Thou Shalt Make No Law Respecting an Establishment of Religion: ACLU v. McCreary County, Van Orden v. Perry, and the Establishment Clause

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INTRODUCTION

On June 27, 2005, the Supreme Court decided two cases involving the display of the Ten Commandments on public property, McCreary County v. ACLU1 and Van Orden v. Perry.2 The Court had last heard a case related to this issue in 1980,

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where a 5-4 majority struck down in, *Stone v. Graham,* a Kentucky law requiring that a copy of the Ten Commandments be posted on the wall of every public classroom in the state. The Court's holding in *Stone* had been the subject of divergent interpretation by lower federal courts and the decision to hear two additional cases was likely an attempt by the Court to more clearly define the scope of its ruling of unconstitutionality in *Stone.* The purpose of this piece is to review the principles behind the Court's holding in *Stone,* analyze its approach to related cases in the subsequent 25 years, review its most recent decisions, and determine whether those decisions will resolve certain difficult issues that have been the subject of debate in this area of the law.

A. Establishment Clause Jurisprudence Leading Up to Stone: The Lemon Test

The Establishment Clause of the First Amendment applies to the various states through the Fourteenth Amendment and provides that the government “shall make no law respecting an establishment of religion.” The Supreme Court's interpretation as to the scope of this clause had undergone a great deal of modification in the years before the Court first addressed the Ten Commandments issue in *Stone.* In the 1947 case *Everson v. Board of Education,* the Court declared that the Establishment
Clause created a “wall of separation” between church and state that “must be kept high and impregnable.”\(^9\) However, this standard was subsequently relaxed only five years later in *Zorach v. Clauson*,\(^{10}\) which stated that separation of church and state is not required, or even possible, in “every and all respects.”\(^{11}\) The Court sought to establish uniformity in the 1971 decision *Lemon v. Kurtzman*,\(^{12}\) developing a three-part analysis that became known as the “Lemon Test.”\(^{13}\) This test dictated that government action, in order to avoid violating the Establishment Clause, must have a secular legislative purpose, have a principal or primary effect that neither advances nor inhibits religion, and, finally, not foster an excessive government entanglement with

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\(^9\) *Id.* at 16–17 (establishing the “wall of separation” test, but, nevertheless, deciding that the Board of Education’s practice of funding transportation for parochial school students did not penetrate the “wall”); *see* Reynolds v. U.S., 98 U.S. 145, 164 (1879) (quoting Thomas Jefferson’s interpretation of the Establishment Clause when initially proposed).

\(^{10}\) 343 U.S. 306 (1952) (finding that a state law permitting absence from public school for religious education and observance was constitutional and declaring that the Establishment Clause did not require governmental hostility towards religion or prevention of religious influence).

\(^{11}\) *Id.* at 312–13. A “common sense” interpretation of the Establishment Clause recognizes the “specific ways” in which “there shall be no concern or union or dependency” between church and state. *Id.* Under a more strict interpretation, the Court stated: the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. *Id.* Furthermore, the Court recognized religion-based traditions that have taken on secular meaning and added that, under an overly strict reading, “[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths – these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.” *Id.* For a suggestion that “the Court undermined its own foundational pronouncements for Establishment Clause analysis” with its position in *Zorach*, see Theologos Verginis, Note, *ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? “With God All Things Are Possible,”* 34 *AKRON L. REV.* 741, 743 (2001).

\(^{12}\) 403 U.S. 602 (1971) (establishing the “Lemon test” for Establishment Clause review).

\(^{13}\) *See* Am. Family Ass’n v. City & County of San Francisco, 277 F.3d 1114, 1121 (9th Cir. 2001) (recognizing that “[i]n *Lemon v. Kurtzman* . . . , the Supreme Court established the now widely known Lemon test for analyzing government conduct under the Establishment Clause of the First Amendment”); *see also* Graham, *supra* note 7, at 162–63 (discussing the three-prongs of the Lemon test).
religion. It was under this relatively (and temporarily) stable framework that the Court decided *Stone v. Graham* in 1980.

**B. The Stone Decision**

In *Stone*, a Kentucky law required that a permanent copy of the Ten Commandments be posted on the wall of every public classroom in the state, along with a notation recognizing that the commandments were instrumental as a fundamental legal code in the development of American common law. The Court found this statute to violate the first prong of the Lemon Test. Despite the Kentucky legislature's assertions as to the commandments' historical significance in the development of American legal principle and the statute's written-in requirement that such significance be explained on each

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14 *See Lemon*, 403 U.S. at 612 (1971) (stating these three tests “may be gleaned” from “the cumulative criteria developed by the Court over many years”); *see also* Graham, *supra* note 7, at 162 (discussing the implications of the Court's analysis in Lemon).


16 *See* *Stone*, 449 U.S. at 40 n.1 (describing a state statute that required the superintendent of public instruction to display “a durable, permanent copy of the Ten Commandments . . . on a wall in each public elementary and secondary school classroom in the Commonwealth”); *see also* Cowan, *supra* note 15, at 186 (emphasizing the Court's decision in *Stone* not to mention factual findings and quoting Judge N. Williams as stating at trial that “[t]he Legislature has declared the Ten Commandments to be the fundamental legal code of Western Civilization and the common law of the United States” and “[t]he common law grew under the influence of men who were free to know and study the Ten Commandments and to adopt the principles of the canon law as it related to various subjects under consideration”).


18 *See* *Stone*, 449 U.S. at 41 (reviewing state's argument that secular purpose was established through the legally required notation which read “The 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” in small print at the bottom of all displays); Pollack, *supra* note 17, at 1390 (opining that *Stone* Court refused "to be 'blinded' by the legislature's 'avowed' secular purpose" allegedly evident in the notation required on each display).
display, the Court found the law to be lacking in secular purpose, stating that:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness... Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Though such language would seem to indicate that the Ten Commandments cannot be separated from their primarily religious significance, the Court refused to extend the holding of Stone beyond the specific facts of that case. Rather, in the time leading up to the Van Orden and McCreary decisions, many of the Court's declarations indicated a trend towards less restriction in such areas.

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19 See Stone, 449 U.S. at 40 n.1 (alluding to the notation required by statute); Cowan, supra note 15, at 187 (noting Kentucky legislature's requirement that notation avowing secular purpose be attached to the bottom of each Ten Commandments display).

20 See Stone v. Graham, 449 U.S. 39, 41 (1980) (declaring the "avowed" secular purpose specified in Kentucky's statute insufficient to avoid violation of the First Amendment); Pollack, supra note 17, at 1380 (recognizing that the disclaimer declaring the "secular application of the Ten Commandments" as "foundational legal text" was ineffective in helping the displays meet requisite constitutional secular purpose).

21 Stone, 449 U.S. at 41–42. The Court further added that: Posting of religious texts on the wall serves no educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. Id.

22 See Lauren Cates, Comment, Issues in the Third Circuit: Freethought Society v. Chester County and the Ten Commandments Debate: The Buck Stops Here for Establishment Clause Challenges to Religious Public Displays in the Third Circuit, 49 VILL. L. REV. 907, 907 (2004) (focusing on the Supreme Court's "case-by-case approach to deciding Establishment Clause challenges to religious public displays" and observing that "such fact-specific... analysis inevitably leads to inconsistent holdings..."); see also Cowan, supra note 15, at 187 (stating that "the Court itself has rejected the per se approach to analyzing Ten Commandments displays").

23 Cowan, supra note 15, at 199 (noting the "noticeable trend in the Court that is increasingly protective of private religious speech on public property"); see also Cates, supra note 22, at 908 (commenting that because the Court had not recently decided any Ten Commandments cases, its prior decision upholding the display of a bronze Ten
C. The Supreme Court's Approach to Similar Issues Following Stone

The Court limited the language of Stone in Edwards v. Aguillard, where it noted that the holding in Stone “did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.” Furthermore, though the Court relied on a Lemon analysis in Stone, it later acknowledged in Lynch v. Donnelly that “we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area,” and that “no fixed, per se rule can be framed” to govern all Establishment Clause cases. Thus, the Court, seemingly in the name of flexibility, developed alternative Establishment Clause tests.

i. The Endorsement Test

It was in Lynch that Justice O'Connor, in her concurring opinion, first introduced the “Endorsement Test,” which has become increasingly prevalent in Supreme Court Establishment

Commandments plaque outside a courtroom constituted an important indication of acceptable public displays religious in nature).

25 Id. at 593–94 (referencing Stone holding as it related to issue of the constitutionality of a state statute requiring either the banishment of the theory of evolution from state schools or the presentation of a religious viewpoint that altogether rejected evolutionary principles).
27 Lynch, 465 U.S. at 679 (1984) (plurality opinion). The Lynch Court further noted that the Court had not always relied on the Lemon test in the past; it specifically stated that “[i]n two cases, the Court did not even apply the Lemon 'test.' We did not, for example, consider that analysis relevant in Marsh v. Chambers, 463 U.S. 783 (1983). Nor did we find Lemon useful in Larson v. Valente, 456 U.S. 228 (1982) where there was substantial evidence of overt discrimination against a particular church.” Id.
28 Id. at 678 (stating “Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application”).
29 See Lynch, 465 U.S. at 679 (stating an unwillingness to use any single test for Establishment Clause cases); see also H. Wayne House, A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?, 13 BYU J. PUB. L. 203, 275 (1999) (noting that “[i]n recent years the Court has used two major alternative tests to that of Lemon, the Endorsement Test and the coercion test,” despite the fact that “neither test ha[d] yet received much support from the entire Court. . .”).
30 See Lynch, 465 U.S. at 687-89 (O'Connor, J., concurring) (introducing the Endorsement Test for constitutionality under the Establishment clause).
The Endorsement Test was developed as a method of clarifying the Lemon Test to increase its usefulness as a device for Establishment Clause jurisprudence. Specifically, the Endorsement Test incorporates the principle of "entanglement" from the third prong of the Lemon Test, while additionally requiring that government action not endorse or disapprove of religion. A state action can violate the Establishment Clause under either of these two standards. In *Lynch*, Justice O'Connor defined endorsement of religion as sending "a message to nonadherents that they are outsiders, not full members of the political community, as well as an accompanying message to adherents that they are insiders, favored members of the political community."

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32 See Allegheny v. ACLU, 492 U.S. 573, 594–95 (1989) (applying Endorsement Test); see also James E. McBride, Note, *Alcoholics Anonymous: Anonymous Theists?* Griffin v. Coughlin and the "Wall of Separation between Church and State" in the New York State Prison System, 19 CARDOZO L. REV. 1455, 1478 (1998) (asserting that "although the Lemon test has not been openly repudiated, the birth and evolution of the Endorsement Test, which has garnered increasing support on the Court, shows that the former's influence is on the wane").


34 See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (stating that one principal way government can "run afoul" of the Establishment Clause is through "excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines"); see also George Linge, Comment, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, 27 B.C. ENVTL. AFF. L. REV. 307, 336 (2000) (explaining Lemon and Endorsement tests' multiple prongs).

35 See *Lynch*, 465 U.S. at 689 (identifying that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" while "[d]isapproval sends the opposite message"); see also Linge, supra note 34, at 336 (noting government has impermissibly endorsed religion if it deems one favored or preferred).


37 See *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring) (defining "endorsement" as it relates to Establishment Clause jurisprudence); see also Harvey, supra note 36, at 311 (stating "government cannot endorse religious practices and beliefs of some citizens without sending a message to those who disagree that they are not full members of the political community").
The majority of the Court assented to Justice O'Connor's Endorsement Test in Allegheny v. ACLU, acknowledging that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."  

ii. The Coercion Test

While the Endorsement Test has been a common standard of Establishment Clause review, the Court, nevertheless, adopted a different approach in Lee v. Weisman, formulating what has become known as the "Coercion Test." The Court stated that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Therefore, under this test, government expression will violate the Establishment Clause where the government compels individuals to participate in religious activities or where the government's actions are so

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38 492 U.S. 573 (1989) (finding an isolated crèche display in a public place unconstitutional, while deciding that a reasonable observer would not view a menorah, when displayed together with a Christmas tree, as an endorsement of the Jewish faith because such a display sends "a message of pluralism and freedom of belief during the holiday season").

39 Id. at 592 (adopting a version of Endorsement Test standards in Establishment Clause analysis); see Noah Feldman, From Liberty to Equality: The Transformation of the Establishment Clause, 90 CAL. L. REV. 673, 698 (2002) (discussing Endorsement Test).

40 See Feldman, supra note 39, at 698 (noting that every member of the Court has accepted the Endorsement Test); see also Timothy R. Fox, Comment and Note, Alabama v. ACLU: A Missed Opportunity to Correct Flawed Establishment Clause Jurisprudence, 11 REGENT U.L. REV. 193, 209 (1999) (positing that "the Supreme Court has typically applied either the Lemon test or the Endorsement Test to decide the constitutionality of religious displays on government property . . . although the Endorsement Test has been used more often in recent years").


42 See Stephen M. Durden, In the Wake of Lee v. Weisman: The Future of School Graduation Prayer is Uncertain at Best, 2001 B.Y.U. EDUC. & L.J. 111, 149 (2001) (discussing Court's application in Lee of the Coercion Test); see also Philip Oliss, Casenote, Praise the Lord and Pass the Diplomas: Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994), 64 U. CIN. L. REV. 705, 740 (1996) (recognizing that "[j]udges and scholars have suggested that Lee, which found that the school's inclusion of the graduation prayer unconstitutionally coerced attending students, established a coercion test for Establishment Clause cases pertaining to prayer and students").

43 Lee, 505 U.S. at 587 (stating further that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause" (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))).
beneficial to one religious sect as to create a state or federal religion.44

D. Important Legal Distinctions

Further complicating the Court's Establishment Clause jurisprudence are several distinctions that have been made involving the factual circumstances surrounding government religious action in the public sphere.45 Regardless of which test the Court may use in a given case, certain key factors may have a substantial influence over the Court's decision.46

i. Private Speech vs. Government Speech

Justice O'Connor's opinion in Board of Education of Westside Community Schools v. Mergens47 noted that "[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."48 This distinction has been upheld by the Court in

44 See Verginis, supra note 11, at 746–47 (noting that Coercion Test "would invalidate governmental action only where the government compels individuals to participate religiously or where the government's actions directly benefit a particular sect to such a dangerous extent so as to establish a state or federal religion"); see also Alberto B. Lopez, Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment, 55 BAYLOR L. REV. 187, 193 (2003) (citing two prongs of coercion test).

45 See Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2323 (2004) (O'Connor, J., concurring) (espousing concept of "ceremonial deism" where certain government expression, which has lost its religious character from repetition or assimilation, can acknowledge or refer to religious ideas without violating the Constitution); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (plurality opinion) (differentiating between private speech occurring in a designated public forum and such expression taking place on property reserved for official government purposes); Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) (explaining distinction between private speech and government speech); Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) (noting that the Court has been "particularly vigilant" in protecting against religious expression in public schools, as opposed to other public fora).

46 See Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) (positing "the complementary constitutional provisions" of the Religion Clauses "and the inexhaustibly various circumstances of their applicability have defied any simple test and have instead produced a combination of general rules often in tension at their edges"); see also Charles J. Russo & Ralph D. Mawdsley, The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: "Bristling with Hostility to All Things Religious" or Necessary Separation of Church and State?, 2001 BYU EDUC. & L.J. 231, 260 (2001) (discussing use of three Establishment Clause tests).

47 496 U.S. 226 (1990) (plurality opinion).

48 Id. at 250.
several subsequent opinions.\textsuperscript{49} In \textit{Capitol Square Review & Advisory Board v. Pinette},\textsuperscript{50} Justice Scalia's plurality opinion declared that “[b]y its terms the Establishment Clause, U.S. Const. amend. I, applies only to the words and acts of government.” Justice Scalia went on to state that the First Amendment “is not meant to serve as an impediment to purely private religious speech connected to the state only through its occurrence in a public forum.”\textsuperscript{51} Therefore, an individual's private contribution to a government-created forum is not government speech\textsuperscript{52} and is thus protected under the Free Speech and Free Exercise Clauses.\textsuperscript{53}

\textbf{ii. Public Fora vs. Property Reserved for Official Use}

However, not all private religious speech will be treated in the same manner.\textsuperscript{54} Private speech is given greater deference if it occurs in a designated public forum rather than on property reserved for specific and official government use.\textsuperscript{55} In \textit{Pinette}, the plurality emphasized this distinction in finding constitutionality under the Establishment Clause with regard to the private display of Ku Klux Klan crosses in a public square.\textsuperscript{56} Justice Scalia stated that:

\textsuperscript{50} 515 U.S. 753 (1995) (plurality opinion).
\textsuperscript{52} See \textit{Santa Fe Indep. Sch. Dist.}, 530 U.S. at 302 (noting that not all statements taking place on government property are messages that belong to the government (citing \textit{Rosenberger}, 515 U.S. 819)); see also Kelly J. Coghlan, \textit{Those Dangerous Student Prayers}, 32 ST. MARY'S L.J. 809, 833 (2001) (discussing Court's recognition that an individual's speech in government-created forum may remain the individual's own private speech).
\textsuperscript{53} See \textit{Board of Education of Westside Community Schools v. Mergens}, 496 U.S. 226, 250 (1990) (plurality opinion) (asserting that private speech endorsing religion is protected under Religion Clauses); see also Coghlan, supra note 52, at 832–33 (noting Constitutional protection of private religious speech).
\textsuperscript{54} See \textit{Pinette}, 515 U.S. at 761 (stating "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State"); see also Lopez, supra note 44, at 202 (recognizing the Court's view that First Amendment does not always protect speech on government-owned property).
\textsuperscript{55} See \textit{Pinette}, 515 U.S. at 761 (explaining strict standard whereby state can only limit expressive content in public forum if necessary to serve a compelling state interest); see also Lopez, supra note 44, at 202 (discussing application of the strict compelling state interest standard to facts of \textit{Pinette}).
\textsuperscript{56} See \textit{Pinette}, 515 U.S. at 770 (concluding that conditions of allowable religious expression were satisfied such that the State could not bar respondent's cross from the
The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. If the former, a state's right to limit protected expressive activity is sharply circumscribed. It may impose reasonable, content-neutral time, place, and manner, but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest.57

Under the test established in Pinette, religious expression is valid under the Establishment Clause where it "(1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."58 This remains true regardless of whether the public may erroneously misconstrue the content as government speech.59 The plurality in Pinette held the crosses to be constitutional because the display took place on government property that was open to the public for speech, permission was requested on the same terms required of other private groups, and the state did not sponsor the expression.60

iii. Religious Expression in Schools vs. Other Public Fora

It is clear from Stone that the Court will be highly protective against religious displays in the classroom setting.61 The Court acknowledged this principle in Edwards,62 recognizing that:


58 Pinette, 515 U.S. at 770 (1995) (plurality opinion) (holding that "the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship").

59 See id. at 765 (stating further that "[g]iven an open forum and private sponsorship, erroneous conclusions by the public do not count").

60 See id. at 761–62 (drawing comparisons between the specific facts of Pinette and those of previous Supreme Court cases).

61 See Stone v. Graham, 449 U.S. 39, 42 (1980). The Court in Stone further stated: If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However, desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Id.

It has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary...

The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.63

In establishing the Coercion Test in Lee, the Court made a similar pronouncement, stating:

There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools... Prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.64

63 Id.
The possibility of coercion expressed in Edwards and Lee seemingly does not exist to the same extent in other public fora. Therefore, the Court will give the least amount of deference to any religious expression taking place within a classroom or schoolyard setting.

iv. Religious Expression vs. Ceremonial Deism

In addition, the Court has demonstrated a willingness to create an Establishment Clause exception for forms of expression that are deemed "ceremonial deism." This concept was introduced in Justice Brennan’s dissenting opinion in Lynch, where he stated:

Such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . as a form a ‘ceremonial deism’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

In Elk Grove Unified School District v. Newdow, the Court agreed to hear a case involving the use of the words “under God” in the Pledge of Allegiance. Although the case was
anticlimactically decided on standing grounds, Justice O'Connor addressed the idea of a ceremonial deism exception in her concurring opinion by suggesting that:

Government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”)... Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test.

Furthermore, Justice O'Connor emphasized four factors to help determine the existence ceremonial deism: (1) the history and ubiquity of the practice; (2) the absence of worship or prayer; (3) the absence of reference to a particular religion; and (4) minimal religious content. Though the Court has yet to expressly create a ceremonial deism exception, the concept has been discussed...

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71 See Newdow, 542 U.S. at 4 (concluding that respondent lacked standing); Stephen K. Green, Reconciling the Free Exercise and Establishment Clauses: Federalism and the Establishment Clause: A Reassessment, 38 CREIGHTON L. REV. 761, 762 (2005) (noting that Newdow was decided on standing grounds).


73 Newdow, 542 U.S. at 37-44 (O'Connor, J., concurring) (describing ceremonial deism and what prevents such instances from violating the Constitution).


75 See Todd Collins, Lost in the Forest of the Establishment Clause: Elk Grove v. Newdow, 27 CAMPBELL L. REV. 1, 29-30 (2004) (asserting Justice O'Connor's views, “if accepted by a majority of the Court, would uphold the Pledge based on the Endorsement Test and establish a constitutional exception for references that can be defined as ceremonial deism’’); see also Z. Ryan Pahnke, Note, Originalism, Ceremonial Deism and the Pledge of Allegiance, 5 NEV. L.J. 742, 764 (2005) (noting that Supreme Court Justices have implicitly relied on “ceremonial deism" throughout Establishment Clause jurisprudence and discussing O'Connor's standard as necessary to any future explicit adoption of such an exception).
on several occasions and seems to be gaining popularity. In sum, the possibility of such an exception warrants attention as the Court's approach to the Establishment Clause continues to develop.

E. Split in the Lower Courts

Due to the uncertain scope of the Court's holding in *Stone* and the metamorphoses in Establishment Clause jurisprudence that took place in the subsequent twenty-five years, the circuit courts took differing stances on issues involving the posting of Ten Commandments displays on government property. Although the specific facts of each case were not identical, the

76 See Collins, *supra* note 75, at 4 (emphasizing "at least five Justices appear to accept the constitutionality of 'ceremonial deism,' or those public activities, such as references to God, that indeed recognize religion but may not violate the Establishment Clause"); see also Pahnke, *supra* note 75, at 764-65 (highlighting Justices who have mentioned ceremonial deism both implicitly and explicitly in their opinions).


78 See Thollander, *supra* note 77, at 234 (suggesting "the changes in the makeup of the Court and in Establishment Clause jurisprudence in the twenty years since *Stone* make a reconsideration of that decision appropriate"); Joan Biskupic, *Court Enters Debate Over Display of Commandments*, U.S.A. TODAY, Mar. 2, 2005, at 1A (highlighting Court decisions since *Stone* which have allowed displays of some religious symbols on public property).

79 See Cowan, *supra* note 15, at 189 (explaining "[t]he controversy surrounding the *Stone* decision is reflected in lower federal and state courts, which are sharply divided over the constitutionality of displaying the Ten Commandments on government property"); see also Green, *supra* note 77, at 529-30 (stating "[b]ased on this uncertainty of whether the Ten Commandments can be officially acknowledged as a source of law, lower courts have split on the propriety of its public display").

80 See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1025 (8th Cir. 2004), vacated by No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Neb. Apr. 6, 2004); ACLU v. McCrory County, 354 F.3d 438, 441-42 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005); Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003); Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000). In *Plattsmouth*, a Ten Commandments monument owned by the City of Plattsmouth was displayed in a park owned by the city. *Plattsmouth*, 358 F.3d at 1025. In *McCreary County*, three different public displays of the Ten Commandments were challenged, all of which initially consisted of at least one framed copy of the Ten Commandments that was not part of a larger display. *McCreary County*, 354 F.3d 441-42. In *Glassroth*, a monument of the Ten Commandments was displayed in the rotunda of the Alabama State Judicial Building and had been placed there by the Chief Justice of the Alabama Supreme Court. *Glassroth*, 335 F.3d at 1284. In *Books*, a monument inscribed with the Ten Commandments was located on the lawn in front of the Municipal Building of the City of Elkhart. *Books*, 235 F.3d at 294.
Sixth, Eighth, and Eleventh Circuits held such practice to violate the Establishment Clause. Conversely, the Third, Fifth and Tenth Circuits held the practice to be

81 See McCreary County, 354 F.3d at 460 (applying Lemon Test in finding three separate displays, purporting to honor the "Foundations of American Law and Government," unconstitutional); see also Adland v. Russ, 307 F.3d 471, 476 (6th Cir. 2002) (holding a Ten Commandments monument, consisting of an amalgamation of Jewish, Protestant, and Catholic versions of the commandments, tablets containing ancient Hebrew script, an "all-seeing eye, similar to the one depicted on the dollar bill," an American eagle holding the American flag, Stars of David, and a symbol representing Christ and two Greek letters, Chi and Rho, donated to Kentucky's state capitol grounds by the Fraternal Order of Eagles to be without a secular purpose).

82 See Elkhart, 235 F.3d at 294–95 (declaring unconstitutional a Ten Commandments monument, similar to that in Adland, located on the lot of a city municipal building); see also Cowan, supra note 15, at 191 (noting "[t]he Seventh Circuit concluded that the Ten Commandments monument violated the Establishment Clause because it failed the first and second prongs of the Lemon test").

83 The Eighth Circuit ruled that a Ten Commandments monument, in a memorial park located ten blocks from city hall, was solely religious in purpose with its primary effect being the promotion of Judeo-Christian theology. See ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1042 (8th Cir. 2004), vacated by 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004). The monument was basically the same as those in Adland and Books despite being donated by the Fraternal Order of Eagles. See id. Recent court cases regarding placement and settings of religious monuments, including Plattsmouth, were comparatively analyzed for their content. See Greg Abbot, Acknowledgement Without Endorsement: Defending the Ten Commandments, 9 TEX. REV. L. & POL. 229, 232 n.16 (2005).

84 The Eleventh Circuit affirmed a finding that a Ten Commandments monument, erected by the Chief Justice of the Alabama Supreme Court on the State Judicial Building, was a violation of the Establishment Clause where the monument was installed "in order to remind all Alabama citizens of, among other things, [the Chief Justice's] belief in the sovereignty of the Judeo-Christian God over both the state and the church." See Glassroth, 335 F.3d at 1284. The Chief Justice had refused to allow a monument displaying a historically significant speech along with the commandments "on the grounds that 'the placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument.'" See Glassroth v. Moore, 229 F.Supp. 2d. 1290, 1297 (M.D. Ala. 2002). The decision in Glassroth was controversial and accordingly scrutinized by legal and religious scholars. See Brett G. Scharffs, Proceedings of the 2004 AALS Meeting: Section on Law and Religion: One Nation Under God?: Unity, Diversity, and Neutrality Under the Religion Clauses: Introduction, 2004 B.Y.U. L. REV. 983, 987 (2004).

85 Using a modified Lemon test, the Court found an 80-year-old plaque on courthouse grounds depicting the Protestant version of the Ten Commandments permissible, due to the secular purpose of demonstrating a key source of American law. See Freethought Soc'y v. Chester County, 334 F.3d 247, 256–60 (3d Cir. 2003). The court was satisfied that a reasonable observer would view the plaque for its historical significance, rather than as an endorsement of Protestant beliefs. See id. This version of the Lemon Test, modified after Justice O'Connor's concurrence in Lynch, was applied in the Modrovich case, and ultimately followed in the Third Circuit. See Modrovich v. Allegheny County, 385 F.3d 397, 400–01 (3d Cir. 2004).

86 A Ten Commandments monument, displayed on capitol grounds along with many other items of secular historical significance was held constitutional because a reasonable
allowable. The Supreme Court granted certiorari to review the Sixth Circuit's holding in *ACLU v. McCreary County* and the Fifth Circuit's decision in *Van Orden v. Perry*.

**ANALYSIS: HOW THE COURT DECIDED THE CASES IT AGREED TO HEAR**

A. *ACLU v. McCreary County*

i. Facts

This case involved the posting of copies of the Ten Commandments in two county courthouses and local district public schools. The copies were not originally part of any larger educational, historical, or retrospective exhibit, but were twice altered by the county, purportedly in an effort to comply with the First Amendment and prevent further litigation. As amended,

observer would not perceive the monument as an endorsement of religion. See *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003). The monument in *Van Orden* was similar to those in *Adland, Books, and City of Plattsmouth*, and was, likewise, donated by the Fraternal Order of Eagles. See *id.* The *Van Orden* monument, moreover, was distinct in its placement, as it was surrounded by a wide array of monuments, plaques and seals honoring Texas' secular and religious history. See *id.* The *Modrovich* court followed the guise of *Van Orden* and commented on the Fifth Circuit's holding of constitutionality regarding public display of the Ten Commandments. See *Modrovich*, 385 F.3d at 413.

88 See *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33–34 (10th Cir. 1973) (concluding that display of Ten Commandments monument was permissible under the Establishment Clause because it was passive, primarily secular, and erected by a non-religious, fraternal organization); *Van Orden*, 351 F.3d at 176 (noting a monument similarly donated by the sectarian fraternal order).

89 See *Cowan*, supra note 15, at 189–90 (contrasting the approach followed by the Third, Fifth, and Tenth circuits with that followed by the Sixth, Seventh, Eighth, and Eleventh circuits regarding the constitutionality of Ten Commandments displays); *Pollack*, supra note 17, at 1386 (discussing difference of views from circuits regarding constitutionality of Ten Commandments on public grounds).

90 354 F.3d 438 (6th Cir. 2003).

91 351 F.3d 173 (5th Cir. 2003); see also Linda Greenhouse, *Justices Will Hear 2 Church-State Cases*, N.Y. TIMES, Oct. 13, 2004, at 23 (reporting Supreme Court's decision to hear two cases involving the constitutionality of posting of the Ten Commandments on public property).

92 See *McCreary County*, 354 F.3d at 441–43 (reviewing facts at issue with regard to display of Ten Commandments).

93 See *McCreary County*, 354 F.3d at 441–42 (noting the courthouse display was erected pursuant to an order by the McCreary County Judge Executive).

94 See *McCreary County*, 354 F.3d at 442 (stating that, after plaintiffs filed suit, defendants altered the displays "in an attempt to bring the displays within the parameters of the First Amendment and to insulate themselves from suit" (quoting *ACLU v. McCreary County*, 96 F. Supp. 2d 678, 684 (E.D. Ky. 2000))).
the courthouse displays professed to honor the "Foundations of American Law and Government" and consisted of "the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments, Lady Justice and a one-page prefatory document." The prefatory included a general description of the display, stating that it contained "documents that played a significant role in the foundation of our system of law and government." The display also contained another introductory description referring specifically to the Ten Commandments:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are

95 See ACLU v. McCreary County, 354 F.3d 438, 443 (6th Cir. 2003) (describing particular displays of the Ten Commandments as well as their respective surroundings).
96 Id. at 443. The version of the commandments displayed at the courthouses read as follows:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

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

Remember the sabbath day, to keep it holy.

Honour thy father and 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.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

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

Id. at 443 n. 2.
97 Id. at 443 (specifying documents on display in courthouses).
endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.98

The School Board displays depicted the same documents as the courthouse displays, with the exception that the Ten Commandments were shown as excerpted from the Congressional Record.99 In addition, the School Board displays contained a Kentucky Statute permitting the posting of historical displays100 and a School Board Resolution101 which stated:

We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools ... It is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools,

98 Id.
99 Id. at 443–44 (6th Cir. 2003). The Court noted specifically: The Ten Commandments were included in a statement of Representative Philip M. Crane of Illinois in which he discussed a Joint Resolution authorizing then-President Reagan to declare 1983 to be the “Year of the Bible”. Representative Crane’s version of the Ten Commandments reads:

1. I am the Lord thy God, thou shalt have no other gods before me.
2. Thou shalt not make unto thee any graven image.
3. Thou shalt not take the name of the Lord thy God in vain.
4. Remember the Sabbath day to keep it holy.
5. Honor thy father and mother.
6. Thou shalt not kill.
7. Thou shalt not commit adultery.
8. Thou shalt not steal.
9. Thou shalt not bear false witness.
10. Thou shalt not covet.  

Id. at 443 n. 3.

100 See id. (mentioning Kentucky state statute depicted on the Ten Commandments display regarding the posting of historical items).

101 See ACLU v. McCreary County, 354 F.3d 438, 443–44 (6th Cir. 2003) (noting “[t]he Resolution also contained a procedure that would permit any person to request the posting of other historical documents with the permission of the Harlan County Board of Education”).
and have had particular historical significance in the development of this country. 102

The Sixth Circuit, strongly influenced by Stone,103 held that the counties’ “avowed” secular purpose of recognizing historical significance104 was insufficient to avoid a First Amendment conflict.105 The schoolhouse displays were struck down because “the very text in which the Ten Commandments are contained... manifests a patently religious purpose.”106 The courthouse displays were likewise held invalid,107 as they were viewed to “manifest a religious purpose because they utterly fail[ed] to integrate the Ten Commandments with a secular subject matter.”108 Furthermore, the circuit court described the Ten Commandments as “inherently religious,”109 and lacking “a

102 Id.
103 See id. at 448. The court stated:
To comply with Stone, however, a purported historical display must present the Ten Commandments objectively and integrate them with a secular message. When such a display consists almost entirely of reading material posted in a public school, the most logical way of achieving this goal is by integrating the Ten Commandments with a secular curriculum, such as through the objective study of history, ethics or comparative religion.

104 Id. at 454. The court further stated:
When distilled to their essence, the courthouse displays demonstrate that Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition. The Supreme Court has held... that “such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment when no effort has been made to integrate the Ten Commandments with a discussion or display of a secular subject matter.”

106 Id. at 453.
107 ACLU v. McCreary County, 354 F.3d 438, 460 (6th Cir. 2003). In finding the displays unconstitutional the court stated that “[a] reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular.” See id. The circuit court noted that all of the documents other than the Ten Commandments relate in some fashion to post-1215 A.D. Western European or American culture and that several of the others related to an American symbol, an American slogan and an American song. See id. Additionally, the court noted that many people find the Ten Commandments to be wholly religious in nature. See id.
108 Id. at 454–55 (asserting that “sandwiching the Ten Commandments between secular texts does not necessitate a finding that the primary purpose of the displays is secular... where the content of the displays otherwise indicates a predominate religious purpose”).
109 Id. at 455 (6th Cir. 2003) (recognizing religious nature of the Ten Commandments as evidenced by their use as sacred texts in the Christian and Jewish faiths).
demonstrated analytical or historical connection with the other documents.”

ii. The Supreme Court Decision

In its opinion, delivered by Justice Souter, the Supreme Court considered only the constitutionality of the displays posted in the county courthouses, as the schoolhouse displays were the subject of a separate petition to the Court. Justice Souter’s opinion, joined by four other justices, held that the development of the displays evinced a clear religious objective by the counties, and that such a manifest objective was, by itself, sufficient to violate the “secular legislative purpose” prong of the Lemon Test. The Court noted that “the eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute.’” The Court rejected the idea of an “absentminded objective observer” and focused on the history of the displays, placing a great deal of importance on the fact that the Commandments were originally posted by themselves, rather than as part of any larger secular historical display. The counties’ inclusion of other historical documents in the displays, following earlier litigation, was viewed mostly as an excuse for the counties to continue their sectarian practice of posting the Commandments.

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110 Id. at 451.
111 See McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2728 n.1 (2005) (noting that issue of Ten Commandments in schoolrooms of Harlan County was subject of a separate petition).
112 See id. at 2745 (affirming lower court’s finding of “predominantly religious purpose” behind the Counties’ three Ten Commandments displays).
113 Id. at 2735 (quoting Santa Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000)).
114 See McCreary, 125 S. Ct. at 2736–37.
115 Id. at 2738 (concluding that display of Ten Commandments was not part of “arguably secular display”).
116 The Court took exception to the Counties’ juxtaposition of the Ten Commandments and the Declaration of Independence by stating that the Ten Commandments “are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives ‘from the consent of the governed[,]’” See McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2741 (2005). The Court further stated that, upon seeing the displays, “if [an] observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.” See id.
iii. Analysis

Given the Court’s recent Establishment Clause jurisprudence, it seems that the decision in McCreary was unduly harsh. Clearly, the displays should be classified as “government speech,” as they were erected in response to county legislation, rather than pursuant to private organization funding, and thus require an increased level of scrutiny. However, had the Court relied on its more modern Endorsement Test (rather than continuing its unpredictable practice of occasionally reviving the Lemon Test), it is unlikely that it would have determined that the counties were endorsing, through their amended displays, the Judeo-Christian beliefs normally associated with the Ten Commandments.

Under the Endorsement Test, government must avoid both an excessive entanglement with religion and an endorsement of religion by sending a message to nonadherents that they are outsiders and a message to adherents that they are favored members of the political community. In McCreary, the Ten Commandments represented the only item of religious
significance in any of the displays. While this could conceivably be viewed as favoritism towards those religions to which the Commandments are sacred, it must be remembered that founders of the United States government held primarily Judeo-Christian beliefs, meaning that the Ten Commandments and other such documents evincing Judeo-Christian morality were likely far more influential in the development of American law than other religious texts.

Regardless of the initial legislative purpose behind the decision to post earlier versions of the displays, the current secular purpose of recognizing influential documents in the development of American law is seemingly sufficient to avoid excessive governmental entanglement with religion. Furthermore, the current design appears sufficient to constitute a legitimate secular purpose rather than one merely "avowed" by the local government. While the Court described the selection of historical documents chosen for display by the counties to be "odd" and "baffling," the Court's responsibility should be to decide whether the Commandments are integrated with items of

121 See ACLU v. McCreary, 354 F.3d 438, 460 (6th Cir. 2003). The circuit court noted that "all of the other documents relate in some fashion to Western European or American culture since 1215; several of the documents are legal in nature, one is an American symbol, one is an American slogan and one is an American song," in contrast to the Ten Commandments, which "are several thousands of years old, were not a product of European or American culture and, many believe, are the word of God." See id.

122 See Ellis Washington, Reply to Judge Richard A. Posner on the Inseparability of Law and Morality, 3 Rutgers J. L. & Religion 1, n.9 (2001) (stating "[t]o the Framers, the law of the Constitution was firmly rooted in irrevocable, Judeo/Christian precepts of liberty, through obedience to God's laws"); see also Karen T. White, The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law, 6 J. Law. & Pub. Pol'y 181, 208 (1994) (stating "biblical principles guided the drafters of the various state constitutions, and their experience in turn guided the drafters of the federal constitution").


124 See Allegheny, 492 U.S. at 635 (stating that religious symbols displayed in secular context may "negat[e] any message of endorsement"); see also Stone, 449 U.S. at 41 (holding that the "avowed" secular purpose of displaying the Ten Commandments, for their development as the fundamental legal code of Western civilization, was insufficient to avoid conflict with the First Amendment).

125 See McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2740 (2005) (noting the bizarre choice to display patriotic anthem and Magna Carta, while excluding original Constitution and the Fourteenth Amendment where theme was documents with "foundational" nature).
historical secular significance, rather than to act as an arbiter in determining the wisdom of a local government's decision to include certain historical documents while excluding others. A reasonably informed viewer would seem to be able to recognize the importance of Ten Commandments in the development of fundamental American legal principles, especially where the Commandments are displayed with other influential historical documents in a display entitled “The Foundations of American Law and Government.”

An objective observer visiting a Kentucky courthouse would most likely not be familiar with the “intimate details” of the legislative history of these displays and would, therefore, be likely to view the Ten Commandments within their secular and historical context that is clearly set forth by the displays, without considering the purpose of earlier displays that are no longer publicly posted. Therefore, the courthouse displays in McCreary should have been held to be constitutional.

The schoolhouse displays, however, are most likely unconstitutional. As recognized by the Court in Edwards, school children are highly impressionable and, therefore, more likely to believe that the government is endorsing Judeo-Christian beliefs through the displays. It would seem that a child viewing the Ten Commandments in the vicinity of documents illustrative of actual American law, could reasonably view the Commandments

126 See id. at 2738 (noting “Stone stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message . . .”); see also Stephen B. Presser, The Ten Commandments Mish-Mosh, THE AMERICAN SPECTATOR, Oct. 1, 2005 (explaining how the exhibition of the Ten Commandments in McCreary County failed under each of the Lemon test's three prongs).

127 McCreary County, 125 S. Ct. at 2739 (noting courthouse displays “placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government.”); see Presser, supra note 126 (reiterating Justice Scalia's viewpoint that the display was facially secular, and documents therein played a significant role in creating our legal system and government).

128 McCreary County, 125 S. Ct. at 2740 (stating “[c]ounties' claims did not, however, persuade the [lower] court, intimately familiar with the details of this litigation, or the Court of Appeals, neither of which found a legitimizing secular purpose in this third version of the display”).

129 See Edwards v. Aguillard, 482 U.S. 578, 582–84 (1987) (explaining that Court's more protective attitude towards religious expression in public schools in light of factors such as parents' expectation that schools will not influence their children's religious beliefs, mandatory attendance requirements, children's impressionability, desire to emulate teachers, and susceptibility to peer pressure); see also School District of Abington Township v. Schempp, 374 U.S. 203, 252–53 (1963) (stating that choice or compulsion to attend specified institution is crucial when determining whether implementing religious practices and teaching is permissible).
as a pronouncement of law to be respected and adhered to in the same manner as is the Bill of Rights.\textsuperscript{130} Such an effect is not problematic where a child adopts the belief that she should not kill or steal, but it seems to become impermissibly coercive when she believes that she is being instructed to “[r]emember the Sabbath day to keep it holy.”\textsuperscript{131} Children are significantly more likely to view the display of the Ten Commandments, depicted along with official American government instruments, as an adoption of a state or federal religion.\textsuperscript{132} Therefore, under the Coercion Test,\textsuperscript{133} the schoolhouse displays in \textit{McCreary} should be held to violate the Establishment Clause.

\textbf{B. Van Orden v. Perry}

\textbf{i. Facts}

At issue in \textit{Van Orden} was a Ten Commandments monument previously donated in 1961 by the Fraternal Order of Eagles organization for display on Texas state capitol grounds.\textsuperscript{134} The monument was similar to other displays which had been donated to various states by the organization, often leading to similar litigation.\textsuperscript{135} Many such displays were the brainchild of motion

\textsuperscript{130} \textit{See Edwards}, 482 U.S. at 623 (noting since students are impressionable, they should be presented with creation science without religious content); \textit{see also} Akhil Reed Amar, \textit{The Bill of Rights and the Fourteenth Amendment}, 101 \textit{Yale L.J.} 1193, 1210 (1992) (recognizing basic, fundamental principle that declarations of rights contained in Bill of Rights should be taught diligently to children because they are of paramount importance).


\textsuperscript{132} \textit{See Edwards}, 482 U.S. at 584 (commenting on students’ impressionable nature, compounded by desire to emulate educators, and likelihood of caving to peer pressure); \textit{see also} Verginis, \textit{supra} note 11, at 746–47 (noting coercion test “would invalidate governmental action only where the government compels individuals to participate religiously or where the government’s actions directly benefit a particular sect to such a dangerous extent so as to establish a state or federal religion”).

\textsuperscript{133} \textit{See} Lee v. Weisman, 505 U.S. 577, 592 (1992) (introducing coercion test as analysis for Establishment Clause cases); \textit{see also} Lynch v. Donnelly, 465 U.S. 668, 701–02 (1984) (explaining where government financing, power, and prestige envelop religious beliefs, religious minorities are indirectly coerced to conform).

\textsuperscript{134} \textit{See Van Orden v. Perry}, 351 F.3d 173, 182 (5th Cir. 2003) (noting the twenty-two acre Texas state capitol grounds were dedicated on May 16, 1888 and were a protected National Historic Landmark maintained by the State Preservation Board).

\textsuperscript{135} \textit{See Adland v. Russ}, 307 F.3d 471, 476 (6th Cir. 2002) (describing a Ten Commandments monument, nearly identical to the monument described in \textit{Van Orden}, donated to Kentucky’s state capitol grounds by the Fraternal Order of Eagles); ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1025 (8th Cir. 2004) (finding
picture producer Cecil B. DeMille and were funded to promote DeMille's film "The Ten Commandments" which was released in the 1950s. The Texas monument displayed a nonsectarian version of the Commandments, and depicted two small tablets with ancient Hebrew script, as well as an American eagle grasping the American flag, an eye inside a pyramid (similar to the symbol displayed on the one-dollar bill), two small Stars of David, and two Greek letters, Chi and Rho, intended to represent constitutional a monument similar to that at issue in Van Orden; Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000) (declaring unconstitutional a Ten Commandments monument located on a municipal building's lot).

The court recounted DeMille's collaboration with juvenile court judge, E.J. Ruegemer, which lead to erection of Books monument and countless similar displays:

Disheartened by the growing number of youths in trouble, . . . [Ruegemer] sought to provide them with a common code of conduct. He believed that the Ten Commandments might provide the necessary guidance. Judge Ruegemer originally planned to post paper copies of the Ten Commandments in juvenile courts, first in Minnesota and then across the country. To help fund his idea, he contacted the Fraternal Order of Eagles ("FOE"), a service organization dedicated to promoting liberty, truth, and justice. At first, FOE rejected Judge Ruegemer's idea because it feared that the program might seem coercive or sectarian. In response to these concerns, representatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one religious group. After reviewing this version, FOE agreed to support Judge Ruegemer's program.

Around this same time, motion picture producer Cecil B. DeMille contacted Judge Ruegemer about the program. DeMille, who was working to produce the movie "The Ten Commandments," suggested that, rather than posting mere paper copies of the Ten Commandments, the program distribute bronze plaques. Judge Ruegemer replied that granite might be a more suitable material because the original Ten Commandments were written on granite. DeMille agreed with Judge Ruegemer's suggestion, and the judge thereafter worked with two Minnesota granite companies to produce granite monuments inscribed with the Ten Commandments. Local chapters of FOE financed these granite monuments and then, throughout the 1950s, donated them to their local communities. The Elkhart chapter of FOE donated its version of the Ten Commandments monument to the City of Elkhart in 1958.

Books, 235 F.3d at 294–95; see also Peter Lewis, Religious Monument May Stay, Judge Rules; Ten Commandments — For 46 Years, It Has Stood on Public Land in Everett, SEATTLE TIMES, Sept. 14, 2005 at B1 (noting that DeMille helped distribute Ten Commandment monuments).

The United States District Court for the Western District of Texas described the Ten Commandments display as an amalgamation of Jewish, Protestant, and Catholic versions:

It is a granite monolith, more than six feet high and more than three feet wide. One side of the monument contains no engraving and is smooth. Engraved on the other side is a version of the Ten Commandments without any "chapter and verse" citation to the Old Testament and with no identification of the specific English translation of the Old Testament from which the wording is taken.

Christ. All expenses in connection with the monument "were borne exclusively by the Eagles" and the state selected the site of its display "on the recommendation of the Building Engineering and Management Division of the State Board of Control."

The capitol building was surrounded by "a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas." Also present on the capitol grounds were a tribute to African American legislators, a Confederate plaque, a plaque commemorating the war with Mexico, a Mexican Eagle and serpent (a symbol of Aztec prophecy), a Confederate Seal containing the inscription "Deo Vindice" (God will judge), and four other monuments: a tribute to Texas children; a tributary statue honoring the role of women in Texas history; a replica of the Statue of Liberty; and a tribute honoring those Texans who died at Pearl Harbor.

The Fifth Circuit held these displays constitutionally permissible. The court determined that a reasonably informed viewer would conclude that, by erecting the monument, the

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138 See Van Orden, 351 F.3d at 176 (describing Ten Commandments monument at issue and noting that it was accepted by joint resolution of the House and Senate in early 1961).

139 See Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003). Specifically, the court stated:

(1) the sparse legislative history "contains no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate Journal entries"; (2) the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control; (3) the expenses "were borne exclusively by the Eagles"; (4) the monument requires virtually no maintenance; and (5) the dedication of the monument was presided over by Senator Bruce Reagan and Representative Will Smith.

Id. (internal citations omitted).

140 Id. (finding Texas chose monument's site so persons entering the courthouse would not be subject involuntarily to the monument).

141 Id. at 175–76.

142 Id. at 176.

143 Id. at 182. The circuit court was "persuaded that Texas does not violate the First Amendment by retaining a forty-two-year-old display of the Decalogue" and added that "the Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government." Id. The court used the standard of a reasonable observer, stating "[w]e are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State is endorsing the religious rather than the secular message of the Decalogue." Id.

144 Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003) (asserting that "we disserve no constitutional principle by concluding that a State's display of the decalogue in a
state was endorsing merely the secular importance of the Commandments, rather than their religious message.\textsuperscript{145} The circuit court further noted that “Texas has a record of honoring the contributions of donors and those they represent,”\textsuperscript{146} and found no evidence refuting the state’s claim that the monument was displayed for the purpose of commending the Eagles organization “for its efforts to reduce juvenile delinquency.”\textsuperscript{147}

\begin{enumerate}
\item The Supreme Court Decision
\end{enumerate}

The Supreme Court affirmed the Fifth Circuit’s holding in \textit{Van Orden}.\textsuperscript{148} In a plurality opinion, delivered by Chief Justice Rehnquist, the Court focused its analysis on the nature of the Texas monument within a national historical perspective, stating that the Lemon Test was not helpful in determining constitutionality when the government action at issue is “passive” as in \textit{Van Orden}.\textsuperscript{149} Justice Rehnquist found significance in the fact that “Texas has treated her Capitol grounds monuments as representing the several strands in the State’s political and legal history,”\textsuperscript{150} noting that “the inclusion of manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer”).

\textsuperscript{145} \textit{Id.} at 181. The circuit court stated:

Even those who would see the decalogue as wise counsel born of man’s experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society. A reasonable viewer must also be aware of the placement of the monument at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law while standing apart and not physically connected to any of them. The decalogue is presented as relevant to these law-giving instruments of State government, but from a distance.

\textit{Id.}

\textsuperscript{146} \textit{Id.} at 178–79 (illustrating Texas’ history of honoring donations by recounting an example where the Legislature authorized the installation of a replica of the Statue of Liberty by the Boy Scouts of America).

\textsuperscript{147} See \textit{id.} (agreeing that “there is nothing in either the legislative record or the events attending the monument’s installation to contradict the secular reasons laid out in the legislative record, brief as it is; there is nothing to suggest that the Legislature did not share the concern about juvenile delinquency”).


\textsuperscript{149} \textit{Id.} at 2861. The Court stated:

Whatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.

\textit{Id.}

\textsuperscript{150} \textit{Id.} at 2864.
the Ten Commandments monument in this group has a dual significance, partaking of both religion and government." This meant that the monument did not have a "plainly religious purpose" and, thus, was permissible under the Establishment Clause.

iii. Analysis

The Court's holding in Van Orden appears to be consistent with its recent Establishment Clause jurisprudence. Monuments like the one at issue in Van Orden are properly viewed as "private speech." The Van Orden monument was funded entirely by the Fraternal Order of Eagles who donated it to the state. The state placed the monument seemingly indiscriminately in an area surrounded by many other items of both secular and religious significance. The Court made it clear in Pinette that private religious expression does not violate the Establishment Clause where it occurs in a traditional or designated public forum, publicly announced and open to all on

151 Id.
152 See Van Orden, 125 S. Ct. at 2863 (contrasting the Van Orden displays with those from Stone held to display "an improper and plainly religious purpose").
153 See Van Orden v. Perry, 125 S. Ct. 2854, 2863 (2005) (concluding that Texas' display was not violative of the Constitution).
154 Compare Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 841-42 (1995) (finding no Establishment Clause concerns in a university student publication's funding program imbued with Christian viewpoint inasmuch as the publication constituted private speech), and Bd. of Educ. v. Mergens, 496 U.S. 226, 250-52 (1990) (determining that acts of a Christian student group who sought permission to use school premises for student-led prayer sessions constituted private speech), with Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (concluding school district's policy of student-led prayer was public speech and thus government sponsorship thereof was impermissible under the Establishment Clause).
156 Van Orden, 351 F.3d at 176 (describing Ten Commandments monument as a "gift" to the state from the Fraternal Order of Eagles).
157 Id. (mentioning that the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control).
158 See Van Orden, 351 F.3d at 176 (describing monument's contextual surroundings); Allegheny v. ACLU, 492 U.S. 573, 614–19 (1989) (finding relevant the coupling of a Chanukah menorah, Christmas tree and sign hailing liberty in concluding that the display of the menorah outside a municipal building did not run afoul of the Establishment Clause).
equal terms. Given the diversity of the other items on display on the Texas capitol grounds, along with Texas' history of accepting and honoring the contributions of donors, it would appear that the capitol grounds are open to any organization wishing to donate such a display.

Under the Endorsement Test, a reasonable observer, viewing the monument in this diverse context, would seemingly be no more likely to believe that the state government is favoring Judeo-Christian beliefs with its display of the Ten Commandments monument than he would be to believe that the state is favoring Aztec beliefs through the display of an Aztec symbol of prophecy. The apparently indiscriminate climate of the capitol grounds is substantial evidence that a person who does not hold Judeo-Christian beliefs is unlikely to feel like an "outsider" while taking a tour of the grounds. Furthermore, even if the Court had chosen to employ the Lemon Test, the purpose of honoring the Eagles for their efforts in the area of juvenile delinquency, along with the general theme of history and diversity that permeates the capitol grounds, would seemingly be sufficient to show a valid secular purpose. Therefore, the monument in Van Orden was correctly held to be constitutional.


160 See Van Orden, 351 F.3d at 175–76 (describing "a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas").

161 See Van Orden v. Perry, 351 F.3d 173, 179 (5th Cir. 2003) (illustrating Texas' history of honoring donations).

162 See Van Orden, 351 F.3d at 176 (noting "[t]here is a Six Flags Over Texas display on the floor of the Capitol Rotunda featuring the Mexican Eagle and serpent - which as visitors will learn, is a symbol of Aztec prophecy"); see also Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (concluding "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement").

163 See Van Orden, 351 F.3d at 175–76 (describing that guided tours offered for those looking to view the displays arranged on the capitol grounds); see also Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (espousing two-part standard for Establishment Clause review that has become known as the "Endorsement Test").

CONCLUSION

The holding in Stone appeared to indicate that the Ten Commandments are a mostly religious symbol and, therefore, cannot be properly placed on public property. The Court's Establishment Clause jurisprudence in the time since Stone, including its holdings in Van Orden and McCreary, however, indicate that it is possible for the Ten Commandments to be displayed on public grounds in some circumstances. The recent decisions seem to suggest that a local government's original purpose in posting the Commandments, together with the surrounding environment in which the Commandments are placed, will be of paramount importance. However, the lack of one definitive test for determining constitutionality in Establishment Clause cases likely will continue to be a source of uncertainty and frustration in deciding such issues.