April 9, 2008

THOU SHALL NOT OVERLOOK CONTEXT: A LOOK AT THE

Adam Silberlight
THOU SHALL NOT OVERLOOK CONTEXT: A LOOK AT THE 
TEN COMMANDMENTS UNDER THE ESTABLISHMENT CLAUSE

I. Introduction

Public display of the Ten Commandments has always been a hotly debated topic. Yet, prior to 2005, the Supreme Court had only one opportunity to address the issue. But on the last day of the 2004-2005 term, the Supreme Court had two chances to address the display of the Commandments in *McCreary County v. American Civil Liberties Union of Kentucky*\(^1\) and *Van Orden v Perry*.\(^2\) In these cases, what observers hoped for was the Court to finally answer many questions about display of the Commandments in a society that is supposed keep church separate from state. Instead, the only separation was of opinion. In two decisions, where the majority of one case mirrored the dissent of the other, the Court provided us with some answers regarding display of the Commandments, but left us with even more questions.

Nevertheless, lower courts have had more opportunities to address the issue. This article will summarize and analyze cases involving the Ten Commandments before and after *McCreary* and *Van Orden*, and also discuss the role of the Commandments in society.

II. The Ten Commandments

The Israelites wandered the desert towards Canaan after Moses lead them out of Egypt. Along the way, they stopped at Mount Sinai. Moses traveled up Mount Sinai to receive the law of God. Moses returned from Mount Sinai with two tablets containing the Ten Commandments. However, he shattered these tablets after he observed his followers worshipping a golden calf.

---

\(^1\) 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (SOUTER, J.).
Moses went back up Mount Sinai and returned with a second set of tablets bearing the law as promulgated by God.³

Through these Ten Commandments, God created a “written set of obligations and responsibilities the people must obey in order to demonstrate their devotion to God and separation from sin. It was through these laws that Israel could learn the character of God and the dangers of sin.”⁴ “Basically, these commandments stress obedience and loyalty to [God] and decent behavior toward members of the community.”⁵ The Commandments, in substance, are as follows:

(1) …You shall have no other gods beside Me;
(2) You shall not make for yourself a sculptured image, any likeness of what is in the heavens above, or on the earth below, or in the waters below the earth. You shall not bow down to them or serve them…;
(3) You shall not swear falsely by the name of the Lord your God…;
(4) Observe the Sabbath and keep it holy…;
(5) Honor your father and your mother…;
(6) You shall not murder;
(7) You shall not commit adultery;
(8) You shall not steal;
(9) You shall not bear false witness against your neighbor;
(10) You shall not covet you neighbor’s wife. You shall not crave your neighbor’s house, or his field, or his male or female slaves, or his ox, or his ass, or anything that is your neighbor’s.⁶

The Ten Commandments were to serve as the basis of Torah, law, and teaching.⁷ There are three versions of the Ten Commandments in the Old Testament.⑧ Jews, Christians,⁹ and believers of Islam all accept the Commandments as the law of God.

---
³ Compare Mel Brooks' History of the World: Part I, wherein Brooks, as Moses, comes down from Mount Sinai with three tablets, proclaiming how God has "given unto you these fifteen [and after he breaks one of the three tablets]; Ten-Ten Commandments-for all to obey.”
III. The Establishment Clause

The First Amendment mandates that “Congress shall make no law respecting an establishment of religion…” Together with the Free Exercise Clause, this gives rise to the separation of church and state. Although our nation has always consisted of “religious people whose institutions presuppose a Supreme Being,” our Founding Fathers realized the need for an Establishment Clause after recognizing that religious diversity and “[s]ectarian differences among various Christian denominations were central to the origins of our Republic.” The

---

8 See Exodus 20:2-17, Exodus 34:12-26, and Deuteronomy 5:6-21.
9 See, e.g., Smart, supra note 7, at 247.
10 U.S. CONST. amend I …(stating, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).
11 See id.
13 County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (BLACKMUN, J.). However, the following excerpt from School Dist. Of Abington Township v. Schempp, 374 U.S. 203, 212-13, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963) (CLARK, J.) should be noted:

   It is true that religion has been closely identified with our history and government… ‘The history of man is inseparable from the history of religion. And… since the beginning of that history many people have devoutly believed that ‘More things are wrought by prayer than this world dreams of. 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. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, ‘So help me God.’ Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership … while less than 3% profess no religion whatever…It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people … Id. (citations omitted).
Clause was intended to protect citizens from “sponsorship, financial support, and active involvement of the sovereign in religious activity.”

Over time, the Supreme Court has interpreted the “Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution’s affairs.” Government may not endorse religion, and must be prevented “from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” In other words “governmental neutrality between religion and religion, and between religion and nonreligion” is sought. However, an absolute separation of church

15 Allegheny, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472. Another summary of the Establishment Clause comes from Everson v. Board of Education of Ewing, 330 U.S. 1, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1947) (BLACKMUN, J.). The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.
Id.
16 See Allegheny, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472.
Whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’
Id. (citation omitted).
and state is impossible as “[s]ome relationship between government and religious organizations is inevitable.” 20

The Supreme Court has created a three-part test to determine whether government action violates the Establishment Clause. In Lemon v. Kurtzman, 21 the Court stated that “[f]irst, 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 entanglement with religion.’” 22 A court will defer to a stated legislative purpose, so long as it is not a sham. 23 And even though a legitimate secular purpose must exist, such purpose need not be “exclusively secular.” 24 As such, “[g]overnmental use of the Ten Commandments is not a per se violation of the purpose prong.” 25

It is the context of the religious message must be examined when analyzing a case under the Establishment Clause. 26 Justice O’Connor’s ‘reasonable observer test’ in County of Alleghany v. American Civil Liberties Union, Greater Pittsburgh Chapter, 27 has pretty much become the standard for Establishment Clause analysis. 28 In her opinion, she stated that

22 Id. at 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (citing Board of Education v. Allen, 392 U.S. 236, 243, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) (WHITE, J.) and Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (BERGER, C.J.). It should be noted that if there appears government action that discriminates amongst religions, a different test is used. Should a challenged governmental action discriminate amongst religions, such action is to reviewed under a strict scrutiny standard, as enunciated in Larson v. Valente, 456 U.S. 228, 72 L.Ed.2d 33, 102 S.Ct. 1673 (1982) (BRENNAN, J.). Under this standard, governmental action discriminating against religion “must be invalidated unless justified by a compelling government interest and unless closely fitted to further that interest.” Id. at 246-7, 72 L.Ed.2d 33, 102 S.Ct. 1673.
25 King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003) (KRAVITCH, J.).
27 Id.
28 Although others may point to other tests used in Establishment Clause jurisprudence, such as a ‘neutrality test,’ a ‘coercion test,’ or a modification of the Lemon test, it appears that Justice O’Connor’s reasonable observer
Under the endorsement test, the ‘history and ubiquity’ of a practice is relevant not because it creates an ‘artificial exception’ from that test. On the contrary, the ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion … The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.29

29

Using this endorsement test, a fact-specific case by case examination is undertaken to evaluate the context and setting of the message conveyed to the reasonable person. The reasonable observer is “deemed aware of the history and context of the community and forum in which the religious display appears.” In essence, this test combines the first two prongs of the Lemon test.

Although the Court has decided many cases involving the Establishment Clause, and even has its own display of the Ten Commandments within its courthouse, it was not until 1981 that the Court addressed public display of the Commandments. In Stone v. Graham, a Kentucky statute required the posting of the Ten Commandments on public classroom walls. The Court found that Kentucky’s “pre-eminent purpose for posting the Ten Commandments on schoolroom walls [was] plainly religious in nature.” The Court stated that,

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one’s parent, killing or murder, adultery, stealing, false witness, and covetousness…Rather the first part of the Commandments concerns the religious duties of believes: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day.

33 See Van Orden, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607.

Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east façade of the building holding the Ten Commandments tablets.

35 See id.
36 Id.
37 Id.
Since Stone, numerous federal courts have had the opportunity to address displays and uses of the Commandments in relation to the Establishment Clause. However, the Supreme Court did not revisit the issue until it decided two cases on June 27, 2005.

IV. McCreary County v. American Civil Liberties Union of Kentucky

In McCreary County v. American Civil Liberties Union of Kentucky, two Kentucky counties placed gold-framed copies of the Ten Commandments in courthouse hallways. These were hung in spaces that were “readily visible to … county citizens who use the courthouse to conduct their civic business, to obtain or renew driver’s licenses and permits, to register cars, to pay local taxes, and to register to vote.”

A month after the ACLU sued the counties in federal court, claiming a violation of the Establishment Clause, the legislature of each county authorized expanded displays of the Commandments. The legislatures of both counties indicating their reasons for displaying the Commandments,

reciting that the Ten Commandments are ‘the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded,’ and stating several grounds for taking that position: that ‘the Ten Commandments are codified in Kentucky's civil and criminal laws’; that the Kentucky House of Representatives had in 1993 ‘voted unanimously . . . to adjourn . . . in remembrance and honor of Jesus Christ, the Prince of Ethics’; that the ‘County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore’ in defense of his ‘display [of] the Ten Commandments in his courtroom’; and that the ‘Founding Fathers [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.

The new displays were accompanied by the following:

- an excerpt from the Declaration of Independence;
- the Preamble to the Constitution of Kentucky;
- the national motto, ‘In God We Trust’;

---

39 Id.
40 See id.
41 See id. (quoting ACLU v. Pulaski County, 96 F. Supp.2d 691 (E.D. Ky. 2000). It should be noted that the case initially involved a third Kentucky County [Harlan County]. The issue in the Harlan County matter concerned the posting of the Ten Commandments in the Harlan County School District.).
42 Id. (citing defendant’s exhibits).
-an excerpt from the Congressional Record of February 2, 1983, Vol. 129, No. 8, proclaiming 1983 as the Year of the Bible;
-a proclamation by President Abraham Lincoln designating April 30, 1863 as a National Day of Prayer and Humiliation;
-an excerpt from President Abraham Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of Bible;”
-a proclamation by President Ronald Reagan making 1983 the Year of the Bible; and
-the Mayflower Compact.\(^{43}\)

The district court issued an injunction commanding the counties to remove the displays, after finding that the displays lacked a secular purpose.\(^{44}\) After this injunction was issued, a third display was placed in each of the counties’ courthouses. The third display, entitled, “The Foundations of American Law and Government Display,” contained:

- the Ten Commandments (with greater verbage than before);
- the Magna Carta;
- the Declaration of Independence;
- the Bill of Rights;
- the Star Spangled Banner;
- the Mayflower Compact;
- the National Motto;
- the Preamble of the Kentucky Constitution;
- a picture of Lady Justice.

Accompanying each of these documents was a statement about its historical and legal significance. In this statement, the following was written:

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that ‘We hold these truths to be self-evidence, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’ The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.\(^{45}\)

The counties argued that their secular purpose was to display documents that have had a significant role in the foundation of law and government. However, a district court supplemented the prior injunction, finding that the counties’ non-secular and “‘clear’ purpose

---

\(^{43}\) See McCreary, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729.
\(^{44}\) 96 F. Supp. 2d at 686-7.
[was] to post the Commandments, not to educate."\textsuperscript{46} Thus, the counties’ actions violated the Establishment Clause.\textsuperscript{47} The Sixth Circuit affirmed this decision.\textsuperscript{48} The Sixth Circuit found that the counties were motivated by religion, and “manifest[ed] a religious purpose [as] they utterly fail[ed] to integrate the Ten Commandments with a secular subject matter.”\textsuperscript{49} But note the dissent, which found a secular purpose for the displays. The dissent recognized “the historical relationship between the Ten Commandments and our law and government,” and noted how the “Commandments have profoundly influenced the formation of Western legal thought and the formation of our country.”\textsuperscript{50} The case then went up to the Supreme Court.

Following \textit{Stone}, the Supreme Court examined the counties’ purposes and ultimately found that the district court injunction was proper as the displays were motivated by a “predominantly religious purpose.”\textsuperscript{51} The Court believed that the original display, like that in \textit{Stone}, displayed the Commandments in a non-secular manner, which was “distinct from any traditionally symbolic representation.”\textsuperscript{52} The Court noted how the Commandments proclaim the existence of a monotheistic God, serve as “a central point of reference in the religious and moral history of Jews and Christians,” and regulate “details of religious obligation.”\textsuperscript{53} The Commandments “original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.”\textsuperscript{54} “[T]he insistence of the religious message is hard to avoid in the absence of a context plausibly

\textsuperscript{46} 145 F. Supp. 2d 845, 849-50 (E.D. Ky. 2000).
\textsuperscript{47} See id. at 852-3.
\textsuperscript{48} See \textit{McCreary}, 354 F.3d 438.
\textsuperscript{49} Id.
\textsuperscript{50} 354 F.3d 438 (RYAN, J., dissenting).
\textsuperscript{51} See \textit{McCreary}, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
suggesting a message going beyond an excuse to promote the religious point of view.”55 The Court noted how the displays lacked a disclaimer indicating its purpose in demonstrating the Commandment’s effect on civil law.56 In considering the context the displays, the Court stated that “[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.”57

The Court’s view of the religious message was not changed by an examination of the other two displays. In the Court’s view, the religious message impressed upon the reasonable observer was not minimized by the placement of surrounding non-secular documents. The Court agreed with both the District Court and the Sixth Circuit that the displays furthered an unconstitutional religious purpose.

In his dissent, Justice Scalia conceded the religious nature of the Commandments, but noted the presence of religion in our daily lives, pointing to references to God in presidential addresses, the Presidential Oath, opening sessions of legislatures and courts, statutes, United States Currency, and the Pledge of Allegiance.58 He realized how this religious presence throughout national historical practices was consistent with the Establishment Clause and recognized how references to religion “thus demonstrate that there is a distance between the acknowledgement of a single Creator and the establishment of a religion.”59 Scalia noted how members of the three largest religions in the United States (Judaism, Christianity and Islam, comprising almost ninety-eight percent of the nation’s population) view the Commandments as

55 Id.
56 See McCreary, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729.
57 See id.
58 See id.
59 Id.
“divine prescriptions for a virtuous life.”\textsuperscript{60} He then stated that publicly honoring the Commandments is consistent with publicly honoring God, as both practices are not “reasonably understood as a government endorsement of a particular religious viewpoint.”\textsuperscript{61} Scalia also recognized a national acknowledgment of the contribution religion has had on our legal system, how displays of the Commandments are part of this acknowledgment, and how “[t]he frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.”\textsuperscript{62}

Citing Alleghany County, Scalia noted how inclusion of the Commandments in the third display “did not transform [an] apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs.” He further noted that when the Commandments appear “alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system.”\textsuperscript{63} He then pointed out how a non-secular purpose behind the displays could be found if the displays were viewed and compared to other governmental religious references permissible under the Establishment Clause.

\textit{V. Van Orden v. Perry}\textsuperscript{64}

In \textit{Van Orden v. Perry},\textsuperscript{65} a six foot three inch granite monument containing the text of the Ten Commandments was displayed in an area between the Texas State Capitol building and the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{McCreary}, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (REHNQUIST, C. J.)
\end{itemize}
\end{footnotesize}
Texas Supreme Court building. Above the text was an eagle grasping the American flag, an eye inside of a pyramid, and two small tablets containing an ancient Hebrew script. Below the text were two Stars of David, and Greek lettering representing Jesus Christ. This monument was presented to the state of Texas by the Fraternal Order of Eagles of Texas in 1961.\(^66\)

Also on the grounds near this monument were thirty-seven other monuments and historical markers “commemorating the ‘people, ideals, and events that compose Texan identity.’”\(^67\) This collection included monuments dedicated to Heroes of the Alamo, the Spanish-American War, the Texas National Guard, Pearl Harbor veterans, Korean War veterans, Soldiers of World War I, disabled veterans, Texas police officers and volunteer firemen.\(^68\)

To provide some background, the Fraternal Order of Eagles is a benevolent organization whose goals include promoting liberty, truth, justice, and to combat juvenile delinquency.\(^69\) Membership in this organization is based on the belief of a Supreme Being. The Eagle’s program of donating granite displays of the Ten Commandments began with a Minnesota juvenile court judge who had before him a juvenile offender not aware of the Commandments.\(^70\)

---

\(^{65}\) Id.

\(^{66}\) See id.

\(^{67}\) McCreary, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729.

\(^{68}\) See id., at note 1.


\(^{70}\) See, e.g., Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) (RIPPLE, J.).

In the 1940s, a juvenile court judge in Minnesota, E. J. Ruegemer, inaugurated the Youth Guidance Program. Disheartened by the growing number of youths in trouble, he sought to provide them with a common code of conduct. He believed that the Ten Commandments might provide the necessary guidance. Judge Ruegemer originally planned to post paper copies of the Ten Commandments in juvenile courts, first in Minnesota and then across the country. To help fund his idea, he contacted the Fraternal Order of Eagles (“FOE”), a service organization dedicated to promoting liberty, truth, and justice. At first, FOE rejected Judge Ruegemer's idea because it feared that the program might seem coercive or sectarian. In response to these concerns, representatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one religious group. After reviewing this version, FOE agreed to support Judge Ruegemer's program.

Around this same time, motion picture producer Cecil B. DeMille contacted Judge Ruegemer about the
This judge believed that the message conveyed by the Commandments could provide guidance to
the youth of America. Many donors supported this judge’s crusade to deter juvenile delinquency
and inspire the youth of America to lead more productive lives by conveying the message of the
Commandments. Since their inception, the Eagles have donated numerous monuments
containing the Ten Commandments across the nation.

Forty years after the monument was erected and six years after he first saw it on a regular
basis, attorney Thomas Van Orden brought action against numerous Texas officials claiming a
violation of the Establishment Clause. After a bench trial in district court, Van Orden’s claim
was dismissed. The district court found that Texas had a valid secular purpose in having the
monument displayed, and also that the reasonable observer would not conclude that display of
this monument conveyed the message of religious endorsement. The Fifth Circuit affirmed this
decision.

The Supreme Court distinguished Stone’s classroom setting and noted the undisputed
religious nature and religious significance of the Ten Commandments, but stated that [s]imply
having religious content or promoting a message consistent with a religious doctrine does not run
afoul the Establishment Clause.” The Court noted the historical significance of the
Commandments, and commented how “Moses was a lawgiver as well as a religious leader.”

program. DeMille, who was working to produce the movie “The Ten Commandments,” suggested that, rather
than posting mere paper copies of the Ten Commandments, the program distribute bronze plaques. Judge
Ruegemer replied that granite might be a more suitable material because the original Ten Commandments
were written on granite. DeMille agreed with Judge Ruegemer’s suggestion, and the judge thereafter worked
with two Minnesota granite companies to produce granite monuments inscribed with the Ten
Commandments. Local chapters of FOE financed these granite monuments and then, throughout the 1950s,
donated them to their local communities.

---

71 See id.
72 351 F.3d 173 (5th Cir. 2003).
73 See Van Orden, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607.
74 Id.
The Court viewed the display as “passive,” and part of a larger display that had both religious and historical significance, and ultimately not a violation of the Establishment Clause.\(^{75}\)

In a concurring opinion, Justice Breyer noted how the display served “a mixed but primarily nonreligious purpose, not primarily ‘advancing’ or ‘inhibiting religion,’ and not creating an ‘excessive government entanglement with religion.’\(^{76}\) In a dissent, Justice Stevens believed that Texas’s public display of the Commandments violated the principle of religious neutrality derived from the Establishment Clause as it served as “an official state endorsement of the message that there is one, and only one, God.”\(^{77}\) Stevens further believed that a state could not use a religious medium to convey a message.

VI. Before McCreary and Van Orden

In *Freethought Society of Greater Philadelphia v. Chester County*,\(^{78}\) the Third Circuit addressed a county’s refusal to remove a plaque of the Ten Commandments from a courthouse façade that had been there for over eighty years. The county’s justification for the plaque was that “it symbolized the ‘two wing’ theory of our polity, in which ‘faith and reason … as a historical reality worked together to create and maintain the American experiment,’” and how the Commandments told a “story of people in the wilderness and coming out of the wilderness to find order, to find civilization through the law.”\(^{79}\) Applying the endorsement test, the Court held that the Establishment Clause was not violated, as the reasonable observer would view the plaque as a historic part of an important building, and would also find the county’s refusal to remove it

---

\(^{75}\) *See id.*

\(^{76}\) *Id.* (BREYER, J., concurring).

\(^{77}\) *Id.* (STEVENS, J., dissenting).

\(^{78}\) 334 F.3d 247 (3d Cir. 2003) (BECKER, J.).

\(^{79}\) *Id.* (citing testimony from two of three Chester County Commissioners).
as an effort to “preserve a longstanding plaque.” The Court did rely heavily on the age of the plaque, noting how a more recent effort to erect the same type of plaque could appear “to be perceived as an endorsement of religion.” Relying on *Freethought*, in *Modrovich v. Allegheny County*, the Third Circuit upheld display of another plaque of the Commandments placed in an Allegheny County courthouse façade, as it too had historical significance.

In *Adlund v. Russ*, the Sixth Circuit was confronted with the same type of monument present in *Van Orden*. This monument was donated by a Kentucky Fraternal Order of Eagles chapter. Relying on *Stone*, the Sixth Circuit found a religious purpose in the monuments' display, drawing attention to the “overtly religious nature of [] preamble clauses” in the resolution promulgating its display. The Court also noted that it was the largest monument of the display. The Court found that the reasonable observer would view the Eagle’s donation of the monument motivated by religious purpose and that the size of the monument itself would demonstrate that conveyance of a religious message was intended. The Court felt that “the Commandments’ religious directives were emphasized, due to the content and size of the monument, and by surrounding text that amplified a “religious message.” As the Court believed that the reasonable observer would feel that government was endorsing religion, it

---

80 See id.
81 Id.
82 385 F.3d 397 (3d Cir. 2004) (FUENTES, J.).
83 See id.
84 307 F.3d 471 (6th Cir. 2002) (MARTIN, J.).
85 See id.
86 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199.
87 *Adlund*, 307 F.3d 471.
88 Id.
89 See id.
90 See id.
found that the monument violated the Establishment Clause.\footnote{See \textit{Adlund}, 307 F.3d 471.} The Seventh Circuit found that similar monuments, also donated by a Fraternal Order of Eagles chapter, furthered religious purpose and had the primary effect of advancing religion in \textit{Books v. City of Elkhart}\footnote{235 F.3d 292 (7th Cir. 2000) (RIPPLE, J.).} and in \textit{Indiana Civil Liberties Union v. O'Bannon}\footnote{259 F.3d 766 (7th Cir. 2001) (BAUER, J.).}.

The Sixth Circuit also found a religious purpose in \textit{American Civil Liberties Union of Ohio Foundation v. Ashbrook}\footnote{375 F.3d 484 (2004) (HOOD, J.).}, where a local judge hung a poster of the Ten Commandments within his own courtroom.\footnote{See id.} This poster was part of a courtroom display that included the Bill of Rights, the Ohio State seal and motto, and other posters containing portraits and quotations from Thomas Jefferson, James Madison, Alexander Hamilton and Abraham Lincoln.\footnote{See id.} Like in \textit{Adlund}, the Sixth Circuit found that the judge furthered a religious purpose when posting the Commandments.\footnote{See id.} The Court also found that the reasonable observer would “think religion, not history” when viewing the posters, and feel “the effect of an endorsement of a particular religious code” from the placement of the Commandments near the Bill of Rights.\footnote{See id.}

Like in \textit{Van Orden} and \textit{Adlund}, \textit{Books} and \textit{O'Bannon}, a monument of the Ten Commandments donated by the Plattsmouth, Nebraska, Fraternal Order of Eagles was at issue...
the first time the Eighth Circuit decided *ACLU Nebraska Foundation v. City of Plattsmouth*. In *Plattsmouth*, a Ten Commandments monument was placed in a public park several blocks from city hall. The Eighth Circuit scrutinized Plattsmouth’s purpose in accepting the monument from the Eagles, finding that erecting the monument was an adoption of the Eagles’ “nationwide campaign to spread its version of the Ten Commandments.” Ultimately, the Court found that Plattsmouth had a “solely religious” motivation and purpose in displaying the monument. Applying the endorsement test to the second *Lemon* prong, the Court also found that the reasonable observer would view the monument, “as an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion.”

In another Commandment-related case, but not involving public display of a monument, the Eleventh Circuit upheld use of a clerk’s office seal depicting “a hilt and tip of a sword,” “overlaid by two rectangular tablets with rounded tops [with the] Roman numerals I through V” on the left tablet and Roman numerals VI-X on the right tablet in *King v. Richmond County*. This seal was used to authenticate documents and was so old that the reason it depicted the Commandments was unknown. In this case, there was no issue that the reasonable observer would deem the contents of the seal to be the Ten Commandments. Yet, continued use of the seal was justified based upon its recognition for the authentication of legal documents. The Court found this to be a valid secular purpose, as use of the seal did not endorse religion in that it

---

99 358 F.3d 1020 (8th Cir. 2004) (Bye, J.), rev’d, 419 F.33d 772 (8th Cir. 2005) (Bowman, J.).
100 See id.
101 Id.
102 See id.
103 Id.
104 331 F.3d 1271 (11th Cir. 2003) (KRAVITCH, J.).
105 See id.
106 See id.
107 See id.
had been used solely for the purpose of authenticating legal documents for one hundred thirty years, was relatively small in size, and did not contain the text of the Ten Commandments.\textsuperscript{108}

In a case that gained national attention, and helped re-ignite the debate over the Ten Commandments, the Chief Justice of the Alabama Supreme Court (dubbed the ‘Ten Commandments’ Judge’) placed a 5280 pound monument depicting the Commandments in the rotunda of the Alabama State Judicial Building in \textit{Glassroth v. Moore}.\textsuperscript{109} The judge placed the monument there as part of an exhibit to further a ‘moral foundation of law’ theme, and to “acknowledge the law and sovereignty of the God of the Holy Scriptures.”\textsuperscript{110} The Court had no problem finding a religious purpose behind the judge’s actions and how the reasonable observer would view the monument as an endorsement of religion.\textsuperscript{111}

\textit{VI. After McCreary and Van Orden}

Both \textit{McCreary} and \textit{Van Orden} reflect the basic constitutional premise of balancing competing interests. On one hand, the Court remained mindful of the need to maintain governmental separation from religious influence. But on the other hand, the Court did not “rule out the official embrace of popular religious symbols.”\textsuperscript{112} What may have been either lost in translation (by the varying opinions), but subsequently made abundantly clear through caselaw, were the starkly different facts of each case. The differences in opinion amongst the justices and the separate conclusions demonstrate that one constant remains in Ten Commandment litigation: that context, background and setting will dictate the outcome. Nevertheless, in the very least, the two decisions “teach that [] a public body may post the Ten Commandments ... if the display’s

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{108} See \textit{King}, 331 F.3d 1271.
\item \textsuperscript{109} 335 F.3d 1282 (11th Cir. 2003) (CARNES, J.).
\item \textsuperscript{110} See \textit{id.}
\item \textsuperscript{111} See \textit{id.}
\item \textsuperscript{112} Charles Lane, \textit{Court Split Over Commandments}, Washington Post, June 28, 2005, at A01.
\end{itemize}
\end{footnotesize}
purpose is secular and the display does not have the primary purpose of advancing or endorsing religion."113 So what else has McCreary and Van Orden left lower courts with?

In Card v. City of Everett,114 at issue was a Ten Commandment display donated by the Fraternal Order of Eagles situated on public land next to what used to be City Hall, but is now a police station.115 National symbols, such as the all-seeing eye, an eagle and a United States flag, as well as religious symbols, such as stars of David, were in this display.116 It had been on display for almost fifty years, and during this time, had been moved once in order to make room for a war memorial.117 Other monuments had been placed near the Commandments.118 The Court noted that details about the history of the monument and the movement of the monument were unclear, and how the Commandments were “shrouded by shrubberies and obscured from view unless one is standing close by.”119 In addressing the intent behind the display, the Court found that “nothing apart from the monument's text suggests a religious motive.”120 Stressing the similarities to Van Orden, but noting that the monuments were actually “more modest in scope than that in Van Orden,” the Court stated that the “monument bears a prominent inscription showing that it was donated to the City by a private organization. As in Van Orden, this serves to send a message to viewers that, while the monument sits on public land, it did not sprout from the minds of City officials and was not funded from City coffers.”121 In another comparison to

115 See id.
116 See id.
117 See id.
118 See id.
120 Id.
121 Id.
Van Orden, the Court noted how only seven complaints were made throughout the monument’s fifty years, and none of these had been raised within the first thirty years of the display.\footnote{122}

\textit{ACLU of Ohio Foundation, Inc. v. Board of Commissioners of Lucas County},\footnote{123} involved a Commandments monument situated on a courthouse square. It had been donated by Fraternal Order of the Eagles almost fifty years before any litigation commenced.\footnote{124} Surrounding the text of the Commandments were Greek inscribed tablets, a bald eagle and United States flag, the ‘all seeing eye,’ two stars of David, and the Chi Rho symbol.\footnote{125} Fourteen other monuments were also present at this location, including one for the Bill of Rights and a statue of President William McKinley.\footnote{126} The court found that the Fraternal Order of the Eagles’ purpose in donating the monument was secular, and that it promoted "a moral code of conduct, rather than religious dogma."\footnote{127} Likewise, in addressing the effect prong, the court found that the monument would not cause the objective observer to believe that the county was utilizing the monument to further religious interests.\footnote{128}

In another Commandments courthouse monument case, a part-time substitute minister came up with the idea that such a monument should be placed on a courthouse lawn in \textit{Green v. Board of County Commissioners of the County of Haskell}.\footnote{129} This individual, a member of the Board of the County Commissioners, received the support of fellow board members and raised all funds necessary for the monument.\footnote{130} After the monument was completed, a religious

\footnotesize{\begin{itemize}
\item \textit{See id.}
\item \textit{See id.}
\item \textit{See id.}
\item \textit{See id.}
\item \textit{Id.}
\item 444 F. Supp.2d 805.
\item 450 F.Supp.2d 1273 (E.D. Oak. 2006) (White, J.).
\item \textit{See id.}
\end{itemize}}
The dedication ceremony took place. The Court noted how local county government officials did not approve or review the monument, nor sponsor the dedication ceremony. After those offended by the monument commenced a lawsuit, members of the community held rallies in support of the monument. The Green Court deemed the facts analogous to those in Van Orden. Realizing that it was a private individual who donated the monument, that the monument did not contain explicit religious symbols, and as it was part of a larger display that included other monuments, it did not violate the Establishment Clause.

In other settings similar to Van Orden, monuments bearing the Ten Commandments have been found constitutional. A perfect example of this is the second coming of ACLU Nebraska Foundation v. City of Plattsmouth, when the Eighth Circuit demonstrated a complete about face from its prior decision less than a year and a half before. Recognizing just how similar its facts were to Van Orden, the Court held that the same display it previously found unconstitutional was now permissible. Rather than scrutinize the stated purpose of the display, as it had done in its 2004 decision, the Eight Circuit now turned its focus to the factual similarities between its case and Van Orden. In doing so, the Court noted how the the Fraternal Order of Eagles had donated the display thirty five years prior to the commencement of litigation, that the display had been “erected in a corner of Plattsmouth’s forty-five-acre Memorial Park, ten blocks distant from Plattsmouth City Hall”; how it was “located two

131 See id.
132 See id.
133 See id.
134 Green, 450 F.Supp.2d 1273.
135 See id.
137 419 F.3d 772 (8th Cir. 2005) (BOWMAN, J.).
138 See ACLU Nebraska Found. v. City of Plattsmouth, 358 F.3d 1020, discussed in Part III.
139 ACLU Nebraska Found. v. City of Plattsmouth, 419 F.3d 772.
140 See id.
hundred yards from the park’s public parking lot”, and how the wording of the monument faced away from the park.\textsuperscript{141} Also important to the Court’s analysis was how, unless in need of repair, the City of Plattsmouth did not perform maintenance on the monument.\textsuperscript{142}

In a case similar to \textit{McCreary}, the Sixth Circuit found that a display that included a monument of the Ten Commandments was constitutional, as its display bore a secular purpose, even though it was identical to the \textit{McCreary} display. In \textit{ACLU of Kentucky v. Mercer County},\textsuperscript{143} the Court drew a critical distinction from \textit{McCreary} in the surrounding circumstances of the monument, and not from the monument itself. Included in the display were the Mayflower Compact, the Declaration of Independence, the Magna Carta and other important historical documents. In highlighting this distinction, the Court pointed out how it was a private individual, and not a governmental body, that created the display, and how the purpose of the display was to demonstrate foundations of American Law. Although several components of the display had religious significance, inclusion of the Commandments demonstrated how the decalogue has “profoundly influenced the formation of Western legal thought and the formation of our country … [and] provide the moral background of the Declaration of Independence and the foundation of our legal tradition.”

\textit{ACLU of Kentucky v. Garrard County},\textsuperscript{144} marked another case similar to \textit{McCreary}. In this case, Garrard county voted to display various historical documents, including the Ten Commandments, in the local county courthouse.\textsuperscript{145} The Commandments served as the

\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} 432 F.3d 624 (6th Cir. 2005) (SUHREHINRICH, J.), \textit{reh. denied}, 446 F.3d 651 (6th Cir. 2006) (note, however, the dissent in the decision denying a rehearing, noting how in the 2005 case, how the Sixth Circuit “panel announced a new rule: that an overt sectarian legislative history is necessary, as a matter of law, before a display will be invalidated.” \textit{ACLU v. Mercer County}, 446 F.3d. 651 (6th Cir. 2006) (COLE, J., dissenting.)
\textsuperscript{144} 517 F.Supp.2d 925 (E.D. Ken. 2007) (FORESTER, J.).
\textsuperscript{145} See id.
centerpiece of the display and stood by itself at one point.146 During the litigation, the display was changed.147 Although it still included the Ten Commandments, it was now identical to one of the displays in McCreary and the display in the Mercer County case.148 However, in the Garrard case, the stated purpose of the display was found to be a sham, and thus, unconstitutional.149

In ACLU of Kentucky v. Rowan County,150 a courthouse display placed in an area not considered a “high traffic” spot that was comprised of significant historical documents, including the Commandments, was found to be constitutional. In Rowan County, the Court noted how the Commandments’ were not larger than any other part of the display, how the idea to create the display had been initiated by a private citizen, that there was no dedication ceremony held for the display, and how the county’s resolution when approving the display lacked a religious theme.151 Although the Court found that the county may have had a religious purpose in creating the display, it was “not the predominant purpose” for the creation of the display.152

However, note ACLU of Kentucky v. Grayson County153, wherein a private individual—a reverend—was granted approval from Grayson County officials to create a courthouse display featuring documents relating to “Foundations of American Law and Government Display.”154 Included in this display were the Commandments.155 No public funds were used to create the

146 See id.
147 See id.
148 See id.
151 See id.
152 See id. (emphasis removed).
154 See id.
155 See id.
display—it was paid for by the reverend. After the display was created, “no formal ceremony was held, no official statement on behalf of the Fiscal Court was made, and no public prayer offered.” After analyzing both McCreary and Mercer County, the Court focused on the purpose of the display and held that the display had “a predominantly religious purpose,” that it had “the ostensible and predominant purpose of advancing religion and, therefore, violates the first prong of the Lemon test.” In focusing on purpose, the Court did not consider the other factors relating to context that other cases have.

VIII. Analysis of the cases

Prior to Van Orden, Federal Circuit Courts appeared consistent in their application of the Establishment Clause to the Ten Commandments. Despite King and Freethought, the aforementioned cases reveal that courts seemed presumptively opposed to public display of the Commandments, most likely due to the reasoning of Stone.

It appeared that the Third Circuit focused on the display itself having historical significance, and not the actual content of the display. Now this may be a strong consideration of context, but what cannot be overlooked is that, from a non-localized standpoint, it is the Commandments that are the items of historical significance, rather than the manner in which they are inscribed. It would seem more sound under the Establishment Clause to consider the message conveyed rather than the medium used to convey it. A localized examination of context and setting is necessary and relevant, but may also served as a way to divert attention from the question of how the Commandments can permissibly be displayed under the Establishment Clause.

See id.  
Id.  
It should be noted that the Court found that the display did not violate the second prong of the Lemon test. 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199.
Cases like *Freethought* appeared drafted as an end run around *Stone* by relying heavily on tradition. It should be noted that *Freethought* dealt with the passive action of refusing to remove an established mark as compared to the active display of that mark, although the logic of *Freethought* lived on in *Modrovich*. As seen, *Freethought* and *Modrovich* were certainly in the minority, something that appears to have changed in light of *Van Orden*. Although *Van Orden* was a close decision, *Freethought* and *Modrovich* remain good law. Likewise, the outcomes of the first *Plattsmouth* case, *Books, O'Bannon* and *Adlund* would have been different if there was more than *Stone* to rely on, especially if *Van Orden* was around. Case in point: the second *Plattsmouth* decision. Certainly, the *King* outcome would remain the same.

Yet is *McCreary* that keeps *Glassroth* as good law. As compared to most of the aforementioned other cases the judge in *Glassroth* had a clear religious purpose in mind when he displayed the monument. *Ashbrook* would have been a much closer call. This demonstrates just how confusing *McCreary* and *Van Orden* can be when read together. For instance, if the focus is on the government’s purpose, like in *McCreary*, then the courtroom display violates the Establishment Clause. However, if endorsement and context are scrutinized, like in *Van Orden*, then a different result will occur. As the reasonable observer’s view prevails, *Ashbrook* provides a good example of how the gray area of a Commandments’ analysis under the Establishment Clause remains.160

160 It should be noted that beyond Ten Commandments cases, the reasoning of both *McCreary* and *Van Orden* have been followed in other First Amendment litigation. For instance, in *Weinbaum v. City of Las Cruces*, 465 F.Supp.2d 1164 (D.N. Mex. 2006) (BRACK, J.), a court held that the official symbol of a city, to wit: three crosses surrounded by a sunburst, did not violate any prong of the *Lemon* test. Citing both *McCreary* and *Van Orden*, the Court noted how the religious significance of a symbol does not automatically render its display unconstitutional. In denying summary judgment, the Court credited the important historical significance of the city’s use of the symbol. *See also Freedom from Religion Found. Inc. v. Nicholson*, 469 F.Supp. 609 (W.D. Wis. 2007) (SHABAZ, J.) (finding that a Veteran Affair chaplaincy program was not unconstitutional); *O’Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (MURPHY, J.) (finding that a “Holier Than Thou” statute on the Washburn University Campus was not unconstitutional).
The second *Plattsmouth* case demonstrates that the closer the facts are to *Van Orden*, the more likely the display will be found constitutional. This seems true even though in *Plattsmouth*, the monument was not placed in or within the immediate vicinity of a courthouse.\textsuperscript{161} Nor does it appear to matter even if the sole item in the display is the Ten Commandments.\textsuperscript{162} Thus, it seems that in an effort to provide clarity in a progeny of Ten Commandment litigation that seeks to resolve conflicting opinions yet not run afoul precedent, courts will stress as many similarities as possible to the facts to either *McCreary* or *Van Orden*.

**IX. Analysis of the Commandments and the Establishment Clause**

No one can credibly dispute the Commandment’s predominantly religious meaning. Whether we consider the Commandments as a ‘sacred’ text rather than a ‘religious’ text, its religious significance will not be overlooked. And the Commandments’ important secular role in our history, law and government cannot be neglected either. Although the first four Commandments instill religious regulations regarding God, the image and name of God, and the Sabbath, the remaining six Commandments can be interpreted as important morals to live by and shorthand versions of most modern criminal statutes. The fifth and tenth Commandments mandate that we are to honor our parents and not fall victims of greed and jealousy. The remaining Commandments proscribe murder, adultery, lying, and theft. These ten rules seek to set standards for modern everyday life, with more than half of them not seeking to impress a religious point of view upon readers. As such, no one will contend that the teachings of these six Commandments have no place in society.

---

\textsuperscript{161} See *id.*

\textsuperscript{162} See *Twombley v. City of Fargo*, 388 F.Supp.2d 983 (N.D. 2005) (Erickson, J.).
The role that the Commandments play in our heritage is indisputable.\textsuperscript{163} Although also undeniable is its religious connotation,\textsuperscript{164} the Commandments can easily be distinguished from other symbols derived from religion that arguably do not have secular meaning. Such items include a cross, a Star of David, or Jesus Christ himself. The Commandments, however, serve as a body of law from which many of our statutes derive. Beyond apparent references to a Supreme Being, the Commandments provide us with a code of morality, regardless of the faith we believe in. For instance, treating one’s neighbor as one would want to be treated is a credo that many of us abide by. That one, or their neighbor, may be of a different faith, or without faith, is of no moment to the significance of this proverb.

The teachings of the Commandments play a significant role within our society, that in effect minimize purely religious views otherwise impermissible under the Establishment Clause. This effect can provide a secularized context of the Commandments. In Allegheny, the Court found that, taken in its context and setting, a holiday display comprised of a Christmas tree, a Chanukah menorah and a sign saluting liberty did not have the purpose or effect of endorsing religion.\textsuperscript{165} The Allegheny Court noted a difference between the religious significance and modern secularization of the holidays. Not that the Commandments have become a commercialized occasion to celebrate, as Christmas and Chanukah are viewed and marketed, but its deep historical roots to almost the entire population increases its secularity.

It should also be noted that the menorah and tree in Allegheny bear significance to only two of the three major religions. As noted, the Commandments have historical and religious significance to all three major religions, which Justice Scalia noted make up almost ninety-eight

\textsuperscript{163} See, e.g., Indiana Civil Liberties Union v. O’Bannon, 259 F.3d 766 (7th Cir. 2001) (COFFEY, J., dissenting).
\textsuperscript{164} See, e.g., Freethought, 334 F.3d 247.
\textsuperscript{165} See Allegheny, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472.
percent of our population. Consequently, as a greater amount of the population can relate to the Commandments’ historical and religious significance, it follows from Allegheny that there is reduced reason to believe that public display of the Commandments conveys the message that government seeks the purpose or effect of endorsing religion. Of course, opponents of this view will contend that popularity is not a factor under an Establishment Clause inquiry.

But just because the Commandments do have religious roots that cannot be overlooked, this does not mean that we must eradicate all displays of the Commandments out of fear that our government is attempting to influence us towards accepting religion. “The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.” For the Clause “does not say that no government official may take any action respecting an establishment of religion or prohibiting the free exercise thereof. It says that ‘Congress shall make no law’ doing that.” The Clause does not require, and there is certainly no reason “for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.” Public insulation from religion cannot be accomplished in a society that seeks to learn from the past as “[t]he history of man is inseparable from the history of religion.” Nor does the Establishment Clause require any special accommodation to those who seek to reside in a wholly secular society. For it is the purpose of the Clause to prevent our government from impressing unwanted religious beliefs upon our society, not to purge our society of religion simply to alleviate fears of the hypersensitive. For those who wish to reside in a sanitized secular society like Thomas Van Orden, one remains

---

166 See McCreary, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (SCALIA, J., dissenting).
168 Glassroth, 335 F.3d 1282.
allowed to look the other way before attempting to place an affirmative obligation upon
government to do away with anything that may bear religious significance.

Schools benefit a child as it serves as an institution where the child can interact with
others and experience a gateway towards real life. Just as a school, in theory, should not change
the way it operates to appease a sensitive and vocal minority, we should not feel forced to change
the way we examine our own history to forget how religion has impacted our history, regardless
of whether we are believers or not. Such action could send us down a road of discord towards
religion and its teachings, thus eliminating it from our everyday history lessons. This would seem
to be a more problematic path than if we were to embrace religion and learn from its teachings
within a secular society in everyday life. Although this may seem as an extreme direction, it is
certainly one that was never envisioned as a byproduct of the Establishment Clause.

Notwithstanding, regardless of our personal views of the Commandments, we must not
forget that they are a symbol of law. The Commandments are a strong symbol of law that have
withstood the test of time and provide the teachings a civilized society cannot do without.
Moreover, countless purely indisputable secular laws have been derived from the
Commandments. For if the Commandments were incompatible with modern law, no
government would offer it for display. And if it ever were offered for display, there would
clearly be a religious purpose and the effect of endorsement of religion. But this is certainly not
the case. In fact, Justice Scalia could not stress enough how much the Commandments are such a
great symbol of law in his McCreary dissent. Regardless of whether one wishes to maximize or
minimize its religious impact, the Commandments will always be considered a foundation of
American government and societal law. Thus, the Commandments will always have secular
meaning.
X. Effects of McCreary and Van Orden

*McCreary* and *Van Orden* both involved displays of the Commandments. The message in both was the same, but conveyed in a much more diluted manner in *McCreary*. A more notable difference, however, was the age of displays, as the display in *Van Orden* was about forty years the senior of the *McCreary* display. Although the age of the display can be considered as part of localized look at history and context, it should not be a determinative factor under the Establishment Clause. The Clause, via the *Lemon* test, seeks to preserve governmental neutrality in regards to religion. Nowhere in the Clause, or in *Lemon* or its progeny, should there be any consideration of the age of the display when the content of the display and the message it conveys is the same. Despite having obvious historical appeal, it should not make a difference whether it is the original tablets that Moses himself was handed or a recently made paper copy hung on a wall.

In *McCreary*, the display was on public land, as compared to *Van Orden*, where the display was inside a public building. However, nowhere in either *McCreary* or *Van Orden* does the Court appear to, or attempt to, create a bright-line rule allowing a display outside of a building but not within it. Just like the examination taking into account the age of a display, the placement of the display, especially when on public land in public places and open to public viewing, should not change the context and message of the display. Thus, this factual distinction between the two cases also should not be a basis to draw a line in the sand between where the Commandments are allowed as compared to where they are not.

If there was not such a drastic evaluation of the purpose behind the display in *McCreary*, the Court would have had to answer the question of whether a multi-document display containing the Commandments truly endorses religion. Since the display in *McCreary* was intended to be a
tribute to the foundation of our law and government, inclusion of the Commandments as part of
the display rather than the Commandments being its focus would simply be an acknowledgment
of the existence of the Commandments. It would also demonstrate how its principles have
impacted and served as the basis of modern law. Rather than assuming purpose and
automatically focusing on the context of a portion of the display, the effect that such portion has
had on the remainder of the display seems as a legitimate reason to include the Commandments.
For a display emphasizing foundation of our law and society seems incomplete without including
its own foundation.

Van Orden prevents the Establishment Clause from being distorted to the point whereby
an acknowledgement of the Commandments delivered through a neutral medium becomes a per
se violation. Such a radical interpretation should never be the case. As noted, we do not, and
should not, live in a sanitized society where religion must be eliminated from our daily lives.
This is especially true when we realize that simple acknowledgement of the Commandments
does not serve as an official establishment of religion. A government acknowledgment of an
item having religious significance should not be synonymous as an establishment of religion.
Without room for such an acknowledgment, we would live in a society that can accept morals
and bodies of law, but not be cognizant of its origins. The Establishment Clause was never
intended to prevent us from learning about our past. It was intended to prevent our government
from impressing religious beliefs upon us.

Notwithstanding, although McCreary and Van Orden may leave us with more questions
than answers, these cases do tell us a few things. One thing that is certain from McCreary and
Van Orden is that any evaluation of the Commandments under the Establishment Clause will
continue to be evaluated on a case by case basis, keeping in mind an effect of Van Orden being a
less conservative view of public display. This means that the *Lemon* test lives on, and that government action and sentiment towards religion must appear neutral to the reasonable observer. And another thing that remains clear is that the displays of the Commandments on the Supreme Court’s own grounds remain perfectly constitutional.

**XI. Conclusion**

As noted, the Court has provided us with some answers about public displays of the Commandments, but has also left us with many questions, some of which have been either intentionally or inadvertently resolved by subsequent litigation. The Establishment Clause has been interpreted over time and seeks to keep government action neutral in the face of religion. The Commandments are a product of religious belief and faith, but morals and our law are products of the Commandments. As these concepts are intrinsically intertwined, the Establishment Clause should not be expanded and distorted in such a manner that affords protection from anything remotely religious under a hypersensitive analysis. What we do know is that all arguments and litigation regarding the role and display of the Commandments and our government will continue to live on, as will the *Lemon* test, and courts will address the issue with even greater confusion than before. And what we definitely know is that as a result of *McCreary* and *Van Orden*, public display of the Commandments may or may not be constitutional.