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ESTABLISHMENT ALONG THE BORDERLINE: SUPREME COURT JURISPRUDENCE ON TEN COMMANDMENTS DISPLAYS

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Abstract: Throughout the 20th and subsequent centuries, the United States Supreme Court has debated the First Amendment's regulations on religious establishment. Particularly, the belief in the "separation between church and state" has become a bedrock constitutional value for some, while for others, it has been rejected for a more accommodationist approach to religion and government intermingling. In 2005, the debate over the legality of religious establishment became further muddied through *McCreary County v. ACLU* and *Van Orden v. Perry.* Both cases revolved around whether a state institution would be allowed to display the Ten Commandments on its property: for the former, in a Kentucky courthouse; for the latter, the Texas state capitol. McCreary ruled the display unconstitutional, yet Van Orden decreed otherwise. These decisions created incongruity in the Supreme Court's line of reasoning, worsening the divide between separationist and accommodationist interpretations of the Bill of Rights. However, by situating these cases in a chronology of similarly back-and-forth decisions on the establishment, it becomes clear that the Supreme Court has purposefully adopted a vague interpretation of the Establishment Clause. Doing so ensures that separation of church and state remains a viable ideal and realistic to popular American Christian sentiment. I craft my argument using Justice Stephen Breyer's employment of a "borderline" to which the Court must adhere. Along it, there is a critical respect for Judeo-Christian values that underscore the American social fabric that the Bench must not uproot. Meanwhile, the 2005 cases place barriers on allowing religious imagery on public grounds by forcing governments to seriously weigh legal consequences, wherein overt attempts to establish a religion can be entirely struck down. Thus, I argue that the Establishment Clause must be kept in vague language that neither entirely codifies separationism nor accommodationism for the sake of lasting societal cohesion. McCreary and Van Orden necessarily came to opposing conclusions on the Ten Commandments displays' constitutionality to enshrine the Establishment Clause as a truly secular guide.

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In his 1952 *Zorach v. Clauson* majority opinion, Justice William Douglas declared, "we are a religious people whose institutions presuppose a Supreme Being."[2] The Supreme Court of the United States has attempted to marry the foundational Protestant religiosity of the American people with First Amendment restrictions on establishment. Specifically, Ten Commandments case law has struck at the legality of government-sponsored religious iconography. *McCreary County v. ACLU* (2005) and *Van Orden v. Perry* (2005) saw the overturning of Kentucky courthouse Ten Commandments displays and the approval of another at the Texas State Capitol, respectively, seemingly creating incongruity. The opinions, however, reveal a line of constitutional reasoning that protects a separationist approach with the necessary flexibility. The outcomes prevent national division that the very spirit of the Establishment Clause implies. *McCreary* and *Van Orden* do not reach the same conclusion on the Ten Commandments displays' constitutionality by design. Together, they follow the Establishment Clause precedent that reasonably delineates a necessary but situational relationship between religion and government derived from national tradition and political harmony.

McCreary v. ACLU sparked a constitutional challenge to a King James' Bible Ten Commandments display alongside an Exodus passage in the McCreary County, Kentucky courthouse. Since its creation, the American Civil Liberties Union of Kentucky has held a strict separationist view of the Establishment Clause. Thus, the Ten Commandments display being "'readily visible to…county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote'" came as a flagrant violation.[3] McCreary County argued that the Ten Commandments served a secular purpose as the basis for Kentucky law. Two other subsequent displays were added to better adhere to secular principles and to avoid a federal district court ruling. The second display included "eight other foundational documents, including the Declaration of Independence."[4] However, the apparent religious passages continued to make McCreary County's

[2] Douglas, William O, "Zorach et al. v. Clauson et al," Legal Information Institute, n.d. https://www.law.cornell.edu/supremecourt/text/343/306.
[3] Dunman, L. Joe, "Religion in the Law: An Open Access Casebook (1st Ed.)," *SSRN Electronic Journal*, August 20, 2021, https://doi.org/10.2139/ssrn.3903347, 194-195.
[4]Schaps, Mike, "Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right," *California Law Review, Inc.* 94, no. 4 (July 2006): 1243–69, https://doi.org/10.2307/20439063, 1255.

secular claims suspicious. The final attempt included documents of equal physical size to the Ten Commandments display, such as the Magna Carta, Mayflower Compact, and the Kentucky Constitution's Preamble; in spite of this, the ACLU continued its pursuit, leading to the United States Supreme Court's involvement. Primarily utilizing the *Lemon* test, a three-pronged assessment to determine if a religious establishment has occurred, Justice David Souter maintained that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[5] The majority concluded that the display violated the Establishment Clause for having an unavoidable religious agenda that no later secular additions could obfuscate.

In a contrasting outcome, a majority ruled the Ten Commandments displayed in *Van Orden v. Perry* constitutional. Petitioner Thomas Van Orden filed a suit against the Texas government for placing a Ten Commandments display on the State Capitol Grounds. This exhibit was privately donated by the Fraternal Order of the Eagles of Texas to spread their anti-delinquency message and engraved with "two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ."[6] Van Orden argued that his First Amendment right had been violated due to a religious expression on the public grounds he frequented. Moving away from the *Lemon* test as a definitive marker of constitutionality, the Court aligned with Chief Justice William Rehnquist's accommodationist view of the Establishment Clause. Though often "the Rehnquist Court did not go nearly as far as Rehnquist would have liked in changing the law regarding the Establishment Clause," *Van Perry v. Orden* successfully upheld a religious and governmental relationship.[7] One of the primary objectives of Chief Justice Rehnquist was relaxing the Establishment Clause's restrictions.[8] Despite Van Orden identifying a religious image on state property, it held a passive and historically relevant position that could not be construed as coercive. Its non-imposing nature gained credence as the display had been in place for 40 years without challenge, whereas in *McCreary*, the displays were newly placed. Justice Breyer agreed the lack of legal battles over four decades "suggest more strongly than any set of

[5] Dunman, "Religion in the Law," 197.
[6] Dunman, "Religion in the Law," 205.
[7] Chemerinsky, Erwin, "Assessing Chief Justice William Rehnquist," *University of Pennsylvania Law Review* 154, no. 6 (2006): 1331-64, https://doi.org/10.2307/40041341, 1354.
[8] Chemerinsky, "Assessing Chief Justice William Rehnquist," 1343.

formulaic tests that few individuals…are likely to have understood the monument as amounting…to a government effort to favor a particular religious sect…"[9] Conforming to the Rehnquist position against strict separation, the plurality rejected Van Orden. In combination with *McCreary*'s focus on a display's intent regarding time, *Van Orden* made the constitutionality of public Ten Commandments scenes dependent on physical, situational context.

Legal precedent for religious display cases oscillates between separation and accommodation, justifying the opposing decisions from *McCreary* and *Van Orden*. The Court relied on *Stone v. Graham* (1980) to uphold the Ten Commandments exhibition display in *Van Orden*. Chief Justice Rehnquist placed importance on the setting of the display in determining how intrusive it is on onlookers. He writes that "the placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone,* where the text confronted elementary school students every day."[10] *Stone* focused on a Ten Commandments display in elementary schools that created a coercive environment for impressionable students. Meanwhile, in *Van Orden*, the mere existence of the Ten Commandments in the open space of the Texas State Capitol did not comparably pressure onlookers. Conversely, the displays in Kentucky courthouses in *McCreary* were required "[to] be posted in 'a very high traffic area'…"[11] Kentucky eventually created an exhibit with a more secular title and theme of "The Foundations of American Law and Government," but Justice Souter was not convinced that the secular purpose of the display outweighed the clearly religious intent. He deferred to the reasonable observer who would have had a memory of the original display's sole focus on Judeo-Christian passages.[12] Thus, the framing, both in a physical and a temporal sense, of the displays played a significant role in the Supreme Court's contrasting decisions in 2005.

Lynch v. Donnelly preceded *Graham* in 1984, now approving the public display of a crèche during the holiday season in Pawtucket, Rhode Island. Accepting religious involvement as inextricably linked to the American national identity and civil life, Pawtucket "has principally

[9] Dunman, "Religion in the Law," 209.
[10] Dunman, "Religion in the Law," 207.
[11]Dunman, "Religion in the Law," 194.
[12]Dunman, "Religion in the Law," 197.

taken note of a significant historical religious event long celebrated in the Western World."[13] By placing the crèche alongside secular objects such as reindeer and Santa's house, the crèche integrated into the widely celebrated holiday tradition. Combined with other historic Christian invocations, such as "congressional and executive recognition of the origins of Christmas, or the exhibition of religious paintings in governmentally supported museums," the Court could not have realistically singled out the crèche.[14] If violative, government buildings across the United States would be unreasonably scrutinized for containing religious images deemed essential to the foundational values of the nation, like the Supreme Court, Capitol, and Library of Congress's Jefferson Building. In *Van Orden*, Chief Justice Rehnquist makes further reference to the Ten Commandments as a source of American values. He asserts that "since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew" in the Supreme Court building.[15] While religious in nature, the Ten Commandments fundamentally shaped Western law and, thus, American law, giving them civic value. Following the reasoning from *Lynch*, *Van Orden* ensures that the Establishment Clause respects the core religious identity of the United States, as "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[16] The 2005 decision keeps with the 1984 Court to preserve the national spirit.

Placing *McCreary* and *Van Orden* in the chronology of other display case law unravels their contradictory appearance. The 2005 decisions present the back-and-forth precedent as "borderline cases."[17] Justice Stephen Breyer applies the "borderline cases" reasoning in his *Van Orden* concurrence. Establishment Clause vagueness mitigates attempts at serious religious encroachment. Before *McCreary*, "government actors inclined to erect a display of dubious constitutionality had little reason for refrain" because "at worst they might be sued."[18] After the decision, if a government attempts to place a display and hopes to eventually gain governmental approval by gradually secularizing the piece, "government actors stand to lose all by violating the

[13] Burger, Warren E, "Dennis Lynch, Etc., et al., Petitioners v. Daniel Donnelly et al," Legal Information Institute, n.d, https://www.law.cornell.edu/supremecourt/text/465/668.
[14] Burger, "Dennis Lynch, Etc., et al., Petitioners v. Daniel Donnelly et al."
[15] Dunman, "Religion in the Law," 206.
[16] Dunman, "Religion in the Law," 207.
[17] Dunman, "Religion in the Law," 208.
[18] Schaps, "Vagueness as a Virtue," 1265.

Establishment Clause in the first instance."[19] The Kentucky counties attempted to retain a Ten Commandments display by slowly conforming to judicial approval. However, the vague case law between *McCreary* and *Van Orden* effectively forces the state or local government to weigh the potentially heavy legal implications of installing the display. The Supreme Court noted that the religious primary legislative purpose of the *McCreary* display had always existed since its first rendition, only being insincerely softened to fit Establishment Clause parameters. To the benefit of separationists, there is a higher chance for a display to be completely removed by avoiding a universal constitutional standard that local governments could work around much in the way McCreary County attempted.

Justice Breyer's concurrence in *Van Orden* further advanced the necessary vagueness of the Establishment Clause in religious display cases because he departed from the *Lemon* test. He writes, "the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation…create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[20] He emphasized the responsibility vested in the justices to uphold social order that removing religious images central to the nation's heritage would undermine. The reasoning follows *Lynch* by recognizing the cohesive role that religion plays. By making the Establishment Clause universally antagonistic toward the Ten Commandments, Justice Breyer argues that "religious divisions…recognized in *Van Orden*, number among the most dangerous risks to Americans' sense of themselves as coparticipants in a venture shaped by a common heritage and shared ideals."[21] An Establishment Clause that restricts all governmentally-sponsored religious symbolism turns the judicial system against the spirit of the nation. The Supreme Court has a duty to preserve religious guardrails that separate church from state. Yet, the *McCreary* and *Van Orden* rulings also underscored necessary flexibility that does not charge the government strictly against the religious beliefs of the American people: in 2014, over 70% of Americans had no objections to public Ten Commandments displays.[22] Justice

[19] Schaps, "Vagueness as a Virtue," 1266.
[20] Dunman, "Religion in the Law," 209.
[21] Fallon, Jr., Richard H, "A Salute to Justice Breyer's Concurring Opinion in 'Van Order v. Perry,'" *The Harvard Law Review Association* 128, no. 1 (November 2014): 429–33, http://www.jstor.org/stable/24643933, 433.
[22] Klarman, Michael J, "Judicial Statesmanship: Justice Breyer's Concurring Opinion in 'Van Orden v. Perry,'" *The Harvard Law Review Association* 128, no. 1 (November 2014): 452–56, https://www.jstor.org/stable/24643935, 456.

Breyer's concurrence hoped to prevent the judiciary from alienating the majority of Americans from their own political institutions.

Justice Breyer's concurrence also leverages vagueness to mitigate the Supreme Court's more radical voices as well. Justice John Paul Stevens dissented in *Van Orden*, pushing for a strict separationist interpretation of the Establishment Clause: the Ten Commandments, as a "Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers feel like outsiders in matters of faith, and strangers in the political community."[23] To him, the display made religious morality paramount to the Fraternal Order of the Eagles of Texas' anti-delinquency efforts, with the state sponsoring the effort. Opposingly, in *McCreary,* Justice Scalia believes that the Establishment Clause legally discriminates against polytheists and non-believers, with Judeo-Christian monotheism given a protected status emanating from the nation's Protestant origins.[24] The concurrence uplifts the moderate voice in the judiciary as a vehicle for civil discourse on religion's role in the American people's lives. The Court appears split between strict separationism and loose accommodation, with Breyer searching for a compromise between both.

Hence, Justice Breyer emphasizes the "borderline" in the Ten Commandments cases to practice a rational Establishment Clause. By over-enforcing strict separationism, expansive removal of the Ten Commandments and other images would become "fodder for political ads…The inevitable political backlash would make it more likely that future presidents and senators, and the future Supreme Court justices they nominate and confirm, would be hostile" to church-state neutrality.[25] By generating hostility toward all Ten Commandments displays, the separationist justices work contrary to their vision. Their decisions do not exist in a political vacuum. Popular backlash leads to politicians who take advantage of the electorate's anger; then, the Supreme Court is downstream, being appointed and confirmed by those elected leaders. Justice Breyer recognizes that separationism can only persevere in the long term through selective permission of religious displays rather than complete removal in a more uniform jurisprudential manner. Historically, such aggression toward religious involvement in public life

[23] Dunman, "Religion in the Law," 211.
[24] Dunman, L. Joe, "Religion in the Law," 202-203.
[25] Schaps, "Vagueness as a Virtue," 1264.

has "contributed significantly to the reemergence of religious fundamentalists in American politics and the rise of the Religious Right," consequent of the proliferation of strict separationist rulings in the 1960s that 70 to 80% of Americans still oppose.[26] Even a liberal justice like Breyer recognized the profoundly political and popular role Judeo-Christian images play in the United States. He also appears to signal to liberal voters who may have felt betrayed by his decision to support the display's constitutionality by suggesting that it is for their electoral benefit in the long term. To prevent the heavy incursion of religion on government that Justice Scalia endorsed, concessions need to be made that give leeway to the Ten Commandments' legality based on temporal and physical setting, not the display itself.

McCreary v. ACLU and *Van Orden v. Perry* represent the Court's historic balancing of religious interests intrinsic to national identity with that of government neutrality. While the cases come to independent conclusions on the constitutionality of Ten Commandments displays, when placed together in precedent, they outline a deliberately vague and flexible interpretation of the Establishment Clause. As expressed through Justice Breyer's swing vote, the survival of separationism rests on its ability to accept religion's integrated role in American life. No test, whether under *Lemon* standards, endorsement, or coercion, properly determines the role of the Ten Commandments in civil affairs. The "borderline" allows for context to be the scrutable issue instead of the Commandments themselves. *McCreary* and *Van Orden* necessitate each other to define an Establishment Clause respectful of American tradition while avoiding social upheaval that could threaten democratic processes.

[26] Klarman, "Judicial Statesmanship," 456.