It's Not Just the Test That's a *Lemon*, It's How Some Judges Apply It

By Robert D. Alt and Larry J. Obhof

On March 2, 2005, the United States Supreme Court heard two cases involving public displays of the Ten Commandments. These cases, appeals from *ACLU of Kentucky* v. *McCreary County*[1] and *Van Orden* v. *Perry*,[2] were the first time that the Supreme Court has specifically considered displays of the Ten Commandments on public property since 1980, and the first time that the Court has ever heard oral arguments on the issue. The Court will also address the continued vitality of the much-maligned *Lemon* test,[3] the frequently criticized and sometimes ignored framework that courts generally follow when determining whether governmental conduct is permissible under the Establishment Clause. Because the Court will consider not only whether the disputed displays are constitutional, but also the appropriateness of the analysis used in answering such questions, *McCreary County* and *Van Orden* could prove to be two of the most important Establishment Clause cases of the past 30 years.

The so-called "*Lemon* test" requires a court to determine that (1) a challenged government action has a secular purpose; (2) the action's primary effect neither advances nor inhibits religion; and (3) the action does not foster an excessive entanglement with religion.[4] A governmental action violates the Establishment Clause if it fails to satisfy any of these prongs.[5] Some have lamented that the three-prong *Lemon* analysis is ambiguous and subjective, and that the lower courts have consequently given the test "widely different and seemingly contradictory interpretations."[6] Nowhere is this better illustrated than the two cases currently before the Court.

In *Van Orden* v. *Perry*, the Fifth Circuit permitted the public display of a six-foot-tall granite monument displaying the Ten Commandments. The Fraternal Order of the Eagles donated the monument to the state. The Fifth Circuit accepted the state's asserted secular purpose of honoring the contributions of the Eagles,[7] and it found that a reasonable observer would not see the display as a state endorsement of the Commandments' religious message.[8] By contrast, in *McCreary County*, the Sixth Circuit purported to apply the same constitutional analysis, but it forbade the inclusion of the Ten Commandments—found on a single sheet of normal-sized paper—as part of a larger public display about the origins of American law and government.

What explains this rift? Some lay blame directly on the *Lemon* test itself. The petitioners in *McCreary County* have explicitly asked the Supreme Court to do away with *Lemon*'s "purpose prong," which they argue "focuses too much on subjective motives when the focus should be on the objective effects of an activity."[9] More than a dozen states have argued as amici that the Supreme Court should analyze government conduct under the "coercion test" first articulated by Justice Kennedy in his concurrence in *County of Allegheny v. ACLU*.[10] This view seems to have also found favor with Justice Thomas, who just last year stated that a policy is constitutionally permissible where "the State has not created or maintained any religious establishment" and the policy "does not expose anyone to the legal coercion associated with an established religion."[11]

While we agree that a shift away from the subjective factors would be more consistent with constitutional principles, we are reluctant to put the blame solely on *Lemon*. Why are the decisions in *Van Orden* and *McCreary County* so different? The subjectivity of the purpose prong is not the sole or even the primary problem. There is little doubt that the historical displays in *McCreary County* pass muster under the *Lemon* test, if that test is properly applied. Rather, the displays in McCreary and Pulaski Counties were found unconstitutional because the Sixth Circuit panel ignored direct, on-point precedent of the Supreme Court, and either misstated or misapplied numerous legal rules throughout its analysis.

Facts

In 1999, officials in McCreary County and Pulaski County, Kentucky posted framed copies of the Ten Commandments in their respective courthouses. The ACLU and several individuals sued, alleging that the displays violated the Establishment Clause of the First Amendment. The counties thereafter erected new displays including secular historical and legal documents, some of which were excerpted and included references to God or the Bible.[12] The district court enjoined the second set of displays and ordered that no similar displays be erected.[13]

County officials later erected historical displays in each courthouse, consisting of a series of foundational historical documents and patriotic texts and symbols that had an impact on the development of our system of law and government. The displays were prominently identified as "The Foundations of American Law and Government Display," and were accompanied by an explanatory sign informing viewers that the displays presented "documents that played a significant role in the foundation of our system of law and government."[14] Among the documents and symbols included were (1) the Star Spangled Banner; (2) the Declaration of Independence; (3) the Mayflower Compact; (4) the Bill of Rights; (5) the Magna Carta; (6) the National Motto; (7) the Preamble to the Kentucky Constitution; (8) the Ten Commandments; and (9) Lady Justice.[15]

Each courthouse contained numerous other displays further demonstrating the counties' commitment to illustrating their historical heritage. In the McCreary County courthouse, there were *hundreds* of historical documents displayed throughout the building, including 58 in the judge's office, 41 in the waiting room, 124 near the side entrance to the courthouse, 33 in the fiscal courthouse, and 28 in a conference

room.[16] The Pulaski County courthouse posted similar displays throughout the building.[17]

Upon plaintiffs' motion for a supplemental preliminary injunction, the district court held that the historical displays lacked a secular purpose and had the effect of endorsing religion.[18] The court also offered the disturbing conclusion that "educat[ing] 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" was *not* a legitimate secular purpose.[19] Although the court had enjoined prior displays because the religious content was not sufficiently diluted by a larger secular display, the court now held that the new displays were unconstitutional because the use of secular documents accentuated the religious nature of the Ten Commandments.[20]

On appeal, the Sixth Circuit affirmed the district court on the basis *Lemon*'s purpose prong. Judge Eric Clay, writing only for himself, suggested that the courthouse displays would violate the second prong as well.[21] Both conclusions were erroneous, and both were based on improper applications of governing law. Due to space limitations, we will focus on the majority's analysis under the purpose prong, which was based almost entirely on misstatements or misapplications of controlling Supreme Court precedent.[22]

The Sixth Circuit applied an erroneous legal standard in its analysis of the defendants' purpose for posting the courthouse displays.

Government action will be invalidated under *Lemon*'s purpose prong only if it is entirely motivated by a religious purpose. In *Lynch v. Donnelly*, the Supreme Court held that the purpose prong is satisfied so long as the government can articulate "a" secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly by religious considerations*."[23] Lest there be any doubt about this rule, the Supreme Court reiterated in *Wallace v. Jaffree* that an action violates the purpose prong only where the action is "*entirely* motivated by a purpose to advance religion,"[24] and stated in *Bowen v. Kendrick* that a statute or government action fails "only if it is motivated *wholly* by an impermissible purpose."[25]

The *McCreary County* defendants steadfastly maintained that their purpose was to display documents that affected the development of American law and government. Consistent with that secular purpose, the displays exhibited foundational historical documents and patriotic texts and symbols; offered an explanatory theme, "The Foundations of American Law and Government Display;" and plainly stated that the displays "contain[] documents that played a significant role in the foundation of our system of law and government."[26] The displays also included an explanation that firmly placed the Ten Commandments in the context of secular traditions:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.[27]

Even the Sixth Circuit itself acknowledged that "the displays did not provide undue physical emphasis to the Ten Commandments. . . . [T]he Ten Commandments appeared on a single piece of paper, the same size as that containing the secular documents."[28]

In the district court, the defendants articulated the animating reasons for the displays and for the inclusion of the Ten Commandments. The defendants explained that the displays were intended, among other things, to illustrate "that the Ten Commandments were part of the foundation of American Law and Government;" to provide the "moral background of the Declaration of Independence and the foundation of our legal tradition;" and 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."[29] These reasons meet the threshold requirement of articulating *some* secular purpose. As Justice Scalia has noted, the Supreme Court almost invariably discovers a secular purpose for actions challenged under the Establishment Clause, and typically devotes only a few sentences to the issue.[30]

The Sixth Circuit was unable to find that the displays were motivated wholly by religious considerations, and instead simply ignored *Lynch*, *Wallace*, and *Bowen*, and applied its own erroneous "predominate purpose" standard. According to the panel, "[t]o satisfy this prong of the *Lemon* test, plaintiffs must show that defendants' *predominate purpose* for the displays was religious."[31] The majority later added that "the district court correctly concluded that Defendants' *primary purpose* was religious."[32] This "predominate purpose" or "primary purpose" standard is not merely incorrect—it directly conflicts with the plain holdings of the Supreme Court.

In her concurrence to *Lynch v. Donnelly*, Justice O'Connor stated that the secular purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes."[33] The Sixth Circuit has repeatedly relied on Justice O'Connor's statement for the erroneous proposition that defendants' actions violate the Establishment Clause where their primary purpose is non-secular.[34] That standard is *not* the standard articulated by the majority in *Lynch*. It is directly at odds with the majority's holding that governmental action is invalid only where it is motivated "*wholly by religious considerations*."[35] It is also at odds with the Supreme Court's restatements of the *Lynch* standard in *Wallace v. Jaffree* and *Bowen v. Kendrick*.[36]

The standard followed by the Sixth Circuit in *McCreary County* (and, prior to that, in *Adland v. Russ*) is simply an incorrect statement of the law which disregards not only *Lynch* but also the Sixth Circuit's own binding case law.[37] Importantly, it is also not the standard enunciated by Justice O'Connor, who wrote in *Lynch* that the proper inquiry "is whether the government intends to convey a message of endorsement or disapproval of religion."[38] It is one thing to find, as the Sixth Circuit did in *McCreary*, that the government's primary purpose was religious.[39] It is something altogether different to find that defendants' actions were "dominated by religious purposes," or were intended to endorse religion. The Supreme Court has spoken clearly on this issue several times, and it is not the prerogative of lower courts to ignore or chip away at the proper analysis by applying selective readings of only those precedents with which they agree.[40]

The courthouse displays had a secular purpose.

The *McCreary County* defendants articulated a legitimate secular purpose for their actions: displaying documents and symbols that had an impact on the development of our system of law and government. The validity of displaying the Ten Commandments in this manner flows naturally from the Supreme Court's decision in *Lynch v. Donnelly.* In *Lynch*, the Court recognized a valid secular purpose for including a nativity scene—an indisputably religious symbol—in a holiday display with Santa's house and sleigh, reindeer, candy-striped poles, and the like. The *Lynch* Court did not evaluate the nativity scene in isolation, but rather considered the display as a whole. When "viewed in the proper context," the inclusion of a religious symbol with secular symbols did not evince an intent to promote religion.[41] Importantly, the Supreme Court specifically addressed the religious origins of the holiday:

> The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. . . . The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.[42]

Like the nativity scene in *Lynch*, the Ten Commandments appeared in the context of broader displays that also included secular documents and symbols. The displays reflected the historical origins of the law in a clear, unmistakable manner. If the Constitution permits the display of a crèche to celebrate and reflect the religious origins of Christmas, then surely the Constitution permits the display of the Ten Commandments to celebrate and reflect the origins of our secular law.

The Sixth Circuit incorrectly applied controlling precedent from the Supreme Court.

The government's assertion of a legitimate secular purpose is entitled to deference, unless the proffered purpose is merely a "sham."[43] The Sixth Circuit and district court each found that the *McCreary County* defendants' stated purpose in posting the displays was a "sham," and concluded that the defendants included the Ten Commandments for predominantly religious reasons.[44] The Sixth Circuit rested its holding on a series of rather glaring misapplications of Supreme Court precedents.

First, the Sixth Circuit gave insufficient weight to the full context of the displays. The court barely mentioned the fact that approximately 90% of each display was purely secular, or that the title of the displays, "The Foundations of American Law and Government Display," evinced a facially secular purpose. The court also gave little weight to the explanatory signs that accompanied the displays, which specifically noted the permissible secular purpose of presenting documents that affected the development of American law and government. Rather than focusing on the displays as a whole, the Sixth Circuit "plainly erred by focusing almost exclusively" on the Ten Commandments.[45]

Second, although the Sixth Circuit noted that the displays did not unduly emphasize the Ten Commandments, the court nevertheless rejected the defendants' proffered secular purpose because of the "blatantly religious" content of the displays.[46] In its attempt to distinguish *Lynch*, the Sixth Circuit seemingly held that the Ten Commandments are different in kind from a nativity scene, at least for constitutional purposes: "The displays do not present a 'passive symbol' of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins."[47] The court misstated the Supreme Court's holding in *Lynch*. The Supreme Court did not approve the display of a nativity scene *despite* the "holiday's religious origins," as the Sixth Circuit suggested.[48] To the contrary, the *Lynch* Court squarely held that acknowledging the origins of the holiday was a valid secular purpose, even if those origins were religious. The Supreme Court upheld the display of the crèche in *Lynch* specifically because "celebrat[ing] the Holiday and . . . *depict[ing] the origins of that Holiday* . . . are legitimate secular purposes."[49] The Sixth Circuit's opinion stands *Lynch* on its head and cites its holding for a nearly opposite proposition, as it must in order to reach the incredible conclusion that depicting the religious origins of the Christmas holiday is a permissible secular purpose, but celebrating the origins and development of American secular law is not.

The *McCreary County* majority also incorrectly applied *Lynch* to the facts of the case. The crèche upheld in *Lynch*—a nativity scene including the figures of Jesus, Mary, Joseph, angels, shepherds, and kings—was obviously neither more passive nor more secular than the Ten Commandments. Unlike the Ten Commandments, the crèche is a purely religious symbol.[50] The *Lynch* Court upheld the government's display of the crèche, even though its sectarian significance was *not* negated by the setting, because the defendant had served a legitimate secular purpose by "tak[ing] note of a significant historical religious event long celebrated in the Western World."[51] If anything, the principle in *Lynch* is

even more compelling when applied to the facts of *McCreary County*. The Ten Commandments have undeniably religious origins but are *not* purely religious. To the contrary, it is well recognized by jurists and scholars alike that the Commandments have played a significant role in the development of secular law and institutions.[52] Whether or not the Decalogue is "the most influential law code in history,"[53] it is certainly not *more* sectarian than the figures of Mary, Joseph, Jesus, and angels in the nativity display permitted in *Lynch*, or the 18-foot Chanukah menorah upheld in *County of Allegheny v. ACLU*.[54]

The Sixth Circuit also gave excessive weight to selected quotations from the Supreme Court's decision in *Stone v. Graham*, which rejected a Kentucky statute requiring the posting of the Ten Commandments, *standing alone*, in all public schoolrooms.[55] The circuit court relied on *Stone* for the proposition that the Ten Commandments, unlike the nativity scene upheld in *Lynch*, are an "active symbol of religion" because several of the Commandments allegedly concern only the religious duties of believers.[56] In particular, the court referenced the Commandments mandating "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."[57]

Nothing in *Stone* requires the omission of the Ten Commandments from a historical display. In fact, the *Stone* Court expressly noted that the Ten Commandments could be "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization . . . or the like."[58] That observation readily applies to the displays at issue in *McCreary County*. The Ten Commandments did not appear alone, but rather were integrated with secular documents in an educational display about secular law. In any event, a finding that the Decalogue necessarily has *some* religious purpose is not the same as a finding that it serves a *wholly* religious purpose or even that the government intends to convey a message of endorsement.[59] Following *Stone*, moreover, the Supreme Court reiterated that the Ten Commandments can serve both religious *and* secular purposes. "[*Stone*] did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization."[60]

The Sixth Circuit's conclusion that several Commandments concern only the religious duties of believers is plainly false when viewed in the context of a historical display. The government defendants debunked this claim in their initial appellate brief, which noted that "[t]welve of the thirteen original colonies adopted the *entire* Decalogue into their civil and criminal laws."[61] Lest there be any doubt, the defendants proceeded to offer examples of each Commandment's enactment as law by one or more of the colonies or states.[62]

Although the circuit court was provided ample evidence undermining its thesis, it failed to even acknowledge—let alone dispute—the role that the first four Commandments played in the development of American law. That error is critical when one considers that defendants' stated secular purpose was to post historical displays presenting significant influences on American law. Indeed, as Judge Batchelder recently noted in dissent from another Sixth Circuit case with nearly identical facts, the "oft-repeated truism that the first three or four Commandments are 'exclusively religious' is simply not true. Including these rules as part of a historical display about the development of American law is accurate, appropriate . . . and legally permissible."[63]

The Sixth Circuit also erred by scrutinizing the accuracy of the prefatory description of the Ten Commandments, which stated, in relevant part:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.[64]

According to the *McCreary County* panel, this explanation presented two problems. First, the court stated that "the evidence [that the Ten Commandments influenced Western legal thought] does not appear in the actual display . . . so an observer would not actually be made aware of these facts."[65] This is irrelevant to the question of defendants' *purpose*. Whether an observer is aware of the historical connection between the Ten Commandments and the law is a separate question from what the defendants' motivations were in posting the displays. Indeed, the Supreme Court upheld the display of a crèche in *Lynch* without requiring any explanatory documents whatsoever.[66] The McCreary County and Pulaski County officials did not have to include any explanatory sign at all—let alone the extensive historical exegesis apparently required by the Sixth Circuit—in order to demonstrate their purpose. Whether the displays could have been more thorough, or could have better explained the historical impact of the Ten Commandments, is distinct from the question of whether the displays were motivated by a religious purpose.

The second "problem" noted by the Sixth Circuit is likewise constitutionally irrelevant. The court went to great lengths to demonstrate that the Ten Commandments did not inspire the drafting of the Declaration of Independence.[67] That claim, however, was not made in either display. The displays made a much more modest assertion, stating only that the Ten Commandments provided the "moral background" of the Declaration and of our legal tradition—a proposition that is far less stark than the straw man created and then critiqued by the Sixth Circuit. Nor would it be dispositive if the explanatory documents *had* made the claims of which they were accused. The accuracy of the displays is a separate and distinct issue from the defendants' purpose in posting them. As its moniker indicates, the "purpose prong" of the *Lemon* test focuses on the defendants' motivations, not on the relative educational merits of viewing the displays.[68] The issue before the court was whether the govern-

ment posted the displays for the sole purpose of endorsing religion. The answer to that question is "no."

The Sixth Circuit Erred in Finding That the "Evolution" of the displays demonstrates a non-secular purpose.

Both the district court and the court of appeals made much of the fact that the defendants changed the content of the displays several times, ostensibly for the purpose of making them permissible under the Establishment Clause. Because the initial displays consisted of the Ten Commandments standing alone, the courts inferred that the earlier displays had "imprinted the defendants' purpose . . . with an unconstitutional taint."[69] According to the Sixth Circuit, this permanent taint "strongly indicate[s] that the primary purpose was religious."[70]

The lower courts' assumption of "unconstitutional taint" is not supported by the case law. The Sixth Circuit relied heavily on *Santa Fe Independent School District v. Doe*[71] for the proposition that prior noncompliance with the Establishment Clause had to be considered in determining whether the defendants' courthouse displays were constitutional.[72] Nothing in *Santa Fe*, however, requires the result reached by the circuit court. In that case, plaintiffs challenged a school district's practice of allowing students to deliver invocations and benedictions at graduation ceremonies and at football games. In the face of litigation, the district altered the policy several times, ultimately arriving at a policy that permitted students to vote on whether they wanted to have student-led prayers at football games.[73] The policy remained substantially unchanged from its original version. Although the *Santa Fe* majority considered the text and history of the school policy at issue in that case, the Court made clear that the policy was invalid on its face. According to the Court, "the text of the [] policy alone" demonstrated its unconstitutional purpose.[74]

As the United States points out in its amicus brief in *McCreary County*, *Santa Fe* "bears no resemblance to this case."[75] The historical displays at issue in *McCreary County* contained numerous secular documents and symbols and were accompanied by explanatory documents setting forth their secular purpose. They bore little resemblance to their predecessors. Whereas the policy struck down by the Supreme Court in *Santa Fe* was scarcely more than a recycled version of earlier unconstitutional policies, the displays at issue in *McCreary County* had little in common with the initial courthouse displays and did not evince a facially religious purpose.[76]

Under the Sixth Circuit's analysis, the government can seemingly never cure the unconstitutionality of its prior conduct. This simply cannot be the case, unless we are to assume that all constitutional violations continue in perpetuity. "[G]overnmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law."[77] Indeed, for exactly this reason, the Third Circuit, Seventh Circuit, and (before this case) the Sixth Circuit have explicitly rejected such arguments.[78] As the Sixth Circuit itself stated in *Granzeier v. Middleton*, "the fact that a particular [policy] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form."[79]

The *McCreary County* panel misapplied the Sixth Circuit's own case law regarding the effects of past conduct. The court relied heavily upon selected quotes from *Adland v. Russ* for the proposition that the defendants' earlier policies or practices demonstrate a non-secular purpose for defendants' present actions.[80] In contrast to the *McCreary County* panel, however, the *Adland* court specifically stated that the defendants *could cure their constitutional defects by changing the composition of the display*: "While we cannot pass on the merits [of proposals to amend the display], we are nevertheless confident that with careful planning and deliberation . . . the Commonwealth can permissibly display the monument in question."[81] The *McCreary County* court not only ignored this language but in fact incorrectly relied on *Adland* for the opposite conclusion.

In contrast to the Sixth Circuit's interpretation of *Santa Fe*, Supreme Court precedent actually undermines the inference of an improper religious intent based on prior conduct. In *McGowan v. Maryland*,[82] a group of defendants charged with violating Maryland's Sunday closing laws challenged the laws as an unconstitutional establishment of religion. The Court acknowledged that "the original laws which dealt with Sunday labor were motivated by religious forces,"[83] but it nevertheless upheld the laws because they had later taken on a secular purpose. The *McGowan* Court explicitly rejected the reasoning that underlies the Sixth Circuit's theory of "unconstitutional taint."

> The present purpose and effect [of Sunday closing laws] is to provide a uniform day of rest for all citizens . . . . To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because . . . such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare . . .[84]

Conclusion

Although this discussion has been limited to only one prong of the *Lemon* analysis, it demonstrates how lower courts misstate or misapply Supreme Court precedent under the guise of being faithful to the *Lemon* test. In *McCreary County*, the Sixth Circuit set a higher bar for the defendants than that either required or permitted by the Supreme Court. The panel ignored multiple holdings of the Supreme Court and required a primarily secular purpose for the courthouse displays where, as a matter of law, only some discernible secular purpose was required. Despite a direct admonition from the Supreme Court,[85] the court of appeals also failed to show any deference to the government's assertion of a legitimate secular purpose.

The Sixth Circuit not only ignored the central holding in *Lynch v. Donnelly*—that acknowledging the religious origins of a practice is a valid secular purpose—but in fact cited that case for a contrary assertion. The court also errone-

ously scrutinized the accuracy of the displays rather than focusing on the question of the defendants' purpose. Lastly, the *McCreary County* panel adopted the district court's theory of "unconstitutional taint," even though that theory conflicts with the Supreme Court's holding in *McGowan v. Maryland* and the Sixth Circuit's own unambiguous statements in *Adland v. Russ*. In short, as Judge Ryan noted in his dissent, "the majority's analysis fails to properly apply the relevant Supreme Court precedent" at nearly every step of the way.[86]

We agree that the *Lemon* test is too subjective. Like the *McCreary County* petitioners and numerous amici, we hope that the Supreme Court will replace this analysis with one that focuses more on objective outcomes and less on subjective factors such as intent. We all must recognize, however, that the schizophrenic nature of Establishment Clause jurisprudence is not merely the result of applying imperfect standards. It is also the natural outgrowth of outcome-oriented jurisprudence. So long as lower courts are willing to misstate or disregard controlling Supreme Court case law, a new test will only put a band-aid on a gaping wound.

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Footnotes

[1] 354 F.3d 438 (6th Cir. 2003) [hereinafter "*McCreary III*"].

[2] 351 F.3d 173 (5th Cir. 2003).

[3] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[4] *Id.*

[5] Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

[6] Michael W. McConnell, *Stuck with a* Lemon*: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A. J. 46 (1997).

[7] *Van Orden*, 351 F.3d at 179.

[8] *Id.* at 181.

[9] Br. for Petitioners at 7, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[10] *See* Br. for the States of Alabama, et al., as Amici Curiae, in Support of Petitioners at 9, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693) ("[T]he amici States respectfully submit that this case should be analyzed under the 'coercion test' articulated by Justice Kennedy. . . focus[ing] on government coercion or compulsion in matters of religion . . . ."). In his concurrence in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy emphasized the coercive nature of state establishment of religion:

> [I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion . . . . It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, . . . requiring religious oaths to obtain government office or benefits, . . . or delegating government power to religious groups . . . .

Id. at 659-60 (Kennedy, J., concurring in part and dissenting in part).

Justice Kennedy again emphasized coercion when he was writing for the majority in *Lee v. Weisman*, 505 U.S. 577 (1992). "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Id.* at 587.

[11] *See* Elk Grove Unified School District v. Newdow, 124 S.Ct. 2301, 2333 (2004) (Thomas, J., concurring). For additional discussion of this theory, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

[12] *See* ACLU of Kentucky v. McCreary County, 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) [hereinafter "*McCreary I*"].

[13] *Id.* at 691.

[14] *McCreary III*, 354 F.3d at 443.

[15] *Id.*

[16] *See* Initial Br. of Appellants at 7, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935).

[17] *Id.*

[18] *See generally* ACLU of Kentucky v. McCreary County, 145 F.Supp.2d 845 (E.D. Ky. 2001) [hereinafter "*McCreary II*"].

[19] *Id.* at 848-49.

[20] *Compare McCreary I*, 96 F. Supp. 2d at 689 ("Here, the Ten Commandments display is not . . . incorporated as part of a larger, secular sculpture or display."), *with McCreary II*, 145 F. Supp. 2d at 851 ("The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents."). The district court provided no explanation for this glaring inconsistency in its decisions.

[21] The Sixth Circuit limited its holding to the conclusion that the defendants had a non-secular purpose for posting the Ten Commandments, and did not reach the effects prong of the *Lemon* test. *See McCreary III*, 354 F.3d at 462 (Gibbons, J., concurring) ("I express no opinion as to whether the displays violate the 'effect/endorsement' prong of the *Lemon* test."); *id.* at 479 (Ryan, J., dissenting) ("[T]he opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel.").

[22] For a critique of Judge Clay's analysis under *Lemon*'s "effects prong," see Br. of Amici Curiae Ashbrook Center for Public Affairs and Ohio Senator Bill Harris in Support of Petitioners at 22-28, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[23] Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (emphasis added).

[24] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (emphasis added).

[25] Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (emphasis added).

[26] *McCreary III*, 354 F.3d at 443.

[27] *Id.* (citation omitted).

[28] *Id.* at 454.

[29] *Id.* at 446-47.

[30] *See* Edwards v. Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting); *see also Lynch*, 465 U.S. at 680 ("Even where the benefits to religion were *substantial*, . . . we saw *a* secular purpose and no conflict with the Establishment Clause.") (emphasis added and internal citations omitted).

[31] *McCreary III*, 354 F.3d at 446 (emphasis added).

[32] *Id.* at 454 (emphasis added); *see also id.* at 447 ("We agree . . . that the predominate purpose of the displays was religious.").

[33] *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring).

[34] *See McCreary III*, 354 F.3d at 446, 447, 454; ACLU of Ohio v. Ashbrook, 375 F.3d 484, 491 (6th Cir. 2004); Adland v. Russ, 307 F.3d 471, 480 (6th Cir. 2002).

[35] *Lynch*, 465 U.S. at 680 (emphasis added).

[36] *See Wallace*, 472 U.S. at 56; *Bowen*, 487 U.S. at 602.

[37] *See* ACLU v. City of Birmingham, 791 F.2d 1561, 1565 (6th Cir. 1986) ("A statute or practice that is motivated in part by a religious purpose may satisfy the first *Lemon* criterion so long as it is not motivated entirely by a purpose to advance religion.").

[38] *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

[39] *See McCreary III*, 354 F.3d at 454.

[40] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quoting Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989)).

[41] *Lynch*, 465 U.S. at 680.

[42] *Id.* at 680-81.

[43] Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987); *see also Wallace*, 472 U.S. at 74 (O'Connor, J., concurring).

[44] *See McCreary III*, 354 F.3d at 446-47; *McCreary II*, 145 F. Supp. 2d at 848-49.

[45] *Lynch*, 465 U.S. at 680; *see id.* (noting that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause").

[46] *McCreary III*, 354 F.3d at 455.

[47] *Id.*

[48] *See id.*

[49] *Lynch*, 465 U.S. at 681 (emphasis added).

[50] *See id.* at 691 (O'Connor, J., concurring) (noting that the crèche is "an unarguably religious symbol").

[51] *Id.* at 680.

[52] *See, e.g., Edwards*, 482 U.S. at 593-94 (stating that the Ten Commandments did not play an exclusively religious role in the history of Western civilization); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., concurring) (stating that most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World.").

[53] John T. Noonan, Jr., The Believer and the Powers that Are 4 (1987).

[54] *See* 492 U.S. 573 (1989).

[55] *See Stone*, 449 U.S. 39.

[56] *McCreary III*, 354 F.3d at 455 (citing *Stone*, 449 U.S. at 42).

[57] *Id.* (quoting *Stone*, 449 U.S. at 42).

[58] *Stone*, 449 U.S. at 42.

[59] See *Lynch*, 465 U.S. at 680; *id.* at 691 (O'Connor, J., concurring).

[60] *Edwards*, 482 U.S. at 593-94.

[61] Initial Br. of Appellants at 19, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935).

[62] *See id.* at 20-30.

[63] *See* ACLU of Ohio v. Ashbrook, 375 F.3d 484, 507 (6th Cir. 2004) (Batchelder, J., dissenting).

[64] *McCreary III*, 354 F.3d at 451.

[65] *Id.* at 452.

[66] *See Lynch*, 465 U.S. at 671. The Supreme Court's failure to require an explanatory plaque in *Lynch* was certainly not because the Court had not considered the issue. Indeed, in his dissent from *Lynch*, Justice Brennan suggested that he would have required such a document. "[T]he City has done nothing to disclaim government approval of the religious significance of the crèche . . . Pawtucket has made no effort whatever to provide a . . . cautionary message." *Lynch*, 465 U.S. at 706-07 (Brennan, J., dissenting).

[67] *See McCreary III*, 354 F.3d at 452-53.

[68] In a moment of candor, the *McCreary County* majority also acknowledged that "this Court has neither the ability nor the authority to determine the 'correct' view of American history." *Id.* at 453. Despite this admission, however, the court's determination did just that, and substituted the judges' understanding of history for that of the defendants.

[69] *Id.* at 457 (quoting *McCreary II*, 145 F. Supp. 2d at 850).

[70] *Id.* at 458.

[71] 530 U.S. 290 (2000).

[72] *See McCreary III*, 354 F.3d at 455-56.

[73] *See Santa* Fe, 530 U.S. at 298 and n.6.

[74] *Id.* at 314.

[75] Br. for the United States as Amicus Curiae Supporting Petitioners at 25, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[76] It is worth noting, moreover, that it is not clear that even the first set of courthouse displays of the Ten Commandments were impermissible. The United States emphasizes this in its amicus brief:

> While a closely divided . . . [Supreme] Court previously had struck down a display of the Ten Commandments in public school classrooms, Stone v. Graham, supra, that holding does not necessarily extend to courthouses because the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools." . . . The constitutionality of a display of the Ten Commandments in non-school settings—*especially in courthouses where historic symbols are commonplace* and where the Ten Commandments' character as a code of conduct is accentuated—remains an open question.

Id. at 23 (citations omitted) (emphasis added).

[77] ACLU of Kentucky v. McCreary County, 361 F.3d 928, 933 (2004) (Boggs, C.J., dissenting from the denial of rehearing en banc).

[78] *See* ACLU of New Jersey v. Schundler, 168 F.3d 92, 105 (3d Cir. 1999) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose . . . .") (quotation omitted); Granzeier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); Metzl v. Leininger, 57 F.3d 618, 623-24 (7th Cir. 1995) (same).

[79] *Granzeier*, 173 F.3d at 574.

[80] *See McCreary III*, 354 F.3d at 456 (citing Adland v. Russ, 307 F.3d 471, 480 (6th Cir. 2002)).

[81] *Adland*, 307 F.3d at 490.

[82] 366 U.S. 420 (1961).

[83] *Id.* at 431.

[84] *Id.* at 445.

[85] *See* Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (stating that the government's assertion of a legitimate secular purpose is entitled to deference).

[86] *McCreary III*, 354 F.3d at 463 (Ryan, J., dissenting).