How Did the Ten Commandments End up on Both Sides of the Wall of Separation between Church and State? The Contradicting Opinions of Van Orden v. Perry and McCreary v. ACLU

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I. INTRODUCTION

On June 27, 2005, in *Van Orden v. Perry*, the United States Supreme Court held the Establishment Clause of the First Amendment allows a Ten Commandments monument on Texas State Capitol grounds. This opinion appeared to be a major step forward in Establishment Clause jurisprudence. However, on the same day, in *McCreary County v. ACLU of Kentucky*, the Court held the State of Kentucky violated the Establishment Clause by posting Ten Commandments displays in two county courthouses.

These conflicting judgments do little to clear up the debate concerning religious monuments on government property. Instead, *Van Orden* and *McCreary* seem to have opened the floodgates to further litigation and blurred the “wall of separation between church and state.”

This case note explains how the conflicting judgments in *Van Orden* and *McCreary* create unacceptable precedent. Part II provides background information on the various tests the Court has applied in Establishment Clause cases. Part III presents the facts from *Van Orden* and *McCreary*. Part IV covers the *Van Orden* and *McCreary* holdings. Part V presents the Court’s reasoning for determining the outcome of each case. Part VI analyzes the contradictions between the *Van Orden* and *McCreary* opinions, and shows why these inconsistencies will create problems in future Establishment Clause challenges. Part VII suggests alternative approaches to future Establishment Clause cases.

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2. Id. at 681.
4. Id. at 850–51.
5. See *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson’s reply to an address by a committee of the Danbury Baptist Association (Jan. 1, 1802)).
II. BACKGROUND OF ESTABLISHMENT CLAUSE JURISPRUDENCE

A. The Lemon Test

Prior to Van Orden and McCreary, the Supreme Court had issued only one decision concerning the Ten Commandments. This was Stone v. Graham,7 where the Court held a Kentucky statute requiring the Ten Commandments to be posted in every public classroom violated the Establishment Clause.8 The Stone Court reached its conclusion by applying the test established in Lemon v. Kurtzman.9 This test, known as the Lemon test, has three prongs. “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.”10

In developing the Lemon test, the Court recognized, “total separation is not possible in an absolute sense.”11 When dealing with the Establishment Clause in modern society, “[s]ome relationship between government and religious organizations is inevitable.”12 Since Lemon v. Kurtzman was decided in 1971, it has been cited in over 1500 cases and 3200 other documents.13 However, the Lemon test has been criticized for producing unpredictable and disputable results.14

B. The Endorsement Test

In 1984, the Lemon test received a makeover when the Supreme Court decided Lynch v. Donnelly.15 The question before the Court was whether the Establishment Clause allowed the city of

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6. Van Orden, 545 U.S. at 737 (Souter, Stevens & Ginsburg, JJ., dissenting).
8. Id. at 41.
10. Id. at 612–13 (internal citations and quotations omitted).
11. Id. at 614.
12. Id.
14. See e.g. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (criticizing the Lemon test, saying “[l]ike some ghou in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District”).
Pawtucket, Rhode Island to display a nativity scene.\textsuperscript{16} The Court concentrated on the third prong of the \textit{Lemon} test and determined the nativity scene did not "create excessive entanglement between religion and government."\textsuperscript{17} In a concurring opinion, Justice O'Connor recognized the difficulty of applying the \textit{Lemon} test to future Establishment Clause challenges when she referred to the three-part \textit{Lemon} test as "no more than a helpful signpost."\textsuperscript{18} O'Connor went on to propose a test that concentrated on two factors. First, does the government statute or practice foster an excessive entanglement with religion?\textsuperscript{19} Second, does the government statute or practice result in the endorsement or the disapproval of religion?\textsuperscript{20}

Justice O'Connor's proposal, known as the endorsement test, has received both positive and negative feedback.\textsuperscript{21} Both Van Orden and McCreary cited Lynch; however, the Court did not strictly apply the endorsement test in either case. In Van Orden, the plurality referenced Lynch to show the Establishment Clause does not require government practices to be void of religious content.\textsuperscript{22} In his concurring opinion, Justice Thomas referred to Lynch as an example of the unwillingness of the Court to strictly apply any single test.\textsuperscript{23}

\textit{C. The Coercion Test}

The third test the Court has applied in Establishment Clause cases is the coercion test. The Court applied the coercion test in \textit{Lee v. Weisman},\textsuperscript{24} and held the Establishment Clause prohibited public schools from including prayers or other religious exercises at graduation ceremonies.\textsuperscript{25} In \textit{Lee}, the district court held a public school's graduation prayer unconstitutional because it violated all

\begin{itemize}
\item[16.] Id. at 670–71.
\item[17.] Id. at 685.
\item[18.] Id. at 688 n. * (O'Connor, J., concurring) (quoting \textit{Hunt v. McNair}, 413 U.S. 734, 741 (1973) (internal citations omitted)).
\item[19.] Id. at 689.
\item[20.] Id.
\item[21.] See e.g. \textit{Co. of Allegheny v. ACLU Greater Pitt. Ch.}, 492 U.S. 573, 655 (1989) (applying the endorsement test and holding Allegheny County violated the Establishment Clause by displaying a crèche but not a menorah; Justice Kennedy criticized the test for creating "an unjustified hostility toward religion") (Kennedy, J., Rehnquist, C.J., White & Scalia, JJ., concurring in part and dissenting in part).
\item[23.] Id. at 693 n. * (Thomas, J., concurring).
\item[25.] Id.
\end{itemize}
three prongs of the *Lemon* test.²⁶ The Supreme Court affirmed the decision but did not apply the *Lemon* test.²⁷ Instead, the Court pioneered the coercion test by holding that a State's involvement in school prayers violated the constitutional principle that government may not coerce individuals to support religion.²⁸

III. FACTS

A. Van Orden v. Perry

In 2001, Thomas Van Orden sued the State of Texas, challenging the constitutionality of a monument displaying the Ten Commandments, located on the Texas State Capitol grounds.²⁹ Van Orden frequently encountered the monument during visits to the Supreme Court building, which was "located just northwest of the Capitol building."³⁰

The three-feet-wide by six-feet-high stone monument is located between the Supreme Court building and the Capitol.³¹ It is one of seventeen monuments and twenty-one historical markers surrounding the Texas State Capitol "commemorating the people, ideals, and events that compose Texan identity."³² The Ten Commandments monument differs from the other monuments located on the Capitol grounds because it has religious significance. The text on the monument reads:

> I AM the LORD thy GOD.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.

²⁶. *Id.* at 585–86.
²⁷. *Id.* at 587.
²⁸. *Id.*
³⁰. *Id.*
³¹. *Id.* at 681.
³². *Id.* (citing Tex. H. Con. Res. 38, 77th Leg. (2001) (internal quotations omitted)).
³³. *Id.* at 681 n. 1 (listing the other monuments as: "Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard . . . , 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").
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.34

The monument was presented by the Fraternal Order of Eagles of Texas35 to the people and youth of Texas in 1961.36 The Eagles paid to erect the monument, and the ceremony was presided over by two state legislators.37

The district court held the Ten Commandments monument did not violate the Establishment Clause.38 The court determined the State had a “valid secular” purpose in displaying the monument and appreciating the efforts the Eagles have taken against juvenile delinquency.39 The court also found the monument to be a “passive” display that would not lead a reasonable observer to believe the State of Texas was endorsing religion.40 The Court of Appeals affirmed the decision41 and the Supreme Court granted certiorari.42

B. McCreary v. ACLU of Kentucky

In 1999, the American Civil Liberties Union (ACLU) of Kentucky brought suit seeking a preliminary injunction to remove Ten Commandments displays from two county courthouses in Kentucky.43 The ACLU claimed the displays violated the Establishment Clause of the Constitution.44

In McCreary County, the legislative body ordered the display to be posted in a “very high traffic area of the courthouse.”45 In Pulaski County, the Commandments were posted in a ceremony presided over by the Judge-Executive who was accompanied by

34. Van Orden, 545 U.S. at 707 (Stevens & Ginsburg, JJ., dissenting).
35. Id. at 701 (Breyer, J., concurring) (describing the Fraternal Order of Eagles as “a private civic (and primarily secular) organization [that], while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency”).
36. Id. at 707 n. 1 (Stevens & Ginsburg, JJ., dissenting).
37. Id. at 682 (plurality).
38. Id.
39. Id.
40. Van Orden, 545 U.S. at 682 (plurality).
41. Id. at 682–83, affg Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).
42. Id. at 683.
44. Id.
45. Id. at 851 (internal quotations omitted).
the pastor of his church. The Judge-Executive called the Commandments "good words to live by" and the pastor told the press that "displaying the Commandments was one of the greatest things the judge could have done to close out the millennium."

In both counties, the displays included gold-framed copies of an abridged text of the King James Version of the Ten Commandments. The text on the displays read:

Thou shalt have no other gods before me.
Thou shalt not make unto thee any graven images.
Thou shalt not take the name of the Lord thy God in vain.
Remember the sabbath day, to keep it holy.
Honor thy father and thy mother.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness.
Thou shalt not covet.

Before the district court responded to the ACLU's request for an injunction, the legislative body of each county issued resolutions authorizing the expansion of each display. The expansions included eight other documents with religious themes. In reaching this order, the district court applied the three-part Lemon test and determined "the original display lack[ed] any secular purpose because the Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God."

Further, the court found the updated version of the displays

46. Id.
47. Id. (internal quotations omitted).
48. Id.
49. McCreary, 545 U.S. at 851–52.
50. Id. at 852–53.
51. Id. at 854 (listing the other documents as "the 'endowed by their Creator' passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, 'In God We Trust'; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,' reading that '[t]he Bible is the best gift God has ever given to man; a proclamation by President Reagan making 1983 the Year of the Bible; and the Mayflower Compact").
52. Id.
53. Id. (quoting ACLU of Ky. v. Pulaski Co., 96 F. Supp. 2d 691, 698 (E.D. Ky. 2000) (internal quotations omitted)).
lacked secular purpose because the "Count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity."54

Following the court's order, the Counties changed the displays a third time.55 These versions included nine equally sized documents with the original Ten Commandments' text expanded to include more extensive quotations.56 The accompanying religious documents were replaced with eight new documents.57 The Counties claimed these documents were "part of the foundation of American Law and Government."58

The district court did not believe the changes had a secular meaning and affirmed the injunction requiring the Counties to remove the displays.59 The Court of Appeals affirmed the decision and found the counties' purpose was religious, not educational or secular.60 The Supreme Court granted certiorari.61

IV. HOLDINGS

A. Van Orden v. Perry

On June 27, 2005, in a five-to-four plurality decision, the Supreme Court affirmed the Fifth Circuit judgment, confirming the State of Texas's right to display the Ten Commandments monument.62 To arrive at this conclusion, the Court ignored Establishment Clause precedent and blazed a new trail for Ten Commandments displays. The Court did not apply the Lemon, endorsement, or coercion tests. However, the Court also failed to articulate a bright-line rule or present a replacement test. Instead, seven Justices published separate opinions offering fractured insight toward future Establishment Clause claims.63

54. Id. at 854–55 (quoting ACLU of Ky., 96 F. Supp. 2d at 697, 699).
55. McCreary, 545 U.S. at 855.
56. Id.
57. Id. at 856 (listing the new documents as "copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice").
58. Id. at 857 (internal quotations omitted).
59. Id.
60. ACLU of Ky. v. McCreary Co., 354 F.3d 438, 451 (6th Cir. 2003).
61. McCreary, 545 U.S. at 858.
63. Id. at 679 ("Rehnquist, C.J., announced the judgment of the Court and delivered an opinion, in which Scalia, Kennedy, and Thomas, JJ., joined. Scalia, J., and Thomas, J., filed concurring opinions. Breyer, J., filed an opinion concurring in the judgment. Stevens,
B. McCreary v. ACLU

On June 27, 2005, in a five-to-four decision, the United States Supreme Court affirmed the Sixth Circuit by upholding the preliminary injunction denying the two Kentucky counties’ right to keep their Ten Commandments displays.\(^{64}\) The Supreme Court concluded the purpose of the displays was “predominantly religious.”\(^{65}\) To arrive at this conclusion, the Court applied the \textit{Lemon} test and determined the displays did not have a secular purpose.\(^{66}\) This contradicted the \textit{Van Orden} decision, where the Court refused to apply the \textit{Lemon} test. While the \textit{Lemon} test is controversial and may be an imperfect solution for determining whether specific displays violate the Establishment Clause, these contradicting opinions—delivered on the same day—are even more problematic. Lower courts now face the challenge of wading through confusing precedent concerning a sensitive area of the law.

V. THE COURT’S REASONING

A. Van Orden v. Perry

Chief Justice Rehnquist announced the \textit{Van Orden} judgment and delivered the plurality opinion.\(^{67}\) Justices Scalia, Thomas, and Kennedy joined the opinion.\(^{68}\) Chief Justice Rehnquist made it clear the Ten Commandments have religious significance when he wrote, “lof course, the Ten Commandments are religious—they were so viewed at their inception and so remain.”\(^{69}\) However, he stressed, “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”\(^{70}\) He asserted, there is “no constitutional requirement which makes it necessary for government to be hostile to religion.”\(^{71}\) The Chief Justice recognized there are lim-

\(^{64}.\) \textit{McCreary}, 545 U.S. at 844.
\(^{65}.\) \textit{Id.} at 881.
\(^{66}.\) \textit{Id.} at 864–65.
\(^{67}.\) \textit{Van Orden}, 545 U.S. at 681 (plurality).
\(^{68}.\) \textit{Id.}
\(^{69}.\) \textit{Id.} at 690.
\(^{70}.\) \textit{Id.}
\(^{71}.\) \textit{Id.} at 684 (citing \textit{Zorach v. Clauson}, 343 U.S. 306, 313–14 (1952)).
its on religious messages and cited Stone v. Graham\textsuperscript{72} as an example of those limits.\textsuperscript{73}

Justices Souter, Stevens, and O'Connor filed dissenting opinions. Justice Stevens criticized the plurality for finding a secular purpose in a Ten Commandments monument that had no connection with the history of Texas.\textsuperscript{74} He said the Van Orden monument sends a clear message: "This State endorses the divine code of the 'Judeo-Christian' God."\textsuperscript{75} Justice Souter stressed that the Court applied the Lemon test in Stone, the only other case addressing "the constitutionality of posting the Ten Commandments.\textsuperscript{76} He criticized the plurality for calling the Van Orden monument "much more passive . . . than was the case in Stone."\textsuperscript{77} Then he said, "[t]he problem in Stone was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it.\textsuperscript{78}

However, the most important opinion came from Justice Breyer. Justice Breyer provided the swing vote that ultimately declared the Van Orden Ten Commandments monument constitutional. This vote was the biggest surprise of the judgment, because Justice Breyer had typically been on the side of enforcing the Establishment Clause.\textsuperscript{79}

[He] dissented in Zelman v. Simmons-Harris,\textsuperscript{80} where the Court held that vouchers from the government may be used for parochial schools. [He] also dissented in Agostini v. Felton,\textsuperscript{81} which allowed more aid to parochial schools, and Rosenberger v. Rectors and Visitors of the University of Virginia,\textsuperscript{82} which held that the government cannot deny funding to religious student groups when money is available to secular groups.\textsuperscript{83}

While Justice Breyer's opinion holding the Ten Commandments monument constitutional was not expected, it was even more surprising that Justice Breyer did not accept the majority view, nor reject all of the dissenting views. He set aside his former

\textsuperscript{73} Van Orden, 545 U.S. at 690 (plurality).
\textsuperscript{74} Id. at 707 (Stevens & Ginsburg, JJ., dissenting).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 737 (Souter, Stevens & Ginsburg, JJ., dissenting).
\textsuperscript{77} Id. at 745.
\textsuperscript{78} Id.
\textsuperscript{79} Erwin Chemerinsky, Why Justice Breyer Was Wrong in Van Orden v. Perry, 14 Wm. & Mary Bill Rights J. 1, 2 (2005).
\textsuperscript{80} Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002).
\textsuperscript{81} Agostini v. Felton, 521 U.S. 203, 240 (1997).
\textsuperscript{83} Chemerinsky, supra n. 79, at 2.
feelings and refused to apply the Lemon, endorsement, or coercion tests. Part VI compares Justice Breyer’s individual Van Orden opinion to the majority opinion in McCreary with which he concurred.

B. McCreary v. ACLU

Justice Souter issued the McCreary majority opinion, in which Justices O’Connor, Stevens, Ginsburg, and Breyer joined. Justice Souter’s analysis centered on “the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” Justice Souter refused to abandon the purpose prong of the Lemon test, and affirmed the importance of this prong when he wrote, “the secular purpose has to be genuine, not a sham, and not merely secondary to a religious objective.” Next, Justice Souter criticized the dissent for asserting “the purpose test is satisfied so long as any secular purpose for the government action is apparent.”

Justice Souter also stressed the importance of using Stone as a legal benchmark for the constitutionality of Ten Commandments displays. He noted the displays rejected in Stone were similar to the displays in the Kentucky courthouses because the original Kentucky displays stood alone and were not part of a secular display. He rejected the Counties’ argument that the constitutionality of only the third updated displays should be considered when he wrote, “the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence.” This statement affirms that the secular purpose cannot be a sham. The statement also asserts that if the original purpose of a display was predominantly religious, a secular purpose cannot be achieved by looking at the most recent government action.

84. McCreary Co. v. ACLU of Ky., 545 U.S. 844, 848 (2005).
85. Id. at 860 (internal quotations omitted).
86. Id. at 864.
87. Id. at 865 n. 13.
88. Id. at 867.
89. Id. at 868.
90. McCreary, 545 U.S. at 866.
VI. ANALYSIS

A. Justice Breyer's Conflicting Opinions in Van Orden and McCreary

Justice Breyer agreed with the judgment and issued a concurring opinion in Van Orden.\(^91\) He joined the majority opinion in McCreary\(^92\) and did not file an individual opinion; therefore, it can be assumed he agreed with Justice Souter's majority opinion. However, a number of key points in Justice Breyer's Van Orden opinion contradict the McCreary majority opinion.

In his Van Orden opinion, Justice Breyer admitted "the Ten Commandments' text undeniably has a religious message."\(^93\) He referred to Van Orden as a borderline case and said, "[I]n such cases, I see no test-related substitute for the exercise of legal judgment."\(^94\) He stressed the judgment must not be a "personal judgment."\(^95\) Next, he recognized the Court's prior tests as useful guideposts, but reasserted that "no exact formula can dictate a resolution to fact-intensive cases such as this."\(^96\) He concluded by saying the Court should not look solely to the text of the Ten Commandments, but should focus on the context of the display and how the text is used.\(^97\)

There is error in Justice Breyer's reasoning. He pointed out the obvious by calling Van Orden a borderline case without an exact formula for a resolution. He also recognized that, without an exact formula, the Court's prior tests provide useful guideposts. But, by failing to apply these useful guideposts, Justice Breyer seems to reject the previous tests used in Establishment Clause cases. This includes the Lemon test the majority applied in McCreary—the same Lemon test Breyer endorsed by concurring with the majority. By avoiding these established guideposts when viewing a borderline case, Justice Breyer made his legal judgment nothing but a "personal judgment." Worse, he failed to establish clear precedent for future analysis of the same issue.

Justice Breyer also contradicted the McCreary majority opinion by holding the Van Orden Ten Commandments monument

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92. McCreary, 545 U.S. at 848 (majority).
93. Van Orden, 545 U.S. at 700 (Breyer, J., concurring).
94. Id.
95. Id.
96. Id.
97. Id. at 700-01.
had an adequate secular purpose. He examined the context of the Van Orden Ten Commandments monument and determined it had both a religious and secular message. However, he ultimately found the monument was predominately secular based on three factors. First, the monument was donated by the Fraternal Order of Eagles, a private and primarily secular organization. Second, it was located among seventeen monuments and twenty-one historical markers on the State Capitol grounds, and not in a public school like the previously unconstitutional Ten Commandments displays. Third, the monument stood for forty years before it was challenged as an Establishment Clause violation.

These factors ignore the Stone precedent. The McCreary majority made it clear the Stone precedent should be followed. "[I]t will be the rare case in which one of two identical displays violates the purpose prong . . . like displays tend to show like objectives and will be treated accordingly." Although the Van Orden Ten Commandments monument is surrounded by other monuments and markers and not posted in public school classrooms, the monument gives the impression the State of Texas is endorsing and promoting the Ten Commandments. This is very similar to the State of Kentucky's unconstitutional statute in Stone.

Further, by stretching to find a secular purpose in Van Orden, Justice Breyer seemed to agree with the dissent in McCreary, who maintained the Lemon purpose test is satisfied as long as any secular purpose for the government action is apparent. However, this is very different from the McCreary majority's view that "the secular purpose has to be genuine, not a sham, and not merely secondary to a religious objective."

Justice Breyer also turned his back on the McCreary majority opinion when he stressed the importance of the Van Orden monument going unchallenged for forty years. He apparently weighed this heavily in his analysis because he claimed those forty years are more important than any "formulaic tests" to determine if a government is "promot[ing] religion over nonreligion."

98. Id. at 701.
99. Van Orden, 545 U.S. at 701 (Breyer, J., concurring).
100. Id. at 702-03.
101. Id.
103. Id. at 902-03 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting; Kennedy, J., dissenting from Parts II-III).
104. Id. at 864 (majority).
105. Van Orden, 545 U.S. at 702 (Breyer, J., concurring).
Justice Breyer's *McCreary* analysis ignores the reality of Establishment Clause violation claims. Forty years ago there were no cases challenging the constitutionality of Ten Commandments displays. The first Ten Commandments case to reach the Supreme Court was *Stone* in 1980. However, the recent increase in cases challenging Ten Commandments displays\(^{106}\) proves present-day citizens question the constitutionality of the Ten Commandments.

The world is a different place than it was forty years ago. Although over ninety-five percent of religious believers in the United States practice Christianity, there are millions of atheists, Muslims, and Buddhists living in America.\(^{107}\) "Today there are many Texans who do not believe in the God whose Commandments are displayed at their seat of government. Many of them worship a different god or no god at all."\(^{108}\) It is not surprising the *Van Orden* monument went unchallenged for forty years. There is little incentive to bring an Establishment Clause violation claim against the government.

Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.\(^{109}\)

By asserting the *Van Orden* monument is predominately secular because it went unchallenged for forty years, Justice Breyer seems to imply the constitutionality of a display can change over time. The constitutionality of a display should not hinge only on how long the display went unchallenged in a court of law. Placing such importance on the amount of time a display stands is an arbitrary approach to determining whether the display violates the Establishment Clause. Under this reasoning, the Kentucky displays Justice Breyer found unconstitutional in *McCreary* would be

\(^{106}\) Id. at 721 n. 19 (Stevens & Ginsburg, JJ., dissenting) ("See e.g. Mercier v. Fraternal Or. of Eagles, 395 F.3d 693 (7th Cir. 2005); ACLU Neb. Found. v. Plattsmouth, 358 F.3d 1020 (8th Cir. 2004); Adland v. Russ, 307 F.3d 471 (6th Cir. 2002); Summum v. Ogden, 297 F.3d 995 (10th Cir. 2002); Books v. Elkhart, 235 F.3d 292 (7th Cir. 2000); State v. Freedom from Religion Found., Inc., 898 F.2d 1013 (Colo. 1995); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973).")


\(^{108}\) Id. at 720.

\(^{109}\) Id. at 747 (Souter, Stevens & Ginsburg, JJ., dissenting).
constitutional if they were erected in 1959 instead of 1999. Following Justice Breyer’s “no harm, no foul” approach will produce inconsistent precedent in an important area of constitutional law. This is not a solid system for deciding the constitutional rights of United States citizens.

B. Why No Test Is Unacceptable

Van Orden and McCreary prove the Supreme Court Justices hold a wide array of opinions about the Establishment Clause. Justices Souter, Ginsburg, Stevens, and O’Connor support the principle of neutrality between the government and religion and assert, “the government may not favor one religion over another, or religion over irreligion.”\textsuperscript{110} Chief Justice Rehnquist and Justices Thomas, Kennedy, and Scalia believe government can favor religion.\textsuperscript{111} As the previous section demonstrated, Justice Breyer seems to float between the two schools of thought.

In McCreary, Justice Scalia filed a dissenting opinion and was joined by Chief Justice Rehnquist and Justices Thomas and Kennedy. The McCreary dissent insisted, “the Court’s oft repeated assertion that the government cannot favor religious practice is false.”\textsuperscript{112} He gave George Washington’s first Thanksgiving Proclamation referring to “that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,”\textsuperscript{113} and prayers referring to “God” that opened sessions of the Supreme Court under Chief Justice John Marshall as examples of government favoring religious practice.\textsuperscript{114}

Chief Justice Rehnquist and Justices Thomas, Kennedy, and Scalia are not fond of the Lemon test. They refused to apply the Lemon test in Van Orden, because it is “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”\textsuperscript{115} In the McCreary dissenting opinion these Justices claimed the Lemon test creates hostility against religion by focusing on the apparent purpose of government action, rather than the

\textsuperscript{110} McCreary Co. v. ACLU of Ky., 545 U.S. 844, 875 (2005) (majority).
\textsuperscript{111} Id. at 885 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting; Kennedy, J., dissenting from Parts II–III).
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 886.
\textsuperscript{114} Id.
\textsuperscript{115} Van Orden, 545 U.S. at 686 (plurality).
actual purpose of government actions. Further, the dissent believed *McCreary* improperly heightens the government purpose prong of the *Lemon* test from simply having a secular purpose to having a predominantly secular purpose. The dissent argued the purpose prong of the *Lemon* test should be abandoned rather than expanded, and warned that the *McCreary* majority opinion set dangerous precedent. The dissent argued by asserting the Court did not identify evidence to prove the first, second, or third *McCreary* displays had the intent to further religion.

The *McCreary* dissent did not believe posting a Ten Commandments display in a "high traffic area" and having a community leader like the Judge-Executive preside over the posting was an unconstitutional endorsement of religion. They also considered the three-feet-wide and six-feet-high stone Ten Commandments monument from *Van Orden* to be a "passive" display. Therefore, it is clear they will never see eye-to-eye with Justices Souter, Ginsburg, Stevens, and O'Connor who agreed with the *McCreary* majority opinion and dissented in *Van Orden*. However, differences in personal beliefs are no excuse for ignoring Court precedent.

In *Van Orden*, the Court did not apply any of the tests used in previous Establishment Clause cases. As a result, all nine Justices overlooked the fact that the posting of the *Van Orden* Ten Commandments monument was presided over by two state legislators. This is similar to the posting ceremony analyzed under the *Lemon* test in *McCreary* and certainly seems relevant when considering whether a government action violates the Establishment Clause. While this may not be sufficient evidence to make the *Van Orden* monument unconstitutional, it was mentioned in the facts section of the case and, therefore, should have been analyzed. Because the Court failed to analyze this evidence, practitioners and lower court judges will have to speculate whether or not it is important that a government official presided over a Ten Commandments posting ceremony.

Contradicting judgments like *Van Orden* and *McCreary* prove the current system the Court uses to deal with Establishment Clause cases is not working. Issuing an opinion like *Van Orden*

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117. *Id.* at 901.
118. *Id.* at 902.
119. *Id.* at 912.
120. *Van Orden*, 545 U.S. at 682 (plurality).
without applying precedent or laying out an alternative test is a reckless approach to developing Establishment Clause jurisprudence. If the Court does not agree with the Lemon, endorsement, or coercion tests, it is time to develop a new test. The Court could take many approaches to develop a new test. Three possible alternatives are listed below.

VII. THREE POSSIBLE ALTERNATIVE TESTS

A. The Strict Language Test

The first option the Court could apply in future Establishment Clause cases is the strict language test. Under this test, the Court would concentrate on the First Amendment language that deals with religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."\(^{121}\) This approach would allow government officials to endorse religion and promote specific religions over other religions—as long as no laws were passed to establish religion or prohibit the free exercise of religion. This test would throw current Establishment Clause precedent out the window.

The strict language test has advantages. It is a black-and-white test that would be easy to apply in most situations. Under the strict language test, the monuments in Van Orden and McCreary would be constitutional. Only Ten Commandments displays required by law would be unconstitutional. Therefore, the Kentucky statute in Stone requiring the Ten Commandments to be posted in public schools would still be unconstitutional. However, government officials could preside over Ten Commandments posting ceremonies. The Governor of Texas could kneel and pray before the Van Orden monument every morning. He could begin his speeches with an introduction endorsing a specific religion. Under this test, only laws establishing religion or prohibiting the free exercise of religion would be unconstitutional.

Although the strict language test would be easy to apply, it has disadvantages. Most notably, it makes a long history of case law void. It would overrule the Lemon, endorsement, and coercion tests without retaining any of the positive attributes of these tests. Further, it would turn United States citizens’ beliefs about acceptable mixing of religion and government upside down. Ignoring rational expectations and developed case law would probably

\(^{121}\) U.S. Const. amend. I.
not be a popular alternative among attorneys, United States citizens, or lower court judges, and it would likely "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."\textsuperscript{122}

\textbf{B. The Zero Tolerance Test}

The second option is the zero tolerance test. Under this test, the Court would not tolerate any mixing of church and state. This test would go beyond the plain language of the First Amendment and attempt to achieve what some people believe Jefferson intended when he talked about the "wall of separation between church and state."\textsuperscript{123}

The zero tolerance test would also be a black-and-white test that disregards previous case law. Under this test, all religious displays on government property would be unconstitutional. However, it would be difficult to draw a line at what constitutes acceptable behavior of government officials regarding religion. For example, the zero tolerance test would not allow the Governor of Texas to start his speeches with a prayer. But neither would this test allow the Governor to say, "God bless you," when his staff member sneezed. More problems would arise if the Governor attended church, or sent his child to a private Catholic school. Government officials would be forced to adopt behavior that is not consistent with the reality of life. The zero tolerance test would create another major problem because money minted by the United States Treasury could no longer contain the words "In God We Trust."

A cost-benefit analysis of the zero tolerance test shows the test is unreasonable because it is not consistent with the reality of life. This test would bring up the problems the \textit{Lemon} Court recognized when it concluded, "total separation is not possible in an absolute sense, [because] [s]ome relationship between government and religious organizations is inevitable."\textsuperscript{124}

\textbf{C. The Middle Ground Test}

The third option is the middle ground test. Under this test, the Court would combine previous Establishment Clause prece-

\textsuperscript{122} \textit{Van Orden}, 545 U.S. at 704 (Breyer, J., concurring).
\textsuperscript{123} \textit{Reynolds v. U.S.}, 98 U.S. 145, 164 (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (Jan. 1, 1802)).
dent into a single test. The Court could combine the *Lemon*, endorsement, and coercion tests with the passive context factor from *Van Orden* to create a three-part test that could be applied to statutes, practices, or displays.

The middle ground test would ask three questions. First, does the statute, practice, or display foster an excessive government entanglement with religion? Second, does the statute, practice, or display endorse or disapprove of religion, or coerce support of religion? Third, is the statute, practice, or display passive, or does it overstep the bounds of acceptable government behavior?

The middle ground test would not result in a unanimous judgment in every Establishment Clause case. However, it would create a test that could be consistently applied to determine whether a statue, practice, or display violates the Establishment Clause.

For example, Justice Scalia may believe the *Van Orden* monument:

(1) does not foster an excessive entanglement in religion because . . . ;
(2) does not endorse or disapprove of religion, or coerce support of religion because . . . ; and
(3) is a passive display that does not overstep the bounds of acceptable government behavior because . . . .

At the same time, Justice Breyer may believe the *Van Orden* monument:

(1) does not foster an excessive entanglement in religion because . . . ;
(2) does endorse religion because . . . ; and
(3) is a passive display that does not overstep the bounds of acceptable government behavior because . . . .

If all nine Justices applied this three-part test to the *Van Orden* display, there would be a clear record of how each Justice feels about the three key elements of the test. Consistently applying this test would create solid Establishment Clause jurisprudence. An attorney challenging a Ten Commandments monument in Missoula, Montana may disagree with Justice Scalia’s analysis of the *Van Orden* monument. But the middle ground test would allow the attorney to dissect Justice Scalia’s opinion and then decide if the Ten Commandments monument in Missoula can be distinguished from the *Van Orden* monument before bringing an Establishment Clause challenge.

The middle ground test is not a flawless solution to Establishment Clause jurisprudence. However, it is a test that would give confused attorneys, individuals, and lower court judges a better
idea of how the Court may rule on a specific Establishment Clause challenge.

VIII. CONCLUSION

The contradicting judgments in *Van Orden* and *McCreary* will likely lead to inconsistency in future Establishment Clause cases. The Supreme Court Justices seem to agree the current tests are not useful in deciding every challenge to the Establishment Clause. Unfortunately, *Van Orden* and *McCreary* are a step backward instead of a step forward. The Court muddied a sensitive field of law by applying the *Lemon* test in *McCreary* but failing to apply it in *Van Orden*. Further, the *Van Orden* Court avoided the endorsement and coercion tests and failed to present an alternative test. Resolving *Van Orden* without providing clear directions to follow in future Ten Commandments cases creates shaky precedent. If the Court is not satisfied with the *Lemon*, endorsement, and coercion tests, it is time to overrule these tests and adopt a new alternative. The test the Court adopts is important, but consistently applying the test is even more important. Lower courts, attorneys, and American citizens need, and deserve, solid Establishment Clause precedent.