An Examination of the United States Supreme Court's Recent Establishment Clause Rulings in *McCreary County, Ky. v. American Civil Liberties Union*[1] and *Van Orden v. Perry*[2]

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Responding to a question concerning whether or not his followers should pay taxes to the Roman government, the Bible records that Jesus answered, "Render unto Caesar the things that are Caesar's and unto God the things that are God's."[3] This statement, quoted in the Bible's Gospel of Matthew, has been called one of the "most revolutionary and history-making utterances that ever fell from those lips divine."[4] While the famous words of Jesus make clear the existence of a distinction between the realms of religion and government, they shed little light on the type of balance that should be struck between them.[5]

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[6] Cases arising under the Establishment Clause have presented a wide variety of issues.[7] Tests used by the courts to determine whether a government action or statute

[1] McCreary County, Ky. v. ACLU, 125 S. Ct. 2722 (2005).
[2] Van Orden v. Perry, 125 S. Ct. 2854 (2005).
[3] *Matthew* 22:21 (NRSV).
[4] Robert B. Setzer, Jr., On Being a First Baptist: Freedom First Baptists, a Sermon for Religious Liberty Day (2004), http://www.bjcpa.org/resources/sermons/0404_rlday_setzer.htm (quoting Walter B. Shurden, THE BAPTIST IDENTITY: FOUR FRAGILE FREEDOMS 52 (Smyth & Helwys Publishing, Inc. 1993)).
http://www.bjcpa.org/resources/sermons/0404_rlday_setzer.htm.
[5] *See* Jim Spivey, Separation No Myth: Religious Liberty's Biblical and Theological Bases, 36 SW. J. THEOLOGY 10 (No. 5 1994), *available at* http://www.bjcpa.org/resources/pubs/pub_spivey_separation.htm.
[6] U.S. CONST. amend. I.
[7] *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (striking down a state law creating a school district for the Jewish community); Lee v. Weisman, 505 U.S. 577 (1992) (striking down graduation invocation); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down law allowing employees not to work on Sabbath); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of crèche outside courthouse); Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating salary supplements paid to private school teachers of secular subjects); Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970) (upholding statute exempting religious organizations from real estate property tax); Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963)

is constitutional have varied just as widely.[8] Whatever the relationship between church and state, it appears that the Framers wisely anticipated the need for a distinction between the two. As one commentator noted:

> Established religion blurs the boundaries between church and state in such a way that the two institutions intrude upon each other. As the church manipulates the state as an engine for power, it produces bad government. Worse still, the state entices the church with promises of power derived from a political manifesto rather than from Scripture, and the state subtly shifts the focus of allegiance from God to a humanistic, ideological cause.[9]

In an American cultural climate in which religious conservatives and secularists have become increasingly polarized and in which the use of religious language by public figures is increasing, the Supreme Court recently decided two cases brought under the Establishment Clause of the Constitution. These cases presented the Court with the opportunity to settle definitively the question of how to determine whether a government's action constitutes an establishment of religion and therefore violates the Establishment Clause.

While at first glance, the Court's rulings in *Van Orden v. Perry* and *McCreary County, Ky. v. American Civil Liberties Union* may appear to be distinct and opposing interpretations of the Establishment Clause, closer examination reveals a thread of consistency and the possibility of the emergence of a more defined test for Establishment Clause analysis.

In 1802, Thomas Jefferson read the First Amendment and advocated "a wall of separation between church and state."[10] But the Supreme Court did not adopt such a bright-line test, and, prior to *Van Orden* and *Perry*, cases brought under the Establishment Clause were largely decided based on the test set forth by Chief Justice Burger in his majority opinion in *Lemon v.*

(invalidating statute providing for Bible reading in public schools).

[8] *See Grumet*, 512 U.S. 687 (neutrality test); *Lee*, 505 U.S. 577 (coercion test); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (endorsement test); *Lemon*, 403 U. S. 602 (three-part examination). *See generally Lynch*, 465 U.S. 668 (stating that the Court "ha[s] repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area").

[9] Spivey, *supra* note 5.

[10] Reynolds v. U.S., 98 U.S. 145, 164 (1878) (quoting Letter from Thomas Jefferson to Danbury Baptist Association (Jan, 1, 1802)), *available at* http://www.usconstitution.net/jeffwall.html.

Kurtzman.[11] *Lemon* declared unconstitutional the use of government funding to subsidize the wages of teachers at private, predominantly Catholic schools, even though those teachers did not teach religious subjects or include religion in their instruction of secular subjects.[12] *Lemon* introduced a three-part examination culled from what Chief Justice Burger called the "cumulative criteria" developed in the Court's previous Establishment Clause decisions:[13] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion."[14] "[F]inally, the statute must not foster 'an excessive government entanglement with religion.'"[15] Violation of any of these three principles by a statute or government action, Burger wrote, should result in a determination that the statute or action is unconstitutional.[16]

However, not all Establishment Clause decisions have utilized the *Lemon* test. Rather, some cases have called for the use of an "endorsement test," in which the constitutionality of government action is based upon whether a reasonable observer would perceive governmental endorsement of religion.[17] As the *Lynch* Court pointed out, "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[18] Under the endorsement test, the emphasis is placed upon the religious component *in context*.[19] So, for example, a crèche, standing alone, may be an invalid state action; a crèche displayed during the Christmas season, on the other hand, could be considered historical and therefore constitutional.[20] In endorsement test cases, the Court scrutinizes the legislation or

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[11] 403 U.S. at 612-13.
[12] *Id.*
[13] *Id.* at 612.
[14] *Id.* (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
[15] *Id.* at 612-613 (quoting *Walz*, 397 U.S. at 674).
[16] *Id.* at 612.
[17] S*ee* Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of a crèche outside a courthouse because it was displayed with secular, historical symbols of Christmas).
[18] *Lynch,* 465 U.S. at 680.
[19] *Id.*
[20] *Id.*

government action "to determine whether, in reality, it establishes a religion or religious faith, or tends to do so."[21]

Other decisions, including, possibly, the recent *Van Orden* ruling, have applied a type of coercion test that would invalidate governmental action under the Establishment Clause if the action results in coercing support of or participation in religion, or provides a direct benefit to a religious group to such a degree that it establishes religion.[22] Some cases have taken a "governmental neutrality" approach under which "'a proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion' . . . favoring neither one religion over others nor religious adherents collectively over nonadherents."[23] The proper relationship between government and religion is not one of hostility, but rather neutrality; a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[24] As the *Schempp* Court explained, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"[25] In other cases, the Court has recognized that separation of church and state cannot be completely achieved without some contact between the two and has allowed government accommodation of religion so long as the involvement does not result in "excessive entanglement" of the government in religion.[26]

In *Stone v. Graham*, the Supreme Court ruled that a Kentucky statute requiring the posting of the Ten Commandments in public schoolrooms across the state contravened the

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[21] *Id.* at 678 (citing Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 669 (1970)).
[22] *Van Orden*, 125 S. Ct. at 2861; *see also* Lee v. Weisman, 505 U.S. 577 (1992) (striking down government-sponsored non-sectarian invocation at public school graduation ceremony).
[23] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-793 (1973)).
[24] *Walz*, 397 U.S. at 669.
[25] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
[26] William M. Howard, Annotation, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R.5TH 1, 23 (2003) (citing 16A AM. JUR. 2D *Constitutional Law* § 422 (1998) (internal citation omitted)); *see, e.g., Walz*, 397 U.S. at 664.

Constitution because it promoted a religious purpose.[27] The *Stone* Court applied the *Lemon* test and found that "[t]he 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."[28] However, the Court was quick to point out that the display in question was posted purely for religious purposes and was not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[29]

In *Van Orden v. Perry*, Texas law school graduate Thomas Van Orden sued the state of Texas seeking an injunction for the removal of a granite monument placed on the grounds of the Texas State Capitol in Austin.[30] The monument, placed by the Fraternal Order of Eagles in 1961 as part of a nationwide campaign to reduce juvenile delinquency, was part of a twenty-two acre park consisting of seventeen monuments and twenty-one historical markers celebrating the history of Texas.[31] Displayed on the monument were selected verses of the Ten Commandments.[32]

A plurality of four justices found the placement of the monument constitutional based upon the context in which the monument was displayed and argued for allowing governments to post the Ten Commandments virtually anywhere other than public school classrooms.[33] The four (Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas) acknowledged the role of religion in American history and culture and noted the existence of displays throughout federal government buildings, including the Supreme Court Building, which incorporate the Ten Commandments in some fashion.[34] In writing for the majority, Chief Justice Rehnquist found

[27] Stone v. Graham, 449 U.S. 39, 43 (1980).
[28] *Id.* at 41.
[29] *Id.* at 42 (citing *Schempp*, 374 U.S. at 225).
[30] Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005).
[31] *Id.*
[32] *Id.*
[33] *Id.* at 2858, 2863-64; *see also* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).
[34] *Id.* at 2862.

that Establishment Clause cases have two faces: one looking toward the historical role of religion and religious tradition and another looking toward the principle that government entanglement in religion affects religious freedom.[35] The Chief Justice acknowledged the religious content of the Ten Commandments but stated that they "have an undeniable historical meaning."[36] Noting the Court's previous use of the *Lemon* test, Chief Justice Rehnquist rejected its use as a valid test in this case on the grounds that it was "not useful in dealing with the sort of passive monument" that had been erected by the Eagles on the grounds of Texas' statehouse.[37] Distinguishing between the monument in *Van Orden* and the displays in *Stone*, Chief Justice Rehnquist held that because the monument had sat unchallenged for forty years and because Van Orden had passed it for nearly six years prior to filing his suit, "[t]he placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone,*"[38] thereby limiting the holding in *Stone* to the context of public schools.[39]

Justice Scalia's short concurrence preferred to find nothing unconstitutional when a State favors religion generally whether through public prayer or non-proselytizing veneration of the Ten Commandments.[40] Justice Thomas' concurrence advocated a "retur[n] to the original meaning of the word 'establishment'" which he believed the Framers understood to mean "actual legal coercion."[41] Under that original definition, Justice Thomas wrote, the Texas display of the Ten Commandments would be constitutional.[42]

Justice Steven Breyer, who concurred in the result, cast the deciding fifth vote to uphold the constitutionality of the Ten Commandments monument; however, his opinion rejected the

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[35] *Id.* at 2859; *see* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 212-13 (1963); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
[36] *Van Orden,* 125 S. Ct. at 2863.
[37] *Id.* at 2861.
[38] *Id.* at 2864.
[39] *See id.*
[40] *Id.* at 2864 (Scalia, J., concurring) (citing McCreary County, Ky. v. ACLU, 125 S. Ct. 2722, 2727-32 (2005) (Scalia, J., dissenting)).
[41] *Id.* at 2865 (Thomas, J., concurring) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring)).
[42] *Van Orden,* 125 S. Ct. at 2865.

plurality's reasoning and advanced a theory of fact-specific, case-by-case analysis of Establishment Clause cases.[43] Justice Breyer wrote that there is "no single mechanical formula that can accurately draw the constitutional line in every case."[44] Rather, in "difficult, borderline cases" such as *Van Orden*, there could be no "test-related substitute for the exercise of legal judgment" which is "faithful to the underlying purposes of the Clauses" and considers the "context and consequences measured in light of those purposes."[45] Justice Breyer found the monument to be constitutional because the circumstances surrounding its placement indicated that Texas intended its secular message to prevail, but he rejected the plurality's position which would have effectively validated any government use of the Ten Commandments short of posting them in public schools.[46]

In a case decided the same day, *McCreary County, Ky. v. American Civil Liberties Union*, the Supreme Court affirmed a preliminary injunction requiring the removal of framed copies of the King James Version of the Ten Commandments which had been posted in the courtrooms of two Kentucky counties.[47] Following the initial filing of the lawsuit, the displays had been modified twice, eventually bearing the title "Foundations of American Law and Government" and incorporating other historical documents, including the texts of the Magna Carta, the Star-Spangled Banner, and the Declaration of Independence.[48] Writing for the 5-4 majority, Justice Souter held that the display in question violated the Establishment Clause because it was placed by the counties for a primarily religious purpose.[49] Justice Souter noted that appellate courts across the country routinely examine purpose in determining constitutional issues, but that such an examination should be conducted through the eyes of an "objective

[43] *Id.* at 2868-71 (Breyer, J., concurring).
[44] *Id.* at 2868 (citing Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).
[45] *Id.*at 2869.
[46] *Id.* at 2870-71.
[47] McCreary County, Ky. v. ACLU, 125 S. Ct. 2722, 2745 (2005).
[48] *Id.* at 2731.
[49] *Id.*at 2745.

observer."[50] In determining whether a display lacks a "secular legislative purpose,"[51] Justice Souter wrote, a court should examine the plain meaning of the statute's words, the context of enactment and legislative history and the sequence of events leading to its passage.[52] The majority concluded that, while past actions do not "forever taint" future attempts to make the display constitutionally valid, inclusion of the Ten Commandments in the display, even after modification, violated the Establishment Clause because of the context and manner in which it was originally erected.[53] Even though the counties eventually included various documents of historical interest with the Ten Commandments, the Court found that the resulting display still failed to pass the neutrality test, largely because the counties failed to show secular legislative purpose in both the posting of the Commandments and in the timing of the changes made to the display.[54] In contrast to the apparent acceptance by the *Van Orden* plurality of the validity of a government's use of the Ten Commandments,[55] Justice Souter wrote that "[w]here a text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote a religious point of view."[56] In further contrast with the *Van Orden* plurality, Justice Souter examined *Stone*, determining that it found an inherently religious message in the Ten Commandments which would violate the Establishment Clause no matter where posted, unless integrated with a secular message of some type.[57] Justice Souter noted the dissent's interest in advancing government support for monotheism[58] and held that "[t]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free

[50] *Id.* at 2734.
[51] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[52] *McCreary County*, 125 S. Ct. at 2734 (citing Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987)).
[53] *Id.* at 2741.
[54] *Id.* at 2740.
[55] *Van Orden*, 125 S. Ct. at 2864.
[56] *McCreary County,* 125 S.Ct. at 2738.
[57] *Id.* at 2739.
[58] *Id.* at 2743;

Exercise Clause."[59] In contrast, the granite monument at issue in *Van Orden* was determined to be a constitutional display because of its context in a larger setting of historical value and because it had stood unchallenged for more than forty years after its initial placement by the Eagles.[60]

In her concurrence in *McCreary County*, Justice O'Connor found that the display conveyed a message of endorsement of religion by the Kentucky counties.[61] She noted that while religious diversity was not so widely recognized during the time of the Framers, the First Amendment's broad language protects even those Americans who do not accept the validity of the Ten Commandments.[62] "It is true," she wrote, "that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment."[63] Justice O'Connor noted the rise of religious violence around the world and pointedly remarked that "[t]hose who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[64]

Until this summer, the Establishment Clause "system" of which Justice O'Connor spoke consisted of a variety of tests, the most prominent of which was the three-part examination set forth in *Lemon*.[65] *Van Orden*'s plurality rejected *Lemon* and advocated a virtual presumption of constitutionality when considering government purpose;[66] however Justice Breyer's concurrence supported a fact-specific, case-by-case analysis.[67] Read alongside the majority's reasoning in *McCreary County*, in which Justice Breyer joined and which advocated consideration of the

[59] *Id.* at 2742.
[60] *Van Orden*, 125 S. Ct. at 2864.
[61] *McCreary County*, 125 S. Ct. at 2747 (O'Connor, J., concurring).
[62] *See id.*
[63] *Id.* (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638.
[64] *Id.* at 2746.
[65] *See supra* notes 9, 11-29 and accompanying text.
[66] Van Orden v. Perry, 125 S.Ct. 2854, 2859-64 (2005); *see also supra* text accompanying notes 33-39.
[67] *Van Orden*, 125 S.Ct. 2868-72 (Breyer, J., concurring); *see also supra* text accompanying notes 43-46.

context and legislative history of the enactment and examination of the legislative purpose by an objective observer applying *Lemon*, it appears that future Establishment Clause cases will be analyzed on a case-by-case basis with special examination given to the context in which a government's purported establishment of religion has occurred. [68]

The result crafted by the Supreme Court in *Van Orden* and *McCreary County* assures the need for future litigation in this area to clarify whether an examination of context becomes the test by which future Establishment Clause cases are decided. Two thousand years ago Jesus instructed his followers to examine context when deciding when to obey God and when to obey the state. Ironically, the Supreme Court may now be following his advice.

[68] *See, e.g., Van Orden*, 125 S. Ct. at 2868-69 (Breyer, J., concurring).