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Constitutional Law: Judicial Oversights—Inconsistency in Supreme Court Establishment Clause Jurisprudence

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CONSTITUTIONAL LAW: JUDICIAL OVERSIGHTS—INCONSISTENCY IN SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

Van Orden v. Perry, 125 S. Ct. 2854 (2005)

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Texas State Capitol grounds contain a display of seventeen monuments and twenty-one historical markers.[1] Amidst the monuments, Texas state officials erected a six-foot high and three and one-half foot wide structure inscribed with the Ten Commandments.[2] The State accepted the monument from the Fraternal Order of Eagles, a national civic organization.[3] Forty years after the erection of the monument, Petitioner[4] brought a 42 U.S.C. § 1983 action in the District Court for the Western District of Texas seeking a declaration that the monument violated the Establishment Clause of the First Amendment[5] and an injunction for its removal.[6] The district court ruled against the Petitioner and held that the

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* To my mother and father, Deborah and Jeffrey, and my sister, Jennifer, whose love & support I cherish deeply.

1. Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005). The monuments included in the display are the following: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statute of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. *Id.* at 2858 n.1.

2. *Id.* at 2858. The monument also includes other religious inscriptions. *Id.* Carved above the text of the Commandments is an eagle holding the American flag, two smaller tablets inscribed with a depiction of an ancient script, and an eye inside of a pyramid. *Id.* Below the text of the Commandments are two Stars of David and the Greek letters Chi and Rho, representing Christ. *Id.*

3. *Id.* In their purpose of combating juvenile delinquency, the Eagles sought to emphasize the Commandments' role in shaping civil morality. *Id.* at 2876 (Breyer, J., concurring). "These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in [juvenile] delinquency." *Id.* at 2878 n.12 (Stevens, J., dissenting) (citing 1961 Tex. Gen. Laws 1995). Other justices claimed that the Eagles sought to convey a religious message. *Id.* at 2892 (Souter, J., dissenting).

According to their website, the Eagles' mission statement is as follows: "The Fraternal Order of Eagles, an international non-profit organization, unites fraternally in the spirit of liberty, truth, justice and equality, to make human life more desirable by lessening its ills, and by promoting peace, prosperity, gladness and hope." Fraternal Order of Eagles International Website, http://www.foe.com (last visited Dec. 14, 2005).

4. Petitioner, Thomas Van Orden, is a resident of Austin and a native Texan. *Van Orden*, 125 S. Ct. at 2858. Van Orden also holds a law degree from Southern Methodist University. *Id.*

5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

6. *Van Orden*, 125 S. Ct. at 2858.

monument did not contravene the Establishment Clause.[7] Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed.[8]

The United States Supreme Court affirmed[9] and HELD that the monument did not contravene the Establishment Clause.[10] Further, the Court determined that the test set forth in *Lemon v. Kurtzman* was not the proper test for deciding whether the monument violated the Establishment Clause.[11] Instead, the plurality applied an alternative test consistent with the "history and tradition" test of *Marsh v. Chambers*.[12]

Over the years, the Supreme Court has considered various Establishment Clause challenges, upholding some[13] and invalidating others[14] under the Establishment Clause. However, despite numerous opportunities to clarify its position, the Supreme Court has demonstrated remarkable inconsistency.[15] The Court set forth the foundational

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7. *Id.* Applying the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court determined that the legislature had a valid, secular purpose in installing the monument. Van Orden v. Perry, No. A-01-CA-833-H, 2002 WL 3273462, at *4 (W.D.Tex. Oct. 2, 2002), *aff'd*, 351 F.3d 173 (5th Cir. 2003). Under the second prong of *Lemon*, the court concluded that the monument did not have the primary effect of either advancing or inhibiting religion. *Id.* at *5. The District Court did not consider the third prong of the *Lemon* test since the Petitioner conceded this point. *Id.* at *3.

8. Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003).

9. *Van Orden*, 125 S. Ct. at 2864.

10. *Id.*

11. *Id.* at 2861 (plurality opinion).

12. *Id.*; Marsh v. Chambers, 463 U.S. 783, 786, 790-92 (1983).

13. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 644, 645 (2002) (upholding a school voucher program); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (allowing religious school groups to use school facilities); Agostini v. Felton, 521 U.S. 203, 208-09 (1997) (upholding a program which allowed public employees to teach remedial classes at a religious school); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822-23, 824, 846 (1995) (holding that the Establishment Clause does not bar disbursement of funds from student activity fees to religious organizations); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993) (permitting a public school district to provide a sign-language interpreter to a deaf student at a Catholic high school); Lynch v. Donnelly, 465 U.S. 668, 670-71, 687 (1984) (upholding a municipality's Christmas display including a nativity scene); Marsh v. Chambers, 463 U.S. 783, 784-85, 792-93 (1983) (maintaining legislative prayer).

14. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (holding unconstitutional student-initiated and student-led prayer at school football games); Lee v. Weisman, 505 U.S. 577, 599 (1992) (invalidating school sponsored graduation prayers); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989) (holding the display of a lone nativity in a courthouse unconstitutional but permitting the display of a menorah outside of a state building); Edwards v. Aguillard, 482 U.S. 578, 582 (1987) (holding unconstitutional a law mandating a creationism curriculum when evolution was taught); Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (rejecting a law mandating a daily minute of silence for meditation or voluntary prayer).

15. *See generally* Adam C. Calinger, *Original Intent & The Ten Commandments: Giving Coherency to Ten Commandments Jurisprudence*, 3 GEO. J.L. & PUB. POL'Y 257, 270-82 (2005) (discussing Establishment Clause jurisprudence over the past fifty years).

Establishment Clause test in *Lemon v. Kurtzman.*[16] In *Lemon*, the Court considered the validity of two state statutes providing state aid to church-related elementary and secondary schools.[17] Under the first statute,[18] the state provided a fifteen percent supplement of teachers' salaries in nonpublic elementary schools.[19] The other statute[20] authorized state reimbursement to nonpublic schools of the cost of teacher salaries and instructional materials in secular subjects.[21] To ensure separation between church and state, both statutes contained strict restrictions.[22] The Rhode Island district court concluded that the Rhode Island statute violated the Establishment Clause because it promoted "excessive government entanglement."[23] In contrast, the Pennsylvania district court validated the Pennsylvania statute.[24]

The Supreme Court reversed the Pennsylvania district court, affirmed the Rhode Island district court,[25] and held that both statutes contravened the Establishment Clause.[26] Garnering criteria from prior cases, the Court established a three-prong test for applying the Establishment Clause.[27]

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16. 403 U.S. 602 (1971).

17. *Id.* at 606.

18. *Id.* at 607 (citing Rhode Island Salary Supplement Act, R.I. GEN. LAWS § 16-51-1 (repealed 1980)).

19. *Id.* The supplement was not to exceed 15% of the teacher's current salary and, in any case, the teacher's salary could not exceed the maximum paid to teachers in public schools. *Id.* To be eligible, teachers had to teach at a nonpublic school where the average per student cost of secular education was less than the average cost in public schools. *Id.*

20. *Id.* at 609 (citing Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 PA. STAT. ANN. §§ 5601-08 (repealed 1977)).

21. *Id.* at 606-07. Under the Pennsylvania statute, the state Superintendent of Public Instruction was authorized to purchase "'contracts'" for "'secular educational services.'" *Id.* at 609.

22. *See id.* at 607-08, 610. The Rhode Island statute required that eligible schools submit financial records proving per student expenditures on secular education. *Id.* at 607-08. The statute also required that eligible teachers only teach public school subjects and use only public school materials. *Id.* at 608. Furthermore, the statute required that eligible teachers agree in writing not to teach religious courses while receiving the supplement. *Id.* The Pennsylvania statute limited funding to courses in secular subjects, specifically: "mathematics, modern foreign languages, physical science, and physical education." *Id.* at 610 (footnote omitted). The statute also required that the state Superintendent of Public Instruction approve all textbooks and instructional materials. *Id.* Finally, the law forbade reimbursement for any subject matter expressing religious teachings. *Id.*

23. DiCenso v. Robinson, 316 F. Supp. 112, 122 (D.R.I. 1970).

24. Lemon v. Kurtzman, 310 F. Supp. 35, 48-49 (E.D. Pa. 1969).

25. *Lemon*, 403 U.S. at 625.

26. *See id.* at 607.

27. *Id.* at 612-13. The second prong of the *Lemon* test was derived from the Court's decision in *Allen v. Allen*, 392 U.S. 236, 243 (1968). *Lemon*, 403 U.S. at 612. The third prong was taken from *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). *Lemon*, 403 U.S. at 613. The Court also recognized three evils which the Establishment Clause was intended to protect:

First, the government action must have a secular purpose.[28] Second, it must not advance or inhibit religion.[29] Third, the government action must not promote "'excessive government entanglement with religion.'"[30] According to the Court, a state action is unconstitutional if it violates any of these three prongs.[31]

In applying the first prong of the test, the Court showed deference to the stated legislative purposes and concluded that the legislatures did not intend to advance religion.[32] The Court, however, invalidated the statutes under the third prong of the test, holding that the statutes involved excessive entanglement between government and religion.[33] The Court held that despite the strict statutory restrictions designed to advance only secular education,[34] the statutes impermissibly entangled church and state because religious instruction was "inevitably" linked with parochial education.[35]

Twelve years later, the Supreme Court applied a modified version of the *Lemon* test in *Lynch v. Donnelly*.[36] In *Lynch*, the question focused on the inclusion of a nativity scene, or creche, in a city's Christmas display.[37] Finding official sponsorship of religion and excessive entanglement, the district court permanently enjoined the inclusion of the nativity in the display, and the court of appeals affirmed.[38]

"'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

28. *Id.* (defining the purpose prong).

29. *Id.* (defining the effect prong).

30. *Id.* at 613 (quoting *Walz*, 397 U.S. at 674) (defining the entanglement prong).

31. *See id.* at 612-13.

32. *Id.* at 613. The statutes were enacted to improve the quality of "secular education in all schools covered by the compulsory attendance laws." *Id.*

33. *Id.* at 614.

34. *Id.* at 613.

35. *See id.* at 615, 618-19. In finding excessive entanglement, the Court noted that both statutes would require "comprehensive . . . state surveillance" to ensure that the First Amendment was respected. *Id.* at 619, 621. The Court found that these increased contacts, at least under the Rhode Island statute, would cause excessive entanglement. *Id.* at 619. The Court also noted that eligible teachers under the Rhode Island statute would have difficulty remaining neutral. *Id.* at 618-19. Finally, the Court reasoned that the statutes had the potential to incite political division along religious lines, a principle evil that the First Amendment was intended to prevent. *Id.* at 622, 623-24. This risk was intensified by the need for increasing annual appropriations. *Id.* at 623-24.

36. 465 U.S. 668 (1984).

37. *Id.* at 670-71. The nativity scene—which had been part of the display for more than forty years—consisted of the infant Jesus, Mary and Joseph, shepherds, angels, animals, and kings. *Id.* at 671. The nativity was one element of a larger Christmas display including, among other decorations, Santa's sleigh, a Christmas tree, candy-striped poles, and carolers. *Id.* The city owned all parts of the display. *Id.*

38. *Id.* at 672. Although the District Court recognized that the nativity did not promote administrative entanglement with religion, the Court "found that excessive entanglement ha[d] been

The Supreme Court reversed, holding that the inclusion of the creche did not contravene the Establishment Clause.[39] In its reasoning, the Court refused to confine itself to a single criterion or test.[40] Instead, the majority examined the role of religion in American history, emphasizing the "unbroken history" of government acknowledgment of religion in American life.[41] Rejecting an absolutist approach to applying the Establishment Clause,[42] the Court focused on the constitutionality of the nativity in the context of the Christmas season.[43] Ultimately, the Court applied a less stringent version of the *Lemon* test. Under the first prong of *Lemon*, the Court accepted the city's stated purpose of depicting the origins of Christmas.[44] Second, while recognizing that the nativity may confer some benefit on those of the Christian faith, the Court determined that the inclusion of the Christian symbol was passive and did not advance or inhibit religion.[45] In making this determination, the Court noted that a law is not unconstitutional simply because the law indirectly or remotely advances religion.[46] Finally, the majority held that there was no administrative entanglement[47] and that political divisiveness alone cannot invalidate otherwise permissible conduct.[48]

Further eroding *Lemon*, the Court in *Marsh v. Chambers*[49] advanced an alternative test for appropriate application of the Establishment Clause—the history and tradition test.[50] In *Marsh*, the Court considered whether the Nebraska Legislature's practice of opening each session with a prayer by a chaplain paid for by the state violated the Establishment Clause.[51] The district court enjoined the legislature from using public

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fostered as a result of the political divisiveness of including the creche in the celebration." *Id.*

39. *Id.* at 687.

40. *Id.* at 679.

41. *Id.* at 674-78.

42. *Id.* at 678.

43. *Id.* at 679.

44. *Id.* at 681.

45. *See id.* at 683.

46. *Id.* (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

47. *Id.* at 684.

48. *Id.* Justice O'Connor's concurrence provided a refined version of the first two prongs of the *Lemon* test. *See id.* at 690-92 (O'Connor, J., concurring). Under Justice O'Connor's first prong, the government must prove that it does not have the *purpose* to convey a message endorsing or disapproving of religion. *Id.* at 691. Under the second prong, the government must prove that it does not have the *effect* of communicating a message advancing or disproving of religion. *Id.* at 692.

49. 463 U.S. 783 (1983).

50. *Id.* at 786, 790-92.

51. *Id.* at 784. The chaplain was a Presbyterian minister who had served in the role since 1965. *Id.* at 785. The chaplain was paid with public funds at a salary of $319.75 per month. *Id.* at 784-85.

funds to pay the chaplain, but refused to invalidate the practice of beginning each session with prayer.[52] Applying the three-part *Lemon* test, the court of appeals modified the district court's injunction and enjoined the whole chaplaincy practice.[53]

The Supreme Court reversed, holding that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause.[54] Marking a dramatic shift in Establishment Clause jurisprudence, the Court abandoned the stringent requirements initiated by the *Lemon* Court twelve years earlier.[55] In the alternative, the Court focused on the extensive history and tradition of legislative prayer in the United States.[56] Unlike the *Lemon* test, the history and tradition test focused primarily on the Founders' intent.[57] While recognizing that historical patterns alone cannot justify constitutional violations, the Court concluded that the past practices of the Founders clearly disclosed their intent to allow legislative prayer.[58]

On facts remarkably similar to the instant case, the Court returned to the *Lemon* test in *McCreary County v. ACLU*.[59] In *McCreary County*, petitioners installed within one year three different displays of the Ten Commandments in the county courthouse in McCreary County, Kentucky.[60] Respondents filed suit seeking a preliminary injunction to

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52. *Id.* at 785. The District Court also enjoined the State from publishing the prayers at the public's expense, holding that this practice violated the Establishment Clause. *Id.* at 785 n.3. However, because petitioners did not challenge this part of the District Court's decision, the Supreme Court did not address the issue. *Id.*

53. *Id.* at 786.

54. *Id.* at 792-93, 795.

55. *See id.* at 790-92.

56. *See generally id.* at 786-92.

57. *See id.* at 787-91.

58. *See id.* The Court specifically cited the adoption of the chaplaincy practice by the Founders at the First Continental Congress in 1774. *Id.* at 787. In the Court's reasoning, it would be inconsistent to impose more stringent standards today than the Founders imposed on the federal government. *Id.* at 790-91.

59. 125 S. Ct. 2722, 2734 (2005) (5-4 decision). Justice Souter delivered the opinion of the court in which Justices Stevens, O'Connor, Ginsburg and Breyer joined. *Id.* at 2727. Justice O'Connor filed a concurring opinion, and Justice Scalia entered a dissenting opinion, in which Chief Justice Rehnquist, and Justices Thomas and Kennedy joined. *Id.* at 2746 (O'Connor, J., concurring); *id.* at 2748 (Scalia, J., dissenting). Justice Kennedy, however, only joined in Parts II and III. *Id.* at 2748 (Kennedy, J., dissenting).

60. *Id.* at 2730 (majority opinion). The first display consisted of a large, gold-framed copy of the King James version of the Ten Commandments installed in the county courthouse. *Id.* at 2728. After suits were initiated claiming Establishment Clause violations, the counties adopted resolutions authorizing expanded versions of the original display. *Id.* at 2729. In addition to the original gold-framed copies of the Ten Commandments, the second display included eight other documents in smaller frames with religious themes. *Id.* After the District Court entered an injunction ordering the removal of the second display, the county installed the third and final display in the courthouse. *Id.* at 2730.

enjoin the third display.[61] Following the three-prong *Lemon* analysis, the district court found that the display lacked a secular purpose and ordered its removal,[62] and the appellate court affirmed.[63]

The narrow question in *McCreary County* was whether the first prong of *Lemon*, the purpose prong, required consideration of the display over time.[64] The Supreme Court determined that the evolution of the exhibit was relevant to the first prong of *Lemon*.[65] While concluding that the Court will generally defer to the legislature's stated objectives, the secular purpose must still be legitimate, "not a sham, and not merely secondary to a religious objective."[66] Based on the record leading up to the third display, the majority found a predominantly religious purpose and upheld the preliminary injunction.[67] In reaching this conclusion, therefore, the Court reaffirmed the importance of the first prong of *Lemon*.

On the same day the Court invalidated the display in *McCreary County*, the Court upheld the Ten Commandments monument in the instant case.[68]

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61. *Id.* at 2731. The third display was part of a larger exhibit entitled "The Foundations of American Law and Government Display." *Id.* In addition to the Ten Commandments, the display included "copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice." *Id.* Each document contained a "statement about its historical and legal significance." *Id.*

The statement on the Ten Commandments read:

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

Id.

62. *Id.* The counties claimed that the purpose of the display was to demonstrate that the Ten Commandments were part of American law and to educate citizens. *Id.*

63. *Id.*

64. *Id.* at 2728.

65. *See id.* at 2736-37.

66. *Id.* at 2735.

67. *Id.* at 2745.

68. Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (4-1-4 decision). Chief Justice Rehnquist announced the judgment and delivered an opinion, in which Justices Scalia, Kennedy, and Thomas joined. *Id.* at 2858 (plurality opinion). Justices Scalia and Thomas also filed concurring opinions, and Justice Breyer filed an opinion concurring only in the judgment. *Id.* at 2864 (Scalia, J., concurring); *id.* at 2864 (Thomas, J., concurring); *id.* at 2868 (Breyer, J., concurring). Additionally, Justice Stevens entered a dissenting opinion that Justice Ginsburg joined. *Id.* at 2873 (Stevens, J., dissenting). Finally, Justices O'Connor and Souter also filed dissenting opinions. *Id.* at 2891 (O'Connor, J., dissenting); *Id.* at 2892 (Souter, J., dissenting). Because Justice Breyer

Unlike the *McCreary County* analysis, the plurality's analysis in the instant case rejected application of the *Lemon* test, concluding that the test was not useful in evaluating "the sort of passive monument that Texas ha[d] erected on its Capitol grounds."[69] Instead, the plurality focused on the nature of the monument and the nation's history.[70] As justification for the Texas monument, the plurality cited official acknowledgments of religion by government officials and physical manifestations of the Ten Commandments in the nation's capital.[71] The plurality also credited prior Establishment Clause decisions and the religious references expressed within them.[72] Finally, based on the passive nature of the monument and the deep-seated history of religion and the Ten Commandments, the plurality determined that the monument did not constitute constitutional infringement under the Establishment Clause.[73] As such, the instant case marked a return to the history and tradition analysis set forth in *Marsh v. Chambers*.[74] However, because the plurality did not overrule *Lemon*, the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence remains undetermined.

By refusing to settle on a consistent standard, the instant Court has utterly failed to provide the lower courts with any principled guideposts for application of the *Lemon* test. While some Establishment Clause cases explicitly refuse application of *Lemon*,[75] other cases simply ignore the *Lemon* analysis.[76] In striking contrast, the Court frequently points to *Lemon* as the governing test in Establishment Clause challenges, notably

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joined with the majority in *McCreary County* invalidating the public display of the Ten Commandments and applying the *Lemon* test, the future of Justice Breyer's concurrence is uncertain. In his concurrence, Justice Breyer stated that no single mechanical formula can adequately draw a line in each case. *Id.* at 2868 (Breyer, J., concurring). Rather than bright line tests, Justice Breyer maintained that the most appropriate test involves the exercise of legal judgment, taking into account the context of the case and the underlying purposes of the Establishment Clause. *Id.* at 2869.

69. *Id.* at 2861 (plurality opinion).

70. *Id.*

71. *Id.* at 2861-63. In particular, the Court recognized representations of the Ten Commandments in their own courtroom, in the rotunda of the Library of Congress, in the National Archives, and outside the federal courthouse for the Court of Appeals and the District Court for the District of Columbia. *Id.* at 2862-63.

72. *Id.* at 2861-62.

73. *See id.* at 2864.

74. 463 U.S. 783, 786, 790-92 (1983).

75. *See, e.g., id.* at 793-95 (applying the history and tradition analysis); Larson v. Valente, 456 U.S. 228, 252 (1982) (finding that *Lemon* was not useful where there was substantial evidence of overt discrimination among religions).

76. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002) (upholding school programs on neutrality grounds); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112-20 (2001) (failing to apply the *Lemon* test).

applying the first prong of the *Lemon* test in *McCreary County*.[77] Similarly, the district court's attempt in the instant case to apply the *Lemon* analysis to the Texas monument had a large degree of precedential support.[78] Nevertheless, the plurality in the instant case dismissed the district court's reasoning and arbitrarily rejected *Lemon*.[79] If the district court improperly applied *Lemon* to the instant case, it was most likely due to the inconsistency of Establishment Clause jurisprudence.

Despite the need for a clear and consistent standard, the plurality's rejection of *Lemon* is brief and troublesome. By applying a fact specific analysis, the plurality rejected *Lemon* based on the "passive" nature of the monument.[80] However, in making this determination, the plurality did not provide a clear definition of what constitutes "passive."[81] Moreover, it did not explain whether courts must reject *Lemon* in every instance of a *passive* religious monument. Compounding the confusion, the Court found a similar Ten Commandments display in *McCreary County* non-passive and applied the *Lemon* test.[82] As such, the standard for application of *Lemon* remains uncertain and courts are without clear guidance. Absent any standard, courts are free to manipulate application of *Lemon* to fit the goals of the judiciary.[83]

The plurality's reliance on the history and tradition analysis further reinforces the inconsistency of Establishment Clause jurisprudence. First, the application of the test in the instant case is inconsistent with prior applications of the analysis. In *Marsh*, the Court found the history and tradition analysis appropriate because the Founders practiced chaplaincy at the Constitutional Convention.[84] The Ten Commandments monument in the instant case, however, is not a historic practice or historic memorabilia. Justice Stevens observed this concern when he contended

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77. McCreary County v. ACLU, 125 S. Ct. 2722, 2733-34, 2745 (2005). Because the Court decided *McCreary County* and *Van Orden* on the same day, future courts will likely attempt to distinguish *McCreary County* from *Van Orden* when determining whether to apply the *Lemon* test. Due to the close similarities between the cases and the Court's failure to establish a bright line test, future courts will likely find this difficult. *See supra* note 68 and accompanying text.

78. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985) (applying *Lemon*); Lynch v. Donnelly, 465 U.S. 668, 679, 681 (1984) (utilizing a modified version of *Lemon*).

79. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion).

80. *See id.*

81. The Court seems to base the passive nature of the monument on the fact that the monument has "dual significance," respecting both religion and government. *Id.* at 2864. The Court also appears to rely on the fact that the Petitioner apparently walked by the monument for a number of years before bringing suit. *Id.*

82. *See McCreary County*, 125 S. Ct. at 2731, 2734-35.

83. Justice Thomas noted that "[t]he 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." *Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring).

84. *See* Marsh v. Chambers, 463 U.S. 783, 790-91 (1983).

that the history and tradition analysis is only marginally relevant to the instant case since it does not concern issues of historic preservation.[85] Hence, with disagreement over the test's application and lack of a principled rule, the plurality again failed to provide the proper guidance to the lower courts.[86]

Second, by basing its analysis on varying accounts of historical evidence, the history and tradition analysis fails to provide lower courts with a test capable of consistent application. The difficulty in applying the history and tradition analysis is illustrated in the instant case. Regarding official government acknowledgments of religion, the plurality cited various proclamations in justifying Texas monuments.[87] However, other statements of the Founders could very well be utilized to invalidate the Ten Commandments monument.[88] Moreover, public acknowledgments may be unreliable since they are not always the clear expression of the government, but often only the views of the individual speaker.[89]

In relying on arbitrary proclamations, the plurality has provided a great degree of flexibility to lower courts. Instead of citing arbitrary proclamations by the Founders, the better approach probably would have been to quote more persuasive statements and documents. Justice Stevens favored this approach in his dissenting opinion in the instant case; he found proclamations of the Founders problematic since they were neither announced at the Constitutional Convention nor espoused in the text of the Constitution.[90]

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85. *Van Orden*, 125 S. Ct. at 2876-77 (Stevens, J., dissenting). On the contrary, Justice Stevens argued that "mere compilation of religious symbols" and "simplistic commentary on the various ways in which religion has played a role in American life" avoided the important issue presented in the case. *Id.*

86. *See generally* Monica Vila, Comment, *Constitutional Law: Thou Shalt Not Establish Religion*, 56 FLA. L. REV. 819 (2004) (discussing the Eleventh Circuit's narrow interpretation of *Marsh* and misapplication of the *Lemon* test).

87. *Van Orden*, 125 S. Ct. at 2861 (plurality opinion). Among the various proclamations cited by the plurality is George Washington's Thanksgiving Day Proclamation which recommended to the American people "'a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God.'" *Id.* Likewise, the concurrence in *McCreary County* quoted George Washington's Farewell Address declaring that "'reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.'" *McCreary County*, 125 S. Ct. at 2749 (O'Connor, J., concurring).

88. In particular, Justice Stevens noted Thomas Jefferson's refusal to issue the Thanksgiving proclamations that Washington had embraced on the grounds that the proclamation would violate the Establishment Clause. *Van Orden*, 125 S. Ct. at 2884 (Stevens, J., dissenting). Likewise, Justice Stevens also cited James Madison's comments stating that Congress's appointment of a paid chaplain was a deviation from principles separating religion and government. *Id.*

89. *Id.* at 2883.

90. *Id.*

By applying the history and tradition analysis of *Marsh*, the plurality arbitrarily rejected the *Lemon* test and relied on a test fraught with debate and controversy. Moreover, by upholding the Ten Commandments monument in the instant case and invalidating the display in *McCreary County*, the Court made the Establishment Clause jurisprudence even more mystifying.[91] As such, the instant case presented serious unanswered questions. Notably, what governs lower courts in deciding whether to apply *Lemon* or some alternative test? Moreover, is the history and tradition test of *Marsh* solid precedent or a judicial anomaly?[92]

In the instant case, the plurality recognized two responsibilities inherent in the Establishment Clause:[93] First, the Clause compels the Court to maintain a division between church and state; and second, the Clause requires that the Court not evince hostility towards religion by disallowing government recognition of the nation's religious heritage.[94] In order to respect both aims, the Court must provide lower courts a clear test capable of consistent application in Establishment Clause challenges. Without principled guidance, lower courts will continue to apply whatever analysis best suits their intended results.[95]

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91. In light of the 4-1-4 decision in the instant case and recent membership changes to the Court, the precedential authority of *Van Orden* in Establishment Clause jurisprudence may be weak. Although the confirmation of Chief Justice John G. Roberts Jr. may not heavily influence the balance of the Court, the additional confirmation of Justice Samuel A. Alito Jr. may have a significant impact in future Establishment Clause conflicts. As many predict, Justice Alito's jurisprudence may in fact fall along the lines of Justices Scalia and Thomas. Thus, in replacing Justice O'Connor, a major swing vote, Justice Alito may shift the balance of the Court to the right and influence future Establishment Clause cases. *See* Robin Toner & Adam Liptak, *2 Camps, Playing Down Nuances, Stake Out Firm Stands*, N.Y. TIMES, Nov. 1, 2005, at A25. Furthermore, due to the retirement of Justice O'Connor, the Court may once and for all abandon the Establishment Clause test set forth by Justice O'Connor in her concurrence in *Lynch*. *See supra* note 48.

92. Considering the recent changes to the Court, the Court may be more likely to return to the *Marsh* reasoning and uphold religious expression based on the history and tradition test.

93. Van Orden, 125 S. Ct. at 2859 (plurality opinion).

94. *Id.*

95. McCreary County v. ACLU, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting).