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No Closer to Clarity: The Establishment Clause and the Supreme Stumble in Van Orden v. Perry

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NO CLOSER TO CLARITY: THE ESTABLISHMENT CLAUSE AND THE SUPREME STUMBLE IN *VAN ORDEN V. PERRY*

I. INTRODUCTION

The Establishment Clause of the First Amendment commands: "Congress shall make no law respecting an establishment of religion . . . ."[1] For more than 200 years, the U.S. Supreme Court has struggled to apply that seemingly simple mandate,[2] and its recent ruling in *Van Orden v. Perry*[3] only makes matters worse.

In *Van Orden*, decided in June 2005, the Court ignored much of its precedent to uphold a display of the Ten Commandments on the Texas State Capitol grounds.[4] In doing so, the Court confused an already complex area of law by failing to adopt a consistent test or overrule old ones. Thomas Jefferson described a "wall of separation between church and State"[5] that preserves the government's neutrality in matters of religion.[6] The practical application of Jefferson's metaphor over the years has shown that his wall has some holes, where the intermingling of state power with religion is constitutional.[7] Because the Court has not settled on a method to determine where those holes are,[8]

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1. U.S. CONST. amend. I.

2. *See* Adam M. Conrad, Note, *Hanging the Ten Commandments on the Wall Separating Church and State: Toward a New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1334–35 (2004) (discussing competing Establishment Clause tests).

3. 125 S. Ct. 2854 (2005).

4. *See id.* at 2861 (plurality opinion). A plurality of the Justices acknowledged the validity of its most-frequently applied Establishment Clause analysis, but did not use it, giving only the simple explanation that the test was "not useful." *Id.*

5. *Id.* at 2874 (Stevens, J., dissenting) (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

6. *See* Julie Van Groningen, *Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219, 222–23 (2004); *see also* McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005) (stating that government neutrality is an objective of the Establishment Clause); County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (stating that government endorsement of religion would violate the principle of neutrality that is necessary in a pluralistic society).

7. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing inclusion of a crèche in a city-owned holiday display); Marsh v. Chambers, 463 U.S. 783 (1983) (allowing prayer by a state-paid chaplain in state legislature).

8. *See* Conrad, *supra* note 2, at 1340.

constitutionality under the Establishment Clause is "largely an exercise in subjective interpretation by judges."[9] *Van Orden* will keep it that way.

This Note examines the Court's Establishment Clause jurisprudence, culminating in an analysis of the decision in *Van Orden*. Part II contains a summary of *Van Orden*, and Part III outlines several of the Court's Establishment Clause decisions since 1980. The examination of *Van Orden* follows in Part IV, which concludes that the Court's holding was not only improper, both in its method and in light of the precedent outlined in this Note, but also brought the Court no closer to clarifying this complicated area of law.

II. FACTS OF *VAN ORDEN V. PERRY*

In 1961, a granite monolith inscribed with the text of the Ten Commandments[10] was placed on the grounds of the Texas State Capitol.[11] Donated by a private civic organization,[12] the monolith is now one of seventeen monuments on the twenty-two-acre grounds that commemorate pieces of Texas history and identity.[13] Besides bearing

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9. Brian T. Coolidge, Comment, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. TEX. L. REV. 101, 106 (1997).

10. In the Jewish and Christian faiths, the Ten Commandments "represent the literal word of God" given to Moses on Mount Sinai and passed down to his followers. *Van Orden*, 125 S. Ct. at 2879 (Stevens, J., dissenting). There are several versions of the Commandments adhered to by different religions and denominations. *Id.* at 2880. The version inscribed on the monolith on the Texas Capitol grounds reads as follows:

> I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make to thyself any graven images. Thou shalt not take the Name of the Lord thy God in vain. Remember the Sabbath day, to keep it holy. Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee. Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbor. Thou shalt not covet thy neighbor's house. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Id. at 2873–74.

11. *Id.* at 2858 (plurality opinion).

12. *Id.* at 2870 (Breyer, J., concurring).

13. *Id.* at 2858 n.1 (plurality opinion). The following monuments appear on the Texas Capitol grounds: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans,

the words of the Decalogue, the monument is adorned with carved patriotic and religious symbols and an inscription marking its presentation to the state.[14]

Forty years after the monolith's erection, its placement was challenged as a violation of the Establishment Clause, with the plaintiff seeking an injunction for its removal.[15] On June 27, 2005, a plurality of U.S. Supreme Court Justices held that the monument's location on the capitol grounds is constitutional.[16]

In an analysis "driven both by the nature of the monument and by our Nation's history," the Court called its most frequently applied Establishment Clause test "not useful,"[17] and described a government tradition of religious acknowledgments that includes several depictions of religious figures or symbols in federal buildings.[18] Reasoning that the Ten Commandments have both religious and historical significance,[19] the Court held that the monolith was a "passive use of those texts" that fits properly among the monuments representing aspects of Texas history.[20]

III. ESTABLISHMENT CLAUSE JURISPRUDENCE BEFORE *VAN ORDEN*: A "GEOMETRY OF CROOKED LINES"[21]

The test the *Van Orden* plurality so easily dismissed was the Court's first official Establishment Clause test, adopted in 1971 in *Lemon v.*

Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. *Id.*

14. *Id.* at 2858. "An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments." *Id.* Two Stars of David and Greek letters representing Jesus Christ are carved below the text, along with an inscription marking the monument's presentation to the state by the Fraternal Order of Eagles in 1961. *Id.*

15. *Id.*

16. *See id.* at 2859.

17. *Id.* at 2861.

18. *See id.* at 2862–63. The Court cited numerous depictions of religious figures or symbols used in government buildings, beginning with the Supreme Court Courtroom: "Since 1935, Moses has stood . . . among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom." *Id.* at 2862. The plurality also noted statutes of Moses and the Apostle Paul in the Library of Congress, depictions of the Ten Commandments in the National Archives and the Department of Justice, and a representation of Moses in the Chamber of the House of Representatives. *Id.* at 2862–63.

19. *Id.* at 2863.

20. *Id.* at 2864.

21. Conrad, *supra* note 2, at 1340 (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring)).

Kurtzman.[22] Under the so-called "*Lemon* test," government action must have "a secular legislative purpose," must not have a primary effect of either promoting or inhibiting religion, and must avoid an "excessive government entanglement with religion."[23]

Although the Court has frequently applied this three-part test in Establishment Clause cases, it has noted its "unwillingness to be confined to any single test or criterion in this sensitive area."[24] As a result, Establishment Clause jurisprudence is full of blurred lines and plurality opinions, as the Court has "almost haphazardly"[25] applied, ignored, or modified the *Lemon* analysis,[26] or proposed entirely new tests.[27] Nevertheless, in its Establishment Clause decisions since 1980, the Court has consistently considered the context of the disputed action,[28] the action's nature or content,[29] and what message a reasonable observer would perceive from the action,[30] even when the test it applies in a given case is not clearly defined.

A. Stone v. Graham

The Court used the *Lemon* test to strike down a Kentucky statute requiring the posting of the Ten Commandments in public schoolrooms in *Stone v. Graham*.[31] Although the statute also required an explanation of the Decalogue's secular significance to be included in each display,[32] the Court held that simply hanging religious materials on the wall serves

22. 403 U.S. 602 (1971).

23. *Id.* at 612–13.

24. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

25. Conrad, *supra* note 2, at 1340.

26. *Compare* County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (accepting endorsement analysis as a refinement of the *Lemon* test), *with* Marsh v. Chambers, 463 U.S. 783, 787–92 (1983) (examining history to determine whether the writers of the Establishment Clause intended it to forbid legislative prayer), *and* Stone v. Graham, 449 U.S. 39, 40–41 (1980) (applying three-pronged *Lemon* test).

27. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (using coercion by the government as indicator of unconstitutionality).

28. *See, e.g.*, *Lynch*, 465 U.S. at 679–85 (focusing on crèche display in the context of the holiday season).

29. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2740 (2005) (considering sectarian language of Ten Commandments display).

30. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (holding that a reasonable student would believe that prayers offered under district policy at high school football games were endorsed by the school).

31. 449 U.S. 39, 40–41 (1980).

32. *Id.* at 41.

no educational function.[33] After noting that the Bible may be used in schools for studying history or ethics, the Court reasoned that the only effect the posted Ten Commandments could have would be to encourage students to consider or obey them.[34] The Court held that the statute lacked a secular purpose, stating "[t]he Ten Commandments are undeniably a sacred text . . . and no legislative recitation of a supposed secular purpose can blind us to that fact."[35]

B. Marsh v. Chambers

Three years after *Stone*, the Court cited "unambiguous and unbroken history" to uphold the Nebraska legislature's practice of opening its sessions with a prayer by a state-paid chaplain in *Marsh v. Chambers*.[36] The majority concluded that the drafters of the Establishment Clause never intended it to forbid prayer in the national legislature[37]—as members of the First Congress, those drafters had approved a statute authorizing the appointment of paid chaplains only three days before the First Amendment language was finalized.[38] Reasoning that it would be improper to impose stricter limits on the states than on the federal government,[39] the majority upheld the Nebraska practice.[40]

The Court did not consider the three-part *Lemon* test, and in dissent, Justice Brennan questioned this departure from convention, declaring that the majority was simply "carving out an exception to the Establishment Clause."[41]

C. Lynch v. Donnelly

The Court returned to the *Lemon* analysis a year after *Marsh* in *Lynch v. Donnelly*,[42] when it upheld a Rhode Island city's inclusion of a crèche in its holiday display.[43] The Court focused its analysis on the

33. *Id.* at 42.
34. *Id.*
35. *Id.* at 41.
36. 463 U.S. 783, 792 (1983).
37. *Id.* at 790.
38. *Id.* at 788.
39. *Id.* at 790–91.
40. *Id.* at 795.
41. *Id.* at 796 (Brennan, J., dissenting).
42. *See* 465 U.S. 668, 681 (1984) (focusing on the purpose prong of *Lemon*).
43. *Id.* at 687.

crèche in the context of the holiday season,[44] and concluded that celebrating Christmas and its origins were legitimate secular purposes.[45] Acknowledging that "on occasion some advancement of religion will result from government action,"[46] the Court held that any benefit to religion from the crèche was indirect and remote, so the display had no more primary effect of advancing religion than the government's recognition of the holiday itself.[47]

Although Justice O'Connor agreed that the display was constitutional, she proposed a modification of *Lemon* that would ensure government neutrality[48] by focusing on whether government action is an endorsement or disapproval of religion.[49] Defining endorsement as an action that "sends a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders,"[50] Justice O'Connor split her test into an analysis of what message the government intended to convey and what message was actually received.[51] After noting that context may alter the message conveyed,[52] she determined that the overall holiday season and the secular symbols of Christmas surrounding the crèche[53] negated any message of endorsement in the display.[54]

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44. *Id.* at 679.

45. *Id.* at 681.

46. *Id.* at 683.

47. *Id.* The Court also compared the crèche to the "exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.* The Court held that there was no government entanglement with religion because the city's material contribution to the crèche was minimal. *Id.* at 684.

48. Van Groningen, *supra* note 6, at 223. *See also* County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) ("If government is to be neutral in matters of religion . . . government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.").

49. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Justice O'Connor stated that the Establishment Clause bars the government "from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687. The most direct way for the government to violate this prohibition is by an endorsement or disapproval of religion. *Id.* at 688. She advocated endorsement as the proper inquiry under the purpose prong of *Lemon* because that test may not be satisfied even when its purpose requirement is met. *Id.* at 691. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980) (invalidating a statute for lack of a secular purpose despite the fact that the statute required secular notations to be included in Ten Commandments displays).

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

51. *Id.* at 690.

52. *Id.* at 692.

53. *Id.* at 669–670. The crèche was one piece of a holiday display that included a Santa Claus house, candy-striped poles, reindeer pulling a sleigh, a Christmas tree, colored lights,

D. County of Allegheny v. ACLU

Justice O'Connor's endorsement test gained majority support five years after *Lynch* when inclusion of a crèche and a menorah in holiday displays on government property in Pittsburgh was challenged in *County of Allegheny v. ACLU*.[55] As in *Lynch*, the displays' constitutionality depended mainly on their particular surroundings.[56] Because the crèche display stood alone atop the Grand Staircase of the county courthouse, the Court concluded that, unlike *Lynch*, nothing in the display's setting detracted from its religious message.[57] In contrast, the menorah was set in a less prominent location as part of a display whose focal point was a towering Christmas tree.[58] As a result, the Court held that a reasonable observer would understand the county to be promoting the Christian message of the crèche,[59] but would perceive in the menorah only the city's recognition of different holiday traditions.[60]

Justice Kennedy characterized the majority's fact-intensive, "endorsement-in-context" analysis as a "jurisprudence of minutiae"[61] that is difficult to apply.[62] As an alternative to endorsement, he proposed a test focusing on whether government action compels religious activity,[63] reasoning that "[a]bsent coercion, the risk of

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and carolers. *Id.* at 671 (majority opinion). It was located in a privately-owned park in the center of the downtown shopping district. *Id.*

54. *Id.* at 692 (O'Connor, J., concurring).

55. *See* 492 U.S. 573, 595 (1989) (stating that Justice O'Connor's endorsement test "provides a sound analytical framework for evaluating governmental use of religious symbols").

56. *Id.* at 597.

57. *Id.* at 598. The crèche was a "visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus," which included figures of the baby Jesus, Mary, Joseph, animals, shepherds, and wise men. *Id.* at 580. A banner with the words "Gloria in Excelsis Deo!" hung over the crèche, and a nearby plaque stated, "This Display Donated by the Holy Name Society." *Id.* The county surrounded the crèche with poinsettia plants and a pair of evergreen trees. *Id.* The Grand Staircase was a central area of the county courthouse, *id.* at 599, and there were no other Christmas decorations on it, *id.* at 581.

58. *See id.* at 614–17. The eighteen-foot menorah, a symbol of the Jewish holiday of Chanukah, was located near a forty-five-foot Christmas tree and a sign saluting liberty in an entrance to the City-County Building. *Id.* at 617.

59. *Id.* at 599–600.

60. *Id.* at 620.

61. *Id.* at 674 (Kennedy, J., dissenting).

62. *See id.* at 674–75 (suggesting that if the endorsement test depends on the relative proximity of religious objects to secular ones, the test would be workable only after the Court "has decided a long series of holiday display cases, using little more than intuition and a tape measure").

63. *Id.* at 660. Justice Kennedy reasoned that "freedom to worship as one pleases

infringement of religious liberty by passive or symbolic accommodation is minimal."[64]

E. Santa Fe Independent School District v. Doe

Coercion and endorsement were central themes in *Santa Fe Independent School District v. Doe*,[65] when the Court held that a school district's policy permitting student-led prayer at high school football games forced fans to "participate in an act of religious worship."[66] The text of the policy was understood by students as encouraging religious invocations before games, and the prayers were delivered over the school's public address system at school-sponsored events.[67] Based on those facts, the Court concluded that a reasonable person would perceive the school's approval of the content of the prayers.[68] Furthermore, because attendance at games could be mandatory for players, cheerleaders, or band members, and because social pressures could make a student's choice not to attend difficult,[69] the Court held that the district's policy would "exact religious conformity from a student as the price of joining her classmates at a varsity football game."[70]

F. McCreary County v. ACLU

The Court returned to the purpose inquiry of *Lemon* to invalidate Ten Commandments displays in Kentucky county courthouses in *McCreary County v. ACLU*.[71] Based mainly on the exhibits' tumultuous history—the counties had already made two unconstitutional attempts to display the Decalogue[72]—the Court concluded that "[n]o reasonable

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without government interference or oppression" is the "great object" of the Establishment Clause, and prohibiting advancement of religion through government coercion "goes far toward attainment of this object." *Id.*

64. *Id.* at 662.

65. 530 U.S. 290 (2000).

66. *Id.* at 312.

67. *Id.* at 307.

68. *Id.* at 307–08.

69. *Id.* at 311–12.

70. *Id.* at 312 (quoting Lee v. Weisman, 505 U.S. 577, 595–96 (1992)) (internal quotations omitted).

71. 125 S. Ct. 2722, 2740 (2005).

72. *See id.* at 2728–31. The counties first displayed the Ten Commandments alone, and each display was challenged as a violation of the Establishment Clause. *Id.* at 2729. However, before that suit was finished, the county legislatures adopted resolutions calling for expanded displays. *Id.* Besides the Ten Commandments, the second displays included eight

observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays."[73] The Court also noted the sectarian tone of the third display, which quoted more of the "purely religious language"[74] of the Ten Commandments than the previous exhibits, and emphasized that the Establishment Clause requires "governmental neutrality in matters of religion."[75]

IV. ANALYSIS OF THE U.S. SUPREME COURT'S DECISION IN *VAN ORDEN V. PERRY*

Against this backdrop, the *Van Orden* decision is faulty both in its method and in its conclusion. When the Court turned to a *Marsh*-like historical justification of the Texas monolith, it disregarded two decades of valid precedent since *Marsh* with little explanation.[76] As a result, the Court failed to thoroughly consider factors that would have invalidated the monolith. Thus, the case was not only wrongly decided, but also represents a missed opportunity for the Court to bring clarity to an "area of constitutional law [that] seems to cry out" for it.[77]

A. The Court Disregarded Valid Precedent in Upholding the Monolith

On the same day it cited the long-established *Lemon* test in *McCreary County*,[78] the *Van Orden* plurality abandoned much of the Court's usual analysis,[79] thereby avoiding thorough consideration of valid precedent while also contradicting the dissent of some of its members in *County of Allegheny*.[80]

In the later case, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, questioned the Court's adherence to the endorsement test introduced in Justice O'Connor's *Lynch* concurrence.[81] The *Lynch*

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other documents that highlighted religious themes. *Id.* at 2729–30. The district court held the displays unconstitutional under *Lemon*, ruling that they lacked a secular purpose because the selection of documents focused exclusively on Christianity. *Id.* at 2730.

73. *Id.* at 2740.

74. *Id.*

75. *Id.* at 2743.

76. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion). After describing the *Lemon* test, the Court simply stated: "[W]e think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.*

77. Conrad, *supra* note 2, at 1340.

78. *McCreary County*, 125 S. Ct. at 2730.

79. *Van Orden*, 125 S. Ct. at 2863–64.

80. *See* County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., dissenting).

81. *See supra* Part III.C.

majority had applied the *Lemon* test,[82] and Justice Kennedy stated that the principle of stare decisis requires the Court to not only follow prior holdings but also to adhere "to their explications of the governing rules of law."[83] Sixteen years later, however, all three Justices followed the *County of Allegheny* majority's example in acknowledging the validity of *Lemon* without applying it or overturning it.[84]

Although the *Van Orden* plurality considered the precedent of *Stone*, it reasoned that nothing in the latter case indicated that its holding would extend from the schoolroom to the capitol grounds.[85] However, the Court's application of *Stone* in *McCreary County*[86] shows that *Stone* is not properly read to apply only when government places religious materials in schools. Furthermore, *County of Allegheny* illustrates the rigorous scrutiny that the Court has applied when a government places religious symbols on public property,[87] and it would be incongruous not to apply that same level of scrutiny to the placement of the Texas monolith.

Even though Establishment Clause jurisprudence is often inconsistent,[88] and the plurality noted cases in which the Court ignored *Lemon*,[89] the plurality still failed to explain why the three-part test was simply "not useful"[90] in this particular case. As a result, rather than directly considering existing Establishment Clause doctrine, the plurality appears to have followed the *Marsh* majority in "carving out an exception"[91] to the Clause. Describing the Court's "aberrant departure"[92] from the settled method in *Marsh*, Justice Brennan

82. *See supra* Part III.C.

83. *County of Allegheny*, 492 U.S. at 668 (Kennedy, J., dissenting).

84. *Compare Van Orden*, 125 S. Ct. at 2861 (plurality opinion) (setting out the *Lemon* test's requirements before declining judgment on its fate "in the larger scheme of Establishment Clause jurisprudence"), *with County of Allegheny*, 492 U.S. at 592 (explaining *Lemon* test before applying endorsement).

85. *Van Orden*, 125 S. Ct. at 2863–64 (plurality opinion).

86. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2737 (2005) ("We take *Stone* as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments.").

87. *See supra* Part III.D.

88. *See* Conrad, *supra* note 2, at 1333–35 (discussing the Court's struggle to "find consistency in its Establishment Clause jurisprudence over the past half-century").

89. *Van Orden*, 125 S. Ct. at 2861 (plurality opinion) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) as recent cases in which the Court has not applied the *Lemon* test).

90. *Id.*

91. Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting).

92. Lynch v. Donnelly, 465 U.S. 668, 695 (1984) (Brennan, J., dissenting).

suggested that Establishment Clause cases are best judged through the "unsentimental eye"[93] of settled doctrine, rather than by the "unique history"[94] of the government action at issue. The fact that the majority returned to apply *Lemon* a year after *Marsh*[95] and has frequently applied it since[96] strengthens this view.

B. The Monolith's Placement Should Have Been Held Unconstitutional

Because of its departure from the conventional analysis, the *Van Orden* plurality failed to thoroughly examine the context of the disputed government action, the content of its message, and what a reasonable observer would understand from the action. Applied in *Van Orden*, these considerations should have invalidated the Texas monolith under any of the tests commonly used in Establishment Clause jurisprudence.

1. The Monolith's Placement is Unconstitutional in Light of Its Context

The Court consistently considers the challenged government action in its overall context,[97] and, based on its setting, the Texas monolith should have been held unconstitutional. Like the crèche display in *County of Allegheny*, which was set in a prominent position at the seat of government,[98] the monolith occupies ground at the center of state power.[99] Although government use of religious symbols on public property does not necessarily violate the Establishment Clause,[100] some

93. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

94. *Id.* at 795.

95. *See Lynch*, 465 U.S. at 681 (finding legitimate secular purposes under purpose prong of *Lemon*).

96. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2745 (2005) (applying *Lemon* test to strike down Ten Commandments displays in county courthouses); *Lynch*, 465 U.S. at 679 (applying *Lemon* test to uphold the inclusion of a crèche in a city-owned holiday display); Stone v. Graham, 449 U.S. 39, 40–41 (1980) (applying *Lemon* test to strike down a statute requiring that Ten Commandments displays be hung in public schoolrooms).

97. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) (examining community and peer pressures of attendance at football games under coercion inquiry); County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (stating that "the effect of the government's use of religious symbolism depends upon its context" under endorsement test); *Lynch*, 465 U.S. at 679–85 (focusing on crèche in context of Christmas season while applying the *Lemon* test).

98. *See supra* text accompanying note 57.

99. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005) (plurality opinion).

100. *See, e.g.*, *County of Allegheny*, 492 U.S. at 621 (holding that menorah's placement on government property during holiday season was constitutional).

Justices have advocated a "strong presumption"[101] against the practice because it risks offending both members and nonmembers of the faith being recognized.[102]

In addition, the monolith's Judeo-Christian aspect[103] is not tempered by its overall setting the way the *Lynch* crèche was. In *Lynch*, the crèche was surrounded by numerous secular symbols of the holiday.[104] In contrast, the monolith is part of a collection of monuments that is spread over a twenty-two-acre area. Whatever effect these scattered monuments have on each other, it is not likely as strong as the neutralizing effect the *County of Allegheny* Christmas tree had on the menorah placed in its shadow, so each monument on the Texas Capitol grounds would likely be taken "on its own terms."[105] For these reasons, the monolith also differs from the depictions of religious figures and symbols in federal architecture described by the plurality,[106] because the examples listed by the Court are placed near secular figures and symbols that offset their religious significance.[107]

Instead of discussing these contextual considerations, the plurality inadequately distinguished the Texas monolith from the displays in *Stone*. The Court simply described the Texas monolith as "far more passive"[108] than the *Stone* displays, but did not demonstrate how it is more "passive" to hang text on a wall than to place the same text on a monument in the ground.[109] "The problem in *Stone* was simply that the

101. *Van Orden*, 125 S. Ct. at 2874 (Stevens, J., dissenting); *see also County of Allegheny*, 492 U.S. at 650 (Brennan, J., dissenting) ("[T]he Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.").

102. *County of Allegheny*, 492 U.S. at 651 (Brennan, J., dissenting).

103. *Van Orden*, 125 S. Ct. at 2863 (plurality opinion) ("[T]he Ten Commandments are religious—they were so viewed at their inception and so remain.").

104. *See supra* text accompanying note 53.

105. *Van Orden*, 125 S. Ct. at 2895 (Souter, J., dissenting).

106. *See supra* text accompanying note 18.

107. *See Van Orden*, 125 S. Ct. at 2894 n.4 (Souter, J., dissenting). Moses appears in the Supreme Court Courtroom in the company of other lawgivers. *Id.* at 2862 (plurality opinion). The depictions of Moses and Saint Paul in the Library of Congress are two of sixteen tightly-grouped statues. *Id.* at 2894 n.4 (Souter, J., dissenting). The inlay containing a depiction of the Ten Commandments in the floor of the National Archives is one of four such displays, which do not have a religious theme. *Id.* In the Chamber of the House of Representatives, Moses is only one of twenty-three portraits, "each approximately the same size, having no religious theme," and the Ten Commandments are not included in the portrait. *Id.*

108. *Id.* at 2864 (plurality opinion).

109. *Id.* at 2896 (Souter, J., dissenting).

State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it."[110]

2. The Monolith's Content is Sectarian and Does Not Indicate a Secular Purpose

Combined with its physical surroundings, the words and symbols carved into the monolith's face should have invalidated its placement. Like the unconstitutional *McCreary* and *Stone* displays,[111] the monolith highlights text that not only proscribes killing or stealing, but also commands worship of one God in a certain manner.[112] The plurality conceded that the Ten Commandments have religious significance,[113] and this aspect of the display is enhanced by the carved depictions of the Ten Commandments tablets, Stars of David, and Greek letters representing Jesus Christ.[114] The notation at the base of the monument attributes the religious monolith to the Fraternal Order of Eagles, and not to the state.[115] The *County of Allegheny* crèche's placement was held unconstitutional despite a nearby plaque which marked its donation by an outside group,[116] so the Texas monolith should not be validated by such a notation either.

Furthermore, nothing on the monolith links the Ten Commandments to the Texan history and identity that the collection of monuments on the grounds is designed to portray.[117] Instead, the monolith is like the Decalogue displays in *McCreary County*, which were invalidated in part because they did not adequately connect their religious content to the counties' stated objective of educating citizens about the foundations of American law.[118] There is also no indication on

110. *Id.*

111. *See supra* Part III.A, F.

112. *See supra* text accompanying note 10.

113. *Van Orden*, 125 S. Ct. at 2863 (plurality opinion).

114. *Id.* at 2858.

115. *Id.*

116. *See supra* text accompanying note 57.

117. *See supra* text accompanying note 13.

118. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2740–41 (2005). The displays included framed copies of the National Anthem, the National Motto, the Declaration of Independence, the Mayflower Compact, the Ten Commandments, the Bill of Rights, and the Magna Carta. *Id.* at 2731. After describing the lack of common secular theme in the documents included in the displays, the Court reasoned that if a viewer trying in vain to discern a secular purpose "had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *Id.* at 2740–41.

the monolith of the Fraternal Order of Eagles' purpose to honor its efforts to fight juvenile delinquency.[119] In this way, the monolith lacks even the "sham"[120] secular objectives represented by the notations on the unconstitutional *Stone* displays.[121]

3. A Reasonable Observer Would Perceive Advancement of Judeo-Christianity

Under the Establishment Clause, government action can be unconstitutional if a viewer could not reasonably think that a religious display on public property could occupy its location without government support and approval,[122] and based on the Texas monolith's context, a reasonable observer would perceive government promotion of its message. In *County of Allegheny*, reasonable passersby were held to perceive an endorsement of Christianity because the crèche could not have been located in the central point of the courthouse without the approval of the county.[123] In *Santa Fe Independent School District*, a reasonable student understood the pre-game prayers as stamped with the school's "seal of approval"[124] because of their performance on school-controlled property at school-sponsored events.[125] Pedestrians on the Texas Capitol grounds could likewise reasonably think that a large granite block could not be placed there without government approval, even if they did not know that the state selected the site for the monument or that its dedication was presided over by state officials.[126]

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119. *Van Orden*, 125 S. Ct. at 2878 (Stevens, J., dissenting). The Fraternal Order of Eagles hoped to fight juvenile delinquency by presenting the Ten Commandments as a code of conduct by which youth could live. *Id.* "It is the Eagles' belief that disseminating the message conveyed by the Ten Commandments will help to persuade young men and women to observe civilized standards of behavior." *Id.*

120. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring)).

121. *See supra* Part III.A.

122. *See* County of Allegheny v. ACLU, 492 U.S. 573, 599–600 (1989) (holding that no reasonable person would think a crèche could be located on the Grand Staircase of the county courthouse without government approval).

123. *See supra* Part III.D.

124. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308.

125. *See supra* Part III.E.

126. *See Van Orden*, 125 S. Ct. at 2858 (plurality opinion). After the monument was donated, the state organization responsible for maintaining the capitol grounds selected a site for it. *Id.* The Fraternal Order of Eagles paid for the monument, whose dedication was overseen by a pair of state legislators. *Id.*

Although decades passed before the monolith was challenged,[127] this fact does not prove, as the plurality hinted,[128] that a reasonable observer would not perceive it as a government advancement of religion. In fact, the unconstitutional crèche in *County of Allegheny* went unchallenged for five years,[129] nearly as long as the *Van Orden* plaintiff regularly walked by the Texas monument before bringing suit.[130] While the plaintiff may indeed have been the first to understand the monument as promoting religion, it is equally likely that numerous reasonable people over the years perceived the same message, but were unwilling to bear the cost or risk the "social ostracism"[131] that may have come from suing the state over it.

Nothing suggests that the *Van Orden* plaintiff or anyone else has been coerced into an act of religious worship by the monument, but because the Court has "never relied on coercion alone as the touchstone of Establishment Clause analysis,"[132] this fact should not make the monument constitutional.

C. *A Missed Opportunity*

Van Orden should be considered not only a validation of an unconstitutional monument, but also a missed opportunity for the Court to provide badly-needed guidance in a confused area of constitutional law.[133] The *Van Orden* plurality noted that it could not abdicate its responsibility to reach decisions that respect religion's role in the

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127. *Id.*

128. *See id.* at 2864 (plurality opinion) (noting that plaintiff walked by the monolith for years without bringing a lawsuit); *see also id.* at 2870 (Breyer, J., concurring) ("[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals . . . are likely to have understood the monument as amounting . . . to a government effort to favor a particular religious sect.").

129. County of Allegheny v. ACLU, 492 U.S. 573, 578 (1989). The crèche was first displayed in 1981. *Id.* Litigation commenced in 1986. *Id.* at 587.

130. *See Van Orden*, 125 S. Ct. at 2858 (plurality opinion).

131. *Id.* at 2897 (Souter, J., dissenting).

132. *County of Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring). Justice Thomas, advocating the coercion test in *Van Orden*, stressed that the monolith in no way compelled the plaintiff to do anything. *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring) ("The only injury to [the plaintiff] is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life."). However, Justice O'Connor explained that a standard that only prohibits coercive government actions does not "take account of the numerous more subtle ways that government can show favoritism" to certain beliefs. *County of Allegheny*, 492 U.S. at 627–28 (O'Connor, J., concurring).

133. *See* Conrad, *supra* note 2, at 1340.

nation's history while maintaining a separation of church from state.[134] However, when it disregarded precedent with minimal explanation, the plurality did just that. Without clear and consistent direction, holdings at all judicial levels may depend on a "game of *Lemon* roulette,"[135] which would not fairly separate church and state or respect religion. If precedent is valid enough to be acknowledged and not overturned,[136] the principle of stare decisis described by members of the *Van Orden* plurality in *County of Allegheny* dictates that the precedent be followed. Conversely, if *Lemon* or its descendents are "not useful"[137] enough to even be applied in two cases on the same day,[138] they should be overturned and replaced, not ignored.

Even Justices Scalia and Thomas, who agreed that the monolith was constitutional, seemed unsatisfied with the plurality's method and called for the adoption of an Establishment Clause jurisprudence that can be consistently applied.[139] Until that call is met, unconstitutional practices like the placement of the Texas monolith will continue to be upheld, while other constitutional, actions will likely be struck down. By failing to provide clear guidance, the *Van Orden* plurality prolonged this "disarray at the nation's highest judicial level."[140]

V. CONCLUSION

Considering the complex and inconsistent nature of Establishment Clause jurisprudence, *Van Orden* may not be a dramatic landmark on the legal landscape. Still, the case shows how the Court's "unwillingness to be confined to any single test"[141] can cause unconstitutional practices to be upheld. The Texas monolith places a uniquely Judeo-Christian text at the heart of state power, and since that text's religious meaning is not neutralized by anything in the monument's surroundings or content, a reasonable passerby would perceive it to be a promotion of that

134. *Van Orden*, 125 S. Ct. at 2859 (plurality opinion).

135. Conrad, *supra* note 2, at 1367.

136. *See supra* note 96.

137. *See supra* Part II.

138. *Compare Van Orden*, 125 S. Ct. at 2861 (plurality opinion) (examining history instead of applying *Lemon*), *with* McCreary County v. ACLU, 125 S. Ct. 2722, 2735 (2005) (applying *Lemon*).

139. *See Van Orden*, 125 S. Ct. at 2864 (Scalia, J., concurring) ("I would prefer to reach the same result by adopting an Establishment Clause jurisprudence . . . that can be consistently applied . . . ."). *See also id.* at 2868 (Thomas, J., concurring) ("[A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order.").

140. Conrad, *supra* note 2, at 1340.

141. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

message by the Texas government. In failing to thoroughly consider its own precedent or explain its reason for doing so, the *Van Orden* plurality not only validated an unconstitutional action, but also ensured that the confusion in applying the Establishment Clause will continue.

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