SOCIAL MEANING:
MAKING SENSE OF THE COURT'S ESTABLISHMENT CLAUSE DOCTRINE REGARDING PUBLIC DISPLAYS

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ABSTRACT: *In recent years, the Supreme Court has decided several cases involving public displays of religious symbols and the Establishment Clause of the First Amendment. In some of these cases, the Court has allowed public displays of religious symbols to stand; in others, the Court has ruled that such displays violated the Establishment Clause. The Court's rulings in these cases have created a body of law that contains many contradictions. In their book Religious Freedom and the Constitution, Princeton University President, Christopher Eisgruber, and former Dean of the University of Texas School of Law, Lawrence Sager, suggested that the answer to the problems presented by public displays of religious symbols is to examine the "social meaning" of those symbols. In this paper, I discuss Eisgruber and Sager's concept of "social meaning" and how it fits in with the Court's precedents in this area of law.*

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The Supreme Court has heard many cases regarding the Establishment Clause of the First Amendment, and some of these cases have specifically challenged government displays of religious symbols and accused these displays of constituting a state establishment of religion. Since 1935, the Court has heard challenges to government displays of religious symbols while seated under a government-sponsored frieze displaying the Hebrew text of the law God handed down to Moses. The irony here is not lost on the Court, which has recognized the complexity of its own Establishment Clause doctrine, and has sought to create clear rules for government-sponsored religious displays.

In this article, I will examine four cases: each case addresses the public display of religious symbols, and each display was challenged on Establishment Clause grounds. In *Lynch v. Donnelly,* the Court allowed the inclusion of a crèche in a government-supported Christmas display. In *Allegheny v. ACLU,* the Court ruled that a crèche inside the Allegheny courthouse was unconstitutional under the Establishment Clause, but in the same case ruled that a menorah outside the courthouse was constitutionally permissible. In *McCreary County v. ACLU,* the Court decided that McCreary County's display of the Ten Commandments in its courthouse was unconstitutional, but in *Van Orden v. Perry,* the Court allowed Texas to maintain a representation of the Ten Commandments on the grounds of its state capitol building.

These four cases, when viewed together, seem confusing at best and completely irreconcilable at worst.

The Supreme Court has not been able to create a single enforceable "rule" when it comes to public displays and the Establishment Clause. In his dissent in *McCreary County v. ACLU,* Justice Scalia criticized the inconsistencies in these types of cases, observing that the majority opinion in *McCreary County* "forthrightly…admits that it does not rest upon consistently applied principle. In a revealing footnote…the Court acknowledges that the 'Establishment Clause doctrine' it purports to be applying 'lacks the comfort of categorical absolutes."[1]

In their opinions in these cases, the justices have recognized the inconsistencies their decisions have created and have attempted to justify them. In *Lynch,* Chief Justice Burger claimed "the Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause…was not to write a statute."[2] But statutory interpretation often fluctuates because statutes themselves are modified, while the words of the Establishment Clause have remained consistent since they were written. Interpretation of the Establishment Clause has fluctuated so dramatically that Justice Thomas noted, "the very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application."[3] With his deciding vote in *Van Orden,* Justice Breyer

1 McCreary County v. ACLU, 545 U.S. 844, 891 (2005).
2 Lynch v. Donnelly, 465 U.S. 668, 678 (1984).
3 Van Orden v. Perry, 545 U.S. 677, 697 (2005).

relied "less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves."[4]

Given the confusion and the overall irreconcilability of precedent in Establishment Clause cases regarding public displays, one might conclude that no tests or criteria exist to help the justices determine a display's constitutionality. However, this is not the case: the Court has merely declined to apply the tests it has created to resolve Establishment Clause disputes, while simultaneously taking care not to overrule these precedents. In *Lemon,* Justice Burger wrote that "In the absence of precisely stated constitutional prohibitions, we must draw lines," and he did so by crafting the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[5]

Through its opinions in *Lynch, Allegheny, McCreary County,* and *Van Orden*, the Supreme Court has come up with new ways to evaluate displays of religious symbols. These include evaluating whether a display endorses religion, whether a display is neutral towards religion, whether a display has a secular purpose, and whether a reasonable observer would perceive a display as constituting an establishment of religion. In their book, *Religious Freedom*

4 *Id.* at 703-704.

5 Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

and the Constitution, Christopher Eisgruber, President of Princeton University, and Lawrence Sager, former Dean of the University of Texas School of Law, advocate interpreting cases involving displays of religious symbols in terms of "social meaning," defined as "the meaning that a competent participant in the society in question would see in that event or expression."[6] Through the concept of social meaning, it is possible to reconcile some of the contradictions found in the Court's rulings on public displays. As Eisgruber and Sager note, "the proper question [to ask in these cases] is 'What is the meaning of the display?' as opposed to 'What is the meaning of the object that is being displayed?'"[7]

The concept of social meaning is most closely related to the Court's concept of a "reasonable observer," whom the Court in *McCreary* describes as "an objective observer, acquainted with the text, legislative history, and implementation of the statute."[8] But in the cases of public displays of religious symbols, the court has found reasons to dispute the idea that imagining a "reasonable observer" is an adequate way to discover whether or not the government's action constitutes a state establishment of religion.

The Court's most convincing objection to the "reasonable observer" standard was the fact that it is nearly impossible to isolate a "reasonable observer" from the community surrounding him and the history of the public

6 Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 127 (Harvard UP eds., 2007).

7 *Id.* at 131.

8 McCreary County v. ACLU, 545 U.S. 844, 862 (2005).

display in question. It is also difficult for attorneys and judges to theorize what a "reasonable observer" does or does not know. The justices and the attorneys on either side delve deep into the cases and, through their research, develop extensive knowledge about the meaning of the symbols involved and the history of the community in which the display exists. To then isolate the knowledge of a "reasonable observer" and draw conclusions through extrapolation is a process that is sure to produce inconsistencies. Furthermore, in examining precedent, it is evident that the justices cannot seem to agree what a "reasonable observer" would or would not know. As Eisgruber and Sager note, "certain practices [have] a disparaging effect that [is] 'real,' and not reducible…to the personal perceptions of [individual reasonable] observers."[9]

Eisgruber and Sager suggest that applying a test of social meaning would produce more consistent outcomes in these cases. If a competent participant of the society would understand the display to constitute a state establishment of religion, using social meaning as a guide, the display is unconstitutional. This differs in an important way from the reasonable observer standard: the reasonable observer test focuses on the symbols themselves. The social meaning standard, however, focuses on the meaning of the display as a whole, combining the context provided by the Court's various tests such as secular purpose and neutrality.

In the cases here, a standard of social meaning might provide coherence in a realm that is currently plagued by

9 Eisgruber & Sager, supra note 6, at 127.

inconsistencies. For example, in *Allegheny,* the majority opinion goes into great detail on the history of the menorah, using the detailed historical explanation to justify the Court's decision to uphold the display as constitutional. But, in a concurring opinion, Justice Kennedy pointed out the many problems presented by delving so deeply into the history of the menorah as a symbol:

> Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers' view of the symbol and the reason for its presence.[10]

If the Court were to take the same display and apply to it the concept of social meaning, it would not be necessary for the Court to examine the long history of the menorah as a symbol and, as Justice Kennedy says, "sit as a national theology board," examining and, for the purpose of the law, deciding the meaning of religious symbols.[11]

The Court has also received criticism for its inconsistency in applying the endorsement test to crèche displays. In *Lynch,* the Court described endorsement as a

10 Allegheny v. ACLU, 492 U.S. 573, 678 (1989).
11 *Id*.

governmental action that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[12] In *Lynch,* examining a public display of a crèche, the Court ruled that the "display of the crèche is no more an…endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums."[13] In *Allegheny,* however, the Court called the display of a crèche in a government building unconstitutional.

In the case of endorsement, the Court must examine whether the government's action has advanced one religion over another, or advanced religion over non-religion. In applying the endorsement test in her concurring opinion in *Lynch*, Justice O'Connor actually took into account factors that look more like a test of social meaning. She wrote that

> the display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion…Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood.[14]

12 Lynch v. Donnelly, 465 U.S. 668, 688 (1984).
13 *Id.* at 683.
14 *Id.* at 668, 683.

By examining the meaning of the display as a whole, instead of the particular symbol in question, and seeking to understand the context of the display in the community, Justice O'Connor concluded that the government had not endorsed religion, or that the "social meaning" of the display was not one that endorses Christianity. As demonstrated in Justice O'Connor's analysis, an application of the endorsement test can be aided by an examination of a display's social meaning.

In *McCreary,* the Court put a lot of emphasis on the idea of "secular purpose," another concept derived from the test in *Lemon*. In cases of public displays, the government cannot sponsor a display with the purpose of advancing religion. But in the case of *McCreary,* the government altered its display twice after its original creation. For the first two displays, the purpose was clearly to advance religion. In the third display, as a result of advice from their lawyers, McCreary County was able to claim they had the secular purpose of exhibiting the foundations of American law. On the surface, the third display seemingly adhered to their supposed secular purpose. However, the Court and the community were both aware of the purpose that had driven the creation of the first two displays, and the third display seemed a desperate last attempt at posting a religious document on the walls of a government building.

The justices struggled to justify their declaration that the third display was unconstitutional. McCreary County asked the court to consider only the third display, which

was the one they could claim had a secular purpose. But, in doing so, the Court argued that it could not ignore "perfectly probative evidence" and neither could the members of the community who had seen the controversy that surrounded the first two displays. The Court noted that "reasonable observers have reasonable memories, and…precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[15]

In this statement, the Court expanded the definition of the reasonable observer to include an idea like Eisgruber and Sager's concept of "social meaning"—not only does the reasonable observer respond to the religious symbols but also to the context of the display. In this opinion, the reasonable observer becomes the "competent participant of society," who has observed all three displays and understands that the government's true purpose is merely veiled in the third display in order to avoid a verdict of unconstitutionality.

In the context of *McCreary,* the Court addressed the idea of government neutrality towards religion as the best way to avoid a state establishment of religion. The Court stated that "the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion."[16] But, in his dissent in *McCreary,* Justice Scalia pointed out that "the Court… cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without

15 McCreary County v. ACLU, 545 U.S. 883, 866 (2005).
16 *Id*. at 883, 875.

losing all that sustains it."[17]

Considering the fact that government sponsored displays have been upheld and still stand, complete neutrality is perhaps not likely or possible. But in the context of social meaning, it is possible for the government to maintain these displays as long as competent participants in the society continue to understand the government as neutral. Such was the case in *Van Orden,* in which the Ten Commandments were allowed to remain on the grounds of the state capitol building in Texas. In *Van Orden*, the Court noted that "a governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or urge its acceptance by others."[18]

The decision in *Van Orden* most closely relates to the presence of the Ten Commandments in the Supreme Court itself. Eisgruber and Sager note that "The Supreme Court frieze depicts Moses…[and might] be regarded and appreciated as an artwork rather than an expression of religious sentiment."[19] In *Van Orden,* Justice Breyer justified his vote to allow the Ten Commandments to remain by referring to context. He noted that "in certain contexts, a display of the tablets of the Ten Commandments can convey…a secular moral message…[or] a historical

17 *Id*. at 892-893.
18 Van Orden v. Perry, 545 U.S. 677, 737 (2005).
19 Eisgruber & Sager, *supra* note 6 at 143.

message…a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation."[20] Justice Breyer continued to examine the circumstances surrounding the display, concluding that its value outside the sphere of religion made it constitutionally permissible. He also noted that the monument had stood uncontested for forty years and had not created any sort of divisiveness in the community; he has been subsequently criticized for allowing the issue of divisiveness to affect his ultimate conclusion. But in the context of social meaning, Justice Breyer considered that the monument had stood and been appreciated for forty years in a non-religious manner, and that the social meaning of the monument was not one of religious establishment.

By applying the idea of social meaning to these precedents, it is possible to reconcile some of the inconsistencies that exist in Establishment Clause doctrine regarding public displays. By expanding the "reasonable observer" test to include the observer's comprehension of context and participation in society, one can create a "competent participant" who better represents the community's response to a public display. If one considers neutrality in the terms of social meaning, the government would not need to completely avoid religious symbols, but would rather need to avoid displays that, as a whole, appear not to be neutral. And, by taking into account the context of public displays and the history that surrounds them, the Court could more consistently interpret whether the social meaning

20 Van Orden v. Perry, 545 U.S. 677, 701 (2005).

of a display is one that constitutes a state endorsement of religion.

Though applying the concept of social meaning to the Court's existing Establishment Clause doctrine allows some of the Court's inconsistencies regarding public displays to be reconciled, several problems remain unresolved. Social meaning is an abstract idea, similar to the ideas of endorsement and reasonable observers, in that it has the potential to be interpreted differently by different judges. Though it may provide a more consistent answer than the previous tests, it still "lacks the comfort of categorical absolutes."[21] It may not be possible to craft a specific, mechanical test that can be applied to every Establishment Clause case, but in the area of public displays and religious symbols, Eisgruber and Sager's concept of social meaning provides one method to make sense of the Court's disparate rulings.

21 McCreary County v. ACLU, 545 U.S. 844, 891 (2005).