515 U.S. 753, 801–02 (1995) (Stevens, J., dissenting) ("The 'reasonable observer' of any symbol placed unattended in front of any capital in the world will normally assume that the sovereign which is not only the owner of the parcel of real estate but also the lawgiver for the surrounding territory has sponsored and facilitated its message.").

334. *See supra* notes 15, 21 and accompanying text.

335. *See supra* note 332.

336. *See supra* note 319 and accompanying text.

337. *See supra* notes 320–321 and accompanying text.

338. *See supra* Section III.

practices,[339] all while undermining but not overruling the *Lemon* test.[340] The Court missed an opportunity to formally adopt and modify its most appropriate test, the endorsement test, for analyzing religious display challenges.[341]

Under the proposed modified endorsement test, the Court would have first determined that drivers on the adjacent highways are the persons who most often come into contact with the Cross, rather than pedestrians intending to visit and learn about its history.[342] The Court then would have held the Cross unconstitutional upon finding that those drivers, being uninformed about the Cross's origins and the government's secular purpose in maintaining it, would perceive the Cross as a governmental endorsement of religion.[343] An appropriate remedy would not have required demolition of the Cross, but a means of making the mitigating, secular aspects of Cross readily apparent to its most common observers.[344]

Nevertheless, this case signals the conservative Court's departure from the longstanding neutrality principle embedded in *Lemon* and a shift towards tolerance of government acknowledgement of time-honored religious practices.

339. *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (Brennan, J., dissenting) ("In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its 'unique history,' . . . is generally exempted from the First Amendment's prohibition against 'an establishment of religion.'").

340. *See supra* Section IV.B.

341. *See supra* Section IV.C.

342. *See supra* Section IV.C.2.

343. *See supra* Section IV.C.2.

344. *See supra* Section IV.C.2.