

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb is filled with a dark blue color, and the bottom bulb is filled with a light blue color. The globe is centered in the narrow neck of the hourglass.

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Public Display of the Ten Commandments

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CRS Report for Congress

Public Display of the Ten Commandments

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Summary

In 1980, the Supreme Court held in *Stone v. Graham* that a Kentucky statute requiring the posting of a copy of the Ten Commandments on the wall of each public school classroom in the state had no secular legislative purpose and was therefore unconstitutional. The Court did not address the constitutionality of public displays of the Ten Commandments again until 2005. In *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*, the Court reached differing conclusions regarding displays of the Ten Commandments in different contexts. This report summarizes the Court's holdings in *Stone*, *McCreary*, and *Van Orden*, and analyzes the distinctions the Court made in reaching the divergent decisions. It also addresses the potential impact of the decisions in Establishment Clause jurisprudence and the case of *Pleasant Grove City, Utah v. Summum*, a case scheduled to be argued before the Court in November 2008.

Background¹

Public displays of religious symbols, such as the Ten Commandments, are subject to review under the Establishment Clause of the First Amendment. The primary test used to evaluate these claims is known the *Lemon* test. Under this test, public displays (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not lead to excessive entanglement with religion.²

The Supreme Court first addressed the constitutionality of public displays of religious symbols in 1980. In *Stone v. Graham*, the Court struck down a Kentucky statute requiring the posting of a privately funded copy of the Ten Commandments on the wall of each public school classroom in the state.³ The Court determined that the statute had no secular purpose, and therefore failed the *Lemon* test. Kentucky argued that the statute

¹ Portions of this report were originally prepared by Angie A. Welborn, formerly a Legislative Attorney, American Law Division.

² *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

³ 449 U.S. 39 (1980).

served a secular legislative purpose because the Commandments displays included the following notation: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”⁴ The Court, however, found that the “pre-eminent purpose for posting the Ten Commandments on schoolroom walls was plainly religious” and the display served no educational function.⁵ The Court held that an “‘avowed’ secular purpose is not sufficient to avoid conflict with the First Amendment.”⁶

In *Stone*, the source of the funding did not affect the constitutionality of the statute. Although the displays were funded by voluntary private contributions, the Court held that “the mere posting of the copies under the auspices of the legislature provides the ‘official support of the State ... Government’ that the Establishment Clause prohibits.”⁷

2005 Supreme Court Decisions Regarding Public Displays

McCreary County v. American Civil Liberties Union of Kentucky.⁸ In 1999, two counties in Kentucky posted large displays of the Ten Commandments, including a citation to the Book of Exodus, in their courthouses. The displays were placed in public areas, “readily visible” to those who used the courthouse.⁹ Soon after the displays were posted, the ACLU of Kentucky sued the counties in federal district court for an injunction against maintaining the displays, alleging a violation of the Establishment Clause. While the court considered the requested injunction, the counties expanded the display to show that the Commandments were Kentucky’s “precedent legal code,” and included eight other documents, each having its own religious reference.¹⁰ The counties stated several grounds for their position, including a declaration 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.”¹¹ Although the district court ordered that the Commandments be removed immediately and that no

⁴ *Id.* at 41. *See also* Ky. Rev. Stat. § 158.178 (1980).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 42.

⁸ 545 U.S. 844 (2005).

⁹ *Id.* at 852.

¹⁰ *Id.* at 853. The documents in the second displays included a passage of the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of the Bible,” reading that “the Bible is the best gift God has ever given to man;” a proclamation by President Reagan marking 1983 as the year of the Bible; and the Mayflower Compact.

¹¹ *Id.* at 853.

county official “erect or cause to be erected similar displays,”¹² the counties erected a third display. This final display in each courthouse included nine documents of similar size to each other, and was titled “The Foundations of American Law and Government Display.”¹³

When the case came before the U.S. Supreme Court, the Court emphasized the importance of neutrality in considering issues under the Establishment Clause, noting that “the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”¹⁴ The Court explained that the Establishment Clause’s core value of neutrality is violated by government actions that have “the ostensible and predominant purpose of advancing religion.”¹⁵ The facts of *McCreary* raised questions of the relevance of the purpose prong of the *Lemon* test. The Court recognized that the purpose of a government action, though rarely dispositive, serves an important function.¹⁶ According to the Court, favoring one religion, or favoring religion generally, contradicts the understanding “that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.”¹⁷ The Court also recognized that purpose is a valid consideration when determining the constitutionality of a statute, citing numerous instances apart from Establishment Clause cases in which the Court looked to the purpose of an action when evaluating its constitutionality.¹⁸

The Court further explained that while a governmental entity’s stated purpose is generally given deference, the *Lemon* test requires that “the secular purpose be genuine, not a sham, and not merely secondary to a religious objective.”¹⁹ The specific actions that the counties had taken in this case led the Court to conclude that the counties acted with an unconstitutional purpose. According to the Court, the first display “lacked even *Stone*’s implausible disclaimer that the Commandments were set out to show their effect on the civil law.”²⁰ Furthermore, the Court noted, the county executive’s pastor “testified to the certainty of the existence of God” at the ceremony for posting the Commandments, which could reasonably lead observers to think that the counties were emphasizing the religious value of the display.²¹ Regarding the second display, the Court looked to the resolutions adopted to modify the displays, which expressed support for other public

¹² *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F. Supp.2d 691, 703 (E.D. Ky. 2000).

¹³ *McCreary*, 545 U.S. at 856. The final display included the Ten Commandments and eight other documents (the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice).

¹⁴ *Id.* at 860.

¹⁵ *Id.*

¹⁶ *Id.* at 859.

¹⁷ *Id.* at 860 (internal quotation omitted).

¹⁸ *Id.* at 861.

¹⁹ *Id.* at 864.

²⁰ *Id.* at 869.

²¹ *Id.*

displays of the Commandments and cited a specific Christian reference used by the state legislature.²² The Court determined that the counties sought to highlight primarily religious texts and that their actions constituted “an indisputable, and undisputed, showing of an impermissible purpose.”²³ Although the counties attempted to demonstrate a valid secular purpose by creating a third display allegedly intended to educate the public on significant documents in American legal history, the Court found that there was no clear theme that overcame the apparent religious objectives the counties held in developing the displays.²⁴ As a result, according to the Court, a reasonable observer “would probably suspect that the counties were simply reaching for a way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.”²⁵

Van Orden v. Perry.²⁶ In 1961, a monolith of the Ten Commandments was erected by the Fraternal Order of the Eagles on the grounds of the Texas State Capitol. The display was included among 17 monuments and 21 historical markers displayed in the 22 acres surrounding the Texas State Capitol, “commemorating the ‘people, ideals, and events that compose Texan identity.’”²⁷ The Eagles paid the cost of erecting the monument, the location of which was determined by the state based on the recommendation of the state organization responsible for maintaining the Capitol grounds. In 2001, Thomas Van Orden, a frequent visitor to the Capitol grounds since 1995, sued state officials, claiming that the display violated the Establishment Clause.

In deciding *Van Orden*, the Court did not use the test set forth in *Lemon*, but rather analyzed the placement of the monument based on the nature of the monument itself and the history of the nation.²⁸ The Court cited numerous examples in which all three branches of government officially acknowledged the role of religion in American life, and specifically noted that the Court had recognized the role of God in American heritage in previous decisions.²⁹ For instance, in *Marsh v. Chambers*, the Court held that the Establishment Clause permits a state legislature to open its daily session with a prayer by a chaplain paid by the state.³⁰ The Court also noted cases in which the Court upheld laws originating from one of the Ten Commandments, e.g., *McGowan v. Maryland* which upheld a law prohibiting the sale of merchandise on Sunday.³¹

With respect to the specific display of the Ten Commandments, the Court found that “acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America,” and cited numerous government buildings where the

²² *Id.* at 869-70.

²³ *Id.* at 870.

²⁴ *Id.* at 871.

²⁵ *Id.* at 873.

²⁶ 545 U.S. 677 (2005).

²⁷ *Id.* at 681.

²⁸ *Id.* at 686.

²⁹ *Id.* at 686-88.

³⁰ 463 U.S. 783 (1983).

³¹ 366 U.S. 420 (1961).

Commandments can be found.³² Despite the focus on the historical significance of the Commandments, the Court acknowledged that they were at their inception and remain inherently religious. However, the Court noted that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”³³

Although the Court’s holding might appear to conflict with *Stone*, the Court distinguished *Van Orden* from *Stone* based on the difference between religious displays in a classroom context and the “more passive” display of the Commandments at issue on the grounds of the Texas State Capitol.³⁴ The Court stated that while it had been “particularly vigilant” in Establishment Clause cases set in schools, there was never any indication that *Stone*’s holding would extend to a legislative chamber or to capitol grounds.³⁵ Because the Texas monument lacked the particular concerns raised by displays in school settings and because *Van Orden* walked past the monument for a number of years before bringing the lawsuit, the Court determined that the *Van Orden* display was different from the texts that confronted elementary school students every day in *Stone*.³⁶ The Court held that the monument in question had a “dual significance, partaking of both religion and government,” and therefore its inclusion among the monuments on the capitol grounds did not violate the Establishment Clause.³⁷

Analysis

The 2005 cases decided by the Court concerning the public display of the Ten Commandments reached divergent conclusions regarding the displays and used different tests to reach those conclusions. While the Court did not use these cases to create a bright-line test for determining whether such displays violate the Establishment Clause, the decisions can be reconciled by studying the specific facts presented in each case. The displays at issue in *McCreary* were created and erected by county officials and placed in prominent locations at the counties’ main government buildings. The counties’ actions in promoting and justifying the display were viewed by the Court as having religious motivations and implicating government endorsement of a religious message. On the other hand, the display at issue in *Van Orden* was characterized by the Court several times in its decision as “passive” and placed in a location where a reasonable observer likely would not infer government endorsement, as it was placed among dozens of other monuments and markers. The fact that the Texas state legislature played no role in creating or erecting the monument in the *Van Orden* case also alleviated the appearance of governmental endorsement of a religious message.

³² *Van Orden*, 545 U.S. 688-89 (citing acknowledgments of the Ten Commandments in the U.S. Supreme Court building, the Library of Congress, the National Archives, the Department of Justice, the Ronald Reagan Building, both the Court of Appeals and the District Court for the District of Columbia, and the Chamber of the United States House of Representatives).

³³ *Id.* at 690.

³⁴ *Id.* at 690-91.

³⁵ *Id.*

³⁶ *Id.* at 691.

³⁷ *Id.* at 692.

What remains unclear from these decisions is the status of the *Lemon* test in the Court's Establishment Clause jurisprudence. The majority opinion in *McCreary* relied on the test, but applied a modified version of the test that incorporates "endorsement" into the purpose and effects prongs of the original *Lemon* test.³⁸ The Court reached its decision in *Van Orden* without a consensus in its reasoning, but the plurality opinion did not use the *Lemon* test, noting other decisions where the Court used the factors set forth in *Lemon* as "helpful signposts" without relying on the three-part test for its analysis.³⁹

The divergent decisions were reached as a result of a split court, and raise the question of what approach the Court will take in future cases of such displays. The views of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer were represented in the *McCreary* opinion that held the display unconstitutional, and the views of Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Breyer were represented in *Van Orden*'s decision that upheld the display as constitutional. The appointments of Chief Justice Roberts and Justice Alito may change the outcome of future public display decisions. Future vacancies and replacements also have the potential to influence the understanding of the standard to be applied in future cases.

Although these cases did not use a consistent standard for analysis, *McCreary* and *Van Orden* might not be as divergent from Establishment Clause jurisprudence as one might expect. Justice Breyer, who provided the deciding vote in the cases, explained his understanding that the Establishment Clause requires the government to "avoid excessive interference with, or promotion of, religion," but "does not compel the government to purge from the public sphere all that in any way partakes of the religious."⁴⁰ This rationale echoed the Court's previous holdings in challenges to public displays of religious symbols. Generally, the Court has upheld public displays of religious symbols where the display is set in diversified context.⁴¹ *McCreary* and *Van Orden* appear to fit this analysis, as the display upheld in *Van Orden* was set in a historical secular context, while the display struck down in *McCreary* indicated a predominantly religious message.

In November 2008, the Court is scheduled to hear the case of *Pleasant Grove City, Utah v. Summum*,⁴² which addresses First Amendment issues regarding monuments displayed in a public park. Summum has challenged the city's refusal to include a monument of the Seven Aphorisms for display in a public park that currently includes various monuments, including the Ten Commandments. The case appears to be brought before the Court on free speech grounds, rather than under the religion clauses. However, the Court's treatment of the case may provide insight on the Roberts Court's approach to public displays of religious symbols.

³⁸ *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

³⁹ *Van Orden*, 545 U.S. at 685.

⁴⁰ *Id.* at 699 (Breyer, J., concurring).

⁴¹ *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

⁴² *Summum v. Pleasant Grove City, Utah*, 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S.Ct. 1737 (2008) (No. 07-665).