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Erwin Chemerinsky

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# WHY JUSTICE BREYER WAS WRONG IN *VAN ORDEN V. PERRY*

Erwin Chemerinsky\*

## INTRODUCTION

From the moment Thomas Van Orden called me to ask if I'd be willing to try and get Supreme Court review in his case,<sup>1</sup> I was convinced that the outcome would turn on Justice Sandra Day O'Connor. As I wrote the brief and as I stood before the Justices, I saw O'Connor as being the swing vote.

I saw little chance of getting the votes of Chief Justice Rehnquist or Justices Scalia, Kennedy, or Thomas. They consistently had expressed a view of the Establishment Clause that left little chance that they would find a religious symbol on government property to be unconstitutional. Justice Kennedy, for example, wrote an opinion in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* arguing for allowing religious symbols on government property and contending that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.<sup>2</sup> Rehnquist and Scalia joined this opinion. I could not think of a way under this test to argue that the Ten Commandments display between the Texas State Capitol and the Texas Supreme Court is unconstitutional.

Justice Thomas has argued repeatedly that he does not believe that the Establishment Clause applies to state and local governments at all. Almost sixty years ago, the Supreme Court unanimously held that the Establishment Clause, like almost all of the other provisions in the Bill of Rights, applies to state and local governments.<sup>3</sup> On several occasions in recent years, Justice Thomas has urged the Court to overrule *Everson* and to hold that the Establishment Clause does not apply to state and local governments.<sup>4</sup> Obviously, this view makes anything Texas wants to do constitutional. Texas could put a large cross atop its State Capitol, and Thomas would uphold its constitutionality.

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\* Alston & Bird Professor of Law and Political Science, Duke University School of Law; counsel of record for the Petitioner in the Supreme Court in *Van Orden v. Perry*. This article is dedicated to Thomas Van Orden with admiration for his courageous and excellent advocacy. I also want to thank the students in Professor Neil Siegel's constitutional theory seminar for their excellent comments on earlier drafts of this article.

<sup>1</sup> *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

<sup>2</sup> 492 U.S. 573, 659–60 (1989) (Kennedy, J., concurring in part and dissenting in part).

<sup>3</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>4</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Thomas, J., concurring).

On the other hand, Justices Stevens, Souter, Ginsburg, and Breyer have been much more willing to enforce the Establishment Clause. They dissented in *Zelman v. Simmons-Harris*, where the Court held that vouchers from the government may be used for parochial schools.<sup>5</sup> They also dissented in *Agostini v. Felton*,<sup>6</sup> which allowed more aid to parochial schools, and *Rosenberger v. Rectors and Visitors of the University of Virginia*,<sup>7</sup> which held that the government cannot deny funding to religious student groups when money is available to secular groups.

Justice O'Connor thus seemed to be the swing vote. She had played exactly this role in *Allegheny*, finding that a nativity scene by itself on government property was unconstitutional, but that a menorah was constitutional since it was part of an overall holiday display.<sup>8</sup> She had repeatedly rejected the very limited scope of the Establishment Clause urged by Rehnquist, Scalia, Kennedy, and Thomas.<sup>9</sup> But she also had joined them in cases like *Zelman*, *Agostini*, and *Rosenberger*.<sup>10</sup>

Thus, on June 27, I was disappointed but not shocked to learn that I had lost 5–4; however, I was very surprised when I found out that Justice Breyer was the fifth vote for the majority. As expected, Chief Justice Rehnquist's plurality opinion, joined by Justices Scalia, Kennedy, and Thomas, made clear that they believe that religious symbols on government property are constitutional.<sup>11</sup> Justice Breyer did not join that opinion but instead concurred in the judgment.<sup>12</sup> He was clear that he accepts the test adopted by the four dissenting justices — Stevens, O'Connor, Souter, and Ginsburg — that the government may not place religious symbols on government property if they symbolically endorse religion.<sup>13</sup> Breyer concluded by saying that he agreed with Justice O'Connor's statement of principles, but not her application in this case.<sup>14</sup>

In other words, Breyer did not see a six-foot-high, three-foot-wide Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court as symbolically endorsing religion. In this Article, I want to explain why Justice Breyer was wrong in his analysis. Breyer made three major arguments in his opinion. First, he briefly argued that the Establishment Clause is primarily

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<sup>5</sup> 536 U.S. 639 (2002).

<sup>6</sup> 521 U.S. 203 (1997).

<sup>7</sup> 515 U.S. 819 (1995).

<sup>8</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 626, 632 (1989).

<sup>9</sup> *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 839–40 (2000) (O'Connor, J., concurring in the judgment).

<sup>10</sup> *Zelman*, 536 U.S. 639 (2002); *Agostini*, 521 U.S. 203 (1997); *Rosenberger*, 515 U.S. 819 (1995).

<sup>11</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005).

<sup>12</sup> *Id.* at 2872 (Breyer, J., concurring).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2874.

about preventing divisiveness based on religion.<sup>15</sup> Second, he argued that the Texas Ten Commandments monument delivers a secular message, and he focused especially on the other monuments on the Texas State Capitol grounds and the fact that the Ten Commandments were donated by the Fraternal Order of Eagles.<sup>16</sup> Third, he stressed that the monument had been there for forty years.<sup>17</sup> I discuss each of these points in turn and conclude by explaining why Justice Breyer missed the forest for the trees: the Texas Ten Commandments monument, as the only religious symbol at the seat of state government, is clearly an endorsement of religion.

### I. DIVISIVENESS

Justice Breyer began his concurring opinion by stressing that a central goal of the Establishment Clause is to prevent divisiveness along religious lines. He wrote, “[The Establishment Clause] seek[s] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”<sup>18</sup> This was not the first time that Breyer emphasized the importance of divisiveness in Establishment Clause analysis. Three years earlier, in a dissenting opinion in the vouchers case, Breyer emphasized the importance of preventing divisiveness as a central concern of the Establishment Clause.<sup>19</sup>

First, there is no doubt that Ten Commandments displays are enormously divisive. The Chief Justice of the Alabama Supreme Court left office over a Ten Commandments monument. The Supreme Court was surrounded with protests on the day of oral argument. I received a number of hate messages around the time of oral argument. All of this is because there are some who care deeply about the government being able to put religious symbols on its property. But there are those who care with equal fervor about our government staying secular. If Justice Breyer is correct that divisiveness is a key concern of the Establishment Clause, that is exactly why he came to the wrong conclusion about the Texas Ten Commandments monument.

Second, divisiveness makes no sense as a principle in this area. *Any* enforcement of the Establishment Clause is inherently divisive. By definition, any enforcement of the Establishment Clause involves the Court striking down a government practice that the majority wants. Banning prayer and Bible-reading in public schools was, and still is, enormously divisive.<sup>20</sup> In a society deeply divided about the role of religion in government, all government practices endorsing religion will be divisive,

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<sup>15</sup> *Id.* at 2868.

<sup>16</sup> *Id.* at 2870.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2868.

<sup>19</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting).

<sup>20</sup> *See, e.g., Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

as will any enforcement of the Establishment Clause. That simply cannot be the focus of Establishment Clause analysis.

Justice Breyer offered no guidance as to how divisiveness could be applied as a First Amendment principle. How could the Court evaluate whether a particular government practice is divisive or whether stopping the government would be more divisive? Divisiveness is an empirical question, but one for which measurement never would be possible. Justices would be left simply to guess as to how divisive something is or how divisive stopping it would be. From the perspective of divisiveness, it is not at all clear why the Ten Commandments displays in *McCreary* were more divisive than the one in *Van Orden*. Yet, Justice Breyer voted to invalidate the former and allow the latter.

Third, the more the government becomes involved with religion, the more opportunities there are for social divisions based on religion. The Establishment Clause, if it is seen as creating a wall separating church and state, prevents divisiveness by limiting government involvement in religion. For example, if the Court allows Ten Commandments displays on government property, there will be fights over which religion's version of the Ten Commandments should be there. If religious symbols are allowed, religions will fight over which religion will get the preeminent display. Accepting Breyer's goal of preventing divisiveness should lead to a robust application of the Establishment Clause — the opposite of his conclusion in *Van Orden*.

## II. SYMBOLIC ENDORSEMENT

The core of Breyer's opinion was his conclusion that the Texas monument did not symbolically endorse religion. Breyer wrote:

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate.<sup>21</sup>

He stressed that “[t]he monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the ‘ideals’ of those who settled in Texas and of those who have lived there since that time.”<sup>22</sup>

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<sup>21</sup> *Van Orden*, 125 S. Ct. at 2870 (Breyer, J., concurring).

<sup>22</sup> *Id.*

There are many flaws in Breyer's analysis here. First, there is no secular purpose for the Texas Ten Commandments monument. Second, its placement and content leaves no doubt as to its conveyance of a profoundly religious message.

*A. Is Breyer Right as to a Secular Purpose?*

What would be the secular purpose of the Ten Commandments monument? The Court of Appeals stressed the Ten Commandments' "influence upon the civil and criminal laws of this country."<sup>23</sup> But characterizing the Ten Commandments monument as secular and as a source of American law is incorrect for many reasons. First, the format of the Ten Commandments monument conveys its religious message, not its secular role. For example, the size of the lettering on the monument emphasizes the religious aspect of the Ten Commandments over the secular. The prefatory words, "I AM the LORD thy GOD," appear larger on the monument than the commandments that have been incorporated into secular law.<sup>24</sup> The Commandments' prohibitions on murder, adultery, and theft are smaller than the text which identifies God as the source of the commandments.<sup>25</sup> By visually emphasizing the religious aspects of the Ten Commandments relative to the arguably secular aspects, the monument belies the claim that it is commemorating any secular role of the Ten Commandments in American law.

Second, the content of the commandments themselves shows that it has little relationship to American secular law. The first four commandments listed — "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the Name of the Lord thy God in vain," "Remember the Sabbath day to keep it holy"<sup>26</sup> — are religious mandates. Any law that imposed these requirements would unquestionably violate the Establishment Clause. As Professor Marci Hamilton explained:

[W]ere the first four commandments enacted into law today, they would constitute plain constitutional violations. It is an exceedingly strange, and strained, argument that argues the primacy of the Ten Commandments as the true source of law when the first four simply *cannot* be enacted into law, because they would conflict with our Constitution. The first four prove that the Commandments are religious rules, not civil law.<sup>27</sup>

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<sup>23</sup> *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

<sup>24</sup> State Preservation Board, Monuments Guide, The Ten Commandments, <http://www.tspb.state.tx.us/spb/gallery/MonuList/10.htm> (last visited Sept. 9, 2005).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Marci Hamilton, *The Ten Commandments and American Law: Why Some Christians' Claims to Legal Hegemony Are Not Consistent with the Historical Record*, Writ, Sept. 11,

Moreover, several of the other commandments have no relationship at all to American law. “Honor thy father and mother” and “Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maid servant, nor his cattle, nor anything that is thy neighbor’s” are not, and never have been, legal commands in our legal tradition.

Thus, only a few of the commandments — “Thou shalt not kill,” “Thou shalt not steal,” “Thou shalt not bear false witness against thy neighbor,” and “Thou shalt not commit adultery” — have any relationship to American law.<sup>28</sup> Even as to these, the Ten Commandments are not a special source for the American legal rules; virtually every legal system, before and after the Ten Commandments, prohibits murder, theft, and perjury. Indeed, Hammurabi’s Code, often regarded as the first written law, nearly 1,000 years before the Ten Commandments, contained these prohibitions.<sup>29</sup> Why does Texas have a monument to the Ten Commandments and not Hammurabi, or the Magna Charta, or any other source of law? Precisely because the Ten Commandments conveys an explicit religious message that these other sources of law do not.

Third, a careful review of history shows that the Ten Commandments were seldom invoked in forming American law. The only explicit connection between the Bible and American law is found in the early Puritan colonies of Massachusetts and Connecticut. The Puritans regarded themselves as “chosen People” and their land as a “second Israel.”<sup>30</sup> But even among the Puritans, the influence of Mosaic law on their legal codes was small.<sup>31</sup>

Nor is there any indication that the Ten Commandments were regarded as a source of secular law in the founding of this nation. They are not mentioned in the records of the Constitutional Convention nor in the history of state legislatures drafting their initial statutes. Not once are the Ten Commandments mentioned in the *Federalist Papers*. After examining the claim that the Ten Commandments were a source of American law, Professor Steven K. Green concluded:

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2003, <http://writ.news.findlaw.com/hamilton/20030911.html> (emphasis in original).

<sup>28</sup> See *supra* note 24 and accompanying text.

<sup>29</sup> THE HAMMURABI CODE ix (Chilperic Edwards trans., Kennikat Press 1904) (criticizing what he calls “arrogant claims in regard to the originality or excellence of the Jewish Pentateuch”).

<sup>30</sup> STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 25–26 (1983).

<sup>31</sup> See Zechariah Chaffee, Jr., *Colonial Courts and the Common Law*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 72–73 (D. Flaherty ed., 1969) (“The view that the colonial law was . . . drawn from the Bible is dispelled by a study of the court records.”); George E. Woodbine, *The Suffolk County Court, 1671–1680*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 202 (D. Flaherty ed., 1969) (“Undoubtedly the influence of [Mosaic] law as an active legal force in [Puritan] civilization has been greatly overstated.”).

Thus absent a handful of early cases, judicial reliance on the Ten Commandments as a source of law was all but nonexistent. . . . The historical record fails to support claims of a direct relationship between the law and the Ten Commandments. Absent the failed experiment in seventeenth century Massachusetts and the other Puritan colonies, American law has generally been viewed as having a secular origin and function.<sup>32</sup>

The irony is that those who favor the Ten Commandments on government property, such as between the Texas State Capitol and the Texas Supreme Court, do so precisely because of the religious content of the Ten Commandments and the importance of the Decalogue as a religious symbol. Yet, supporters of Ten Commandments monuments are forced to defend them as secular, as Justice Breyer did. This denigrates religion by denying the essential and profoundly religious nature of the Ten Commandments.<sup>33</sup>

Finally, and perhaps most importantly, the presence of the Ten Commandments monument as the *only* monument remotely concerning the sources of law conveys the message that it is *the* foundation of American law. No one — not the State of Texas nor any of its *amici* — contended that the Ten Commandments are the only source, or even the preeminent source, of American law. But that is exactly the message that is conveyed by its being alone on a “direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building.”<sup>34</sup>

Justice Breyer also stressed that the monument had a secular purpose because it was donated by the Fraternal Order of Eagles.<sup>35</sup> In *Allegheny*, the nativity scene bore a similar dedication that it had been donated by a private group.<sup>36</sup> But the Court explained that

[t]he fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion [of government endorsement]. On the contrary, the sign simply demonstrates that the government is endorsing the religious

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<sup>32</sup> Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & RELIGION 525, 558 (1999–2000).

<sup>33</sup> See, e.g., RONALD S. WALLACE, *THE TEN COMMANDMENTS: A STUDY OF ETHICAL FREEDOM* viii–ix (1965) (“[The Ten Commandments] are one of the important focal points within the Bible. If they have been given prominence within the discipline of the [Protestant] Church, this is simply because they have prominence within the Word which the Church has sought to obey.”).

<sup>34</sup> *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003).

<sup>35</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2870 (2005) (Breyer, J., concurring).

<sup>36</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989).



message of that organization, rather than communicating a message of its own.<sup>37</sup>

The case is even clearer for the Texas monument, for the inscription implies, clearly and correctly, that it is the state which owns the monument. These Ten Commandments are, literally and constitutionally, the state's own words.

Moreover, Justice Breyer's argument has no stopping point; under the State's view, the government could place any religious symbol anywhere on its property so long as it came as a gift. The government cannot evade the Establishment Clause when it erects a religious monument simply by proclaiming that it was donated by others and was placed to honor the donor.

Nor is it credible that Texas chose to place the Ten Commandments between its Capitol and its Supreme Court to honor the Fraternal Order of Eagles. A person viewing the monument or reading the State's brief cannot discern what role the Fraternal Order of Eagles played in Texas or nationally that would cause Texas to honor this organization. Even if the State wished to acknowledge the Fraternal Order of Eagles at the time it accepted this gift, this cannot change the fact that the only plausible purpose for displaying the monument in its uniquely prominent place is because of its religious content.

### *B. Is Breyer Right as to the Message Communicated?*

The Supreme Court has been clear that a government action violates the Establishment Clause if it symbolically endorses religion or a particular religion.<sup>38</sup> Assuming a secular purpose, not every display of the Ten Commandments is unconstitutional, just as not every nativity scene on government property violates the First Amendment.<sup>39</sup> For example, a reasonable observer might be more likely to understand the government's asserted secular message if the Ten Commandments

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<sup>37</sup> *Id.*

<sup>38</sup> *See, e.g., id.* at 592 ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that long had a place in our Establishment Clause jurisprudence."). As Justice O'Connor explained: "As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not [be] . . . conveying a message that religion or a particular religious belief is favored or preferred." *Id.* at 627 (O'Connor, J., concurring). *See also* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (stating the Establishment Clause is violated "when the reasonable observer would view a government practice as endorsing religion").

<sup>39</sup> *Compare* Lynch v. Donnelly, 465 U.S. 668, 671, 680 (1994) (upholding a nativity scene as part of a larger holiday display), *with* Allegheny, 492 U.S. at 621 (invalidating a nativity scene by itself on government property).

monument is installed as part of a larger display depicting various sources of law, with several religious and secular monuments of the same size grouped together.

The frieze on the wall of the United States Supreme Court is exactly this type of permissible display. The frieze depicts Moses holding the Ten Commandments — quite significantly without any writing on the tablets and therefore without any explicit religious message being conveyed. Additionally, there are two other religious figures on the frieze, Confucius and Mohammed, and many secular figures including Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. As Justice Stevens explained, the placement of all of these historical figures together on the frieze signals a respect for great lawgivers, not great proselytizers.<sup>40</sup> But that is not at all the case with the Texas monument. The Ten Commandments sits by itself in a prominent position between the Texas State Capitol and the Texas Supreme Court with no other monuments visible when standing before it.<sup>41</sup> There is no other religious monument anywhere on the grounds of the State Capitol. The “reasonable observer” who sees the Ten Commandments monument can draw but one conclusion — that the State of Texas endorses the religious views expressed on it.

The Supreme Court has explained that “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”<sup>42</sup> Three factors make it likely that the “reasonable observer” would see this Ten Commandments monument as impermissibly endorsing religion: its placement, its context, and its content.

### 1. The Placement of the Ten Commandments Monument

The Court has recognized that a display at the seat of government, so plainly under government ownership and control, is marked with the government’s seal of approval.<sup>43</sup> The State Capitol building and its twenty-seven acres of grounds are the seat of government in the State of Texas. The Ten Commandments monument is located at the intersection of two sidewalks, one that runs in front of the State Capitol building and the other that runs in front of the Texas Supreme Court. The monument is seventy-five feet from the Texas State Capitol, which houses the Texas State Legislature and the Texas Governor’s office.<sup>44</sup> The monument is 123 feet from the Texas Supreme Court building, which houses the Texas Supreme

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<sup>40</sup> See *Allegheny*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part).

<sup>41</sup> Joint Appendix, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (No. 03–1500), 2004 WL 3174744, at \*117 (photographs showing no other monument adjacent to or visible from the Ten Commandments monument) [hereinafter “Joint Appendix”].

<sup>42</sup> *Lynch*, 465 U.S. at 694.

<sup>43</sup> *Allegheny*, 492 U.S. at 599–600 (O’Connor, J., concurring).

<sup>44</sup> Stipulation 31, Joint Appendix, *supra* note 41, at \*95.

Court, the Texas Court of Criminal Appeals, some offices of the State Attorney General, and the Texas State Law Library. The monument immediately abuts the “Great Walk,” which tightly encircles the Capitol building, and it is angled so that anyone walking on these sidewalks from the Texas State Capitol to the Texas Supreme Court will see it prominently displayed.

In *Allegheny*, the location of the nativity scene was crucial to the Court’s conclusion that it violated the Establishment Clause. The Court noted that the crèche was displayed in the main and most beautiful part of the county courthouse. As Justice O’Connor explained:

No viewer could reasonably think that it occupies this location without the support and approval of the government. . . . [B]y permitting the “display of the crèche in this particular physical setting,” the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.<sup>45</sup>

Even more than the county courthouse in *Allegheny*, no reasonable viewer could see the Ten Commandments monument in this case, directly in front of the Texas State Capitol and the Texas Supreme Court, without thinking that it has “the support and approval of the government.”<sup>46</sup> Texas law is clear and strict in providing that only the government can place monuments in the Capitol area. Texas law makes it a criminal offense, punishable by a fine of up to \$1,000 and imprisonment of up to one year, if a “[p]erson, including a state officer or employee . . . without the prior express consent of the legislature . . . builds, erects, or maintains a building, memorial, monument, statue, concession, or other structure on Texas State Capitol grounds.”<sup>47</sup> The Texas statute also provides that a state officer who violates this law “is subject to removal from office by impeachment” and that “[a]ny other state officer or employee who violates [this] shall be dismissed immediately from state employment.”<sup>48</sup>

This complete government control over the area where the monument is located strongly communicates that the government is endorsing the religious message contained on the Ten Commandments monument. The “reasonable observer” would not even need to know the history of this Ten Commandments monument to understand that the government is responsible for its presence on government property, notwithstanding the fact that the monument states that it was initially donated by the Fraternal Order of Eagles.

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<sup>45</sup> *Allegheny*, 492 U.S. at 599–600 (O’Connor, J., concurring).

<sup>46</sup> *Id.* at 600.

<sup>47</sup> TEXAS GOV’T CODE ANN. § 2165.255 (Vernon 2000).

<sup>48</sup> *Id.*

The history makes the government's endorsement even clearer. First, as required by Texas law, the Texas legislature formally accepted the monument and authorized its placement on the Capitol's grounds by a joint resolution of the House and the Senate.<sup>49</sup> The State chose the location of the monument and placed it in a symbolically important position: between the Texas State Capitol and the Texas Supreme Court.<sup>50</sup> Second, the State removed the monument for a period of time and then chose to put it back on government property in its current location. Although other monuments in the area north of the Capitol were taken down and not replaced, in 1993 the State Preservation Board decided to return the monument to its original place on the Capitol grounds, between the Capitol and the Texas Supreme Court, and to position it so that it was angled for maximum viewing at the corner of the sidewalk running between these two buildings.<sup>51</sup>

## 2. The Context of the Display

The Ten Commandments display sits on a corner by itself in front of the Texas State Capitol and the Texas Supreme Court. No other monument or display is next to, or even visible from, the Ten Commandments monument.<sup>52</sup> The closest monuments in the area of the Ten Commandments, north of the State Capitol, are the Texas Pioneer Woman and a Tribute to Texas Children. The Ten Commandments monument is separated from these by 120 feet and 111 feet, respectively,<sup>53</sup> and by a number of rows of hedges which entirely block their view from the Ten Commandments monument. The other monuments in the area north of the Capitol, which are even further from the Ten Commandments monument, are a replica of the Statue of Liberty and a monument honoring the veterans of Pearl Harbor. These also are not visible from the Ten Commandments monument.<sup>54</sup>

Context is crucial in determining that there is a governmental symbolic endorsement of religion. In *Lynch*, the Court upheld a religious display — a nativity scene — because the viewer saw a crèche as well as a Santa House, Santa, a Christmas tree, statues of carolers, and other traditional symbols of the December holiday season.<sup>55</sup> The crèche was part of a unified display, in which all of the symbols within the view of the observer concerned the holidays.

The Ten Commandments display, however, between the Texas State Capitol and the Texas Supreme Court is not part of such a unified display. The Ten

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<sup>49</sup> 57(R) S.C.R. No 16, 1961 Tex. Gen. Laws 1195–96.

<sup>50</sup> Stipulation 6, Joint Appendix, *supra* note 41, at \*91.

<sup>51</sup> *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003).

<sup>52</sup> *See supra* note 41.

<sup>53</sup> *See supra* note 44.

<sup>54</sup> *See supra* note 41.

<sup>55</sup> *Lynch v. Donnelly*, 465 U.S. 668, 671, 680 (1994).

Commandments does not fit into any overall theme for the monuments on the Capitol's grounds. Quite the contrary: as the *only* religious symbol in the area, the monument expresses clear endorsement of religion. Thus, the Ten Commandments monument is like the nativity scene that the Court declared unconstitutional in *Allegheny*; it is unlike the one upheld in *Lynch* because it is a solitary religious symbol on government property.

Justice Breyer, in upholding the Texas Ten Commandments monument, stressed the number of displays in the entire Capitol area. He included as an appendix to his opinion an aerial photograph provided by the State in its brief showing all the monuments on the Capitol grounds.<sup>56</sup> Of course, from the air, all the Capitol's grounds and monuments are visible; however, the perspective of the reasonable observer certainly cannot be what is seen from a helicopter or low-flying airplane.

The appropriate focus must be on what the viewer of the Ten Commandments monument sees when looking at it and the area immediately around it. No other monuments are visible when looking at the Ten Commandments display, and at most, four are in its immediate vicinity — the Pioneer Woman monument, the Texas Children monument, a Statue of Liberty replica, and the Pearl Harbor display. What is contained inside the buildings is not relevant; there is no reason to believe that the reasonable observer who passes by this monument will go in the buildings or associate the symbols there with the Ten Commandments. The Texas Capitol grounds encompass twenty-seven acres. Surely it cannot be that a non-religious symbol anywhere on those grounds makes all other religious symbols anywhere on the property permissible.

The Court made exactly this point in invalidating the nativity scene in *Allegheny*. In that case, a crèche was displayed alone and the viewer saw only the crèche and its floral frame. The Court declined the government's invitation to consider decorations throughout the building and in a nearby forum as part of the crèche display.<sup>57</sup> The Court obviously refused to assume that the viewer had taken a tour of the building or of the nearby areas. Context was restricted to what the viewer saw when observing the questioned display. Justice Blackmun included a photograph as an appendix to his opinion to show what the viewer looking at the crèche would see.<sup>58</sup> In this way, the photograph of the Ten Commandments monument in this case is virtually identical in that the viewer sees a large Ten Commandments display unaccompanied by other symbols in its immediate area.<sup>59</sup>

Second, even if the entire area of the Capitol is viewed, there are not religious symbols anything like the Ten Commandments monument anywhere else on the

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<sup>56</sup> *Van Orden*, 125 S. Ct. at 2872–73 (Breyer, J., concurring).

<sup>57</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 598 n.48 (1989).

<sup>58</sup> *Id.* at 622.

<sup>59</sup> *See supra* note 41.

grounds. The Fifth Circuit points to an image of a Mexican eagle and a serpent,<sup>60</sup> which is part of a larger painting on the floor inside the Capitol rotunda, and says that this is religious because it is an Aztec symbol. It is doubtful that the reasonable observer would know this or think of a picture of an eagle and a serpent as religious. Likewise, the untranslated Latin phrase above the bench of the State Supreme Court is unlikely to be understood as religious by the reasonable observer.

Third, in addition to being a symbol of some religions and to commemorating a religious event, the Ten Commandments monument expresses a religious message. The monument unequivocally proclaims that there is a God and that God has decreed rules for religious observance and non-religious conduct. No other monument anywhere on the grounds of the Texas State Capitol conveys a religious message. Other monuments memorialize notable heroes and commemorate worthy acts; this one exalts and expresses one religion's view of God's commands.

As in *Allegheny*, the Ten Commandments monument, as the sole religious symbol and religious expression on government property, is an impermissible symbolic endorsement of religion. Actually, the strong impression of government approval and endorsement of religion is even more compelling than in *Allegheny* because the display is permanent and viewed year-round, rather than temporary and viewed only at the holiday season. A temporary display placed on government property in the time between Thanksgiving and New Year's Day might be seen as celebrating the holidays. However, a permanent display, such as the monument in this case, can convey only one message: government endorsement of the religious message contained on it. Many lower courts, in determining what is an impermissible symbolic endorsement of religion, have stressed that permanent displays convey a different, more obviously religious message.<sup>61</sup>

### 3. The Content of the Ten Commandments Monument

The government's symbolic endorsement of religion is most obvious from the content of the monument itself. This is what Justice Breyer most ignored. In large letters, the monument proclaims "I AM the LORD thy GOD" and several specific commandments profess religious mandates, such as, "Thou shalt not take the name of the Lord thy God in vain" and "Remember the Sabbath day, to keep it holy."

Moreover, the monument's other symbols heighten and highlight its endorsement of religion. At the bottom of the Ten Commandments monument, there are two small Stars of David and two Greek letters, Chi and Rho, superimposed over

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<sup>60</sup> *Van Orden*, 351 F.3d at 176.

<sup>61</sup> See, e.g., *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001), cert. denied, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991), cert. denied, 505 U.S. 1218 (1992).

each other to represent Christ. The monument also has, prominently displayed above the lettering, an American eagle grasping a flag.

First, the presence of symbols of Judaism and Christianity themselves endorse religion. The monument's containing symbols of two religions, but no others, violates the Establishment Clause because "it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"<sup>62</sup>

Second, the prominent placement of the American eagle gripping an American flag further expressly conveys the linkage between government and specific religions. As the Seventh Circuit explained in discussing an identical monument on government property: "In this regard, the placement of the American eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government."<sup>63</sup> Just as the floral and evergreen decoration surrounding the crèche display in the Allegheny County courthouse "contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the crèche,"<sup>64</sup> the patriotic symbols on the Texas monument strongly contribute to the impression that the government itself is endorsing religion.

### III. TIME

Justice Breyer repeatedly stressed that the monument had been there for forty years.<sup>65</sup> This seems to cabin the impact of the Court's holding in *Van Orden*: old monuments are more likely to be acceptable, but new construction won't be allowed.

The passage of time cannot justify a government action that violates the Constitution; there is no statute of limitations for Establishment Clause claims. In *School District of Abington Township v. Schempp*,<sup>66</sup> the Court invalidated a fifty-year-old statute requiring the recitation of Bible passages in public schools.<sup>67</sup> If the Ten Commandments monument is symbolic endorsement of religion, it does not become permissible because it was doing this unconstitutionally for a long period of time.

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<sup>62</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (citation omitted).

<sup>63</sup> *Books*, 235 F.3d at 307.

<sup>64</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 599 (1989).

<sup>65</sup> *Van Orden*, 125 S. Ct. at 2870.

<sup>66</sup> 374 U.S. 203 (1963).

<sup>67</sup> *See id.* at 240–41 (Brennan, J., concurring) (explaining why the longevity of a practice does not immunize it from Establishment Clause challenges).

The reality is that challenges to religious symbols are expensive, and often there is no one, like Thomas Van Orden, with the courage to bring a long, drawn-out suit. Justice Souter made exactly this point in his dissent:

Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.<sup>68</sup>

Moreover, the meaning of symbols changes over time. Since 1961, the Ten Commandments increasingly have become a symbol embraced by the religious right and fundamentalists. The dispute over the Ten Commandments monument in the Alabama Courthouse that led to the removal of Chief Justice Roy Moore illustrates this shift.<sup>69</sup> In light of this, the passage of time before a challenge surely cannot be decisive.

#### CONCLUSION

The central flaw of Justice Breyer's opinion and of the Court's holding in *Van Orden* is that it ignored the most basic reality of this case. On the grounds of the Texas State Capitol, there is one prominent religious symbol: a large Ten Commandments monument between the Capitol and the Supreme Court. The Ten Commandments are a preeminent symbol of some, but not of other, religions and that they express a profoundly religious message: there is a God, and that God has commanded rules for behavior.

The good news from my perspective is that the Court did not significantly change the law of the Establishment Clause on June 27, 2005. In the companion case, *McCreary County v. American Civil Liberties Union of Kentucky*,<sup>70</sup> the Court reaffirmed the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*,<sup>71</sup> which provides that the government violates the Establishment Clause if it acts with the purpose of advancing religion, or if its actions have the effect of advancing or inhibiting religion, or if there is excessive government entanglement with religion. Conservative Justices, however, have repeatedly urged the overruling

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<sup>68</sup> *Van Orden*, 125 S. Ct. at 2897 (Souter, J., dissenting).

<sup>69</sup> See, e.g., Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471 (1998).

<sup>70</sup> 125 S. Ct. 2722 (2005).

<sup>71</sup> 403 U.S. 602 (1971).



of the *Lemon* test in favor of allowing far more government support for religion.<sup>72</sup> But the Ten Commandments decisions reaffirmed that test.

Moreover, five Justices — Stevens, O'Connor, Souter, Ginsburg, and Breyer — reaffirmed that the test for evaluating religious symbols on government property is whether there is a symbolic endorsement of religion. Breyer was clear that his disagreement with these Justices in *Van Orden* was over the application of this test.<sup>73</sup> The result will be that each religious symbol on government property will need to be separately litigated concerning its history, its purpose, and its context.

As the lawyer for Thomas Van Orden, I was very disappointed at Justice Breyer's vote and opinion, but I also realize that it could have been much worse. When Sandra Day O'Connor announced her resignation on July 1, and with her vote being the fifth to affirm the *Lemon* test and the symbolic endorsement approach, it is apparent that worse may happen quite soon.

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<sup>72</sup> See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

<sup>73</sup> *Van Orden*, 125 S. Ct. at 2874 (Breyer, J., concurring).