

Casenote

Holy Moses: What Do We Do With the Ten Commandments?

In *McCreary County v. ACLU*,¹ the United States Supreme Court held displays of the Ten Commandments in two county courthouses unconstitutional because the displays violated the Establishment Clause of the United States Constitution.² However, in *Van Orden v. Perry*,³ the United States Supreme Court held that a display of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause.⁴ This obvious contradiction does little to resolve the uncertainty of current Establishment Clause jurisprudence. In *McCreary* the Court reaffirmed the Establishment Clause test⁵ articulated in *Lemon v. Kurtzman*,⁶ while at the same time rejecting the test in *Van Orden*.⁷ Clearly, having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establish-

1. 125 S. Ct. 2722 (2005).

2. *Id.* at 2728; U.S. CONST. amend. I.

3. 125 S. Ct. 2854 (2005).

4. *Id.* at 2858.

5. *McCreary*, 125 S. Ct. at 2722.

6. 403 U.S. 602 (1971).

7. *Van Orden*, 125 S. Ct. at 2861.

ment Clause.⁸ Courts have the choice of using the *Lemon* test or inquiring into a religious display's history, purpose, and context, or some combination of both.

I. FACTUAL BACKGROUND

A. *McCreary County v. ACLU*

In the summer of 1999, McCreary County and Pulaski County, Kentucky ("Counties") erected large, framed copies of an abridged text of the Ten Commandments in each of their respective courthouses. In McCreary County, the Commandments were placed in the courthouse in response to the county legislative body requiring that the display be posted in a high traffic area. In Pulaski County, the Commandments display included a ceremony presided over by the county judge-executive and the pastor of the county judge-executive's church.⁹ In November 1999 the American Civil Liberties Union ("ACLU") sued the Counties under 42 U.S.C. § 1983 to enjoin the displays on the ground that the displays violated the Establishment Clause of the First Amendment.¹⁰

Before the district court responded, the Counties adopted similar resolutions calling for an expansion of the exhibit to show that the Commandments are Kentucky's "precedent legal code."¹¹ The resolutions noted several grounds for taking this position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics."¹² The displays around the Commandments were modified to include eight smaller historical documents, all of which contained religious references. After this second display, the district court entered a preliminary injunction ordering that the displays be removed. The district court followed the *Lemon v. Kurtzman*¹³ test, finding that the original display lacked a secular purpose because the Commandments were distinctly religious.¹⁴ Further, the district court found that the second display lacked a secular purpose because the Counties narrowly tailored the selection of foundational documents displayed along with the Commandments to those specifically referring to Christianity.¹⁵

8. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984).

9. *McCreary v. ACLU*, 125 S. Ct. 2722, 2728 (2005).

10. *Id.* at 2729.

11. *Id.*

12. *Id.*

13. 403 U.S. 602, 612 (1971).

14. *McCreary*, 125 S. Ct. at 2730.

15. *Id.*

After changing counsel, the Counties revised the exhibits once again, this time with neither new resolutions nor with the repeal of the past resolutions. The new display, entitled “The Foundations of American Law and Government Display,” consisted of nine framed documents of equal size. One of the framed documents contained the Commandments quoted at greater length than the previous displays. Along with the text of the Commandments, the display contained an explanation about how the Commandments have profoundly influenced the formation of Western legal thought in the United States. The Counties’ professed intent behind the third display was to show that the Commandments were part of the foundation of American Law and government, and to educate county citizens about the documents.¹⁶ Despite this professed intent, on motion by the ACLU, the district court included this third display in the injunction. The district court found that under *Stone v. Graham*,¹⁷ the Counties’ proclamation of the Commandments’ foundational value contained a religious, rather than secular purpose.¹⁸ Further, the court found that the Counties’ educational intent failed upon an examination of the litigation’s history.¹⁹

In affirming the district court, the Sixth Circuit stressed that under *Stone*, “displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry ‘a secular message.’”²⁰ The court concluded that no integration existed in the Counties’ third display because of a lack of demonstrated analytical or historical connection between the Commandments and the other documents.²¹ The United States Supreme Court granted certiorari.²²

B. *Van Orden v. Perry*

In 1961 the Fraternal Order of Eagles of Texas, a national social, civic, and patriotic organization, donated a monument measuring six feet high and three feet wide to “The People and Youth of Texas. . . .”²³ The primary content of the monument is the text of the Ten Commandments. Above the text of the Ten Commandments is an eagle holding an American flag, an eye inside of a pyramid, and two small tablets. Below

16. *Id.* at 2730-31.

17. 449 U.S. 39 (1980).

18. *McCreary*, 125 S. Ct. at 2731.

19. *Id.*

20. *Id.* (quoting *McCreary v. ACLU*, 354 F.3d 438, 449 (2003)).

21. *Id.* at 2731-32.

22. *Id.* at 2732.

23. *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005).

the text are two Stars of David and the Greek letters Chi and Rho.²⁴ The monument was erected by the Eagles on the Texas State Capitol grounds between the capitol and the supreme court building. It is included among seventeen other monuments and twenty one historical markers commemorating the “people, ideals, and events that compose Texan identity” on the twenty-two acre property.²⁵

Petitioner Thomas Van Orden is a native Texan and an Austin resident, as well as a former attorney. He testified that he encountered the monument on frequent visits to the Capitol grounds for the purpose of using the law library in the supreme court building beginning in 1995. Six years later, Van Orden brought suit “under Rev. Stat. § 1979, 42 U.S.C. § 1983 seeking both a declaration that the monument’s placement violates the Establishment Clause and an injunction requiring its removal.”²⁶

After a bench trial, the district court held that there was no violation of the Establishment Clause where the State had a valid secular purpose in recognizing the Eagles for their efforts to reduce juvenile delinquency, and the “reasonable observer, mindful of the history, purpose and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion.”²⁷ The Fifth Circuit Court of Appeals affirmed the district court’s holding.²⁸ The United States Supreme Court granted certiorari.²⁹

II. LEGAL BACKGROUND

A. Introduction—Constitutional Framework

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”³⁰ These clauses of the First

24. The Greek letters Chi and Rho represent Christ. *Id.* at 2858.

25. *Id.* (quoting Tex. H. Con. Res. 38, 77th Leg. (2001)).

The other monuments are: Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts’ Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.

Id. at 2858 n.1.

26. *Id.* at 2858.

27. *Id.* at 2858-59.

28. Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).

29. *Van Orden*, 125 S. Ct. at 2859.

30. U.S. CONST. amend. I.

Amendment impose two restrictions, one of which is the Establishment Clause, which requires a degree of separation between church and state. Although the degree of separation cannot be determined, the struggle for religious liberty in Virginia during the 1780s may be helpful in supplying the key to understanding the Establishment Clause.³¹ First, the long dispute in Virginia had caught the attention of the other states, several of which were influenced by its outcome to eliminate their own religious establishments. Therefore, the victory for religious liberty in Virginia created a national climate of opinion favorable to the separation of church and state. Even more important, the leaders of the anti-establishment forces in Virginia played a major role in the creation and adoption of the Bill of Rights. As a result, it can be argued that the views these leaders expressed during the Virginia campaign in favor of a strict separation of church and state were incorporated into the First Amendment religion clauses.³²

B. Cases Defining Establishment of Religion

The Supreme Court had little occasion to construe the Establishment Clause for almost 150 years after its conception, until the religion clauses were incorporated in *Everson v. Board of Education*.³³ Since then, however, the Court has decided more than eighty religion cases. In *Everson* the Court upheld a New Jersey statute that covered the cost of bus transportation for students attending either public or private (including sectarian) schools.³⁴ Justice Black contended that the statute did not violate the First Amendment because of the public purpose it served as determined by the legislature passing the legislation.³⁵ In so holding, both the majority and dissenters agreed that the Establishment Clause was meant to erect a “wall of separation” between

31. *Everson v. Bd. of Educ. of Ewin Twp.*, 330 U.S. 1, 11-12 (1947).

32. *Id.* at 13. After the adoption of the First Amendment, Thomas Jefferson stated:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion or prohibiting the free exercise thereof,” thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Reynolds v. United States, 98 U.S. 145, 164 (1878).

33. 330 U.S. at 14-16.

34. *Id.* at 17.

35. *Id.* at 16-18.

church and state.³⁶ Justice Black summarized the Court's position by stating: "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."³⁷ Therefore, the Court defined the Establishment Clause as (1) imposing restrictions on state activity as stringent as those imposed on the national government, and (2) requiring strict neutrality not only among religions, but also between religion and irreligion. Though the New Jersey legislation was within New Jersey's power, the Court did note that "it approaches the verge of that power" to enact legislation.³⁸ Therefore, though the court was erecting a high wall of separation between church and state, the factors weighing against establishment were the public benefit and the secular means provided by such bus transportation.³⁹

One of the most difficult Establishment Clause questions faced by the Justices of the Supreme Court has been the validity of governmental aid to programs that benefit both sectarian and nonsectarian institutions. *Everson* illustrates the difficulties posed by this question. On one side of the debate, the state reimbursement for the cost of transporting children to sectarian schools in *Everson* clearly facilitates attendance at those schools and therefore seems inconsistent with the no-aid standard announced in *Everson*.⁴⁰ On the other side of the debate, for the state to deny transportation to students merely because they attend religious schools would appear to reflect governmental hostility, rather than neutrality, towards religion.⁴¹ The Court first reviewed major aid programs to private (including sectarian) schools in the 1971 case, *Lemon v. Kurtzman*.⁴² In reviewing such aid programs, the Court announced a three-pronged test applicable to all cases of possible violations of the Establishment Clause.⁴³

At issue in *Lemon* were two state programs: Pennsylvania's program, which directly reimbursed nonpublic elementary and secondary schools for the costs of teachers' salaries, textbooks, and instructional materials in specific secular subjects; and Rhode Island's program which provided

36. *Id.* at 18, 41.

37. *Id.* at 15-16.

38. *Id.* at 16.

39. *Id.* at 16-17.

40. *Id.* at 15-16.

41. *Id.* at 18.

42. 403 U.S. 602 (1971).

43. *Id.* at 612-13.

a fifteen percent salary supplement to teachers of secular subjects in nonpublic elementary and secondary schools.⁴⁴ With only one dissenter, the Court invalidated both programs.⁴⁵ Speaking for the Court, Chief Justice Warren Burger announced a three-pronged test collected from previous Supreme Court decisions: “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.”⁴⁶

Applying this test to the programs, Justice Burger concluded that although both programs had a secular legislative purpose, both involved excessive governmental entanglement with the sectarian schools.⁴⁷ This entanglement was true, he noted, in that a major aim of sectarian elementary and secondary education is to instill religious belief, not only through religious instruction, but also by creating a pervasively religious atmosphere in the schools.⁴⁸ Further, because all aspects of sectarian elementary and secondary education promote the school’s religious goals, aid to such schools constitutes unconstitutional government fostering of religious beliefs.⁴⁹ Finally, Justice Burger pointed out that such aid programs had the effect of promoting political divisions along religious lines, “one of the principal evils against which the First Amendment was intended to protect.”⁵⁰

The major shift in the Court’s approach to Establishment Clause cases occurred in 2002 in *Zelman v. Simmons-Harris*.⁵¹ In *Zelman* the Court upheld a system of tuition vouchers that enabled students in Cleveland to attend a school of their parents’ choosing, whether public or private.⁵² Chief Justice Rehnquist, in delivering the opinion of the Court, renounced three key components of the Court’s *Lemon* test. First, Justice Rehnquist maintained that the Court should uphold government aid programs if they meet the first two criteria articulated in *Lemon* (secular purpose and a primary effect that neither advances nor inhibits religion).⁵³ Second, Justice Rehnquist insisted that governmental aid to religious schools, if provided as part of a general program of aid to education and distributed without regard to the religious or nonreligious

44. *Id.* at 602.

45. *Id.* at 625.

46. *Id.* at 612-13.

47. *Id.* at 614.

48. *Id.* at 613.

49. *Id.* at 619.

50. *Id.* at 622.

51. 536 U.S. 639 (2002).

52. *Id.* at 643-44.

53. *Id.* at 648-49.

character of the recipient schools, satisfied the constitutional requirement of neutrality.⁵⁴ Third, Justice Rehnquist shifted the focus from whether the schools receiving aid were pervasively religious, a crucial factor in *Lemon*, to whether funds were given to such schools as a result of “true private choice.”⁵⁵

The overall effect of *Zelman* on Establishment Clause jurisprudence signified a major change in the application of the *Lemon* test. In short, Justice Rehnquist downgraded the third prong of the *Lemon* test (excessive government entanglement between government and religion) by reducing it to merely one element only relevant in determining a program’s primary effect.

C. *Development of Establishment Clause Jurisprudence*

In 1952 the Supreme Court upheld a New York statute that provided for the release of public school students from school to attend religious classes.⁵⁶ The Court held that the program did not involve religious instruction in public school classrooms or the expenditure of public funds and therefore did not violate the First Amendment.⁵⁷ The crux of the program required teachers to cooperate with students’ religious needs only to the extent of making it possible for the students to participate in religious ceremonies and activities consistent with their beliefs.⁵⁸ The Court stated

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people. . . . To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion. . . .⁵⁹

54. *Id.* at 653-54.

55. *Id.* at 652-53, 662.

56. *Zorach v. Clauson*, 343 U.S. 306 (1952).

57. *Id.* at 308-09.

58. *Id.* at 313.

59. *Id.* at 313-14.

Because the activity of the schools only involved adjusting its schedules to accommodate a program of outside religious instruction, the Court held that the statute did not violate the Establishment Clause.⁶⁰

In 1962 the Court concluded that a New York law officially prescribing a prayer to be recited in a school system violated the Establishment Clause.⁶¹ The Court reasoned that the state was using its school system to encourage the recitation of prayer, an activity that has always been regarded as religious.⁶² The Court noted that the students were not required to participate over their own, or their parents' objections, but nonetheless, held that the prayer was inconsistent with both the purposes of the Establishment Clause and with the Establishment Clause itself.⁶³ The Court noted that "the history of man is inseparable from the history of religion," and discussed in great detail the mindset of the Founders when choosing to include a prohibition against governmental establishment of religion.⁶⁴

These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to.⁶⁵

The Court also stated:

[I]t is no part of the business of the government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.⁶⁶

In 1983 the Court concluded that the practice of opening the Nebraska Legislative session with a prayer led by a chaplain paid with public

60. *Id.* at 315.

61. *Engel v. Vitale*, 370 U.S. 421, 433 (1962).

62. *Id.* at 424-25.

63. *Id.* at 433.

64. *Id.* at 434.

65. *Id.* at 435.

66. *Id.* at 425.

funds was not a violation of the Establishment Clause.⁶⁷ The Court first noted the history and tradition of legislative and other deliberative bodies of opening with prayer: "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."⁶⁸ The Court noted that even sessions of the United States Supreme Court begin with the invocation, "God save the United States and this Honorable Court."⁶⁹ The Court further noted that the practice dates back to the First Congress, where one of the first items of business was to adopt a policy of selecting a chaplain who would open each session with a prayer.⁷⁰ A committee was appointed in each house of Congress, Chaplains were selected, and a statute was enacted into law providing for the payment of these chaplains on September 22, 1789.⁷¹ Three days after Congress authorized the selection of these paid chaplains, final agreement was reached on the Bill of Rights.⁷²

The Court pointed out that historical patterns alone cannot justify constitutional violations.⁷³ However, the Court also noted that historical evidence sheds light on the meaning of the Establishment Clause.⁷⁴ The fact that the clergyman was of one denomination, that he was paid with public funds, and that the prayers were consistent with Judeo-Christian tradition did not overcome the weight attributed to the historical background of the practice.⁷⁵

In 1984 the Court had occasion to consider another Establishment Clause case concerning a challenge to the inclusion of a nativity scene in a city Christmas display.⁷⁶ The Court began its analysis by recognizing that achieving total separation of church and state is impossible.⁷⁷ The Court stated that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."⁷⁸ This history, according

67. *Marsh v. Chambers*, 463 U.S. 783 (1983).

68. *Id.* at 786.

69. *Id.*

70. *Id.* at 787-88.

71. *Id.* at 788.

72. *Id.* "It can hardly be thought . . . members of the First Congress . . . intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id.* at 790.

73. *Id.* at 790.

74. *Id.*

75. *Id.* at 793.

76. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

77. *Id.* at 672.

78. *Id.* at 674.

to the Court, is the reason for declining to take a rigid, absolutist view of the Establishment Clause.⁷⁹ The Court indicated its unwillingness to mechanically invalidate all governmental conduct that gives special recognition to religion in general or to one faith, and noted that “the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.”⁸⁰ Throughout the opinion, the Court emphasized an unwillingness to confine its analysis of Establishment Clause challenges to a single test or bright line rule.⁸¹ The Court therefore concluded that it would only invalidate legislation or governmental action on the ground that it lacked a secular purpose when “there was no question that the statute or activity was motivated wholly by religious considerations.”⁸²

D. Cases Involving Religious Displays

In *Stone v. Graham*,⁸³ the Court held that a state law requiring public schools to permanently post the Ten Commandments violated the Establishment Clause.⁸⁴ In *Stone* the Court looked at the constitutionality of a Kentucky statute requiring the posting of the Ten Commandments in every public school classroom. According to the statute, each plaque would be purchased with private contributions and would bear the following statement: “[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”⁸⁵ After the Kentucky legislature passed the statute, state courts upheld its constitutionality using the *Lemon* test.⁸⁶ The state courts upheld the purpose prong of the *Lemon* test because the statute required a secular notation be included on the display.⁸⁷ The United States Supreme Court held that, notwithstanding this characterization, the “pre-eminent purpose for posting the Ten Commandments on schoolroom

79. *Id.* at 678.

80. *Id.*

81. *Id.* at 679. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). See also cases declining to apply the *Lemon* test: *Marsh*, 463 U.S. at 783; *Larson v. Valente*, 456 U.S. 228 (1982).

82. *Lynch*, 465 U.S. at 680.

83. 449 U.S. 39 (1980).

84. *Id.* at 43.

85. *Id.* at 41 (quoting Ky. Rev. Stat. § 158.178 (1980)).

86. *Id.*

87. *Id.*

walls is plainly religious in nature.”⁸⁸ The majority argued that the Ten Commandments not only deal with secular matters such as murder and adultery, but also plainly consider religious duties such as sole worship of God and avoiding idolatry. Therefore, a proclaimed secular purpose for legislation is not enough to overcome the purpose prong of *Lemon*.⁸⁹

To support its position in *Stone*, the Court cited its 1963 decision in *Abington*,⁹⁰ which disallowed daily Bible reading and the recitation of the Lord’s prayer in public schools.⁹¹ The school district asserted that such practices had secular purposes such as “the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.”⁹² The Court concluded that “[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”⁹³

In so holding, the Court established that although a government display of the Ten Commandments may be viewed from a secular standpoint, because of the historical and religious basis for the Commandments, its display is irrefutably religious. Therefore, such a display is unconstitutional in that the government is not permitted to endorse, directly or indirectly, any religious message or doctrine.⁹⁴

While *Lemon* established a framework for examining possible Establishment Clause violations, as seen above, it became subject both to attack and to neglect beginning in the 1980s as illustrated in *Allegheny County v. ACLU*.⁹⁵ In this decision, the Court prohibited a holiday display in the Grand Staircase of the Allegheny Courthouse.⁹⁶ The display had a crèche and an angel bearing a banner proclaiming “*Gloria in Excelsis Deo*.”⁹⁷ At the same time, the Court allowed the display of a forty-five-foot high Christmas tree next to an eighteen-foot high menorah outside the City-County building in Pittsburgh.⁹⁸

88. *Id.*

89. *Id.* at 41-42.

90. *Id.* at 42 (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

91. *Stone*, 449 U.S. at 41.

92. *Id.* (quoting *Abington*, 374 U.S. at 223).

93. *Id.* at 42 (citing *Abington*, 374 U.S. at 225).

94. *See id.*

95. 492 U.S. 573 (1989).

96. *Id.* at 621.

97. *Id.* at 580.

98. *Id.* at 621.

In delivering the opinion of the Court, Justice Blackmun began his analysis of the displays by stating that when the Court evaluates “the effect of government conduct under the Establishment Clause, we [the Court] must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’”⁹⁹

Following this reasoning, Justice Blackmun argued that the effect of the Courthouse crèche turned on its setting, stating that “nothing in the context of the display detracts from the crèche’s religious message.”¹⁰⁰ Despite the crèche’s blatant religious message, Justice Blackmun stated that the same could not be said about the joint Christmas tree/menorah display, arguing that the Christmas tree, as a secular symbol, dominated the tree/menorah display, secularizing the menorah.¹⁰¹

The effect of *Allegheny* was the refinement of the *Lemon* test, which was suggested by Justice O’Connor in her *Lynch*¹⁰² concurrence. In *Allegheny*, the majority adopted Justice O’Connor’s “symbolic endorsement” test in *Lynch*,¹⁰³ under which the government violates the Establishment Clause if it generally endorses either religion or secularism.¹⁰⁴ Further, *Allegheny* indicates that the Court is more willing to permit religious displays when they are placed alongside other less sectarian ones, because such displays tend to diminish the impression of governmental endorsement of religion.¹⁰⁵

III. COURT’S RATIONALE

A. *McCreary County v. ACLU*

In *McCreary County v. ACLU*,¹⁰⁶ by a five to four majority the Court held that a display on government property containing a religious symbol violated the Establishment Clause.¹⁰⁷ In so holding, the Court disagreed with the Counties argument that the purpose prong of the *Lemon v. Kurtzman*¹⁰⁸ test should be overruled, and instead analyzed

99. *Id.* at 597 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

100. *Id.* at 598.

101. *Id.* at 617-18.

102. *Lynch*, 465 U.S. at 687.

103. *Id.* at 694.

104. *Allegheny*, 492 U.S. at 597, 620.

105. *Id.* at 617-18.

106. 125 S. Ct. 2722 (2005).

107. *Id.* at 2732.

108. 403 U.S. 602 (1971).

how each display violated the Establishment Clause under the *Lemon* test.¹⁰⁹

In determining that the purpose prong should not be overruled, the Court first explained that in *Stone v. Graham*,¹¹⁰ the Court noted “a predominantly religious purpose in the government’s posting of the Commandments, given their prominence as ‘an instrument of religion.’”¹¹¹ Further, the Court concluded that *Lemon’s* purpose requirement is aimed at preventing the government from abandoning neutrality and acting with the intent of promoting one particular point of view in religious matters.¹¹² When the government acts with the purpose of advancing religion, the government violates the Establishment Clause value of neutrality, in that there is a lack of neutrality when the government’s objective is to take sides.¹¹³

Second, in holding that the purpose prong should not be overruled, the Court noted that “scrutinizing purpose . . . makes practical sense . . . in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact[s]” set forth in a statute’s text, legislative history, and implementation of comparable official act.¹¹⁴ Therefore, a determination of the Counties’ purpose is a sound basis for ruling on Establishment Clause complaints.

Finally, in holding that the purpose prong should not be abandoned, the Court explained that *Lemon* requires the secular purpose “be genuine, not a sham, and not merely secondary to a religious objective.”¹¹⁵ Applying this requirement, the Court determined that the appellant’s argument, that purpose should be inferred only from the latest in a series of governmental actions, is erroneous because “reasonable observers have reasonable memories, and [the Court’s] precedents sensibly forbid an observer ‘to turn a blind eye to the context in which the policy arose.’”¹¹⁶

After explaining that the purpose prong of *Lemon* should not be abandoned, the Court turned its attention to how each display individually violated the Establishment Clause by advancing religion. Beginning with the first display, the Court noted that the Commandment’s text was “distinct from any traditionally symbolic representation,” like blank

109. *McCreary*, 125 S. Ct. at 2733-38.

110. 449 U.S. 39 (1980).

111. *McCreary*, 125 S. Ct. at 2732 (quoting *Stone*, 449 U.S. at 41).

112. *Id.* at 2733.

113. *Id.*

114. *Id.* at 2734.

115. *Id.* at 2735.

116. *Id.* at 2736-37 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

tablets, and that the display stood alone, not part of an arguably secular display.¹¹⁷ In such a case, the Court reasoned that “the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.”¹¹⁸

Moving on to the second display, the Court noted that the display did not stand alone, but rather included a statement of the government’s purpose, a purpose which had been set out in the Counties’ resolutions.¹¹⁹ The purpose was further underscored, reasoned the Court, by putting the Commandments in the company of other documents the Counties found significant in the historical foundation of American government.¹²⁰ As a result, the Court held that the second display focused on religious passages in that the Counties posted the Commandments because of their sectarian content.¹²¹ This demonstration of the government’s objective was further enhanced by religious references and the accompanying resolutions’ claims about the embodiment of ethics in Christ. The Court stated that together, “the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.”¹²²

In examining the third display, the Court responded to the lower court’s conclusion that no legitimizing secular purpose promoted the Counties’ third display, the “Foundations of American Law and Government.”¹²³ The Court noted that this display placed the Commandments in the company of other documents the Counties’ found significant in the historical foundation of American government. Further, the Court examined the Counties cited new purposes for the third version, including a desire to educate the citizens of the County as to the significance of the documents displayed.¹²⁴ Despite this defined purpose, the Court took issue with the fact that the resolutions for the second displays, passed just months earlier, were not repealed. The effect, the Court stated, was that no reasonable observer could accept the claim that the Counties had cast off the objective so unmistakable in the earlier displays, “[n]or did the selection of posted material suggest a

117. *Id.* at 2738.

118. *Id.*

119. *Id.* at 2739.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

clear theme that might prevail over evidence of the continuing religious object.”¹²⁵

Although holding that the Counties’ displays violated the Establishment Clause, the Court did note that it was not deciding that “the Counties’ past actions forever taint any effort on their part to deal with the subject matter.”¹²⁶ Rather, the Court stated that its holding should be more narrowly understood so that “purpose needs to be taken seriously under the Establishment Clause” and is to be understood in light of its context.¹²⁷ Finally, the Court noted that it was not holding “that a sacred text can never be integrated constitutionally into a governmental display on the subject of law or American history.”¹²⁸

1. O’Connor Concurrence. In her concurrence, Justice O’Connor stated that the goal of the religion clause of the First Amendment is to “carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society.”¹²⁹ To that end, the purpose behind a display “is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”¹³⁰ Therefore, according to Justice O’Connor, given the history of the displays in the current case, “the Court correctly finds an Establishment Clause violation.”¹³¹

2. Scalia Dissent (Joined by Rehnquist, Thomas, and Kennedy). In his dissent, Justice Scalia contended that the *Lemon* purpose prong should be abandoned.¹³² The need to abandon the purpose prong, noted Scalia, is apparent from the Court’s current use of the *Lemon* test in that the Court is “shifting the focus of *Lemon*’s purpose prong from the search for a genuine, secular motivation to the hunt for a predominately religious purpose.”¹³³ Further, despite the fact that the purpose prong already creates the possibility that an “exclusive purpose to foster or assist religious practice,” which might not necessarily be invalidating, Scalia contended that the Court in the current

125. *Id.* at 2740.

126. *Id.* at 2741.

127. *Id.*

128. *Id.*

129. *Id.* at 2746 (O’Connor, J., concurring).

130. *Id.* at 2747 (O’Connor, J., concurring).

131. *Id.* at 2747 (O’Connor, J., concurring).

132. *Id.* at 2758 (Scalia, J., dissenting).

133. *Id.* (Scalia, J., dissenting).

decision is converting “what has in the past been a fairly limited inquiry into a rigorous review of the full record.”¹³⁴

Despite his position regarding the purpose prong, Justice Scalia went on to attack the Court’s application of the *Lemon* test. Initially Scalia argued that although the *Lemon* test embodies the supposed principle of neutrality, it is distorted because such neutrality is not applied consistently by the Court.¹³⁵ In his second attack on the Court’s application of the *Lemon* test, Scalia argued that the Court manipulated the test to reach a desired result.¹³⁶

Despite Scalia’s insistence that the purpose prong of the *Lemon* test be abandoned, Scalia asserted in his conclusion that even under *Lemon*, the displays should stand.¹³⁷ In sum, Scalia noted that (1) the displays were not noticed, and even if the displays were noticed, they were not unremarkable in that the walls of the courthouses already displayed historical documents; (2) the Foundations Displays manifested a purely secular purpose; (3) the displays portrayed the Commandments as a foundation of the rule of law; and (4) there is no basis for attributing the motive behind the first and second displays to the third.¹³⁸

134. *Id.* (Scalia, J., dissenting).

135. *Id.* at 2751 (Scalia, J., dissenting). To support this assertion that the neutrality principle is not consistently applied by the Court, Scalia illustrated several examples. First, Scalia explained that the Court admitted that its opinion does not rest upon consistently applied principles by admitting that the Establishment Clause doctrine does not have clear-cut absolutes. Scalia explained that what the Court means is “that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not.” *Id.* at 2751 (Scalia, J., dissenting). Second, Scalia supported his argument that the principle of neutrality is not consistently applied by the Court through an analysis of the Court’s suggestion that “the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another.” *Id.* at 2752 (Scalia, J., dissenting). The problem with this, argued Scalia, is twofold. First, Scalia explained that it should be clear from the nation’s historical practices that the Establishment Clause permits public acknowledgement of religious belief, disregarding polytheists and atheists. In other words, Scalia stressed that historical practices demonstrate that “there is a distance between the acknowledgment of a single Creator and the establishment of religion.” *Id.* (Scalia, J., dissenting). Second, because the Ten Commandments are so widely known, their display is not understood as any sort of government endorsement of a particular religious viewpoint. *Id.* (Scalia, J., dissenting).

136. *Id.* at 2757 (Scalia, J., dissenting). To support his proposition, Scalia noted that under the Court’s approach, “even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court’s objective observer would think otherwise.” *Id.* (Scalia, J., dissenting). Therefore, Scalia argued that the Court is replacing the *Lemon’s* requirement that the government have a secular purpose with a “heightened requirement that the secular purpose predominate any purpose to advance religion.” *Id.* (Scalia, J., dissenting).

137. *Id.* at 2758 (Scalia, J., dissenting).

138. *Id.* at 2759-63 (Scalia, J., dissenting).

B. *Van Orden v. Perry*

In *Van Orden v. Perry*,¹³⁹ by a five to four majority the Court held that the Establishment Clause was not violated by a monument displaying the Ten Commandments erected in 1961 on the Texas State Capitol grounds.¹⁴⁰ In so holding, the Court chose not to use the *Lemon* test, but to focus instead on balancing an acknowledgment of our nation's history with the division between church and state without evincing "a hostility to religion by disabling the government from in some ways recognizing our religious heritage."¹⁴¹ The Court also noted the importance of the nature of the Ten Commandments display in terms of its history and context.¹⁴²

In reaching the conclusion that the monument did not violate the Establishment Clause, the Court first reviewed the past and acknowledged the role of religion and religious traditions throughout our nation's history. The plurality pointed out that religion and religious traditions have had a pervasive role in our nation's history and that all three branches of government have acknowledged that religions play a significant role in our nation's history.¹⁴³

The Court then examined the significant role the Ten Commandments have played in our nation's heritage and stated that the Ten Commandments display on the Texas State Capitol grounds is typical of such historical acknowledgments of the role of religion in our nation's history.¹⁴⁴ Physical representations of the Ten Commandments can be seen throughout the Nation's Capital, including the Courtroom of the United States Supreme Court. These physical representations empha-

139. 125 S. Ct. 2854 (2005).

140. *Id.* at 2858.

141. *Id.* at 2859. "We find no constitutional requirement which makes it necessary for government to be hostile to religion." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

142. *Id.* at 2861. The Court acknowledged that the factors identified in *Lemon* twenty five years ago have sometimes been used in Establishment Clause cases, but pointed out the fact that two years after *Lemon* was decided, the Court deemed the *Lemon* factors as "no more than helpful signposts." *Id.* at 2860-61 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

143. *Id.* at 2861. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). In 1789 both Houses passed resolutions asking President George Washington to issue a Thanksgiving Day Proclamation to encourage the people of the United States to observe "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God." 1 Annals of Cong. 90, 914.

144. *Van Orden*, 125 S. Ct. at 2861-64.

size the historical role the Decalogue plays in America's heritage.¹⁴⁵ The Court further noted that Texas has treated the Capitol grounds monuments as representative of the various aspects of the state's political as well as legal history. Therefore, the Court concluded that while the Ten Commandments are religious, they have an undeniable historical meaning and "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."¹⁴⁶

The Court then examined previous Establishment Clause jurisprudence, which sets forth limits to the display of religious messages or symbols.¹⁴⁷ For example, the Court has "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."¹⁴⁸ The Court pointed to its holding in *Stone* that statutes requiring the display of the Ten Commandments in classrooms of elementary and secondary schools are unconstitutional.¹⁴⁹ However, the Court noted that these cases do not stand for the proposition that the Ten Commandments cannot ever be displayed.¹⁵⁰ In fact, the Court noted that the display of the Ten Commandments on the Texas State Capitol grounds is a far more passive use than the texts at the heart of the controversy in *Stone*, where the children would encounter them every day.¹⁵¹ The display was so passive, the Court noted, that Van Orden himself walked by the monument for a number of years before filing a lawsuit to require its removal.¹⁵²

1. Scalia Concurrence. Justice Scalia concurred with the opinion of Chief Justice Rehnquist because he believed it accurately reflected the current application of Establishment Clause jurisprudence.¹⁵³ However, Scalia wanted the Court to adopt an Establishment Clause jurisprudence that could be more consistently applied.¹⁵⁴ This jurisprudence would revolve around the idea that there is nothing inherently unconstitutional in a state's favoring religion generally, honoring God through

145. *Id.* at 2861-63.

146. *Id.* at 2863.

147. *Id.*

148. *Id.* at 2863-64 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)).

149. *Id.* at 2863.

150. *Id.* at 2864 n.11.

151. *Id.* at 2864.

152. *Id.*

153. *Id.* (Scalia, J., concurring).

154. *Id.* (Scalia, J., concurring).

public prayer and acknowledgment, or displaying the Ten Commandments in a nonproselytizing manner.¹⁵⁵

2. Thomas Concurrence. Justice Thomas agreed that the monument has religious significance, religion has had a prominent role in this nation's history and the permissibility of government displays acknowledging that history.¹⁵⁶ Thomas advocates a need for the Court to rethink Establishment Clause jurisprudence and return to the original meaning of the word "establishment" as the framers understood it to mean "actual legal coercion."¹⁵⁷ Clearly then, the Ten Commandments display on the Texas State Capitol grounds would be constitutional. Additionally, Thomas concluded that returning to this original meaning of the Establishment Clause would alleviate the "incoherence of the Court's decisions in this area," which "renders the Establishment Clause impenetrable and incapable of consistent application."¹⁵⁸ Therefore, not every acknowledgment of religion would give rise to a claim for violation of the Establishment Clause.

3. Breyer Concurrence in the Judgment Only. Justice Breyer concurred in the judgment of the Court but disagreed with the plurality's analysis of the Ten Commandments on the Texas State Capitol grounds. Breyer would have reached the same conclusion by examining the context of the display, noting specifically its location and identity of the donor, in light of the purposes for which the Establishment Clause was enacted.¹⁵⁹

Breyer noted that the Establishment Clause does not compel the government to remove all religious elements from the public sector, or force the government to favor nonreligion over religion.¹⁶⁰ Breyer pointed out the difficulty in achieving a balanced separation of church and state that dictates that the government neither "engage in nor compel religious practices," nor "work deterrence" of any religious belief.¹⁶¹

Breyer posited that the task of the Court would be far simpler if there was a single test or formula which would accurately distinguish between

155. *Id.* (Scalia, J., concurring).

156. *Id.* at 2865 (Thomas, J., concurring).

157. *Id.* (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in judgment)).

158. *Id.* at 2866 (Thomas, J., concurring).

159. *Id.* at 2868-70 (Breyer, J., concurring in judgment).

160. *Id.* at 2868 (Breyer, J., concurring in judgment).

161. *Id.* (Breyer, J., concurring in judgment) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (concurring opinion)).

what is constitutionally permissible and what is not in all Establishment Clause cases.¹⁶² The result, according to Breyer, would be that in the difficult borderline cases, members of the Court would apply legal, not personal, judgment to the facts of the case.¹⁶³

Breyer contended that because *Van Orden v. Perry* was a borderline case, the Court needed to determine the message that the text in question conveyed by considering how the text was used.¹⁶⁴ Breyer posited that it is possible for a display of the Ten Commandments to convey a religious message, a secular moral message, and even a historical message.¹⁶⁵ Breyer concluded that the secular nonreligious message predominated based on the identity of the donor and the circumstances surrounding the donation, as well as the location of the monument.¹⁶⁶ Breyer noted that the donor of the monument, the Fraternal Order of Eagles, was a primarily secular civic organization that sought to highlight the role of the Ten Commandments in shaping morality. Additionally, Breyer argued that the acknowledgment on the face of the monument that the Eagles had donated the display “further distances the State itself from the religious aspect of the Commandments’ message.”¹⁶⁷ Breyer concluded that the monument’s physical location is not conducive to meditation or other religious activities.¹⁶⁸ Additionally, Breyer noted that the Ten Commandments display is included in a group of markers and monuments that indicate the history of ethics, morals, and ideals of Texans, suggesting that the display’s message reflects history, and that the moral principles predominate.¹⁶⁹

Breyer concluded that the fact that the monument was not challenged for at least forty years was the determinative factor the Court should consider.¹⁷⁰ Breyer stated that this fact indicated more strongly than any bright line test that the monument was not considered to be government endorsement of a particular religion or even government promotion of religion over irreligion in general.¹⁷¹ Breyer indicated that reaching a contrary conclusion would be exhibiting hostility toward

162. *Id.* (Breyer, J., concurring in judgment).

163. *Id.* at 2869 (Breyer, J., concurring in judgment).

164. *Id.* (Breyer, J., concurring in judgment).

165. *Id.* at 2869-70 (Breyer, J., concurring in judgment).

166. *Id.* at 2870 (Breyer, J., concurring in judgment).

167. *Id.* (Breyer, J., concurring in judgment).

168. *Id.* (Breyer, J., concurring in judgment).

169. *Id.* (Breyer, J., concurring in judgment).

170. *Id.* (Breyer, J., concurring in judgment).

171. *Id.* (Breyer, J., concurring in judgment).

religion and “could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”¹⁷²

4. Stevens Dissent (Joined by Ginsburg). Justice Stevens’ dissent centered on the argument that the plain message of the display is that “the State endorses the divine code of the ‘Judeo-Christian’ God” and that it is not a passive acknowledgment of religion.¹⁷³ Stevens argued that the Establishment Clause creates a strong presumption against the display of religious symbols on public property, and demanded that the government not exercise one religious faith over another.¹⁷⁴ Stevens cited the Court’s decision in *Wallace v. Jaffree* as reaffirming the notion that the Establishment Clause “requires the same respect for the atheist as it does for the adherent of a Christian faith.”¹⁷⁵

Stevens stated that because the state chose to display one of many versions of the Ten Commandments, the state took a position on a doctrinal religious debate—an action which is unquestionably unconstitutional.¹⁷⁶ At the very least, he argued that the display expresses an impermissible preference for religion over irreligion.¹⁷⁷ Stevens also criticized the plurality opinion for failing to recognize the significance of the display location, not just on any government property, but at the State Capitol. The fact that the text is physically placed at the seat of the Texas government “actually enhances the religious content of its message.”¹⁷⁸

In the third section of his dissent, Stevens attacked the plurality opinion for according so much weight to the history of our nation and the founders’ speeches and beliefs. Stevens argued that the historical arguments are flawed for several reasons. First, Stevens contended that the words “public official’s words” are not a transmission directly from the government, but solely the personal views of the speaker.¹⁷⁹ Second, Stevens argued that the monument is a permanent fixture, and as such, the message does not cease to be transmitted, and objecting viewers have no choice but to accept it or avert their gaze.¹⁸⁰ Third, the plurality failed to account for other views that may have been

172. *Id.* at 2871 (Breyer, J., concurring in judgment).

173. *Id.* at 2874, 2877 (Stevens, J., dissenting).

174. *Id.* at 2874 (Stevens, J., dissenting).

175. *Id.* at 2876 (Stevens, J., dissenting).

176. *Id.* at 2880 (Stevens, J., dissenting).

177. *Id.* at 2880-81 (Stevens, J., dissenting).

178. *Id.* at 2882 (Stevens, J., dissenting).

179. *Id.* at 2883 (Stevens, J., dissenting).

180. *Id.* (Stevens, J., dissenting).

espoused by other leaders during that time.¹⁸¹ Finally, Stevens argued that the plurality's "appeals to the religiosity of the Framers ring hollow" unless they are willing to overlook *stare decisis* and over sixty-five years of Establishment Clause jurisprudence as well as "cross back over the incorporation bridge."¹⁸²

Stevens contended that the Court is not only bound by "what has been," but must also contemplate "what may be."¹⁸³ According to Stevens, this may be accomplished by looking not only to our nation's history, but also to our democratic aspirations. Stevens stated that the governing principle is one of neutrality among the valid belief systems, which he argued would be a foreign concept to the Framers. The judgment of the Court, Stevens argued, "makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion."¹⁸⁴

Finally, Stevens addressed Thomas' argument that Establishment Clause jurisprudence should be simplified by returning to the original meaning of the clause as prohibiting coercion. Stevens stated that under Thomas' view, the Establishment Clause would be a replica of the compelled speech doctrine.¹⁸⁵ Additionally, Stevens contended that determining what form coercion must take in order to be violative would be difficult and thus would lead to inconsistent application, contrary to Thomas' view.¹⁸⁶

5. Souter Dissent (Joined by Stevens and Ginsburg). Justice Souter argued that the Ten Commandments are a religious statement, and "the purpose of singling them out in a display is clearly the same."¹⁸⁷ Souter pointed to the fact that the phrase "I AM the LORD thy God" is emphasized using capital letters to be "the most eye-catching segment of the quotation."¹⁸⁸ Souter also noted that the other symbols

181. *Id.* (Stevens, J., dissenting). Stevens refers to the view of Thomas Jefferson that the Thanksgiving proclamations issued by Washington were a violation of the Establishment Clause. *Id.* (Stevens, J., dissenting) (citing Letter from Thomas Jefferson to Rev. S. Miller).

182. *Id.* at 2887 (Stevens, J., dissenting).

183. *Id.* at 2889-90 (Stevens, J., dissenting).

184. *Id.* at 2890 (Stevens, J., dissenting).

185. *Id.* at 2890 n.35 (Stevens, J., dissenting).

186. *Id.* (Stevens, J., dissenting).

187. *Id.* at 2892 (Souter, J., dissenting).

188. *Id.* at 2893 (Souter, J., dissenting). Souter also notes that the phrase "I am the Lord thy God" is also slightly larger than the following phrases and centered on the stone. *Id.*

on the stone do not detract from the overall religious nature of the monument.¹⁸⁹

Souter contrasted this depiction of the Ten Commandments with other presentations of the Decalogue that would be constitutionally permissible in his view. Souter pointed to the lack of prominence placed on the religious aspect of the statues, sculptures and portraits, where Bible figures are portrayed along with other historical figures, and themes are not emphasized above other themes.¹⁹⁰

Souter disagreed with the State's argument that the monument is part of a larger group of monuments that together operate like a collection in a museum, and thus should be viewed in light of the overall combined message of the displays.¹⁹¹ Souter discounted this argument as overlooking the lack of common appearance or history between the displays, and the fact that observers would view each on its own terms without a sense of a greater purpose.¹⁹²

Souter also criticized the plurality for limiting the holding of *Stone* to cases focused on a classroom setting when the Court's discussions of *Stone* heretofore have not done this.¹⁹³ Souter further disagreed that the monument is a more passive use of the Ten Commandments than hanging them on the wall in a classroom. Souter argued that the Commandments in both cases are being put in a location for the purpose of being seen.¹⁹⁴

Finally, Souter disagreed that the forty years of elapsed time between the monument's erection and the filing of the lawsuit challenging its constitutionality is significant. Souter argued instead that the lack of challenges to the monument's placement is only a reflection of the fact that suing a state for an Establishment Clause violation does not put anything in a plaintiff's pocket and may instead take a lot out, in addition to the fact that "the risk of social ostracism can be powerfully deterrent."¹⁹⁵

189. *Id.* (Souter, J., dissenting). *See also id.* at 2893 n.2 ("the monument sends the message that being American means being religious (and not just being religious but also subscribing to the Commandments, *i.e.*, practicing a monotheistic religion)").

190. *Id.* at 2893-94 n.4 (Souter, J., dissenting).

191. *Id.* at 2895 (Souter, J., dissenting).

192. *Id.* (Souter, J., dissenting).

193. *Id.* at 2896 (Souter, J., dissenting).

194. *Id.* at 2896-97 (Souter, J., dissenting).

195. *Id.* at 2897 (Souter, J., dissenting).

IV. IMPLICATIONS

These two cases stand for the proposition that a display of the Ten Commandments may or may not be a uniquely religious symbol. Eight Justices saw no distinction between the Ten Commandments displays in the two cases; Rehnquist, Scalia, Kennedy and Thomas voted to uphold both displays, while Stevens, O'Connor, Souter, and Ginsburg voted to strike both displays as violative of the Establishment Clause. On the other hand, Justice Breyer concluded there were enough significant factual distinctions that only one of the displays should be struck.

What can be gleaned from these two cases is that not all displays of the Ten Commandments violate the First Amendment Establishment Clause, and the determination of whether a display violates the Establishment Clause is extremely fact-intensive. Consistent with the Court's actions this summer, lower courts are not obligated to use the *Lemon* test, but may find that it serves as a helpful guidepost. In cases where it is not clear that the government is or is not establishing religion, courts may look to the display's history, purpose, and context to determine whether the display violates the Establishment Clause.

A. *Religious Displays*

The Court stated that the Establishment Clause does not mandate the government to refrain from all acknowledgment and accommodation of religion.¹⁹⁶ However, it noted that there are limits to the government's acknowledgment of religion and the display of religious symbols.¹⁹⁷ In limiting the government's ability to display religious symbols on government property, the majority agreed that the government cannot place religious symbols on government property in such a manner that symbolically endorses religion.¹⁹⁸

B. *Ten Commandments Displays*

According to the Court, the Ten Commandments are religious in *McCreary* and *Van Orden*, and therefore any display of the Ten Commandments will necessarily be a religious display. Justice Souter's opinion for the Court in *McCreary* clearly illustrates that the Ten Commandments are a profound religious message. Souter explained that the Commandments are regarded as sacred text by many religions and it expresses the view that there is a God and that God has commanded

196. *Van Orden v. Perry*, 125 S. Ct. 2854, 2860 n.3 (2005).

197. *McCreary v. ACLU*, 125 S. Ct. 2722, 2739 (2005).

198. *Id.*

rules for behavior.¹⁹⁹ In noting this, the majority reaffirmed its decision in *Stone v. Graham*.²⁰⁰ Because this Court viewed the Ten Commandments as a religious symbol, such displays will automatically trigger an Establishment Clause inquiry to determine whether the displays are an unconstitutional establishment of religion.

Despite the majority in *McCreary*, the Court noted in *Van Orden* that the Ten Commandments also have an undeniable historical meaning.²⁰¹ These two opinions together indicate that displays of the Ten Commandments that are solely for religious purposes will not be upheld. However, where the display also has a historical meaning, it may not run afoul of the Establishment Clause. Courts should then turn to the history, purpose, and context surrounding the display to determine whether it violates the Establishment Clause.

C. Court Must Focus on History, Purpose, and Context of Display

In both cases, the Court looked to the history, purpose, and context of the display in determining whether they were constitutional. The effect of analyzing these three factors is that every religious symbol on government property will have to be judged individually based on the circumstances and facts surrounding it. Regarding history, Justice Breyer stressed that the Texas Ten Commandments had been displayed there for forty years, while the Kentucky displays were of recent origin.²⁰² In analyzing purpose, the Court concluded that the Kentucky displays had an expressly religious purpose, whereas the Texas display served a primarily nonreligious purpose.²⁰³ In terms of context, the Court noted that the Texas display was only one of thirty-eight monuments and historical markers designed to illustrate the ideals of Texas living, while the symbols in the Kentucky displays were put there in an attempt to save the Commandments' display.²⁰⁴ This framework for analysis of Establishment Clause cases does not lend itself to a bright line rule to which courts will be able to apply to the facts of any particular case. However, the displays at issue in these two cases stand in such contrast to one another that they foster an understanding of where permissible lines may be drawn.

199. *Id.* at 2738.

200. 449 U.S. 39 (1981). In *Stone* the Court held that it was unconstitutional for Kentucky to require the posting of the Ten Commandments in public school classrooms. *Id.* at 40.

201. *Van Orden*, 125 S. Ct. at 2863.

202. *Id.* at 2870-71 (Breyer, J., concurring in judgment).

203. *Id.* at 2871 (Breyer, J., concurring in judgment).

204. *Id.* at 2870 (Breyer, J., concurring in judgment).

D. The Fate of the Lemon Test

When *Lemon* was decided, it was announced as the governing test for Establishment Clause cases.²⁰⁵ However, in the last twenty-five years, the Court has waffled in its use of the *Lemon* test, applying the factors test in some cases and avoiding it in others.²⁰⁶ Further, the Court has sometimes used *Lemon* as a guidepost without strictly adhering to it, a pattern that began only two years after *Lemon* was decided.²⁰⁷ Additionally, for many years after the creation of the *Lemon* test, many Justices on the Court have molded the test to fit within their idea of how Establishment Clause cases should be approached.²⁰⁸ Despite reaffirming the *Lemon* test in *McCreary*, the Court opted not to use the *Lemon* test in deciding *Van Orden*.²⁰⁹ As a result, courts are presently left to use their own discretion in choosing whether or not to apply the *Lemon* test in whole, in part, or not at all.

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205. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

206. Compare *Wallace v. Jaffree*, 472 U.S. 38 (1985) (applying *Lemon*), with *Marsh v. Chambers*, 463 U.S. 783 (1983), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (not applying *Lemon*).

207. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

208. *McCreary*, 125 S. Ct. at 2722, 2758 (Scalia, J., dissenting) (urging that the purpose prong of the test be abandoned).

209. *Id.* at 2735; *Van Orden*, 125 S. Ct. at 2861.