

THE CONSTITUTIONALITY OF RELIGIOUS SYMBOLISM  
AFTER *MCCREARY* AND *VAN ORDEN*

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## I. INTRODUCTION

The public display of symbols with religious significance has been the subject of extensive litigation in the last fifty years. That litigation culminated in two cases recently decided by the Supreme Court involving challenges to the public display of the Ten Commandments, *McCreary County, Kentucky v. ACLU of Kentucky*<sup>1</sup> and *Van Orden v. Perry*.<sup>2</sup> In these two decisions, the Court did little to clarify the law in this area. In *McCreary*, it struck down a display of the Ten Commandments in a county courthouse as a violation of the Establishment Clause. In a plurality opinion in *Van Orden*, it affirmed a display of the Ten Commandments on the grounds of the Texas State Capitol, leaving the lower courts to sort out the principles that resulted in such disparate results regarding substantially similar displays.

While the decisions are less than a model of clarity, they do suggest some principles that may be applied by courts in considering the constitutionality of similar displays, as well as some potential clues as to the Court's future jurisprudence in this area. In particular, two themes emerge from the Court's decisions.

*First*, the Court made clear that displays having historical as well as religious significance generally do not violate the Establishment Clause. This came across most clearly in *Van Orden*, where four Justices reiterated their belief that religious displays having historical significance, such as those depicting the Ten Commandments, were plainly constitutional.<sup>3</sup> A fifth Justice, Justice Breyer, espoused similar views.<sup>4</sup> Given the recent changes in the Court's personnel, it is likely that this theme running through the Court's decisions will take on a more prominent role.

Indeed, a constitutional rule that prohibited the display of items that have religious significance would manifest a profound hostility to religion, would be inconsistent with traditional notions regarding the proper roles of church and state, and would largely exclude religion from the public square. Such a rule, moreover, is unnecessary given that displays that convey a "dual message," one that is both historical

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1. 545 U.S. 844 (2005).

2. 545 U.S. 677 (2005).

3. *Id.* at 691–92.

4. *Id.* at 699–700 (Breyer, J., concurring in the judgment).

and religious, do not necessarily suggest any “endorsement” of religion. In allowing such displays on government property, the government may merely be recognizing the historical significance of the items contained in the display.

*Second*, in its recent decisions, the Supreme Court reaffirmed the objective nature of the test used to evaluate whether a particular display constitutes an establishment of religion. In *McCreary*, the Court took great pains to make clear that it was in fact adhering to an objective test in striking down the Ten Commandments display and that it was only the unusual history of that display that made it constitutionally impermissible.<sup>5</sup> While some may dispute whether the Court properly applied that test, in both *McCreary*<sup>6</sup> and *Van Orden*,<sup>7</sup> the Court reiterated that the test was an objective one.

Again, the emphasis on the objective nature of the constitutional test may be beneficial in terms of establishing guidelines for the display of religious symbols. An objective test is far easier to administer and apply than a subjective test and may in the long run lead to a reduction in the amount of litigation, which can often be particularly divisive and consume scarce resources. Moreover, the objective test prohibits the “heckler’s veto”; it is not the hypersensitive member of society whose values and judgments govern the constitutionality of a particular display but rather the judgment of a *reasonable* member of society. Were the rule otherwise, religion would be excluded entirely from public fora given that one may always find someone who is offended by a particular display of religious symbolism.

Despite these recent developments, given the recent changes in the Court’s composition, it is possible that it may substantially redefine its religion clause jurisprudence. In particular, the Court may reexamine the original meaning of the Establishment Clause, adopting a more deferential approach in reviewing the constitutionality of state measures involving religion. The Court may develop a safe harbor for those displays of religious symbols that have longstanding historical significance. Alternatively, it may determine that only active measures by the government—ones that result in religious coercion—violate the Establishment Clause. In any event, the scope of permissible religious expression is only likely to expand.

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5. *McCreary*, 545 U.S. at 872–74.

6. *Id.*

7. *Van Orden*, 545 U.S. at 616.

Nonetheless, a return to the original meaning of the Establishment Clause would require a far more radical reinterpretation. As numerous academic commentators and certain members of the Court have observed, the Establishment Clause originally may have been intended to act primarily as a “jurisdictional” provision that made clear the proper roles of the state and federal governments in matters regarding the establishment of religion.<sup>8</sup> Under this interpretation, the clause was designed to preserve the states’ right to maintain their established churches, free from federal interference.

At a minimum, these commentators argue, the clause may have been designed to underscore the states’ primacy in matters regarding religion.<sup>9</sup> Just as the states had the primary role in criminal matters and public morality, so too they originally had primary jurisdiction in matters involving religious issues. In the future, the Court may look to this historical record in further refining its Establishment Clause jurisprudence.

Part I of this Article discusses the Court’s decisions in *McCreary* and *Van Orden*, outlining the themes that emerge from the various opinions issued in those cases and their relevance in future disputes under the Establishment Clause. In particular, this section addresses the objective test that emerges from the Court’s twin decisions, as well as the strong deference accorded displays that have historical as well as religious significance.

Part II discusses the circuit court decisions that have been issued in the wake of the Supreme Court’s decisions. It assesses the extent to which lower courts have remained faithful to the teachings of *McCreary* and *Van Orden*. What emerges from these initial decisions is a heavy reliance on the historical analysis articulated by the Court in *Van Orden* and a strong deference to state and local officials regarding the propriety of displays that contain religious symbols that also have historical meaning. Indeed, some courts have gone so far as to hold that the Supreme Court has effectively abolished the three-part test of *Lemon v. Kurtzman*<sup>10</sup> in cases involving religious displays that have historical significance.

Finally, Part III discusses the future of the Court’s Establishment Clause jurisprudence as it pertains to public displays of religious symbols such as the Ten Commandments. Given the recent changes in the Court’s membership, the deference accorded displays having

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8. See *infra* note 193.

9. *Id.*

10. 403 U.S. 602 (1971).

historical significance is likely to strengthen. This section explores the ways in which the Court may revise its jurisprudence, as well as the historical record indicating that the Establishment Clause was intended, at least in part, to leave matters implicating religion to state and local authorities, rather than the federal government. While *McCreary* and *Van Orden* seem to have served as an impetus behind greater judicial tolerance of public displays of religious symbols, this trend is only likely to strengthen as the Court is called upon to further revise its jurisprudence in this area.

## II. THE SUPREME COURT'S DECISIONS IN *MCCREARY* AND *VAN ORDEN*

The Court's recent decisions in *McCreary* and *Van Orden* were the subject of significant public interest. Efforts to ban longstanding displays of the Ten Commandments (which in many instances were more than forty years old) had stirred up strong emotions on both sides of the issue. The attempt to remove such displays can be seen as the latest chapter in the culture wars between those who want a rigid "separation of church and state" and those who believe that official acknowledgment, or indeed promotion, of religious values is appropriate.

While the numerous opinions issued in the two cases appear on their face to be confusing and contradictory, certain themes emerge that may guide future decisions addressing the constitutionality of public displays containing religious symbolism. First, the Court relied heavily upon the historical significance of the displays in determining whether they were constitutional. Second, the Court applied an objective test based on the perceptions of a "reasonable" observer. Nonetheless, given the multiple opinions issued in the two decisions and the lack of clarity, litigation and controversy over public displays including religious symbolism is likely to continue unabated.

### A. *The Deference Accorded Displays Having Historical Significance*

One of the primary themes emerging from *McCreary* and *Van Orden* is the deference the Court pays to displays of religious symbols having an independent historical meaning. This theme came across most clearly in the Court's decision in *Van Orden*. There, the Court considered the constitutionality of a Ten Commandments monument erected on the grounds of the Texas State Capitol by the Fraternal Order of Eagles nearly forty years ago.<sup>11</sup> The monument stood alone,

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11. *Van Orden*, 545 U.S. at 681–82.

and its “primary content” was the text of the Ten Commandments.<sup>12</sup> Nonetheless, there were several other monuments and historical markers located elsewhere on the Capitol grounds, many of which had no religious significance, but rather were erected solely to commemorate various aspects of Texas and United States history.<sup>13</sup>

The Court upheld the constitutionality of the Ten Commandments monument in a plurality opinion. Writing on behalf of four members of the Court, Chief Justice Rehnquist observed that the Court had repeatedly upheld public displays of religious symbols that also had some historical meaning. Noting the “strong role played by religion and religious traditions throughout our Nation’s history,” Chief Justice Rehnquist observed that a contrary rule would “evinced a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”<sup>14</sup> Indeed, he went so far as to note that “[o]ur institutions presuppose a Supreme Being.”<sup>15</sup>

In coming to this conclusion the plurality ignored the usual test, articulated in *Lemon v. Kurtzman*,<sup>16</sup> for ascertaining whether there was a violation of the Establishment Clause. The plurality observed that many of the Court’s recent decisions had eschewed the factors identified in *Lemon*.<sup>17</sup> Moreover, it concluded that the *Lemon* test was “not useful in dealing with the sort of passive monument” at issue in *Van Orden* and that the analysis should instead be “driven both by the nature of the monument and by our Nation’s history.”<sup>18</sup>

Applying these principles, the Court concluded that the display of the Ten Commandments was plainly constitutional given that “acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America.”<sup>19</sup> Not only the Court itself, but also “[t]he Executive and Legislative Branches” had “acknowledged the historical role of the Ten Commandments.”<sup>20</sup> The fact that the Ten Commandments monument also had “religious

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12. *Id.* at 681.

13. *Id.*

14. *Id.* at 683–84.

15. *Id.* at 683.

16. 403 U.S. 602, 612–13 (1971) (articulating a three-part test under which the court ascertains whether the government act has a “secular legislative purpose,” whether its “principal or primary effect” is to advance or inhibit religion, and whether it fosters “excessive government entanglement with religion”).

17. *Van Orden*, 545 U.S. at 685–86 (“[O]ur recent cases simply have not applied the *Lemon* test”).

18. *Id.* at 686.

19. *Id.* at 688.

20. *Id.* at 690.

significance” did not render it unconstitutional.<sup>21</sup> This was so, the Court concluded, because the Ten Commandments had “an undeniable historical meaning.”<sup>22</sup> Accordingly, the Court held that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”<sup>23</sup> In sum, the “dual significance” of the monument rendered it constitutional.<sup>24</sup>

Justice Breyer, concurring in the result, observed that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”<sup>25</sup> “Such absolutism is not only inconsistent with our national traditions, . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.”<sup>26</sup> Accordingly, Justice Breyer, too, was willing to allow a public display of religious symbols when they were combined with a predominantly secular message.<sup>27</sup>

In the case of the display at issue in *Van Orden*, Justice Breyer found that the monument, as a whole, conveyed such a secular message. As he noted, a display of the Ten Commandments could have both “secular moral” and “historical” messages in addition to its religious meaning:

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well.<sup>28</sup>

Justice Breyer concluded that such secular messages were evident in the case of the Texas monument given that a private organization

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 691–92.

25. *Id.* at 699 (Breyer, J., concurring in the judgment).

26. *Id.*

27. *Id.* at 701–02 (noting the “predominantly secular” character of the display based upon both the state’s original purpose in creating the display and the public’s reaction to the display over subsequent decades).

28. *Id.* at 701 (citations omitted).

had donated the display and “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.”<sup>29</sup> The monument did not violate the Establishment Clause because it conveyed a predominantly secular message.

Indeed, Justice Breyer observed that “a contrary conclusion . . . based primarily on the religious nature of the tablets’ text would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”<sup>30</sup> Such an interpretation of the Establishment Clause would “encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation” and “could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”<sup>31</sup>

The Court’s decision in *Van Orden* is consistent with a long line of decisions recognizing the constitutionality of public displays of religious symbols that also have independent historical significance. The Court has consistently acknowledged that “religion has been closely identified with our history and government,”<sup>32</sup> that “[t]he history of man is inseparable from the history of religion,”<sup>33</sup> and that “[i]nteraction between church and state is inevitable.”<sup>34</sup> As the Court observed in *School District of Abington Township, Pennsylvania v. Schempp*, “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.”<sup>35</sup> Indeed, there has been “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”<sup>36</sup> Thus, the Court has repeatedly declared that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>37</sup>

Indeed, a test that would invalidate longstanding displays having historical meaning would raise significant questions of internal consistency in the Court’s jurisprudence. The Court has long

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29. *Id.*

30. *Id.* at 704.

31. *Id.*

32. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 212 (1963).

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

34. *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

35. *Schempp*, 374 U.S. at 213.

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

37. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

recognized the central role that religion has played in our society. Consequently, it has consistently upheld public practices that have both historical and religious significance.<sup>38</sup> Perhaps the most significant case adopting this approach before *Van Orden* was *Marsh v. Chambers*, in which the Court upheld the Nebraska legislature's practice of opening legislative sessions with a prayer on the ground that it was "deeply embedded in the history and tradition of this country."<sup>39</sup> In doing so, the Court noted the "unambiguous and unbroken history of more than 200 years" supporting such practices, which the Court concluded established "the practice of opening legislative sessions with prayer" as "part of the fabric of our society."<sup>40</sup>

The Court's decision in *Van Orden* therefore constitutes merely the latest in a long line of decisions that have sought to preserve state and local governments' authority to acknowledge the historical role of religion in our society. There are several reasons that the Court has adopted such a principle.

First, it is consistent with the original meaning of the Establishment Clause. Both the text and early practice suggest that official acknowledgments of religion by the government were not deemed impermissible.<sup>41</sup> For those members of the Court that adhere to an originalist approach, a test that would invalidate displays that have long been deemed constitutionally permissible would be inconsistent with this interpretive methodology: the fact that such displays have long stood unchallenged is itself evidence that they are consistent with the Establishment Clause's original meaning.

Second, the historical approach also allows the continuation of long-standing practices. Official acknowledgments of religion have

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38. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (upholding display of a cross); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 614–15 (1989) (upholding display of a menorah); *Lynch*, 465 U.S. at 680 (upholding display of a crèche).

39. 463 U.S. 783, 786 (1983).

40. *Id.* at 792.

41. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 787 (1983) ("The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain."); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1116 (1998) ("In the period between the Founding and Reconstruction, the federal government involved itself with religion and religious exercise in a variety of ways."); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755, 765 ("In addition to urging the Thanksgiving Proclamation, the House of Representatives authorized the use of its hall for religious services, and the First Congress established a Congressional Chaplain system.").

been commonplace in our public life for hundreds of years.<sup>42</sup> A dramatic shift in the Court's jurisprudence that would forbid such practices would have a profound effect on the traditional authority of state and local officials.

Third, precluding such acknowledgments would go beyond ensuring that government did not promote religion; it would manifest an overt hostility toward religion. Barring government officials from making statements regarding religion or its role in our nation's history would have an unnecessarily restrictive effect on government actors' speech and would single out religion for special, negative treatment. Such a constitutional principle is likely to create exactly the sort of divisiveness that the Establishment Clause was designed to prevent.<sup>43</sup>

In essence, under such a test, religious meaning would serve as a "taint" that would render a display unconstitutional even though it might have primarily historical significance. Moreover, this undesirable result is not outweighed by countervailing considerations: as Justice Breyer observed in his concurrence in *Van Orden*, the fact that a particular display is rooted in long-standing traditions makes it less likely that it will offend those members of the public who do not share the religious convictions that are contained in the display.<sup>44</sup> Thus, the benefits of allowing a full range of views in the public square outweigh any potential costs to those who are offended by displays with religious meaning on government property.

Finally, there are simply practical realities that militate against such a test. It would require the removal of long-standing monuments and displays from public property in jurisdictions across the country with the attending divisive litigation. Such sweeping judicial action based on a test that is not rooted in the text or history of the Establishment Clause would call into question the legitimacy of the Court's decisionmaking.

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42. See CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 88 (1964) ("During the period immediately after the Revolution and previous to the ratification of the federal Bill of Rights, it was generally acknowledged from one end of the nation to the other that government should not be hostile to religion. Indeed, the activities of the Continental Congress indicate clearly that this body was pleased to promote the cause of religion.").

43. *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005).

44. See *id.* at 704 (Breyer, J., concurring in the judgment) ("This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive.").

*B. The Objective Nature of the Constitutional Test*

A second theme that is evident in the Court's recent decisions is that a public display containing religious symbols can only be held unconstitutional where the purpose behind the display is solely religious in nature, as perceived by an *objective* observer. This principle is illustrated in *McCreary* where the Court held that a display of the Ten Commandments violated the Establishment Clause because of the overtly religious motivation behind the display.<sup>45</sup> The local officials responsible for erecting the display had made clear that their desire was to promote religious principles and not merely to erect a display based on the historical significance of the Commandments.<sup>46</sup>

In finding that the display was unconstitutional by a narrow 5-4 margin, the Court emphasized that the test was an objective one. As the Court observed, the purpose behind a particular display can only be unconstitutional "where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts."<sup>47</sup> Under this test, "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act."<sup>48</sup> Accordingly, in presiding over an Establishment Clause challenge, courts may not "look to the veiled psyche of government officers."<sup>49</sup> Rather, a display may be held unconstitutional only where "a religious objective permeated the government's action."<sup>50</sup>

The Court further indicated that this test was a difficult one to meet. The Court noted that in its prior decisions the test had "not been fatal very often"<sup>51</sup> and that the purpose requirement would "rarely be determinative" of the constitutionality of government action in Establishment Clause cases.<sup>52</sup> Indeed, it is the rare case in which a state actor will express an objectively religious motivation for a

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45. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005).

46. *Id.* at 869–70.

47. *Id.* at 862.

48. *Id.* (quoting *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

49. *Id.* at 862–63.

50. *Id.*

51. *Id.*

52. *Id.* at 859 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring)). See *id.* at 859–61 (discussing the application of the purpose test in Establishment Clause challenges).

particular display. Even if the state actor's motivation is entirely based on religious principles, it will often conceal that purpose in order to avoid constitutional scrutiny. Accordingly, in most cases the objective test is easily met.

Moreover, the Court in *McCreary* held that generally state actors' statement of the purpose behind a display is "entitled to some deference."<sup>53</sup> Accordingly, there are only limited exceptions where a display may be held unconstitutional despite government officials' representation that they did not have a religious purpose in erecting the display. The courts' primary role in this respect is to ascertain whether the expressed purpose behind a display constitutes "an apparent sham."<sup>54</sup>

Again, the Court made clear that this exception would likely apply only in rare circumstances.<sup>55</sup> The role of the courts under this test is a limited one; it is not to delve into the subjective intent of state actors but rather to discern whether there are objective facts that indicate a plainly religious purpose.

The Court concluded that the record before it presented just such a rare and unique case. It noted that county officials had expressed overtly religious motivations in erecting the display and had not utilized any disclaimer that illustrated a secular purpose.<sup>56</sup> In particular, the record contained "serial religious references," and a resolution accompanying the display made "claim[s] about the embodiment of ethics in Christ."<sup>57</sup> These expressly religious objectives were never disavowed by local officials.<sup>58</sup> Accordingly, the Court concluded that "[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message."<sup>59</sup>

In holding that the Ten Commandments display in *Van Orden* was constitutional, the Court, and Justice Breyer in particular, sought to distinguish it from the display at issue in *McCreary*. Justice Breyer observed that the history of the *McCreary* display "indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a

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53. *Id.* at 864 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308).

54. *Id.* at 865.

55. *Id.*

56. *Id.* at 869–72.

57. *Id.* at 870.

58. *Id.*

59. *Id.* at 869.

religiously inspired document.”<sup>60</sup> Thus, the record evidence demonstrated “the substantially religious objectives” of those responsible for the display of the Ten Commandments in *McCreary* as well as the effect of “this readily apparent objective upon those who view them.”<sup>61</sup> This contrasted sharply with the monument at issue in *Van Orden*, which was not associated with such expressly religious motivations. There, Justice Breyer determined that “the public visiting the capitol grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.”<sup>62</sup> Thus, the display in *McCreary* constitutes the rare exception that proves the rule: a display accompanied by an overtly religious purpose that was never disavowed by the local officials responsible for its creation.

In adhering to this objective approach, the Court followed a long line of Supreme Court precedent making clear that the test under the Establishment Clause is an objective one based on the perceptions of a *reasonable* observer.<sup>63</sup> As Justice O’Connor explained in *Capitol Square Review & Advisory Board v. Pinette*, the reasonable observer “is similar to the ‘reasonable person’ in tort law, who ‘is not to be identified with any ordinary individual, who might occasionally do unreasonable things,’ but is ‘rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.’”<sup>64</sup> Consequently, the Court does not “ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.”<sup>65</sup> Rather, the standard is based on the perceptions of an *objective* observer. Courts therefore have “no license to psychoanalyze the legislators.”<sup>66</sup>

60. *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring) (distinguishing the display in *Van Orden* from that at issue in *McCreary*).

61. *Id.*

62. *Id.*

63. *See, e.g.*, *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (test based on an “objective observer”); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (court looks to “the ‘objective’ meaning of the [government’s] statement in the community”).

64. 515 U.S. 753, 779–80 (1995) (O’Connor, J., concurring in the judgment) (quoting W. KEETON ET AL., *PROSSER AND KEATON ON THE LAW OF TORTS* 175 (5th ed. 1984)).

65. *Id.* at 780 (emphasis in original) (internal quotations omitted).

66. *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring in the judgment). *See also* *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (noting the Court’s “reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute”); *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (noting the “fundamental principle of constitutional adjudication” that the courts may not “restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted”).

The objective approach adopted in *McCreary* has several advantages. It attempts to remove the subjective element from the constitutional analysis by directing courts to look at objective measures of government actors' intent. By adopting a "reasonable person" standard, it also seeks to prevent the heckler's veto. The test is not based on the perceptions of a member of the community who sees a religious motivation at every turn. Such a test would bar all expressions of religious symbolism. Rather, the test is based on the perceptions of an objective member of the community who is aware of the significant role that religion has played in our nation's history. Finally, the objective test is arguably easier to administer than a fact-intensive subjective test and provides clear guidelines for local officials.

Even so, there are some distinct disadvantages to this approach. First, it arguably opens the door to creeping subjectivism as courts are called upon to ascertain what the "objective" observer would conclude regarding legislative purpose. Second, one wonders why any inquiry into legislative purpose is warranted at all. Arguably what matters more is the effect of the display on those who see it, rather than the intentions of the government actors responsible for erecting it. Requiring an inquiry into purpose arguably generates unwarranted litigation with little societal benefit. In any event, the Court in *McCreary* seemed mindful of such concerns in repeatedly clarifying that the purpose prong should rarely be invoked to invalidate government action.<sup>67</sup>

### III. EARLY APPLICATION OF *MCCREARY* AND *VAN ORDEN*

Despite these general principles that may be derived from *McCreary* and *Van Orden*, subsequent decisions have concluded that these cases do little, if anything, to clarify the Court's Establishment Clause jurisprudence. The multiple opinions issued in the two cases and their seeming inconsistency have led to debate among the lower courts regarding exactly what principles should guide their analysis of the constitutionality of public displays that include religious symbolism.

Nonetheless, courts addressing purported Establishment Clause violations since these twin decisions were issued have generally

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67. See, e.g., *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 859 ("[T]he secular purpose requirement alone may rarely be determinative." (quoting *Wallace*, 472 U.S. at 75)); *id.* at 863 (arguing that, even if there were a "secret [religious] motive," the test would not be met since it "stirs up no strife and does nothing to make outsiders of noadherents").

followed the Court's directions in *Van Orden*, upholding those displays that have some intrinsic historical significance. In contrast, they have viewed *McCreary* as largely limited to its facts, concluding that public displays of religious symbols may not be invalidated unless there is some overt expression of a religious motivation behind the display.

However, one point of significant debate remains: whether the *Lemon* test is still good law after *McCreary* and *Van Orden*. While most courts have concluded that *Lemon* may apply in some circumstances and has not been expressly overruled, the lower courts have largely ignored it. Rather, where a constitutional challenge has been made to a display containing religious symbolism, courts have placed significant reliance upon the historical analysis of *Van Orden*.

A. *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*

In *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, an en banc panel of the Eighth Circuit upheld a display of the Ten Commandments that, like the display at issue in *Van Orden*, had been donated by the Fraternal Order of Eagles to a local municipality approximately forty years ago.<sup>68</sup> The granite monument was inscribed with a nonsectarian version of the Ten Commandments and was erected in an "attempt to provide youths with a common code of conduct to govern their actions."<sup>69</sup> The court affirmed the display as falling foursquare within the holding of *Van Orden*.

The court eschewed reliance upon the *Lemon* test,<sup>70</sup> noting the *Van Orden* plurality's statement that "the *Lemon* test was 'not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.'"<sup>71</sup> Instead, it conducted an analysis to determine whether the monument had an independent historical significance aside from its obvious religious symbolism, observing that the Ten Commandments display in *Van Orden* was held constitutional because it "communicate[d] both a secular and a religious message."<sup>72</sup> Based on its analysis of the record, the court concluded that the same was true of the Ten Commandments display it was considering, which used "the text of the Ten Commandments to

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68. 419 F.3d 772, 773 (8th Cir. 2005).

69. *Id.* at 774 n.3.

70. *See id.* at 778 n.8 ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test.").

71. *Id.* at 776 (quoting *Van Orden v. Perry*, 545 U.S. 677, 686 (2005)).

72. *Id.*

acknowledge the role of religion in our Nation's heritage."<sup>73</sup> Accordingly, the court held that "[a]lthough the text of the Ten Commandments has undeniable religious significance, '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.'"<sup>74</sup>

While the court relied extensively on the Supreme Court's decision in *Van Orden*, it gave short shrift to its companion decision in *McCreary*, noting only that *McCreary* showed that "there are limits to government displays of religious messages or symbols."<sup>75</sup> The court did not say what those limits were or spend any time analyzing the *McCreary* opinion, noting only that it could not conclude that the display of the Ten Commandments before it was "different in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*."<sup>76</sup> Thus, *Plattsmouth* stands as a strong precedent illustrating the dominance of the *Van Orden* historical analysis. Not only did the court largely ignore the *McCreary* decision, it went so far as to hold that the *Lemon* test was inapplicable in cases involving public displays containing religious symbolism.

#### B. ACLU of Kentucky v. Mercer County, Kentucky

Not all courts have summarily rejected the *Lemon* test as the court in *Plattsmouth* did, however. Other courts have concluded that, because the Court in *Van Orden* and *McCreary* did not expressly overrule *Lemon*, it remains the governing law in analyzing the constitutionality of public displays containing religious symbolism. Nonetheless, these courts have arguably modified the *Lemon* analysis in light of *Van Orden*, examining whether the public display at issue communicates a secular or historical message in addition to its religious symbolism.

A prime example is the Sixth Circuit's decision in *ACLU of Kentucky v. Mercer County, Kentucky*.<sup>77</sup> The display at issue in *Mercer County* was "identical in all material respects" to the display that the Sixth Circuit and later the Supreme Court deemed unconstitutional in *McCreary*.<sup>78</sup> Nonetheless, because it did not have the same history demonstrating a plainly religious motive behind its

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73. *Id.* at 776–77.

74. *Id.* at 778 (quoting *Van Orden*, 545 U.S. at 690).

75. *Id.*

76. *Id.*

77. 432 F.3d 624 (6th Cir. 2005).

78. *Id.* at 628.

creation, the court concluded that the display was constitutional under the analysis set forth in *McCreary* and *Van Orden*.

The court engaged in a two-step analysis, first determining whether the display should be invalidated under the rationale of *McCreary* and then applying the traditional analysis using the *Lemon* test. In analyzing whether the display was unconstitutional under *McCreary*, the court emphasized the Supreme Court's observation that the "secular purpose" prong of *Lemon* was "seldom dispositive" and "rarely . . . determinative."<sup>79</sup> Among other things, the court underscored the objective nature of the test—that a display could only be held unconstitutional if an "objective observer" would believe that the display was based upon predominantly religious motivations.<sup>80</sup>

In applying this test, the court concluded that "the predominant purpose of the display" was "secular," unlike the display at issue in *McCreary*.<sup>81</sup> It found that none of the factors that made the *McCreary* display unconstitutional were present in the case before it:

Critical to the finding of sectarian purpose in *McCreary County* was the extended history: the original standalone copy of the Ten Commandments; a pastor's speaking to the existence of God at the hanging ceremony; a second, more distinctly religious display; and the "extraordinary" resolutions authorizing the displays that were not repealed even after the "Foundations" display was posted. The objective observer in *McCreary* and Pulaski Counties was deemed aware of this background, and thus saw an impermissible purpose.<sup>82</sup>

Thus, the objective test of *McCreary* resulted in a much different outcome in *Mercer County* even though the display on its face was identical to the display in *McCreary*. This was because "[t]he objective observer in Mercer County ha[d] no recent history of religiously motivated governmental acts or resolutions to incorporate into the display."<sup>83</sup> Moreover, the court found that the government's stated purpose—to acknowledge American legal history—did not constitute a "sham."<sup>84</sup>

Having considered and rejected a challenge under the rationale of *McCreary*, the court then proceeded to analyze the display using the

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79. *Id.* at 630.

80. *Id.*

81. *Id.* at 631.

82. *Id.* See also *ACLU of Ohio Found., Inc. v. Bd. of Comm'rs of Lucas County, Ohio*, 444 F. Supp. 2d 805 (N.D. Ohio 2006) (applying *Lemon* in affirming the constitutionality of a display of the Ten Commandments on the grounds of a county courthouse).

83. *Mercer County*, 432 F.3d at 632.

84. *Id.* at 631–32.

factors articulated in *Lemon*. Unlike the court in *Plattsmouth*, the court in *Mercer County* concluded that *Lemon* was still good law after *McCreary* and *Van Orden*, finding that “the Supreme Court declined an invitation to abandon *Lemon* in *McCreary County*”—even though it “never explicitly reaffirm[ed] *Lemon*.”<sup>85</sup> While the court acknowledged that the plurality in *Van Orden* “disregarded the *Lemon* test” and that “Justice Breyer’s concurrence arguably provided a fifth vote as to *Lemon*’s inapplicability,”<sup>86</sup> it nonetheless concluded that it must follow *Lemon* because it was not expressly overruled—a result that it characterized as leaving it in “Establishment Clause purgatory.”<sup>87</sup>

While the court held that the *Lemon* test must be applied, it concluded that “context” was “crucial” to the analysis, which it observed is an objective one based on a “reasonable person” standard.<sup>88</sup> Applying this standard, the court held that there was nothing unconstitutional about the display of the Ten Commandments given that it occurred in “an otherwise secular exhibit” that contained other historical documents regarding the foundations of American law.<sup>89</sup> In so ruling, it emphasized the objective nature of the test, noting that “[w]ere we to focus on the perceptions of individuals, every religious display would be ‘necessarily precluded so long as some passersby would perceive a governmental endorsement thereof.’”<sup>90</sup>

In particular, it observed that “the reasonable person is not a hypersensitive plaintiff.”<sup>91</sup> Indeed, it even went so far as to take a jab at the ACLU, which had brought the case, noting that the court’s concern was with “the reasonable person” and “the ACLU, an organization whose mission is ‘to ensure that . . . the government [is kept] out of the religion business,’ does not embody the reasonable person.”<sup>92</sup> Thus, the court’s decision, while continuing to apply the *Lemon* test,

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85. *Id.* at 635–36.

86. *Id.* at 636.

87. *Id.*

88. *Id.*

89. *Id.* at 637–38.

90. *Id.* at 638 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995)).

91. *Id.* at 639–40 (observing that the reasonable observer “appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions”).

92. *Id.* at 638 (citing the American Civil Liberties Union’s Religion and Belief Page, <http://www.aclu.org/religion/index.html> (last visited XX, 2007)).

emphasized the objective nature of the inquiry as a strong limitation on the ability of the courts to intervene in this area.

Constraining the scope of the *Lemon* test even further, the court relied heavily upon a principle of deference to the judgments of state and local authorities regarding displays of religious items. For example, the court observed that it would “defer to the government’s stated purpose” in assessing whether a display was religious in nature.<sup>93</sup> In applying this principle to the facts before it, the court concluded that: “By including the Ten Commandments in a display of American legal documents, the County is merely acknowledging the Commandments’ historical influence. We generally defer to the government’s rational judgment of what is historically relevant.”<sup>94</sup> Accordingly, while the court held that the *Lemon* test was still relevant, it concluded that the Supreme Court’s decisions in *Van Orden* and *McCreary* had modified the test in ways that arguably made it more difficult to establish a constitutional violation in the context of displays containing religious symbolism.

#### C. O’Connor v. Washburn University

The court in *Mercer County* is not the only one that has continued to apply *Lemon* (with some qualifications) to public displays of religious symbols since the Supreme Court’s decisions in *McCreary* and *Van Orden*. The Tenth Circuit applied the test in upholding the constitutionality of a display that mocked the Roman Catholic religion in *O’Connor v. Washburn University*.<sup>95</sup> *O’Connor* involved a challenge to a sculpture that was displayed on the grounds of Washburn University. The plaintiffs maintained that the sculpture violated the Establishment Clause because it manifested an open hostility to the Catholic Church.<sup>96</sup> In analyzing the constitutionality of the display, the court applied the *Lemon* test even though it recognized that the Supreme Court in *Van Orden* “upheld the constitutionality of one Ten Commandments display without a discussion of either the *Lemon* factors or the endorsement test.”<sup>97</sup> As had the Sixth Circuit in *Mercer County*, the court in *O’Connor*

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93. *Id.* at 631.

94. *Id.* at 633.

95. 416 F.3d 1216, 1224 (10th Cir. 2005).

96. The display, entitled *Holier Than Thou*, included a statue of a Catholic bishop wearing a miter “that some have interpreted as a stylized representation of a phallus.” *Id.* at 1219.

97. *Id.* at 1224.

applied the *Lemon* test because the Supreme Court did not expressly overrule *Lemon* or hold that it was inapplicable.<sup>98</sup>

Applying a modified version of the *Lemon* test,<sup>99</sup> the Tenth Circuit concluded that there was no evidence showing that the university's decision to display the statue was based on "improper motives."<sup>100</sup> It further found that a "reasonable observer" would not view the statue as an endorsement of any particular religious views, given that it was "one of thirty outdoor sculptures"<sup>101</sup> that were displayed "in the context of a university campus, a place that is 'peculiarly the marketplace of ideas.'"<sup>102</sup> Thus, while the court applied *Lemon*, it emphasized the objective nature of the analysis, as had the court in *Mercer County*.<sup>103</sup>

#### D. *Skoros v. City of New York*

The Second Circuit addressed similar issues in *Skoros v. City of New York*.<sup>104</sup> In *Skoros*, the court considered the constitutionality of a policy regarding holiday displays in the New York City public schools that allowed the display of a menorah and the star and crescent but prohibited the display of a crèche or nativity scene.<sup>105</sup> The court observed, as had other post-*McCreary* and *Van Orden* courts, that the "splintered Supreme Court decisions on the constitutionality of public displays involving religious symbols" offered lower courts little guidance.<sup>106</sup> As a result, the court noted, "[g]overnment officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking,

98. *Id.* ("Until the Supreme Court overrules *Lemon*, however, it remains binding law in this circuit.")

99. *See id.* (following Justice O'Connor's modification of the *Lemon* test in *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring), which emphasized the purpose and effect of the challenged state action).

100. *Id.* at 1227.

101. *Id.* at 1228.

102. *Id.* at 1229 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

103. At least one district court within the Tenth Circuit has addressed the constitutionality of a Ten Commandments display after *McCreary* and *Van Orden*. In *Green v. Board of County Commissioners of the County of Haskell*, the court upheld the constitutionality of a Ten Commandments Display at the Haskell County Courthouse. 450 F. Supp. 2d 1273, 1296–97 (E.D. Okla. 2006). Similarly, the court in *Weinbaum v. Las Cruces Public Schools* upheld a public school's display of a range of symbols having religious significance, including an emblem, sculpture, and student-designed mural containing three Christian crosses. *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1182 (D.N.M. 2006) (memorandum of decision); *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1116 (D.N.M. 2006) (memorandum opinion and order denying cross-motions for summary judgment).

104. 437 F.3d 1 (2d Cir. 2006).

105. *Id.* at 3–4.

106. *Id.* at 13.

as do some of the justices, that they confront a ‘jurisprudence of minutiae’ that leaves them to rely on ‘little more than intuition and a tape measure’ to ensure the constitutionality of public holiday displays.”<sup>107</sup>

Nonetheless, the court attempted to apply the *Lemon* test to the disputed policy with little reference to the Supreme Court’s more recent decisions in *McCreary* and *Van Orden*. The majority determined that the policy was designed to promote “tolerance and respect for diverse customs,” and thus its purpose was “permissibly secular.”<sup>108</sup> Similarly, it found that the policy did not endorse any particular religious beliefs or constitute an excessive entanglement between religion and government.<sup>109</sup> Thus, the court upheld the Department of Education’s policy of excluding the crèche and nativity scene, while at the same time refusing to decide whether a policy that required their display would violate the Constitution.<sup>110</sup>

#### E. *Myers v. Loudoun County Public Schools*

While not a case involving public displays of religious symbols, the Fourth Circuit applied the Supreme Court’s recent Establishment Clause decisions in the context of a school policy regarding the Pledge of Allegiance in *Myers v. Loudoun County Public Schools*.<sup>111</sup> The court upheld the school’s policy providing for voluntary recitation of the Pledge after applying the principles articulated in the Supreme Court’s recent decisions. In particular, the court relied heavily upon the Supreme Court’s decision in *Van Orden*, observing that “[t]here is ‘no single mechanical formula that can accurately draw the constitutional line in every case.’”<sup>112</sup>

In applying *Van Orden*’s historical approach, the court discussed at length historical acknowledgments of religion such as legislative prayer and official days of thanksgiving. It concluded that “[i]f the founders viewed legislative prayer and days of thanksgiving as consistent with the Establishment Clause, it is difficult to believe they would object to the Pledge, with its limited reference to God.”<sup>113</sup> The

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107. *Id.* at 15 (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 674–75 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

108. *Id.* at 19.

109. *Id.* at 32–38.

110. *Id.* at 39–40.

111. 418 F.3d 395, 397 (4th Cir. 2005).

112. *Id.* at 402 (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment)).

113. *Id.* at 405.

court observed that “[t]he Pledge is much less of a threat to establish a religion than legislative prayer, the open prayers to God found in Washington’s prayer of thanksgiving, and the Declaration of Independence.”<sup>114</sup> Indeed, it concluded that “[t]he notion that official acknowledgments of religion and its role in the founding of our nation such as that in the Pledge ‘pose a real danger of establishment of a state church’ is simply ‘farfetched.’”<sup>115</sup>

It distinguished the recitation of the Pledge from school prayers that had been invalidated in prior cases. While it acknowledged that “religious exercises in public schools, even if voluntary, may violate the Constitution because they can indirectly coerce students into participating,” the court concluded that “the Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one.”<sup>116</sup> The Pledge, it observed, “contains a religious phrase,” but the court found that the phrase did not transform the Pledge into a prayer or religious statement.<sup>117</sup>

What is striking about the court’s decision is its heavy reliance on the historical acknowledgment of religion in upholding the Pledge policy as opposed to an analysis of the factors articulated in *Lemon*. The court also paid little attention to the Supreme Court’s decision in *McCreary*, which it addressed only in a footnote, expressly repudiating the notion that *McCreary* articulated a “neutrality principle” that would bar “patriotic references to the Deity.”<sup>118</sup> Accordingly, once again *Van Orden*’s historical approach seems to have been the dominant principle emerging from the Supreme Court’s recent Establishment Clause decisions.

#### F. Access Fund v. United States Department of Agriculture

In *Access Fund v. United States Department of Agriculture*,<sup>119</sup> the Ninth Circuit likewise focused on alternative secular rationales in affirming a government policy. *Access Fund* involved the U.S. Forest Service’s decision to ban rock climbing at Cave Rock, a site near Lake Tahoe that has religious and cultural significance to the Washoe Tribe.<sup>120</sup> The court affirmed the district court’s order holding the

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114. *Id.* The court also relied upon prior statements by certain Justices of the Supreme Court, suggesting that recitation of the Pledge was not unconstitutional. *Id.* at 405–06.

115. *Id.* at 408 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984)).

116. *Id.* at 407.

117. *Id.*

118. *Id.* at 402 n.8.

119. 499 F.3d 1036 (9th Cir. 2007).

120. *Id.* at 1039.

policy constitutional on the ground that the government had a legitimate secular interest in protecting the cultural and historical significance of the site, wholly apart from any religious considerations.<sup>121</sup>

In doing so, the majority observed that, while “[t]he *Lemon* test remains the benchmark to gauge whether a particular government activity violates the Establishment Clause,” it had “hardly been sanctified by the Supreme Court.”<sup>122</sup> In particular, it observed that the *Van Orden* plurality had “question[ed] the continued vitality of *Lemon*.”<sup>123</sup> In a separate concurrence, Judge Wallace went even further, concluding that “the *Lemon* test should [not] be applied in analyzing the claim under the Establishment Clause” and that the court should “follow *Van Orden* instead.”<sup>124</sup> Once again, *Van Orden* at a minimum significantly colored the Establishment Clause analysis.

#### G. *Staley v. Harris County, Texas*

While *McCreary* has largely been limited to its facts, it has emerged in a haphazard way to play a significant role in subsequent decisions. A prime example is the Fifth Circuit’s decision in *Staley v. Harris County, Texas*.<sup>125</sup> *Staley* involved a challenge to a display of the Bible in a monument located on the grounds of the Harris County Civil Courthouse, which honored a local businessman, William S. Mosher, for his philanthropic works.<sup>126</sup> Relying heavily on the Supreme Court’s decision in *McCreary*, a divided panel held that the display violated the Establishment Clause.<sup>127</sup> While the Fifth Circuit sitting en banc subsequently vacated the panel’s decision as moot because the monument in question had been taken down during the

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121. *See id.* at 1043–45 (discussing the first prong of the *Lemon* test).

122. *Id.* at 1042. In an earlier decision, the Ninth Circuit observed that “[n]otwithstanding its ‘checkered career,’ *Lemon v. Kurtzman* continues to set forth the applicable constitutional standard for assessing the validity of governmental actions challenged under the Establishment Clause” and that “the Supreme Court recently reaffirmed the viability of the *Lemon* test in *McCreary County*.” *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1254–55 (9th Cir. 2007) (citations omitted).

123. *Access Fund*, 499 F.3d at 1042.

124. *Id.* at 1047 (Wallace, J., concurring).

125. 461 F.3d 504 (5th Cir. 2006). The author appeared in the appeal as counsel of record for an amicus party supporting reversal of the district court’s decision. The district court held that the display of the Bible violated the Establishment Clause, reasoning that “the *purpose* and the *effect* of the Bible in the monument casing were religious.” *Id.* at 508.

126. *Id.* at 506.

127. *Id.* at 515.

pendency of the appeal,<sup>128</sup> the panel's decision is instructive because it demonstrates how *McCreary* can be misapplied.

The panel invalidated the display even though, as in *Van Orden*, it was designed and paid for by a private organization, there were other monuments on or near the courthouse that did not have a religious message, and the display had been in existence for over thirty years without challenge.<sup>129</sup> Indeed, the court *acknowledged* that the display as originally designed was plainly constitutional: “[A]lthough some religious expression and religious values seem to have been behind the erection of the monument, it does not betray sound reasoning to conclude that, from the viewpoint of the objective observer, the primary purpose of the monument originally was to honor the life and contributions of a generous, compassionate, and well-respected citizen whose life reflected the Christian values that inspired his contributions to the community.”<sup>130</sup> In particular, the court observed: “It is certainly true that Christian prayers were included in the dedication ceremony. Nevertheless, the fact that the monument, with the Bible, stood without complaint for thirty-two years, supports the notion that the original purpose was not objectively seen as predominantly religious.”<sup>131</sup>

What the majority found troubling was the refurbishment of the monument in 1995 by a judge who “campaign[ed] on a platform of putting Christianity back into government.”<sup>132</sup> In holding that the display as reconstituted was unconstitutional, the majority purported to apply the “objective observer” test.<sup>133</sup> It concluded that the monument, which it acknowledged had been considered predominantly nonreligious for decades, began “to morph into a religious symbol” because the purpose behind the refurbishment of the monument was “almost exclusively religious.”<sup>134</sup> In particular, the court cited the fact that the judge responsible for refurbishing the monument had no relationship to Mosher, that he had added a “red neon light surrounding the Bible” as part of the monument, and that

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128. *Staley v. Harris County, Tex.*, 485 F.3d 305, 307 (5th Cir. 2007). The Fifth Circuit did not vacate the district court's judgment, however. *Id.* at 314.

129. *Staley*, 461 F.3d at 505–08. Originally erected in 1956, the monument remained undisturbed until 1988, when the Bible was removed from the display after complaints by atheists. *Id.* at 506.

130. *Id.* at 513.

131. *Id.*

132. *Id.* at 507. Judge John Devine solicited private donations and obtained the approval of Harris County to improve the monument, installing a new Bible outlined by a red neon light. *Id.*

133. *Id.* at 513.

134. *Id.* at 514.

there were Christian ministers at the rededication ceremony who led prayers.<sup>135</sup> According to the majority, these events would lead a “reasonable observer” to “conclude that the monument, with the Bible outlined in red neon lighting, had evolved into a predominantly religious symbol.”<sup>136</sup> Thus, while the panel majority purported to follow the objective observer test, it arguably stretched that test to the limits in holding that the Mosher monument was unconstitutional.

The majority’s opinion was met by a vigorous dissent, contending that it “exhibit[ed] an appalling hostility to any hint of religion in public spaces.”<sup>137</sup> The dissent’s criticism focused primarily on the majority’s application of the objective observer test: “Despite its desire to appear conflicted over the merits of the ‘objective observer’ test, the majority proceeds to create an observer whose memory is short and whose antipathy to religion lacks any semblance of objectivity.”<sup>138</sup> The dissent found the Mosher monument similar to the Ten Commandments monument upheld in *Van Orden*. Both monuments, it observed, had been in existence for decades without challenge.<sup>139</sup> The dissent found this factor significant, noting: “The collective wisdom of the community over an extended period of time provides more reliable evidence of the purpose of a public display

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135. *Id.*

136. *Id.* at 514–15 (“Taking into account Judge Devine’s political platform, the lack of connections between the refurbishers of the monument and Mosher or Star of Hope, the religious ceremonies attending the refurbishment, and the addition of a red neon light drawing added attention to the religious portion of the monument, an objective observer would conclude that the monument in its new phase of life had come to have a predominantly religious purpose.”).

137. *Id.* at 515 (Smith, J., dissenting).

138. *Id.* In particular, the dissent observed that “[a] religious purpose appearing for the first time nearly forty years after the foundation of a monument can hardly classify as ‘predominant.’ . . . [T]he objective observer does not forget the purpose underlying previous iterations of the same display.” *Id.* at 517, 518 n.7. In the dissent’s view, the purpose of the monument remained the same as it had in 1956 when it was erected: “to honor the life of a Houston businessman and Christian philanthropist.” *Id.* at 519. This analysis is consistent with *McCreary*, which recognized that “[r]easonable observers have reasonable memories,” and accordingly the constitutional inquiry must take *all* phases of the disputed displays into account. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

139. *Staley*, 461 F.3d at 515–17 (Smith, J., dissenting). As the dissent observed, the Bible was ubiquitous in public displays in the United States. Within the Washington Monument “at least two interior memorial stones feature Bible passages . . . and the apex of the east face bears the inscription *Laus Deo*, or ‘Praise be to God.’” *Id.* at 521. Likewise, the Jefferson Memorial and the Lincoln Memorial each contain inscriptions with religious references. *Id.* at 520. Indeed, at oral argument, counsel for plaintiff conceded that “a hypothetical *identical Biblical monument*, dedicated to the Reverend Martin Luther King, Jr., and obviously emphasizing the religious aspects of his life and service, would pass constitutional muster if it lacked a sectarian history.” *Id.* at 522.

than do the musings of ‘the uninformed, the casual passerby, the heckler, or the reaction of a single individual.’”<sup>140</sup>

Moreover, the primary purpose of the monument was not to advance any particular religious beliefs, but rather to honor an individual whose Christian faith happened to motivate him to do philanthropic works that the monument sought to recognize. In this regard, the district court’s findings regarding the monument are instructive. It was erected on the courthouse grounds in 1956 by a private organization, the Star of Hope Mission.<sup>141</sup> The Mission was a local Christian charity that provided food and shelter to the indigent that received significant support from Mr. Mosher.<sup>142</sup> The monument was specifically identified as a memorial to Mr. Mosher erected by this private organization. As the district court recognized, the Bible contained in the monument takes some effort to see: “a passerby would have to walk up to the monument to observe that it contains a Bible and would have to stand in front of it to read the Bible.”<sup>143</sup> The open Bible in the display measured only “twelve-by-sixteen inches.”<sup>144</sup> Moreover, the Mosher monument was not the only display located at the courthouse. There were also numerous wall plaques and other “historical markers” that were located “in the same area as the Mosher monument” but did not contain “any religious message.”<sup>145</sup> Thus, the context of the Mosher memorial was similar to that of the Ten Commandments monument in *Van Orden*.

Moreover, as the district court itself recognized, just like the Ten Commandments at issue in *Van Orden*, “[t]he King James Bible can advance both secular and religious purposes.”<sup>146</sup> This finding alone

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140. *Id.* at 517 (quoting *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2003)).

141. *Staley v. Harris County, Tex.*, 332 F. Supp. 2d 1030, 1033 (S.D. Tex. 2004).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1033–34.

146. *Id.* at 1036. In particular, the Bible has been a significant historical influence in the development of both religious and secular moral systems. For this reason, the Bible is *commonplace* in courthouses throughout the country. Federal rules and statutes specifically acknowledge the authority of judges and court officials to administer oaths on the Bible. *See Engel v. Vitale*, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring) (observing that one of the longstanding “aids” to religion in this country” is the fact that “[t]he Bible is used for the administration of oaths”). *See also* 28 U.S.C. §§ 459, 953 (authorizing court clerks to administer oaths); Fed. R. Evid. 603 (requiring administration “by oath or affirmation administered in a form calculated to awaken the witness’s conscience and impress the witness’s mind with the duty to do so.”). Indeed, it has long featured prominently in official proceedings in courts throughout the country, given that witnesses are routinely administered an oath upon the Bible before they are permitted to testify. *See Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 446 (7th Cir. 1992) (“From the outset, witnesses in our courts

should have been sufficient to assure the constitutionality of the display.<sup>147</sup> However, the district court went even further, specifically finding that the monument’s secular purpose predominated, given that “the *primary purpose* of the Star of Hope Mission for erecting the stone monument *was to honor William S. Mosher.*”<sup>148</sup>

While the panel majority disagreed with the dissent’s analysis, both the majority and the dissent focused on the objective nature of the constitutional test. They merely disagreed as to its application. To the extent *McCreary* allows the lower courts a hook to depart from the objective test affirmed by the Court in both *McCreary* and *Van Orden*, it is troublesome. Nonetheless, to date the departures from the objective test have been rare.<sup>149</sup> Thus, in letting *Van Orden* serve as their guide, the lower courts have articulated standards that are relatively clear-cut in the face of Supreme Court decisions that have the potential for troubling ambiguity.

#### H. Selman v. Cobb County School District

Another potentially negative effect of the *McCreary* decision is to prolong and complicate Establishment Clause litigation. In *Selman v. Cobb County School District*, the Eleventh Circuit was unable to come to a determination in reviewing a decision ordering school officials to remove from biology textbooks a sticker stating that evolution was a theory and encouraging that it “be approached with an open mind, studied carefully, and critically considered.”<sup>150</sup> Citing the Supreme Court’s decision in *McCreary*, the court observed that in Establishment Clause litigation, “the devil is in the details” and “[k]nowledge of the particular facts and specific circumstances is

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have taken oaths on the Bible, and sessions of court have opened with the cry ‘God save the United States and this honorable Court.’”).

147. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly by religious considerations.*”) (emphasis added).

148. The panel’s decision in *Staley* was dismissed as moot by the court sitting en banc. *Staley*, 332 F. Supp. 2d at 1036 (emphasis added). See also *Staley*, 461 F.3d at 513 (“The evidence is clear and indisputable that Star of Hope erected the monument to honor the life and contributions of Mosher.”). The district court nonetheless found that the memorial was unconstitutional because “Mosher was a devout Christian,” a result the panel affirmed. *Staley*, 332 F. Supp. 2d at 1036. In so holding, the district court seemed to articulate a rule that would require that any memorial to a prominent individual be stripped of all mention of religion—even if that individual’s religious belief was a motivating factor behind the works for which he or she is being honored.

149. *Staley*, 485 F.3d at 314 (dismissing *Staley*’s appeal as moot because the monument had been removed from public view but declining to vacate the district court’s judgment).

150. 449 F.3d 1320, 1324 (11th Cir. 2006).

essential to a determination of whether the governmental acts in question are religiously neutral.”<sup>151</sup>

The court concluded that it should remand for additional fact-finding because the evidentiary record was not clear with respect to the district court’s determination that the stickers had the effect of promoting religion.<sup>152</sup> While the district court had concluded that the sticker did not have a religious purpose,<sup>153</sup> it found that it had the effect of promoting religion given the particular set of circumstances leading to its adoption.<sup>154</sup> In particular, the court relied heavily on its finding that the sticker policy was adopted only after members of the community submitted a petition with 2,300 signatures asking the school board to place a “disclaimer” on its textbooks regarding evolution.<sup>155</sup> The district court believed that this sequence of events “communicate[d] to those who endorse evolution that they are political outsiders” and “to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.”<sup>156</sup> The court therefore concluded that in adopting the sticker policy after the filing of the petition, “the board created the appearance that it has ‘sided with these religiously-motivated individuals,’ and in that way ‘the Sticker sends an impermissible message of endorsement.’”<sup>157</sup>

But on appeal, the Eleventh Circuit observed that this petition could be found nowhere in the record. The only petition the court could locate was submitted *after* the sticker policy was approved.<sup>158</sup> Accordingly, the court concluded that additional fact-finding was required given that “[t]he record, even as supplemented, does not support a finding that the board was presented with a 2,300 name, anti-evolution, pro-sticker petition—or any other petition—before it adopted the sticker.”<sup>159</sup>

While the court made a point of stating that it was making no judgment on the legal framework the district court used in reaching its judgment,<sup>160</sup> by remanding the case for additional fact-finding it did

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151. *Id.* at 1322–23.

152. *Id.* at 1334–38.

153. *Id.* at 1325.

154. *Id.* at 1326.

155. *Id.* at 1329.

156. *Id.* at 1327–28.

157. *Id.* at 1328 (citation omitted).

158. *Id.* at 1330, 1332.

159. *Id.* at 1332.

160. *Id.* at 1338.

nothing to dispel the notions that the Establishment Clause required such fact-specific determinations and that a legitimate means of analysis would be to determine whether submissions to the school board before it adopted its policy somehow created an “appearance” that the board was endorsing religion. Leaving aside the effect such a ruling would have on the right of members of the community to express themselves freely in the political process, it seems implicitly to endorse a method of analysis that vastly complicates the litigation of Establishment Clause issues. Indeed, such a rule appears to depart from a strict reasonable-observer test. Is it really so reasonable to believe that an observer of the evolution sticker would be familiar with the details of all the submissions presented to the school board and their timing, much less draw an inference that particular submissions gave rise to some form of “endorsement” of religion? Despite its disclaimers, the practical effect of the Eleventh Circuit’s ruling is to sanction such an approach, at least for the moment pending subsequent appeal. Moreover, the court’s decision illustrates the potential pitfalls of the *McCreary* analysis, which in practice may lead to significant complication and prolongation of Establishment Clause litigation.<sup>161</sup>

#### IV. THE FUTURE

While the lower appellate courts have observed that the Supreme Court’s Establishment Clause jurisprudence remains in disarray after *McCreary* and *Van Orden*,<sup>162</sup> the foregoing analysis demonstrates that

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161. In an earlier decision within the circuit, a district court did uphold the use of sectarian references in invocations at the beginning of sessions of a county commission and planning commission, relying heavily on the fact that such invocations were part of a long-established historical tradition of legislative prayer. *Pelphrey v. Cobb County, Ga.*, 410 F. Supp. 2d 1324, 1345 (N.D. Ga. 2006). Nonetheless, the court still maintained that “each case is ‘fact-intensive.’” *Id.* at 1344 (quoting *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment)).

162. Numerous commentators have criticized the Supreme Court’s decisions in this area. See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* v (1995) (“Virtually no one is happy with the Supreme Court’s doctrines and decisions in this area or with its explanations of those doctrines and decisions.”); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693 (1997) (“That the Supreme Court has made a mess of this area is agreed to by most everyone, including many of the justices themselves.”); Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) (“It is by now axiomatic that the Supreme Court’s Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.”); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 536 (1991) (“A majority of the members of the current Court now appear to have concluded that the Religion Clause jurisprudence of the past fifty years is seriously flawed.”); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374 (1996) (noting

certain guiding principles have emerged. In particular, there has been a heavy reliance on *Van Orden*'s historical analysis. Indeed, in many cases it completely supplants the traditional analysis under *Lemon*. Moreover, where the *Lemon* factors are applied, their application is colored by the analysis in *Van Orden* so that displays containing religious symbols that have historical as well as religious significance are generally found permissible.

In fact, since *Van Orden* was decided, the lower courts have been highly deferential to displays of religious symbols, albeit applying different analyses in reaching the same conclusion. Some courts have gone so far as to articulate an express principle of deference to state and local officials in reviewing their judgments regarding what is a permissible display containing religious symbolism. If the state and local authorities conclude that a display has some historical significance, there is a high likelihood that it will be upheld by the federal courts.

Given the change in the composition of the Supreme Court since *McCreary* and *Van Orden*, it is likely that any future decisions regarding the constitutionality of public displays containing religious symbols will only increase this deference.<sup>163</sup> There are several directions that the Court may take in the future, many of which would make it significantly more difficult to mount challenges to the constitutionality of such displays. Several members of the Court have already expressed their concern that the current Establishment Clause tests are overly hostile to religion and are flatly inconsistent with the original meaning of the Constitution and the early practice of the Founding Generation. They have also expressed concern that the disarray in the Court's jurisprudence has spawned unnecessary and divisive litigation that is inconsistent with the underlying purposes of

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that the Court's jurisprudence "has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors").

163. See Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 516 (2006) (concluding that "*Van Orden*, which gave local governments far greater leeway to place religious iconography in public places, probably represents the wave of the future"). See also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 *NW. U. L. REV.* 1097, 1098 (2006) (arguing that Justice Scalia's *McCreary* dissent "may represent the beginnings of a revolution in Establishment Clause jurisprudence—a wholesale rethinking of the constitutional relationship between church and state"); Stephen G. Gey, *Vestiges of the Establishment Clause*, 5 *FIRST AMEND. L. REV.* 1, 1 (2006) ("We may be on the cusp of a root-and-branch change in Establishment Clause jurisprudence, which will fundamentally alter the landscape of church/state relations and produce a constitutional regime that specifically permits the government to endorse the views of the religious majority and use government programs to advance the majority's sectarian goals.").

the Establishment Clause. Such statements may serve as the precursors for fundamental change.

In particular, many of the Justices issued separate opinions in *McCreary* and *Van Orden* indicating that they believed that the states had much greater latitude in the area of religion. In his separate concurring opinion in *Van Orden*, for example, Justice Scalia reiterated his belief that “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”<sup>164</sup> Moreover, he and other members of the Court were highly critical of a test that might “inflame religious passions by making the passing comments of every government official the subject of endless litigation.”<sup>165</sup>

Similarly, Justice Thomas in a concurring opinion in *Van Orden* repeated the view he first expressed in *Elk Grove Unified School District v. Newdow* that the Establishment Clause “‘resis[ts] incorporation’ against the States.”<sup>166</sup> Under this interpretation, the clause would have “no application” against state action such as that at issue in *McCreary* and *Van Orden*.<sup>167</sup> Moreover, Justice Thomas noted that with respect to the federal government, the clause appeared to preclude only “‘legal coercion.’”<sup>168</sup>

Justice Thomas’s interpretation of the clause would have dramatic effects on plaintiffs’ ability to mount Establishment Clause challenges. As Justice Thomas observed, “[r]eturning to the original meaning” of the clause in this fashion would dramatically cut back on litigation over the public display of religious symbols by ceasing to “elevate[] the trivial to the proverbial ‘federal case,’ by making benign signs and postings subject to challenge.”<sup>169</sup> Moreover, according to Justice Thomas, his interpretation would end the current state of affairs where “the incoherence of the Court’s decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.”<sup>170</sup> Thus, as he did in his concurrence in

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164. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

165. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 908 (2005) (Scalia, J., dissenting).

166. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas, J., concurring in the judgment)).

167. *Id.* at 693.

168. *Id.* (quoting *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment)).

169. *Id.* at 694.

170. *Id.* (observing that the “Court’s jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new”).

*Newdow*, Justice Thomas renewed his call for “a more fundamental rethinking of our Establishment Clause jurisprudence.”<sup>171</sup>

Such a “fundamental rethinking” would have dramatic effects on Establishment Clause litigation. There are several principles that are found in the Court’s current caselaw that might find greater expression were it to revisit the original meaning of the clause. Some of these principles would have less dramatic effects than others. Nonetheless, all are likely to restrict the ability of potential plaintiffs to contest state and local officials’ decisions to include religious symbols in public displays.

#### A. *Abandonment of the McCreary Exception*

One of the least dramatic potential results of revisiting the Court’s Establishment Clause jurisprudence would involve abolition of the *McCreary* exception for displays that are associated with a religious purpose, which was supported by only a narrow 5-4 margin.<sup>172</sup> The dissenters in *McCreary* made clear that the purpose behind a particular display—whether religious or entirely secular—was irrelevant in their minds.<sup>173</sup> They believed that the historical record demonstrated that government could favor religion and that the Court itself “even *after* its embrace of *Lemon*’s stated prohibition of such behavior—has approved government action ‘undertaken with the specific intention of improving the position of religion.’”<sup>174</sup> Justice Scalia noted, for example, that “when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice—but [the Court has] approved it. Indeed, [the Court has] even approved (post-*Lemon*) government-led prayer to God.”<sup>175</sup>

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171. *Id.* at 698.

172. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 848 (2005).

173. *See id.* at 889–90 (Scalia, J., dissenting) (“Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century. And it is, moreover, a thoroughly discredited say-so.”) (citations omitted).

174. *Id.* at 891 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting)).

175. *Id.* at 891–92 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987); *Marsh v. Chambers*, 463 U.S. 783, 792

Another reason for abolishing the inquiry into purpose is that it is arguably irrelevant to an objective observer. The objective observer is confronted only with the display as it stands. Any inquiry into purpose is arguably too far removed from the observer's perceptions to be of any significance. Whether the government officials who erected the display intended to promote religion, or merely to create a display that would underscore the historical aspects of particular symbols, is irrelevant to the observer: the critical inquiry is what the objective observer perceives based on the nature of the display.

Indeed, this aspect of the *McCreary* rule can lead to perverse results. As Justice Scalia observed, under the rule articulated by the majority in *McCreary*, "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion."<sup>176</sup> If the display does not on its face reflect a religious purpose, then according to the *McCreary* dissenters, the inquiry should end.<sup>177</sup>

Such a revision in the Court's jurisprudence would likely have only minor consequences. The majority in *McCreary* itself acknowledged that application of this principle would be "rare."<sup>178</sup> Moreover, the facts with which the Court was presented in *McCreary* are unique and unlikely to repeat themselves. Indeed, now that government actors know that, if they express overtly religious motivations in support of a particular display, they run the risk of rendering it unconstitutional, they will remain silent. And because the *McCreary* test is an objective one, under such circumstances the display is likely to be deemed constitutional because the courts have no license to delve into the subjective intentions of the government actors. Accordingly, dispensing with the *McCreary* exception is likely to have little effect—particularly given that the lower courts are already essentially ignoring *McCreary* as an anomalous case that is very much limited to its unique facts.<sup>179</sup>

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(1983); *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 673 (1970); *Zorach v. Clauson*, 343 U.S. 306, 308 (1952)) (citations omitted).

176. *McCreary*, 545 U.S. at 901 (Scalia, J., dissenting).

177. *Id.* at 902 (arguing that "*Lemon*'s purpose prong [should] be abandoned").

178. *Id.* at 866 n.14 (majority opinion).

179. *See supra* Part II.

### B. Imposition of a Coercion Requirement

Another possible direction the court may take in the future is to impose a requirement that there be actual coercion to establish a constitutional violation.<sup>180</sup> Such a requirement would mean that displays of religious symbols would almost never be unconstitutional given that such passive displays do not involve government “coercion.” Rather, the Establishment Clause would be limited to more active governmental action—action that involves imposing the government’s will on its citizens. Such a requirement would significantly limit the scope of the Establishment Clause and would allow state and local authorities to endorse various religious viewpoints.

This interpretation of the clause finds support in the *McCreary* dissent. Justice Scalia, joined by Chief Justice Rehnquist and Justices Thomas and Kennedy, observed that “[t]he Court has in the past prohibited government actions that ‘proselytize or advance any one, or . . . disparage any other, faith or belief,’ or that apply some level of coercion.”<sup>181</sup> He noted that, while there had been some “disagree[ment] about the form that coercion must take,”<sup>182</sup> “[t]he passive display of the Ten Commandments, even standing alone,” would not implicate any of the proffered definitions of “coercion.”<sup>183</sup> This is because no one is “‘compelled to observe’” such “‘purely passive symbols,’” but rather anyone is “‘free to ignore them.’”<sup>184</sup>

180. This approach has been the subject of substantial academic debate. Compare Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (advocating the coercion test), and Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993) (maintaining that “the coercion principle, properly understood, is the best single test for when government action violates the Establishment Clause”), with Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 465 (arguing that the “coercion theory is incompatible with the main thrust of the First Amendment”), Douglas Laycock, “*Nonpreferential Aid to Religion: A False Claim About Original Intent*,” 27 WM. & MARY L. REV. 875, 922 (1986) (arguing that the coercion test allows government to aid one religion above others and makes the religion clauses redundant), and Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 578 (1991) (“[A] theory premised on coercion ignores the comparative right to participate in, or not be excluded from, the benefits generated by the political community.”).

181. *McCreary*, 545 U.S. at 908 (Scalia, J., dissenting) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)) (citation omitted).

182. *Id.* at 908–09.

183. *Id.* at 909.

184. *Id.* (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)). See also *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (“[the plaintiff] need not stop to read [the Ten Commandments display] or even look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.”).

Application of the coercion requirement would significantly limit the role of the Establishment Clause with respect to passive displays of religious symbols. Moreover, as Justice Thomas observed in his *Van Orden* concurrence, it would “simplify” the Court’s task and “avoid the pitfalls present in the Court’s current approach to such challenges.”<sup>185</sup> This, in turn, would eliminate the “unintelligibility” of the rules the Court has asked the lower courts to apply:

The unintelligibility of this Court’s precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application.<sup>186</sup>

In reality, however, applying the coercion test would likely remove public displays of religious symbols entirely from the ambit of judicial review. As the *McCreary* dissent observed, passive displays of religious symbols do not “coerce” anyone to do anything,<sup>187</sup> and accordingly there would be little occasion for judicial review of such government actions.

### C. A Jurisdictional Approach

While the coercion test would undoubtedly have a dramatic effect on judicial review of government-sponsored displays of religious symbols, Justice Thomas offered an even more dramatic interpretation of the Establishment Clause in his *Van Orden* concurrence—one that would have far-reaching consequences beyond the religious symbol cases. As Justice Thomas observed, there is historical evidence suggesting that the Establishment Clause was intended as a jurisdictional provision that would reinforce the states’ primacy in matters involving religion.<sup>188</sup> Accordingly, the clause, if

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185. *Van Orden*, 545 U.S. at 694.

186. *Id.* at 697.

187. *McCreary*, 545 U.S. at 908–09 (Scalia, J., dissenting).

188. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (referring to his analysis previously expressed in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment), and in *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 & n.3 (2002) (Thomas, J., concurring)).

interpreted literally, would have no application to state actors but rather would apply solely to the federal government. At a minimum, under this interpretation, the clause evidences a strong principle of deference to state and local authorities in matters involving religion.<sup>189</sup>

Justice Thomas's interpretation finds significant support in both the text and history of the Establishment Clause. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."<sup>190</sup> "As a textual matter," the primary purpose of the clause was to "prohibit[] Congress from establishing a national religion."<sup>191</sup> The text is "consistent with the prevailing view" during the Founding period "that the Constitution *left religion to the States*."<sup>192</sup> Thus, both the text and history of the clause demonstrate that it is "best understood as a federalism provision."<sup>193</sup>

189. See *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment) ("[T]he Clause made clear that Congress could not interfere with state establishments . . ."); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).").

190. U.S. CONST. amend. I.

191. *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment). As the Court noted in *Wallace v. Jaffree*:

"The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ."

472 U.S. 38, 54 n.36 (1985) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877, at 594 (1851) (emphasis omitted)).

192. *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment) (emphasis added).

193. *Id.* This interpretation has received substantial support in recent academic commentary. See, e.g., AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 41 (1998) (concluding that the clause is a "federalism provision"); SMITH, *supra* note 162, at 18 (the religion clauses were an "exercise in federalism"); Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 650 (1999) ("[R]atification of the Constitution in 1788 and the Bill of Rights in 1791 had no immediate legal effect on church-state arrangements in the states and altered nothing in matters regarding federal involvement with religion. They merely made explicit the jurisdictional policies that were already implicit in the constitutional order."); Lash, *supra* note 41, at 1099–1100 ("There is a general consensus among legal historians that at least one of the purposes of the Establishment Clause was to protect state religious establishments from federal interference."); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 588 (2006) ("Justice Thomas's federalism interpretation most accurately captures the Establishment Clause's original meaning."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion.").

Indeed, the Framers repeatedly emphasized the primacy of local authorities over matters involving religion.<sup>194</sup> James Madison observed in the Virginia ratification debates, for example, that “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”<sup>195</sup> James Iredell similarly stated in defending the proposed Constitution that “[i]f any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, ‘Who authorized the government to pass such an act?’”<sup>196</sup> Thus, even before the Establishment Clause was embodied in the text of the Constitution, there was a general recognition that primary authority in matters involving religion rested with the state and local authorities.

Despite these structural guarantees, there remained some concern that the federal government might usurp authority to act with respect to the established religions existing in many of the states. Accordingly, the proposed Bill of Rights contained express restrictions on the national government. As James Madison observed in describing the proposed amendments, certain of the state conventions “seemed to entertain an opinion” that the Necessary and Proper Clause might enable Congress to “make laws of such a nature as might infringe the rights of conscience, and establish a national religion.”<sup>197</sup> In order to reinforce this jurisdictional division between the states and the federal government and to better secure religious liberty, the Framers sought to make this division of power express when crafting the Bill of Rights.

Congress went through several drafts in creating what ultimately became the Establishment Clause. James Madison initially proposed

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194. When the Constitution was ratified, several of the states had established churches. See Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 960 (1996) (“Many states had exclusive religious establishments or settlements, and it was generally conceded that the federal government could not displace those arrangements.”); Paulsen, *supra* note 193, at 320 (“Many states maintained established churches at the time they ratified the first amendment . . .”); William W. Van Alstyne, *What Is “An Establishment of Religion”?*, 65 N.C. L. REV. 909, 910 (1987) (“As of 1787, when the Constitution was proposed, a number of states maintained established religions, i.e., specific churches and ministries officially favored by state government, religions thus themselves ‘established’ by state law.”).

195. 5 THE FOUNDERS’ CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987).

196. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 194 (Jonathan Elliot ed., 2d ed. 1891).

197. 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789).

that the Constitution be amended to provide that “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”<sup>198</sup> The House Committee of the Whole subsequently debated language providing that “no religion shall be established by law, nor shall the equal rights of conscience be infringed.”<sup>199</sup> Madison indicated that this provision meant “Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”<sup>200</sup> According to Madison, “the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.”<sup>201</sup> At the same time, however, some “thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments.”<sup>202</sup> Thus, the debates demonstrate Congress believed that the federal government had limited authority to act in religious matters.<sup>203</sup> Nonetheless, in order to dispel any concerns, the Framers sought to make this division of power express.

Early commentary on the Constitution confirmed this understanding of the new amendment. In his *Commentaries on the Constitution*, Justice Story stated, for example, that under the Establishment Clause, “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.”<sup>204</sup> The clause, according to Story, was merely designed to “prevent any national ecclesiastical establishment.”<sup>205</sup> Similarly, William Rawle, in his influential treatise on the Constitution, concluded that “[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It

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198. *Id.* at 451.

199. *Id.* at 757.

200. *Id.* at 758.

201. *Id.*

202. *Id.* at 757 (remarks of Roger Sherman).

203. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”).

204. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833).

205. *Id.* § 1871.

would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress.”<sup>206</sup> Such views have been further confirmed by modern scholarship, which has described the Establishment Clause as an “exercise in federalism” and as making “explicit jurisdictional policies that were already implicit in the constitutional order.”<sup>207</sup>

The Establishment Clause therefore reflects a fundamental division of power between the states and the federal government that runs throughout the Constitution. As the Supreme Court has observed, “[i]t is incontestable that the Constitution established a system of ‘dual sovereignty.’”<sup>208</sup> While the states “surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’”<sup>209</sup> This fundamental aspect of our constitutional system is “reflected throughout the Constitution’s text.”<sup>210</sup> In particular, “residual state sovereignty” is “implicit . . . in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones.”<sup>211</sup>

Because the Constitution is “‘an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.’”<sup>212</sup> The Supreme Court has observed that this aspect of our constitutional structure

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206. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), reprinted in 5 THE FOUNDERS’ CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987) (emphasis omitted).

207. See, e.g., SMITH, *supra* note 162, at 18 (“The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism.”); David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (noting the “federalistic motivation for the establishment clause”); Dreisbach & Whaley, *supra* note 193, at 650 (“[ratification of the Constitution] made explicit the jurisdictional policies that were already implicit in the constitutional order”); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) (“[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.”); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (“[The Establishment Clause] acts as a sort of ‘federalism-based’ guarantee that merely delineates the proper roles of the federal and state governments with respect to religious establishments.”).

208. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

209. *Id.* at 918–19 (quoting THE FEDERALIST NO. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987)).

210. *Id.* at 919.

211. *Id.* See also *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers.”).

212. *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1900 (1833)).

represents a “unique contribution of the Framers to political science and political theory.”<sup>213</sup> The “separation of the two spheres is one of the Constitution’s structural protections of liberty.”<sup>214</sup> “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>215</sup>

In implementing this division of authority, “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>216</sup> Areas of fundamentally local concern such as marriage,<sup>217</sup> domestic relations,<sup>218</sup> and criminal law<sup>219</sup> were reserved to the state and local authorities. Religion—and in particular decisionmaking by local governmental bodies concerning the public display of symbols that have both religious and historical meaning—is just such a uniquely local matter. Indeed, “it is common knowledge that the Constitution’s framers thought that religion was a matter for the states, not for the national government . . . .”<sup>220</sup> Under our Constitution, “the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions.”<sup>221</sup> While no state or local authority may “establish” a religion, the Constitution recognizes that in matters involving religion, state and local authorities are the primary decisionmakers.

Because the Establishment Clause was likely intended to be a jurisdictional provision, as Justice Thomas observed in *Van Orden* and *Newdow*, it resists incorporation against the states under the Fourteenth Amendment.<sup>222</sup> The provision embodies fundamental structural guarantees, as opposed to many of the other provisions of the Bill of Rights, which on their face are designed to protect

213. *Printz*, 521 U.S. at 921 n.11 (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)).

214. *Id.* at 921.

215. *New York*, 505 U.S. at 181–82 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

216. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

217. *Trammel v. United States*, 445 U.S. 40, 50 (1980).

218. *Id.*

219. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

220. SMITH, *supra* note 162, at 119.

221. *Ex parte Garland*, 71 U.S. 333, 397 (1866) (quoting STORY, *supra* note 204, § 1873). See also AMAR, *supra* note 193, at 34 (observing that the Establishment Clause “calls for the issue [of establishment] to be decided locally”).

222. See *supra* note 188.

individual rights from government infringement. Accordingly, the text and history of the Establishment Clause suggest that it does not place any restrictions on state and local authorities or their actions with respect to matters involving religion.

Moreover, the same considerations that drove the Framers to reserve the power over matters of religion to the states and local authorities apply today. There are dramatic cultural and religious differences both among and within the states. The Constitution's reservation of local control over matters touching upon religion wisely allows for a diversity of practices instead of imposing a judicially enforced, uniform rule. Due regard should be given to local authorities' traditional role in matters of religion, particularly where—as in the religious symbol cases—the issue before the Court implicates local control over state or municipal property.<sup>223</sup>

#### *D. Deference to State Decisionmaking*

While Justice Thomas's jurisdictional interpretation of the clause may not be able to garner majority support, a deferential approach to state decisionmaking regarding religion may well emerge in the Court's future decisions. As the four dissenters emphasized in *McCreary*, the Court has “repeated many times that, where a court undertakes the sensitive task of reviewing a government's asserted purpose, it must take the government at its word absent compelling evidence to the contrary.”<sup>224</sup> The dissenters were highly critical of what they perceived as the majority's “reflexive skepticism of the government's asserted secular purposes,” which they asserted was “inconsistent with the deferential approach taken by [the Court's] previous Establishment Clause cases.”<sup>225</sup> Indeed, the lower courts already appear to be taking a highly deferential approach in reviewing state and local authorities' decisions regarding the public display of religious symbols. In the cases decided since *McCreary* and *Van Orden*, courts have been hesitant to strike down as unconstitutional local authorities' decisions in this area.<sup>226</sup>

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223. *Cf.* *New York v. United States*, 505 U.S. 144, 161 (1992) (holding that the federal government may not “commandeer” or direct local authorities).

224. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 903 n.9 (2005) (Scalia, J., dissenting).

225. *Id.*

226. *See, e.g.,* *Skoros v. City of New York*, 437 F.3d 1, 40 (2d Cir. 2006) (upholding holiday display policy); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005) (upholding Ten Commandments display); *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 638–39 (6th Cir. 2005) (same); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th

Moreover, a principle of deference might serve to reduce the scope of the litigation regarding public displays of religious symbols, which has continued unabated. It would also allow for diverse practices among various jurisdictions that are more consistent with the desires of the local populations. Thus, the City of Plattsmouth would remain free to preserve its Ten Commandments monument, while Washburn University would remain free to display a sculpture that was critical of the Catholic religion. Instead of the courts being the ultimate arbiters of what is permissible, the political process would decide such matters. Such a result may have the salient effect of eliminating some of the divisiveness that has accompanied Establishment Clause litigation, where the judiciary is often called upon to reverse the popular decisions of local political authorities.

#### V. CONCLUSION

Despite its recent decisions in *McCreary* and *Van Orden*, the Court's jurisprudence regarding the constitutionality of public displays of religious symbols is in need of further clarification. Given the disarray in the Court's cases, parties on opposite ends of the political spectrum are able to latch on to various statements in the Court's decisions to justify their positions. This, in turn, has merely spurred continued litigation, with the parties having no incentive to relent, given the lack of clarity in the law. Such an outcome is not in anyone's interest and imposes significant and unnecessary costs on states and municipalities facing an onslaught of lawsuits over relatively innocuous actions that implicate religion.

Nonetheless, there are certain principles that may be adduced from the Court's decisions that, if faithfully applied, should curtail much of the litigation. First, courts should be able to rely upon the deference accorded to public displays that have historical significance to dispose of most cases. Long-standing displays of symbols such as the Ten Commandments, which have a recognized historical role in contributing basic legal and moral principles that have had a significant impact on Western civilization, should easily pass muster under the Court's recent decisions. Again, such principles may dispose of most cases with little cost and should bring clarification to an area that sorely needs it. Second, the Court's adherence to an objective test for ascertaining whether state action constitutes an

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Cir. 2005) (upholding anti-Catholic display); *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 407–08 (4th Cir. 2005) (upholding Pledge of Allegiance).

“endorsement” of religion should make the remaining cases relatively clear-cut. Instead of relying upon a searching inquiry into the motivation of state actors, courts should be able merely to assess the objective characteristics of public displays to ascertain whether they constitute an endorsement of religion.

At the end of the day, however, we may have to wait for the Court to revisit this area in order to bring the clarification necessary to end the waves of wasteful and often divisive litigation. The Court’s new composition brings with it the possibility that it may adopt new principles that hold the potential for even greater clarification. For example, dispensing with the *Lemon* test altogether in favor of an express principle of deference to state action regarding public displays of symbols having religious significance may go a long way toward staving off further litigation. Moreover, it would have the salutary effect of more closely tracking the original meaning of the Establishment Clause and affording states and municipalities the opportunity to adopt their practices to local tastes. In some jurisdictions, there may be greater tolerance for the public display of religious symbols; in other jurisdictions, the tolerance may not be as great. A principle of deference to state and local authorities would allow for a diversity of practices that would accommodate the strongly-held religious and secular values of the American people.