A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: 
*McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*

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A MISSED OPPORTUNITY TO ABANDON THE REASONABLE OBSERVER FRAMEWORK IN SACRED TEXT CASES: MCCREARY COUNTY v. ACLU OF KENTUCKY AND VAN ORDEN v. PERRY

SUSAN HANLEY KOSSE *

INTRODUCTION

Justice Kennedy summed up the inherent dilemma in sacred text cases with the following excerpt during oral arguments:

Suppose you had a county 100 miles away or a state, a different state, and the same display was put on and the recitation was—and it was a sincere recitation, that the government simply wanted to recognize that the 10 Commandments has played an important role in the civic lives of our people. Then you have—they’re each up for five years and five years later, some school kids wander by one and they wander by the other. In your view, from what you’re telling me, the Commandments are permitted in one location and not the other? I mean, that’s the necessary

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purport of your argument. You may not think that either of them are valid but on this prong of the argument, it seems to me that to differentiate, I just don't understand that.¹

Justice Kennedy’s hypothetical did not need a five year time gap to actually manifest. Within one month of the McCreary County oral arguments, the constitutionality of a Ten Commandments display in Elkhart, Indiana was the subject of judicial review.² The similarities between the McCreary County and the Elkhart display were striking:

- Both displays were posted in government buildings.³
- Both displays were entitled “Foundations of American Law and Government.”⁴
- Both displays contained a framed text of the King James’ version of the Ten Commandments.⁵
- Both displays also contained the same collection of “significant historical documents and symbols.”⁶
- The documents in both displays were all the same size and framed identically.⁷

² See Books v. Elkhart County, 401 F.3d 857, 858 (7th Cir. 2005); ACLU v. McCreary County, 354 F.3d 438, 440 (6th Cir. 2003), aff’d, ___ U.S. ___, 125 S. Ct. 2722 (2005).
³ Books, 401 F.3d at 858; McCreary County, 354 F.3d at 440.
⁴ Books, 401 F.3d at 858; McCreary County, 354 F.3d at 443.
⁵ Books, 401 F.3d at 858; McCreary County, 354 F.3d at 443 n.2.
⁶ Books, 401 F.3d at 858; McCreary County, 354 F.3d at 443. The King James’ version of the Ten Commandments, Magna Carta, Declaration of Independence, Bill of Rights of the U.S. Constitution, text of the Star-Spangled Banner, national motto emblem (“In God We Trust”), Mayflower Compact of 1620, and a picture of Lady Justice were some of the items included in both displays.
⁷ Books, 401 F.3d at 859; McCreary County, 354 F.3d at 480 (Ryan, J., dissenting).
The stated purpose of the Indiana display was to "positively contribute to the educational foundation and moral character of the citizens of [Elkhart] county." The stated purpose of the McCreary County display in Kentucky was to educate county residents about the impact various historical documents had on the foundation of our laws.

Both the Indiana and the Kentucky displays contained explanatory text next to the Ten Commandments stating that "[t]he Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country" and provide the "moral background of the Declaration of Independence and the foundation of our legal system."

A person observing the two displays would see essentially identical presentations. As Justice Kennedy noted, schoolchildren passing by in five years would view nearly identical displays. Yet despite all of these similarities, the Seventh Circuit ruled the Indiana display constitutional, while the Sixth Circuit ruled the Kentucky display unconstitutional for the primary reason that the improper religious purpose articulated for Kentucky's original stand-alone display tainted the final version.

The contrasting results of these two cases occurred because of the flawed reasonable observer framework used in Establishment Clause cases. This framework focuses on the fiction of an observer who somehow knows the history and context of the community and forum of the particular religious display. This Article examines the reasonable observer framework in Establishment Clause cases, specifically in relation to the two most recent Ten Commandments cases decided by the Supreme Court. Part I describes the evolution of Establishment Clause jurisprudence from the three-prong Lemon test to Justice O'Connor's endorsement test and the various definitions of a

9. McCreary County, 354 F.3d at 441.
11. Id.
12. Id. at 858.
13. McCreary County, 354 F.3d at 440.
14. Id. at 454-58.
reasonable observer as applied by federal courts. Part II summarizes the history of Ten Commandment cases in the United States Supreme Court and examines, in detail, *McCreary County v. ACLU*\(^\text{15}\) and *Van Orden v. Perry*,\(^\text{16}\) the two recent sacred text decisions. Part III analyzes and describes the inherent problems with the reasonable observer framework. Finally, Part IV recommends the elimination of the current reasonable observer framework and proposes the adoption of a new framework which presumes an improper purpose when the government displays a sacred text. This proposed presumption of unconstitutionality test may be rebutted if the government demonstrates that the sacred text is used either in a de minimis fashion or is sufficiently narrowly tailored such that a logical connection exists between the sacred text and the surrounding theme at the site of the display. Substituting this new framework in the adjudication of sacred text cases would eliminate the current problem of different results for identical displays.

I. THE DEVELOPMENT OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."\(^\text{17}\) Plaintiffs nationwide invoke the Establishment Clause when bringing suits challenging governmental religious displays. Courts have traditionally used the *Lemon* test, a three-pronged analysis, to resolve these disputes, requiring the government activity to: (1) have a secular purpose; (2) have a principal or primary effect "that neither advances nor inhibits religion;" and (3) not involve excessive entanglement with religion.\(^\text{18}\)

\(^{15}\) __ U.S. __, 125 S. Ct. 2722 (2005).
\(^{16}\) __ U.S. __, 125 S. Ct. 2854 (2005).
\(^{17}\) U.S. CONST. amend. I.
\(^{18}\) Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that state statutes providing financial support to non-public elementary and secondary schools were unconstitutional due to excessive government entanglement with religion).
Over the past thirty plus years, there has been much confusion in the lower courts regarding the *Lemon* test.\(^9\) Even the Supreme Court has ignored or modified the *Lemon* test in subsequent Establishment Clause cases.\(^20\) Perhaps the biggest modification came in Justice O'Connor's concurrence in *Lynch v. Donnelly*,\(^21\) a case in which the Court upheld the constitutionality of a holiday display. In *Lynch*, the city of Pawtucket, Rhode Island displayed various holiday symbols in a park owned by a non-profit organization.\(^22\) The display's items, owned by the city, included Santa's house, reindeer, candy-striped poles, carolers, clowns, elephants, colored lights, a Christmas tree, a Seasons Greetings banner, and a crèche.\(^23\) The ACLU, with city residents, sued the city for including the crèche, alleging an Establishment Clause violation.\(^24\) The Court upheld the entire display finding that the city of Pawtucket did not endorse Christianity by including the crèche since a secular purpose existed for the display.\(^25\) In addition, the

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19. *See, e.g.*, *infra* notes 74-78 and accompanying text.
20. Justice Scalia has criticized the Court for its selective adherence to *Lemon*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

22. *Id.* at 671.
23. *Id.*
24. *Id.*
25. *Id.* at 685.
Court concluded no excessive entanglement existed, therefore satisfying the third prong of the *Lemon* test.\(^{26}\)

Justice O'Connor concurred in the opinion and first introduced her idea of modifying *Lemon* with what is now commonly referred to as the "endorsement test."\(^{27}\) Essentially, this test asks what message the government intended to convey with the display and what message the governmental action actually conveyed.\(^{28}\) This refinement collapses the first and second prongs of the *Lemon* test together in a highly fact-specific inquiry focusing heavily on the perceptions of a reasonable observer. The Court, however, has not resolved precisely who is a reasonable observer.\(^{29}\)

**A. Justice O'Connor's Definition of a Reasonable Observer**

In her concurrence in *Allegheny v. ACLU*,\(^{30}\) Justice O'Connor hinted that her definition of a reasonable observer is someone who possesses a certain level of information, including the "history and ubiquity" of an action and the values underpinning the Free Exercise Clause.\(^{31}\) This concept of a knowledgeable

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 687-89 (O'Connor, J., concurring). Post-*Lynch*, there has been some confusion about whether the endorsement test is a separate test or merged into the *Lemon* test. *See* Jeanne Anderson, *The Revolution Against Evolution, Or "Well, Darwin, We're Not in Kansas Anymore,"


\(^{28}\) *Lynch*, 465 U.S. at 691.

\(^{29}\) In *Good News Club v. Mildford Central School*, 533 U.S. 98, 127-30 (2001), the Court appeared to be adopting Justice O'Connor's definition of a reasonable observer, but Justice Breyer's concurrence prevented a majority on this issue because he argued that the case failed on procedural grounds. Justice O'Connor's definition of a reasonable observer is based on the tort law definition of a reasonable person. This hypothetical person is "a model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion . . . . [H]e is . . . a personification of a community ideal of reasonable behavior, determined by the jury's social judgment." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 174-75 (5th ed. 1984)


31. *Id.* at 630-32 (O'Connor, J., concurring in part and concurring in the judgment).
reasonable observer took shape more clearly in her concurrence in *Capitol Square Review and Advisory Board v. Pinette*. Justice O'Connor dismissed a reasonable observer definition that would focus on the passerby and instead favored a definition "similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" This reasonable observer would have more information than some members of society, including "the history and context of the community and forum in which the religious display appears." The reasonable observer would also be "acquainted with the text, legislative history, and implementation of the statute" concerning the display. The reasonable observer gleans knowledge from the actual display itself as well as by having background knowledge of the general history of prior governmental displays and usage of space. Justice O'Connor discounts Justice Stevens' characterization of her reasonable observer as an "'ultrareasonable' observer who understands the vagaries of the Court's First Amendment jurisprudence," and argues that the reasonable observer is not required to know specific legal definitions, only how public places have been used in the past.

Applying this definition to the facts in *Capitol Square*, Justice O'Connor concluded that a reasonable observer would not perceive the government to be endorsing religion if it allowed the temporary display of a Ku Klux Klan cross by a private group on public property. Emphasizing a "collective standard" over actual individual perceptions, she attributed to a reasonable observer "knowledge that the cross is a religious symbol, that Capitol Square

33. Id. at 779-80 (quoting KEETON ET AL., supra note 29, at 175 (alteration in original)).
34. Id. at 780 (plurality opinion).
37. Id. at 781.
38. Id. at 782.
is owned by the State, and that the large building nearby is the seat of state government. In addition, she attributed to the reasonable observer knowledge of the prior history of the park's usage which in this case had been a forum traditionally open to the public for private expression. Justice O'Connor concluded that this knowledge enabled a reasonable observer to reach the conclusion that the State was not endorsing the Klan's private religious message.

B. Justice Stevens' Definition of a Reasonable Observer

Highly critical of Justice O'Connor's definition, Justice Stevens' dissent in Capitol Square indicates that he prefers a reasonable observer definition that would not make the individual a "well-schooled jurist" or "a being finer than the tort-law model." Trying to encompass more than the "'ideal' observer," he would "extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement." The perception that the government is endorsing religion would need to be objectively reasonable, which he argued alleviates Justice O'Connor's fear that there will always be someone offended.

Applying his reasonable observer definition, Justice Stevens concluded that since the cross was placed on land the government controlled, a reasonable observer would perceive at least an implicit endorsement of the message by the government. In his view, having a freestanding, unattended structure placed at the actual seat of government would cause a reasonable observer to believe the State sponsored and facilitated the message. Justice Stevens gives the example that "[a] person who views an exotic cow at the zoo as a symbol of the Government's approval of the Hindu religion cannot survive this test."
disagreed that a reasonable observer knows the law regarding the permissibility of displays on public grounds or the history of Capitol Square. He noted, "[m]any (probably most) reasonable people do not know the difference between a 'public forum,' a 'limited public forum,' and a 'nonpublic forum.'" He argued that adopting such a fiction will detrimentally affect "passersby, including schoolchildren, traveling salesmen, and tourists" who do not have this knowledge.

C. The Lower Courts

The confusion surrounding the definition of a reasonable observer has resulted in inconsistent decisions among the lower courts and even within individual circuits. For example, the Third

47. Id. at 804 n.7.
48. Id. at 808.
49. Id. at 807. "Traditional public forums are those places that 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Matthew D. McGill, Note, Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine, 52 STAN. L. REV. 929, 933 (2000) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). This category includes "streets and parks" and "sidewalks and the curtilage around state capitols and town halls." Id. "In Perry and subsequent cases, ... designated public forums - those that were set aside for a particular purpose, subject, or class of speaker - were called limited public forums." Id. at 935. "The non-public forum is the default categorization of public property. If government property is open neither by tradition nor designation, then it is classified as a non-public forum." Id.

51. See infra notes 74-78 and accompanying text; see also Kreisner v. City of San Diego, 1 F.3d 775, 784 (9th Cir. 1993) (upholding a Christmas display in a public park because "the reasonable observer is aware of Balboa Park's public forum nature and City's first-come, first-served permit policy. Our observer realizes that the Park ... host[s] an eclectic range of uses throughout the year"); Ellis v. City of La Mesa, 990 F.2d 1518, 1526 (9th Cir. 1993) (refusing to consider the "historical significance" of a municipality's display of a cross in a city park); Kong v. City & County of San Francisco, 18 Fed. Appx. 616, 618 (9th Cir. 2001) (quoting language from a ruling by the U.S. Court of Appeals for the Seventh Circuit that discussed the perceptions of a "reasonable but unknowledgeable observer") (emphasis added).
Circuit appeared to adopt Justice Stevens' definition of a reasonable observer in a case involving the display of a crèche and menorah on the City Hall plaza.\textsuperscript{52} In defending the display, the City argued that the informed reasonable observer would know of the City's year-long celebration of different cultures and religions and therefore not view the display as endorsing religion.\textsuperscript{53} The Third Circuit rejected Justice O'Connor's supposition that a reasonable observer would be aware of "'history and context'" when viewing a municipality's religious display.\textsuperscript{54} Characterizing such knowledge as "a view that departs from reality," the Third Circuit adopted a passerby definition and concluded: "A general awareness of the City's celebration of diversity throughout the year is obscured by the physical presence of the symbols of Christianity and Judaism before City Hall."\textsuperscript{55}

Later developments in the same case, however, indicated that the Third Circuit was retreating from its previous position on what constitutes a reasonable observer.\textsuperscript{56} After losing the case in 1995, the City modified its display to contain a crèche, menorah, Christmas tree, Santa Claus, Frosty, a sled, and Kwanzaa symbols on the tree.\textsuperscript{57} In addition, the City posted signs that explained this display was part of a series of displays that celebrated different cultures and ethnic diversity.\textsuperscript{58} In upholding the constitutionality of this display, the Third Circuit revisited the reasonable observer issue.\textsuperscript{59} This time the Third Circuit adopted Justice O'Connor's definition, holding that "'the history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."\textsuperscript{60}

\textsuperscript{52} ACLU v. Schundler, 104 F.3d 1435, 1448 (3d Cir. 1997).
\textsuperscript{53} Id. at 1447-48.
\textsuperscript{54} Id. at 1448.
\textsuperscript{55} Id. at 1449.
\textsuperscript{56} ACLU v. Schundler, 168 F.3d 92, 106 (3d Cir. 1999).
\textsuperscript{57} Id. at 95.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 106-07.
\textsuperscript{60} Id.
The inconsistencies in the Third Circuit's Establishment Clause jurisprudence also appear in sister circuits with panels adopting different approaches. Although it appears most circuits are adopting the O'Connor definition, this approach is not without critics. For example, the reasonable observer definition is criticized when it appears to require omniscience instead of just knowledge.

In *ACLU of Ohio v. Capitol Square Review and Advisory Board*, plaintiffs challenged the constitutionality of Ohio's motto "With God All Things Are Possible." Writing for the majority, Judge Nelson took issue with the dissenters' opinion that Ohio's motto was unconstitutional since sister circuits had previously upheld the constitutionality of the similar national motto "In God We Trust." Specifically, the majority held that a reasonable observer "may well be" one who is knowledgeable about the Christian Bible and the New Testament. Judge Nelson would not require the reasonable observer to have "an encyclopedic knowledge" of the Old and New Testaments. The inherent vagaries associated with the reasonable observer test in current First Amendment jurisprudence does not provide any clear guidance to courts regarding this fundamental freedom of the non-Establishment of religion.

61. For an excellent summary of cases adopting Justice O'Connor's approach, see Julie Van Groningen, Note, *Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219, 238-41 (2004). However, courts have refused to adopt this approach. See, e.g., Robinson v. City of Edmond, 68 F.3d 1226, 1232 (10th Cir. 1995) ("[A]n appeal to history . . . is indeed an argument which could always 'trump' the Establishment Clause, because of the undeniable significance of religion and religious symbols in the history of many of our communities."); Harris v. City of Zion, 927 F.2d 1401, 1415 (7th Cir. 1991), cert. denied, 505 U.S. 1229 (1992) (striking a city seal containing Christian symbols and concluding that "[n]o appeal to history can abate [a sectarian] message when the images in the seal are abstract symbols of a particular Christian sect").


63. *Id.*

64. *Id.* at 301.

65. *Id.* at 303.

II. TEN COMMANDMENT CASES

The confusion surrounding the reasonable observer definition and religious displays is no less with cases involving displays of religious text. Decisions both upholding and overturning Ten Commandment displays have only added to the confusion.

A. History

Until 2005, the Supreme Court had considered only one Ten Commandments case, Stone v. Graham.\(^6\)\(^7\) Stone also originated from Kentucky and centered around the Decalogue being posted on the walls of classrooms in public schools.\(^6\)\(^8\) A Kentucky statute mandated the posting of the Ten Commandments along with a small print notation explaining the purpose of the display below the last Commandment.\(^6\)\(^9\) The notation stated: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."\(^7\)\(^0\) Deciding the case without briefs or oral arguments, the Supreme Court held in a per curiam opinion that the statute violated the Establishment Clause because it had no secular purpose.\(^7\)\(^1\) Neither the private funding of the display nor the required notation regarding the purpose negated the religious nature of the Ten Commandments.\(^7\)\(^2\) The Court did leave open the possibility that the Ten Commandments could be displayed if they were integrated into the school curriculum and "used in an appropriate study of history, civilization, ethics, comparative religion, or the like."\(^7\)\(^3\)

Since 1980, lower courts have reviewed the constitutionality of Ten Commandment displays on numerous occasions and there is

\(^{68}\) Id. at 39-40.
\(^{69}\) Id. at 40 n.1.
\(^{70}\) Id.
\(^{71}\) Id. at 41.
\(^{72}\) Id. at 41-42.
\(^{73}\) Id. at 42.
no consensus among the circuits regarding the permissibility of these displays under the First Amendment.\textsuperscript{74} In the seven circuits that have addressed the issue, three have ruled the displays unconstitutional,\textsuperscript{75} and five have upheld the constitutionality of the displays,\textsuperscript{76} with the Seventh Circuit being in both categories. What make the cases so interesting are not necessarily the results, but rather the logic underlying the results. Many times the seeming exact same factor - location of the display on a courthouse lawn, for example - is used to infer whether or not a reasonable observer would perceive government endorsement with completely opposite results. For example, the Fifth Circuit held a Ten Commandments monument placed on the grounds between a state’s legislative, executive, and judicial buildings would allow a reasonable observer to see the Decalogue's connection with the law, and therefore would not be considered a religious endorsement.\textsuperscript{77} In contrast, the

\textsuperscript{74} See William M. Howard, Annotation, \textit{First Amendment Challenges to Display of Religious Symbols on Public Property}, 107 A.L.R. 23 (2003). The Seventh Circuit has held both ways on this issue. Compare Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001) (holding that the Ten Commandments monument on state grounds violated the Establishment Clause) with Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005) (upholding the Ten Commandments displayed with other patriotic documents).

\textsuperscript{75} See ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (holding that a monument engraved with the Ten Commandments in an Alabama State Judicial Building violated Establishment Clause); Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001); Books v. City of Elkhart Indiana, 235 F.3d 292 (7th Cir. 2000) (holding that a city's display of a monument inscribed with the Ten Commandments on the lawn of a municipal building violated the Establishment Clause), cert. denied, 532 U.S. 1058 (2001).

\textsuperscript{76} See Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005); Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003); Freethought Soc'y. v. Chester County, 334 F.3d 247 (3d Cir. 2003) (upholding an eighty-two year-old plaque); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (upholding an illuminated monolith of the Ten Commandments as serving a primarily secular purpose); see also ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005) (holding originally that the Ten Commandments display at city park violated the Establishment Clause, but reversing on rehearing en banc).

\textsuperscript{77} Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), cert. granted, 543 U.S. 923 (2004).
Seventh Circuit held a reasonable observer would perceive endorsement when a monument is placed at the seat of government on grounds containing the Capitol, the Governor’s office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals.  

Lower courts struggle in their analysis if they concentrate on the age of the display. In reversing the district court, the Third Circuit held that a reasonable observer would perceive an eighty-two year-old plaque containing the Ten Commandments as the government’s attempt to preserve a longstanding fixture on a historical monument and would not be a religious endorsement. Additionally, an Eighth Circuit panel decision finding that a thirty-five year old monument was a religious endorsement was later overruled en banc. These examples exemplify the inconsistencies in lower courts resulting from the reasonable observer test and demonstrate the need for a change in how these cases are analyzed. Hoping for clarifications and more guidance, lower courts, scholars, local government officials, and would-be plaintiffs anxiously awaited the Supreme Court decisions from the Spring 2005 Term.

B. McCreary County v. ACLU of Kentucky

Kentucky’s latest Ten Commandments controversy arose when county officials simply posted a version of the Ten Commandments in a high traffic area of the McCreary County Courthouse. The display’s alleged purpose was to teach citizens about “American religious history” and to show “America’s

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80. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1039 (8th Cir. 2004), rev’d en banc, 419 F.3d 772, 774-75 (8th Cir. 2005).
81. See infra Part IV.
82. ACLU v. McCreary County, 354 F.3d 438, 441-42 (E.D. Ky. 2003). Another display occurred in the Pulaski County courthouse and the two cases were ultimately joined. This Article focuses on the facts of McCreary County.
Christian heritage. The ACLU sued the County, asserting that the posting of the Ten Commandments violated the First Amendment’s Establishment Clause. In response to the suit, county officials modified the display by adding excerpts from various historical documents, each one included for its reference to religion. Not satisfied that this cured the Establishment Clause violation, the ACLU proceeded with its lawsuit and a federal district court granted the ACLU’s request for a preliminary injunction, ordering county officials to remove the display.

District Court Judge Coffman, applying the Lemon test, determined that the display violated the purpose and effects prong and thus concluded that the ACLU was likely to succeed on the merits of the case.

McCreary County first appealed the decision, but later voluntarily dismissed the appeal and filed a motion asking the District Court Judge to clarify her order. Judge Coffman denied that motion and the County posted yet another display. This third attempt was entitled “Foundations of American Law and Government,” and its alleged purpose was to educate county residents about the impact various historical documents had on the foundation of our laws. The documents were all the same size,

84. McCreary County, 354 F.3d at 440.
85. Id. at 442. The second display included all or parts of eight documents: an excerpt from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto of the United States (“In God We Trust”); a page from the Congressional Record declaring 1983 the Year of the Bible (which included a copy of the Ten Commandments); an 1863 proclamation by President Lincoln declaring April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible” reading, “The Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 as the Year of the Bible; and the Mayflower Compact. Id.
86. Id. at 444.
87. McCreary County, 96 F. Supp. 2d at 682, 685.
88. McCreary County, 354 F.3d at 441.
89. Id.
90. Id.
framed identically, and included the following: the King James version of the Ten Commandments with a citation to Exodus 20:3-17; the Magna Carta; the Declaration of Independence; the Bill of Rights of the U.S. Constitution; the Star-Spangled Banner; the national motto emblem, "In God We Trust," along with the preamble to the Constitution of Kentucky; the Mayflower Compact of 1620; a picture of Lady Justice; and a prefatory document explaining the significance of each symbol. The explanatory text for the Ten Commandments indicated that:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

The ACLU then asked the court to either extend the preliminary injunction or find the County in contempt. Judge Coffman extended the preliminary injunction holding that the twice-amended display failed the Lemon test since it lacked a secular purpose and would have the effect of advancing religion. McCreary County appealed the decision to the Sixth Circuit which affirmed and refused a rehearing en banc. The Supreme Court

91. Id. at 480 (Ryan, J., dissenting).
92. Id. at 444. The citation was later voluntarily removed. Id.
93. Id. at 443.
94. Id.
96. Id. at 851-53.
97. ACLU v. McCreary County, 361 F.3d 928, 928 (6th Cir. 2004), aff'd, 125 S. Ct. 2722 (2005).
granted certiorari on several issues including whether the *Lemon* test should be overruled and whether the prior displays tainted the present display.\(^{98}\)

Writing for the majority of the Court, Justice Souter refused to either eliminate the *Lemon* test or revise it by removing the purpose prong as recommended by the Kentucky government officials.\(^{99}\) Holding purpose still extremely relevant in Establishment Clause enquiries,\(^{100}\) Justice Souter acknowledged the important role purpose plays in statutory construction and other constitutional issues.\(^{101}\) Having retained the purpose prong,\(^{102}\) Justice Souter refused to accept the officials' argument that the secular purpose articulated for the third display erased the previous sectarian purposes of the prior two displays.\(^{103}\) Although historically giving great deference to legislatures, the Court required more than a sham purpose and would not abandon its role in analyzing whether a truly secular purpose existed for a government's actions.\(^{104}\) Part of that analysis required the Court to

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98. McCreary County v. ACLU, 125 S. Ct. 2722, 2728 (2005).
99. *Id.* at 2734. The purpose prong is criticized because true purpose is unknowable, leading to opposite results for identical displays solely focusing on expressed motives. Displays are upheld when savvy officials either are mute or express secular motives while displays are ruled unconstitutional when religious motives are expressed. A problem exists also in determining whose motives matter and how long an improper motive can taint future displays. *See infra* Part III.A.

A real life example of this can be found in the recent Sixth Circuit decision to uphold a display absolutely identical to the display at issue in *McCreary County*, except that there was no extensive legislative history of prior displays or religious statements from government officials. ACLU v. Mercer County, 432 F.3d 624, 2005 U.S. App. LEXIS 28072 at [*19-21] (6th Cir. 2005).

100. In her concurrence, Justice O'Connor also finds purpose relevant: "The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer." *McCreary County*, 125 S. Ct. at 2747 (O'Connor, J., concurring).
101. *Id.* at 2734.
102. *Id.* at 2735-36.
103. *Id.* at 2736-37.
104. *Id.* at 2735.
be cognizant of the history of the display and its impact on current circumstances.\textsuperscript{105}

In addition, the items in the display failed to dilute the County's impermissible sectarian purpose.\textsuperscript{106} Justice Souter found no clear theme among the posted materials.\textsuperscript{107} He characterized as odd the inclusion of a patriotic anthem to the exclusion of the Fourteenth Amendment since that amendment was "the most significant structural provision adopted since the original Framing."\textsuperscript{108} He surmised that a reasonable observer would be "baffl[ed]," "perplex[ed]," and "puzzled" and would conclude the government had included unrelated documents as a guise to keep the Ten Commandments posted.\textsuperscript{109}

Justice Souter also spent considerable space discussing the government's obligation to be neutral, except for limited circumstances, regarding issues of religion.\textsuperscript{110} This neutrality concept underpinning the Establishment Clause prevents the government from endorsing one religion over another or religion over non-religion.\textsuperscript{111} Moreover, the neutrality concept prevents the government from taking sides on contested issues of religion.\textsuperscript{112} Recognizing the posting of the Ten Commandments as being one of these controversial issues, he found that county officials crossed the neutrality line when they posted a Christian version of a sacred text.\textsuperscript{113} Thus, the Court held that the display failed the purpose prong of the \textit{Lemon} test.\textsuperscript{114} Because no clear secular theme existed that would prevail over the religious purpose, the Court affirmed the Sixth Circuit's decision to uphold the preliminary injunction.\textsuperscript{115}

In a stinging dissent, often questioning and criticizing his colleagues by name, Justice Scalia vehemently disagreed with

\begin{itemize}
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.} at 2740.
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.} at 2742.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 2739, 2745.
\item \textsuperscript{114} \textit{Id.} at 2745.
\item \textsuperscript{115} \textit{Id.}
\end{itemize}
interpreting the Establishment Clause as requiring neutrality between religion and non-religion.\textsuperscript{116} Instead of neutrality, he argued the framers intended the Clause to allow activities that pay tribute to God and religion.\textsuperscript{117} He concluded that this accommodation was intended even if it focuses on monolithic religions.\textsuperscript{118} For support, he referenced early presidential writings and speeches in which God is mentioned.\textsuperscript{119} As in prior cases, he attacked the \textit{Lemon} test, in particular the purpose prong, and argued that the Court has had no consistent approach to its Establishment Clause jurisprudence.\textsuperscript{120} After considering both of the 2005 Ten Commandment cases, Justice Scalia concluded that "there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments."\textsuperscript{121}

C. \textit{Van Orden v. Perry}

The second Ten Commandments case of the Spring 2005 Term involved a much older display erected in 1961 on the grounds of the Texas State Capitol.\textsuperscript{122} Here, the Decalogue was carved on a

\textsuperscript{116} \textit{Id.} at 2750-53 (Scalia, J., dissenting).

\textsuperscript{117} \textit{Id.} Examples of these activities include: "so help me God" in presidential oaths, opening Supreme Court sessions with a prayer, and references to God on our coins and in our Pledge of Allegiance. \textit{Id.} at 2750.

\textsuperscript{118} \textit{Id.} at 2753 n.3.

\textsuperscript{119} \textit{Id.} at 2748-49, 2753 (referencing President Washington’s Thanksgiving Proclamation, various inaugural addresses, and a letter from John Adams).

\textsuperscript{120} \textit{Id.} at 2757-58.


\textsuperscript{122} \textit{Van Orden}, 125 S. Ct. at 2864. This case was argued on the same day as \textit{McCreary County}. 
granite monument about six feet high and three and one-half feet wide to honor the Fraternal Order of Eagles' efforts on behalf of youths.\textsuperscript{123} This monument is similar to many others donated during the 1950s and 1960s across the United States.\textsuperscript{124} Besides the two tablets containing the Ten Commandments, the monument also included "an eagle grasping an American flag, an eye inside a pyramid, two small stars of David, two superimposed Greek letters representing Christ, and an inscription noting that it was donated by the Fraternal Order of Eagles."\textsuperscript{125} The text of the Commandments is larger than any of the other symbols.\textsuperscript{126} The monument is one of seventeen other statues, monuments and commemoratives that pay tribute to the "people, ideals and events" of Texas' history,\textsuperscript{127} yet it is the only monument that contains religious text.\textsuperscript{128} The monuments closest to the Ten Commandments are tributes to the women and children of Texas and several others honor various war veterans.\textsuperscript{129}

In contrast to the Kentucky display at issue in \textit{McCreary}, little legislative history exists explaining why the monument was installed.\textsuperscript{130} A resolution at the time of the installation indicates that in addition to honoring the Fraternal Order of Eagles' efforts,

\begin{itemize}
\item 123. Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003).
\item 124. \textit{Van Orden}, 125 S. Ct. at 2877 (Stevens, J., dissenting). In 1990, the monument was removed during a restoration project but was reinstalled in 1993 at the same location. Respondent's Brief at 14, Van Orden v. Perry, 125 S. Ct. 2854 (2005) (No. 03-1500).
\item 125. \textit{Van Orden}, 125 S. Ct. at 2858.
\item 126. \textit{Id.} (noting that the primary content of the monolith was the text of the Ten Commandments).
\item 127. \textit{Id.}
\item 129. \textit{Id.}; see also Respondent's Brief, supra note 124, at 3.
\item 130. \textit{Van Orden}, 125 S. Ct. at 2858 (noting that the "legislative record surrounding the State's acceptance of the monument from the Eagles . . . is limited to legislative journal entries").
\end{itemize}
the monument was established to promote morality and the prevention of juvenile delinquency. Another implicit reason, mentioned in the government’s brief, is to acknowledge the historic role of the Ten Commandments in American culture and law.

The District Court, finding no constitutional violation, granted summary judgment to the government and the Fifth Circuit affirmed. The fact that the monument stood on the Capitol grounds with seventeen other monuments for forty-two years before being challenged was particularly compelling to the court. Additionally, the court found that the placement of this monument between the legislative, executive, and judicial buildings would indicate to a reasonable observer that there was a connection between the Decalogue and “law-giving instruments of State government.”

Reaching a different result from McCreary, a plurality of the Supreme Court held that the Texas monument was constitutional. In announcing the judgment, Justice Rehnquist acknowledged the Court’s duty to maintain a division between church and state while at the same time avoiding being hostile to religion. Calling the Texas monument a passive display, Justice Rehnquist determined the Lemon test to be unhelpful. Although recognizing the monument had religious significance, Justice Rehnquist placed it with other acceptable acknowledgements of religion. He cited detailed examples of past governmental recognition of the role of God in our Nation’s heritage, including President Washington’s Thanksgiving Day Proclamation, legislative

131. Id. at 2870 (Breyer, J., concurring).
132. Respondent’s Brief, supra note 124, at 32-36.
133. Van Orden v. Perry, 351 F.3d 173, 175 (5th Cir. 2003). The District Court accepted the State’s secular purpose as recognizing the Eagles’ work with youth and found that a reasonable observer mindful of the history, purpose, and context, would not conclude that the monument violated the Establishment Clause. Id. at 179.
134. Id. at 181.
135. Id.
136. Van Orden, 125 S. Ct. at 2858.
137. Id. at 2859.
138. Id. at 2861.
139. Id. at 2863.
prayers, and religious content on buildings and monuments.\(^{140}\) Justice Rehnquist distinguished the Texas monument from prayers or Ten Commandment displays in schools, finding it to be more passive than what is confronted by public schoolchildren.\(^{141}\)

Justice Breyer, the swing vote, declined to apply the *Lemon* test and instead endorsed using legal judgment as the best standard rather than relying on any particular test.\(^{142}\) Calling this a "borderline case," he concluded that the State intended the nonreligious aspects of the monument to predominate.\(^{143}\) For support, he relied on the Fraternal Order of Eagles' efforts to select a nonsectarian text and the physical setting of the monument on a non-sacred site.\(^{144}\) In addition, he found it very determinative that no challenge had been brought against this monument for over forty years.\(^{145}\) Based on this, he concluded that "this display is unlikely to prove divisive."\(^{146}\)

Justice Thomas filed a concurring opinion in which he took issue with the Court's continual reliance on the "unusually informed observer."\(^{147}\) He argued that a reasonable observer analysis failed to satisfy either the adherents or the non-adherents by failing to give their views proper weight.\(^{148}\) In addition, Justice Thomas noted that the reasonable observer analysis "provides no principled way to choose between those views" and that the adoption of a coercion test would likely avoid this dilemma.\(^{149}\)

In writing one of the dissents, Justice Stevens concluded that "[t]he sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten

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140. *Id.* at 2861-63.
141. *Id.* at 2861 (noting that for passive displays, such as the Texas monument at issue, "our analysis is driven both by the nature of the monument and by our Nation's history").
142. *Id.* at 2869 (Breyer, J., concurring in judgment).
143. *Id.* at 2869-70.
144. *Id.* at 2870.
145. *Id.*
146. *Id.* at 2871.
147. *Id.* at 2867 (Thomas, J., concurring).
148. *Id.*
149. *Id.* at 2867.
Commandments. As a result, Justice Stevens refused to accept the plurality’s characterization of the case as about “historic preservation or the mere recognition of religion.” In addition, he objected to the use of a venerable religious text to achieve a secular goal of reducing juvenile delinquency. Justice Stevens also took issue with the plurality’s reliance on religious statements and proclamations of our Nation’s leaders. He distinguished these actions from a permanent display of religious text since the former contained personal views of the speakers. Finally, Justice Stevens reaffirmed his commitment to the neutrality principle which, in his mind, prohibits the choice of one version of the Decalogue over another since that choice “invariably places the State at the center of a serious sectarian dispute.”

Although it was surprising that Justice Breyer became the swing vote between the two decisions instead of Justice O’Connor as many anticipated, the bigger surprise came from Justice Stevens. Interestingly, Justice Stevens joined with the other Justices’ description of a more knowledgeable observer, instead of using his previous passerby definition. Justice Stevens had criticized Justice O’Connor’s “well-schooled jurist” reasonable observer model in previous cases. Yet, in McCreary County, Justice Stevens joined a majority opinion full of references to an observer who is “acquainted with the text, legislative history, and implementation of the statute.” This approach even contrasts with his dissent in Van Orden, in which he spent a considerable amount of time tracing the history and original purpose of the display donated by the Fraternal Order of Eagles, all of which a

150. Id. at 2873 (Stevens, J., dissenting).
151. Id. at 2876.
152. Id. at 2878.
153. Id. at 2882-90.
154. Id. at 2883.
155. Id. at 2880.
157. Id; see also, supra notes 42-50 and accompanying text.
"passerby" would not know. Only once did he seem to limit the reasonable observer's knowledge, opining that an observer would not know the particulars about the selected version of the Ten Commandments.

Of course, Justice Stevens voted to strike down the McCreary County display since he believes the Establishment Clause creates "a strong presumption against the display of religious symbols on public property." Yet it seems curious that he did not write a concurrence, agreeing in result only, opining that a reasonable observer would not require all this background knowledge to conclude that the display's content and context have the effect of endorsing religion. As he discussed, its placement at the seat of government and its text which commands a preference to religion over non-religion are enough. Knowing the prior history of the display in Kentucky or the way the monument came to be in Texas is really unnecessary to the analysis if Justice Stevens held true to his definition of a reasonable observer as a mere passerby. Unfortunately, he seems to have either abandoned this approach to join the others who create fictions of what an observer knows, or only diverged because of the obvious legislative purpose on the record in McCreary. Regardless of the reason, adhering to his passerby definition would have been better for the development of Establishment Clause jurisprudence which already is riddled with more than its share of inconsistencies.

III. PROBLEMS WITH THE REASONABLE OBSERVER ISSUE FRAMEWORK

Serious problems exist when trying to use the reasonable observer framework to analyze Lemon's purpose and effect prongs in sacred text cases. When analyzing the first prong, the government's purpose, the fiction of a reasonable observer requires the hypothetical observer to know much more than an actual

159. Van Orden, 125 S. Ct. at 2877-78 (Stevens, J., dissenting).
160. Id. at 2880.
161. Id. at 2874.
162. Id.
observer knows. Most observers will not know the text, legislative history, and implementation of the statute, especially if the display is old. In addition, the reasonable observer framework offers no help when legislative history is absent or inconclusive.

Moreover, this framework is also flawed when used to determine the second prong, the effect the display has on a reasonable observer. For example, when determining whether a reasonable observer would conclude a sufficient connection exists between the Ten Commandments and the rest of the display, the court looks not just to the display itself but imputes other knowledge to a reasonable observer. A normal observer would not have this additional information. Besides the obvious fiction that a normal observer has all of this knowledge, this method will only work if there is agreement regarding what it is the reasonable observer must know. Absent such agreement, a judge must decide between competing theories. A local judge would tend to favor the majority position especially in areas such as this where there are religious overtones. Instead of maintaining neutrality, this forces the government to choose sides.

A. Problems with a Reasonable Observer's Knowledge of Purpose

Based on its current definition, a reasonable observer knows more about the government's motivations than an actual observer. The fictions of what a reasonable observer knows are a byproduct of allowing knowledge to be based on extrinsic evidence, i.e., evidence other than what is present at the site of the display. Problems will naturally occur when state officials are allowed to justify the displays by their word alone and/or by digging into decades-old legislative history. Critics of this approach argue that a government's endorsement should not be rebuttable by the oral testimony of government officials claiming private intentions, or by historic claims buried in the archives. It should not be rebuttable

by claims of subtle secular messages that can be ferreted out only with effort that exceeds what is required to see the explicit message on the face of the display. When courts entertain evidence of offsite explanations or subtly implied secular messages, they invite sham claims of secular purpose and effect.164

These fictions significantly impacted the most recent Supreme Court cases. The first fiction was that a reasonable observer in Kentucky had knowledge of the origins of the prior displays and the previous litigation associated with them. Crediting observers with such knowledge was particularly important to the case’s outcome because it bolstered the argument that the final display disguised a sham purpose. Without such knowledge, a reasonable observer would be far less likely to perceive the display unconstitutional, at least on purpose grounds. But with such knowledge, altering a religious display to make it constitutional may be nearly impossible, as a reasonable observer would then assume that the message remained the same and that the secular objects were added only to make the display constitutional.

Practical problems exist, too, if the court adopts an approach in which a reasonable observer has knowledge of prior unconstitutional displays which taints his/her perception of future ones. Specifically, how long would the taint last – one year? Five years? Forever? According to Justice Souter, a reasonable observer has a “reasonable memory” but surely even he does not think these memories last for eternity.165 Justice Scalia speculates that in actuality the majority of people will not be familiar at all with the resolutions authorizing the display.166

164. Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner at 11, Van Orden v. Perry, 125 S. Ct. 2854 (2005) (No. 03-1500) [hereinafter Petitioner’s Brief of Baptist Joint Committee]. Much has been written criticizing the use of legislative history characterizing sources of legislative history as being easily manipulated and untrustworthy. See, e.g., Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371 (1987).

165. McCreary County, 125 S. Ct. at 2737. Justice Souter emphasized that “we do not decide that the Counties’ past actions forever taint any effort on their part to deal with the subject matter.” Id. at 2741. Despite saying this, he offers no guidance on when that may be.

166. Id. at 2763.
Moreover, the reasonable observer framework breaks down when no legislative history exists or when it is inconclusive or incomplete. A presumption of proper purpose should not result from the simple or perhaps orchestrated absence of facts. For example, little legislative history existed in the Texas case since the monument was so old. One should not assume, however, that the government's purpose was necessarily secular. Nor should a secular purpose be presumed with newer displays where governmental officials are careful to avoid any mention of religion. The purpose inquiry drives courts to reach opposite results when one government official has been counseled not to reveal the true illegal purpose while another carelessly voices or politically exploits the religiously motivated purpose. Consistency in Establishment Clause jurisprudence will never be achieved if decisions turn on such a flimsy distinction.

Justice Scalia acknowledged this real flaw in his *McCreary* dissent by pointing to the nonsensical result that identical displays in Kentucky, Tennessee, and Indiana would not all be constitutional. These inconsistencies occur, at least in large measure, because of the reliance on the reasonable observer's knowledge of the events leading up to the displays, including knowledge of legislative history. Scalia succinctly writes:

Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

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167. *Van Orden*, 351 F.3d at 176.
168. *McCreary County*, 125 S. Ct. at 2761 (Scalia, J., dissenting).
169. Id.
B. Problems with the Effect on a Reasonable Observer

The flaws associated with the reasonable observer framework are no less apparent in analyses of the Lemon test's effect prong. Crediting a reasonable observer with sufficient knowledge about the origins of American law so that a secular connection can be identified between the Ten Commandments and the display's political and patriotic documents is unrealistic. In the 2001 U.S. History Assessment developed by the National Assessment Governing Board, fifty-seven percent of high school seniors fell below "basic," an achievement level that denotes only partial mastery of significant historical knowledge and analytical skills. In a different survey only forty-six percent of the 800 adult Americans surveyed could identify Washington as the general who led the Continental Army to victory in the Revolutionary War. Other studies show one in five high-school seniors thought Germany was a U.S. ally during World War II and one in four eighth-graders did not know why the Civil War was fought. Such a documented lack of knowledge of basic history among Americans makes imputing knowledge of the origins of American law to a reasonable observer an absurd fiction.

The level of knowledge imputed to a reasonable observer is further complicated by the inherent bias as to what the knowledge should be. For example, a raging debate exists between scholars as to the extent the Ten Commandments influenced American law or whether the Enlightenment philosophies played a greater role.

Because no definitive answer exists as to whether there is even a connection between the Ten Commandments and historical documents such as the Declaration of Independence, it is impossible to effectively analyze whether a reasonable observer would make a connection, perceiving either a secular message of patriotism or one of endorsement. In situations like this, when no agreement exists regarding history, the reasonable observer framework offers no help to the courts.

As a result, judges are forced to choose among one of these competing scholarly theories which necessarily violates the Establishment Clause's mandate that the government remain neutral and not take sides over religious debates. Critics of the reasonable observer framework suggest this choice often favors the majority position. By basing the reasonable observer on a community ideal, courts run the danger of dismissing viewpoints that belong to a minority of the community. In addition, the fiction of the reasonable observer having knowledge and understanding of the policies and practices of the government only intensifies the problem since these policies and procedures originated from the majority. That is, a display, practice, or symbol may be ubiquitous because it originates from a dominant, majority religion. If this is the case, the value underlying the

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174. Brief of Baptist Joint Committee et al. as Amici Curiae in Support of Respondents at 15, McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (No. 03-1693) ("Government discussions of religion must be religiously neutral, and in general, that will mean that government must confine itself to objective facts, readily verified. When government makes evaluative claims about a particular sacred text, it is taking sides in a religious controversy.").


176. Id. at n.197.


Establishment Clause to protect religious minorities is effectively turned upside down.\textsuperscript{179}

Giving weight to the religious atmosphere of a particular community increases the danger that minorities' concerns will be dismissed. Critics have warned that non-adherents would be shut out using the community ideal framework. Moreover, defining the community ideal of reasonable behavior by the "collective social judgment" is impossible in a religious arena.\textsuperscript{180} An observer's perception of what is reasonable changes depending on whether that observer is an atheist, Buddhist, or a Christian.\textsuperscript{181} Although a reasonable observer framework may be effective for analyzing tort, contract, and criminal law issues, it is not particularly effective in this arena because uniformity of beliefs do not exist between religions.\textsuperscript{182} Since no collective social judgment about religious matters exists, the tendency to analyze the cases based on the desired outcome or a majority perspective is a real danger.

C. Problems in Application to Specific Cases

This danger materialized in the cases before the Court this term with the Justices reaching opposite conclusions regarding the effect the content had on a reasonable observer. In \textit{McCreary County}, the Court held that the government highlighted the Ten Commandments by placing them in a context with unrelated secular documents causing a reasonable observer to infer a national significance and thus endorsement.\textsuperscript{183} In purported contrast, a plurality in \textit{Van Orden} found that the placement of the Ten Commandments among sixteen other monuments that commemorated Texas history was not unconstitutional since a

\begin{itemize}
\item that "widespread acceptance of religious symbols indicates only the 'dominance of certain religions'")
\item 181. Groningen, \textit{supra} note 61, at 233 n.64.
\item 182. \textit{Id}.
\item 183. 125 S. Ct. at 2731 n.7.
\end{itemize}
reasonable viewer would see the monument as an acknowledgment of the large role the Decalogue has played in America's heritage. Consequently, this caused the Court to reach different conclusions as to whether a reasonable observer would identify the common theme of the development of American law when viewing the Decalogue and the surrounding items. The connection was apparent in Texas, but not in Kentucky.

These findings seem somewhat counterintuitive since McCreary County at least tried to connect the items with an explanatory plaque describing the display, while the state of Texas did not. The only plaque at the site of the Texas monument bore the inscription “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.” These inconsistent findings vividly illustrate the flawed reasonable observer framework and its reliance on pure fictions.

In addition, although not an integral part of the Supreme Court's opinions, the Sixth and Fifth Circuit courts reached opposite conclusions regarding the impact of the displays' location on a reasonable observer. The Sixth Circuit held that placing the display on the Kentucky courthouse walls caused a reasonable observer to infer approval since anything “posted at the seat of government... 'is so plainly under government ownership and control....'” In contrast, the Fifth Circuit found the placement of the monument between the Texas Capitol, the Governor's office, and Supreme Court building strengthened the legal, secular connection since its location made it “plainly linked with those houses of the law.” Other courts across the country have likewise reached polar opposite conclusions when addressing the relevance of the display’s location.

184. Id. at 2877.
185. Id. at 2858.
186. ACLU v. McCreary County, 354 F.3d 438, 461 (6th Cir. 2002) (quoting Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000)).
188. See Howard, supra note 74 (summarizing cases involving First Amendment challenges to displays of religious symbols and conflicting results).
One significant distinction, at least for Justice Breyer, was the age of the displays, with McCrery County's being brand new and the Texas monument being forty-two years old.\footnote{Van Orden, 125 S. Ct. at 2870-71 (Breyer, J., concurring).} Although the Texas monument at issue in \textit{Van Orden} actually had its date posted, many times a reasonable observer could only know the age of a display if that knowledge was imputed to him. Therefore, most observers will probably not know the age of the display forcing courts to create yet another fiction to find such knowledge.

Even if an observer knew the age of a display, the relevance of that knowledge is questionable on two counts. First, simply because a display is old does not mean it is constitutional, as the Court has acknowledged: "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."\footnote{Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 678 (1970).} Thus, the mere fact that no challenges have been brought against a display should not determine its constitutionality. Although not claiming the age of a display to be totally irrelevant, Justice Souter in his dissent does not agree that forty years without a challenge means the display should stand.\footnote{Van Orden, 125 S. Ct. at 2897 (Souter, J., dissenting).} While acknowledging that many explanations could exist for the lack of a challenge, Justice Souter doubted "that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause."\footnote{Id.} Second, even if the Court made the age of a display a significant factor in its analysis, judges need more guidance as to what length of time gives rise to a presumption of constitutionality. From these two cases we can surmise forty-two years is enough but two years is not enough. Is thirty years old enough? Twenty years? Ten years? The reasonable observer framework, once again, is unable to provide clarity.

\begin{itemize}
\item \footnote{Van Orden, 125 S. Ct. at 2870-71 (Breyer, J., concurring).}
\item \footnote{Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 678 (1970).}
\item \footnote{Van Orden, 125 S. Ct. at 2897 (Souter, J., dissenting).}
\item \footnote{Id.}
\end{itemize}
IV. RECOMMENDATIONS

Unfortunately, these recent decisions muddied the waters even more due to the majority's reliance on Lemon's purpose prong in McCreary County and Justice Breyer's contrasting reliance on the facts in Van Orden. This continued uncertainty is guaranteed to spawn more lawsuits as the decisions provided lower courts little guidance for future holdings and allows for judges' subjective beliefs about what a reasonable observer does or does not know to influence Establishment Clause jurisprudence. The relevance of the Lemon test remains questionable since it was not overruled in McCreary County but then not used in Van Orden. In addition, Justice Breyer's opinion seems to "grandfather in" older displays, but gives no guidance as to how old is old enough. Finally, the decisions seem to leave open the real possibility of opposite holdings for identical displays if politicians take the Court's cue and make no religious references while creating the displays.

In defense of the Justices, the inherent tensions between acknowledging our Nation's heritage while keeping church and state separate make for no easy solutions. However, different guidelines from what the Court has provided will help resolve the ambiguities and inconsistent applications associated with the reasonable observer framework. A more uniform pattern to these cases can be obtained by eliminating the fictions from the analysis. To this end, future courts must stop imputing knowledge about legislative history and the age of the display to the reasonable observer when deciding whether a government action acknowledges or endorses religion. This change alone will greatly help to eliminate the problem of opposite results for identical displays.

A. "Presumption of Unconstitutionality" Test

The Lemon test needs to be revised for sacred text cases. When sacred text is posted, either by itself or as part of a larger display, the presumption should be that the purpose is to endorse

193. Id. at 2870-71 (Breyer, J., concurring).
religion. This presumption should apply even if the text has a secular component because a religious purpose more likely exists when a government displays sacred text as opposed to a symbol. In contrast to text, "a symbolic depiction, like tablets with 10 roman numerals... could be seen as alluding to a general notion of law, not a sectarian conception of faith."

If courts adopt the presumption that an improper purpose exists when governments display sacred text, the judges will avoid having to engage in the impossible task of identifying the purpose underlying these displays. In addition, this presumption would eliminate the need for courts to impute knowledge on reasonable observers and engage in utter fictions. Thus, even if legislative history is silent or the government officials hide their true religious purpose, an improper purpose will be assumed unless it can be rebutted.

An amicus brief written by the pre-eminent church-state scholar, Professor Douglas Laycock, provided three ways to effectively rebut the presumption of unconstitutionality when using a sacred text. Using these ideas as a basis for my recommendations, I would propose two broad categories of displays that might include sacred text yet still be constitutional. First, a display of sacred text could be constitutional if the government shows that it fits within a de minimis exception. A

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194. McCreary County v. ACLU, 125 S. Ct. 2722, 2738 (2005). In their Amicus Brief in Van Orden, the Baptist Joint Committee and The Interfaith Alliance Foundation argued that "implicit statements of nonverbal symbols are more open to interpretation than express statements in words." Petitioner's Brief of Baptist Joint Committee, supra note 164, at 5 n.3. In contrast, a message, when it is composed of words, has the intended effect for readers to believe what is stated. See McCreary County, 125 S. Ct. at 2738.

195. If a plaintiff had actual knowledge of improper purposes, then even if the presumption can be rebutted there may well still be an Establishment Clause violation. See supra Part III.A.

196. Petitioner's Brief of Baptist Joint Committee, supra note 164, at 24-30. Professor Laycock, as counsel of record, lists three ways to overcome the presumption: (1) using sacred text as part of an explicit secular message that is objectively neutral with respect to the sacred text's content (i.e. display on history of Jewish people, survey on ancient moral codes); (2) using religious language in de minimis ways for secular purposes satisfying the ceremonial deism test developed by Justice O'Connor; (3) using brief quotations from religious sources with meanings equivalent to secular sentiments. Id.
display would fit this exception if it expressed a generic reference to a religious thought in conjunction with a secular or ceremonial function. The sacred text could not be, however, a complete core belief or tenet of a particular religion. This exception would allow such generic religious thoughts as "In God We Trust" on our coins. In addition, this exception would be broad enough to include brief quotations from a religious source that have a secular meaning.

The second way the State could rebut the presumption of unconstitutionality is by fitting the display into a narrowly tailored inclusion category. This exception would require the display of the sacred text to be narrowly tailored to support the secular theme. The State would be required to demonstrate a logical connection between the core religious beliefs or tenets and the surrounding theme and that connection must be objectively apparent at the site. Justice Souter justified the Court's decision in *McCreary County* by relying on "openly available data [that] supported a commonsense conclusion that a religious objective permeated the government's actions." However, most of the openly available data of which Justice Souter spoke was not at the site of the display. Not requiring the data to be at the site of the display, but instead imputing the knowledge of legislative history and implementation of the statute to a reasonable observer, results in all of the problems


[I]n a discrete category of cases, [the government can] acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court").

*Id.* (quoting County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989)). The "history, character, and context [of such examples] prevent them from being constitutional violations at all." *Id.*


199. *McCreary County*, 125 S. Ct. at 2735.
discussed in the previous section of this Article. A better approach requires analyzing what the observer actual observes from the "four corners" of the display itself.

The narrowly tailored requirement would sometimes require that certain portions of the sacred text not be displayed if those portions do not have a logical connection to the theme of the display. This exception avoids an absolute ban on the display of sacred text but instead allows its display when the connection to a secular theme will be apparent. For example, the Supreme Court frieze which contains Moses holding tablets exhibiting some of the text of the secularly phrased Commandments would be constitutional under this test. The frieze logically fits within a display of great lawgivers and is narrowly tailored to include only those Commandments that connect with the theme.200

B. Applying the Presumption of Unconstitutionality Test

These practical and workable suggestions are much better than what the Court provided and will go a long way in resolving the non-uniformity of the present cases dealing with government displays of the Ten Commandments. Analysis of the Kentucky and Texas cases becomes much simpler using these factors, instead of the current reasonable observer framework which relies on "offsite explanations or subtly implied secular messages."201 Under this new approach, the Kentucky and the Texas displays would be presumed unconstitutional because of the use of sacred text instead of symbols. The government in both cases would have failed to adequately rebut the presumption because the displays would not fit within either the de minimis use exception or the narrowly tailored inclusion exception. The displays would fail to fit within the de minimis use exception because neither of the displays was a generic reference to a religious thought used in conjunction with a secular or ceremonial function. Instead, the government displayed

200. Id. at 2741. Justice Souter wrote: "Nor do we have occasion to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history." Id.

201. Petitioner's Brief of Baptist Joint Committee, supra note 164, at 11.
the entire text of the Ten Commandments which express a core belief or tenet of a particular religion. The display of the full text of the Ten Commandments would not satisfy Justice O'Connor's ceremonial deism test which examines four factors: (1) the history and ubiquity of the item, (2) whether it requires worship or prayer, (3) whether it refers to a specific religion and (4) whether there is minimal religious content. The only ceremonial deism element satisfied by either of the Ten Commandments displays is that neither required a person to worship or pray. Although non-religious references to the Ten Commandments may be common, actual displays of the Ten Commandments in public buildings are relatively new and the Kentucky display is very recent. In addition, even the longevity of the more historical Ten Commandment displays, such as the Texas monument, do not make them ubiquitous. They in no way compare to the "In God We Trust" verbiage on our coins which Americans use daily.

202. In the McCreary County courthouse at issue, the Ten Commandments were listed as:

- Thou shalt have no other gods before me.
- Thou shalt not make unto thee any graven images.
- Thou shalt not take the name of the Lord thy God in vain.
- Remember the sabbath day, to keep it holy.
- Honor thy father and thy mother.
- Thou shalt not kill.
- Thou shalt not commit adultery.
- Thou shalt not steal.
- Thou shalt not bear false witness.
- Thou shalt not covet.

McCreary County, 125 S. Ct. at 2728.


Moreover, the Commandments favor religion over non-religion and most people would understand which religions in particular are linked to the Commandments. Finally, while the opening prayer of the legislative session or the Pledge of Allegiance have minimal religious content and a tradition separate from their religious origins, the Ten Commandments have retained their substantial religious content and significance which prevents them from fitting in Justice O'Connor's ceremonial deism exception. The text contains multiple references to God and several of the Commandments have no link to any secular law.

Besides not being used in a ceremonial function, this display of the Decalogue does not fit within the category of a brief quotation from a religious source with a meaning that is equivalent to secular sentiments. No secular sentiment exists for the Commandments and especially not for the ones focusing on worshiping the Lord. Instead, they have a sacred meaning to the various religious groups that adhere to them, which is not necessarily replicated in society at large.

In addition, the displays also fail to fit within the narrowly tailored inclusion exception because no logical connection of the core religious beliefs with the surrounding theme existed. Even if a logical connection existed, that connection was not objectively apparent at the site. The announced theme of the Kentucky display was the origins of American law and government. However, then the message of legal development of American law would at most be "subtly implied and undeveloped." To fit within the narrowly tailored inclusion exception, only the parts of the Ten Commandments that arguably relate to American law should have

The "Ten Commandments" are well known as a phrase and as a concept, but no version of the text is well known; I am confident that most Americans could not list the Ten Commandments. The reasonable observer is not familiar with the text, let alone with any ubiquitous secular use of the text.

Id.

206. Elk Grove, 542 U.S. at 43 (noting that "the reference to 'God' in the Pledge of Allegiance qualifies as a minimal reference to religion").

207. Petitioner's Brief of Baptist Joint Committee, supra note 164, at 18.
been displayed. Instead, the display also included Commandments that were purely religious in nature: "Thou shalt have no gods but me; Thou shalt not make upon thee any graven images; Thou shalt not take the name of the Lord Thy God in vain; Remember the sabbath day, to keep it holy; and Honor thy Father and thy Mother." 208 None of these Commandments provide a basis for an American law. The message of endorsement of the Ten Commandments was clear, explicit, and not negated by anything at the site of the display.

As to the other five Commandments, scholars dispute whether they actually influenced American law. Furthermore, even if the government’s premise was accurate and these last five Commandments influenced American law, that connection should be objectively apparent at the display itself. Although the explanatory plaque in Kentucky attempted to do this, it failed because it was based on conclusory, inaccurate, exaggerated, and disputed claims of secular significance. 209 Someone looking at the display would not readily see the connection the plaque tried to make since it focused on the Declaration of Independence which does not mirror the Ten Commandments. The government’s only other attempt to make connections between the Ten Commandments and American law came not at the display, but in briefs which were inaccessible to an actual observer. The government could have negated the religious message by including other sources, both religious and secular, which influenced the foundations of our laws as well as by including only the relevant portions of the Ten Commandments. But the government chose not to do that, instead displaying one particular version of a sacred text to the exclusion of other versions and other documents that may have played a role in our nation’s laws. The displays were one-

208. McCreary County, 125 S. Ct. at 2728.

209. Petitioner’s Brief of Baptist Joint Committee, supra note 164, at 19 ("Even if there were an explicit statement that the Ten Commandment were significant in the development of American law, that conclusory, overbroad, and contentious statement would not negate the endorsement of the Commandments themselves, as this Court correctly held in Stone v. Graham, 449 U.S. 39 (1980). ").
sided, not only due to the selection of one version of the Decalogue, but also because the secular message was incomplete.

The Ten Commandments displayed on the Texas monument provided even less of a connection with its secular theme. No obvious and logical connection existed between the Ten Commandments and recognizing the Fraternal Order of Eagles' efforts to reduce juvenile delinquency. In addition, the implicit goal of recognizing the historical role of the Ten Commandments in American culture and law can only be imagined by a passer-by since there is nothing on site that makes mention of this goal. Again, even if evidence connecting that theme to the Ten Commandments existed at the site, only those Commandments that actually related to the theme could be constitutionally displayed.

Before concluding, two other situations need to be addressed. First, a disclaimer at the site of the display indicating that the government does not intend to endorse religion will not automatically overcome the presumption of an improper purpose. The Court still must determine if the display fits into the de minimis exception or the narrowly tailored inclusion exception. A display of the entire text of the Ten Commandments will rarely fit into either of these exceptions and a simple disclaimer, analogous to the fine print in a contract, would not be sufficient to save the display.

The second situation arises, as in the Kentucky case, when a plaintiff has actual, not imputed knowledge, of the government trying to display sacred text for a religious purpose. In such a situation, the government will likely be unable to argue successfully that the sacred text display falls within either of the exceptions, thereby rendering the display unconstitutional. This was certainly the case with the Kentucky display. However, it is possible that a plaintiff has actual knowledge of an improper governmental purpose and yet the display is either narrowly tailored to include

210. Some governments have done this. See, e.g., Nancy Lofholm, Monument Gets Disclaimer, DENVER POST, Mar. 21, 2001, at B6 ("Grand Junction is following the example of Pocatello, Idaho, where controversy over a Ten Commandments monument at a county building was settled with the addition of a disclaimer."); see also Disclaimer for Idaho Falls Ten Commandments Monument (picture on file with FALR, courtesy of Professor Thomas Metzloff)).
only that text which relates to the secular theme or is a generic reference to a religious thought. In this case, the display would qualify as a de minimis exception. Some will surely argue that the government's actions still violate the Establishment Clause despite fitting into the exceptions. Any other result, they say, would only encourage government officials to continue to use religion for political purposes. They feel blatant religious motives actually known to a plaintiff requires a finding of unconstitutionality because to that individual no fiction exists that the government intends to endorse religion.

Critics of this approach argue that as long as the display fits into one of the exceptions it should stand despite the knowledge of a religious purpose. Eliminating all religious motives is unrealistic because religious motives often underlie governmental actions and this does not necessarily lead to a bad result. For example, religion has motivated the enactment of many valuable laws including civil rights and abolition legislation.

However, the better argument for permitting an otherwise constitutional display, despite announced religious motives, is that the display itself should stand or fall on its own merits. The separate conduct of a governmental official promoting religion through statements or resolutions is a separate act that should be reviewed apart from the validity of the display. If that separate official act violates the Establishment Clause or otherwise is shown to be conduct outside of the scope of the official's capacity, the offending actor should be appropriately sanctioned. The problem is the official, not the display. In this way, the effect of the display will be judged not by those in the community who may have actual knowledge of the official's statements, but the many individuals inside and outside of the community who most certainly would not have knowledge of those statements. To hold otherwise, and make an actual observer's knowledge trump an otherwise valid display, brings us back to the exact problem we are trying to avoid: different results for identical displays and courts relying on extrinsic evidence.

212. Id.
from sources other than the four corners of the display. In addition, this approach avoids the difficulty of proving what a plaintiff actually knows, how plaintiff came to that knowledge, and what governmental actions might be sufficient to violate the Establishment Clause. Courts deciding these two evidentiary issues inevitably would contribute to another body of case law that would be filled with even more inconsistencies than what we have now.

CONCLUSION

The Supreme Court should adopt a presumption of unconstitutionality for all sacred text displays and then engage in the following two-part inquiry. First, is the text used in a de minimis fashion? If the answer is yes, then the presumption is rebutted. If the answer is no, then the second question is whether or not the use of the text is narrowly tailored so that there is a logical connection, obvious at the site, between the core religious beliefs and the surrounding theme. This simpler analysis will not only lead to more consistent results, but also will resolve the problems associated with the reasonable observer approach. How much knowledge a reasonable observer does or does not have ceases to be an issue because prominent evidence must exist at the site of the display that objectively connects the text to the theme. Judges no longer have to determine what background knowledge a person should be presumed to have since the focus is on what is at the site, not inside a hypothetical person’s mind. The danger of favoring the majority is also removed because the government must show objective proof that the religious text is necessary to the explicit secular message of the display, not just included for no apparent reason. This approach allows the court to examine the individual circumstances of each individual case and sets no per se rule. But unlike the current reasonable observer framework, it provides more guidance to the lower courts by focusing on objective criteria instead of subjective fictions.