3-1-2012

Cooking up a New *Lemon Test*: The Establishment Clause, Displays of Religious Objects, and Lessons from India

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A foreign tourist visiting a public high school in Giles Country, Virginia, might wonder why the Ten Commandments are on the school’s wall, next to “the Declaration of Independence, the Star-Spangled Banner, and the Virginia Statute for Religious Freedom.”1 If the foreigner is a practicing Jew or Christian, she might be offended by the commandments’ proximity to less momentous documents.2 Visitors, whether Jewish, Christian, or atheistic, might wonder why the words of Thomas Jefferson and the Abrahamic deity merit similar treatment.3 The display might seem especially bizarre if the tourist knew that the Establishment Clause of the United States Constitution prohibits any “law respecting an establishment of religion.”4 The tourist might think—

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3. See McCreary Cnty., 545 U.S. at 872–73.

as this Note argues—that courts hearing challenges to Ten Commandments displays ought to presume that the displays are impermissibly religious \(^5\) and that a student’s perspective ought to govern Ten Commandments displays in public schools.\(^6\)

The hypothetical tourist’s confusion reflects two important issues. First, even if she read case law and scholarly commentary carefully, she could not be sure what the Establishment Clause means for government actions that might support religion.\(^7\) A stone monolith engraved with the Ten Commandments and placed on government-


6. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (“Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”) (emphasis added)); Marshall, supra note 5, at 541–44.

7. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 678–79 (“In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. . . . The [Establishment] Clause erects a ‘blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.’” (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971))); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (observing that “our Establishment Clause jurisprudence is in hopeless disarray”); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (observing that “our Establishment Clause jurisprudence is in hopeless disarray”); Putting Religious Symbolism in Context, supra note 4, at 492 (“The treatment of Establishment Clause challenges to displays of religious symbolism by the Supreme Court and the lower courts is notoriously unpredictable . . . . A number of commentators have suggested that this disarray can be blamed largely on the chaotic state of the Supreme Court’s Religion Clauses doctrine.”) (footnotes omitted)); Marshall, supra note 5, at 495 (“From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common.”)); Mark Tushnet, The Constitution of Religion, 18 Conn. L. Rev. 701, 702 (1986) (“Contemporary constitutional law just does not know how to handle problems of religion.”).
owned land near the Texas Capitol was found constitutional in Van Orden v. Perry, but in McCreary County v. American Civil Liberties Union of Kentucky a framed print of the Commandments hanging on a county courthouse wall was found unconstitutional. Yet a government-erected crèche commemorating the birth of Jesus can be constitutional under the Establishment Clause, at least if the nativity scene is presented in recognition “of a significant historical religious event” and in a way that “engenders a friendly community spirit of goodwill in keeping with the season.” A Roman Catholic group cannot put a crèche in a county courthouse, but a Jewish group might be able to place a menorah outside of a public building. In addition to confusion over which objects can be displayed, there is uncertainty over what test will control. Given the state of Establishment Clause jurisprudence, a district court judge analyzing a display of potentially religious objects on


10. Id. at 881.


12. Id. at 680.

13. Id. at 685.


15. See id. at 620–21 (opinion of Blackmun, J.).

16. Compare, e.g., Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (“Whatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”), with McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 861 (2005) (“[T]he Counties ask us to abandon Lemon’s purpose test, or at least to truncate any enquiry into purpose here. . . . The assertions [made in support of abandoning the test] are as seismic as they are unconvincing.”). See also Marshall, supra note 5, at 497 (“At times the Court has described the [Lemon] test as a helpful signpost, at other times the Court has suggested that it can be discarded in certain circumstances, at still other times the Court has held that it must be rigorously applied.” (footnotes omitted)).
government property could be pardoned for feeling as confused as a tourist seeing the Ten Commandments on a school wall.\textsuperscript{17}

The tourist’s confusion points to a second issue. How can courts decide whether the government is sending an unacceptably religious message by displaying objects?\textsuperscript{18} Even if courts know what test to use, they have to define religion and decide whose perspective counts.\textsuperscript{19} The Supreme Court has struggled to do so,\textsuperscript{20} leading Justice William Brennan to worry that “analysis under the Establishment Clause look[s] more like an exam in Art 101 than an inquiry into constitutional law.”\textsuperscript{21} The jibe captured the Court’s fact-heavy analysis of possibly impermissible holiday displays in \textit{County of Allegheny v. American Civil Liberties Union},\textsuperscript{22} which considered whether a menorah made a Christmas tree send a religious message, or a Christmas tree made a menorah send a secular message.\textsuperscript{23} The Court’s inability to enter such factual morasses and emerge with consistent results and doctrine suggests that the Court’s current approach to defining religion and that which is religious is insufficient for Establishment Clause purposes.\textsuperscript{24}

American judges are not the only ones who have struggled to decide what is and is not religious, and how government may act in the religious sphere.\textsuperscript{25} India has faced similar questions,\textsuperscript{26} which have an

\begin{itemize}
\item \textsuperscript{17} See supra notes 7, 16.
\item \textsuperscript{18} Compare, e.g., Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (“The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”), with \textit{id. at} 695 (Brennan, J., dissenting) (“Nothing in the history of such practices or the setting in which the city’s crèche is presented obscures or diminishes the plain fact that Pawtucket’s action amounts to an impermissible governmental endorsement of a particular faith.”).
\item \textsuperscript{19} See Marshall, \textit{supra} note 5, at 511–12, 533–35. The problem of defining religion generally is beyond the scope of this Note. See Nelson Tebbe, \textit{Nonbelievers}, 97 VA. L. REV. 1111, 1130–40 (2011).
\item \textsuperscript{20} See \textit{Putting Religious Symbolism in Context, supra} note 4, at 493.
\item \textsuperscript{21} Cnty. of Allegheny v. ACLU, 492 U.S. 573, 643 (1989) (Brennan, J., concurring in part and dissenting in part).
\item \textsuperscript{22} Id. at 573 (majority opinion).
\item \textsuperscript{23} See \textit{id. at} 617 (Blackmun, J., opinion).
\item \textsuperscript{24} See \textit{Ceremonialism Deism, supra} note 5, at 727; Hill, \textit{Putting Religious Symbolism in Context, supra note} 4, at 545; Marshall, \textit{supra} note 5, at 495–96.
\item \textsuperscript{25} See, e.g., McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 885–86 (2005) (Scalia, J., dissenting) (noting differences in American and European church-state relationships); \textit{GARY JEFFREY JACOBSON, THE WHEEL OF LAW: INDIA’S
added saliency because of recent, deadly violence between various religious communities during and after India’s independence from British rule in 1947.\textsuperscript{27} According to the Indian Constitution, “all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”\textsuperscript{28} Yet India’s Constitution explicitly characterizes India as a “secular democratic republic.”\textsuperscript{29} There are numerous other references to religion in the Constitution.\textsuperscript{30} As


26. For examples of the problems that the Indian Supreme Court has confronted, see Upendra Baxi, \textit{Siting Secularism in the Uniform Civil Code: A “Riddle Wrapped Inside an Enigma”}, in \textbf{The Crisis of Secularism in India} 267, 268 n.1 (2007).

27. \textit{See Jacobsohn, supra} note 25, at 5; Sugata Bose \& Ayesha Jalal, \textit{Modern South Asia: History, Culture, Political Economy} 157–62 (2nd ed. 2004) (noting that partition included “an orgy of murder, rape and plunder on an unprecedented scale” and was justified in part by appeals to religious communities); Peter Van der Veer, \textit{Religious Nationalism: Hindus and Muslims in India} 23–24 (1994) (relating inter-religious violence in India to attempts to define religion in India and the state’s role in it). As important as this history is, it should not be considered “as [an] effect . . . of the persistence of premodern religious passions and fanaticism.” Thomas Blom Hansen, \textit{The Saffron Wave: Democracy and Hindu Nationalism in Modern India} 10 (1999). Nor should it be considered only the result of nineteenth century British intervention in India. See Van der Veer, \textit{supra}, at 19–20. For better or worse, religious nationalism in India is a phenomenon in which Indians, as well as former colonial rulers, have participated. \textit{See Hansen, supra}, at 11, 18–24.

28. \textit{India Const.} art. 25, § 1.


recently as 2002, "[m]ore than 1,000 people, mostly Muslims[,]" died in riots between religious groups in the state of Gujarat. After state officials and Hindu nationalists urged replacing a mosque with a Hindu temple in Ayodhya in 1992, "more than a thousand people lost their lives." Balancing the demands of secularization and religion in such a charged atmosphere puts Indian judges in the difficult position of deciding what might push India across the line from being a republic where people can practice religion freely to a republic that is no longer secular.

One might wonder how relevant India is to American courts. The United States has its own share of violence linked to religion, but the riots following the destruction of the mosque at Ayodhya have no parallel in America’s last two decades. Unlike the Constitution of India, the Constitution of the United States does not require the country to be a "secular democratic republic." However, there are still lessons to be had from India. Over time, Americans are participating in a wider range of religious traditions. Courts will struggle to decide whether new

33. DONIGER, supra note 32, at 664.
37. See JACOBSOH, supra note 25, at 8–9.
beliefs and practices are religious for purposes of the First Amendment.\(^3\) Observing Indian courts' chosen definitions and perspectives can help American judges see what has and has not allowed Indian citizens to participate in political society.\(^4\) Americans do mistreat each other on account of religion, and courts have a role in blessing or condemning that mistreatment.\(^4\) If the Indian Supreme Court has promoted a peaceful civil society through analysis of religion, the Court's rulings could be instructive for American judges.\(^4\) Finally, although there is no constitutional requirement that America be secular, some scholars argue that the United States “should separate church and state” so “that our government [can] be secular” as a constitutional norm.\(^4\) Indian judges’ analysis of being secular can clarify the meaning of being secular.\(^4\) India and the United States might not be perfect parallels, but the United States can still learn from India.\(^4\)

This Note is divided into four parts. Part I surveys selected cases applying the Establishment Clause to potentially religious displays. Part II discusses an Indian Supreme Court decision addressing the meaning of secularism. Part III applies the previous parts to explain how courts should resolve a recent Establishment Clause challenge to a Ten

\(^3\) See Marshall, supra note 5, at 511.


\(^4\) See Church and State, supra note 5, at 2208; Vincent Blasi & Seana V. Shiffrin, The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought, in CONSTITUTIONAL LAW STORIES 409, 419–22 (Michael C. Dorf ed., 2d ed. 2009) (describing violent attacks on Jehovah's Witnesses after the Supreme Court upheld a mandatory flag salute challenged by Witnesses, and noting that at least one vigilante thought that the Supreme Court had called the Witnesses “traitors” and thus justified driving them out of a town).


\(^4\) See Church and State, supra note 5, at 2196.

\(^4\) See, e.g., S. R. Bommai, A.I.R. 1994 S.C. at 2002 (“When the State allows citizens to practise and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State.”).

\(^4\) See Jacobsohn, supra note 25, at 8–9.
Commandments display in a public high school. Part IV draws lessons from both the United States and India to suggest a better application of the Lemon v. Kurtzman test. Courts should reaffirm the endorsement version of the Lemon test and presume that there are real but impermissibly religious motives behind ostensibly secular displays of the Ten Commandments in public schools.

PART I: THE LEMON TREE AND ITS FRUIT: ESTABLISHMENT CLAUSE JURISPRUDENCE

The Establishment Clause's larger history is beyond the scope of this Note, but several milestones deserve attention. The story begins with the Court using the Lemon test to keep the Ten Commandments out of a school because of their religious import. Later, the Court changed directions: instead of finding a partially religious meaning to be a dispositive strike against an object, the Court allowed a nativity scene and, in a plurality opinion, a Ten Commandments display. Has the Lemon test become a disfavored, incoherent doctrine with unpredictable results, or an analytical tool that, with some refinement, can prevent

47. See infra Part I.
48. Cf. Ceremonial Deism, supra note 5, at 769 (arguing that “courts’ analysis should rely on a rebuttable presumption that a facially religious phrase or practice has continuing religious meaning”); Putting Religious Symbolism in Context, supra note 4, at 544–45 (arguing that “a presumption against the display of religious symbols on public property . . . might lend a degree of predictability and minimize the majoritarian bias inherent in the interpretation of religious symbols”); Marshall, supra note 5, at 544 (arguing that “[a]ny governmental action benefitting religion in the public schools, then, should be upheld only under extraordinarily narrow circumstances”).
53. See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (Scalia, J., concurring) (criticizing “the strange Establishment Clause
religion from being used to make some citizens feel like less than full participants in their community? In short, has the Lemon test rotted or ripened?

A. Bringing Lemon to the School

An early Establishment Clause challenge to a public display of the Ten Commandments provides a useful starting point to modern jurisprudence. In Stone v. Graham, the Court invalidated “[a] Kentucky statute requir[ing] the posting of a copy of the Ten Commandments . . . on the wall of each public classroom in the State.” The Court relied on Lemon v. Kurtzman’s standard for whether state statutes comply with the Establishment Clause. “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.’” Rejecting Kentucky’s argument that there was “a secular legislative purpose” of highlighting the Commandments’ historical importance, the Court held that the statute “has no secular legislative purpose, and is therefore unconstitutional.”

geometry of crooked lines and wavering shapes” and citing opinions in which “five of the [then] sitting Justices have” rejected the Lemon three-part test).

54. See supra Church and State, note 5, at 2206 (presenting Justice O’Connor’s Lynch concurrence, which referenced Lemon, as a model for how Establishment Clause jurisprudence should prevent political alienation); Marshall, supra note 5, at 538–49 (explaining how precedent, including cases relying on Lemon, can be used to deduce more consistent rules for Establishment Clause cases, especially in the public school setting).

55. The Establishment Clause has proved to be a conceptual tangle for decades, even before the cases discussed supra. In Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947), the Court noted that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions,” but upheld “spending tax-raised funds to pay the bus fares of parochial school pupils.” Id. at 16, 17.

57. Id. at 39.
58. Id. at 40 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
59. Id. (alteration in original).
60. Id. at 41.
61. Id.
The majority in *Stone* incorporated a religious-secular divide into its reasoning and required the government to place objects in a secular curricular context to avoid an Establishment Clause violation.62 The majority categorized the Ten Commandments as “undeniably a sacred text” that “do[es] not confine [itself] to arguably secular matters”,63 such as “history, civilization, ethics, comparative religion, or the like.”64 “[A]rguably secular matters” deal with behaviors toward other human beings as well as intellectual disciplines; “religious duties” involve beliefs and actions regarding God.65 The *Stone* Court defined religion in terms of belief in a god who wants loyalty and provides followers with a sacred text; the secular is what is outside of that religious realm.66 Although there are permissible uses for the Ten Commandments in the public classroom,67 under the majority’s decision the burden is on the state to contain the Commandments’ religiosity and place them in an acceptably secular context that shows the state’s neutrality toward any religious meaning.68

62. See id. at 41–42.
63. Id. at 41.
64. Id. at 42.
65. Id. at 41–42.
66. Id. In other cases, the Supreme Court has taken conflicting positions on whether a deity must be involved for an activity or belief to be religious. Compare, e.g., United States v. Seeger, 380 U.S. 163, 166 (1965) (holding that, for purposes of interpreting the relevant statute, “a given belief that is sincere and meaningful” can qualify someone for a draft exemption if the belief “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God”), and Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (“Neither [states nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” (footnotes omitted)), with Wisconsin v. Yoder, 406 U.S. 205, 216 (1962) (“Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.”).
67. See *Stone*, 449 U.S. at 42 (per curiam).
68. Id. at 41–42. The Court’s decision focused on the purpose prong of the *Lemon* test. However, the Court clearly indicated that Kentucky was impermissibly endorsing the Ten Commandments as an object of religious devotion. Id. “If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey the Commandments. . . . [This] is not a permissible state objective under the Establishment Clause.” Id. at 42.
On the other hand, according to Justice William Rehnquist's dissent in *Stone*, the First Amendment accommodates objects with some religious meaning in government-owned spaces. Justice Rehnquist was more willing than the majority to believe Kentucky's claim of a secular goal and to accept for constitutional purposes a secular goal "overlap[ping] with what some may see as a religious objective." In his view, "the public sector [does not have to] be insulated from all things which may have a religious significance or origin." In other words, Justice Rehnquist believed that some objects have religious and secular meaning, and that having religious meaning in addition to a secular meaning should not exclude an object from government-owned property. Under Justice Rehnquist's argument, the government can maintain that an object has been a part of public culture long enough that displaying it is acknowledging the country's innate religiosity. In that case, the government could rely on contemporary uses of words and symbols to imply that the words or objects have never had a divisively religious meaning at all, contrary to common knowledge. Despite what the First Amendment requires, courts crediting such disingenuous arguments might allow displays that leave citizens feeling that religion is "relevant . . . to status in the political community."
B. O Come, All Ye Faithful Historians: A Court Holiday, Round One

Four years after Stone, in Lynch v. Donnelly, the Court asked whether the government could display a nativity scene. A Rhode Island town “erect[ed] a Christmas display as part of its observance of the Christmas holiday season”; part of the display was a “crèche . . . consisting of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals.” The display was on privately-owned land. The Court considered whether the Establishment Clause barred the display and held that it did not, based on the Lemon test.

To justify upholding the display, the Court explained how it is secular. The city had the purpose of displaying Christmas’s “historical origins” rather than advocating Christianity’s virtues, and that purpose made the scene “secular” enough to survive the Establishment Clause challenge. The Court’s description of the crèche in historical rather than devotional terms reflected the Stone Court’s implied definition of

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77. Id. at 670–71.
78. Id. at 671.
79. Id.
80. Id.
81. Id. at 670, 685 (“We are satisfied that the city has a secular purpose for including the crèche, that the city has not impossibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.”). The Court searched for “a secular purpose” for state action, not a solely secular purpose. Id. at 681 n.6 (emphasis added). Additionally, unlike the Court’s typical “ardent separationist” approach to religion in public schools, Marshall, supra note 5, at 541, Lynch disclaimed the need for “total separation” between church and state, Lynch, 465 U.S. at 672. If a religion is widely shared, it may be laudable for the government to recognize it. See id. at 677–78. Similar arguments justified upholding legislative prayer in Marsh v. Chambers, 463 U.S. 783, 792 (1983). For further analysis of legislative prayer and other examples of ceremonial deism, which is largely beyond the scope of this Note, see generally Ceremonial Deism, supra note 5. Perhaps recognizing that the foregoing propositions from Lynch taken as a whole give the First Amendment a koan-like ambiguity, Chief Justice Burger noted that “the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause.” Lynch, 465 U.S. at 678.
83. Id. at 680.
religion as dealing with a supreme god and its worship. After Lynch, government can cabin an object's religiosity and supplant it with secular meaning by presenting the object as part of history.

Lynch is also significant because of Justice Sandra Day O'Connor's concurrence, where she gave her own interpretation of Lemon. Focusing on Lemon's "purpose and effect prongs[,]" Justice O'Connor argued that they involved, respectively, whether "the government intends to convey a message of endorsement or disapproval of religion" and whether "the practice . . . in fact conveys a message of endorsement or disapproval." Engaging in practices with religious meaning is not necessarily forbidden so long as there is no desired or actual endorsement.

Applying her version of Lemon, Justice O'Connor found that "the overall holiday setting . . . negates any message of endorsement of that [religious] content." By acknowledging the role of context in viewers' interpretation of displays, Justice O'Connor properly focused on how individuals' perception of symbols affects their sense of

84. See Stone v. Graham, 449 U.S. 39, 41-42 (1980) (per curiam) ("The Commandments do not confine themselves to arguably secular matters . . . . The first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.").

85. See Lynch, 465 U.S. at 680; Marshall, supra note 5, at 515 ("Basically, [Chief Justice] Burger argued that Christmas and nativity scenes had been sufficiently 'secularized' by our history and culture so that they did not violate Lemon's strictures of purpose and effect.").


88. Id. at 691.

89. Id. at 690.

90. See id. at 690-93.

91. Id. at 692. Justice O'Connor compared the crèche to "a typical museum setting" that allows paintings with religious themes to be displayed without proselytization. Id. The setting made the crèche comparable to legislative prayers approved in Marsh v. Chambers, 463 U.S. 783 (1983), and other "government acknowledgements of religion[,]" Lynch, 465 U.S. at 693, and distinguishable from Ten Commandments that urge devotional practices upon viewers, Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam).

belonging in the larger political community.93 What she did not explain sufficiently in *Lynch* is whose perspective courts should consider.94 The malleability of the meaning of objects and words and the possibility for disingenuous papering over of their history mean the selection of one perspective as authoritative could endorse government acts that are "offensive and alienating"95 to many.96

**C. O Christmas Tree . . . What Are You? A Court Holiday, Round Two**

Justice O'Connor's concurrence in *Lynch* resurfaced in *County of Allegheny*,97 where the Court considered whether the separate displays of a crèche and a menorah violated the Establishment Clause.98 The crèche display, owned by "a Roman Catholic group," was in the Allegheny County Courthouse's Grand Staircase, the building's "'main,' 'most beautiful,' and 'most public' part[,]"99 and "include[d] figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men . . . [as well as] an angel bearing a banner that proclaims 'Gloria in Excelsis Deo!'"100 A block away, at a public building owned by Allegheny County and Pittsburgh and used for officials' offices, the City displayed a "[forty-five]-foot Christmas tree" and "an [eighteen]-foot
Chanukah menorah." The City of Pittsburgh owned the Christmas tree, and "a [private] Jewish group" owned the menorah. A divided Court ruled that the crèche was unconstitutional. Justice Blackmun found that the menorah is not an "endorsement of . . . [the] Jewish faith[" but that there might be constitutional concerns under "the 'purpose' or 'entanglement' prong of the Lemon analysis." The case was remanded first to the Third Circuit Court of Appeals, and then to the Western District of Pennsylvania. The County did not display the Christmas tree or the menorah at the courthouse following the Court's decision.

The finding that a crèche violated the Establishment Clause but a menorah might not reflected the Court's division over how to analyze Establishment Clause challenges. In Allegheny, Justice Blackmun used the following test: "[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context." Thus, Justice O'Connor's "endorsement" test, presented in Lynch as a "clarification" of the Lemon test, gained traction in a plurality opinion that she joined only in part. Other opinions in Allegheny indicated a variety of attitudes toward the Lemon test's utility for Establishment Clause cases. The range of opinions on the Court

101. Id. at 587.
102. Id. at 581, 587.
103. Id. at 602 (majority opinion).
104. Id. at 620–21 (opinion of Blackmun, J.). Justice O'Connor agreed that the menorah did not endorse Judaism, see id. at 632 (O'Connor, J., concurring in part and concurring in the judgment), and Justices Kennedy, White, and Scalia and Chief Justice Rehnquist thought that the menorah was "permissible," see id. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
105. Id. at 621 (opinion of Blackmun, J.).
108. See Putting Religious Symbolism in Context, supra note 4, at 492.
109. Cnty. of Allegheny, 492 U.S. at 597 (plurality opinion).
111. Cnty. of Allegheny, 492 U.S. at 573 (syllabus), 593 (portion of plurality opinion joined by Justice O'Connor), 595 (portion of plurality opinion not joined by Justice O'Connor); see Choper, supra note 86, at 505.
112. Cnty. of Allegheny, 492 U.S. at 626, 634 (O'Connor, J., concurring in part and concurring in the judgment) (evaluating objects based on whether they would
foreshadowed the current possibility of it abandoning the Lemon test entirely, and suggested the need to incorporate Justice O’Connor’s insights in her Lynch concurrence into future decisions.

The majority of the Justices’ analysis of the crèche and menorah depended, in part, on how they categorized the objects along the religious-secular divide. As in the earlier cases, one of the major themes was that context affects whether objects send a sufficiently secular message to pass Constitutional muster. Justice Blackmun distinguished between Christmas’s “cultural aspect” and its “theological exclude observers from the “political community”); id. at 637 (Brennan, J., concurring in part and dissenting in part) (referring to Justice Brennan’s dissenting opinion in Lynch, 465 U.S. at 697, which approvingly referred to the Lemon three-part test); id. at 650 (Stevens, J., concurring in part and dissenting in part) (referring to previous decisions, including Lemon, without deciding which one should be controlling); id. at 655, 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (“I am content for present purposes to remain within the Lemon framework, but do not wish to be seen as advocating, let alone adopting that test as our primary guide in this difficult area . . . Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.” (quoting Lynch, 465 U.S. at 678)). For a summary of the Justices’ votes in Cnty. of Allegheny, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1267 (4th ed. 2011) [hereinafter CONSTITUTIONAL LAW].

113. CONSTITUTIONAL LAW, supra note 112, at 1267–68 (describing “prospect for a major change in the law in this area” after changes in the Court’s composition); Church and State, supra note 5, at 2204.

114. See Marshall, supra note 5, at 531–33.

115. See Cnty. of Allegheny, 492 U.S. at 598–602 (majority opinion), 613–21 (Blackmun, J., opinion), 632–37 (O’Connor, J., concurring in part and concurring in the judgment), 637–44 (Brennan, J., concurring in part and dissenting in part), 652–55 (Stevens, J., concurring in part and dissenting in part), 665 (Kennedy, J., concurring in the judgment in part and dissenting in part). But see id. at 666 (“[T]he [Lynch] Court did not view the secular aspects of the display as somehow subduing the religious message conveyed by the crèche, for the majority expressly rejected the dissenters’ suggestion that it sought ‘to explain away the clear religious import of the crèche’ or had ‘equated the crèche with a Santa’s house or reindeer.’” (quoting Lynch, 465 U.S. at 685 n.12)).

116. See id. at 598–602 (majority opinion), 613–21 (Blackmun, J., opinion), 632–37 (O’Connor, J., concurring in part and concurring in the judgment), 637–44 (Brennan, J., concurring in part and dissenting in part), 652–55 (Stevens, J., concurring in part and dissenting in part).
significance” in the United States, and between Chanukah’s “cultural or secular dimension” compared to its “religious significance.” Justice Blackmun’s analysis of Chanukah gave examples of what is cultural rather than religious. As Justice Blackmun stated, “[i]ndeed, the Chanukah story always has had a political or national, as well as a religious dimension: it tells of national heroism in addition to divine intervention.” The “political and national” elements encompass “national heroism”; “divine intervention” is in the “religious dimension.” Although a majority of the Court did not join Justice Blackmun’s opinion in so far as it analyzed the menorah, other Justices nonetheless followed Justice Blackmun in separating the “historical and cultural” from the “religious.” In sum, the case suggested that the secular is about an identifiable group’s narrative of its past and thus reinforced the Lynch majority’s idea that a display can be secular if it only acknowledges “a particular historic religious event.”

In contrast to secular objects, religious objects are those that make a statement about a god and people’s relationship to it. The crèche, for example, contained an angel proclaiming, “Glory to God in the Highest!” The angel’s words, and the crèche, gave “praise to God

117. Id. at 579 n.3 (plurality opinion).
118. Id. at 587.
119. Id. at 585–86.
120. Id. at 585.
121. Id.
122. See id. at 634 (O’Connor, J., concurring in part and concurring in the judgment) (“The opinion is correct to recognize that the religious holiday of Chanukah has historical and cultural as well as religious dimensions, and that there may be certain ‘secular aspects’ to the holiday.”); id. at 643 (Brennan, J., concurring in part and dissenting in part) (“It is no surprise and no anomaly that Chanukah has historical and societal roots that range beyond the purely religious.”); id. at 652–53 (Stevens, J., concurring in part and dissenting in part) (comparing artwork showing Moses along with “Confucius and Mohammed” to artwork showing Moses along with “secular figures such as Caesar August, William Blackstone, Napoleon Bonaparte, and John Marshall alongside [Confucius and Muhammed]” to show that the former image would be about religion, but the latter would be about “respect... for great lawgivers”).
124. See, e.g., Cnty. of Allegheny, 492 U.S. at 598 (majority opinion), 634 (O’Connor, J., concurring in part and concurring in the judgment).
125. Id. at 598 (majority opinion).
in Christian terms . . . just as . . . in a church service." 126 The display thus had a "religious meaning" that the Court found "unmistakably clear." 127 The surrounding flowers and occasional carolers "[drew] one's attention to the [crèche's] message." 128 Additionally, "[t]he fact that the crèche [bore] a sign disclosing its ownership by a Roman Catholic organization . . . demonstrate[d] that the government [was] endorsing the religious message of that organization." 129 The message was "that people [should] praise God for the birth of Jesus." 130 In sum, a message is religious because it emphasizes a specific tradition's deity and how people ought to think about and behave toward that deity. 131

Courts attempting to analyze objects after Allegheny had to consider whether to take the position of an observer who sees a display as highlighting its theistic, evangelical qualities or an observer who sees a display as highlighting its historical, documentary qualities. 132 Choosing the latter perspective allows courts to ignore religious divisiveness in symbolic objects or words. 133

126. Id.
127. Id.
128. Id. at 599.
129. Id. at 600.
130. Id. at 601.
131. See id. at 611 ("Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday . . . it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief."). The Court's theistic conception of religion would be inadequate for a religion that does not emphasize belief in deities, or an analogous belief structure, as a path to salvation. See Peter Connolly, Introduction to Approaches to the Study of Religion, 1, 4–5 (1999) (noting that theistic definitions of religion exclude some Buddhist traditions).
132. See Ceremonial Deism, supra note 5, at 744–47; Marshall, supra note 5, at 531–33.
133. Cf. Ceremonial Deism, supra note 5, at 744–48 (explaining how focusing on words' occurrence in what are seen as non-religious contexts ignores the words' commonly understood religious references).
D. The Parting of the Justices: The Commandments Go to Court

The Court gave another pair of contradictory opinions in *McCreary County v. American Civil Liberties Union of Kentucky* \(^{134}\) and *Van Orden v. Perry*, \(^{135}\) which analyzed two displays of the Ten Commandments under the Establishment Clause. \(^{136}\) Five Justices upheld a preliminary injunction against the display in *McCreary County* because there was “ample support for the District Court’s finding of a predominantly religious purpose behind the . . . display.” \(^{137}\) Yet five other Justices voted to uphold the display in *Van Orden*. \(^{138}\) The Commandments \(^{139}\) in *McCreary County* were one of “nine framed documents of equal size” hanging on a county courthouse wall. \(^{140}\) Writing for a majority in *McCreary County*, Justice David Souter referred to *Lemon*’s requirement of the government having “a secular legislative purpose” as “a common, albeit seldom dispositive, element of our cases.” \(^{141}\) Drawing attention to the fact that the county’s attempt to display the Ten Commandments in the courthouse followed two other, similar efforts, one of which endorsed religion and “lack[ed] a secular purpose[,]” \(^{142}\) the majority upheld an injunction against the display because it violated the secular purpose prong of *Lemon*. \(^{143}\)

In contrast, the Commandments \(^{144}\) at issue in *Van Orden* were engraved on a stone “monolith . . . stand[ing] 6-feet high and 3-1/2 feet wide.” \(^{145}\) The monument was installed near the Texas Capitol and

\(^{134}\) 545 U.S. 844 (2005).
\(^{135}\) 545 U.S. 677 (2005) (plurality opinion).
\(^{136}\) *McCreary Cnty.*, 545 U.S. at 850; *Van Orden*, 545 U.S. at 681.
\(^{137}\) *McCreary Cnty.*, 545 U.S. at 881.
\(^{138}\) *Van Orden*, 545 U.S. at 692.
\(^{139}\) The County chose to display portions of Exodus 20:3–17 (King James).
\(^{140}\) *McCreary Cnty.*, 545 U.S. at 855.
\(^{141}\) *Id.* at 859.
\(^{143}\) *McCreary Cnty.*, 545 U.S. at 851–56, 881.
\(^{144}\) The monument displayed portions of Exodus 20:3–17 (King James). See *Van Orden*, 545 U.S. at 707–08 (Stevens, J., dissenting).
\(^{145}\) *Id.* at 681 (plurality opinion).
Supreme Court in 1961. Writing for a plurality, Chief Justice Rehnquist upheld the display based on “the nature of the monument and . . . our Nation’s history.” Contrary to Justice Souter’s refusal to “abandon Lemon’s purpose test” in McCreary County, the plurality thought that the Lemon test was “not useful in dealing with the sort of passive monument that Texas . . . erected on its Capitol grounds.” In McCreary County and Van Orden, respectively, neither Justice Souter nor Justice Rehnquist explained why, faced with two reproductions of the Ten Commandments during the same term, the Court could not at least agree to apply the same analysis to both objects. The decisive vote in the two cases was Justice Stephen Breyer, who joined the majority in McCreary County but concurred in the judgment in Van Orden. His concurrence used the same notion of the religious-secular dichotomy that other Justices used in the two cases.

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146. Id. at 681–82.
147. Id.
148. McCreary Cnty., 545 U.S. at 861.
149. Van Orden, 545 U.S. at 686.
150. See id. at 697 (Thomas, J., concurring) (“The inconsistency between the decisions the Court reaches today in this case and in [McCreary County] only compounds the confusion [over the Court’s Establishment Clause precedent].” (citation omitted)); Putting Religious Symbolism in Context, supra note 4, at 501–02 (describing different grounds for decisions); Laura S. Underkuffler, Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence, 5 FIRST AMEND. L. REV. 59, 62 (2006) (summarizing the division on the Court between those who “insisted that the ideal of equal treatment be retained” and those who “explicitly jettisoned the ideal of equal treatment by government”).
151. McCreary Cnty., 545 U.S. at 849.
152. Van Orden, 545 U.S. at 698 (Breyer, J., concurring in judgment).
153. See id. at 701–03; id. at 689–90 (plurality opinion) (noting that the Commandments have an “undeniable historical meaning” in light of the frequent depiction of Moses or two tablets in buildings in Washington, D.C., and references to Moses in federal documents); id. at 717, 717–18 nn.15–16 (Stevens, J., dissenting) (noting that the Commandments send a religious message because they are edicts from and about a deity, and that different versions of the Ten Commandments reflect significant disagreements between religious traditions); id. at 740 (Souter, J., dissenting) (noting that state informed people about obeying a deity’s commands, not “great lawgivers”). Justices Scalia and Clarence Thomas’s concurrence in Van Orden avoided the religious-secular divide. See id. at 692 (Scalia, J., concurring) (arguing that “there is nothing unconstitutional in a State’s favoring religion generally); id. at 693 (Thomas, J., concurring) (arguing that the
but with different results.\textsuperscript{154} In Justice Breyer’s view, “the Court has found no single mechanical formula [including the \textit{Lemon} test] that can accurately draw the constitutional line in every case . . . . In such \textit{[borderline]} cases, [there is] no test-related substitute for the exercise of legal judgment.”\textsuperscript{155} Justice Breyer used the now familiar divide of the religious being about a deity and the secular about culture and history, by maintaining:

On the one hand, the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing the Deity . . . . In certain contexts, a display of the tablets of the Ten Commandments can convey . . . a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) . . . .\textsuperscript{156}

The Texas display was such “that the State itself intended the latter, nonreligious aspects” to control the display’s meaning.\textsuperscript{157} Justice Breyer thought that the display’s provenance in a private campaign “to combat juvenile delinquency” indicated that Texas was more concerned with proper behavior toward other people than with religion.\textsuperscript{158} Additionally, the outdoor placement “does not readily lend itself to

Establishment Clause should prevent only “legal coercion” (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in judgment)).

\textsuperscript{154} Compare \textit{Van Orden}, 545 U.S. at 701–03 (Breyer, J., concurring in judgment) (“The setting . . . (together with the display’s inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State’s citizens, historically speaking, have endorsed. . . . [T]hese factors provide a strong, but not conclusive indication that the Commandments’ text on this monument conveys a predominantly secular message . . . .”), with id. at 716 (Stevens, J., dissenting) (“The reason this message stands apart is that the Decalogue is a venerable religious text. . . . Attempts to secularize what is unquestionably a sacred text defy credibility and deserve people of faith.”).

\textsuperscript{155} \textit{Id.} at 699–700 (Breyer, J., concurring in judgment).

\textsuperscript{156} \textit{Id.} at 700–01.

\textsuperscript{157} \textit{Id.} at 701.

\textsuperscript{158} \textit{Id.}
meditation or any other religious activity. But it does provide a context of history and moral ideals.\footnote{159} All of those factors, as well as the decades in which no one argued about the display’s religious nature,\footnote{160} meant that the display had a more secular than religious message.\footnote{161} For Justice Breyer, a religious message would have meant mandating behavior toward a deity or discouraging particular beliefs, but a secular message would have focused—as he argued the Texas monument did—on social norms and civic identity.\footnote{162}

Likewise, Justice Souter’s majority opinion in \textit{McCreary County} concluded that the courthouse display impermissibly advanced a “sectarian” goal by emphasizing scriptural references to a particular deity and humans’ relationship with the deity,\footnote{163} rather than the permissible purpose of “alluding to a general notion of law.”\footnote{164} Justice Souter made his analytical approach even clearer when he distinguished \textit{McCreary County} from \textit{Allegheny}: “Crèches . . . do not insistently call for religious action . . . ; the history of posting the Commandments expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority.”\footnote{165}

Importantly, \textit{McCreary County} expanded the role of an “objective observer.”\footnote{166} The idea of an objective observer was introduced implicitly in \textit{Lynch} as part of Justice O’Connor’s endorsement test but only applied to \textit{Lemon}’s effect prong.\footnote{167} After \textit{McCreary County}, courts

\begin{footnotes}
\item[159] Id. at 702.
\item[160] Id. at 701.
\item[161] Id. at 702–03.
\item[162] See id.; \textit{Church and State}, \textit{supra} note 5, at 2202; Douglas G. Smith, \textit{The Constitutionality of Religious Symbolism After McCreary and Van Orden}, 12 Tex. Rev. L & Pol. 93, 99–100 (2007); Underkuffer, \textit{supra} note 150, at 72–73 (summarizing Justice Breyer’s argument that the Establishment Clause requires the “government [to] remain neutral between religion and nonreligion, and between religion and religion” but allows “historical practices and [government-sanctioned] monuments clearly recognized by the reasonable observer as such”).
\item[163] \textit{McCreary Cnty. v. ACLU} of Ky., 545 U.S. 844, 871 (2005).
\item[164] Id. at 868.
\item[165] Id. at 877 n.24.
\item[166] Id. at 862 (quoting \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 308 (2000)).
\item[167] See \textit{Lynch v. Donnelly}, 465 U.S. 668, 690 (O’Connor, J., concurring); Bowman, \textit{supra} note 94, at 446 (“In this formulation, a court would view the purpose of the government as speaker from its own judicial perspective and shift its
should analyze effects and purpose from an objective observer’s perspective. The "objective observer . . . . takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act." In cases where the challenged governmental action was preceded closely by related acts, the objective observer should also take those acts into account. Additionally, a reasonable observer seeing an “isolated exhibition” of the Ten Commandments should presume that “the display [is] . . . presumptively . . . meant to advance religion.” However, the objective observer cannot forget that “Stone did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key.” If the Commandments are placed in a different, more ostensibly secular context, or the legislative history is different, than a reasonable observer might still be unsure of whether the display is religious or secular. Another question that was not at issue in McCreary County, but would be in cases involving schools, is whether the objective observer is an adult or a student. Courts relying on McCreary County focus to the perspective of the reasonable observer when evaluating the perceived effect.

168. See Bowman, supra note 94, at 461.
169. McCreary Cnty., 545 U.S. at 862 (quoting Santa Fe Indep. Sch. Dist., 530 U.S. at 308).
170. See id. at 866 ("The Counties’ position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’") (alteration in original) (quoting Santa Fe Indep. Sch. Dist., 530 U.S. at 315).
171. Id. at 867.
172. Id.
173. See id. at 874 ("Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history."); Choper, supra note 86, at 510-13 (explaining difficulties in defining the reasonable observer, including questions of the reasonable observer’s own knowledge and religious views).
174. Compare Santa Fe Indep. Sch. Dist., 530 U.S. at 308 ("Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.” (emphasis added)), with Zelman v. Simmons–Harris, 536 U.S. 639, 655 (2002) ("Any objective observer familiar with the full history and context of the Ohio program [providing vouchers for private education, including parochial schools] would reasonably view it as one aspect of a
cannot be sure if the relevant observer is a child or an adult, or how the relevant observer’s religious and political views compare to others’ views.

Despite the difficulty of identifying an objective, reasonable observer, McCreary County’s application of the Lemon test presumptively governs Establishment Clause cases. McCreary County’s summary of Lemon and its progeny taught that “the government cannot place religious symbols on government property in a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.”). See also Bowman, supra note 94, at 461 (noting differences in independent observer’s characteristics across cases). The two seminal twentieth-century cases dealing with minorities in public schools both suggest that the perspective of a student who is a member of a minority group ought to receive special solicitude in courts. See Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (“To separate [African-American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630–31 (1943) (“The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.”); Marshall, supra note 5, at 531 n.214 (speculating “that the true spiritual guide of the school prayer decisions was not the first amendment but rather [Brown].”).

175. See Bowman, supra note 94, at 461.
176. See Choper, supra note 86, at 511.
177. See, e.g., ACLU of Ky. v. Grayson Cnty., 591 F.3d 837, 844 (6th Cir. 2010) (“The long-standing (but not always applied) test for determining whether government action violates the Establishment Clause was first articulated in Lemon v. Kurtzman.” (citation omitted)); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) (“During the past decade, we have emphasized that the Lemon test guides our analysis of Establishment Clause challenges.”); ACLU of Fla., Inc. v. Dixie Cnty., 2011 WL 2784238, at *6 (N.D. Fla. July 15, 2011) (“Both the Supreme Court and the Eleventh Circuit continue to use the Lemon analysis, despite the fact that several Justices and commentators have strongly criticized it.”); Edith Brown Clement, Public Displays of Affection . . . for God after McCreary and Van Orden, 32 HARV. J.L. & PUB. POL’Y 231, 246–47 (2009); Underkuffler, supra note 150, at 67–68 (noting that the majority in McCreary required the government to maintain “neutrality between religion and religion, and between religion and nonreligion” and avoid excluding individuals from the political community because of religion (quoting McCreary Cnty., 545 U.S. at 860)).
178. See McCreary Cnty., 545 U.S. at 859–61.
manner that symbolically endorses religion." To know if there is an endorsement, courts must ask if an objective, "reasonable observer" would think that the government action "has the effect of creating an apparent endorsement of religion." The perspective of a "reasonable observer" will also govern whether the government "was motivated by an impermissible . . . purpose." However, Van Orden was a reminder that neutrality is not always required of the government. The Ninth Circuit, for example, interpreted Van Orden to mean that there is a special Establishment Clause exemption for Ten Commandments displays that have been in place for decades. The difficulty that civil liberties groups have had in challenging displays of the Ten Commandments following McCreary County and Van Orden reflects Van Orden’s accommodating spirit. In fact, the current Roberts Court, which includes Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor, and no longer includes Justice O’Connor, might entirely

179. CONSTITUTIONAL LAW, supra note 112, at 1269.
181. ld.
182. 545 U.S. 677 (2005) (plurality opinion).
183. See Underkuffler, supra note 150, at 73–74.
184. See Card v. City of Everett, 520 F.3d 1009, 1021 (9th Cir. 2008) ("Reading Van Orden and McCreary together, we conclude a limited exception to the Lemon test exists in contexts closely analogous to that found in Van Orden. This case presents such a closely analogous context. Therefore, it is clear that Van Orden controls our decision.").
185. See ACLU of Ky. v. Grayson Cnty., 591 F.3d 837, 840–41 (6th Cir. 2010) (holding that display of Ten Commandments and other historical documents in county courthouse does not have "impermissible purpose or . . . endorse[] religion"); Card, 520 F.3d at 1021 (holding that Ten Commandments monument near city-owned building and on public land does not violate Establishment Clause); ACLU v. Mercer Cnty., 432 F.3d 624, 640 (6th Cir. 2005) (holding that display of Ten Commandments and other historical documents in county courthouse does not have impermissible "religious purpose" or "the effect of endorsing religion"); ACLU Neb. Found. v. City of Pattemsmouth, 419 F.3d 772, 778 (8th Cir. 2005) (holding that granite monument displaying the Ten Commandments in city park does not violate Establishment Clause). But see ACLU of Ky. v. McCreary Cnty., 607 F.3d 439, 449 (6th Cir. 2010) (holding that displays of Ten Commandments in county courthouses violated the Establishment Clause); Green v. Haskell Cnty. Bd. of Comm’rs, 568 F.3d 784 (10th Cir. 2009) (holding that display of Ten Commandments at county-owned historical society violates the Establishment Clause).
abandon the Lemon test. The divided final appellate ruling on McCreary County, in which the Court of Appeals for the Sixth Circuit ruled the display impermissible, suggests that appellate judges are very much aware of the Court’s fractured view of the Establishment Clause and the possibility for change in the law. If Lemon and its progeny are to remain checks against government action endorsing a religion and alienating citizens, then Establishment Clause doctrine must be clarified. Focusing on how allegedly religious symbols are perceived is an important part of courts’ inquiry, but the inquiry cannot remain unclear about whose perspective governs.

186. See CONSTITUTIONAL LAW, supra note 112, at 1250, 1269 (“If Chief Justice Roberts and Justice Alito agree with [Justices] Scalia, Kennedy, and Thomas [that the Court should give up the Lemon test], . . . the entire Lemon test will be overruled. Moreover, as of this writing, it is unknown how the two newest Justices, Sotomayor and Kagan, will deal with this issue.”).
187. McCreary Cnty., 607 F.3d at 439.
188. Id. at 441.
189. See id. at 452 (Ryan, J., dissenting) (“I cannot be too critical of my panel colleagues who feel stare decisis bound by the Supreme Court majority’s persistent hostility to religion . . . . The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of Lemon v. Kurtzman.”); Linda Greenhouse, Nine Justices and Ten Commandments, N.Y. TIMES OPINIONATOR BLOG (Aug. 26, 2010, 9:07 PM), http://opinionator.blogs.nytimes.com/2010/08/26/nine-justices-and-ten-commandments/.
190. See Church and State, supra note 5, at 2207.
191. See Putting Religious Symbolism in Context, supra note 4, at 493 (noting “a widely recognized inconsistency, confusion, and apparent subjectivity in the Supreme Court and lower court cases dealing with public displays of religious symbolism”).
2012] COOKING UP A NEW LEMON TEST

PART II: THE INDIAN SUPREME COURT AVOIDS THE TEMPLE OF DOOM: THE BOMMAI CASE

Just as in the United States, the Supreme Court of India has had to interpret constitutional provisions regarding religion. In 1994, for instance, the Supreme Court of India decided a case, S.R. Bommai v. Union of India, dealing with one of the most politically charged topics in contemporary India: the destruction of a mosque in Ayodhya by Hindu extremists.

The mosque at Ayodhya dated to 1528 CE, when the Moghul emperor Barbar's general built it. Per some local traditions, "the mosque was built to replace an even more ancient Hindu temple to the god Rama, which had occupied the spot from the eleventh century [CE]." Politicians appealing to a sense of national Hindu identity sometimes use the image of Rama, a Hindu god, to gain support. Since at least the mid-nineteenth century, and until the partition of India and Pakistan in 1947, Hindus and Muslims have both worshipped at the site. In 1947, after Hindus put "an image of [the god] Rama..."
mosque” and violence followed, the Indian government prevented any further worship at the mosque and adjacent land.201

In the 1980s, Hindu nationalists,202 including members of political parties as well as activist groups not formally part of political parties, made access to the site for worship a national political issue.203 Partially because of this political agitation, the Hindu nationalist Bharatiya Janta party (“BJP”)204 did well in the 1991 state elections in Uttar Pradesh (“UP”), where Ayodhya is located, and gained control of the UP government.205 The BJP and associated Hindu nationalist groups “incit[ed] and exhort[ed] their followers to demolish the [mosque] and to build a temple there. The [BJP-affiliated m]inisters . . . [took an] active part in organising [sic] and sending [large groups] to Ayodhya.”206 “[O]n 6 December 1992, a rally in Ayodhya [organized by the BJP and other Hindu nationalists] . . . resulted in an attack on the mosque and its subsequent demolition.”207 The national government, controlled by a rival party to the BJP, took over control of UP and dismissed BJP-controlled governments in other states where governments allegedly

201. Id. at 2–3.

202. Hindu nationalism is movement based on the belief that “India was always and will remain fundamentally Hindu in a civilizational sense, just as (it [Hindu nationalism] implies) Muslims and other non-Hindus always were alien to India and will remain so forever.” HANSEN, supra note 27, at 11. For book-length discussions of religious nationalism in India, see generally id.; VAN DER VEER, supra note 27.

203. See VAN DER VEER, supra note 27, at 3–4.

204. “The BJP is a Hindu nationalist party which wishes to uphold the rights of Hindus and establish in India a Hindu value system . . . .” FLOOD, supra note 198, at 264.

[A]t the heart of the . . . founding party of the RSS-VHP-BJP combine [of Hindu nationalist organizations], is the belief in a homogeneous Hindu identity and culture as coterminous with the nation, India, in which Muslims and Christians remain foreigners and outsiders until such time as they give up their religious difference.

Needham & Rajan, supra note 30, at 16.

205. See VAN DER VEER, supra note 27, at 5–6.


207. VAN DER VEER, supra note 27, at 6; see also DONIGER, supra note 32, at 664 (noting that “leaders of the BJP whipped a crowd of two hundred thousand into a frenzy” before the crowd “attacked [the mosque] with sledgehammers”).
supported destroying the mosque at Ayodhya.\textsuperscript{208} Horrific violence between Hindus and Muslims elsewhere in India followed.\textsuperscript{209} "[T]he destruction of the mosque provoked immense communal violence . . . . More than a thousand people—most of them Muslims—were killed in Bombay alone."\textsuperscript{210} Accordingly, what happened at Ayodhya and how the site will be used by religious groups remains controversial.\textsuperscript{211}

The Supreme Court of India was confronted with the aftermath of Ayodhya when members of the ministerial councils, dismissed by Presidential proclamation, sued the national government to challenge the proclamation's validity.\textsuperscript{212} The opinion involved multiple issues that are beyond the scope of this Note, but the relevant portions\textsuperscript{213} focused on the question of whether state officers' support for building a temple to Rama at the site of the Ayodhya mosque "follow[ed] the objectives of secularism which was part of the basic structure of the Constitution and also the soul of the Constitution."\textsuperscript{214} If not, then the President of India had a valid constitutional reason to take control of state governments; if the state officials stayed true to India's secular character, then the President would have needed alternative grounds to dissolve the state governments.\textsuperscript{215}

The Indian Supreme Court held that the President had a valid constitutional reason to dissolve state governments because the state officials violated the Constitution's requirement of secularism.\textsuperscript{216} The Court reached this conclusion in light of three crucial points: the definitions of the religious and the secular,\textsuperscript{217} the importance of

\textsuperscript{208} VAN DER VEER, supra note 27, at 6. The President has constitutional authority in India to take over state governments. See S. R. Bommai, A.I.R. 1994 S.C. at 1959–60.
\textsuperscript{209} VAN DER VEER, supra note 27, at 7; DONIGER, supra note 32, at 664.
\textsuperscript{210} VAN DER VEER, supra note 27, at 7.
\textsuperscript{211} See India's Supreme Court Court Suspends Ayodhya Ruling, BBC NEWS (May 9, 2011 4:16 AM), http://www.bbc.co.uk/news/world-13330492 (describing reaction to ruling on future use of mosque site at Ayodhya and continued interest in matter).
\textsuperscript{214} Id. at 2000.
\textsuperscript{215} See id. at 2111.
\textsuperscript{216} See id. at 2004, 2111.
government neutrality,218 and the legality of the central government intervening to stop states from acting religiously.219

The Court’s first task was to define the religious and the secular.220 "Religion and secularism operate at different planes. Religion is a matter of personal belief and mode of worship and prayer, personal to the individual while secularism operates, as stated earlier, on the temporal aspect of the State activity in dealing with the people professing different religious faiths."221 These definitions recall the ways in which the United States Supreme Court distinguished between the religious and the secular.222 For both the Indian Supreme Court and the United States Supreme Court, religion is about people’s belief in and actions with respect to deities, or analogous figures, and the secular is about how people treat other human beings.223

Having defined the religious and the secular, the Court held that the government, as a secular one, must remain neutral in its treatment of religions.224 As the Court said,

219. See id. at 2045-46.
221. Id. at 2017; see also id. at 2000 ("Article 25 of the Constitution guarantees to all persons equally the freedom of conscience and the right freely to profess, practise [sic] and propagate religion subject to public order, morality and health and subject to the other Fundamental Rights and the State’s power to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practices."); id. at 2002 ("The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life.").
222. See supra Part I.
224. See S. R. Bommai, A.I.R. 1994 S.C. at 1952 ("[The Chairman of the Drafting Committee for the Constitution of India] was . . . careful while drafting the Constitution to ensure that adequate safeguards were provided in the Constitution to protect the secular character of the country and to keep divisive forces in check so that the interests of religious, linguistic, and ethnic groups were not prejudiced."); id. at 2000 ("These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring [sic] any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations."); id. at 2014 ("The State guarantee[s] individual and corporate religious freedom and dealt with
[w]hile the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. How is this equal treatment possible, if the State were to prefer or promote a particular religion, race or caste, which necessarily means a less favourable [sic] treatment of all other religions, races and castes. How are the Constitutional promises of social justice, liberty of belief, faith or worship and equality of status and of opportunity to be attained unless the State eschews the religion, faith or belief of a person from its consideration altogether while dealing with him, his rights, his duties and his entitlements. 225

Much like some interpretations of the Establishment Clause in the American Constitution, 226 the Court’s interpretation of secularism meant that the government could not indicate a preference for any one religion over others. 227 The Supreme Court noted that “the religion, faith or belief of a person is immaterial” to government policy in so far as governmental policy might negatively discriminate based on religion. 228

an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another.”); id. at 2113 (“[F]rom the point of view of the State, the religion, faith or belief of a person is immaterial. To the state, all are equal and entitled to be treated equally.”); JACOBSOHN, supra note 25, at 146–47 (noting that “[t]he dominant [argument] is equal treatment of religions”).

226. See, e.g., Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947) (“Neither [a state nor the federal government] can pass laws which . . . prefer one religion over another.”); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”).
228. Id. at 2065.
If the state were to classify citizens to their detriment based on religion, then the state would renege on its constitutional duty to “eschew[] the religion... of a person from its consideration altogether.” Any state distinctions that prefer some citizens over others based on religion are a forbidden act of “prefer[ing] or promot[ing] a particular religion.” According to the Court, secularism means—in part—a religiously neutral government that does not discriminate against citizens based on religion. The neutrality requirement, along with the government’s obligation to reform social practices connected to religion, means that all religions should be equal in the government’s eyes, and all Indians ought to be equal members of the polity.

Having defined religion and articulated the government’s relationship to it, the Court held that the federal government could properly prevent religious divisiveness by intervening in the face of clearly sectarian actions.

229. Id. at 2066.
230. Id. at 2065–66.
231. See JACOBSOHN, supra note 25, at 146–47; Padhy, supra note 193, at 5028 (noting that “the [C]ourt strongly held the opinion that secularism undeniably sought to separate the religious from the political”); Sen, supra note 30, at 8 (noting the Court’s emphasis on “secularism as an essential component of democracy as well as of national unity and integration”). While maintaining that the government must avoid invidious religious discrimination, the Court recognized the government’s ability and obligation to intervene in matters connected to religion for the sake of correcting social inequalities. See S. R. Bommai, A.I.R. 1994 S.C. at 2018–19; JACOBSOHN, supra note 25, at 151. In so far as the Indian Supreme Court recognized the government’s “missionary role to reform the Hindu society [and] Hindu social order[,]” S. R. Bommai, A.I.R. 1994 S.C. at 2019, the Indian Supreme Court differed from the Supreme Court of the United States. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012) (concluding that “[t]he interest of society in the enforcement of employment discrimination statutes” is outweighed by “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission”).
233. See id. at 2066. For further explanation of this Indian version of secularism, or “ameliorative secularism,” see JACOBSOHN, supra note 25, at 94.
235. See id. at 2045–46. For a description of the relevant constitutional mechanism, which is beyond the scope of this Note, see id.
In trying to decide how the events at Ayodhya and the state governments’ role in them fit into the religious-secular divide, the Indian Supreme Court had to respond to the BJP’s claims that it was promoting a national rather than religious identity.\textsuperscript{236} In public statements prior to the mosque’s destruction, the BJP presented its goal of building a temple to Rama as “a symbol of . . . our cultural heritage and national self-respect. For [the] BJP it is purely a national issue and [no] vested interest [should] give it a sectarian and communal colour.”\textsuperscript{237} The BJP’s claim that it was really engaged in the creation of a civic identity rung hollow to the Supreme Court because the BJP failed to show “religious tolerance and [provide] equal treatment of all religious groups.”\textsuperscript{238} Because secularism requires equal treatment of religious communities, the Court found that the BJP violated the “secularism enshrined in our Constitution.”\textsuperscript{239} Since secularism is a constitutional requirement, the federal government had authority to take over BJP-run state governments that violated secularism.\textsuperscript{240}

The Court’s reasoning is compelling. The BJP’s public comments and actions were an “an appeal to religion” because they targeted a discrete community that the Court saw as religious.\textsuperscript{241} A religious community is one distinguished by distinct “belief[s] and mode[s] of worship and prayer.”\textsuperscript{242} Because the BJP appealed to and encouraged the belief that the proper worship of the deity Rama includes the rebuilding of a temple to him at Ayodhya,\textsuperscript{243} the BJP involved itself in people’s “belief[s] and mode[s] of worship and prayer.”\textsuperscript{244} When state governments appealed to belief at the expense of Muslims, who were harmed in the aftermath of the mosque demolition, the states acted religiously, not secularly.\textsuperscript{245}

\begin{footnotes}
\item[236.]	extit{Id.} at 2002.
\item[237.]	extit{Id.}
\item[238.]	extit{Id.} at 2003.
\item[239.]	extit{Id.}
\item[240.]	extit{See id.} at 2045–46.
\item[241.]	extit{See id.} at 2002.
\item[242.]	extit{Id.} at 2017.
\item[243.]	extit{See FULLER, supra} note 32, at 271; \textit{VAN DER VEER, supra} note 27, at 4–6.
\item[245.]	extit{See id.} at 2002–03; \textit{JACOBSOHN, supra} note 25, at 147, 153–54.
\end{footnotes}
The Indian Supreme Court’s ruling and its context is instructive for American courts because it shows why actions or objects that most people would see as religious should not be treated as secular simply because of an ostensibly secular rationale or context.\textsuperscript{246} If the Supreme Court had accepted the BJP’s argument that its support for building a temple to Rama at Ayodhya was about a secular national identity rather than religion,\textsuperscript{247} the Court would have excluded non-Hindus; some Hindus who do not want to be involved in acts that could be conflated with the worship of Rama; and devotees of Rama who do not want their worship to be subsumed into a national political project.\textsuperscript{248} Many Indians who do not identify as Hindus, especially Muslims, do not want a national identity symbolized by a temple to Rama at Ayodhya.\textsuperscript{249} The notion that being a true Indian requires supreme loyalty to a temple to Rama at Ayodhya\textsuperscript{250} is false to many Indians, who want to be part of

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\textsuperscript{246} Cf. Ceremonial Deism, supra note 5, at 747–48 (explaining how speech attempting to remove religious symbols from a divisive religious context is hard pressed to entirely hide the earlier, divisive context). \\
\textsuperscript{248} See, e.g., Fuller, supra note 32, at 271 (describing one socially ostracized villager who cannot participate in his own village’s worship rituals and therefore finds the more remote temple at Ayodhya meaningless, and also describing a Hindu devotee of Rama who objected to the politicization of the deity and did not support Hindu nationalists’ Rama-based campaign); Hansen, supra note 27, at 177 (describing how another Hindu nationalist organization’s rhetoric “sought to transform the worship of Ram[a] from a localized and heterogeneous set of religious practices to be a symbolic expression of a supposed syncretic and inherent ‘unity in heterogeneity’ of Hindu culture”); Van der Veer, supra note 27, at 9–10 (describing some Indian Muslims’ desire to participate in a secular Indian state that protects them through, in part, symbolic actions such as safeguarding historical Islamic buildings). The Indian Supreme Court’s acknowledgement of religious conflict, see S. R. Bommai, A.I.R. 1994 S.C. at 2002, is a stark, welcome contrast to Justice Scalia’s disregard for the Ten Commandments’ sectarian history. See McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 909–10 (2005) (Scalia, J., dissenting) (“The sectarian dispute regarding text, if serious, is not widely known.”). \\
\textsuperscript{249} See After Partition: India, Pakistan, Bangladesh, BBC NEWS (Aug. 8, 2007, 3:39 PM), http://news.bbc.co.uk/2/hi/in_depth/629/629/6922293.stm (noting that approximately thirteen percent of Indians are Muslim, two percent are Christians, almost two percent are Sikhs, less than one percent are Buddhists, and less than one percent are Jains); Van der Veer, supra note 27, at 9–10. \\
\textsuperscript{250} See G. Vazirani, Extract from an Interview of L.K. Advani, in Hindu Nationalism: A Reader 282, 287 (Christophe Jaffrelot, ed., 2007) (“[T]here is but
India the political state but do not think of Ayodhya as special because of its connection to Rama.\textsuperscript{251} Even those who worship Rama or attribute religious significance to Ayodhya do not necessarily do so in the way that the BJP wanted.\textsuperscript{252} Indian religious practices include “deeply embedded heterodox, syncretic and pluralist religious and philosophical folk traditions” that overflow “the artificial boundaries of modern political identities.”\textsuperscript{253} When Hindu nationalists did not acknowledge that worshipping Rama at a temple in Ayodhya would involve more than civic identity,\textsuperscript{254} they attempted to recreate the Indian state in a way that did not tolerate diversity.\textsuperscript{255} By recognizing that the BJP’s argument marginalized many Indians based on their religion, the Indian Court denied legitimacy to Hindu nationalist arguments that excluded millions of people who are not Hindus or the right sort of Hindus from membership in the Indian polity.\textsuperscript{256}

one India, and . . . this India, and its entire population, Hindu or Muslim, can identify itself only with Rama and not with Babar [whose general supposedly built the mosque at Ayodhya].”\textsuperscript{251}

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\item \textsuperscript{251} See \textsc{Van der Veer}, \textit{supra} note 27, at 9–10.
\item \textsuperscript{252} See \textsc{Fuller}, \textit{supra} note 32, at 271; \textsc{Hansen}, \textit{supra} note 27, at 177.
\item \textsuperscript{253} \textsc{William Dalrymple}, \textsc{Nine Lives: In Search of the Sacred in Modern India} at xvi (2010).
\item \textsuperscript{255} See \textsc{Jacobsohn}, \textit{supra} note 25, at 154; \textsc{Van der Veer}, \textit{supra} note 27, at 10. For an example of Hindu nationalist rhetoric that claims non-Hindu Indians are nonetheless fundamentally Hindu, and thus erases a difference that many Indians take seriously, see Atal Behari Vajpayee, \textsc{The Bane of Pseudo-Secularism, in Hindu Nationalism: A Reader} 315, 316 (Christophe Jaffrelot, ed., 2007) (“The Muslims and Christians for whom India is a home have not come from outside. Their ancestors were Hindus and Hindu blood flows in their veins. A change in religion does not mean a change in nationality or culture.”).
\item \textsuperscript{256} See \textsc{Hansen}, \textit{supra} note 27, at 177 (describing how Hindu nationalist discourse marginalizes local religious traditions that do not comport with nationalists’ political project); \textit{id.} at 178–79 (describing how Hindu nationalist discourse demonizes Muslims); \textsc{Jacobsohn}, \textit{supra} note 25, at 155 (“\textsc{P}olitical outcomes depend on the achievement of a dominant position in the way in which societal conflict gets to be defined. As in other places, playing the communal card in India (as in the vindication of our cultural—that is, Hindu—heritage), can be a very effective means of maintaining the status quo in social and economic privilege.”); \textsc{Needham & Rajan}, \textit{supra} note 30, at 16 (“For at the heart of the . . . founding party of the RSS-VHP-BJP combine [of Hindu nationalist organizations], is the belief in a homogeneous Hindu identity and culture as coterminous with the nation, India, in
Had the Court accepted the BJP’s arguments, the sincere religious convictions of Rama’s devotees who wanted to honor him at Ayodhya would also have been marginalized or distorted.257 For some people, Rama is the incarnation of the divine.258 A temple built for the ostensibly secular reason that the BJP offered the Supreme Court of India would send a contradictory or confused message.259 Assuming that the BJP had not entirely lost sight of worshipping Rama at the desired temple, then the temple would be a place for both worshipping Rama and building a national identity.260 In that scenario, if the BJP was sincere in wanting to include every Indian in its project, then the project would also include the many Muslims, Christians, Jews, Jains, Sikhs, and Buddhists in India.261 In that case, the worship of Rama would be done by or associated with people who do not accept the divinity of Rama, or at least have strong loyalties to other deities or traditions in addition to Rama.262 In that case, the belief that Rama is the supreme deity, or the deity most deserving of worship,263 seems significantly undermined by the implied message that one could worship Rama at Ayodhya but maintain equally significant religious loyalties to other objects of worship.264 If the BJP intended the temple at Ayodhya to be entirely which Muslims and Christians remain foreigners and outsiders until such time as they give up their religious difference.”.

257. See, e.g., FLOOD, supra note 198, at 145–46 (describing contemporary cults devoted to Rama); FULLER, supra note 32, at 163–69 (describing one order of Rama’s devotees, many of whom live in Ayodhya); HANSEN, supra note 27, at 177 (describing how Hindu nationalist discourse marginalizes local religious traditions).

258. See VAN DER VEER, supra note 27, at 2; FLOOD, supra note 198, at 107–09 (describing epics that narrate Rama’s story), 145–46 (describing contemporary cults devoted to Rama).

259. Cf. Ceremonial Deism, supra note 5, at 747–48 (explaining how speech attempting to remove religious symbols from a divisive religious context does not entirely hide the earlier conflict, leading to symbols with many meanings).


262. See DALRYMPLE, supra note 253, at xvi; HANSEN, supra note 27, at 177.

263. For example of devotees who focus their worship on Rama, see FLOOD, supra note 198, at 145–46; FULLER, supra note 32, at 163–69.

264. For many Hindus, devotion to multiple deities or different forms of the same deity and participation in different religious communities is normal. See FULLER, supra note 32, at 30. Hindu nationalists who advocated for building a
focused on a sense of Indian national identity without reference to any particular deity, then people’s desire to commemorate Rama would be thoroughly frustrated. Regardless of whether the temple was meant to be a mix of nation-building and devotion to Rama, or just civic identity, the Indian government would have made the worship of Rama at Ayodhya less centered on Rama than some of Rama’s partisans would want.

The story of Ayodhya contains important lessons for arguments about American displays of religious objects. In *Lynch* and *Van Orden*, the United States Supreme Court allowed government-sanctioned displays of a crèche and the Ten Commandments because they ostensibly symbolized history and civic identity. For many people, crèches and the Commandments have such a strong tie to religion that seeing them as primarily symbolizing something else is absurd and offensive. American courts err when they analyze symbols without sufficiently considering whose perspective to assume. Had the Indian Supreme Court been in the same interpretative muddle in *Bommai*, it would have inquired into the meaning of a temple at Ayodhya without knowing whether to think about the temple from the viewpoint of a Hindu in favor of it or a Muslim opposed to it. Without further guidance, the Court might have readily deferred to claims of nation-temple to Rama at Ayodhya did not accept such flexibility. See *Hansen*, *supra* note 27, at 177.

266. See *Van der Veer*, *supra* note 27, at 4 (describing how the BJP encouraged the commemoration of Rama); *Fuller*, *supra* note 32, at 271 (stating the same).
267. For examples of how the campaign to build a temple included devotion to Rama as well as “political militancy,” see *Hansen*, *supra* note 27, at 164–65.
272. See *supra* note 2.
275. Cf. *Choper*, *supra* note 86, at 511 (“For example, is the reasonable observer a member of one of the regnant faiths, a minority adherent, or an atheist?”).
building. Instead, the Court relied on a constitutional presumption against state involvement in religion and implicitly took the perspective of a member of the Muslim minority who would have seen what happened at Ayodhya as an attack. That thumb on the scale was enough to make the Court scrutinize the BJP's arguments carefully.

The lesson for American courts is that potentially religious symbols in symbolically important settings deserve skepticism so that paeans to civics and history cannot be used to whitewash division.

As the Indian Supreme Court recognized, the BJP and Hindu nationalists intended to promote a form of Indian nationalism that "takes one religion as the basis of national identity, thereby relegating adherents of other religions to a secondary, inferior status." As the Supreme Court of India rightly concluded, "The very manifestoes and [BJP-led state governments'] programme [sic] of action were such as to hurt the religious feelings of the Muslim community. The demolition of the disputed structure was no ordinary event. The disputed structure had become the focal point, and the bone of contention between two religious communities." Removing a mosque used by Muslims for worship and replacing it with a site to be used by Hindus sends an unavoidably sectarian message to Muslims in India. "[A] mosque is sacred space. It cannot simply be demolished or removed. The very idea that a mosque should make room for a temple, in which images are worshiped, sounds like an utter defeat of Islam and is therefore highly repugnant to

277. See supra notes 231-34 and accompanying text.
278. See VAN DER VEER, supra note 27, at 9-10.
280. See Ceremonial Deism, supra note 5, at 747-48, 755-56; cf. Padhy, supra note 193, at 5029 ("While the Bommai case strongly called for separating the two spheres [of the religious and the secular], in [a subsequent case] the Supreme Court has let manifest appeals to religion stand by, redefining those appeals as appeals to culture or history, oblivious to the context that fosters those appeals. The court thus seems to have appropriated the symbols of Hindu India as Indian culture and history.").
281. VAN DER VEER, supra note 27, at 23; see also JACOBSON, supra note 25, at 284.
283. See VAN DER VEER, supra note 27, at 9.
Muslims. If politicians advocate replacing a politically charged mosque with a Hindu temple, they violate the Indian Supreme Court's definition of secularism and the Indian Constitution's requirements of a secular government. More importantly for American courts trying to make sense of symbols with religious meaning, Bommai's theory of what it means to be secular can help promote a more inclusive "civic community." The key in Bommai was the initial presumption that government acts suggesting religious exclusion are problematic and require careful scrutiny.

PART III: BETWEEN STONE AND A HARD PLACE

Of course, seeing a dangerous conflation of government and religion is much easier in a foreign country. Plaques on school walls might seem more innocuous than demolished mosques, but endorsing religion is just as inappropriate in the United States as it is in India. Public schools' political and cultural significance mean that a presumption against the government use of potentially religious symbols therein is especially important. A Ten Commandments case filed in

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284. Id.
287. See id.; Church and State, supra note 5, at 2206. One objection to the comparison between the Bommai case and a public display of the Ten Commandments is that the former involves government action while the latter only involves government speech. However, even if one were to accept arguendo that the display is only government speech, speech has the power "to do [something]" beyond make descriptive statements. J.L. Austin, How To Do Things With Words 6 (J.O. Urmson ed., 1962). As Justice Alito observed, when the government speaks by accepting or displaying monuments, the speaking is establishing the government's views and thus has a normative influence over a polity's character. See Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009) ("Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.").
288. See Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in
2011, Doe 1 v. School Board of Giles County,\(^{289}\) could allow courts to rule against a divisive, religiously-motivated display, thus reinvigorating the core teaching of Lemon and its progeny: the government may not endorse a religion or religion generally.\(^{290}\)

In Giles County, Virginia, a high school posted a copy of the Ten Commandments in “a main hallway at the high school, near the trophy case and on the way to the cafeteria, where it [could] be seen by students every day.”\(^{291}\) In addition to the Ten Commandments, there were “historical documents relating to American history, such as the Declaration of Independence, the Star-Spangled Banner, and the Virginia Statute for Religious Freedom.”\(^{292}\) As of early April 2012, a student and parent, represented by the American Civil Liberties Union of Virginia
(ACLU) and the Freedom from Religion Foundation, are challenging the display on Establishment Clause grounds.\(^{293}\)

Before the challenged display was posted, every public school in Giles County displayed a copy of “the Decalogue . . . in a single frame along with a copy of the United States Constitution.”\(^{294}\) The simpler displays were originally given to schools by private citizens after the shootings at Columbine High School and were briefly taken down in late 2010 after the ACLU and the Freedom from Religion Foundation complained to the school system.\(^{295}\) Community members objected vigorously on religious grounds, and in January of 2011 the school board voted to return the simpler displays of the Constitution and the Decalogue to the schools.\(^{296}\) As rumors of litigation spread in February of 2011, the school board again voted to take down the Ten Commandments.\(^ {297}\) Citizens criticized the board for failing to honor county residents’ religious views.\(^{298}\) “Many supporters made clear that they viewed the Ten Commandments displays as expressing approval for their religious beliefs and, therefore, did not want them removed from the schools.”\(^{299}\) In fact, “approximately 200 Giles High School students walked out of class in support of community efforts to restore the displays to the schools.”\(^{300}\) In June of 2011, the school board approved the challenged display of the Ten Commandments along with various historical and political documents.\(^ {301}\) The plaintiffs filed suit in the fall of 2011, shortly after school began.\(^ {302}\)

The text and context of the Giles County display is comparable to the Ten Commandments monuments discussed above. Like Stone,\(^ \text{303} \) McCreary County,\(^ \text{304} \) and Van Orden,\(^ \text{305} \) the case centers on the Ten

\(^{293}\) Id.
\(^{294}\) Complaint, \emph{supra} note 289, at 2.
\(^{295}\) Id. at 3–4.
\(^{296}\) \emph{See id.}
\(^{297}\) \emph{See id.} at 4.
\(^{298}\) \emph{See id.}
\(^{299}\) Id.
\(^{300}\) Id. at 5.
\(^{301}\) Id. at 5–6.
\(^{302}\) ACLU OF VIRGINIA, \emph{supra} note 1.
\(^{303}\) \text{449 U.S. 39 (1980) (per curiam).}
\(^{304}\) \text{545 U.S. 844 (2005).}
\(^{305}\) \text{545 U.S. 677 (2005) (plurality opinion).}
Commandments. Unlike the display in *Stone*, there is an attempt to clothe Ten Commandments in secular garb by surrounding them with political documents. The visual effect is analogous to Hindu nationalists’ rhetorical placement of a temple at Ayodhya in the context of Indian political unity. The outcome of the case hinges on whether the plurality’s opinion in *Van Orden* or the majority’s opinion in *McCreary County* controls. Perhaps when Justice O’Connor was still on the Court and observers were not so concerned about the fate of the *Lemon* test, the plaintiffs might only have had to cite *Stone* and *McCreary County* and highlight the factual similarity of posting the Ten Commandments in a public, government-owned building to win summary judgment and subsequent affirmation. At present, however, the case is less certain.

One way of resolving the case is to make *Van Orden* controlling and uphold the display. Like the display at issue *Van Orden*, the “passive” display in Giles County is about the “historical origins” of American law and acknowledgement of America’s religious past. If courts follow *Van Orden*, then the display’s nature makes the *Lemon* test inapposite and requires a court to resolve the matter based on “the nature of the monument and . . . our Nation’s history.” The political documents around the Commandments put them clearly on the secular side of the secular-religious line drawn in the Establishment Clause cases.

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306. See *Stone*, 449 U.S. at 42.
307. See *McCreary Cnty.*, 545 U.S. at 856.
308. See Complaint, supra note 289, at 6.
310. See *Van Orden*, 545 U.S. at 691–92; *McCreary Cnty.*, 545 U.S. at 881.
311. See CONSTITUTIONAL LAW, supra note 112, at 1250, 1269.
313. See CONSTITUTIONAL LAW, supra note 112, at 1250, 1269.
314. See *Van Orden*, 545 U.S. at 691–92.
315. Id. at 686.
318. See id. (“Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”).
noted above. Although the display at issue in Giles County is several decades more recent than the display in Van Orden, some posting of the Ten Commandments has been on display at the school for more than a decade and the only concerns noted in the complaint are those related to the litigation. There is thus little evidence that the display has been inappropriately “divisive” prior to the present case. Also like the display in Van Orden, the display in Giles County originated in an attempt to improve students’ behavior; its location in a busy, crowded school building “does not readily lend itself to meditation or any other religious activity.” Thus, by analogy to Van Orden, the display is not unconstitutional.

Bommai is helpful to understanding why upholding the Giles County display would ignore people’s sincerely held religious beliefs. Upholding the Giles County display would make one of several possibilities constitutional when none of them should be. One possibility is that courts would accept the claim that the display is about using legal history to promote a civic identity. That claim is analogous to the

319. See, e.g., id. at 701 (Breyer, J., concurring) (“In certain contexts, a display of the tablets of the Ten Commandments can convey . . . a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) . . . .”).
320. See id.
322. See Van Orden, 545 U.S. at 704.
323. Id. at 701.
324. Id. at 702.
325. See id. at 691–92 (plurality opinion).
326. As the defendants pointed out to the district court, the School Board approved the following resolution to be posted as part of the challenged display:

A sense of historical context, civic duty and responsibility, and a general appreciation and understanding of the law of this land are all desirable components of the education of the youth of the county. We believe these . . . . documents positively contribute to the educational foundations and moral character of students in our schools.


The defendants relied on that resolution and the placement of the Commandments along with other “historical documents” to argue that there was no impermissibly religious purpose. See id. at 7; cf. Marsh v. Chambers, 463 U.S. 783,
BJP’s claim that building a temple at Ayodhya was about using a potentially religious object to build a shared identity among Indians; promoting Rama was not the point. In reality, people urged the school board to return the Ten Commandments to the wall precisely because of their religious content, just as some people wanted to build a temple at Ayodhya because they wanted to promote the worship of Rama. Also, the plaintiff is offended because of the display’s religious content, just as Muslims (among others) were hurt because the BJP wanted to build a temple to replace a mosque. Thus, upholding the display in Giles County because it is secular suffers from the same defect as concluding that the BJP’s goal in Ayodhya is secular: discounting sincerely held religious beliefs and alienating those who do not hold them.

Another possibility is that courts could uphold the display despite recognizing that there is the clear appearance of a religious purpose. This ruling would have the advantage of recognizing the expressed motivations of supporters of the display, but it would have the far more significant disadvantage of leaving the student-plaintiff feeling like “an outsider and not a full participant in the school community.”

792 (1983) (“To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”); Van Orden, 545 U.S. at 691–92 (“Texas has treated its Capitol grounds monuments as representing the several strands in the State’s political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government.”).

329. See Hansen, supra note 27, at 176–77.
330. See Complaint, supra note 289, at 6; Van der Veer, supra note 27, at 9.
331. See, e.g., Van Orden, 545 U.S. at 717 (Stevens, J., dissenting) (“Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.”); Rebuttal Brief for Defendants, supra note 326, at 8 (“The Board merely included one religious document in a display containing numerous historical documents that influenced the development of the laws in this nation and in Virginia.”); Church and State, supra note 5, at 2193–94 (noting that people have religious motivations for displaying the Ten Commandments on government grounds).
332. See Van Orden, 545 U.S. at 690.
As the complaint notes, "Another student [expressing support for
displaying the Ten Commandments] said, 'This is Giles County and
Christ is a big, big, big part of Giles County. For those who don't like it,
go somewhere else.'"334 Although courts ought to be honest enough to
admit that Ten Commandments displays are popular in part because of
exclusionary sentiments, those sentiments should not be persuasive or
given legal imprimatur.335

A third alternative, and the one that courts should choose, is to
invalidate the display based on Allegheny County and McCreary
County.336 According to those cases, the display should be invalidated if
it has "the purpose or effect of 'endorsing' religion"337 and thus excludes
individuals from the "political community."338 Drawing upon Bommai,
courts should evaluate purpose and effect from the perspective of a
student and member of a religious minority who is more likely to feel
marginalized by seemingly religious government action.339

The Giles
County school board posted the contested display after citizens

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334. Complaint, supra note 289, at 5; cf. G. Vazirani, supra note 250, at 287
("[T]here is but one India, and . . . this India, and its entire population, Hindu or
Muslim, can identify itself only with Rama and not with Babar [whose general
supposedly built the mosque at Ayodhya]."
335. See Church and State, supra note 5, at 2206.
336.Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573
(1989); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005).
337. Cnty. of Allegheny, 492 U.S. at 592 (plurality opinion).
338. McCreary Cnty., 545 U.S. at 860.
listener's support for, or objection to, the message, an objective Santa Fe High
School student will unquestionably perceive the inevitable pregame prayer as
stamped with her school's seal of approval." (emphasis added)). In some settings, an
evangelical Christian might feel that he is a minority. Even if a Ten Commandments
display would make that student feel that he is more welcome in the school, that
display would still be an unacceptable instance of "tak[ing] sides" in a religious
debate. See McCreary Cnty., 545 U.S. at 860.
advocated for it precisely because of its Christian nature. To a reasonable student, especially one who is part of a non-Christian minority and more sensitive to the Ten Commandments’ religious elements, the intense advocacy for the display and its genesis in a pastor’s donation would suggest the school’s endorsement of Christianity. When the reasoning of McCreary County and Allegheny is applied from an appropriate perspective, the display is unconstitutional.

Resolving ambiguities of perspective against the display would reflect the common sense notion that the Ten Commandments are more religious than secular, and reaffirm that displays’ purpose and effect should be evaluated by the Lemon test as articulated by Justice O’Connor and subsequently refined. Analysis of purpose and effect should still include the concepts of the religious and the secular because of the concepts’ precedential ubiquity. Moreover, requiring the government to present actions as secular—based on common values that do not depend on transcendent, divine ideals—will promote social structures that in turn protect the independence of both religion and the political community.

If the secular and the religious are to be more than fig

342. See Complaint, supra note 289, at 3–5; cf. Epperson v. Arkansas, 393 U.S. 97, 108 (1968) (concluding “that fundamentalist sectarian conviction was and is the law’s reason for existence” based on evidence such as advertisement run in favor of statute); Kitzmiller v. Dover Area Sch. Dist., 400 F.Supp.2d 707, 728 (M.D. Pa. 2005) (“An objective student is also presumed to know that the Dover School Board advocated for the curriculum change and disclaimer in expressly religious terms, that the proposed curriculum change prompted massive community debate over the Board’s attempts to inject religious concepts into the science curriculum, and that the Board adopted the [intelligent design] Policy in furtherance of an expressly religious agenda . . . .”).
343. See McCreary Cnty., 545 U.S. at 860; Cnty. of Allegheny, 492 U.S. at 592–94.
344. See, e.g., Stone, 449 U.S. at 42.
345. See Choper, supra note 86, at 504–08.
346. See supra Part I.
347. See TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993) (“It may be a happy accident that this effort of defining religion converges with the liberal demand in our time that it be kept quite separate from politics, law, and science—spaces in which verities of
leaves, claims that the government is acting only to inform people about history or other ostensibly secular categories should receive less deference than they do at present. When judges respond to the common sense notion that the Ten Commandments, crèches, and other such objects are religious, judges will have to confront unspoken social norms about what is religious. Judges ought to presume that displays of the Ten Commandments have an impermissibly religious purpose and effect, lest they ignore genuine religious motivations or alienate people who want to participate in public life without reminders of religious difference. Whether in India or the United States, a welcoming and inclusive community cannot be centered on objects and places that many people know are a source of conflict.

PART IV: WITH A TWIST OF LEMON

The Supreme Court has given the country bewildering applications of the Establishment Clause. According to Lynch and Van

power and reason articulate our distinctively modern life. This definition is at once part of a strategy (for secular liberals) of the confinement, and (for liberal Christians) of the defense of religion.

348. See Putting Religious Symbolism in Context, supra note 4, at 540 (“As the doctrine of religious symbolism currently stands, the judge is left to decide essentially in a vacuum what the social meaning of a display is and whether that social meaning is sufficient to trigger Establishment Clause concerns... Not only does this lack of guidance render decisionmaking more difficult, it also masks the substantive judgments that are really at work when a judge decides, purportedly as a question of law, what the message of a display is.”).

349. See id.

350. See id. at 539; Church and State, supra note 5, at 2206; Ceremonial Deism, supra note 5, at 769. If schools and other institutions want to use the Ten Commandments in activities such as reading the relevant portions of Exodus as literature that does not command a devotional response, that might be permissible. See Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam) (“This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).

351. See Church and State, supra note 5, at 2194, 2206 (arguing that the motives of those wanting to display objects such as crosses and the Ten Commandments on government property are religious, and that the presence of such objects reduces some people’s inclusion in political life).

352. See id. at 2206; VAN DER VEER, supra note 27, at 9–11.
Orden, placing objects in a historical context either physically or rhetorically is a viable defense against claims of a religious purpose. Yet Stone, Allegheny, and McCreary County did not defer to supposedly secular contexts. The Court’s religious-secular categorization that underlies all of the cases discussed above allows governments to defend displays that some Americans think of as religious and some find alienating. Real religious motives and origins are obscured even as their divisive effects remain. Current Establishment Clause jurisprudence is ripe for a change.

Seeing courts elsewhere struggle with religion in the public sphere reveals that the way forward requires modifying Lemon. When the Supreme Court of India was confronted with a clearly religious purpose, it asked the same basic question that the purpose and effect prongs of Lemon ask: did government actors have, or appear to have, a religious purpose that would exclude citizens from political life? Despite claims of a secular goal, the Supreme Court of India recognized that building a temple to Rama was divisively religious. The lesson for American courts is that appeals to history or national identity should not

355. See Frosty, Save This Honorable Court, supra note 107, at A6 (arguing that the Establishment Clause does not prevent public religious expression such as the County of Allegheny’s display).
357. See ASAD, supra note 347, at 53 (“Religious symbols . . . cannot be understood independently of their historical relations with nonreligious symbols or of their articulations in and of social life, in which work and power are always crucial.”); Church and State, supra note 5, at 2194; Ceremonial Deism, supra note 5, at 746–48.
358. See Putting Religious Symbolism in Context, supra note 4, at 493.
359. Compare S. R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918, 2003 (“[R]eligious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution.”), with McCreary Cnty., 545 U.S. at 860 (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”).
be taken at face value. Underneath seemingly milquetoast, vacuous prayers, for example, are polarizing debates about American identity and religion. The First Amendment is meant to keep the state from using religion to leave anyone out of the political community.

School Board of Giles County is a chance for courts to clarify the proper application of the Establishment Clause. The Lemon test gives a useful framework to ask about a government action's purpose, its effect, and the possibility for impermissible government involvement in religion. With the addition of a presumption that seemingly religious objects reflect an impermissible governmental purpose and effect, and, if those objects are placed in schools, the adoption of the perspective of a student in a religious minority, the test can prevent government actions that endorse or distort the meanings of religious symbols venerated by some and found offensive by others. For any country that wants both a vibrant religious life and a welcoming ethos for its varied citizens, the jurisprudential recipe can include a Lemon, but only with a twist.

362. See, e.g., id. at 763 (noting that Congressional prayer “has been mired in controversy from its inception” contrary to the Court’s assertion in Marsh v. Chambers).
363. See Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592–94 (1989) (plurality opinion); Church and State, supra note 5, at 2206.
366. See Ceremonial Deism, supra note 5, at 769; Putting Religious Symbolism in Context, supra note 4, at 540; Marshall, supra note 5, at 549.
368. See, e.g., Church and State, supra note 5, at 2206; Ceremonial Deism, supra note 5, at 724 n.85; Marshall, supra note 5, at 535.