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THE SUPREME COURT AND THE TEN COMMANDMENTS: COMPOUNDING THE ESTABLISHMENT CLAUSE CONFUSION

Jay A. Sekulow*
Francis J. Manion**

INTRODUCTION

The Supreme Court's decisions in *Van Orden v. Perry*¹ and *McCreary County, Kentucky v. ACLU of Kentucky*² have done nothing to clear away the fog obscuring religious display cases or Establishment Clause jurisprudence generally. If anything, the decisions have exacerbated an already confused and confusing area of the Court's decisional law, an area which Justice Scalia has not shrunk from calling "embarrassing."³ Douglas Laycock, who filed amicus briefs in both cases in support of challengers of the respective displays, laments that the Court's decisions "draw fuzzy and unprincipled lines."⁴ An editorial in *Christianity Today* captures the understandable reactions of partisans of both sides:

Everyone knows the Supreme Court ruled that one kind of Ten Commandments display on government property is unconstitutional, but that another kind is acceptable. But no one — including the Supreme Court itself — seems to be able to explain why.⁵

It seems that the Chief Justice may have chosen the wrong classical allusion when, in his *Van Orden* plurality opinion, he described the Court's Establishment Clause cases as "Januslike,"⁶ i.e., pointing in two directions.⁷ A better choice would have been "Hydralike," after the nine-headed mythological creature killed by Hercules as

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¹ 125 S. Ct. 2854 (2005).

² 125 S. Ct. 2722 (2005).

³ *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

⁴ Douglas Laycock, *How to be Religiously Neutral*, LEGAL TIMES, July 4, 2005, at 42.

⁵ *Broken Tablets: The Court Splits the Baby and Denies the Rule of Law. Feel United Yet?*, CHRISTIANITY TODAY, Aug. 2005, at 26.

⁶ *Van Orden*, 125 S. Ct. at 2859; see also EDITH HAMILTON, MYTHOLOGY 51 (1942) (describing Janus, the Roman god of good beginnings depicted with two faces looking in opposite directions).

⁷ *Van Orden*, 125 S. Ct. at 2859.

part of his famous Twelve Labors.⁸ After this pair of decisions, the question is whether there is anywhere a logical, coherent principle or set of principles upon which five or more members of the Court can agree in order to perform the apparently Herculean task of adjudicating these cases in any kind of consistent, predictable manner.

I. BACKGROUND

Perhaps the most disappointing aspect of the *Van Orden* and *McCreary* decisions is that they utterly failed to resolve an issue that has been boiling over in the lower courts for the past decade. Prior to 1996, only three reported decisions addressed the merits of constitutional challenges to Ten Commandments displays on non-school public property.⁹ After that, the deluge.¹⁰

⁸ HAMILTON, *supra* note 6, at 231. Of the Hydra's nine heads, one was immortal. As for the other eight, when Hercules chopped off one, two grew back in its place. Assisted by his nephew Iolaus, Hercules used a burning brand to sear the neck as he chopped off each head to prevent its growing back. He took care of the immortal one by burying it under a great rock. *Id.*

⁹ *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (holding that the Eagles monument in front of courthouse was primarily secular and did not violate the Establishment Clause); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994) (holding that the framed panel of Ten Commandments and Great Commandment in courthouse violated Establishment Clause; the order was stayed to permit parties to create educational display incorporating panel); *State v. Freedom from Religion Found.*, 898 P.2d 1013 (Colo. 1995) (finding that the Eagles monument on State Capitol grounds was secular and did not violate Establishment Clause).

¹⁰ *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated and reh'g granted by* No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004); *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Sumnum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001); *Sumnum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Turner v. Habersham County*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003), *rev'd and remanded sub nom.*, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002); *Baker v. Adams County/Ohio Valley Sch. Bd.*, No. C-1-99-94, 2002 U.S. Dist. LEXIS 26226 (S.D. Ohio June 11, 2002), *aff'd*, 86 F. App'x 104 (6th Cir. 2004); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000); *Ind. Civ. Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001).

As this non-exhaustive list shows, from about 1997 on, hardly a month went by without a decision being issued by either a district court or court of appeals on the constitutionality of some Ten Commandments display somewhere in the nation. The results were anything but consistent. The courts of appeals divided as follows: The Tenth Circuit held onto a pre-*Stone v. Graham*¹¹ case upholding a courthouse display of the Fraternal Order of Eagles monument.¹² The Third Circuit upheld a courthouse plaque of the Decalogue dating from 1920.¹³ The Sixth Circuit struck down every Ten Commandments display brought before it, including a *Van Orden*-esque state Capitol Eagles monument,¹⁴ a judge's courtroom poster,¹⁵ a school lawn historical texts display,¹⁶ and, of course, McCreary County's "Foundations of American Law and Government" display.¹⁷ The Eleventh Circuit struck down Chief Justice Roy Moore's monumental display,¹⁸ but upheld Richmond County, Georgia's use of the Decalogue in its seal.¹⁹ The Fifth Circuit upheld Texas's state capitol display of the Eagles monument in *Van Orden*.²⁰ The Seventh Circuit struck down a state capitol monument display,²¹ struck down a city hall Eagles monument display in the city of Elkhart, Indiana,²² but, just three months before the hammer fell on McCreary County's display, upheld a courthouse display identical to McCreary's in the county of Elkhart, Indiana.²³ The Eighth Circuit took a wait-and-see attitude. That court vacated a three judge panel's 2-1 decision affirming the district court's striking down of an Eagles monument in a city park,²⁴ heard oral argument en banc on September 15, 2004, then apparently informally abated further action pending the Supreme Court's consideration of *Van Orden* and *McCreary*.²⁵

¹¹ 449 U.S. 39 (1980) (per curiam).

¹² *Anderson*, 475 F.2d 29. On August 1, 2005, a panel of the Tenth circuit, citing *Van Orden* and *McCreary*, held that *Anderson* has been superseded by those cases.

¹³ *Freethought Soc'y*, 334 F. 3d 247.

¹⁴ *Adland*, 307 F.3d 471.

¹⁵ *Ashbrook*, 375 F.3d 484.

¹⁶ *Baker v. Adams County/Ohio Valley Sch. Bd.*, No. C-1-99-94, 2002 U.S. Dist. LEXIS 26226 (S.D. Ohio June 11, 2002), *aff'd*, 86 F. App'x 104 (6th Cir. 2004).

¹⁷ *ACLU of Ky. v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

¹⁸ *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

¹⁹ *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

²⁰ *Van Orden v. Perry*, 351 F. 3d 173 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

²¹ *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

²² *Books v. City of Elkhart*, 235 F. 3d 292 (7th Cir. 2000). For an exchange of views by Chief Justice Rehnquist (joined by Scalia and Thomas) and Justice Stevens on the Supreme Court's denial of certiorari, see *City of Elkhart v. Books*, 532 U.S. 1058, 1058-63 (2001).

²³ *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005).

²⁴ *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated and reh'g granted* by No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004).

²⁵ On August 19, 2005, the en banc Eight Circuit reversed the lower court's decision by a vote of 10-2. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

Confused? So were the lower courts, which frequently expressed, in the cases cited above as well as in district court opinions, their frustration with the lack of anything approaching clear direction from the highest court in the land. Judges at oral argument repeatedly voiced this frustration and wondered aloud when the Supreme Court was going to exercise its conflict-resolution responsibilities and give some guidance to the inferior courts.²⁶

But amidst the welter of confused and confusing lower court decisions, a certain theme emerged: predictions by those courts of where the Supreme Court was likely to go should it ever take up one of these cases. In hindsight, given the direction the Court actually took in *Van Orden* and *McCreary*, those lower court forecasts bring to mind the television weather forecaster who finds himself pelted with snowballs after predicting a warm, dry day.

For example, the Third Circuit was convinced that the Supreme Court had tacitly abandoned the *Lemon* test,²⁷ at least in the context of religious displays and symbols. Noting that, in cases such as *Lynch v. Donnelly*,²⁸ (at least in Justice O'Connor's concurrence),²⁹ *County of Allegheny v. ACLU*,³⁰ *Capitol Square Review & Advisory Board v. Pinnette*,³¹ and *Agostini v. Felton*,³² the Court had ignored *Lemon*, the Third Circuit all but explicitly rejected the relevance of *Lemon*'s purpose prong and concentrated on the nuances of Justice O'Connor's endorsement test.³³ In a similar way, the Fifth Circuit thought that *Lemon*'s purpose and effect prongs had been collapsed into the endorsement test.³⁴ The Seventh Circuit took a similar approach in *City of Elkhart*,³⁵ while, in the *Elkhart county* case,³⁶ the panel majority took the more traditional *Lemon* course while observing that "*Lemon*['s] days may be numbered."³⁷ The Sixth Circuit, sitting en banc in a religious motto case, poured scorn on *Lemon* and applied a combination of *Marsh v. Chambers*³⁸ and the endorsement test before grudgingly paying lip service to *Lemon*'s prongs.³⁹

²⁶ Attorneys for the American Center for Law and Justice have, since 1997, argued some sixteen times before a total of thirty-three district and courts of appeals judges in Ten Commandments display cases. See generally American Center for Law and Justice, <http://www.aclj.org> (last visited Nov. 7, 2005).

²⁷ *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003).

²⁸ 465 U.S. 668 (1984).

²⁹ *Id.* at 687–94.

³⁰ 492 U.S. 573 (1989).

³¹ 515 U.S. 753 (1995).

³² 521 U.S. 203 (1997).

³³ *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 257–62 (3d Cir. 2003).

³⁴ *Van Orden v. Perry*, 351 F.3d 173, 177–78 (5th Cir. 2003).

³⁵ *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000).

³⁶ *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005).

³⁷ *Id.* at 862.

³⁸ 463 U.S. 783 (1983).

³⁹ *ACLU of Ohio v. Capitol Sq. Rev. & Advisory Bd.*, 243 F.3d 289, 305–08 (6th Cir.

If anticipation of *Lemon*'s demise was common among the inferior courts, it was equally common among legal scholars. For instance, Berkeley's Jesse Choper, in a 2002 article observing that *Lemon* "has been thoroughly discredited as a workable Establishment Clause standard,"⁴⁰ pronounced that "[t]he Court has implicitly abandoned the *Lemon* test for the validity of enactments under the Establishment Clause, and has instead adopted an approach championed by Justice O'Connor — the 'endorsement' test."⁴¹

Anticipation was heightened further when the Court granted certiorari in *McCreary* on a set of questions presented that included the following: "Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence."⁴²

An additional tantalizing fact (and, in hindsight, well nigh inexplicable) was the absence of *Lemon* in the Court's decision in *Cutter v. Wilkinson*.⁴³ The *Cutter* case was an Establishment Clause challenge to section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁴⁴ The Sixth Circuit relied on *Lemon* in holding that section 3 violated the Establishment Clause, but the Supreme Court, per Justice Ginsburg, reversed in an opinion that expressly avoided *Lemon*.⁴⁵ *Lemon* was relegated to a succinct footnote which acknowledged its existence but stated: "We resolve this case on other grounds."⁴⁶ Coming just three weeks before the Court's Commandments decisions, *Cutter* seemed a harbinger of *Lemon*'s downfall.

II. MCCREARY: YOU CAN'T KEEP A GOOD GHOUL DOWN

Justice Scalia's famous description of *Lemon* as a continually returning "ghoul in a late-night horror movie"⁴⁷ never seemed more apt than in *Lemon*'s stunning

2001) (en banc). In one of the seemingly endless ironies of this area of litigation, the en banc Sixth Circuit thus cleared the way for Judge James DeWeese to sit in his courtroom beneath Ohio's obviously religious and theologically exclusionary motto: "With God All Things Are Possible," while a panel of the same Sixth Circuit struck down DeWeese's inclusion of a Ten Commandments poster in a courtroom display intended to educate visitors about the foundations of our legal system. *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 491 (6th Cir. 2004).

⁴⁰ Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002) (footnotes omitted).

⁴¹ *Id.* (footnotes omitted).

⁴² Petition for Writ of Certiorari at i, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 310 (2004) (No. 03-1693), 2004 WL 1427470.

⁴³ 125 S. Ct. 2113 (2005).

⁴⁴ Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (2000).

⁴⁵ *Cutter*, 125 S. Ct. at 2120 n.6.

⁴⁶ *Id.*

⁴⁷ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

reemergence as *the* principal analytical framework in Justice Souter's majority opinion in *McCreary*.⁴⁸ Not merely was *Lemon* revived, it was given new blood. More so than the inherent inconsistencies decried by critics of the Court's split decisions, the revitalization of *Lemon* in this context — and the much maligned purpose prong at that — may be the most surprising part of the Court's baby-splitting. After all, it would not have been much of a surprise if, applying its prior "endorsement test" standards, the Court had concluded that the Texas monument did not violate the Establishment Clause while the Kentucky display did.⁴⁹ The "endorsement test" itself, whatever its superiority over the *Lemon* test, is still notoriously subjective.⁵⁰ But pinning the decision on *Lemon*'s purpose prong was an unexpected novelty.

In Justice Souter's hands, the purpose prong has been transformed. Where previously this prong was quite easy to satisfy — a secular purpose was deemed sufficient⁵¹ — the purpose prong now quite clearly requires a *predominantly* secular purpose.⁵² This is a change in the law, Justice Souter's protestations to the contrary notwithstanding.⁵³ At the same time as it adds teeth to the purpose prong, this development hastens the already apparent demise (at least in Establishment Clause cases) of the Court's deference to a state's articulation of a secular purpose.⁵⁴ A judicial inquiry into which purposes are predominant must necessarily involve sifting of evidence and assessing the credibility of state actors — the very antithesis of "deference."

Nor does the *McCreary* majority offer any guidance on how multiple motives or purposes are to be weighed in order to determine which one predominates. In the typical case, one is dealing not with a single individual's purposes, but those of a group of people — a governing body whose members may each have their own different motives for voting to display the Decalogue varying from the purely religious to the purely political. These individuals may or may not disclose their "real" purposes; indeed, they may not have given very much thought to them.

⁴⁸ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2732–33 (2005).

⁴⁹ *But see Broken Tablets*, *supra* note 5. This editorial implied an opposite result from the standpoint of a reasonable observer:

So guess which display won approval: Was it the six-foot granite monolith inscribed with a Christian *Chi-Rho* symbol and "I AM the LORD thy GOD" in extra-large letters? Or was it the framed copy of Exodus 20:3–17 from the King James Version displayed along with the Magna Carta, the Declaration of Independence, the Bill of Rights, and other items . . . ?

Id. In the view of the editorial writer, it was the *Van Orden* monument, not the *McCreary* contextual display, which obviously smacked more of "endorsement" of religion. *Id.*

⁵⁰ *See Choper*, *supra* note 40, at 500 n.10.

⁵¹ *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

⁵² *McCreary*, 125 S. Ct. at 2736.

⁵³ *Id.* at 2734–35. Even Justice Stevens had been content with the "a clearly secular purpose" reading of *Lemon*. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

⁵⁴ *See McCreary*, 125 S. Ct. at 2758 n.9 (Scalia, J., dissenting).

How is a court even supposed to discover all of the relevant evidence of a government actor's purposes and motives, let alone somehow weigh them in some sort of judicial Predominometer? The temptation to pick and choose tidbits of evidence supporting one's own predilections is enormous.

The Court has yet to effectively counter Justice Scalia's devastating critique of the purpose prong set out in his dissent in *Edwards v. Aguillard*:⁵⁵

But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. . . . The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.⁵⁶

Now that the purpose prong is officially back, bigger and better than ever, Justice Scalia's critique takes on fresh relevance.

That Justice Souter's use of the purpose prong in *McCreary* invites courts to cherry pick the record in search of evidence propping up predetermined outcomes (a criticism leveled by both Justices Scalia and Thomas)⁵⁷ is evident from the majority's own handling of the *McCreary* record. At the very outset of its recitation of the facts in *McCreary*, the majority zoomed in on what was clearly inadmissible hearsay contained in newspaper articles.⁵⁸ What is worse, the majority highlighted the inadmissible hearsay statements not of a county official — but the official's pastor.⁵⁹ The search for a predominantly religious purpose is apparently unbounded by the basic rules of evidence or the even more basic notion that, if they are to count at all, inadmissible hearsay statements ought to at least be attributable to the party against whom they are sought to be used.

The mischief of the *McCreary* majority opinion is best summed up by Justice Scalia:

By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record.

⁵⁵ 482 U.S. 578 (1987).

⁵⁶ *Id.* at 636–37 (Scalia, J., dissenting).

⁵⁷ *McCreary*, 125 S. Ct. at 2757 (Scalia, J., dissenting) (“As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different.”). Justice Thomas joined in Justice Scalia's dissenting opinion.

⁵⁸ *Id.* at 2728 (majority opinion).

⁵⁹ *Id.*

Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.⁶⁰

It is actually worse than that. As Michael McConnell has incisively observed, those people “responsible for the adoption of the Religion Clauses”⁶¹ would undoubtedly find the current Supreme Court majority’s understanding of the Establishment Clause and, in particular, its use of *Lemon*’s purpose and effect clauses, utterly incomprehensible:

For example, the presence or absence of a “secular legislative purpose” is said to be the first hallmark of an establishment. At the end of the eighteenth century, however, advocates of established religion almost invariably justified the establishment on the basis of its social utility, not its religious truth or spiritual value It was the *opponents* of the establishment, the proponents of *disestablishment*, who were more likely to offer religious or theological justifications for their position.⁶²

Regarding the forbidden effect of “advancing religion,” presumably still in place as an analytical prong after *McCreary*, McConnell points out: “But one of the principal arguments against establishment was that it was harmful to religion, and many sought disestablishment in order to strengthen and revitalize Christianity.”⁶³ It may fairly be said, therefore, that under current Establishment Clause jurisprudence, as reaffirmed in *McCreary*, the Establishment Clause itself violates the Establishment Clause.

And what of the “endorsement test”? It hardly figures at all in the *McCreary* majority’s analysis.⁶⁴ This is surprising in light of the Court’s own prior forays into this area in which, as noted above, the “endorsement test” had basically supplanted *Lemon* as the proper analytical framework either explicitly, as in *Allegheny* and *Pinette*, or implicitly in the opinions of the lower courts where, loath to ignore *Lemon* entirely, judges would resort to “collapsing” or “folding” its prongs into the

⁶⁰ *Id.* at 2758 (Scalia, J. dissenting).

⁶¹ *Id.*

⁶² Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2206 (2003) (footnote omitted).

⁶³ *Id.*

⁶⁴ *McCreary*, 125 S. Ct. at 2737.

“endorsement test.”⁶⁵ In *McCreary*, even Justice O’Connor makes scant mention of what is, by all accounts, one of the hallmarks of her Supreme Court career.⁶⁶ Litigants on both sides of these cases are, in effect, back to square one in trying to decide which test is *the* test and how they should most effectively structure their arguments.

III. *VAN ORDEN V. PERRY*:⁶⁷ *SALUS CURIAE SUPREMA LEX*⁶⁸

Five minutes after *Lemon*’s triumphant return from the grave in *McCreary*, the Court proceeded to rebury it in *Van Orden*. The four justice plurality voted to uphold the display of the six-foot-high monolith inscribed with the Ten Commandments, rejecting *Lemon*,⁶⁹ and using something that reads like a hybrid *Marsh v. Chambers*/endorsement test.⁷⁰ The fifth and deciding vote was supplied by Justice Breyer who, expressly disavowing reliance on *Lemon*,⁷¹ wrote that he relied “less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment’s Religion Clauses themselves.”⁷² Justice Breyer concluded that this was a “borderline case” and that, in such cases, there is “no test-related substitute for the exercise of legal judgment.”⁷³ He quickly added that this

⁶⁵ See, e.g., Kirsten K. Wendela, Note, *Context is in the Eye of the Beholder: Establishment Clause Violations and the More-Than-Reasonable Person*, 80 CHI.-KENT L. REV. 981, 991 (2005) (“Because of the extensive criticism the *Lemon* test has received in recent years, the Third Circuit held that the correct analysis in religious display cases comes from Justice O’Connor’s endorsement test. The court explained that this approach collapses the purpose and effects prongs of *Lemon* into a single inquiry.”) (footnote omitted) (citing *Freethought Soc’y of Greater Phila. v. Chester County*, 334 F.3d 247, 250 (3d Cir. 2003)).

⁶⁶ See *McCreary*, 125 S. Ct. at 2746 (O’Connor, J., concurring).

⁶⁷ 125 S. Ct. 2854 (2005).

⁶⁸ “The Safety (or Welfare) of the Court is the Highest Law.” A paraphrase of the Missouri state motto: “*Salus Populi Suprema Lex Esto*”: Let Welfare of the People be the Supreme Law. The Great Seal of Missouri, <http://www.sos.state.mo.us/symbols/symbols.asp?symbol=seal> (last visited Sept. 16, 2005).

⁶⁹ The Chief Justice wrote: “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.” *Van Orden*, 125 S. Ct. at 2861.

⁷⁰ *Id.* at 2859–64.

⁷¹ Justice Breyer wrote that the Texas display “*might* satisfy this Court’s more formal Establishment Clause tests,” citing both *Lemon* and Justice O’Connor’s explication of the endorsement test in *Pinette*. *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring) (emphasis added).

⁷² *Id.*

⁷³ *Id.* at 2869.

“legal judgment,” by which Establishment Clause cases are to be decided from now on, “is not a personal judgment.”⁷⁴

But if it is not “a personal judgment,” it is difficult to figure out exactly what else it could be. Justice Thomas, concurring in *Van Orden* and quoting Justice Breyer’s “legal judgment” test, called it “the personal preferences of judges.”⁷⁵ Justice Scalia, seeing a similar sort of untethered “legal judgment” behind the majority’s rationale in *McCreary* and other Establishment Clause cases, decried the practice of relying on so amorphous a standard:

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that — thumbs up or thumbs down — as their personal preferences dictate. Today’s opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle.⁷⁶

Justice Breyer’s “legal judgment” does take into account a number of factors. The circumstances surrounding the monument’s placement on the capitol grounds are one such factor.⁷⁷ That the monument was donated by a civic (rather than religious) organization that sought to highlight the organization’s efforts to fight juvenile delinquency, for Justice Breyer at least, suggests a secular motive.⁷⁸ The physical setting, a large park containing numerous other monuments and markers of a historical nature, suggests that the intended context is one of “history and moral ideals.”⁷⁹ But the “determinative” factor is none of these things. The “determinative” factor is that no one filed a formal legal objection to the monument’s presence for forty years until Mr. Van Orden filed his lawsuit.⁸⁰

Justice Breyer does not even attempt to respond to what must be conceded are formidable counter-arguments put forth by Justice Souter in dissent — formidable especially in light of the Court’s *McCreary* decision, a decision Justice Breyer joined.⁸¹ Justice Souter points out that the inarguably religious nature of the text of the Decalogue — the starting point of the *McCreary* analysis — is present also in

⁷⁴ *Id.*

⁷⁵ *Id.* at 2867 (Thomas, J., concurring).

⁷⁶ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2751 (2005).

⁷⁷ *Van Orden*, 125 S. Ct. at 2870.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *McCreary*, 125 S. Ct. at 2727.

Van Orden.⁸² If anything, the Eagles monument, with its graphic emphasis on the words “I AM the LORD thy GOD” and its inclusion of indisputably Christian and Jewish symbols,⁸³ is far more obviously “religious” than the unadorned McCreary County Decalogue situated amidst nine other similar looking texts.⁸⁴ As for the physical setting, Justice Souter is having nothing to do with the idea that Texas’s agglomeration of miscellaneous markers has some discernible unifying theme, at least a theme sufficient to neutralize the religious message of the Eagles’ monument:

[A]nyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass. One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. . . . [T]here is no common denominator.⁸⁵

For Justice Souter, the setting of the monument on the Capitol grounds sends the opposite message than the one Justice Breyer perceives:

There is something significant in the common term “statehouse” to refer to a state capitol building: it is the civic home of every one of the State’s citizens. . . . [A]ny citizen should be able to view that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion.⁸⁶

Finally, Justice Souter is unimpressed with the “nobody’s ever complained before” factor, the “determinative” factor for Justice Breyer. Souter points out that there may be many reasons — not least of which is “the risk of social ostracism” — which come into play, to the extent that the forty-year gap is relevant at all.⁸⁷

⁸² *Van Orden*, 125 S. Ct. at 2892 (Souter, J., dissenting).

⁸³ *Id.* at 2893.

⁸⁴ Justice Souter also points to evidence about the Eagles’ original purpose in donating these monuments. *Id.* at 2892 n.1. Frankly, this evidence of purpose sounds at least as religious as the evidence so decisive to the majority — including Justice Breyer — in *McCreary*.

⁸⁵ *Id.* at 2895.

⁸⁶ *Id.* at 2897.

⁸⁷ *Id.*

The remarkable thing about *Van Orden* is that, given his concurrence in *McCreary*, Justice Breyer did not similarly sign on to Justice Souter's opinion in *Van Orden*.⁸⁸ Had he done so, of course, the result would almost certainly have been the removal of not only the Texas monument, but hundreds, and perhaps thousands, of Ten Commandments monuments and similar symbols across the nation.⁸⁹ That the mere failure of anyone to file a "legal objection"⁹⁰ to the monument should be the "determinative" factor in what is the determinative opinion upholding this display (and now, presumably, hundreds of others) is less than satisfying as a matter of constitutional interpretation. In fact, it suggests that some other factor was truly determinative here.

Justice Scalia's dissent in *McCreary* provides a clue to Breyer's defection from the majority in that case to the monument-saving deciding vote in *Van Orden*. Scalia bluntly answers his own rhetorical question about how to explain the glaringly inconsistent decisions of the Court when it comes to upholding or striking down religious or quasi-religious practices and traditions engaged in by government officials:

I suggest it is the instinct for self-preservation, and the recognition that the Court, which "has no influence over either the sword or the purse," cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.⁹¹

In other words, just as the "switch in time saved nine"⁹² from FDR's Court-packing plan in the 1930s, it is plausible to view Justice Breyer's switching sides from *McCreary* to *Van Orden* as compelled by something other than the strict

⁸⁸ *Id.* at 2892.

⁸⁹ Justice Breyer recognized this, saying, "Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation." *Id.* at 2871 (Breyer, J., concurring).

⁹⁰ *Id.* at 2870. Although not defined in the opinion, Justice Breyer's use of the phrase "legal objection" implies that objections of an informal sort, however numerous or frequent, would not suffice to tip the scales of his "legal judgment." *Id.* at 2869. This hardly seems consistent with the desire he later expresses of avoiding divisive disputes about such displays. If anything, it may well encourage objectors to formalize their objections via litigation instead of attempting to resolve such disputes short of the formal legal process.

⁹¹ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting) (internal citations omitted).

⁹² JOSEPH ALSOP & TURNER CATLEDGE, 168 DAYS 135 (Doubleday 1938).

application of clear and consistent constitutional principles. After all, as Justice Breyer himself recognized in *Van Orden*, an opinion striking down the Texas monument would have had enormous repercussions.⁹³ Those repercussions, however, would not have been limited to the thousands of monuments and longstanding depictions that would have been placed in imminent danger of removal. The repercussions would also have been felt by a Court that increasingly finds itself enmeshed, willingly or not, in the most contentious and divisive social and political controversies of the day. Opinion polls regularly show overwhelming popular support for Ten Commandments displays (and similar practices) with little apparent distinction made by the public at large between *McCreary*-type and *Van Orden*-type displays.⁹⁴ A grand slam for the anti-display side, i.e., a pair of decisions effectively banning Ten Commandments displays on all public property, would have provoked, at a minimum, a firestorm of popular resentment directed at the Court and would have fueled the always-simmering debate about whether or how to rein in an out-of-control judicial branch. As noted earlier, however, the Court's split decision avoided this outcome with reactions on both sides of the debate able to be characterized more as bewilderment and confusion than triumph or outrage.⁹⁵

IV. APPLYING *MCCREARY* AND *VAN ORDEN*

What both sides had hoped for in these cases — clear direction from the Nation's highest court — is simply not to be found in the *McCreary* and *Van Orden* decisions. As Professor Laycock put it: "The split decision, the emphasis on government purpose in *McCreary* and Breyer's emphasis on the specific facts of *Van Orden*, mean that we will be litigating these cases one at a time for a very long time."⁹⁶ And those who will be litigating these cases⁹⁷ "one at a time for a very long time"⁹⁸ now face a quandary which is none too easily resolved — which test to apply to any particular case, and how to apply it?

Before these decisions were made, it was possible to construct a logical legal argument based on a reading of the Court's precedents coupled with an intelligent (not so intelligent as it turned out) prediction of where the Court was heading. This is what the courts of appeals did in *Chester County*, and in the Fifth Circuit's *Van*

⁹³ *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).

⁹⁴ See, e.g., Survey Shows Broad Public Support for the Ten Commandments Display, Pew Forum on Religion & Public Life, <http://pewforum.org/publications/surveys/tencommandments.pdf> (last visited Oct. 13, 2005).

⁹⁵ See Laycock, *supra* note 4.

⁹⁶ *Id.*

⁹⁷ The American Center for Law and Justice (ACLJ) currently has eight Ten Commandments display cases in active litigation. Two ACLJ cases were denied certiorari on the day after the *McCreary* and *Van Orden* decisions. *Adams County/Ohio Valley Sch. Bd. v. Baker*, 125 S. Ct. 2989 (2005); *DeWeese v. ACLU of Ohio Found.*, 125 S. Ct. 2290 (2005).

⁹⁸ See Laycock, *supra* note 4.

Orden decision, viz., acknowledge *Lemon* as the not yet overruled benchmark and then proceed to apply Justice O'Connor's endorsement test.⁹⁹ But all that would seem to be changed now. In both *Chester County* and *Van Orden*, for example, the courts could have reached the same results without bothering to satisfy either *Lemon* or the endorsement test; they simply could have noted the longstanding status of the monuments, along with the fact that no formal objection had been filed for decades, and then have been done with it.

If, however, *City of Elkhart*¹⁰⁰ were brought today instead of five years ago, which test would the court apply? That case involved an Eagles monument set amidst other historical monuments and about which no one had complained for forty years.¹⁰¹ The panel majority struck it down based on the Decalogue's inherent religiosity and the statements of religious purpose made at its dedication in 1958.¹⁰² Those statements, however, were not substantially different from the religious-sounding statements (noted by Justice Souter in *Van Orden*) that accompanied the Eagles' monument donations generally.¹⁰³ The *Van Orden* plurality-plus-Justice Breyer thought such statements were insignificant in light of other factors such as history, tradition, and lack of community objection.¹⁰⁴ Arguably, then, *City of Elkhart* would be decided under the Court's *Van Orden* "test" now, and Elkhart's monument would still be standing.

The *McCreary* and *Van Orden* decisions give no guidance about which test applies when. Nor do they shed any light on how to apply whichever test is chosen. For example, using *McCreary*'s revitalized *Lemon* test, when should religious-sounding statements be considered? Whose statements matter? One would think it should only be statements of government actors. After all, it is only the government that can violate the Establishment Clause. But the *McCreary* majority gave prominence to statements made by a government official's pastor. Such an approach is obviously fraught with danger and ripe for abuse. Who is within the zone of persons whose statements of purpose may be counted against the government? Must

⁹⁹ See *Van Orden v. Perry*, 351 F.3d 173, 177–78 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 250–51 (3d Cir. 2003).

¹⁰⁰ *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000).

¹⁰¹ *Id.* at 294.

¹⁰² *Id.* at 302–03.

¹⁰³ *Van Orden v. Perry*, 125 S. Ct. 2854, 2892 n.1 (2005) (Souter, J., dissenting).

¹⁰⁴ *Id.* at 2857 (plurality opinion) ("Th[e] 40 years [in which the monument went unchallenged] suggest more strongly than can any set of formulaic tests that few individuals, whatever their belief systems, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to establish religion."); *id.* at 2863 ("These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments."); *id.* ("[T]he Ten Commandments have an undeniable historical meaning."); see also *id.* at 2869–71 (Breyer, J., concurring in judgment).

government actors, politicians for the most part and acutely sensitive to popular sentiment, act affirmatively to muzzle or contradict legally problematic statements made by community members who support otherwise constitutionally defensible displays?

And what of the issue of “taint”? Can government actors, such as the *McCreary* officials, who start out with an unconstitutional display, ever correct their mistake? After *McCreary*, it is clear that past sins count enormously, perhaps predominantly, against the validity of subsequent attempts to display the Decalogue in any fashion. But is there no statute of limitations for statements of invalid religious purpose? Are places like *McCreary* and Pulaski Counties in Kentucky — as the Acting Solicitor General suggested facetiously at oral argument in *McCreary* — now the equivalent of Section 5-covered jurisdictions under the Voting Rights Act?¹⁰⁵ Nothing in either the *McCreary* or *Van Orden* decisions even attempts to resolve these and a host of other difficulties.

Of course, one way of avoiding the thorny problems created by *McCreary*’s revival of *Lemon*’s purpose prong and the *Lemon* test generally would be simply to conclude that a particular case is, factually, more like *Van Orden* than *McCreary*.¹⁰⁶ This would permit the lower courts to avoid the tough issues of purpose, motive, taint, and the other judicial nightmares for which *Lemon* has so long been castigated and which led so many to look forward to its official downfall. Not all cases, however, lend themselves easily to the *Van Orden* approach and it is likely that it will be these cases, involving more recent displays with a fresher “paper trail” littered with statements of purpose, that will be analyzed under *McCreary*’s decidedly non-deferential standards.

The reality is that the approach most courts will take in these cases will, with the Supreme Court’s apparent blessing, be dictated more by an individual judge’s “legal judgment” (or, as Justice Thomas puts it, “personal preferences”¹⁰⁷) than by any predictable application of clear legal principles. Until a consensus on the Court itself coalesces around either approach or, perhaps a different approach entirely, cases involving displays of the Decalogue or other religious symbols on government property will continue to be resolved on a case-by-case, ad hoc basis.

¹⁰⁵ Perhaps jurisdictions like *McCreary* County and Pulaski County, Kentucky — perhaps the whole state, given the number of Ten Commandments cases arising there — could be required to hold off on all courthouse renovations or redecorating pending review by the U.S. Attorney General or the U.S. District Court for the District of Columbia. Cf. 42 U.S.C. § 1973.

¹⁰⁶ Since the Court’s *McCreary* and *Van Orden* decisions, four courts have rendered decisions upholding the Commandments displays, relying largely on *Van Orden*. See *ACLU Neb. Found. v. Plattsmouth*, 419 F.3d 772 (8th Cir. 2005); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D.N.D. 2005); *Card v. City of Everett*, 386 F. Supp. 2d 1171 (W.D. Wash. 2005); *Russelburg v. Gibson County*, No. 3:03-CV-00149-RLY-WGH, 2005 WL 2175527 (S.D. Ind. Sept. 7, 2005).

¹⁰⁷ *Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring).

CONCLUSION

Is there a way out? The dissents of Justices Scalia and Thomas suggest at least two such ways. A third, less direct approach, suggested in the past by Justices Rehnquist, Scalia, and Thomas, but for reasons unknown not touched upon in *McCreary* or *Van Orden*, is also worth considering.

Justice Scalia, dissenting in *McCreary*, went to the root of the problem: *Everson's* “demonstrably false principle that the government cannot favor religion over irreligion.”¹⁰⁸ Justice Scalia distinguished between application of this principle to public aid or free exercise cases (where the principle is valid) and cases involving “public acknowledgement of the Creator” (where it is not). Clarification of *Everson's* generalization — the fountainhead of much Establishment Clause mischief — would go far toward lessening the confusion.

Justice Thomas would go even further. Reiterating, though not insisting upon, his radical (yet logically and historically irrefutable) observation that the Establishment Clause does not restrain the States, an observation first made in *Zelman*¹⁰⁹ and repeated in *Newdow*,¹¹⁰ Thomas would return to the “original meaning” of the word “establishment” as necessarily including an element of coercion.¹¹¹ Mere offense, disagreement, or even genuinely felt insult would simply not give rise to an Establishment Clause violation.¹¹² After cataloguing the familiar examples of the Court's inconsistencies caused by its futile attempts to improve upon the Framers' original understanding of “establishment,” Thomas concluded:

Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application.¹¹³

A third approach — tightening the requirements for Article III standing — is worth considering. It has the advantage of indirection, i.e., it would not require a radical overruling of the Court's Establishment Clause precedents, but it would weed out many, if not most, of the seemingly endless parade of challenges to what are, for the most part, traditional, non-controversial practices that enjoy the broad support of the American people.

¹⁰⁸ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting).

¹⁰⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹¹⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 125 S. Ct. 21 (2004).

¹¹¹ *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring).

¹¹² *Id.*

¹¹³ *Id.* at 2867–68.

For reasons unexplained, none of the justices discussed standing in the *McCreary* and *Van Orden* cases. Yet in *Valley Forge Christian College v. Americans United for Separation of Church and State*,¹¹⁴ an Establishment Clause case, the Court held that the “psychological consequence presumably produced by observation of conduct with which one disagrees” is not an “injury” sufficient to give standing under Article III.¹¹⁵ The Court has never overruled this statement of basic principle, even if the lower courts, in religious display cases, have avoided it like the plague. Three members of the Court, dissenting from a denial of certiorari, applied the *Valley Forge* principle to a city’s display of a Latin cross on its seal, signs, flags, stationery, and official documents.¹¹⁶ There is no meaningful distinction between the factual predicates for standing advanced by the *McCreary* and *Van Orden* plaintiffs (not to mention the plaintiffs in dozens of lower court display cases) and the plaintiffs in *Valley Forge* and *City of Edmond*.

The logic of the “no standing” approach is tied in closely to the coercion requirement and, thus, would permit the Court to move toward a coercion test in displays and symbols cases without abandoning the flexibility the majority thinks it needs in deciding other kinds of Establishment Clause cases. As articulated by Judge Easterbrook in *Elkhart County*, this approach also makes sense of and helps reconcile cases and situations where courts, and the Nation in general, find tolerable messages that other citizens may find deeply offensive without conferring on those so offended a legal entitlement to have such messages silenced:

What the display may do is give offense, either to persons outside the religious tradition that includes the Book of Exodus or to those who believe that religion and government should be hermetically separated. Yet Themis [Greek goddess and model for Lady Justice] may offend Christians (and all icons offend Muslims), the military’s ads offend religious pacifists, and the message in *Rust* supports one religious perspective on human life while deprecating others. Public policies and arguments pro and con about them often give offense, as do curricular choices in public schools. But the rebuke implied when a governmental body supports a point of view that any given person finds contemptible (or believes should be left to the private sector) is a great distance from “coercion.” So great a distance, indeed, that the insulted person lacks standing to sue.¹¹⁷

¹¹⁴ 454 U.S. 464 (1982).

¹¹⁵ *Id.* at 485.

¹¹⁶ *City of Edmund v. Robinson*, 517 U.S. 1201, 1202–03 (1996) (Rehnquist, C.J., dissenting from denial of certiorari).

¹¹⁷ *Books v. Elkhart County*, 401 F.3d 857, 870 (7th Cir. 2005) (Easterbrook, J., dissenting) (internal citations omitted).

One thing has been made clear by the *McCreary* and *Van Orden* decisions: just as before, not much is predictable in Establishment Clause jurisprudence. Of course, with the retirement of Justice O'Connor and the death of Chief Justice Rehnquist, the temptation to engage in "what-if" speculation is irresistible. The replacement of Rehnquist by John Roberts¹¹⁸ — by all indications a judge with a constitutional philosophy similar to that of his mentor, the late Chief Justice — coupled with the replacement of Justice O'Connor by the Third Circuit's Judge Samuel A. Alito¹¹⁹ — portends a realignment on these cases that will probably lead the Court at least in the direction of the *Van Orden* plurality and away from Justice Breyer's amorphous "legal judgment" approach. Whatever direction the Roberts Court might take, any of the alternative approaches suggested here would be an improvement over the post-*McCreary* and *Van Orden* morass in which we now find ourselves.

¹¹⁸ It would appear that John Roberts clerked for then-Justice Rehnquist during the same term, 1980–81, in which Justice Rehnquist wrote his forceful dissent in the Court's only prior Ten Commandments case, *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

¹¹⁹ Judge Alito's nomination as O'Connor's successor is particularly interesting. In *ACLU of New Jersey v. Schundler*, 108 F.3d 92 (3d Cir. 1999), Alito wrote for the majority in reversing the district court's injunction against a city's modified Christmas display that included a menorah, a crèche, a Christmas tree, and other holiday decorations. Alito expressly rejected the notion of "unconstitutional taint," the very notion that underlies the majority's holding in *McCreary*. It seems likely that a Justice Alito would have tipped the scales in favor of the Kentucky counties in *McCreary*.