

INCONSISTENT GUIDEPOSTS:
*VAN ORDEN, MCCREARY COUNTY, AND THE CONTINUING NEED FOR A SINGLE AND
PREDICTABLE ESTABLISHMENT CLAUSE TEST*

By Frank J. Ducoat*

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in *consistently applied principle*.¹

I. Introduction

Two terms ago, the Supreme Court decided a pair of cases, *Van Orden v. Perry*² and *McCreary County v. ACLU*,³ which evaluated the constitutionality of a pair of Ten Commandments⁴ displays on public property. Some commentators predicted this could have

* J.D. 2006, Rutgers-Camden School of Law; B.A. 2003, William Paterson University. The author would like to thank Arlenys Casanova and Gina Nitting for their valuable suggestions, the staff of the Rutgers Journal of Law & Religion and Samantha, for her enduring love, which makes all things worthwhile.

¹ *McCreary County v. ACLU*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting) (emphasis added).

² 545 U.S. 677 (2005).

³ 545 U.S. 844 (2005).

⁴ Also sometimes referred to as the “Decalogue,” the Ten Commandments, according to Judeo-Christian tradition, were revealed by God directly to Moses. They are:

1. I am the LORD thy God . . . Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or

been the point at which the Court made “Establishment Clause history”⁵ and put forth a test that clearly determines what violates the first command of the Bill of Rights. Instead, the Court further muddled an already opaque doctrine by producing a myriad of opinions containing little, if any, practical guidance.⁶

This Note will explain the *Van Orden* and *McCreary County* cases and how they exemplify the need for a single, predictable test. Part II sets out a very brief history of Establishment Clause jurisprudence to the extent necessary to provide a fundamental framework

any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:

2. Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me; And shewing mercy unto thousands of them that love me, and keep my commandments.

3. Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain.

4. Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it.

5. Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.

6. Thou shalt not kill.

7. Thou shalt not commit adultery.

8. Thou shalt not steal.

9. Thou shalt not bear false witness against thy neighbour.

10. Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.

Exodus 20:1-17; *Deuteronomy* 5:6-21 (the Ten Commandments have been numbered for citation purposes).

⁵ Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2005 CATO SUP. CT. REV. 159, 159.

⁶ See *Van Orden v. Perry*, 545 U.S. 677, 697-98 (2005) (Thomas, J., concurring) (while agreeing with the Court in its ultimate conclusion, Justice Thomas notes his disappointment by saying “a more fundamental rethinking of our Establishment Clause jurisprudence remains in order”).

for the rest of the Note. Part III discusses both the *Van Orden* and *McCreary County* decisions, including a detailed analysis of the ten different opinions the case generated in the Supreme Court. Part IV will illustrate the effect of these decisions on Establishment Clause jurisprudence by showing, through recent lower-court cases, the disarray made by the pair. Finally, Part V sets forth a couple of basic principles of constitutional interpretation that should be used in interpreting the Establishment Clause and suggests, with an eye towards these principles, a resolution that brings us one step closer to a clearer and more consistent Establishment Clause test.⁷

II. The Establishment Clause

The First Amendment to the United States Constitution provides, *inter alia*, that “Congress shall make no law respecting an establishment of religion.”⁸ Prior to incorporation in 1947,⁹ the Clause was hardly litigated in the Supreme Court.¹⁰ Decades later the Court began using a simple, two-part analysis, asking first whether the government action had a religious purpose and second, whether it had a religious effect.¹¹ In 1971, the Supreme Court set forth what is now referred to as the *Lemon* test for determining whether a law violates the

⁷ The point of this Note is not to put forth a comprehensive Establishment Clause test to be used by the courts. A more realistic task in a brief project such as this, and the one I undertake in Part V, is to merely set forth a pair of principles that will be helpful at a later date when a comprehensive test is constructed.

⁸ U.S. CONST. amend. I.

⁹ Incorporation is the process by which the Court applies provisions of the federal constitution to the states via the Fourteenth Amendment. The Establishment Clause was incorporated in *Everson v. Board of Ed. of Ewing Township*, 330 U.S. 1 (1947). Courts and commentators have attacked incorporation of the Establishment Clause altogether on the grounds that states supported and encouraged religious exercise in some form since the founding of the Republic. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (O’Connor, J., concurring); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1087 n.11 (1995) (and commentaries cited therein). *But see* DEREK DAVIS, ORIGINAL INTENT 93 (1991) (noting that scrapping incorporation altogether “is so unrealistic as not to warrant consideration . . . [it] is so firmly rooted in American constitutional law that overthrowing it is no longer conceivable”). *See generally* Note, *Rethinking the Incorporation of the Establishment Clause*, 105 HARV. L. REV. 1700 (1992). Whether incorporation is wise (or justified) is beyond the scope of this Note.

¹⁰ Prior to 1947, the Court only decided two Establishment Clauses cases. *See Bradfield v. Roberts*, 175 U.S. 291 (1899); *Quick Bear v. Leupp*, 210 U.S. 50 (1908). Neither provided anything comparable to a detailed analysis.

¹¹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

Establishment Clause.¹² A law only survives the tripartite *Lemon* test if 1) it has “a secular legislative purpose,” 2) the principle or primary effect neither advances nor inhibits religion, and 3) it does not foster “an excessive governmental entanglement with religion.”¹³

While *Lemon* has been the primary test, it has not been exclusive.¹⁴ This instability has produced inconsistent and, in fact, “bizarre” results.¹⁵ Nor has it escaped scathing criticism from commentators,¹⁶ lower courts,¹⁷ and the Supreme Court itself.¹⁸ In 1997, the Court

¹² *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But as one commentator has noted, while *Lemon* gets the glory, the origin of the three-prong test is found in *Walz v. Tax Comm’n*, 397 U.S. 664 (1970). Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, 2001 B.Y.U. EDUC. & L.J. 271, 280 n.38 (2001).

¹³ *Lemon*, 403 U.S. at 612-13. The test has also been referred to as the “purpose-effect-entanglement” test. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.3 (7th ed. 2004).

¹⁴ Compare *Wallace v. Jaffree*, 472 U.S. 38 (1985) (applying *Lemon*), with *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (not applying *Lemon*) and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same) and *Marsh v. Chambers*, 463 U.S. 783 (1983) (same). See also *Hunt v. McNair*, 413 U.S. 734 (1973) (*Lemon* factors are “no more than helpful guideposts”). Individual Justices have also set forth their own tests. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting) (endorsement against a reasonable person standard test); *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O’Connor, J., concurring) (endorsement test).

¹⁵ DAVIS, *supra* note 9, at 112-13 (quoting then-Justice Rehnquist at length in *Wallace*, 472 U.S. at 110-111 (Rehnquist, J., dissenting) (setting forth the parade of inconsistencies)).

¹⁶ See, e.g., Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 654 (1992) (the “aptly named *Lemon* test . . . must be abandoned”); William P. Marshall, “*We Know It When We See It*” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) (“From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common . . . [including] contradiction and confusion in the [*Lemon* test].”).

¹⁷ See, e.g., *Barnes v. Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) (“[W]e add our voices to those who profess confusion and frustration with *Lemon*’s analytical framework.”); *Ross v. Keelings*, 2 F. Supp. 2d 810, 816 (E.D. Va. 1998) (calling it “[a] much maligned three-prong test”); *Jackson v. Benson*, 578 N.W.2d 602, 612 n.5 (Wisc. 1998) (“[W]e cannot command this ghoul to return to its tomb when we wish it to do so . . .”) (internal quotation marks omitted).

¹⁸ See, e.g., *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (listing Court’s fitful invocation of *Lemon*); *Comm. for Pub. Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (referring to the *Lemon* test as “the sisyphian task of trying to patch together blurred, indistinct, and variable barriers . . .”). See also *supra* note 14 (listing cases that have not used the *Lemon* test). Such

“repackaged”¹⁹ the *Lemon* test and applied an “endorsement test” which takes *Lemon*’s entanglement prong and subsumes it under the effect prong.²⁰ The result is a two-thirds *Lemon*.²¹ In some senses, we are back to where we started.

Currently, the *Lemon* test is the most used and most criticized of all the existing standards by which Establishment Clause cases are decided, but the Court has yet to set forth a single, workable test for *all* Establishment Clause challenges.

III. *Van Orden v. Perry* and *McCreary County v. ACLU*

In *Van Orden v. Perry*, the state of Texas displayed the Ten Commandments on the grounds of its state capital.²² It was one of 17 monuments and 21 historical markers²³ which

criticism even dates back to the formation of the test itself. *See Lemon*, 403 U.S. at 668 (White, J., concurring in part and dissenting in part) (calling the test “an insoluble paradox” that is neither useful nor principled).

¹⁹ NOWAK & ROTUNDA, *supra* note 13, at § 17.3.

²⁰ *Agostini v. Felton*, 521 U.S. 203 (1997).

²¹ *See generally* *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 174-75 & n.36 (3rd Cir. 2002) (collecting cases in which the Court has taken this dual-pronged approach).

²² The Court of Appeals for the Fifth Circuit described the monument as follows:

The Ten Commandments monument was a gift of the Fraternal Order of Eagles, accepted by a joint resolution of the House and Senate in early 1961. It is a granite monument approximately six feet high and three and a half feet wide. In the center of the monument, a large panel displays a nonsectarian version of the text of the Commandments. Above this text, the monument contains depictions of two small tablets with ancient Hebrew script. There are also several symbols etched into the monument: just above the text, there is an American eagle grasping the American flag; higher still, there is an eye inside a pyramid closely resembling the symbol displayed on the one-dollar bill. Just below the text are two small Stars of David, as well as a symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other. Just below the text of the commandments, offset in a decorative, scroll-shaped box, the monument bears the inscription: “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.”

Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003), *reh’g denied*, 89 Fed. Appx. 905 (5th Cir. 2004).

sought to commemorate the “people, ideals, and events that compose Texan identity.”²⁴ Nearly forty years after the monument’s erection, petitioner brought suit, claiming the display violated the Establishment Clause.²⁵

The District Court judge rejected petitioner’s claim,²⁶ and the Fifth Circuit Court of Appeals affirmed.²⁷ The Supreme Court granted certiorari²⁸ and by a 5-4 vote affirmed the decision of the Court of Appeals.²⁹

The plurality³⁰ began by highlighting what is already quite clear: Establishment Clause jurisprudence is two-headed and “Januslike.”³¹ One head looks at the “strong role played by religion” in this country and the other at endangering religious freedom through governmental intervention.³² Unlike the courts below, the plurality explicitly rejected using the *Lemon* test for the case at hand and instead employed an analysis “driven both by the nature of the monument and by our Nation’s history.”³³ Reviewing first the nature of the monument on the Texas capital,

²³ All of the other monuments are unquestionably secular. *See Van Orden*, 545 U.S. at 681 n.1 (plurality opinion) (listing monuments).

²⁴ *Id.* at 681 (quoting Tex. H. Con. Res. 38, 77th Leg. (2001)). Noticeably absent is any reference to religion.

²⁵ *Van Orden v. Perry*, 2002 U.S. Dist. LEXIS 26709, *2 (W.D. Tex. Oct. 2, 2002). The suit was brought under 42 U.S.C. § 1983 (2002), which provides a private cause of action for “any citizen of the United States or other person within the jurisdiction thereof [who has been deprived] any rights, privileges, or immunities secured by the Constitution” Petitioner sought declaratory and injunctive relief, namely a declaration that the monument was unconstitutional and an injunction directing it be taken down immediately. *Id.* at *2-3.

²⁶ *Id.* Petitioner’s claim was evaluated by the District Court under the *Lemon* test. *Id.* at *12-20.

²⁷ *Van Orden*, 351 F.3d at 175. The Court of Appeals also evaluated petitioner’s claim under *Lemon*. *Id.* at 177-81.

²⁸ *Van Orden v. Perry*, 543 U.S. 923 (2004).

²⁹ *Van Orden*, 545 U.S. at 683 (plurality opinion).

³⁰ The plurality opinion was written by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy, and Thomas.

³¹ *Id.* at 683. Janus was the Roman God of all beginnings and is represented artistically with two opposite faces. “Janus.” Encyclopedia Mythica Online, <http://www.pantheon.org/articles/j/janus.html> (last visited Apr. 5, 2007) (on file with author).

³² *Van Orden*, 545 U.S. at 683.

³³ *Id.* at 686. For a criticism of the plurality’s rejection of *Lemon*, see generally Shawn Staples, *Nothing Sacred*, 39 CREIGHTON L. REV. 783 (2006).

the plurality found that the Ten Commandments have an “undeniable historical meaning.”³⁴ While the plurality conceded the Decalogue is undoubtedly religious, it found Texas’ use to be far more “passive” than other cases that found establishment³⁵ and therefore does not run afoul of the Establishment Clause.³⁶

Justice Thomas wrote separately to suggest that the Court abandon the “inconsistent guideposts” constituting the Court’s Establishment Clause jurisprudence up to this point and that the Court return to the original meaning of the Clause, a meaning which adopts “coercion” as the touchstone of the inquiry.³⁷ An originalist approach to the Establishment Clause, he argued, would “avoid the pitfalls” of the existing framework, namely first, that as of now, any recognition could constitute establishment, and second, in an attempt to balance, members of the Court undermine the religious significance of certain terms or symbols; and third, flexibility leads to inconsistent application, a problem evident from this decision and *McCreary County* - together, they could only “compound[] the confusion.”³⁸ In this case, Justice Thomas could find no such coercion.³⁹

³⁴ *Van Orden*, 545 U.S. at 690. In support of this, the plurality cited President Washington’s 1789 Thanksgiving Day Proclamation, previous Court decisions, things typically seen during a tour of Washington D.C. and the Supreme Court courtroom itself. *Id.* “Our opinions, like our building, have recognized the role the Decalogue plays in America’s heritage.” *Id.*

³⁵ *Id.* The plurality drew a sharp distinction between previous cases that struck down public displays of the Ten Commandments because the public place was a school. *See, e.g., id.* at 690-91 (citing *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (applying *Lemon* to strike down Kentucky statute that required the Commandments be posted in every classroom). *Stone* relied on two of the Court’s school prayer cases and this, according to the plurality, “stands as an example of the fact that we have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” (internal quotation marks and citations omitted). *Van Orden*, 545 U.S. at 691.

³⁶ *Van Orden*, 545 U.S. at 691.

³⁷ *Id.* at 693 (Thomas, J., concurring). Justice Thomas defined coercion as follows:

The Framers understood an establishment necessarily to involve legal coercion The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty* [F]or example, mandatory observance or mandatory payment of taxes supporting ministers.

Id. (internal quotation marks, parentheses, and citations omitted) (emphasis in original).

³⁸ *Id.* at 697. As to the first point, *see id.* at 694 (collecting lower court cases where mere recognition was found to constitute establishment).

Justice Breyer cast the fifth and decisive vote in the judgment in favor of Texas. However, in lieu of joining the plurality opinion, Justice Breyer set forth a no-tests test.⁴⁰ After dismissing several of the Court's previous tests, including *Lemon*, Justice Breyer took the position that legal judgment, formed by taking into account the context, purpose, and consequences of the challenged display, should be what guides a court in evaluating Establishment Clause claims.⁴¹ Perhaps what influenced Justice Breyer the most was the fact that the display at issue went challenged for four decades while it stood on the Texas capital grounds.⁴² After evaluating these factors and realizing any contrary conclusion in the judgment would create hostility towards religion in this country, Justice Breyer concluded that the Texas display did not violate the Establishment Clause.⁴³

³⁹ *Id.* at 693-94. Justice Scalia also wrote a concurring opinion suggesting that the Court adopt “an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices” as set forth in his *McCreary County* dissent. *Id.* at 692 (Scalia, J., concurring). See *infra* notes 66-73 and accompanying text discussing this opinion.

⁴⁰ See *id.* at 700 (Breyer, J., concurring) (“I see no test-related substitute for the exercise of legal judgment [N]o exact formula can dictate a resolution”).

⁴¹ *Id.* at 700-01. Justice Breyer found that the display at issue contains both a secular and religious purpose, but that the circumstances surrounding its placement on the grounds and its physical setting, along with its 40-year unchallenged history, indicate that its effect has been primarily secular. *Id.* at 701. Although he purports to give it non-dispositive force, another factor relied upon by Justice Breyer is that the monument was donated, indicating an effort by Texas to remove itself from the religious nature of the display. *Id.* How this proves an effort to distance itself is unexplained and not obvious on its face.

⁴² See *id.* at 702-03:

If these [other] factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor[, the unchallenged history,] is determinative here. . . . [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to engage in any religious practice to compel any religious practice, or to work deterrence of any religious belief.

(internal citation and quotation marks omitted). This sends the implicit message that challenges for challenges-sake will be recognized as such and be suspect. This brings to mind Justice Thomas' concern about highly flexible tests not properly taking into account the seriousness of the nonadherent's beliefs. See *id.* at 697 (Thomas, J., concurring).

The four dissenters in *Van Orden* took varying views. Justice Stevens took the position of neutrality: the government must remain neutral to religion and any state action tipping the scales towards favoring a religion constitutes establishment.⁴⁴ By displaying such a cornerstone of one religion on public property, Texas runs afoul of the constitutional prohibition.⁴⁵ Justice Souter's dissent⁴⁶ also took the position that the Establishment Clause requires neutrality and went a step further, opposing Justice Breyer's temporal consideration, saying a 40-year history of no challenges is irrelevant in making such a determination.⁴⁷ Justice Souter agreed, however, with Justice Breyer's position that context and judgment are critical.⁴⁸ Based on such judgment, Justice Souter found the Establishment Clause required removal of the display.⁴⁹

McCreary County v. ACLU presented a similar situation. Abridged versions of the Ten Commandments along with eight other documents in equal-sized frames were displayed inside a number of courtrooms in two Kentucky counties pursuant to county resolutions.⁵⁰ The American Civil Liberties Union filed suits to have the displays removed, and in response, the counties revised the displays twice more⁵¹ by removing, adding, and modifying the existing displays.⁵² The District Court supplemented an earlier injunction to include this new display in its earlier

⁴³ *Id.* at 704-05 (Breyer, J., concurring).

⁴⁴ *Id.* at 733-34 (Stevens, J., joined by Ginsburg, J., dissenting).

⁴⁵ *Id.* at 735.

⁴⁶ Justices Stevens and Ginsburg joined Justice Souter's dissent.

⁴⁷ *See Van Orden*, 545 U.S. at 747 (Souter, J., dissenting) (doubting "that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.").

⁴⁸ *Id.* at 745. Justice Souter also sharply rejected the notion that displaying the Ten Commandments in the classroom is constitutionally distinguishable from displaying it anywhere else on public property. *Id.* at 744-45.

⁴⁹ *Id.* at 746-47. Justice O'Connor dissented for the reasons set forth in her concurrence in *McCreary County*. *See infra* notes 63-65 and accompanying text discussing this opinion.

⁵⁰ *McCreary County v. ACLU*, 545 U.S. 844, 852 (2005).

⁵¹ The District Court found the first revision of the display unconstitutional and entered a preliminary injunction against the counties based on *Lemon*. *ACLU v. Pulaski County*, 96 F. Supp. 2d 691, 702-03 (E.D. Ky. 2000).

⁵² *McCreary County*, 545 U.S. at 850. The final display also included the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. *Id.* at 856. The documents were all of equal size, although the Ten Commandments were now set forth at greater length than before. *Id.* at 855.

prohibition.⁵³ A divided panel of the Court of Appeals affirmed, finding that because there was no connection between the purely religious and purely secular documents in the challenged displays, this showed a religious purpose.⁵⁴ The panel further found that the history of litigation in this particular case proved the counties had engaged in establishment in erecting the displays.⁵⁵

The Supreme Court granted certiorari,⁵⁶ and by a 5-4 vote, affirmed.⁵⁷ The Court, per Justice Souter, held that purpose is a sound basis for determining whether an Establishment Clause violation occurred and that the “evolution” of the challenged display can be taken into account when determining that purpose.⁵⁸ Purpose is a permissible factor to use because it is “a staple of statutory interpretation” and makes practical sense in Establishment Clause analysis, since “an understanding of official objective emerges from readily discoverable fact” that any reasonable, objective observer could perceive.⁵⁹ The history of a challenged display is helpful in determining purpose because it would be contrary to common sense to assume an objective observer does not take into account the history of a display when she observes it.⁶⁰ The majority declared neutrality the touchstone of the analysis⁶¹ and found that, based on the display’s purpose as inferred from its history, the display violated the Establishment Clause.⁶²

⁵³ *ACLU v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000); *ACLU v. McCreary County*, 145 F. Supp. 2d 845 (E.D. Ky. 2001).

⁵⁴ *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *reh’g denied*, 361 F.3d 928 (6th Cir. 2004). Both the District Court and the Court of Appeals found the Decalogue to be religious rather than secular. *McCreary County*, 145 F. Supp. 2d at 849; *McCreary County*, 354 F.3d at 451.

⁵⁵ *McCreary County*, 354 F.3d at 455-57.

⁵⁶ *McCreary County v. ACLU*, 543 U.S. 924 (2004).

⁵⁷ *McCreary County*, 545 U.S. at 858. The Justices split as they did in *Van Orden* with the exception of Justice Breyer.

⁵⁸ *Id.* at 850-51.

⁵⁹ *Id.* at 862.

⁶⁰ *Id.* at 866.

⁶¹ *Id.* at 860. The majority makes the claim that neutrality was intended by the Framers, but it is clear from the history that strict neutrality was not the original intent of the Framers. For an in-depth discussion of original intent, see *infra* notes 143-67 and accompanying text.

⁶² *McCreary County*, 545 U.S. at 881. The majority specifically refused to abandon *Lemon*’s purpose requirement altogether, and instead expanded it from “a fairly limited inquiry into a rigorous review of the full record.” *Id.* at 902 (Scalia, J., dissenting).

Justice O'Connor joined in the majority opinion, but wrote separately to reiterate the balancing test that she has used throughout her time on the Court.⁶³ In this case, the question for her became whether the government appeared to endorse religion according to the reasonable observer. The test, like so many of Justice O'Connor's throughout her 24-year tenure on the Court, was a fact-specific balancing act in which she landed on the side of establishment: "Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."⁶⁴ While Justice O'Connor reaches a conclusion based on a test that she has consistently applied, it has never commanded a majority of her brethren.⁶⁵

Justice Scalia dissented, rejecting neutrality as an Establishment Clause mandate.⁶⁶ Neutrality, as embodied in the *Lemon* test, he noted, has not been applied consistently, is sometimes ignored altogether if a majority of Justices desire to do so,⁶⁷ and "contradicts both historical fact and current practice."⁶⁸

According to Justice Scalia, the majority modified and significantly expanded *Lemon* in two ways. First, it modified *Lemon*'s first prong, secular legislative purpose, from actual purpose to the purpose apparent to an objective observer.⁶⁹ What makes this modification problematic is that now instead of giving the government its usual degree of deference,⁷⁰ courts

⁶³ *Id.* at 883-84 (O'Connor, J., concurring). See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 626-27 (1984) (O'Connor, J., concurring).

⁶⁴ *McCreary County*, 545 U.S. at 883-84 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J. concurring). For a discussion of Justice O'Connor's many balancing tests throughout her career on the Court, compare Richard Brust, *Balancing Act*, A.B.A. JOURNAL, Sept. 2005, at 35, 37 (discussing how O'Connor's style has often been to set forth her views in a concurring opinion "as a method of shaping the development of legal doctrine . . ."), with Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J. L. & PUB. POL'Y 107, 124-29 (2006) (O'Connor's test "is no test at all.").

⁶⁵ Brust, *id.*, at 37.

⁶⁶ *McCreary County*, 545 U.S. at 887-88 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., and in part by Kennedy, J., dissenting). This position is unacceptable, according to Justice Scalia, because neither the text of the Constitution, the history of the Republic, or even the current state of society, supports it. *Id.* at 889 (citing 148 Cong. Rec. S6226 (2002), an Act of Congress unanimously passed in the Senate which criticized a Court of Appeals ruling holding "under God" in the Pledge of Allegiance unconstitutional.).

⁶⁷ *Id.* at 890-91.

⁶⁸ *Id.* at 893.

⁶⁹ *Id.* at 900-01.

must discount a wholly secular effect based on the misperceptions of an imaginary observer.⁷¹ Second, the secular purpose requirement now required the secular purpose to be the predominant purpose.⁷² But *Lemon*, according to Justice Scalia, is more limited in its scope than the “rigorous review of the full record” now required under the majority’s opinion.⁷³

With a number of Justices questioning *Lemon* in general, and especially post-*Van Orden/McCreary County*, *Lemon* is even less reliable a test than before. The current need is clear: *Lemon* must be abandoned as an Establishment Clause test in order to achieve consistent and just results.

IV. *Van Orden* and *McCreary County* in the Lower Courts

Since the myriad of decisions were handed down in *Van Orden* and *McCreary County* two terms ago, lower courts are beginning to use the two cases as guidance. A number of recent cases show this has yielded strange results. One category of cases relies primarily on the *Van Orden* decision. Another group has used *McCreary County* as the decisional guidepost. A third category has also emerged: courts that are faced with a pair of cases that demand such in-depth factual analysis and conflicting rationales that existing records are insufficient to proceed with the important constitutional issue before them.

One recent case is *Card v. City of Everett*.⁷⁴ In December 1959, the Fraternal Order of Eagles donated a monument of the Ten Commandments to Everett, Washington “in an attempt to inspire young people and curb juvenile delinquency by providing children with a moral code of conduct”⁷⁵ In 1988 the monument was moved to accommodate a war memorial and now stands amongst trees, 43 feet to the right of the entrance to City Hall.⁷⁶ Fifteen years later, a city resident brought the first lawsuit challenging the constitutionality of the monument.⁷⁷

In determining whether the display violated the Establishment Clause,⁷⁸ Judge Lasnik found no violation, relying on *Van Orden*.⁷⁹ The choice to follow *Van Orden* rather than

⁷⁰ *Id.* at 903 n.9 (citing, *inter alia*, *Edwards v. Aguillard*, 482 U.S. 578, 586 (1983) (“[T]he Court is . . . deferential to a State’s articulation of a secular purpose, unless that purpose is insincere or a sham”) (internal quotation marks omitted)).

⁷¹ *McCreary County*, 545 U.S. at 900-01 (Scalia, J., dissenting).

⁷² *Id.* at 901.

⁷³ *Id.* at 902.

⁷⁴ 386 F. Supp. 2d 1171 (W.D. Wash. 2005).

⁷⁵ *Id.* at 1174.

⁷⁶ *Id.* at 1175.

⁷⁷ *Id.*

⁷⁸ The court also found no violation of Article I, § 11 the Washington Constitution. *Id.* at 1178.

McCreary County was based on the fact that the monument at issue in that case was “remarkably similar” to the one at issue in *Van Orden*.⁸⁰ Based on *Van Orden*, the District Court created its own three-prong test, which analyzed 1) the government’s purpose in accepting and displaying the monument, 2) the history and location of the monument, and 3) the community’s reaction to the display.⁸¹

Another Fraternal Order of Eagles Ten Commandments display was at issue in *ACLU Nebraska Foundation v. City of Plattsmouth*.⁸² There, the Ten Commandments were publicly displayed in a Plattsmouth, Nebraska park.⁸³ Relying on the *Van Orden* decision, the *en banc* Eighth Circuit Court of Appeals reversed the decisions of both the District Court⁸⁴ and a divided panel of the Court of Appeals⁸⁵ and found no Establishment Clause violation.⁸⁶ Writing for the majority, Judge Bowman determined that *Van Orden* governed since the monument at issue there and the one before the Court of Appeals were identical, both making “passive--and permissible--use of the text of the Ten Commandments to acknowledge the role of religion in our Nation’s heritage,” thus no constitutional violation occurred.⁸⁷

⁷⁹ *Id.* at 1173.

⁸⁰ *Card*, 386 F. Supp. 2d at 1173.

⁸¹ *Id.* at 1178. This case appears to be the first to put forth a “purpose-location-public reaction” test.

⁸² 419 F.3d 772 (8th Cir. 2005) (*en banc*). For a more detailed discussion of this case, see Keith T. Peters, *Small Town Establishment of Religion in ACLU of Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005); *Eagles Soaring in the Eighth Circuit*, 84 NEB. L. REV. 997 (2006).

⁸³ *Id.* at 773-74.

⁸⁴ *ACLU Nebraska Found. v. City of Plattsmouth*, 186 F. Supp. 2d 1024 (D. Neb. 2002).

⁸⁵ *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated and reh’g en banc granted*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004).

⁸⁶ *ACLU Nebraska Found.*, 419 F.3d at 775.

⁸⁷ *Id.* at 776-77.

While these two decisions, as well as others,⁸⁸ relied on *Van Orden* as the Establishment Clause guidepost, another class has instead used *McCreary County* as the guidepost. For example, in *ACLU v. Mercer County*,⁸⁹ the Sixth Circuit Court of Appeals found a display of the Ten Commandments inside a Kentucky county courthouse did not violate the Establishment Clause.⁹⁰ While it conceded the display at issue there was “identical in all material respects” to that of *McCreary County*,⁹¹ the court distinguished that case and found the display before it “lack[ed] a religious purpose and . . . d[id] not endorse religion.”⁹² Unlike the display in *McCreary County*, Judge Suhrheinrich found the “predominant purpose of the display . . . [to be] secular.”⁹³

A third category, those cases which had to be remanded because the Supreme Court demanded such an in-depth factual inquiry that records had to be further developed in light of the *Van Orden* and *McCreary County* decisions, is also beginning to surface.⁹⁴ While this third category illustrates a problem with the decisions at issue in this Note, such a problem is in no way unique to these cases or Establishment Clause jurisprudence. Supreme Court decisions often have to be run through lower courts a number of times before they are properly formulated

⁸⁸ At least two other instances of Ten Commandments displays donated by the Fraternal Order of Eagles have been found to not violate the Establishment Clause. *See Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 992-93 (D.N.D. 2005) (finding no Establishment Clause violation because neither the reasonable observer nor an observer with knowledge of the history of the public display of the Ten Commandments would consider the monument purely secular); *Russelburg v. Gibson County*, 2005 U.S. Dist. LEXIS 33856 (S.D. Ind. Sep. 7, 2005) (finding no Establishment Clause violation where Ten Commandments display on the grounds of the County courthouse lacked a history of displays and had no companion resolutions).

⁸⁹ 432 F.3d 624 (6th Cir. 2005), *reh'g denied*, 446 F.3d 651 (6th Cir. 2006).

⁹⁰ *Id.* at 640.

⁹¹ *Id.* at 631.

⁹² *Id.* at 626. For a criticism of this approach, see *ACLU v. Mercer County*, 446 F.3d 651, 651-55 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing *en banc*).

⁹³ *Id.* at 632. Other cases have also relied on *McCreary County* for the proposition that it reaffirmed the principle that neutrality is the touchstone of the Establishment Clause. *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005) (finding no merit in defense that allowing defendants to rent space in a New York City public middle school to plaintiffs, a church, for Sunday morning meetings, would create governmental establishment of plaintiffs' beliefs).

⁹⁴ *See, e.g., Selman v. Cobb County School Dist.*, 449 F.3d 1320, (11th Cir. 2006) (remanding case because recent Establishment Clause jurisprudence requires a fact-sensitive analysis and the record, in its present state, was insufficient to conduct such an analysis); *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (same).

for day-to-day use. For these reasons, discussion of this category is unhelpful to resolving the issues presented by this Note.⁹⁵

An analysis of the cases discussed above that have relied on *Van Orden*⁹⁶ and *McCreary County*⁹⁷ show that the Supreme Court has failed to provide adequate and consistent guidance for resolving issues under the Establishment Clause. The cases bring to the fore the practical dilemma of the inconsistency: by having two decisions in which eight Justices found the fact pattern to be the same but with two different results, the Supreme Court has created two lines of jurisprudence that will produce contrary results under the same constitutional provision.⁹⁸

For example, the court in *Card* relied exclusively on *Van Orden*. While it was proper to do so, nothing prevented the *Card* court from relying on *McCreary County* to guide its decision. Applying the facts of *Card* to the analysis of *McCreary County*, it is clear that under that decision, the monument would not pass constitutional muster and would have to be removed. Recall in *McCreary County*, the majority held a county's display of an abridged version of the Ten Commandments in the county courthouse violated the Establishment Clause due to their predominantly religious purpose.⁹⁹ The purpose, the majority stated, can be inferred from the developmental history of the display, which contained clearly religious intentions.¹⁰⁰ The Court decided if an objective observer feels alienated by a display with a religious purpose, the display violates the Establishment Clause.¹⁰¹

⁹⁵ This illustrates a problem in addition to the two decisions producing an unworkable result. It also increases court congestion. Because the guideposts are so unclear, remands are evident in order to clarify the records. While court congestion is not a problem even close in consequence to Establishment Clause violations, it is a valid consideration.

⁹⁶ See *supra* notes 74-81 and accompanying text (discussing *Card*); *supra* notes 82-87 and accompanying text (discussing *City of Plattsburgh*); *supra* note 88 (discussing *Twombly* and *Russelburg*).

⁹⁷ See *supra* notes 89-93 and accompanying text (discussing *Mercer County*).

⁹⁸ One court has sidestepped this problem by analyzing the facts before it under both cases, see *ACLU v. Bd. of Comm'rs*, 444 F. Supp. 2d 805 (N.D. Ohio 2006), as well as two other tests, *see id.* at 815 n.12. This should be viewed not as a solution to the dilemma presented in this Note, but rather a "safety in numbers" approach exemplifying the trouble ahead and the need for reform. Using four separate analyses does little to produce a predictable, workable result and sets a taxing precedent for future cases.

⁹⁹ *McCreary County v. ACLU*, 545 U.S. 844, 850-51 (2005).

¹⁰⁰ *Id.*

¹⁰¹ The troubling results of this novel approach were brought to light by the dissent. *See id.* at 901 (Scalia, J. dissenting) ("[T]he legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion." (emphasis in original)).

But nothing in the facts of *Card* suggest that the same objective observer would not conclude governmental establishment of the Ten Commandments display outside Everett, Washington's City Hall. While it is true the *Card* display was not as central to public traffic as the one at issue in *McCreary County*, it remained on the grounds of government property and was visible to the public. The purpose offered by the City of Everett, "to inspire young people and curb juvenile delinquency by providing children with a moral code of conduct,"¹⁰² is no more secular than the purpose espoused by McCreary County, "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of [their] system of law and government."¹⁰³ This latter purpose the Supreme Court found to be contrary to common sense in the eyes of the objective observer.¹⁰⁴ In fact, one might even argue the City of Everett's purpose is even *less* secular as it invokes inspiration and moral authority, which, in the case of the Ten Commandments, is nothing more than a governmental use of religion to achieve a religiously desirable objective.

Judge Lasnik made a reasonable choice to apply *Van Orden* and not *McCreary County* to the case before him because the facts were similar in certain respects. Specifically, the display was given by the same association with the same motive, which was to, "inspire young people and curb juvenile delinquency."¹⁰⁵ However, there appears to be nothing unreasonable about applying *McCreary County* either. The Supreme Court did not, in either case, suggest which of the two cases should be followed in what circumstances. It would have been perfectly reasonable, consistent with *McCreary County*, to order the city to remove their Ten Commandments display.

Similarly, in *City of Plattsmouth*, *McCreary County* could have been the Court of Appeals' guidepost.¹⁰⁶ There, the court found the Ten Commandments display constitutional based on *Van Orden*'s command that passive use of a religious display is constitutional.¹⁰⁷ However, in *McCreary County*, a majority of the Court relied on the fact that if the objective observer viewing the challenged display felt alienated by it, its constitutionality was unlikely.¹⁰⁸ The display in *City of Plattsmouth*, like those in *Card* and *Van Orden*, all potentially alienate someone who viewed the display.¹⁰⁹ The dissent noted:

¹⁰² *Card*, 386 F. Supp. 2d at 1174.

¹⁰³ *McCreary County*, 545 U.S. at 857.

¹⁰⁴ *Id.* at 866.

¹⁰⁵ *Card*, 386 F. Supp. 2d at 1174.

¹⁰⁶ *Cf. Peters*, *supra* note 82, at 1030-37 (stating the subjective nature of the purpose prong is an important factor in determining a government entity's intent).

¹⁰⁷ *City of Plattsmouth*, 419 F.3d at 776 (citing *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion)).

¹⁰⁸ *McCreary County*, 545 U.S. at 866 n.14.

¹⁰⁹ In fact, that is why plaintiffs brought suit in the first place, "claiming that the Ten Commandments monument interfered with Doe's use of Memorial Park and caused him to

The religious message announced by these depictions is undeniable, but their long history and proximity to secular institutions founded upon many of the same basic principles, places them in a historical context *not apparent to those viewing Plattsmouth's display*. Instead, the Plattsmouth monument stands alone with nothing to recommend it but its religious message.¹¹⁰

Similarly, another main point of the *McCreary County* decision, purpose,¹¹¹ dictates that the display in Plattsmouth could reasonably be held to violate the Establishment Clause. “[N]othing reflected in the context of [the city’s display suggests] a secular or historical message [was] to predominate” and without a broader context, it is quite clear the display advances the religious views of a particular faith and thus violates the Establishment Clause.¹¹²

Cases addressing Establishment Clause challenges that relied on *McCreary County* could have instead relied on *Van Orden*. For example, *Mercer County* is especially puzzling. There, the court relied on *McCreary County* on the basis that it was conceded by the parties that the display there was “identical in all material respects” to that of *McCreary County*.¹¹³ Because the

modify his travel routes and other behavior to avoid unwanted contact with the monument.” *City of Plattsmouth*, 419 F.3d at 774.

¹¹⁰ *Id.* at 780 (Bye, J., dissenting) (emphasis added). Another important distinguishing characteristic between the *City of Plattsmouth* display and the *Van Orden* display was that the latter included 17 other monuments and 21 historical markers. *Id.* See also *id.* (“Conversely, Plattsmouth's monument rests alone among the park's trees and recreational equipment in an area well-suited for reflection and meditation.” (citing *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (“The setting [of the Texas display] does not readily lend itself to meditation or any other religious activity))).

¹¹¹ *McCreary County*, 545 U.S. 850-51.

¹¹² *City of Plattsmouth*, 419 F.3d at 780 (Bye, J., dissenting). See also *id.* at 781:

Without the contextualizing presence of other messages or some indicia of historical significance, there is nothing to free the display from its singular purpose of advancing its religious message. Because no such broader application is apparent . . . the monument violates the Establishment Clause The monument does much more than acknowledge religion; it is a command from the Judeo-Christian God on how he requires his followers to live.

¹¹³ *ACLU v. Mercer County*, 432 F.3d 624, 626 (6th Cir. 2005).

display lacked the tarnished history of the display at issue in *McCreary County*, the Court of Appeals held the display constitutional.¹¹⁴

Recall that the approach called for by the *Van Orden* plurality required a look into the nature of the monument with an eye towards this nation's history to resolve the constitutional question.¹¹⁵ While the ultimate result reached in *Van Orden* is the same as in *Mercer County*, strict reliance on *Van Orden* would have produced the opposite result. The *Mercer County* display was erected to put forth a document that greatly influenced the formation, as well as the moral backdrop and foundation of the legal traditions, of the United States.¹¹⁶ The nature of the display combined with history supports the conclusion that the display is nothing more than a "passive use" of the Decalogue to present "several strands in the [county's] political and legal history."¹¹⁷

But what really happened in *Mercer County* is quite perplexing. Had the Court of Appeals truly relied on *McCreary County*, it would have had to find the display before it unconstitutional. It centered its focus on the fact that since the display before it lacked the long (and sometimes unconstitutional) history of the display in *McCreary County*, the results were readily distinguishable.¹¹⁸ But *McCreary County* did more than state that one unconstitutional result would forever taint subsequent displays of a similar nature.¹¹⁹ It also relied on neutrality¹²⁰ and purpose¹²¹ in holding *McCreary County*'s display unconstitutional.

The display at issue in *Mercer County*, like that of *McCreary County*, diverges from neutrality. This is supported by the concession that the displays are similar "in all material respects."¹²² It was more than the tarnished history of the *McCreary County* display that caused

¹¹⁴ *Id.* at 640.

¹¹⁵ *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion).

¹¹⁶ *See Mercer County*, 432 F.3d at 626-27. *See also id.* at 627 (putting forth the District Court's finding that the display was "part of the city's [sic] celebration of its cultural and historical roots and not a promotion of religious faith." (quoting *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 794 (E.D. Ky. 2002))).

¹¹⁷ *Van Orden*, 545 U.S. at 691 (plurality opinion).

¹¹⁸ *Mercer County*, 432 F.3d at 632.

¹¹⁹ The contrary also highlights a fundamental error in the *McCreary County* decision: errors in the first instance could forever taint future attempts and constitutional displays.

¹²⁰ *McCreary County*, 545 U.S. at 860. The language of the opinion suggests that this may be the most important aspect of the Court's holding. *See id.* at 881 ("This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.").

¹²¹ *Id.* at 850-51.

¹²² *Mercer County*, 432 F.3d at 631.

it to violate neutrality and *a fortiori* the Establishment Clause. While it is difficult to decipher why the *McCreary County* display violated the principle of neutrality, it seems likely that in addition to a short history of questionably secular purposes, the Court, stating that in Establishment Clause cases “detail is key,”¹²³ more than one factor contributed to its conclusion that the display violated neutrality.¹²⁴

Furthermore, the purpose of the *Mercer County* display, to recognize the historical significance of the Ten Commandments,¹²⁵ was the same as that put forth by the defendants in *McCreary County*.¹²⁶ But the *Mercer County* court failed to heed *McCreary County*’s statement that “[a]s an initial matter, it will be the rare case in which one of two identical displays violates the purpose prong.”¹²⁷ Perhaps this is the rare case Justice Souter was talking about. But the Court of Appeals makes no attempt to explain why this one is any different and deserves exceptional status from the scope of *McCreary County*’s disposition.

It should be noted that these distinctions have been drawn not to choose sides in this debate or chastise a specific court for following one case and not the other. The point is that either decision could have been relied upon. The problem is that when a court has two reasonable options, each one legally sound, there is a lack of consistency with litigants in similarly situated cases and the unfairness is self-evident. Equally self-evident is the need for a single, consistent, predictable guidepost.

Deducible from this brief analysis is the fact that there is a situation where lower courts are picking and choosing jurisprudence. This is not to imply that in all instances lower court judges are conducting results-oriented judicial decision-making¹²⁸ or are acting in bad faith. It

¹²³ *McCreary County*, 545 U.S. at 867-68 (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (“The question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears”)).

¹²⁴ Some other factors mentioned by the Court in *McCreary County* were absence of context “that might have indicated an object beyond the religious character of the text” and the presence of a pastor at the initial posting ceremony. *Id.* at 868.

¹²⁵ *Mercer County*, 432 F.3d at 627.

¹²⁶ See *McCreary County*, 545 U.S. at 875 n.18 (2005) (the counties’ stated purposes were “a desire to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government. . . . [;] to erect a display containing the Ten Commandments that is constitutional; . . . to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; . . . [to include the Ten Commandments] as part of the display for their significance in providing ‘the moral background of the Declaration of Independence and the foundation of our legal tradition.’” (internal quotation marks and citations omitted)).

¹²⁷ *Id.* at 866 n.14.

merely presents the problem that occurs when such a dichotomy exists in constitutional jurisprudence.

V. Where to Begin: Two Basic Principles

In order for consistent application of Establishment Clause cases, the Supreme Court must eliminate the dichotomy created by *Van Orden* and *McCreary County* and provide a test that can accomplish the purpose the Framers had in mind when they wrote the Clause. This is no simple task. The cases discussed above present complex problems with real life consequences. They also evidence a growing condition that is both unpredictable and inconsistent. This Note does not attempt to undertake the awesome task of putting forth a seemingly infallible test to resolve Establishment Clause cases such as the ones discussed above – that must wait for another day. The goal in this section is to merely put forth a pair of principles that, if used, will result in the formulation of a single and consistent Establishment Clause test.

A. Textualism.

The first principle is that the text of the Establishment Clause means what it says. This sounds simplistic, but in fact is less relied upon than one might imagine.¹²⁹ Recall the text of the Clause: “Congress shall make no law respecting an establishment of religion.”¹³⁰ Most of the words have plain meanings.¹³¹ The two words that give the reader greatest pause are “respecting” and “establishment.”

With textualism, defining the terms at issue is the key task. A dictionary provides a necessary starting point, but proves insufficient in isolation. The dictionary definition of “respect” is “to . . . hold in high regard; to consider or treat with deference or dutiful regard. . . .”¹³² “Establishment” was defined in the first American dictionary as “the act of establishing, founding, ratifying or ordaining, such as in [t]he episcopal form of religion, so called, in England

¹²⁸ Courts abhor such an approach when as a result the losing party is not dealt with fairly. *See Wilson v. Garcia*, 471 U.S. 261, 272 n.24 (1985).

¹²⁹ The starting point in interpretation should always be the text of the provision in the context of the terms around it. I call this textualism. *But see* Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 *FORDHAM L. REV.* 2393, 2393, 2406 (2001) (sharply criticizing textualism as “constitutional law’s Loch Ness Monster[.]” but using “textualism” to mean relying heavily on “grammatical rules”).

¹³⁰ U.S. CONST. amend. I.

¹³¹ “Congress shall make no law” is generally understood today to mean not only federal legislation, which is clearly prohibited, but also state laws, see *supra* note 9 and accompanying text, as well as any other governmental action. “Religion” encompasses religions as well as non-religion. *See Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“Government in our democracy . . . may not be hostile to any religion or to the advocacy of noreligion [sic] The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

¹³² WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1221 (4th ed. 1999).

[sic].”¹³³ An establishment of religion is therefore a settled or permanently ordained church or faith. The government “respects” said establishment only if it treats it with deference or holds it in high regard.¹³⁴ From this it is clear that if the federal government were to create a national church, the Establishment Clause would be violated.¹³⁵

But where is the line? What can the government do short of establishment, if anything? Is there an infinite high, impenetrable wall as Thomas Jefferson suggested,¹³⁶ in which religion is kept completely away from government?¹³⁷ Or can a government act in some way with consideration for religion and avoid a constitutional violation?¹³⁸

¹³³ *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (quoting 1 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (quotation marks omitted)).

¹³⁴ While definitions of respect include other phrases such as to “show honor or esteem . . . or . . . consideration for,” such a definition is incompatible with the First Amendment’s other tenet, that “Congress shall make no law . . . prohibiting the free exercise [of religion].” To say the Establishment Clause is violated when government does not show consideration for a particular religion creates an insoluble paradox. This shows that context goes hand-in-hand with textualism and the two are not separate doctrines. *Accord McGreal, supra* note 129, at 2437.

¹³⁵ This was the primary concern of the Framers. *See Sch. Dist. v. Schempp*, 374 U.S. 203, 309 (Stewart, J., dissenting). Furthermore, the opposite also would clearly violate the First Amendment as well – when the government prohibits all religion, the Free Exercise Clause would be violated. Discussion of the commingling of the two Clauses is beyond the scope of this Note. For a wide-range of issues and positions, see *Symposium: The Tension between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO ST. L. J. 289, 289-499 (1986) and NOWAK & ROTUNDA, *supra* note 13, at § 17.1.

¹³⁶ This oft-quoted provision comes from a letter Jefferson wrote to the Danbury Baptist Association in 1802. *See Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1879). Since this language is not found in the text of the Constitution, its usefulness in the Establishment Clause debate has rightly been debated. *Compare* LEO PFEFFER, CHURCH, STATE, AND FREEDOM 133 (1989) *with Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400-01 (1985) (Rehnquist, J., dissenting). *See also* DAVIS, *supra* note 9, at 95-97 (collecting then-Justice Rehnquist’s discontent for the metaphor).

¹³⁷ This broad position on the Clause is commonly referred to as a “separationist” position, see DEREK DAVIS, RELIGION AND THE CONTINENTAL CONGRESS: 1774-1789: CONTRIBUTIONS TO ORIGINAL INTENT 10 (2000), and is often used to support the position of neutrality. *See Wallace*, 472 U.S. at 93 (Rehnquist, J., dissenting).

¹³⁸ This is commonly referred to as an “accommodationist” position. *See* DAVIS, *supra* note 137, at 11. *See generally* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

In a system of jurisprudence that relies on *stare decisis*, we must look beyond dictionaries new and old and consider words as they have been used and defined by our courts. “Respecting” has been “most frequently interpreted” as preventing government “not only from formally establishing a religion, but also from enacting any law that might advance *that end*.”¹³⁹ Under this view, respecting is a step towards establishment: all acts of establishments respect, but not all acts of respect establish.

As for “establishment,” that is where the true point of debate lies. Neutralists, for example, argue establishment is a result: when the government violates neutrality, religion has been “established” and the Constitution has been violated.¹⁴⁰ Others have said establishment requires some element of coercion¹⁴¹ or is strictly limited to establishing a national church.¹⁴²

The difference of opinions of well-respected jurists and legal theorists highlights the dilemma of textualism: sources. Different interpretations lay in *how* one gains their definitions, whether it is through historical, prudential, structural, or doctrinal methods. It is this author’s position that a historical approach is most useful.

B. Original Intent

The second principle necessary in this constitutional analysis is the intent of the Framers, or “original intent.”¹⁴³ This approach, perhaps more than any other method of constitutional interpretation, is hotly debated amongst bar, bench, and legal academia. There is considerable debate as to whether any consideration should be given to original intent. Some have said it is

¹³⁹ Note, *supra* note 9, at 1707 & n.48 (emphasis added) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“A given law might not *establish* a state religion but might nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such an establishment”(emphasis in original)).

¹⁴⁰ For a review of neutrality, see *supra* text accompanying note 44.

¹⁴¹ See *infra* notes 168-76 and accompanying text.

¹⁴² See *infra* note 149.

¹⁴³ Original intent, in a very oversimplified way, means nothing more than what was the intent of the authors (or Framers) of the text at issue. For example, many of those who argue with the weapon of original intent often cite the acts of the First Congress or early Presidents to support their views of the Constitution’s original intent.

the only way to truly understand the text of the Constitution.¹⁴⁴ Others have been so critical of the doctrine that they have referred to it as nothing more than “arrogance cloaked in humility.”¹⁴⁵

But its proponents present a stronger case, one supported by both history and logic. At the time of the Constitution’s drafting, debate was rampant and the authors chose their words carefully in order to be extremely clear – “the language they chose meant something.”¹⁴⁶ Only when the language of the Constitution is unclear, as it is here, does a need arise for other modes of interpretation. The only way to truly know what the Constitution says is to try and analyze what the authors meant when they drafted it. As Justice Story said over a century ago: “Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.”¹⁴⁷ Historically, original intent makes sense.

Logic also supports original intent. For example, Derek Davis argues:

In light of the historic and contemporary appeals from both sides for the necessity of a constitutional jurisprudence that upholds, to one degree or another, the intentions of the framers, it is altogether proper to consider the intentions of the framers. Moreover, the Supreme Court has historically considered the intentions of the founding fathers, when discoverable, to be important, if not binding, in constitutional interpretation. . . . The Constitution is the national charter of the United States. It is the binding framework of law for the nation; all other laws must be measured by it; it is the starting place for a people committed to the rule of law in a civilized society. Therefore, its original meanings, if ascertainable, necessarily govern its interpreters.¹⁴⁸

¹⁴⁴ See, e.g., *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) (“If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . .”). Speaking specifically about the Establishment Clause, then-Justice Rehnquist said, “The true meaning of the Establishment Clause can *only* be seen in its history.” *Id.* at 113 (emphasis added).

¹⁴⁵ See, e.g., William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986). Justice Brennan seemed most threatened by original intent because it was difficult to ascertain and would often cut in opposition to a rewriting of constitutional rights, or what he called “social progress.” *Id.* at 436.

¹⁴⁶ Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986).

¹⁴⁷ *Id.* (quoting JOSEPH STORY, COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 285-86 (1883)).

¹⁴⁸ DAVIS, *supra* note 9, at 42-43.

Davis' point makes logical sense: when we want to know if a federal statute has been drafted properly, when we want to know if a criminal defendant has been dealt with fairly, and when we want to know what the government generally can and cannot do, we look to our starting point, which is the text of the Constitution. To hold the view that what the authors of the Constitution meant when they wrote it is without value is to turn the document into nothing more than a fad or fashion, oft-changing and seemingly worthless.

Moving away from the theory of original intent generally, and looking at the Establishment Clause specifically, some constitutional historians contend what the Framers probably meant by the Establishment Clause was that the government should not “promote, sponsor, or subsidize religion.”¹⁴⁹ Others have said the ban is not as strict and only prohibits preferences among religious sects,¹⁵⁰ some going so far as to say the doctrine of neutrality is totally contrary to the Framers' intent.¹⁵¹ Some have taken the middle ground, saying the varying historical evidence fails to produce a single purpose of the Establishment Clause.¹⁵² Since this Note argues that original intent is an important factor to consider in analyzing the Establishment Clause and determining a consistent, reliable test, it is essential we now turn to the original intent of the Establishment Clause.

Strict separation, at least at the federal level, was “virtually nonexistent” at the time of the confederation.¹⁵³ Only four states supported such a position, therefore its influence on the Continental Congress was minimal.¹⁵⁴ Legislative prayer existed at this time and was seen as an acceptable way of “acknowledging the transcendent dimension of nationhood.”¹⁵⁵ This practice,

¹⁴⁹ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 121 (1986). *See also Schempp*, 374 U.S. at 309-10 (Stewart, J., dissenting) (discussing the history of the Clause Justice Stewart stated, “[t]he events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”).

¹⁵⁰ John S. Baker, Jr., *The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 41-53 (Eugene W. Hickock, ed. 1991).

¹⁵¹ *See Meese, supra* note 146, at 464 (“[To argue], as is popular today, that the [First] amendment demands a strict neutrality between religion and non-religion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally.”).

¹⁵² *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3 (2nd ed. 1988) (“historical record is ambiguous”); NOWAK & ROTUNDA, *supra* note 13, at § 17.2 (“no clear history”).

¹⁵³ DAVIS, *supra* note 137, at 199.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 200.

along with traditions such as military chaplains and the prohibition of religious tests for public office, have survived modern challenges, often on the basis of their historical roots.¹⁵⁶ One state even had an established church as late as the mid-19th century.¹⁵⁷

Of course there are contrary arguments. One could point to the lack of religious discussion in the main body of the Constitution. However, religion, being as sensitive an issue then as it is today, was probably kept out of the main document initially to avoid threatening the document's ratification.¹⁵⁸ Others have argued that the Continental Congress' unwillingness to publish an American Bible provides some support.¹⁵⁹ However, these are, as Davis suggests, examples of Congress avoiding the question at the federal level, separating religion from government, but not in the way separationists suggest.¹⁶⁰ What the record reveals is that the policy of the Continental Congress was to shift the responsibility to other governments rather than the national one.¹⁶¹

While there are many, one case study shows that the Framers were accommodationists rather than separationists. In 1787, Congress enacted the Northwest Ordinance.¹⁶² Relevant to this Note is the article dealing with religion, Article Three, which stated: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged"¹⁶³ This provision, while short of the language wanted by some Congressmen which would have set aside land specifically for a religious institution, demonstrated that religion was to be an essential component of education.¹⁶⁴

¹⁵⁶ *Id.* at 200-01.

¹⁵⁷ *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (stating Massachusetts had "an established church.").

¹⁵⁸ DAVIS, *supra* note 137, at 203. The concern was to avoid usurping the states' long-held jurisdiction over religion and anything that would even slightly appear to threaten such sovereignty "would spell certain defeat." *Id.* at 204.

¹⁵⁹ *Id.* at 202. The ground given by the Continental Congress was that such a task was religious, rather than governmental. However, Davis suggests that financial concerns were likely the true motivating factor for the failure to go forward with the project. *Id.*

¹⁶⁰ DAVIS, *supra* note 137, at 203.

¹⁶¹ *Id.*

¹⁶² *Id.* at 168.

¹⁶³ *Id.* at 169.

¹⁶⁴ *Id.* at 202, 169.

It is abundantly clear under a strict separationist philosophy that the ordinance is unconstitutional.¹⁶⁵ However, after the Constitution was ratified, Congress reenacted the ordinance, including Article Three.¹⁶⁶ It is highly unlikely the same Congress that approved the Constitution, including the First Amendment, would have re-enacted legislation that so clearly violates the newly enacted charter.¹⁶⁷

On the current Court, only Justice Thomas has openly embraced this “coercive” view.¹⁶⁸ According to Justice Thomas, the “inconsistent guideposts” that the Court has used to address Establishment Clause challenges renders the Clause “impenetrable and incapable of consistent application.”¹⁶⁹ The correct, and a “far simpler” approach, would be to follow the original intent.¹⁷⁰ He argues that following original intent requires what can be called a “coercion” test.¹⁷¹ Coercion at the time of the founding required government action – “financial support by force of law and threat of penalty,” mandatory observance, and mandatory tax payments

¹⁶⁵ *Id.* at 169.

¹⁶⁶ DAVIS, *supra* note 137, at 169. Many more recent examples show that separationism, as an Establishment Clause philosophy, is neither “perfect nor absolute.” DAVIS, *supra* note 9, at 132. Sunday closings, conscientious objectors, and religious tax exemptions were all upheld by the Supreme Court against Establishment Clause challenges during its liberal heyday. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law); *United States v. Seeger*, 380 U.S. 163 (1965) (conscientious objectors); *Walz v. Tax Comm’n of New York*, 397 U.S. 664 (1970) (religious tax exemptions). These were all decided under the guise of avoiding hostility towards religion, but that is exactly what separationists bringing such challenges desire – if not in intention, then in desired effect.

¹⁶⁷ DAVIS, *supra* note 137, at 169. *See also* *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting).

¹⁶⁸ *Van Orden*, 545 U.S. at 692-98 (Thomas, J., concurring). Since the decisions of *Van Orden* and *McCreary County*, the Court has seen significant personnel changes. No indication exists yet as to whether they will follow Justice Thomas’ approach. *See* Christopher B. Harwood, *Evaluating the Supreme Court’s Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry*; *McCreary County v. ACLU*, 71 MO. L. REV. 317, 348-50 (2006) (arguing that President Bush’s recent appointments of Chief Justice John Roberts and Justice Samuel Alito will shift the Court towards an accommodationist approach to Establishment Clause cases).

¹⁶⁹ *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). *See also id.* (“All told, this Court’s jurisprudence leaves courts, governments, and believers and non-believers alike confused – an observation that is hardly new.”); *id.* at 697 (“[T]his Court’s effort to assess religious meaning is fraught with futility . . . the very flexibility of this Court’s Establishment Clause precedent leaves it incapable of consistent application.”).

¹⁷⁰ *Id.* at 693.

¹⁷¹ *Id.*

supporting clergy¹⁷² all serve as examples. This standard would prohibit very little: most state actions adjudicated to have violated the Establishment Clause would pass constitutional muster under a coercive standard.¹⁷³ Despite its strictness, the test is consistent with original intent and thus should be followed. “[M]ost important[ly],” as Justice Thomas concluded, “precedent would be capable of consistent and coherent application.”¹⁷⁴

While the coercive position is not without its critics,¹⁷⁵ if one wishes to follow the principles of textualism and original intent in analyzing an Establishment Clause challenge and maintain a consistent standard, the coercive approach is best for a number of reasons. First, from a textualist standpoint, under a coercive test, “coercive” is a word closer in meaning to “establishment” than the less-strict “neutrality” principle. Webster’s defines “coerce,” when used as a verb, as “to force or compel, as by threats, to do something . . . to bring about by using force.”¹⁷⁶ While coercion requires “force,” force need not mean violence against a person or property. Force can simply be the force of law. Thus, a law establishing a national church or taxation for religious causes coerces American citizens into worshipping a certain sect, therefore violates the Establishment Clause. But something less, like a plaque quoting the Ten Commandments, either inside or outside of a courthouse, coerces no one and therefore establishes nothing.

Second, from an originalist perspective, the coercive approach would permit state acknowledgements of religion – something the Founding Fathers practiced consistently and often.¹⁷⁷ With coercion as the touchstone, the current Court, and future ones as well, could stand

¹⁷² *Id.* (emphasis in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (Scalia, J., dissenting) and *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring)).

¹⁷³ *See id.* (citing a number of absurd examples of successful challenges, including *Granzieir v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff’d on other grounds*, 173 F.3d 568 (6th Cir. 1999) (posting of a sign by the courthouse saying the courthouse was closed for Good Friday); *Buono v. Norton*, 212 F. Supp. 2d 1202 (N.D. Cal. 2002) (a cross in the middle of the Mohave Desert honoring a World War I veteran).

¹⁷⁴ *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

¹⁷⁵ Some have said that a coercive standard like the one advocated by Justice Thomas would render the Establishment Clause redundant because of the Free Exercise Clause. *See Lee*, 505 U.S. at 621 (Souter, J., concurring); Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 36 (1992) (suggesting that the Free Exercise Clause prohibits coercion and therefore the Establishment Clause must do something else or be rendered redundant). One problem with Justice Thomas’ position is that he fails to present a situation where an Establishment Clause challenge would be successful. This problem suggests itself in the strict nature of the test.

¹⁷⁶ WEBSTER’S NEW WORLD COLLEGE DICTIONARY, *supra* note 132, at 283.

¹⁷⁷ *See McCreary County*, 545 U.S. at 886-90 (Scalia, J., dissenting) (citing examples of Founding Fathers’ practices acknowledging religion).

by a single test, deeply-rooted in this Nation's history, and avoid charges of incoherence, of acting too liberally or too conservatively.¹⁷⁸ Like the Constitution, a test that remains solid and unchanged stands the test of time. Inconsistent guideposts leave a traveler lost. But a single, predictable test would allow government actors to conform their conduct to the Constitution.

It is overwhelmingly clear that neither the display on the grounds of the county courthouse in Texas nor a plaque displayed inside a courthouse in McCreary County, Kentucky coerce passersby to the point of establishment. The displays are passive acknowledgements of religion, lacking the coercive elements discussed above, such as force, of either law or otherwise. As such, under the coercive standard that ought to be adopted, their constitutionality is undoubted.

VI. Conclusion

The purpose of this Note has not been to propose a new test, but merely a pair of principles that will help bring us towards more consistent guideposts for Establishment Clause cases. When the Supreme Court decided *Van Orden* and *McCreary County*, they failed to provide a consistent, workable test that could be used in Establishment Clause cases in the future. Writing a myriad of opinions setting forth a number of tests including neutrality, coerciveness, and even a nature-historical approach, the Court highlighted the need for a consistent guidepost in this area of jurisprudence – a need as old as the Clause itself.

Settling on a single test consistent with the text of the First Amendment and the original intent of the Framers of the Constitution would provide the deeply-rooted basis needed for a test of a document that has and will continue to last through the ages. When the Constitution shifts with the ideologies of its members, its permanence is threatened and “a constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense of the term.”¹⁷⁹ Only a strict reading of the text of the Establishment Clause, with ambiguities decided in accordance with the views of the writers of the document itself, can continue to survive as the pride of our Nation and our shining light in the darkest of times.

¹⁷⁸ *Cf.* Meese, *supra* note 146, at 464.

¹⁷⁹ *Id.* at 465.