University of Florida Journal of Law & Public Policy

Volume 18 | Issue 1 Article 5

2007

Fair Use Rights in a World of the Broadcast Flag and Digital Rights Management: Do Consumers Have a Chance?

Andrew William Bagley

CASE COMMENT

CONSTITUTIONAL LAW: DETERMINING PURPOSE: THOU SHALT NOT STUDY THE EVOLUTION OF RELIGIOUS DISPLAYS

McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722 (2005)*

*Shari Ben Moussa***

Two Kentucky Counties (Respondents) each posted a large, readily visible gold-framed copy of the Ten Commandments (Commandments) on their courthouse walls.[1] Alleging that the two displays violated the First

---

* Editor's Note: This Case Comment received the Huber C. Hurst Award for the Outstanding Case Comment for Spring 2006.

** J.D. anticipated December 2007, University of Florida Levin College of Law; B.A. with College Honors, Washington University in St. Louis, 2002. To my family for their love and guidance. Thank you Anis, Erica, Mom, Dad, and Grandma.

1. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2727-28 (2005). The two counties were McCreary County and Pulaski County. *Id.* The display in McCreary County responded to a legislative order that required "the display [to] be posted in 'a very high traffic area' of the courthouse." *Id.* (citing ACLU of Ky. v. McCreary County, Ky., 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000)). During the ceremonial display of the Commandments in Pulaski County, the county Judge-Executive, accompanied by the pastor of his church, declared the Commandments as "good rules to live by." *Id.* (citing Dodson, COMMONWEALTH J., July 25, 1999, at A1-2, in Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction in Civ. A. No. 99-509 (ED Ky.)). Pulaski County's first and second displays included the following version of the Commandments followed by a citation to Exodus 20:3-17:

> "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."

Id. The text of the Commandments was similar in McCreary County's first and second displays. *Id.* at 2728 n.2.

Amendment Establishment Clause,[2] the American Civil Liberties Union (ACLU) sought a preliminary injunction against the courthouse displays.[3] In the interim, the Respondents adopted resolutions authorizing the erection of modified displays that integrated the Commandments, Kentucky's "precedent legal code,"[4] and other historical documents.[5] Although the second version of the displays advanced more of a secular purpose,[6] the district court issued a preliminary injunction to remove the displays.[7] To comply with the injunction, the Respondents modified the displays a third time, this time claiming that the displays advanced an educational purpose due to the addition of other historical documents.[8] However, the district court subsequently included these displays in the injunction,[9] and the Court of Appeals for the Sixth Circuit affirmed.[10] The U.S. Supreme Court granted certiorari,[11] affirmed and HELD,

---

2. *McCreary County, Ky.*, 125 S. Ct. at 2729. *See infra* text accompanying note 13.

3. *ACLU of Ky.*, 96 F. Supp. 2d at 682. The ACLU sought injunctive relief under 42 U.S.C. § 1983. *Id.* at 684.

4. *See* KY. REV. STAT. ANN. § 158.195 (2006).

5. *McCreary County, Ky.*, 125 S. Ct. at 2727. The second displays contained eight smaller, historical documents including the Declaration of Independence's "endowed by their Creator" passage; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact. *Id.* at 2729.

6. KY. REV. STAT. ANN. § 158.195 (2006). According to the resolution, "[t]he purpose of the display shall not be to advance religion . . . ," but rather "[t]o advance the secular purpose of making citizens of the Commonwealth more knowledgeable concerning the founding of America, the intent of the nation's Founders, and the formative influence of the Bible and the Ten Commandments on American leaders, institutions, and law." *Id.* The resolution stated that a copy of the resolution must accompany any display of the Commandments in classrooms and on public property. *Id.*

7. *ACLU of Ky.*, 96 F. Supp. 2d at 691.

8. ACLU of Ky. v. McCreary County, Ky., 145 F. Supp. 2d 845, 846, 853 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005). The Respondents changed counsel before posting the third display of the "King James Version" of the Commandments. *McCreary County, Ky.*, 125 S. Ct. at 2730. The third display, entitled "The Foundations of American Law and Government Display," consisted of nine framed documents of equal size that explained how the Commandments influenced the development of Western legal thought and the Nation. *ACLU of Ky.*, 145 F. Supp. 2d at 846-47. The expanded displays also included the Star Spangled Banner's lyrics and a picture of Lady Justice, accompanied by statements about their historical and legal significance to educate the Respondents' citizens. *Id.* at 846.

9. *ACLU of Ky.*, 145 F. Supp. 2d at 853, *aff'd*, 354 F.3d 438 (Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

10. ACLU of Ky. v. McCreary County, Ky., 354 F.3d 438, 462 (Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

11. *McCreary County, Ky.*, 125 S. Ct. at 2732. The Court stated that the issues were whether a determination of the Respondents' purpose was a "sound basis" for assessing Establishment

consideration of the evolution of the displays to determine the Respondents' purpose is valid when there is an alleged Establishment Clause violation.[12]

The First Amendment of the U.S. Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[13] An inherent ambiguity in the analysis of First Amendment Establishment Clause issues lies in determining what degree of separation between church and state is constitutionally required given the prevalent role of religion in American history.[14] Courts struggle to interpret the language of the Establishment Clause because of this deep-rooted uncertainty.[15] However, in *Lemon v.*

Clause violations and whether the evolution of the displays was relevant in the evaluation of the Respondents' claims of the displays' secular purpose. *Id.* at 2728.

12. *Id.* Justice Souter delivered the opinion of the Court, with whom Justice O'Connor concurred and filed opinion. *Id.* at 2727, 2746.

13. U.S. CONST. amend. I. The Establishment Clause was made applicable to the states by the Fourteenth Amendment's Due Process Clause. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 215 (1963); *see also* Walz v. Tax Commission, 397 U.S. 664, 680-81 (Brennan, J., concurring) (noting that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

Walz, 397 U.S. at 680.

14. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The Court has stated that "total separation is not possible in an absolute sense" because "[s]ome relationship between government and religious organizations is inevitable." *Id.* Additionally, complete separation of church and state is not constitutionally required. Lynch v. Donnelly, 465 U.S. 668, 673-74 (1984) (noting that Congress enacted legislation to pay chaplains for the House and Senate during the same week that Congress approved the Establishment Clause as part of the Bill of Rights). *See also Schempp*, 374 U.S. at 212 (stating that "religion has been closely identified with our history and government"); Marsh v. Chambers, 463 U.S. 783, 784, 787 (1983) (upholding an opening prayer before legislative sessions).

15. *McCreary County, Ky.*, 125 S. Ct. at 2733 n.10. The Court noted that, since *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), "it has been clear that [the] Establishment Clause doctrine lacks the comfort of categorical absolutes." *Id. See also Lemon*, 403 U.S. at 612-13 (finding that it is difficult to determine whether a law merely respects religion or whether it establishes religion in violation of the Establishment Clause due to the "opaque" language of the First Amendment).

Kurtzman,[16] the U.S. Supreme Court recognized that a statute may violate the Establishment Clause if the statute fails to satisfy the requirements of a three-part test.[17] Under the *Lemon* test, a "statute must have a secular legislative purpose," its "principal or primary effect must be one that neither advances nor inhibits religion," and "the statute must not foster an excessive government entanglement with religion."[18] Although *Lemon* continues to influence the Court, the Court has stated that the test is not always useful.[19]

In *Lemon,* the U.S. Supreme Court addressed whether statutes authorizing state aid to religious schools violated the Establishment Clause.[20] Rhode Island's statute authorized the state to provide a fifteen percent annual salary supplement to teachers of secular subjects in church-related elementary schools.[21] The state not only required eligible schools to submit financial data, but also examined school records on occasion to ascertain whether the expenditures supported primarily secular or religious education.[22] Pennsylvania's statute authorized the state to directly reimburse nonpublic elementary and secondary schools for the cost of teachers' salaries and for various educational materials used in secular subjects.[23] The state required schools receiving reimbursements to maintain certain accounts, subject to state audit, to ensure that educational costs were only dedicated to secular studies.[24]

To determine whether government entanglement with religion was excessive, the Court reasoned that it was necessary to examine the purpose of the supported institutions, the nature of the State aid, and the ensuing relationship between the government and the religious body.[25] The Court acknowledged that deference should be given to the legislature because the statutes intended to advance secular education by requiring government

---

16. *Lemon*, 403 U.S. at 602.

17. *Id.* at 612-13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 674). *See also* Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (noting that the Supreme Court has recently reframed the *Lemon* analysis by focusing on whether the statute's purpose or the statute's effect led to governmental endorsement of religion).

18. *Lemon*, 403 U.S. at 612-13.

19. Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (citing Hunt v. McNair, 413 U.S. 734, 741 (1973) (stating that the *Lemon* factors serve as "no more than helpful signposts.")).

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

21. *Id.* at 607.

22. *Id.* at 607-08. The state performed surveillance when the average expenditure on secular education per nonpublic school student exceeded that of a public school student. *Id.* at 620.

23. *Id.* at 606-07. The state cigarette tax provided the funds necessary to reimburse the schools. *Id.* at 610.

24. *Id.* at 610.

25. *Lemon*, 403 U.S. at 615.

surveillance.[26] However, the Court emphasized that nonpublic church-related schools have a mission to promote religious values, regardless of the statutes' intended objective to reimburse and to supplement secular education.[27] Therefore, the Court reasoned that state surveillance of the schools' expenditures may conflict with the First Amendment.[28] Additionally, the Court explained that annual state aid to church-related schools may influence political activity because voters in opposition of or in support of the state aid may vote based on religious beliefs.[29] Furthermore, the Court noted that the mixture of church and state may potentially affect students of such an impressionable age.[30] Thus, the Court held that the statutes violated the Establishment Clause because they fostered excessive government entanglement in religion.[31]

In *Stone v. Graham,* the Court applied *Lemon* to a Kentucky statute, which required public schools to post the Ten Commandments on classroom walls.[32] The statute required the Commandments to include a notation, which referred to the Commandments as a "fundamental legal code."[33] The Petitioners sought an injunction against the statute's enforcement claiming that the statute violated the Establishment and Free

---

26. *See id.* at 613, 616.

27. *Id.* at 613. For example, the Court explained that in Rhode Island, the nonpublic schools were located near parish churches, religious symbols adorned school buildings, and the majority of the teachers were nuns. *Id.* at 615.

28. *Id.* at 619-20. The Court explained that "a textbook's content is ascertainable, but a teacher's handling of a subject is not," and "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." *Id.* at 617, 619. However, in his concurring opinion, Justice Douglas, with whom Justice Black joined, wrote that without state surveillance, "the zeal of religious proselytizers" may actually infringe on the Establishment Clause. *Id.* at 627. For example, Justice Douglas wrote that even in a mathematics course, a teacher at a parochial school said to her class, "If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?" *Id.* at 635 (citing JOSEPH H. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 86 (1958)).

29. *Id.* at 622. The Court stated that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.*

30. *Lemon*, 403 U.S. at 616.

31. *Id.* at 625. However, the Court noted that complete separation between church and state was not absolutely possible because nonpublic church-related schools were still permissibly subjected to state land use and safety regulations. *Id.* at 614.

32. Stone v. Graham, 449 U.S. 39, 39-41 (1980) (per curiam).

33. *Id.* at 41 (citing KY. REV. STAT. ANN. § 158.178 (1980)). The notation in *Stone* 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." *Id.*

Exercise Clauses.[34] The Court addressed whether the statute's "avowed purpose" was secular or plainly religious in nature.[35] The Court held that the statute violated the Establishment Clause because it lacked a secular legislative purpose.[36]

The Court first explained that the statute must be invalidated if it violated any one of the three factors enunciated in *Lemon*.[37] A notation claiming an "avowed" secular purpose, the Court reasoned, would not save the statute from violating the First Amendment.[38] Rather, the Court explained that posting the Commandments may actually have the effect of encouraging students to pray.[39] Furthermore, it was irrelevant that the Commandments display was financed by voluntary private contributions because the legislature's support created a conflict with the Establishment Clause.[40] Thus, the Court concluded that the statute violated the first prong of *Lemon* because the statute's "avowed" secular purpose was not in fact secular.[41] The Court distinguished posting the Commandments on classroom walls from merely integrating the Commandments into class lessons, which might not violate the Constitution due to its educational purpose.[42]

---

34. *Id.* at 39-40. The state trial court upheld the statute, and the Supreme Court of the Commonwealth of Kentucky affirmed, although both decisions were made by heavily divided courts. *Id.* at 40.

35. *Id.* at 40-41.

36. *Id.* The Court explained that the Commandments are widely recognized as a sacred text in Judaism and Christianity. *Id.* at 41.

37. *Stone*, 449 U.S. at 40-41.

38. *Id.* at 41. The Court stated that such a notation cannot conceal the inherently religious purpose of posting the Commandments on classroom walls. *Id.* The Court noted that it has previously found prayer and Bible readings in school unconstitutional, even where the school asserted a secular purpose in the readings. *Id.* (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

39. *See id.* at 41-42.

40. *Id.* at 42.

41. *See id.* at 41. *But see id.* at 44 (Rehnquist, J., dissenting). Chief Justice Rehnquist reasoned that a statute may be constitutional even if the avowed secular purpose overlaps with a religious objective. *Id.* The Chief Justice explained that the Court's rejection of the legislature's avowed secular purpose is without precedent because deference should be given to the legislature's purpose in Establishment Clause cases. *Id.* at 43-44. Justice Rehnquist quoted Justice Jackson: "[m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . ." *Stone*, 449 U.S. at 46 (quoting Justice Jackson, concurring in McCollum v. Bd. of Educ., 333 U.S. 203, 236 (1948)).

42. *Stone*, 449 U.S. at 42. The majority also distinguished *Lemon* from *Stone* because the state assistance to private schools in *Lemon* created a secular purpose by supporting education. *Id.* at 43 n.5.

Subsequently, in *Santa Fe Independent School District v. Doe*, the Court applied *Lemon* to determine whether student-led prayers at school football games violated the Establishment Clause.[43] Students and their parents filed a complaint against the school district opposing the prayers.[44] Following an order from the district court,[45] the school district enacted various policies regarding student-led prayers at graduation and football games.[46] The school's final policy, enacted in October, stemmed from two student elections that had been held to determine whether to deliver "invocations" at football games and which student should deliver the "invocation."[47] The Court held that the resultant school football policy authorizing student-led, student-initiated "invocations" was coercive and invalid on its face in violation of the Establishment Clause.[48]

Using *Lemon*, the Court examined the evolution of the school's football policy to determine whether the purpose of the policy was primarily religious in nature.[49] The Court noted that the school's student election may have created a "limited public forum" because the student body majority elected the student speaker whose message most likely

---

43. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315-17 (2000).

44. *Id.* at 295.

45. *Id.* at 295-96.

46. *Id.* at 296-98.

47. *Id.* at 297-98. The school enacted graduation ceremony policies in May and July and football game policies in August and October. *Id.* at 296. The Court only considered the validity of the October policy. *Id.* at 298. The May policy authorized the graduating senior class to conduct two student votes to determine whether to allow and who should deliver "nonsectarian, nonproselytizing invocations and benedictions" during graduation ceremonies. *Id.* at 296-97. The July graduation policy removed the requirement that the invocation and benediction be "nonsectarian and nonproselytising [sic]," however, the July policy also stated that the May policy would "automatically become effective" upon injunction of the July policy. *Santa Fe*, 530 U.S. at 297. The August policy provided for two student votes to determine whether to allow invocations at football games and who should deliver them. *Id.* Additionally, the August policy also eliminated the requirement that the invocation be "nonsectarian and nonproselytizing," like the July policy and included a "fallback provision" to reinstate that requirement upon injunction. *Id.* The October policy was substantially similar to the August policy except that the district eliminated or modified some of the terms used in the August policy. *Id.* at 298.

48. *Santa Fe*, 530 U.S. at 301. The Court explained that the prayers were not private speech because the policies were enforced on school grounds at school-sponsored events. *Id.* at 302. Noting that the term "invocation" has always included a religious message, the Court determined that the policy had an expressly religious purpose. *Id.* at 306-07. The Court stated that an objective observer who was acquainted with the policy would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Id.* at 308.

49. *Id.* at 309. It is the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Id.* at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)).

represented the majority's viewpoint.[50] Additionally, the Court reasoned that the evolution from the office of "Student Chaplain" to the role of regulating prayer at football games, coupled with the school's history of student-led prayers at football games and graduations, revealed the religious purpose of the school's policy.[51] Therefore, the Court explained that the school district's "sponsorship" of student-broadcasted religious messages over the school's public address system was "impermissible."[52]

In his dissent, Chief Justice Rehnquist criticized the majority for requiring school policies to be completely content-neutral.[53] The Chief Justice explained that Establishment Clause cases do not require "content neutrality," and the lack thereof does not imply government endorsement of religion.[54] Furthermore, the Chief Justice explained that the principle of neutrality generally applies to freedom of speech cases rather than to Establishment Clause cases.[55]

As it previously did in *Stone* and *Santa Fe*, the instant Court in *McCreary County* applied the *Lemon* test to analyze an alleged Establishment Clause violation after the Respondents posted the Commandments in their respective county courthouses.[56] The Respondents argued that the instant Court should limit its analysis of the Respondents' purpose under *Lemon* because their true purpose was "unknowable."[57] However, the instant Court stated that Establishment Clause analysis frequently involves inquiry into a secular purpose, which must be the primary objective and not a "sham."[58] Furthermore, the instant Court

---

50. *See id.* at 304.

51. *Id.* at 309.

52. *Id.*

53. *Santa Fe*, 530 U.S. at 325 (Rehnquist, J., dissenting).

54. *Id.*

55. *Id.*

56. *See* McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2732-33 (2005). Although the instant Court incorporated *Lemon* into its analysis, it focused primarily on the first prong, the "purpose" prong. *See id.* at 2733-34. The instant Court referred to the First Amendment throughout the instant case, but predominantly applied *Lemon* to the Establishment Clause, rather than the Free Exercise Clause. *Id.*

57. *Id.* at 2732. The Court noted that scrutiny of purpose alone may be insufficient evidence of a First Amendment violation because a predominantly religious purpose may not automatically violate religious neutrality. *Id.* at 2733 n.10. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 791 (1983) (finding that the religious nature of legislative prayer did not violate the Establishment Clause).

58. *See McCreary County, Ky.*, 125 S. Ct. at 2734-36. The instant Court stated that "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 2734 (quoting *Santa Fe*, 530 U.S. at 308). The instant Court

reasoned that the constitutionality of the legislative resolutions depended on whether all parts of the displays had a predominantly secular purpose.[59] Thus, the instant Court held that a determination of the Respondents' apparent purpose may be dispositive for assessing a constitutional violation, and the evolution of the displays should be considered when determining the Respondents' purpose.[60]

Beginning with an analysis of the Respondents' first version of the courthouse displays, the instant Court compared the facts of the instant case to *Stone* because the Respondents in both cases posted the Commandments in public buildings, thereby triggering a potential First Amendment violation.[61] In both cases, the Respondents failed to create a predominantly neutral context because they posted the Commandments alone.[62] However, the instant Court distinguished the instant case from *Stone* because the first version of the displays failed to include a notation explaining the relationship between the Commandments and the law.[63] Therefore, the instant Court reasoned that, by posting the Commandments alone in the first display, the Respondents in the instant case had a primarily religious purpose.[64]

The instant Court's interpretation of the contextual display of the Commandments did not substantially differ in the second version of the displays.[65] Rather, the instant Court reasoned that the evolution of the displays actually accentuated the Respondents' religious purpose, regardless of the posted resolutions that allegedly shifted their purpose from religious to secular.[66] The instant Court affirmed that an objective observer would realize that even the Respondents' second displays

---

explained that if the purpose test required only *some* secular purpose, such an approach would "leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action." *Id.* at 2736 n.13.

59. *See id.* at 2736 n.11. Additionally, Justice O'Connor stated, in a concurring opinion, that the government is prohibited from coercing people to participate in religion against their will. *Id.* at 2746 (O'Connor, J., concurring) (citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15-16 (1947)).

60. *Id.* at 2728.

61. *Id.* at 2737-38.

62. *Id.* at 2738.

63. *McCreary County, Ky.*, 125 S. Ct. at 2738. *See supra* text accompanying note 33.

64. *McCreary County, Ky.*, 125 S. Ct. at 2739.

65. *Id.*

66. *Id.* at 2739-40 (noting that although the Respondents claimed that the third displays intended to educate the public, the Respondents failed to convince the district court or the court of appeals of such a secular purpose).

advanced a sectarian purpose due to the references to Christ throughout the posted legislative resolution and the displays.[67]

With regard to the third version of the courthouse displays, the instant Court stressed that consideration of the contextual evolution of the displays was necessary to determine the constitutionality of the displays.[68] The Respondents claimed that the historical and legal documents integrated with the Commandments in these displays served an educational function.[69] Notwithstanding this claim, the instant Court doubted the existence of a secular purpose because the two preceding courts, which failed to find a secular purpose, significantly influenced the instant Court's analysis of the displays' context.[70] Moreover, the instant Court believed that the Respondents could not convince an objective observer of a new secular purpose when the third displays included more religious references than the previous two displays.[71] Although the Respondents claimed that the resolutions did not apply to the third displays, the instant Court asserted that many of the documents included in the second displays were also found in the third displays, from which an objective observer might infer that the resolutions applied to both displays.[72] Therefore, the instant Court determined that, similar to the

---

67. *Id.* at 2739. According to the instant Court, an Establishment Clause violation occurs when the objective observer is aware of a display's religious references. *Id.* at 2737. The instant Court noted that the Respondents declined to defend the purpose of the second display, yet a "reasonable observer could not forget it." *Id.* at 2739.

68. *Id.* at 2741.

69. *McCreary County, Ky.*, 125 S. Ct. at 2739.

70. *Id.* at 2740 (citing Edwards v. Aguillard, 482 U.S. 578, 594 n.15 (1987) (holding that where preceding courts already ruled on the case and were unable to find a valid secular purpose, then this Court "normally should hesitate to find one")).

71. *Id.* at 2740-41. The instant Court explained that, in comparison with the first and second displays, the third display made relatively more references to the "Lord" and to "God." *Id.* The instant Court noted that, in addition to the religious references, an objective observer would question the absence of certain fundamental legal doctrines such as the Fourteenth Amendment in a display which supposedly established the Commandments as Kentucky's "precedent legal code." *Id.* at 2740.

72. *Id.* at 2740 n.20. *See also id.* at 2737 (citing Santa Fe Indep. Sch. Dist. v. Doe, at 315) (noting that "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'")). Although the Respondents argued that an objective observer would realize that the resolutions did not authorize the third display, the instant Court reasoned that the language of the resolutions applied to the documents posted in the third display. *Id.* at 2740 n.20. Additionally, the Respondents never rejected the resolutions until the arguments surrounding the instant case arose, at which point they chose to repeal the resolutions. *See id.* at 2740 n.19. Furthermore, the counties did not adopt a new resolution or repudiate the resolutions accompanying the second set of displays. *McCreary County, Ky.*, 125 S. Ct. at 2740. *But see id.* at 2763 n.14. (Scalia, J. dissenting). Justice Scalia stated that

evolution of the *Santa Fe* student-led football invocations, the evolution of the displays at issue in the instant case indicated the Respondents' underlying religious purpose.[73]

Finally, the instant Court stated that neutrality is a valuable principle that preserves the intent of the Framers of the First Amendment to prevent governmental support of any religion.[74] The instant Court rejected the dissent's attempt to limit the neutrality principle despite the dissent's suggestion that the Framers encouraged zealous support of monotheistic religions.[75] Additionally, the instant Court criticized the dissent's comparison of a holiday display or an official prayer to a display of the Commandments by maintaining that unlike a holiday display or an official prayer, the genuine underlying purpose for posting the Commandments was to compel an objective observer to act or to react based on religious faith.[76]

Joined by Chief Justice Rehnquist and Justice Thomas in his dissent, and by Justice Kennedy as to Parts II and III,[77] Justice Scalia criticized the majority for applying the principle of neutrality when the nation's history provides evidence of religious references in government activities.[78] In response to the majority, the dissent stated that the invocation of God may support widely held religious beliefs as previous case law suggests, but it does not establish monotheistic religions in violation of the First Amendment.[79] The dissent criticized the majority for using *Lemon* to determine the government's purpose based on what was apparent to an objective observer rather than on the government's actual subjective purpose.[80] The dissent also disagreed with the majority's strict application

---

the resolutions authorized the second version of the displays, but not the third version of the displays, because a copy of the resolution did not accompany the Commandments in the latter displays. Additionally, the third versions of the displays did not include all of the documents listed in the resolutions and, on the other hand, included some documents not listed in the resolutions. *Id.* (Scalia, J. dissenting).

73. *Id.* at 2741 n.22.

74. *McCreary County, Ky.*, 125 S. Ct. at 2742-43.

75. *Id.* at 2743, 2745.

76. *Id.* at 2743 n.24.

77. *Id.* at 2748.

78. *Id.* at 2750 (Scalia, J., dissenting) (noting that the Pledge of Allegiance states that we are a Nation "under God" and that the sessions of the Supreme Court begins "God save the United States and this Honorable Court"). *See also* Stone v. Graham, 449 U.S. 39, 45-46 (1980) (per curiam) (Rehnquist, J., dissenting) (commenting that the Establishment Clause does not require that the public be shielded from all religious references).

79. *McCreary County, Ky.*, 125 S. Ct. at 2756 (Scalia, J., dissenting). *See also supra* text accompanying note 14.

80. *McCreary County, Ky.*, 125 S. Ct. at 2757 (Scalia, J., dissenting).

of the *Lemon* test, which required that the secular purpose of a governmental action outweigh any other purpose.[81]

By holding that a display is unconstitutional unless an objective observer finds a predominantly secular purpose throughout the evolution of the display, the instant Court broadens the scope of the First Amendment Establishment Clause.[82] The instant Court examined the purpose of the Respondents' displays by comparing the instant case to the state aid sent to religious schools in *Lemon*, the Commandments posted in classrooms in *Stone*, and the evolution of a student-led football prayer in *Santa Fe*.[83] However, the school setting of those cases differs from the courthouse setting of the displays at issue in the instant case.[84] Therefore, the instant Court expands the applicability of the *Lemon* test to Establishment Clause claims in courthouses, where the purpose of displays, including displays of religious documents, has different implications.[85]

Although the instant Court focuses on each of the three prongs of the *Lemon* test, the instant Court substantially changes the purpose prong by depending on an objective observer to determine neutrality.[86] However, there is an inherent difficulty in determining neutrality due to the personal sensitivities of even the most objective observers.[87] Furthermore, an objective observer must be aware of religious references for a possible violation to occur, but there is no way to determine which observers have knowledge of the Respondents' initial displays or the subsequent

---

81. *Id.*

82. *See id.* at 2757 (Scalia, J., dissenting) (criticizing the Court's modified *Lemon* test for relying too heavily on an objective observer's determination of purpose, rather than the actual purpose, and for requiring the secular purpose to "predominate" over any other religious purpose).

83. *See supra* text accompanying notes 14, 32, & 43.

84. *See McCreary County, Ky.*, 125 S. Ct. at 2727-31. The Court has "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." Van Orden v. Perry, 125 S. Ct. 2854, 2863-64 (2005) (quoting Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987)).

85. *McCreary County, Ky.*, 125 S. Ct. at 2760 (Scalia, J., dissenting) (stating that the frequency of displays of the Commandments provides evidence that the Commandments are valued as a source of law, which influences government). The instant Court itself has a courtroom frieze, which depicts Moses, holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments, and seventeen other legal figures. *Id.* at 2741. *See also* Stone v. Graham, 449 U.S. 39, 46 (1980) (per curiam) (Rehnquist J., dissenting) (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963) (noting that the Court has recognized that "religion has been closely identified with our history and government")).

86. *See supra* text accompanying notes 54 & 55.

87. *See McCreary County, Ky.*, 125 S. Ct. at 2752 (Scalia, J., dissenting) (explaining that the principle of neutrality challenges historical and current tendencies).

resolution, which may lead to differing opinions of purpose.[88] Thus, the instant Court may actually create a pool of biased observers by requiring an objective observer to possess a certain degree of knowledge before the observer can form an opinion about a display's purpose or analyze the significance of a display's evolution.[89]

The instant Court expands the use of the *Lemon* purpose prong by considering how the evolution of the displays may affect an objective observer.[90] Moreover, the instant Court's modified *Lemon* test fails to illustrate a constitutional violation in this case because an objective observer may have only viewed the third displays of the Commandments, which did not primarily promote religion due to the incorporation of other legal and historical documents.[91] The instant Court intends to create an absolute line between neutral and unconstitutional actions, yet the instant Court's inconsistencies in deciding previous case law demonstrate the fallacy of this principle.[92]

Additionally, the instant Court's focus on the evolution of the displays suggests that the constitutionality of a legislative action depends solely on the initial, rather than on the current purpose.[93] Unless the government's initial action promotes a secular purpose, the instant Court's decision risks that the final action will always be susceptible to constitutional attack.[94] Although the instant Court explained that the Respondents' original purpose would not prevent them from creating a suitable display in the

---

88. *See supra* text accompanying note 67. *See McCreary County, Ky.*, 125 S. Ct. at 2737 n.14 (noting that "[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage"). For example, on the same day as the instant case, the instant Court decided Van Orden v. Perry, 125 S. Ct. 2854 (2005). In that case, the Court ruled that a display of the Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause because it was a passive monument with historical meaning and because no one challenged the display for forty years. *Van Orden*, 125 S. Ct. at 2858-59. Unlike in the instant case, in *Van Orden*, the Court emphasized that First Amendment analysis should focus more on a "monument's nature and the Nation's history" rather than the *Lemon* test when the display in question is only a passive monument. *Id.* at 2861.

89. *See supra* text accompanying note 71.

90. *See McCreary County, Ky.*, 125 S. Ct. at 2736-37.

91. *See supra* text accompanying note 85. "Judicial caveats against entanglement must recognize that the line of separation, . . . , is a . . . variable barrier depending on all the circumstances of a particular relationship. . . . [H]owever, . . . we are [not] to engage in a legalistic minuet in which precise rules . . . must govern." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

92. *See supra* text accompanying note 14.

93. *See McCreary County, Ky.*, 125 S. Ct. at 2763 (Scalia, J., dissenting).

94. *See id.*

future,[95] the instant Court neglects the Respondents' revised displays by comparing their initial motivations to their current purpose.[96] Therefore, the instant Court's analysis of neutrality under the *Lemon* test creates a slippery slope for future Establishment Clause claims.[97]

Unlike the observers in *Stone* or *Santa Fe*, the objective observer of the courthouse displays in the instant case would probably not be an impressionable student.[98] In *Stone*, every day students were exposed to an isolated copy of the Commandments posted on their classroom wall.[99] However, in the instant case, the observer objecting to the courthouse displays was the American Civil Liberties Union, an entity which often fights against government entanglement in religion, but probably not regularly exposed to the courtroom displays.[100] In the instant case, a reasonable observer could read the copy of the posted resolution, which explicitly stated that the purpose of the display was secular, and not intended to advance religion.[101] Moreover, in the instant case, the objective observer could reasonably perceive the revised displays as possessing a secular purpose because nothing in the display explicitly encouraged religious participation;[102] whereas in *Santa Fe,* the school continually supported student-led prayers.[103]

The instant Court's application of the *Lemon* test also infringes on the intent of the Framers of the First Amendment to require proof of coercion in finding a violation of the Establishment Clause.[104] The instant Court noted that it is difficult to interpret Establishment Clause issues due to the ambiguity in the language of the First Amendment; however, it is more complicated to rule on alleged violations based on an objective observer's opinion of purpose rather than returning to the Framers' coercion standard.[105] Furthermore, the instant Court's analysis fails to demonstrate

---

95. *Id.* at 2741.

96. *See id.* at 2763-64 (Scalia, J., dissenting).

97. *See id.* at 2752 (Scalia, J., dissenting).

98. *See supra* text accompanying notes 32 & 43.

99. *See supra* text accompanying note 32.

100. *See McCreary County, Ky.*, 125 S. Ct. at 2729.

101. *See supra* text accompanying note 6.

102. *See id.* at 2763 (Scalia, J., dissenting) (stating that a plaque, accompanying the display, informed passersby that the documents in the display influenced the law and government).

103. *See supra* text accompanying note 51.

104. *See supra* text accompanying note 13.

105. *See supra* text accompanying note 59. *See also* Van Orden v. Perry, 125 S. Ct. 2854, 2865, 2867 (2005) (Thomas, J. concurring). Justice Thomas affirmed that it would be easier for the Court to apply the Framers' definition of "establishment" than for the Court to continue applying other terminology. *Id.* at 2865. Previously the Court has stated that "[t]he Framers understood an

how the display of the Commandments coerced a courtroom observer to engage in religious worship or to pray any more than the friezes displayed in the instant Court's own courthouse.[106] If the Supreme Court permits a frieze that integrates Moses holding a version of the Commandments, but deems that the instant case integrated displays of the Commandments are offensive to an objective observer, then the principle of neutrality becomes subjective, and any religious reference may arbitrarily become unconstitutional regardless of its current context.[107] Instead, by applying the Framers' test for an Establishment Clause violation, the displays would be considered passive monuments because they do not lead to impermissible government coercion.[108]

Finally, stringent application of the *Lemon* test may lead to a separation of powers encroachment if the judiciary fails to give the legislature deference when enacting statutes or resolutions.[109] The majority stated that the government's asserted reasons for an action will generally receive deference, yet the instant Court affirmed the injunctive order even after the Respondents revised the displays twice.[110] The instant Court failed to acknowledge the plain meaning of the resolutions, which asserted the Respondents' secular purpose of the revised displays.[111] Therefore, the instant Court creates ambiguity by favoring a hypothetical objective observer's interpretation of a display over a statute's plain meaning. Such an analysis seems especially unnecessary when a notation accompanies the display.[112] In the interest of public policy, the *Lemon* test and the principle of neutrality should not be the default standards used to assess alleged

---

establishment 'necessarily [to] involve actual legal coercion.'" *Id.* (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004)).

106. *See supra* text accompanying note 85. Furthermore, the contents of the Ten Commandments, similar to the constitutionally reimbursed textbooks in *Lemon*, were "ascertainable" and did not require ongoing surveillance. Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

107. *But see supra* text accompanying note 78.

108. *See Van Orden*, 125 S. Ct. at 2865.

109. *See supra* text accompanying note 41; *see infra* text accompanying note 112.

110. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2727, 2733 (2005).

111. *See supra* text accompanying note 6. *But see* Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987) (noting that determination of purpose looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage").

112. *See McCreary County, Ky.*, 125 S. Ct. at 2763 (Scalia, J., dissenting). *See also* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (reasoning that a statute should be given deference when inquiry into the legislative purpose shows that the statute clearly states that it is intended to enhance the quality of the secular education).

constitutional violations of the Establishment Clause, especially when the legislative body has attempted to comply with the First Amendment.[113]

The *Lemon* test may no longer suffice to prove a First Amendment violation because application of the *Lemon* test leads to inconsistent results.[114] Although evidence of a secular purpose in governmental action continues to be determinative of constitutionality, the instant Court continues to struggle with whether the secular purpose has to be the predominate purpose in the eye of the objective observer.[115] The Court should shift the focus of its Establishment Clause analysis from an evaluation of purpose under *Lemon* to an evaluation of coercion.[116] Due to the integration of religion with law throughout the Nation's history, the Court should redefine the *Lemon* test and the principle of neutrality.[117] Otherwise, the Court will continue to perpetuate the fine line between a governmental action with a primary religious purpose, which is unconstitutional, and a secondary religious purpose, such as the Respondents' third displays, which should be constitutional.[118] Finally, as long as the Court supports religious references in various fora and relies on the objective observer's determination of purpose, then the Court must evaluate a governmental action solely in its current context.[119]

---

113. *McCreary County, Ky.*, 125 S. Ct. at 2763 (Scalia, J., dissenting).

114. *Id.* at 2750-51 (Scalia, J., dissenting). *See also supra* text accompanying notes 17 & 19.

115. *See McCreary County, Ky.*, 125 S. Ct. at 2757 (Scalia, J., dissenting).

116. *See id.* at 2761-62 (Scalia, J., dissenting).

117. *See id.* at 2750-51 (Scalia, J., dissenting).

118. *See id.* at 2751 (Scalia, J., dissenting) (stating that the Court has failed to consistently apply the principle of neutrality).

119. *See id.* at 2757 (Scalia, J., dissenting).