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Upholding the Unbroken Tradition: Constitutional Acknowledgment of the Ten Commandments in the Public Square

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UPHOLDING THE UNBROKEN TRADITION: CONSTITUTIONAL ACKNOWLEDGMENT OF THE TEN COMMANDMENTS IN THE PUBLIC SQUARE

Greg Abbott*

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I. A CONSTITUTIONAL DISPLAY +

The recent Supreme Court opinions in the Ten Commandments cases reached the result many Court watchers anticipated — the Texas display survived, and the Kentucky display was declared unconstitutional. While the reasoning in the Kentucky case, *McCreary County v. American Civil Liberties Union of Kentucky*,¹ focused rather predictably on secular purpose (or the Court's view of the lack thereof), the Texas case, *Van Orden v. Perry*,² focused surprisingly on the long, unbroken tradition of public religious acknowledgments, particularly acknowledgments of the Ten Commandments. The decision in *Van Orden* represents a major victory for those favoring public acknowledgment of our multifaceted religious heritage; it is the strongest statement from the Court in favor of this position since *Marsh v. Chambers* in 1983.³

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+ The State's brief filed in *Van Orden* served as the basis for an article published before the Supreme Court had ruled. See Greg Abbott, *Acknowledgment Without Endorsement: Defending the Ten Commandments*, 9 TEX. REV. L. & POL. 229, 229–75 (2005). Portions of the present article, in turn, draw heavily both from that article and from the original brief in *Van Orden*.

¹ 125 S. Ct. 2722 (2005).

² 125 S. Ct. 2854 (2005).

³ 463 U.S. 783 (1983) (holding that Nebraska's practice of opening legislative sessions

Taken together, the two opinions do little to clarify an already murky area of the law. A public servant trying to discern the proper way to handle a Ten Commandments monument under his jurisdiction may find the precedent bewildering, and with good reason. *Van Orden* and *McCreary* affirm some guiding principles, but the two 5–4 decisions do not diminish the ad hoc nature of the results in any individual case. The opinions are replete with tensions, if not contradictions. For example, *Van Orden* deemed the so-called *Lemon* test⁴ inappropriate for analyzing “passive monument[s],”⁵ yet *McCreary* found *Lemon*’s secular purpose inquiry of paramount importance.⁶ *Van Orden* relied on a long tradition of recognizing the role of religion, including Christianity, in our history to find the Texas monument constitutional,⁷ but *McCreary* held that a specific intent to recognize that role in Kentucky was unconstitutional.⁸ *Van Orden* found the context of the display significant,⁹ but *McCreary* suggests that once a religious purpose is evident, the context or effect on the observer is immaterial.¹⁰

with a word of prayer did not violate the Constitution because this public religious practice dated back to the founding of the United States).

⁴ The Court articulated a tripartite test governing Establishment Clause cases in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”) (internal quotation marks and citation omitted). The controversial test has been sharply criticized, even by some of the Justices themselves, and the Court has not strictly applied the three prongs in every Establishment Clause case across the board. It remains, however, a significant force in Establishment Clause jurisprudence.

⁵ *Van Orden*, 125 S. Ct. at 2861.

⁶ *McCreary*, 125 S. Ct. at 2734–37.

⁷ *Van Orden*, 125 S. Ct. at 2861–63.

⁸ *McCreary*, 125 S. Ct. at 2728–33. In *McCreary*, the offending statement from the legislative bodies authorizing the two displays at issue noted that “the Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.” *Id.* at 2729 (internal quotations omitted). As Justice Scalia noted, “The ‘fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.’” *Id.* at 2749 (Scalia, J., dissenting) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963)). *Cf. Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring) (noting that certain “government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”).

⁹ *Van Orden*, 125 S. Ct. at 2864 (Breyer, J., concurring) (noting that there are “particular concerns that arise in the context of elementary and secondary schools” (internal citations omitted)).

¹⁰ *McCreary*, 125 S. Ct. at 2732–33 (noting specifically that if the government justifies an otherwise constitutional act with a stated religious purpose, the action becomes unconstitutional).

In any event, the Texas monument is worth examining in detail because it is now the only Ten Commandments display the Supreme Court has ever expressly found constitutional.¹¹ Despite the ambiguity in the two Supreme Court opinions this Term, some principles do emerge from *Van Orden* that could serve as guideposts for other states and municipalities that find themselves embroiled in litigation over similar displays.

The Texas Capitol Grounds create the context for the Texas Ten Commandments monument. The Capitol Grounds were established in 1888,¹² and the Texas Chapter of the Fraternal Order of Eagles donated the Ten Commandments monument “to the People and Youth of Texas”¹³ at their own expense in 1961.¹⁴ For the text of the Ten Commandments appearing on the monument, the Eagles carefully selected a version developed by representatives of the Jewish, Protestant, and Catholic faiths.¹⁵

When the Legislature accepted the Eagles monument, it officially “congratulated” the Eagles “for [their] efforts and contributions in combating juvenile delinquency throughout [the] nation.”¹⁶ The legislative history evidences no reference to religion or to a religious message, nor does it appear that any clergy members participated in its dedication.¹⁷

The state agency responsible for overseeing the grounds at that time recommended that the monument be erected on the northwest Capitol Grounds between the Capitol and the Supreme Court building.¹⁸ Currently, the Eagles’ donation is one of seventeen monuments and twenty-one historical markers adorning the Capitol

¹¹ Although Supreme Court justices have noted in passing their approval of the appearance of Moses and the Ten Commandments in the frieze of eighteen lawgivers in its own courtroom, that frieze has never come before the Court in the context of a lawsuit. *See, e.g., id.* at 2741; *Van Orden*, 125 S. Ct. at 2862 (plurality opinion); *id.* at 2894 (Souter, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 652–53 (1989) (Stevens, J., dissenting).

¹² STATE PRESERVATION BOARD, THE TEXAS CAPITOL GROUNDS, A SELF-GUIDED TOUR (1999) (on file with author) [hereinafter SELF-GUIDED TOUR].

¹³ State Preservation Board, Monuments Guide, The Ten Commandments [hereinafter Monuments Guide], <http://www.tspb.state.tx.us/spb/gallery/MonuList/10.htm> (last visited Mar. 17, 2005) (depicting the monument, which is inscribed with the dedication “Presented to the People and Youth of Texas”).

¹⁴ *See* 57(R) S.C.R. No. 16, 1961 Tex. Gen. Laws 1195–96.

¹⁵ *See* *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1017 (Colo. 1995) (en banc).

¹⁶ *Supra* note 14.

¹⁷ *See id.*

¹⁸ Letter from R. Aubrey Smelser, Chief, Building Engineering and Management Division, to Wm. J. Burke, Executive Director 1–2 (May 15, 1961) (on file with the Texas Office of Attorney General).

Grounds,¹⁹ together commemorating people, events, and ideals that have contributed to the history, diversity, and culture of Texas.²⁰

The *Van Orden* Court rightly upheld both the monument's constitutionality and the ability of a government to acknowledge religion without endorsing it. The opinions, however, did not mechanically apply the tests articulated in previous Establishment Clause cases.²¹ Instead, several of the Justices relied on broad principles to support their decisions.²² Most importantly, the plurality affirmed that recognizing the historical influence of religion can be done constitutionally.²³ Combining the plurality and concurrences in *Van Orden* and the secular purpose analysis in *McCreary*, certain criteria emerge that will likely govern the constitutionality of Ten Commandments displays going forward.

II. WHITHER ENDORSEMENT?

Conspicuously absent from the *Van Orden* plurality opinion was the application of three key Establishment Clause tests: the *Lemon* test, the endorsement test, and the coercion test.²⁴ Rather, the plurality emphasized the long-standing role of religion in our nation's history.²⁵ Chief Justice Rehnquist, writing for the plurality, noted that Supreme Court precedent both "look[ed] toward the strong role played by religion and religious traditions throughout our Nation's history" and "toward the principle that governmental intervention in religious matters can itself endanger religious freedom."²⁶

Recognizing that these distinct strands require that government neither manifest hostility toward religion nor "press religious observances upon their citizens,"²⁷ the plurality opinion declined to apply strictly any of the tests the Court has previously articulated to accomplish this goal. First, it noted that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."²⁸ Perhaps because of this passivity, the plurality opinion did not analyze the monument under the coercion test.²⁹

¹⁹ State Preservation Board, Maps & Floorplans, Capitol Grounds [hereinafter Capitol Grounds], <http://www.tspb.state.tx.us/spb/plan/floorplan/grounds.htm> (last visited Mar. 17, 2005).

²⁰ See 77(R) H.C.R. No. 38, 2001 Tex. Gen. Laws 6473.

²¹ See *supra* notes 5–10 and accompanying text.

²² *Van Orden v. Perry*, 125 S. Ct. 2854, 2860–61, 2864 (2005) (Scalia, J., concurring); *id.* at 2865 (Thomas, J., concurring); *id.* at 2869–70 (Breyer, J., concurring).

²³ *Id.* at 2856–57.

²⁴ *Id.* at 2854–72.

²⁵ *Id.* at 2859.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 286. See also *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁹ The coercion test was first articulated in *Lee v. Weisman*, 505 U.S. 577, 596–97 (1992).

Most significantly, the plurality opinion does not even mention the endorsement test. Justice Sandra Day O'Connor first articulated this test in her concurrence in *Lynch v. Donnelly*³⁰ as an improvement over the *Lemon* test in evaluating the constitutionality of religious displays on government property.³¹ A plurality of the Court adopted the test several years later in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*.³² The absence of any endorsement analysis in the plurality opinion in *Van Orden* is somewhat surprising, given that the lower courts have consistently applied it to religious displays in the wake of *Allegheny*, even concurrently with *Lemon*.³³

Anticipating an endorsement analysis, the State's argument before the Supreme Court focused heavily on the application of that test to the monument on the Capitol Grounds. Under that test, as it was applied in the past, the Ten Commandments monument should easily be constitutional.

*A. The Context of the Texas Monument*³⁴

Because the endorsement test entails an extensive inquiry into the context of a display with religious connotations, the State's brief described the precise location and surroundings of the monument in great detail.³⁵ It explained how the Capitol and its Grounds are set up much like a museum, and that museum setting features many symbols from various religious traditions important to Texans and the history of Texas.³⁶ Indeed, the Capitol and its Grounds are listed on the National Registry of Historic Places, designated as a National Historic Landmark,³⁷ meeting the federal

(finding a commencement prayer unconstitutional because of its coercive effect on non-adherents). Justice Thomas's concurrence advocated application of an "actual legal coercion" test for future challenges. *Van Orden*, 125 S. Ct. at 2865, 2868 (Thomas, J., concurring).

³⁰ 465 U.S. 668, 688 (1984) (finding constitutional a city's inclusion of a nativity scene in its annual holiday display).

³¹ *Id.* at 687–88, 690.

³² 492 U.S. 573, 592–94 (1989).

³³ Although the endorsement test began as a mere distillation of the first two prongs of *Lemon*, its application in religious display cases has become so nuanced as to warrant its distinction as a separate test. Indeed, lower courts tend to apply both and treat the analyses separately.

³⁴ The following section draws substantially from the State's brief in *Van Orden v. Perry*, as published in the *Texas Review of Law & Politics*. See Greg Abbott, *Acknowledgment Without Endorsement: Defending the Ten Commandments*, 9 TEX. REV. L. & POL. 229, 237–47 (2005).

³⁵ Respondents Brief at 1–8, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03-1500).

³⁶ *Id.* at 1–2.

³⁷ See Letter from Edwin C. Bearss, Chief Historian, National Park Service, to Frank Cooksey, Mayor, City of Austin (Aug. 8, 198[illegible]) (on file with the author) (informing Mayor Cooksey that the property had been designated a National Historic Landmark). See also 16 U.S.C. § 461 (West 2005) (noting that the National Historic Preservation Program

statutory definition of a “museum,”³⁸ and are maintained by a professional curator.³⁹ The State Preservation Board even makes available brochures that offer self-guided tours of the Capitol and its Grounds.⁴⁰

The guided tour of the Capitol Building portrays both the religious and secular history of Texas through various memorials, plaques, and seals.⁴¹ For example, a large Six Flags Over Texas display on the floor of the Capitol rotunda features the Mexican eagle and serpent⁴² — a religious symbol of Aztec prophecy⁴³ — as well as the Confederate seal inscribed with “Deo Vindice” (“With God as our protector”).⁴⁴ Likewise, visitors to the old Supreme Court Chambers on the third floor of the Capitol Building, will find “Sicut Patribus, Sit Deus Nobis” (“As God was to our fathers, may He also be to us”) inscribed above the justices’ bench.⁴⁵

Passing through the Capitol Grounds, too, brings a visitor in full view of other monuments and religious symbols in addition to the Ten Commandments.⁴⁶ When

exists to preserve “for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States”).

³⁸ 20 U.S.C. § 9172 (West 2005).

³⁹ See TEX. GOV’T CODE ANN. § 443.006(a) (Vernon 2005) (“The curator of the Capitol must have at least a master’s degree and four years’ experience in historic collections administration with a specialization in the material culture of this state.”).

⁴⁰ See SELF-GUIDED TOUR, *supra* note 12.

⁴¹ See State Preservation Board, Plan Your Visit to the Texas Capital, Tours, <http://www.tspb.state.tx.us/spb/plan/Tours.htm> (last visited Mar. 17, 2005); SELF-GUIDED TOUR, *supra* note 12.

⁴² Significant Spaces Gallery, Texas Capitol Rotunda Floor [hereinafter Significant Spaces], http://www.tspb.state.tx.us/spb/gallery/SigSpace/rot_sm.htm (last visited Mar. 17, 2005).

⁴³ In the center of the Mexican flag lies a brown eagle, eating a serpent while perched on a prickly-pear cactus, which grows from a rock surrounded by water. See Wikipedia, Flag of Mexico, at http://en.wikipedia.org/wiki/Flag_of_Mexico (last visited Oct. 20, 2005). The Aztecs believed that Huitzilopochtli, the Sun and War God, gave their leaders this sign to mark the site where they should found their theocratic capital Tenochtitlán (“The Place of the Fruit of the Cactus”). See INGA CLENDINNEN, AZTECS: AN INTERPRETATION 23–24, 298 (1991). Founded in 1325 C.E., on a marshy island in Lake Texcoco, the city is the present-day site of Mexico City. *Id.* at 15, 23, 308 & n.22. This religious display thus reflects a faith tradition existing in Texas long before the arrival of the Jewish and Christian faiths. Indeed, the contribution of this Aztec mythology to Texas history and culture is such that it is taught in the Texas public schools in the fourth and seventh grades. See, e.g., 19 TEX. ADMIN. CODE § 113.6(b)(20) (West 2005) (“Culture. The student [is expected to] understand[] the contributions of people of various racial, ethnic, and religious groups to Texas.”); *id.* § 113.6(b)(1) (“History. The student [is expected to] understand[] the similarities and differences of Native-American groups in Texas and the Western Hemisphere before European exploration.”).

⁴⁴ See Significant Spaces, *supra* note 42.

⁴⁵ Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003), *aff’d*, 125 S. Ct. 2854 (2005).

⁴⁶ See SELF-GUIDED TOUR, *supra* note 12.

standing on the sidewalk facing the Ten Commandments monument, the visitor can observe the Boy Scouts of America, Pearl Harbor, and World War I monuments — all abutting the same sidewalk — to the left.⁴⁷ And one need only turn in place for unobstructed views of the Bicentennial memorial plaque and Texas National Guard monument.⁴⁸

Immediately above and to the right of the viewer is the frieze of the Capitol building itself, with the Six Flags of Texas, including the Aztec religious symbol of an eagle on a cactus with a serpent in his beak, and the Confederate flag, inscribed with “Deo Vindice” (“With God as our protector”).⁴⁹ And atop the rotunda stands the Goddess of Liberty.⁵⁰

Before the Supreme Court, the State of Texas argued that the monument’s setting did not endorse religion. Using the endorsement test as enunciated by the Supreme Court in *Lynch* and *Allegheny*, the State argued that the reasonable observer, viewing the display in its full context,⁵¹ would perceive that the museum-like setting here would “not neutralize the religious content . . . [but] negate[] any message of endorsement of that content.”⁵² Although the Court ultimately did not apply the endorsement test, the context of the monument proved pivotal to the outcome.

Because the Ten Commandments are an ancient legal code with historically distinct religious, moral, and civic dimensions, the message perceived by their display may be more highly dependent on context than for other religious symbols — the Decalogue’s display may well deliver qualitatively different messages in a church, in a school, or in a courthouse.⁵³ The Ten Commandments monument at issue in *Van Orden* sits on the Capitol Grounds on a line between the Texas Capitol and Supreme Court.⁵⁴ “Considered in that setting, the monument does not express the [State’s] preference for particular religions or religious belief in general. It

⁴⁷ See Abbott, *supra* note 34 at 272–73.

⁴⁸ See Capitol Grounds, *supra* note 19; see also SELF-GUIDED TOUR, *supra* note 12.

⁴⁹ See Abbott, *supra* note 34, at 274.

⁵⁰ *Id.*; see also State Preservation Board, Historic Artifacts Gallery, Goddess of Liberty, <http://www.tspb.state.tx.us/spb/gallery/HisArt/19.htm> (last visited Jan. 28, 2005) (“Standing nearly 16 feet tall and weighing approximately 2,000 pounds, the statue probably represents Pallas Athena, the Greek goddess of wisdom, justice, and arts and crafts. Athena, later called ‘Minerva’ in Roman mythology, served as the protectress of the democratic city-state of Athens in ancient times.”).

⁵¹ See *Lynch v. Donnelly*, 465 U.S. 668, at 679–80 (1984).

⁵² *Id.* at 692 (O’Connor, J., concurring).

⁵³ *Cf.* *City of Elkhart v. Books*, 532 U.S. 1058, 1062–63 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (Ten Commandments monument displayed near municipal building); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (Ten Commandments posted in public school classroom).

⁵⁴ See Capitol Grounds, *supra* note 19; Abbott, *supra* note 34, at 275.

simply reflects the Ten Commandments' role in the development of our legal system."⁵⁵

A visitor to the Capitol Grounds would not understand the State to express any endorsement of the monument's message. An observer standing amidst the many monuments readily visible from the Eagles' monument would surely not believe the State had officially endorsed the command, "Thou shalt not make to thyself any graven images."⁵⁶

The monuments on the Capitol Grounds are commemorations of people, events, and ideals that have contributed to the history and diversity of Texas. They do not purport to be an exclusive catalogue of such influences and in no way disparage other perspectives. For example, the many monuments commemorating veterans do not communicate disapproval of pacifists; the Tribute to Children does not reflect negatively on older Texans; the Hiker and horse-riding Cowboy monuments send no message concerning motorized transport; and the Volunteer Firemen monument reflects no official disapproval of those who pursue firefighting as a paid profession. The monuments, memorials, and commemorative plaques on the Capitol Grounds simply do not create "insiders" and "outsiders" in the Texas political community.⁵⁷

Similarly, the Ten Commandments monument does not indicate any government endorsement of the Decalogue, but rather an acknowledgment and commemoration of the role of the Ten Commandments in our history and culture. A viewer would not mistake these commands for official statements of Texas policy, any more than she would deem the artistic portrayal of the Last Supper in the National Gallery of Art⁵⁸ as an official command to partake in Holy Communion. Instead, she understands the Ten Commandments as a religious text and an ancient legal code that has had an historically significant impact on our law and culture.⁵⁹

B. The Waning Influence of the Endorsement Test

Despite our fervent defense of the monument's context, the endorsement test effectively received only one vote on the Court. That vote was not Justice O'Connor's

⁵⁵ *Books*, 532 U.S. at 1062–63 (Rehnquist, C.J., dissenting from denial of certiorari).

⁵⁶ *Monuments Guide*, *supra* note 13.

⁵⁷ *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

⁵⁸ *The Last Supper*, <http://www.nga.gov/cgi-bin/pinfo?Object=12135+0+none> (last visited Oct. 25, 2005).

⁵⁹ Following the Ten Commandments' text are three additional symbols: two small stars and the superimposed Greek letters Chi and Rho. STATE PRESERVATION BOARD, ONLINE GALLERY: MONUMENT GUIDE, TEN COMMANDMENTS, <http://www.tspb.state.tx.us/spb/gallery/MonuList/10.htm> (last visited Mar. 17, 2005). The observer would understand these Jewish and Christian symbols to denote the Ten Commandments' historical connection with both of these faith traditions. And, by displaying side-by-side symbols from two separate faiths, the monument diminishes any perception that one particular faith is being favored.

— whose favor we had hoped to earn with this argument — but Justice Breyer’s.⁶⁰ Justice Breyer focused mainly on the importance of avoiding religious divisiveness and on the inability of any single test to decide all cases. Instead, he would leave the decision to what he termed “the exercise of legal judgment.”⁶¹ This “legal judgment,” he explained, “must take account of context and consequences measured in light of those purposes [assuring religious liberty and tolerance without divisiveness].”⁶² Thus, Justice Breyer’s “legal judgment” somewhat resembled the endorsement test in that he relied heavily on the context of the Ten Commandments monument, and that context was outcome-determinative.⁶³

In effect, all of the arguments we had been aiming at Justice O’Connor’s endorsement test missed their mark, but hit another target — Justice Breyer’s “legal judgment” test — to precisely the same effect. And that, of course, provided our necessary fifth vote to prevail.

Justice Breyer appeared particularly persuaded by the lack of any divisiveness created in this particular context. He concluded that the context and content of the display on the Capitol Grounds created a situation in which the non-religious message of the monument predominated.⁶⁴ In addition to the present context and content, he also found significant that the monument had stood for forty years without challenge — a fact that suggested to him that the monument’s display did not indicate government favoritism of any particular sect.⁶⁵ Although Justice Breyer wrote only a concurring opinion, his concurrence is entitled to considerable weight. As the fifth and deciding vote, Justice Breyer won the day in *Van Orden*, yet he disagreed with the plurality’s reasoning.⁶⁶ Therefore, because his reasoning was narrower than the plurality’s and necessary to the ultimate decision, his “legal judgment” rule may prove fulcrumatic in the future.⁶⁷

Justice O’Connor, on the other hand, dissented, referring the reader to Justice Souter’s dissent and to her concurrence in *McCreary*.⁶⁸ In that case, she barely mentioned her own endorsement test.⁶⁹ Rather, she wrote broad statements of

⁶⁰ *Van Orden v. Perry*, 125 S. Ct. 2854, 2869–72 (2005) (Breyer, J., concurring).

⁶¹ *Id.* at 2869.

⁶² *Id.*

⁶³ *Id.* at 2871.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2871–72.

⁶⁷ See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds . . .”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

⁶⁸ *Van Orden*, 125 S. Ct. at 2891 (O’Connor, J., dissenting); see also *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2746–47 (2005) (O’Connor, J., concurring).

⁶⁹ *McCreary*, 125 S. Ct. at 2747 (“The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”). Although Justice O’Connor’s *McCreary* opinion focused heavily on impermissible purpose,

principle to the effect that government may not encroach on the religious freedoms of citizens, “prefer one religion over another or promote religion over nonbelief,”⁷⁰ or “mak[e] adherence to religion relevant to a person’s standing in the political community.”⁷¹ She did not write her own analysis of the context in *Van Orden* — a context that usually figures heavily in endorsement analysis. The fact that Justice O’Connor did not write an explicit analysis using her own test as she did in both *Lynch* and *Allegheny* may signal the test’s demise perhaps even more strongly than the plurality’s and concurrence’s failure to rely on it.

Justice O’Connor also agreed with the reasoning of Justice Souter’s opinion.⁷² Justice Souter, who was joined by Justices Stevens and Ginsburg, argued that displaying the text of the Ten Commandments was inherently religious and that the Texas display had the effect of singling out the religious message, not integrating it into a historical context.⁷³ His emphasis on context reflects endorsement test principles, yet he did not specifically apply that test.⁷⁴ Justice Souter’s failure to apply the endorsement test further implies Justice O’Connor’s acquiescence in the death of endorsement as a specific inquiry.

Justice Stevens, also dissenting, did purport to apply endorsement analysis.⁷⁵ Noting that the Texas display endorses “the message that there is one, and only one, God,”⁷⁶ Justice Stevens opined that the reasonable observer would perceive the State as taking sides in a religious debate because the Decalogue prefers monotheism to polytheism, nontheism, or atheism.⁷⁷ Moreover, he argued, the text “impermissibly commands a preference for religion over irreligion.”⁷⁸

Thus, only the dissenters seemed to rely on endorsement at all, and even then, the term appears more as a way of explaining the broad concept of impermissible favoritism than as a carefully applied test. Those who have criticized the inconsistently applied endorsement and *Lemon* tests may take comfort in the fact that the Court may be signaling a shift away from these tests, at least in terms of analyzing the effect of a display as advancing or endorsing religion by examining a religious symbol’s surroundings in minute detail. Endorsement appears to have been reduced

her *Van Orden* opinion merely refers the reader to *McCreary*. Given that there was no evidence of an impermissible purpose in *Van Orden*, her lack of any additional analysis in the Texas case is somewhat perplexing.

⁷⁰ *Id.* at 2746.

⁷¹ *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring)).

⁷² *Van Orden*, 125 S. Ct. at 2891 (O’Connor, J., dissenting).

⁷³ *Id.* at 2892–97 (Souter, J., dissenting).

⁷⁴ *Id.*

⁷⁵ *Id.* at 2876–77 (Stevens, J., dissenting).

⁷⁶ *Id.* at 2877.

⁷⁷ *Id.* at 2880.

⁷⁸ *Id.* at 2881.

from a distinct constitutional test to a mere principle generally referring to a religious symbol's context.

Unfortunately, a majority of the Court did not agree on any bright-line rule to govern the constitutionality of Ten Commandments monuments. Instead, we are left with Justice Breyer's "legal judgment" standard,⁷⁹ one hardly likely to produce ex ante predictability for government decisionmakers charged with erecting or maintaining official monuments. But, we may hope, over time perhaps the plurality opinion will garner at least five votes and provide that much needed clarity in the law.

III. THE DECALOGUE IN HISTORICAL TRADITION

The most important principle laid out by the plurality opinion in *Van Orden* is that the Constitution does not require a public square barren of religious acknowledgments. Acknowledging the Ten Commandments' role in the development of our law has long been a prominent feature of American culture. The State of Texas argued this point in its brief, and it became a central feature of the plurality opinion.⁸⁰ The plurality's vigorous defense of the propriety of government nods to religious tradition provides a strong basis for maintaining longstanding monuments bearing religious symbols on public property in the future.

*A. The Secular Role of the Ten Commandments*⁸¹

Since 1961, aside from a brief period during which the Capitol Extension was under construction — and for more than one-third of the Capitol's existence — the Ten Commandments monument has stood on the Capitol Grounds twenty-four hours a day, seven days a week. And there are Eagles monuments just like the one in Texas in communities all across America, perhaps as many as hundreds or even thousands erected in the 1950s and 60s.⁸² Additionally, the Ten Commandments have been

⁷⁹ *Id.* at 2869 (Breyer, J., concurring).

⁸⁰ *Id.* at 2869–70.

⁸¹ The following section draws substantially from the State's brief in *Van Orden v. Perry*, as published in Abbott, *supra* note 34, at 251–59.

⁸² See *Books v. City of Elkhart*, 235 F.3d 292, 295 (7th Cir. 2000). The United States' amicus brief in *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (No. 03-1693), 2004 WL 2831788, contains an appendix with an informal survey indicating that Ten Commandments monuments can be found in at least twenty States. Of course, there are only fifty States, and the fact that fewer than fifty legislatures "scattered around the country" engaged in the opening prayers did not prevent the Supreme Court from finding such prayers "ubiquitous" in *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

officially displayed and depicted on plaques, medallions, sculptures, seals, frescoes, and friezes across our Nation since at least the 1870s.⁸³

The most famous of these displays, naturally, is the frieze on the south wall of the Supreme Court's own courtroom. It portrays eighteen lawgivers, including Moses "holding two overlapping tablets, written in Hebrew," on which "Commandments six through ten are partially visible."⁸⁴ The Ten Commandments appear again on the Supreme Court's East Pediment, in its Great Hall, twice on the doors to the courtroom, and repeatedly on the support frame of the courtroom's bronze gates.⁸⁵ Indeed, the image of the Ten Commandments appears no less than *forty-three times* in various locations of the Supreme Court of the United States.

Chief Justice Rehnquist, writing for the plurality, likewise identified several additional appearances of the Ten Commandments in the Capital, including "a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, [which] has overlooked the rotunda of the Library of Congress's Jefferson Building since 1897."⁸⁶ He also listed representations of the Ten Commandments in the Jefferson Building's Great Reading Room, on a statue inside the Department of Justice, on a sculpture outside the federal courthouse, on a statue in front of the Ronald Reagan International Trade building, and in the Chamber of the United States House of Representatives.⁸⁷

Our nation has a rich national tradition of depicting the Ten Commandments on government property. The history of official acknowledgment of the role of the Ten Commandments in American law and culture merely mirrors the "unbroken history of official acknowledgment by all three branches of government of the role of

⁸³ See, e.g., *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004) (Ten Commandments plaque in courthouse donated to county in 1918); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 249 (3d Cir. 2003) (Ten Commandments plaque in courthouse donated to county in 1920); *King v. Richmond County*, 331 F.3d 1271, 1273–74 (11th Cir. 2003) (Ten Commandments depicted in superior court seal since at least 1872).

⁸⁴ See Office of the Curator, Supreme Court of the United States, Courtroom Friezes: North and South Walls, [http://www.supremecourtus.gov/about/north&south walls.pdf](http://www.supremecourtus.gov/about/north&south%20walls.pdf) (last visited Oct. 25, 2005).

⁸⁵ See Office of the Curator, Supreme Court of the United States, Architectural Information Sheets, <http://www.supremecourtus.gov/about/archdetails.html> (last visited Oct. 25, 2005).

⁸⁶ *Van Orden v. Perry*, 125 S. Ct. 2854, 2862 (2005).

⁸⁷ *Id.* at 2862–63.

religion in American life.”⁸⁸ Presidents,⁸⁹ Congress,⁹⁰ and the courts⁹¹ have acknowledged the Ten Commandments’ secular impact.

The history of the Ten Commandments in the common law dates back to the Ninth Century, when Alfred the Great placed them at the beginning of his Book of Dooms.⁹² Seven hundred years later, the most prominent jurists of the Protestant Reformation produced systematic legal treatises “basing the various branches of the law on the Ten Commandments.”⁹³ When religious refugees colonized the New

⁸⁸ *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

⁸⁹ See, e.g., President Harry S. Truman, Public Messages (Feb. 15, 1950), in HARRY S. TRUMAN: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, JAN. 1 TO DEC. 31, 1950, at 157 (U.S. Gov. Print. Off. 1965) (“The fundamental basis of this nation’s law was given to Moses on the Mount.”); John Quincy Adams, 6 LETTERS OF JOHN QUINCY ADAMS TO HIS SON ON THE BIBLE AND ITS TEACHINGS 61, 70–71 (Auburn, James M. Alden 1850) (“The law given from Sinai was a civil and municipal code as well as a moral and religious code; it contained . . . laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws.”); John Adams, 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 9 (Charles Francis Adams ed., 1851) (“If ‘Thou shalt not covet,’ and ‘Thou shalt not steal,’ were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.”).

⁹⁰ See S. Con. Res. 13, 105th Cong. (1997); H.R. Con. Res. 31, 105th Cong. (1997) (“[T]he Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization . . .”).

⁹¹ See, e.g., *Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299, 301 (Cal. 1940); *Comm’rs v. Lacy*, 93 S.E. 482, 487 (N.C. 1917); *Bertera’s Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200–01 (Pa. 1967); *Hardin v. State*, 46 S.W. 803, 808 (Tex. Crim. App. 1898).

⁹² See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION* 65 (1983).

⁹³ Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 746 (2000). Berman writes:

As Roman Catholic jurists had systematized the canon law on the basis of the sacraments, so Lutheran jurists used Melanchthon’s topical method in basing the various branches of the law on the Ten Commandments. Thus Johann Oldendorp, whose principal treatise three centuries later was in the library of our Supreme Court Justice Joseph Story, founded criminal law on the commandment “Thou shalt not kill,” property law on the commandment “Thou shalt not steal,” family law on the commandment “Thou shalt not commit adultery,” the law of contract and delict on the commandments “Thou shalt not bear false witness” and “Thou shalt not covet.” . . . These were “topics” not only in the sense of categories or headings but also in the sense of general principles — theologically based moral principles in light of which subordinate species of legal rules were to be interpreted. This was a new method of legal synthesis which transcended the earlier divisions among co-existing legal systems within the same polity.

World in the seventeenth century, they deliberately enacted many, and sometimes all, of the Ten Commandments into their legal codes.⁹⁴ Three hundred years later, at the dawn of the twentieth century, “it continued to be widely believed, at least in the United States . . . [that] divine law, especially the Ten Commandments,” was one of “the ultimate sources of positive law.”⁹⁵ Thus, for over a millennium, the Ten Commandments have influenced Western legal codes. Courts have routinely recognized the importance of the Ten Commandments as a source for American legal rules.⁹⁶

At the time of our Nation’s founding, the Ten Commandments were widely understood to have three distinct uses or dimensions — religious, moral, and civic.⁹⁷ In fact, “[t]wo philosophers of Anglican connection, Thomas Hobbes and John Locke, used the Commandments almost exclusively for their civic and moral significance.”⁹⁸ In common perception today, one considers the “first table” as

Id. See also John Witte, Jr., *The Civic Seminary: Sources of Modern Public Education in the Lutheran Reformation of Germany*, 12 J.L. & RELIGION 173, 176 (1995–96) (“Lutheran theologians introduced the concept of the magistrate as the [‘father of the community’], called by God to enforce both tables of the Decalogue in the community.”); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1661–62 (1994) (“Protestants looked to the Bible, and especially the Ten Commandments, as the ultimate source of the content of natural law.”); John E. Witte, Jr., & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 451 (1993–94) (“[E]arly modern jurists” believed that “[t]he laws which [authorities] promulgate must encapsulate and elaborate the principles of God’s moral law, particularly as it is set out in the Ten Commandments.”).

⁹⁴ See generally Brief Amicus Curiae of Wallbuilders, Inc. in Support of the Petitioner, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (No. 03-1693).

⁹⁵ Berman, *The Western Legal Tradition*, *supra* note 93, at 751.

⁹⁶ See, e.g., *Freethought Soc’y v. Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (noting that the Ten Commandments “are regarded as a significant basis of American law and the American polity”); *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000) (“The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.”); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973) (noting that the Ten Commandments are “a foundation for law” and “historically important”); *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1024 (Colo. 1995) (“[T]he Ten Commandments has served over time as a basis for our national law.”); see also *City of Elkhart v. Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (noting that the Ten Commandments “have made a substantial contribution to our secular legal codes”); *Hollywood Motion Picture Equip. Co.*, 105 P.2d at 301; *Lacy*, 93 S.E. at 487; *Bertera’s Hopewell Foodland, Inc.*, 236 A.2d at 200–01; *Hardin*, 46 S.W. at 808; Brief of Amicus Curiae American Center for Law and Justice in Support of Petitioner App. A, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (No. 03-1693) (listing state supreme court decisions which refer to the Ten Commandments).

⁹⁷ See Witte & Arthur, *The Three Uses of the Law*, *supra* note 93, at 436.

⁹⁸ Paul Grimley Kuntz, *The Ten Commandments on School Room Walls?*, 9 U. FLA. J.L.

setting forth rules governing relations between God and His people and the “second table” as setting forth rules governing relations between the people and each other. At the time of the founding, however, the idea of the moral and civic dimension in the Decalogue was not confined to the so-called “second table.” In his seminal work, *The Leviathan*, Thomas Hobbes interpreted the “first table” as laying out an entirely secular “law of sovereignty.”⁹⁹ Thus, even secular philosophers found a secular significance in those commandments commonly viewed as defining man’s relationship to God.

The Ten Commandments had widespread influence in early America. It had a prominent role in the New England Primer, “the most widely read school book in America for 100 years.”¹⁰⁰ The 1777 edition of the Primer included the following exchange encouraging students to reflect on the comprehensive nature of the Ten Commandments as a moral code:

Q. 39. What is the duty which God requires of man?

A. The duty which God requires of man is obedience to his revealed will.

Q. 40. What did God at first reveal to man for the rule of his obedience?

A. The rule which God at first revealed to man for his obedience was the moral law.

Q. 41. Where is the moral law summarily comprehended?

A. The moral law is summarily comprehended in the ten commandments.¹⁰¹

The Primer then addressed each of the Ten Commandments in turn.¹⁰²

Because the Ten Commandments figured so prominently in children’s early education, Americans at the time of the founding were intimately familiar with the Ten Commandments, and they would have associated the Decalogue not only with divine law, but also with moral and natural law. When Jefferson’s compatriots read the Declaration’s invocation of “the Laws of Nature and of Nature’s God,”¹⁰³ they would likely have thought of the Ten Commandments.

& PUB. POL’Y 1, 11–12 (1997).

⁹⁹ See THOMAS HOBBS, *LEVIATHAN* 428–513 (Liberal Arts Press 1958) (1651); see also PAUL GRIMLEY KUNTZ, *THE TEN COMMANDMENTS IN HISTORY: MOSAIC PARADIGMS FOR A WELL-ORDERED SOCIETY* 136–38 (2004).

¹⁰⁰ R.F. BUTTS & L.A. CREMIN, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* 69 (1953) (noting that some 3,000,000 copies of the Primer were sold between 1700 and 1850).

¹⁰¹ The Shorter Catechism, in *THE NEW ENGLAND PRIMER* (1777), available at <http://www.sacred-texts.com/chr/nep/1777> (last visited Sept. 5, 2005).

¹⁰² *Id.*

¹⁰³ THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

Of course, the Framers' genius was in recognizing that because this "duty which we owe to our Creator . . . is precedent both in order of time and degree of obligation, to the claims of Civil Society," a prohibition on governmental establishment of religion was necessary.¹⁰⁴ And a robust protection against religious establishment — to protect the freedom of conscience of every man and woman — is entirely consistent with public acknowledgment of the role the Ten Commandments have played in Western culture and legal development.¹⁰⁵

B. The Supreme Court's Approval of Religious Acknowledgments

In balancing competing interests, the Supreme Court has consistently protected against religious establishment, while at the same time upholding the constitutionality of acknowledging the undeniable significance of religion in American society. For example, the Court has acknowledged that its own proceedings open with the cry, "God save the United States and this Honorable Court."¹⁰⁶ Elsewhere, the Court has noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of the Supreme Court, and regular presidential proclamations for a National Day of Prayer.¹⁰⁷ As Justice O'Connor explained in *Lynch*, "Because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."¹⁰⁸ Justice O'Connor reiterated this position last year in *Elk Grove Unified School District v. Newdow*:

Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment

¹⁰⁴ JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 1 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947).

¹⁰⁵ Abbott, *supra* note 34, at 258–59.

¹⁰⁶ *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

¹⁰⁷ *Lynch v. Donnelly*, 465 U.S. 668, 673–77 (1984). The extent to which expressly religious acknowledgments have been deemed acceptable by the Supreme Court is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*: "[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation . . . To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas." *Id.* at 675 n.3 (quoting Proclamation No. 2629, 3 C.F.R. 38 (1944)).

¹⁰⁸ *Id.* at 693 (O'Connor, J., concurring).

to religious freedom so as to sever our ties to the traditions developed to honor it.¹⁰⁹

That irony is not lost, as Justice O'Connor chose not to extend her reasoning in *Lynch* and *Newdow* to the Texas display, which has stood undisturbed on the Capitol Grounds for over forty years.

Indeed, as the Supreme Court has observed, "religion has been closely identified with our history and government,"¹¹⁰ the "history of man is inseparable from the history of religion,"¹¹¹ and "[w]e are a religious people whose institutions presuppose a Supreme Being."¹¹² Between the two extremes of government endorsement of religion and government hostility against religion, there is a middle ground where government may acknowledge the foundational role of religion in our laws and history. These practices are "simply a tolerable acknowledgment of beliefs widely held among the people of this country."¹¹³

The plurality opinion in *Van Orden* decided the case based on the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."¹¹⁴ The plurality notes, as we argued in the brief, that both historical practice and the Court's own decisions have acknowledged the place of religion in the public square.¹¹⁵

Thus, the tradition of religious acknowledgment, combined with the ubiquitous recognition of the influence of the Ten Commandments both as a legal and religious document, created the basis for upholding the monument. The analysis here is similar to that in *Marsh v. Chambers*, in which the Supreme Court upheld the Nebraska Legislature's "practice of opening sessions with prayers by a state-employed [Presbyterian] clergyman" who opened the Legislature's sessions with prayers offered "in the Judeo-Christian tradition."¹¹⁶ The Court there reasoned that, due to its long history in the American political landscape, such legislative prayer had "become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."¹¹⁷ Similarly, recognizing the Ten Commandments' role in

¹⁰⁹ *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2327 (2004) (O'Connor, J., concurring).

¹¹⁰ *Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963).

¹¹¹ *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

¹¹² *Zorach v. Claiborn*, 343 U.S. 306, 313 (1952).

¹¹³ *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

¹¹⁴ *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

¹¹⁵ *Id.* at 2861–63.

¹¹⁶ *Marsh*, 463 U.S. at 786, 793 (1983).

¹¹⁷ *Id.* at 792. The comparison with *Marsh* is particularly appropriate in *Van Orden*, where

the development of law and morality have become a part of our society that the government may constitutionally acknowledge.¹¹⁸

Marsh had heretofore been considered something of an outlier among the Establishment Clause cases in that it was previously the only controlling opinion that used the idea of an unbroken tradition of religious acknowledgments as the principal basis for finding a religious practice constitutional. *Van Orden* broadens that application considerably. *Van Orden* also extends the Supreme Court's unbroken tradition rationale to religious symbols, rather than only religious activities. With the caveat in both the plurality opinion and Justice Breyer's concurrence that impressionable school children might present a different case,¹¹⁹ *Van Orden* suggests that a plurality of the Court might apply the unbroken tradition reasoning to other religious displays and practices if properly supported by history.¹²⁰ This is a major victory not only for the State of Texas, but for all who believe that the Establishment Clause does not mandate a public square devoid of all reference to religion.

IV. LOOKING AHEAD

Combining *McCreary* and *Van Orden*, several principles emerge that may serve as guideposts for future cases. First, older displays will likely receive greater deference than new displays. Eagles monuments in particular — which have stood for decades and which have previously been subject to repeated legal challenge — should now easily survive scrutiny in almost all cases. *McCreary*, however, should not be read to foreclose all new Ten Commandments monuments. In *McCreary*, unlike in *Van Orden*, the record indicated that official statements had included

a visitor to the Texas Capitol, before wandering past the Ten Commandments monument outside, might well observe the House open its daily session with a prayer from its own chaplain. See Tex. H.R. Rule 6 § 1(3), 78th Leg. (2003), available at <http://www.house.state.tx.us/resources/hr78th.pdf> (last visited Sept. 9, 2005). Continuing past the monument, a visitor to the Texas Supreme Court would discover that it also commences its proceedings with a theophoric petition: "God save the State of Texas, and this Honorable Court." Respondent's Brief at 59 n.35, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03-1500). This is, of course, the State analogue of the invocation opening sessions of each of the federal courts, including the Supreme Court. See *Marsh*, 463 U.S. at 786. Again, no visitor could reasonably believe that the passive Ten Commandments monument sitting along a sidewalk between the State Capitol and Supreme Court represented a greater threat of religious establishment than the active supplications to God offered within the Capitol's stately chamber and the Supreme Court's imposing courtroom a stone's throw away. See Abbott, *supra* note 34, at 275.

¹¹⁸ See *Van Orden*, 125 S. Ct. at 2862–63 (noting both society's and the Court's recognition of the Ten Commandments' role in the nation's heritage).

¹¹⁹ *Id.* at 2864 (plurality); *id.* at 2870 (Breyer, J., concurring).

¹²⁰ The weight of Justice Breyer's analysis may change depending on the views of Justice O'Connor's and Chief Justice Rehnquist's successors.

numerous expressly religious comments about the display in such a manner as manifested, in the Court's judgment, an overarching impermissible religious purpose.¹²¹ *Van Orden*, in contrast, had no such evidence of impermissible purpose.¹²² Thus, new monuments lacking egregious indicia of impermissible purpose may fall more under *Van Orden* than *McCreary* and so may well survive constitutional challenge.

Second, purpose matters. Despite a frontal assault on the purpose inquiry by both the respondents in *McCreary*¹²³ and the United States as amicus curiae,¹²⁴ the Court firmly entrenched the principle that monuments erected with the express purpose to endorse religion — even if in all other respects unproblematic — will face exacting scrutiny in federal court.¹²⁵

Third, divisiveness, or a lack thereof, can be critical. Justice Breyer's opinion in particular focused heavily on the lack of controversy over the Texas monument.¹²⁶ Other monuments, erected in the heat of media glare and over the hue and cry of opponents, may well face a much more difficult road than monuments erected without dissension. Likewise, a demonstrated history of tolerance and pluralism could have considerable weight in defending a monument from charges that it excludes other perspectives.

Fourth, some contexts, such as elementary or secondary schools, may remain subject to more exacting standards. The plurality opinion expressly noted that acknowledging religion in a public school classroom is currently governed by stricter criteria,¹²⁷ so *Stone v. Graham*¹²⁸ could well control in that setting — even if only because of the high hurdle the secular purpose bar poses. Moreover, Justice Breyer believes that where young, impressionable children are involved, the government “must exercise particular care in separating church and state.”¹²⁹

Finally, and most importantly, all Justices agreed that at least some displays of the Ten Commandments are constitutionally permissible. Indeed, none of them has seriously questioned the constitutionality of the Ten Commandments representations

¹²¹ *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2728–29 (2005) (noting that the purpose evidence included, inter alia, a statement of purpose that included a quote referencing “‘Jesus Christ, the Prince of Ethics’” and a story with the moral that “‘there must be a divine God’”).

¹²² See *supra* note 69 and accompanying text.

¹²³ Respondent's Brief, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (No. 03-1500).

¹²⁴ Brief for the United States as Amici Curiae Supporting Petitioners at 14–27, *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) (No. 03-1693).

¹²⁵ See *McCreary*, 125 S. Ct. at 2732–39.

¹²⁶ *Van Orden v. Perry*, 125 S. Ct. 2854, 2870–71 (2005) (Breyer, J., concurring).

¹²⁷ *Id.* at 2863–64 (plurality opinion).

¹²⁸ 449 U.S. 39 (1980) (finding a display of the Ten Commandments in a public school classroom unconstitutional).

¹²⁹ *Van Orden*, 125 S. Ct. at 2871 (Breyer, J., concurring).

in the Supreme Court building itself.¹³⁰ For the dissenters, symbolic representations appear less problematic than displays of the full text,¹³¹ perhaps because they believe that a symbol is more likely to convey the secular dimension than the text. But even dissenters would allow the text to be displayed where it is sufficiently integrated into a larger display indicating a cohesive historical context, like the courtroom frieze.¹³²

When *Van Orden* and *McCreary* were decided, there were five votes on the Supreme Court to uphold displays like the Texas monument — the four members of the plurality, plus Justice Breyer. That calculus could change considerably with the confirmation of Chief Justice Rehnquist's and Justice O'Connor's successors. For over two decades, Justice O'Connor has been the critical vote on virtually every Establishment Clause case decided by the Court.¹³³ If her successor shares the views of the plurality, Justice Breyer's inherently unpredictable "legal judgment" test could become far less relevant, and there could emerge a solid majority for the plurality's standard recognizing considerable constitutional tolerance for passive acknowledgements of religion in the public square.

In the meantime, *Van Orden* and *McCreary* control. Between the two of them, *Van Orden* is likely to prove the far more important precedent. *McCreary* may well remain confined to the relatively uncommon situation where there is overwhelming evidence of express religious purpose. For all other displays, lower courts should look to *Van Orden*. Indeed, appellate courts are already doing so. Just recently, the Eighth Circuit en banc upheld a Fraternal Order of Eagles monument virtually identical to the one in Texas in *ACLU Nebraska Foundation v. City of Plattsmouth*.¹³⁴ Both the trial court and the three-judge panel had previously found the monument unconstitutional.¹³⁵ Significantly, the en banc majority's opinion closely tracked Chief Justice Rehnquist's plurality opinion in *Van Orden*.¹³⁶ It noted, as did the *Van Orden* plurality, the longstanding tradition of displaying the Ten Commandments on public property, the Supreme Court's acknowledgment of the role of religion in history, and the appropriateness of passively acknowledging religion.¹³⁷ Also similar to *Van Orden*, the *Plattsmouth* monument had stood for thirty-five years

¹³⁰ *Id.* at 2862 (plurality opinion); *id.* at 2893–94 (Souter, J., dissenting).

¹³¹ *Id.* at 2893–97 (Souter, J., dissenting).

¹³² *Id.* at 2893–94.

¹³³ See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny County v. ACLU*, 492 U.S. 573 (1989); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

¹³⁴ *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005).

¹³⁵ *Id.* at 774.

¹³⁶ *Id.* at 775–77; see also *id.* at 778 n.8 (“Taking our cue from Chief Justice Rehnquist’s opinion for the Court and Justice Breyer’s concurring opinion in *Van Orden*, we do not apply the *Lemon* test.”).

¹³⁷ *Id.* at 776–77.

without challenge.¹³⁸ On those facts, eleven of the thirteen Eighth Circuit judges agreed that the monument was constitutional.¹³⁹

It is striking that the *Plattsmouth* dissent commanded only two votes. Such a result would have been hard to imagine only a few months ago before the Court decided *Van Orden*. This two-judge dissent relied only on its interpretation of the variables in Justice Breyer's concurrence to attempt to distinguish it from *Van Orden*. Focusing on Justice Breyer's observation that the Texas monument did "not readily lend itself to meditation or any other religious activity,"¹⁴⁰ the dissent deemed the Plattsmouth monument far better suited for "meditation" and further concluded that the donated park equipment and honorary plaques did not create the same sort of historical context present in *Van Orden*.¹⁴¹

The State of Texas is proud of its role in litigating *Van Orden v. Perry*. For too long, some courts have read into the Establishment Clause a manifest hostility to religion. That view is not supported by either the text or the Framers' understanding of our Constitution. Indeed, the Supreme Court has long wrestled with this view and with the competing (and correct) view that the Constitution tolerates wide accommodation of religion in the public square. As Chief Justice Rehnquist observed in *Van Orden*:

Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage¹⁴²

¹³⁸ *Id.* at 774.

¹³⁹ Judge Kermit Bye filed a dissenting opinion, in which Judge Morris Shepard Arnold joined. *See id.* at 778 (Bye, J., dissenting).

¹⁴⁰ *Van Orden v. Perry*, 125 S. Ct. 2854, 2870 (2005) (Breyer, J., concurring).

¹⁴¹ *ACLU Neb. Found.*, 419 F.3d at 779 (contending that "the monument's stark religious message stands alone with nothing to suggest a broader historical or secular context.").

¹⁴² *Van Orden*, 125 S. Ct. at 2859.

Nothing in the First Amendment requires bringing out the bulldozers and chisels — as, sadly, would have been required in Texas had the result been otherwise — to erase decades of public acknowledgments of the role of religion in our history and culture. Thankfully, *Van Orden* was a significant step in the right direction toward ensuring that all Americans can exercise freedom of conscience in matters of faith while at the same time preventing courts from overt religious hostility by attempting to excise all references to the Almighty from the public square. May it please the Court to continue that journey.