

**PUBLIC DISPLAYS OF AFFECTION . . . FOR GOD:
RELIGIOUS MONUMENTS AFTER *MCCREARY* AND
*VAN ORDEN***

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INTRODUCTION

On March 2, 2005, the United States Supreme Court heard two cases involving the constitutionality of public displays of the Ten Commandments under the Establishment Clause of the First Amendment: *McCreary County v. ACLU*¹ and *Van Orden v. Perry*.² *McCreary* involved a display of nine copies of historically significant documents in identical frames hanging on the walls of two Kentucky courthouses. The documents included the Magna Carta, the Declaration of Independence, and the lyr-

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

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

ics to *The Star-Spangled Banner*. They also included the text of the Ten Commandments, accompanied by a statement explaining the role of the Commandments in influencing American law. In *Van Orden*, the challenged display was a granite monument—six feet high and three-and-a-half feet wide—whose primary content was the text of the Ten Commandments but which also included two Stars of David and the Greek letters Chi and Rho, an ancient symbol for Jesus Christ. As one commentator predicted at the time, “[T]hese two cases are likely to be resolved in accordance with I Kings 3:16–28[.] And [O’Connor] said: ‘Fetch me a sword.’ And they brought a sword before [O’Connor]. And [O’Connor] said: ‘Divide the living child in two, and give half to the one, and half to the other.’”³

The baby was split, but not by Justice O’Connor. Justice Breyer emerged as the supposed Solomon in both cases, and it was he who wrote the controlling opinion in *Van Orden*. Perhaps to the surprise of some, the Court held in a fragmented opinion that the large granite monument in *Van Orden* was indeed constitutional. And instead of upholding the carefully nuanced historical display in *McCreary*, the Court held that its stormy history, including repeated legal and rhetorical battles concerning both its form and substance, rendered it an unconstitutional establishment of religion.

I respectfully submit that *McCreary* and *Van Orden* imprudently shifted religious monument jurisprudence under the Establishment Clause away from a display-focused analysis and toward an actor-focused analysis. A display-focused approach emphasizes the placement and content of the display itself and is expressed in “bright-line” legal rules that are applicable to all monuments of a particular type. An actor-focused approach, in contrast, uses the historical and physical qualities associated with a display to shed light on the purposes of those who placed it. Under the actor-focused approach, the same monument can be constitutional or unconstitutional depending on the motives of the relevant government

3. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2004_10_17_2004_10_23.shtml#1098403243 (Oct. 21, 2004, 20:00 EDT) (quoting Mark Stancil) (name substitution in original).

actors—ultimately, this is a recipe for further confusion and uncertainty over what some have called our “first freedom.”⁴

One example of a display-focused Establishment approach is the 1980 case *Stone v. Graham*.⁵ In *Stone*, the Supreme Court held that Kentucky could not post the Ten Commandments on the walls of its public school classrooms.⁶ Although *Stone* also held that the legislature did not have a valid secular, or nonreligious, purpose for posting the Ten Commandments, the short opinion relied principally on the content of the display as *prima facie* evidence of the lack of such a purpose.⁷

The strength of a display-focused approach is that it can offer a basis for clear guidelines to public officials because it emphasizes the physical characteristics, placement, and content of the display. The weakness is that adequate guidelines have not been developed to account for the culturally and historically important uses of religious symbols in public spaces, perhaps most notably on the facade of the Supreme Court building itself. The tension in the display-focused approach is one of the factors which led to ten separate opinions and a split decision in the *McCreary* and *Van Orden* sequence.⁸

The actor-focused approach has strengths and weaknesses of its own, which are apparent in the first generation of federal appellate decisions issued after *Van Orden*. On one hand, the actor-focused analysis has given courts greater flexibility to uphold some religious monuments.⁹ The courts of appeals, however, have struggled to answer the crucial questions of *who* and *when*: whose motives are relevant and what is the applicable time frame when evaluating the government’s actions? Can

4. See generally Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243 (2000).

5. 449 U.S. 39 (1980).

6. See *id.* at 40.

7. See *id.* at 41 (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”).

8. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (“Neither can this Court’s other tests readily explain the Establishment Clause’s tolerance, for example, of . . . the public references to God on coins, decrees, and buildings . . .”).

9. See, e.g., *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005) (upholding a display identical to the display struck down in *McCreary*, based on its less contentious history).

a later refurbishment of an originally constitutional monument create an unconstitutional establishment where none existed before?¹⁰ Can the religious motivation of nongovernmental actors taint the government's secular purpose and create an unconstitutional endorsement of religion?¹¹ As one might guess, even leaving aside the question of its jurisprudential value, the time and sensitivity required when applying the actor-focused approach have already had a big impact on Establishment Clause cases in the courts of appeals.¹²

I. MCCREARY AND VAN ORDEN

To understand the shift from a display-focused approach to an actor-focused approach and its significance, one must first take a closer look at the way the Court decided *McCreary* and *Van Orden*.

A. McCreary

Justice Souter wrote the majority opinion in *McCreary*, striking down the Kentucky Ten Commandments display.¹³ Justice Souter applied the famous—or infamous, depending on one's point of view—Establishment Clause test from *Lemon v. Kurtzman*, which has three elements.¹⁴ “First, the statute must have a secular legislative purpose; second, its principal or primary ef-

10. See *Staley v. Harris County*, 461 F.3d 504, 513–14 (5th Cir. 2006) (holding that an originally constitutional memorial erected in the 1950s acquired an unconstitutional purpose when it was refurbished in 1995), *abrogated by* 485 F.3d 305, 314 (5th Cir. 2007).

11. Compare *Buono v. Kempthorne*, 502 F.3d 1069, 1085–86 (9th Cir. 2007) (holding that a cross erected as a war memorial in 1934 was now an unconstitutional establishment of religion even though the government acted to transfer the land to a private organization), with *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1045–46 (9th Cir. 2007) (upholding Forest Service regulations protecting a religiously significant rock formation and stating that just because “a group of religious practitioners benefits in part from the government's policy does not establish endorsement”).

12. See *McCreary County v. ACLU*, 545 U.S. 844, 861–62 (2005) (stating that discerning a display's “purpose” is an important component of Establishment Clause jurisprudence and within the competency of appellate courts); *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006) (remanding for further fact-finding in light of *McCreary*); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240–41 (10th Cir. 2005).

13. See *McCreary*, 545 U.S. at 850.

14. See *id.* at 859 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

fect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”¹⁵ Interestingly, Justice Souter focused on the “secular purpose” element—a rarely invoked prong of the *Lemon* test. In so doing, he rejected Kentucky’s argument that the legislature’s purpose was “unknowable” and that courts that search for purposes are prone to “act selectively and unpredictably in picking out evidence of subjective intent.”¹⁶ Justice Souter asserted that the legislature’s purpose was knowable through the normal legal tools of text, history, and implementation, and he pointed out that these tools are used by courts every day to determine government purposes in cases involving Equal Protection claims or statutory interpretation.¹⁷

After concluding that the government’s purpose was knowable, Justice Souter emphasized that the government could not satisfy *Lemon*’s purpose prong by proffering any motive it pleased. The courts must examine the government’s allegedly secular motives to make sure that they are not a “sham.”¹⁸ Further, according to Justice Souter, the government’s secular purpose must also be the preeminent purpose, not just secondary to a primarily religious intent.¹⁹

Justice Scalia’s dissent sharply criticized the preeminent purpose principle. Justice Scalia noted that “[i]n all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion.”²⁰ In the one case where the Supreme Court said that the “state action was invalid because its ‘primary’ or ‘preeminent’ purpose was to advance a particular religious belief,” that statement was “unnecessary to the result, since the Court rejected the State’s only proffered secular purpose as a sham.”²¹ Justice Scalia predicted that the majority opinion in *McCreary* would dramatically affect future Establishment Clause litigation “[b]y shifting the focus of *Lemon*’s

15. *Lemon*, 403 U.S. at 612–13 (citation and quotation marks omitted).

16. *McCreary*, 545 U.S. at 861.

17. *See id.* at 861–62.

18. *Id.* at 864.

19. *See id.*

20. *Id.* at 901–02 (Scalia, J., dissenting).

21. *Id.* at 902 (citing *Edwards v. Aguillard*, 482 U.S. 578, 589 (1987)).

purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose."²² Such a search would require a "rigorous review of the full record"²³—a laborious and potentially risky task. As described below, the courts of appeals have seemingly fulfilled Justice Scalia's predictions, remanding several Establishment Clause cases for additional fact finding in light of *McCreary*.²⁴

Justice Souter then moved from discussing the need for a genuine, preeminent secular purpose to instructing courts on how to determine that purpose. He said that the government's purpose is to be measured from the perspective of an objective observer who is presumed unfamiliar with the context and history of the government's actions in each case.²⁵ Justice Scalia argued in dissent that this method of determining purpose resulted in *hostility* to religion, because "even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise."²⁶ Justice Scalia asserted that, under the majority's approach, "the legitimacy of a government action with a wholly secular effect [c]ould turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion."²⁷ Justice Souter concluded his discussion of the *Lemon* test's purpose element by asserting that "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."²⁸ The courts of appeals have taken Justice Souter at his word, and at least one court has upheld a display of the Ten Commandments that was identical to the *McCreary* display but which lacked its stormy history.²⁹

22. *Id.* at 902.

23. *Id.*

24. See, e.g., *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006) (citing *McCreary*); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240–41 (10th Cir. 2005) (citing *McCreary* and *Van Orden v. Perry*, 545 U.S. 677 (2005)).

25. *McCreary*, 545 U.S. at 862.

26. *Id.* at 900–01 (Scalia, J., dissenting).

27. *Id.* at 901.

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

29. See *ACLU v. Mercer County*, 432 F.3d 624, 626 (6th Cir. 2005).

Justice Souter's reasons for defending and elaborating on the purpose element of the *Lemon* test in such detail become clear in the next part of the *McCreary* opinion. The nine historical documents collectively titled the "Foundations of American Law and Government" were parts of the third Ten Commandments display posted by McCreary County.³⁰ Justice Souter relied on the broad definition of legislative history he laid out in the first part of the opinion to examine not just the display hanging in the county courthouse when the case reached the Supreme Court, but also the two previous displays the county had posted.³¹

The first display, installed in 1999, included only the Ten Commandments and reproduced their text in an abridged format.³² Justice Souter distinguished the first display from what he termed "symbolic" representations of the Ten Commandments, such as a sculpture of two stone tablets with ten roman numerals.³³ This is perhaps an odd distinction for those who practice one of the many religions in this country that are rich with symbolism. In any event, according to Justice Souter, a "symbolic" representation is one that "could be seen as alluding to a general notion of law."³⁴ The actual text of the Ten Commandments, however, was "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction."³⁵ In Justice Souter's view, "[w]hen the government initiates an effort" to place the *text* of the Ten Commandments "alone in public view, a religious object is unmistakable."³⁶

Under Justice Souter's analysis of the first display in *McCreary*, an unconstitutional display is one that is government-initiated, includes the text of the Ten Commandments, and stands alone in public view. Thus far, Justice Souter's analysis is decidedly display-focused. In the next two sections of his opinion, however, the actor-focused approach moves to the foreground as his analysis shifts from the display itself to the motives of the actors who put it in place.

30. See *McCreary*, 545 U.S. at 851–57.

31. See *id.* at 868–73.

32. See *id.* at 851–52.

33. *Id.* at 868.

34. *Id.*

35. *Id.* at 869.

36. *Id.*

After the ACLU filed suit against McCreary County, the county constructed a modified display which it subsequently exhibited for approximately six months.³⁷ The county legislature passed a resolution noting the theistic and religious references in numerous American historical documents and authorized that several of these documents be posted alongside the Ten Commandments in the county courthouse.³⁸ The resolution stated that

the “County Judge and . . . magistrates agree with the arguments set out by Judge [Roy] Moore” in defense of his “display [of] the Ten Commandments in his courtroom”; and that the “Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.”³⁹

This display avoided the “sin” of exposing the text of the Ten Commandments in isolation, but Justice Souter found that the surrounding historical documents actually *enhanced* the impermissible religious message of the display because the “sole common element” among the documents was “highlighted references to God.”⁴⁰ This display stood for only six months and the county explicitly disavowed it in its briefs, but Justice Souter stated that “the reasonable observer could not forget it.”⁴¹

The third and final incarnation of the *McCreary* display was entitled “Foundations of American Law and Government.”⁴² Justice Souter noted that although the county proposed several new secular purposes for the third display, both the district court and the Sixth Circuit held that there was no “legitimizing secular purpose” in the third display.⁴³ Justice Souter agreed with the courts below and found that the third display failed to remedy the constitutional violations of the first two displays for four reasons.⁴⁴ First, he observed that the new purposes were only proposed as a litigating position and had not been

37. *See id.*

38. *See id.* at 869–70.

39. *Id.* at 853 (alterations in original) (citation omitted).

40. *Id.* at 870.

41. *Id.*

42. *Id.* at 870–71.

43. *Id.* at 871.

44. *See id.* at 871–72.

enacted through legislation.⁴⁵ Second, the legislative resolution authorizing the *second* display was not repealed until after the Justices raised it in oral argument.⁴⁶ Third, the third display quoted even more explicitly religious language of the Ten Commandments than the second display did.⁴⁷ Finally, Justice Souter found that nothing in the third display communicated “a clear theme that might prevail over evidence of the continuing religious object.”⁴⁸

Justice Souter also engaged in a detailed critique of the display’s historical claims as part of his analysis of the government’s purpose. He found the display’s statement that the Ten Commandments’ “influence is clearly seen in the Declaration [of Independence]” to be particularly dubious.⁴⁹ He noted that “the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives ‘from the consent of the governed.’”⁵⁰ Some may find Justice Souter’s skepticism about the Ten Commandments’ formative influence on American law puzzling considering the religious views of the Founding generation and how they influenced the lawmaking of that era.⁵¹

Justice Souter concluded his analysis by noting that a change in legislative purpose is possible, but it must be believable.⁵² He found that it was improbable that the county in this case changed its purpose between the second and third displays.⁵³ Justice Souter did note, though, that it was theoretically possible for the Ten Commandments to be integrated into a display on United States history so long as the overall display did not violate the constitutional principle of neutrality.⁵⁴

In short, the Court in *McCreary* used an actor-focused approach to the Establishment Clause when it relied heavily on assumptions about the lawmakers’ motives. Although Justice

45. *See id.* at 871.

46. *See id.* at 871 & n.19, 872.

47. *See id.* at 872.

48. *Id.*

49. *Id.* at 873 (internal quotation marks omitted).

50. *Id.*

51. *See generally* GERARD V. BRADLEY, *RELIGIOUS LIBERTY IN THE AMERICAN REPUBLIC* (2008).

52. *See McCreary*, 545 U.S. at 873–74.

53. *See id.* at 873.

54. *See id.* at 874.

Souter seemingly kept the display-focused approach alive throughout his discussion of the first display in *McCreary, Van Orden's* conclusion that the historical and political context of a monument could be dispositive threw into question even this limited appreciation of the display-focused approach.

B. Van Orden

Van Orden affirmed a decision of the Fifth Circuit upholding the inclusion of a Ten Commandments monument in a display located on the twenty-two acres surrounding the Texas State Capitol.⁵⁵ The display consists of seventeen monuments and twenty-one historical markers.⁵⁶ According to the Texas legislature, the display commemorates “the people, ideals, and events that compose Texan identity.”⁵⁷ The Ten Commandments monument was placed on the Texas State Capitol grounds in 1961 by the Fraternal Order of Eagles,⁵⁸ and is identical to at least one hundred other Ten Commandments monuments that the Eagles placed on government property over the course of several decades.⁵⁹ The program began when a Minnesota juvenile justice judge first thought of posting the Commandments in courthouses nationwide after encountering a “juvenile offender who had never heard of the Ten Commandments.”⁶⁰ After a committee selected a nonsectarian text, Hollywood mogul Cecil B. DeMille, who produced the movie *The Ten Commandments*, learned of the plan and teamed up with the Eagles to distribute the granite monuments and paper replicas throughout the country.⁶¹ According to their Supreme Court briefs, the Eagles distributed the monuments in hopes of “inspir[ing] the youth to live law-abiding and productive lives.”⁶² Before Thomas Van Orden filed his suit against the State of Texas in 2001, the Texas monument had never been the subject of a complaint.⁶³

55. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

56. *Id.* at 681.

57. *Id.* (internal quotation marks omitted).

58. *See id.* at 681–82.

59. *See id.* at 712–13 (Stevens, J., dissenting).

60. *Id.* at 713.

61. *See id.* at 701 (Breyer, J., concurring in the judgment); *id.* at 713 (Stevens, J., dissenting).

62. Brief for Fraternal Order of Eagles as Amicus Curiae Supporting Respondents at 4, *Van Orden*, 545 U.S. 677 (No. 03-1500).

63. *See Van Orden*, 545 U.S. at 682 (Breyer, J., concurring in the judgment).

These relatively straightforward facts yielded a fragmented opinion. Chief Justice Rehnquist wrote the plurality opinion, joined by Justices Scalia, Kennedy, and Thomas.⁶⁴ Justices Scalia and Thomas also wrote separate concurrences.⁶⁵ Justice Breyer concurred in the judgment and wrote a lengthy separate opinion.⁶⁶ Among the dissenting Justices—Justices Stevens, O’Connor, Souter, and Ginsburg—there were three separate opinions.⁶⁷ In total, seven Justices wrote separately in *Van Orden*.

Because no opinion commanded a majority, Justice Breyer’s concurring opinion is the law of the case. Justice Breyer started his analysis by discussing the “purposes” of the First Amendment’s Religion Clauses, identifying three: “assur[ing] . . . religious liberty and tolerance for all,”⁶⁸ avoiding “divisiveness based upon religion,”⁶⁹ and “maintain[ing] [the] ‘separation of church and state.’”⁷⁰ Although scholars such as Professor Philip Hamburger have made a compelling case questioning the historical accuracy of this last “separation” purpose, it nevertheless has been incorporated into the Court’s jurisprudence.⁷¹

In any event, Justice Breyer reviewed the limits that these three purposes place on government action. He stated that the

64. *Id.* at 681 (Rehnquist, C.J., plurality opinion).

65. *Id.* at 692 (Scalia, J., concurring); *id.* at 692 (Thomas, J., concurring).

66. *Id.* at 698 (Breyer, J., concurring in the judgment).

67. *Id.* at 707 (Stevens, J., dissenting); *id.* at 737 (O’Connor, J., dissenting); *id.* (Souter, J., dissenting).

68. *Id.* at 698 (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

69. *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting)).

70. *Id.* (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282–83 (H. Mansfield & D. Winthrop trans. & eds., 2000) (1835)).

71. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 481 (2002) (arguing that “the constitutional authority for separation is without historical foundation”). Professor Hamburger observes that the concept of “separation between church and state” arose not from any authoritative constitutional source, but rather from an 1802 letter from Thomas Jefferson to the Danbury, Connecticut Baptist Association. See *id.* at 1–3. Though cited in the federal polygamy-law case of *Reynolds v. United States*, 98 U.S. 145, 164 (1878), the phrase did not become the clear basis for a Supreme Court Establishment Clause decision until Justice Black famously wrote in *Everson v. Board of Education*, 330 U.S. 1 (1947)—a case that, interestingly enough, approved public aid for busing to religious schools—that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.” *Id.* at 18; see HAMBURGER, *supra*, at 454–55; see also *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (offering a similar critique).

government could not show favoritism between religion and nonreligion, but also noted that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”⁷² A religious purge would be inconsistent with our national traditions and would in fact “promote the kind of social conflict the Establishment Clause seeks to avoid.”⁷³

Justice Breyer next turned to the Supreme Court’s then-existing Establishment Clause tests. In *McCreary*, Justice Breyer had opined that “[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.”⁷⁴ In *Van Orden*, however, Justice Breyer emphasized that the Supreme Court has not consistently embraced the concept of neutrality.⁷⁵ More important, he recognized *why* past Justices were wary of this principle by quoting Justice Goldberg:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.⁷⁶

Justice Breyer also rejected the *Lemon* test⁷⁷ as well as the “endorsement” test used in Justice O’Connor’s concurrence in *Lynch v. Donnelly*, a test that emphasizes the effect of the governmental action at issue on non-adherents of a particular religion.⁷⁸ According to Justice Breyer, these tests are inadequate because they cannot explain why we still have “In God We Trust” on our currency, why our state and national legislatures

72. See *Van Orden*, 545 U.S. at 698–99 (Breyer, J., concurring in the judgment).

73. *Id.* at 699.

74. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

75. See *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

76. *Id.* (quoting *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

77. *Id.* at 699–700 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

78. *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 687–88, 692, 694 (O’Connor, J., concurring)).

open with prayer, and why we recognize the religious dimensions of holidays like Thanksgiving.⁷⁹

Justice Breyer thus proposed that in borderline cases, such as those involving displays like the Texas Ten Commandments monument, judges must rely instead on their “legal judgment.”⁸⁰ In Justice Breyer’s view, legal judgment should reflect three things: the *purposes* of the Religion Clauses, the *context* of the issue at hand, and the *consequences* of the court’s decision.⁸¹ Like Justice Souter’s “purpose” inquiry, Justice Breyer’s contextual analysis is still clearly actor-focused.

Justice Breyer emphasized three aspects of the Texas monument’s context in upholding that display. First, the circumstances of the monument’s erection “suggest[ed] that the State itself intended the . . . nonreligious aspects of the tablets’ message to predominate.”⁸² In particular, the monument had been donated by the Fraternal Order of Eagles, “a private civic (and primarily secular) organization” that had wished to “shap[e] civic morality as part of [its] efforts to combat juvenile delinquency.”⁸³ Second, the monument’s physical setting on the capitol grounds, among dozens of other historical monuments, communicated to visitors that “the State intended the display’s moral message—[which] reflect[ed] the historical ‘ideals’ of Texans—to predominate.”⁸⁴ Finally, Justice Breyer found that the complete lack of controversy surrounding the monument for the past forty years was ultimately “determinative”:

[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect [or engage in any other activity prohibited by the First Amendment].⁸⁵

The actor-focused approach is evident here, as Justice Breyer used even the physical characteristics of the monument to discern the motives of those who placed it. Whereas the “short

79. See *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

80. *Id.* at 700.

81. See *id.*

82. *Id.* at 701.

83. *Id.*

84. *Id.* at 702.

85. *Id.*

(and stormy) history” of the *McCreary* display revealed “the substantially religious objectives of those who mounted” it and the effects of these religious objectives upon its observers,⁸⁶ the Texas monument’s history and physical characteristics, in Justice Breyer’s view, reflected positively—from a constitutional perspective—on the motives of those who installed it.

Interestingly, Justice Breyer went on to speculate about whether any contemporary display of the Ten Commandments could be constitutional. He opined, “in today’s world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [the] longstanding, pre-existing [Texas] monument has not.”⁸⁷ This statement marks a strong departure from the display-focused approach and explicitly rejects the idea that a particular kind of display could be constitutional in all times and all places.

Curiously enough, in voting to uphold the Texas display, Justice Breyer acknowledged that removing the monument could also have divisive consequences. Such removal, he argued, “might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation,”⁸⁸ which in turn could “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid”⁸⁹—albeit in the nonreligious direction.

Justice Breyer’s use of the “divisiveness” argument to *preserve* the Texas monument is unusual. Historically, the Supreme Court has invoked the divisiveness rationale to *expel* religious symbolism from the public square.⁹⁰ Professor Richard Garnett has challenged “the assumption that the Constitution authorizes courts to protect our ‘normal political process’ from a *particular kind* of strife and to purge a *particular kind* of dis-

86. *Id.* at 703.

87. *Id.*

88. *Id.* at 704.

89. *Id.*

90. In *Lemon*, for example, Chief Justice Burger asserted that the school subsidies at issue were an excessive entanglement in part because of their “divisive political potential.” *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971). For a thorough discussion of the history of the divisiveness argument, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1705–07 (2006).

agreement from politics and public conversation about how best to achieve the common good.”⁹¹ Professor Garnett’s compelling critique argues instead that “[i]t is . . . misguided . . . to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people.”⁹² Justice Breyer nods in Garnett’s direction when he argues that deciding to remove the Texas monument solely because of “the religious nature of the tablets’ text would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”⁹³ But his reliance on divisiveness in the rest of his opinion indicates that he does not fully agree with Professor Garnett’s argument that division over religious matters is no more a threat to civil society than division over politics or economics.

The divisiveness argument has other weaknesses as well. Although the Texas monument was not the subject of litigation before *Van Orden*, at least one identical monument placed by the Eagles in Salt Lake City, Utah was the target of lawsuits in the 1970s.⁹⁴ If divisiveness truly is dispositive, then the Utah monument could be unconstitutional even though its substance and genesis are indistinguishable from the Texas monument in *Van Orden*. Would the divisiveness argument require the development of an Establishment Clause analogue to the “community standards” test used in obscenity cases under the Free Speech Clause?⁹⁵ These unresolved issues raise questions about the validity and usefulness of a divisiveness test in Establishment Clause jurisprudence.

Because he considered the Texas monument a “borderline case,”⁹⁶ Justice Breyer concurred on deliberately narrow grounds. In the closing paragraphs of his opinion, he suggested that the

91. Garnett, *supra* note 90, at 1668.

92. *Id.* at 1670.

93. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment).

94. See *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 30 (10th Cir. 1973), *superseded by Van Orden*, 545 U.S. 677, and *McCreary County v. ACLU*, 545 U.S. 844 (2005), as recognized in *Soc’y of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1291 n.1 (10th Cir. 2005).

95. Cf. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)) (including “community standards” in the test for determining whether a particular expression is obscene and, thus, unprotected by the First Amendment).

96. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

Texas monument “might [also] satisfy this Court’s more formal Establishment Clause tests.”⁹⁷ He expressed agreement with the principles that Justice O’Connor laid out in her *McCreary* concurrence—in which she concurred in striking down the Kentucky display largely on “endorsement” grounds—and stated that he only differed with Justice O’Connor on her “evaluation of the evidence.”⁹⁸ Justice Breyer’s opinion was therefore narrow in two ways: It both preserved the forty-year-old status quo with regard to the Texas monument and sought to do so without disturbing what he regarded as Establishment Clause orthodoxy. Nevertheless, by upholding a monument that featured the text of the Ten Commandments essentially alone, Justice Breyer came very close to rejecting Justice Souter’s evaluation of the first display in *McCreary*, albeit on a similar actor-focused theory. Indeed, Justice Breyer’s analysis undermined what was left of the display-focused approach after *McCreary* even in upholding the monument at issue in *Van Orden*.

II. REFLECTIONS ON *MCCREARY* AND *VAN ORDEN*

Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*, yet this conclusion has not come without a struggle. As one

97. *Id.* at 703.

98. *Id.* at 704–05 (citing *McCreary*, 545 U.S. at 881–83 (O’Connor, J., concurring)). Justice O’Connor made three points in her *McCreary* concurrence. First, she stated that religion is a matter of individual conscience. *See McCreary*, 545 U.S. at 882 (O’Connor, J., concurring). Second, she stated that government endorsement of religion fosters religious division and threatens liberty. *See id.* at 883. Third, she argued that the broad acceptance of the Ten Commandments is irrelevant in determining the constitutionality of a particular Ten Commandments display because religious minorities are also protected by the First Amendment. *See id.* at 884.

Justice O’Connor’s very short *Van Orden* dissent stated her agreement with Justice Souter’s dissenting opinion, which Justice Ginsburg also joined. *See Van Orden*, 545 U.S. at 737 (O’Connor, J., dissenting). Justice Souter emphasized that a “government display of an obviously religious text” such as the Ten Commandments is not neutral when it appears in a context where the government’s “predominant purpose” is “to adopt the religious message or urge its acceptance by others.” *Id.* at 737–38 (Souter, J., dissenting). Justice Souter disagreed with Justice Breyer that the monument’s placement on the capitol grounds distinguished this case from *Stone*, in which the Court struck down the display of the Ten Commandments in Kentucky public schools. *See id.* at 744–45. He also did not find it constitutionally significant that the first lawsuit challenging the Texas monument came forty years after its installation. *See id.* at 746. Justice Souter acknowledged, however, that reasonable minds could differ on these issues. *See id.*

Ninth Circuit panel commented, “[c]onfounded by the ten individual opinions in the two cases, and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both ‘Establishment Clause purgatory,’ and ‘Limbo.’”⁹⁹

Out of the ten-plus religious monuments cases actually decided by the courts of appeals since *Van Orden*,¹⁰⁰ only two have expressly declined to apply *Lemon*,¹⁰¹ and both did so on extremely narrow grounds. In *ACLU Nebraska Foundation v. City of Plattsmouth*, the Eighth Circuit, sitting en banc, held that a Ten Commandments monument identical to the Texas monument in *Van Orden* also did not violate the Establishment Clause,¹⁰² concluding that the monument was not “different in any constitutionally significant way” from the monument in *Van Orden*.¹⁰³ The Eighth Circuit declined to apply the *Lemon* test because neither Chief Justice Rehnquist nor Justice Breyer applied it in *Van Orden*.¹⁰⁴ At the same time, the Eighth Circuit stated that “were we to apply the *Lemon* test, we would conclude, essentially for the reasons set out in the dissent to the panel decision in the present case, that the City’s display of the monument passes that test.”¹⁰⁵ Even *Plattsmouth*’s small departure from *Lemon* has been limited to its facts in other Eighth Circuit cases.¹⁰⁶

99. *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (citations omitted).

100. As of this writing, post-*Van Orden* courts of appeals cases include: *Weinbaum v. City of Las Cruces*, Nos. 06-2355, 07-2012, 2008 WL 4182390 (10th Cir. Sept. 12, 2008); *Card*, 520 F.3d 1009; *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007); *Access Fund v. U.S. Dep’t of Agric.*, 499 F.3d 1036 (9th Cir. 2007); *Staley v. Harris County*, 461 F.3d 504 (5th Cir. 2006), *abrogated by* 485 F.3d 305 (5th Cir. 2007) (en banc); *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006); *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc’y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *O’Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005).

101. *See Card*, 520 F.3d at 1016; *Plattsmouth*, 419 F.3d at 778 n.8.

102. *Plattsmouth*, 419 F.3d at 773–74.

103. *Id.* at 778.

104. *See id.* at 778 n.8.

105. *Id.* (citation omitted).

106. The Eighth Circuit has continued to apply *Lemon* in other Establishment Clause cases. *See, e.g., Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 423 (8th Cir. 2007) (affirming the district court’s permanent injunction forbidding two Christian organizations from receiving state funding to operate inmate rehabilitation programs in Iowa state prisons).

In *Card v. City of Everett*, yet another case evaluating a monument identical to the one in *Van Orden*,¹⁰⁷ a Ninth Circuit panel reached two conclusions:

First, . . . the three-part test set forth in *Lemon* . . . remains the general rule for evaluating whether an Establishment Clause violation exists.

Second, . . . we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context.¹⁰⁸

Card's interpretation of when *Lemon* applies seems slightly narrower than *Plattsmouth*'s, but other Ninth Circuit panels have continued to apply *Lemon* in religious monument cases.

The next interesting question is how the courts of appeals have altered their analyses in response to the expanded purpose inquiry in *McCreary*. Recall that in his *McCreary* dissent, Justice Scalia warned that "[b]y shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record."¹⁰⁹ Moreover, as noted above, both *Plattsmouth* and *Card* considered monuments similar to the display in *Van Orden*. In fact, the Eagles distributed more than one hundred Ten Commandments monuments.¹¹⁰ Yet under *McCreary*'s fact-intensive and actor-focused approach, whenever litigation arises, the courts of appeals must examine the history of each monument anew.

The Tenth Circuit case *Society of Separationists v. Pleasant Grove City*¹¹¹ is a good example of the complication. In *Separationists*, the monument at issue was once again provided by the Eagles.¹¹² Before the Supreme Court decided *McCreary* and *Van Orden*, the Society of Separationists asked the Tenth Circuit to overturn *Anderson v. Salt Lake City Corp.*, the 1973 case noted

107. *Card v. City of Everett*, 520 F.3d 1009, 1010 (9th Cir. 2008).

108. *Id.* at 1016 (citations omitted).

109. *McCreary County v. ACLU*, 545 U.S. 844, 902 (2005) (Scalia, J., dissenting).

110. See *Van Orden v. Perry*, 545 U.S. 677, 713 (2005) (Stevens, J., dissenting).

111. 416 F.3d 1239 (10th Cir. 2005).

112. See Reply Brief of the Defendants-Appellees at 7–8 & n. 3, *Separationists*, 416 F.3d 1239 (No. 04-4136).

above that had held a Salt Lake City Eagles monument to be constitutional.¹¹³ But the Tenth Circuit decided to wait until the Court handed down *Van Orden* and *McCreary* before ruling on the Separationists' appeal.¹¹⁴ After the opinions' release, the Tenth Circuit—fulfilling Justice Scalia's prophecy and, according to Professor Douglas Smith, embodying one of *McCreary's* potential harms¹¹⁵—found itself obliged to remand *Separationists* to the district court because the record on appeal did not include enough data to satisfy the “fact-intensive analysis” of *McCreary* and *Van Orden*.¹¹⁶

In *Staley v. Harris County*, the Fifth Circuit also found that the record on appeal did not permit “the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*.”¹¹⁷ In the original appeal, the panel majority held a memorial monument to civic leader William Mosher, which featured a Bible, unconstitutional under *McCreary* and *Van Orden*.¹¹⁸ The original three-judge panel's opinion strikingly exemplifies the actor-focused approach. The majority acknowledged the absence of a predominantly religious purpose when the monument was placed on the grounds of the Harris County Civil Courthouse in Texas in the 1950s.¹¹⁹ Rather, it was clearly intended to honor Mosher, and the religious symbolism in the

113. See *Separationists*, 416 F.3d at 1241 n.1 (citing *Anderson v. Salt Lake City Corp.*, 975 F.2d 29 (10th Cir. 1973)).

114. See *id.* at 1240.

115. See Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 119 (2007) (“Another potentially negative effect of the *McCreary* decision is to prolong and complicate Establishment Clause litigation.”).

116. *Separationists*, 416 F.3d at 1240–41. *Separationists* involved a motion for judgment on the pleadings, so it is perhaps not surprising that the Tenth Circuit needed more information before it could make a well-supported decision. But Professor Smith has noted that the Eleventh Circuit also engaged in heavy reliance on facts when it cited *McCreary* in remanding a case involving pro-creationism stickers on biology textbooks for further fact finding on the motives of the legislators. See Smith, *supra* note 115, at 119–20 (discussing *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322–23 (11th Cir. 2006)). The record in *Selman* had been partly lost, however, so *McCreary* probably was not determinative of the decision to remand. See *Selman*, 449 F.3d at 1322. At a minimum, Professor Smith is likely correct that *McCreary* has had the effect of making Establishment Clause litigation slower and more complicated.

117. *Staley v. Harris County (Staley II)*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).

118. *Staley v. Harris County (Staley I)*, 461 F.3d 504, 506, 508–09, 515 (5th Cir. 2006).

119. See *id.* at 505–06, 513.

monument reflected his faith.¹²⁰ Citing *McCreary*, however, the panel found that the purpose of the memorial changed in 1995, when a local judge who ran for election on a platform of “putting Christianity back in government” refurbished the memorial.¹²¹ The majority concluded that the judge and his staff displayed an “almost exclusively religious purpose” for their actions in restoring the monument.¹²² In an expansive reading of *McCreary*, the panel majority stated: “*McCreary County* makes clear that the entire history surrounding the monument is relevant An original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to an original purpose.”¹²³

This holding was abrogated when the Fifth Circuit took the case en banc. Though a majority of the en banc court held that the controversy was moot because Harris County had removed the monument to make way for renovations, the court also cited *McCreary* and *Van Orden*, finding that “any dispute over a probable redisplay [of the memorial] is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause.”¹²⁴

The *Staley* opinions highlight two of the ways that *McCreary* has affected the courts of appeals. The original panel opinion is an example of an almost exclusively actor-focused analysis. The panel held that a monument that was constitutional when it was installed later became unconstitutional because of the suspect motives of the government officials who maintained it. The en banc opinion confirms Justice Scalia’s concern and Professor Smith’s prediction that *McCreary* and *Van Orden* will make religious monument litigation slower and more complicated because they require such a thoroughly developed factual record.¹²⁵

120. *See id.* at 513.

121. *Id.* at 507, 513–14.

122. *Id.* at 514.

123. *Id.* at 513.

124. *Staley v. Harris County (Staley II)*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).

125. *See Smith, supra* note 115, at 119–20.

III. TWO "PURPOSE" APPROACHES AFTER
MCCREARY AND VAN ORDEN

One of the most troubling aspects for public officials of *McCreary's* actor-focused approach is that it can make it extremely difficult to take action to preserve potentially constitutional religious monuments once they have been challenged by an individual or advocacy group seeking their removal. Although courts are generally deferential to a government body's statements about its purposes, courts generally will not defer to interpretations which they view as "convenient litigating positions" adopted after suit has been filed.¹²⁶ Because of the cloudy state of religious monument jurisprudence, the rules have the potential to penalize government actors for good-faith efforts to conform their actions to the Establishment Clause while litigation is in progress.

This point is well illustrated by comparing two Ninth Circuit monument cases. In the first case, *Buono v. Kempthorne* (*Buono IV*), the court was skeptical of the government's asserted purposes for taking action to preserve a challenged monument.¹²⁷ In the second case, *Access Group v. U.S. Department of Agriculture*, the court was much more sensitive to the broad range of motives that the government could have for taking action to protect a religious monument that was sacred to a particular religion.¹²⁸

A. *Skeptical Approach: Buono I–IV*

In his concurrence in *Van Orden*, Justice Thomas commented that "[i]f a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge."¹²⁹ Justice Thomas was referring to *Buono v. Norton* (*Buono I*),¹³⁰ an earlier incarnation of *Buono IV*. The *Buono* series of cases began with a district court decision holding that a cross erected on a rock in

126. Compare *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (giving weight to the Department of Transportation's interpretation of its own regulations because the interpretation has been "consistent[] over time"), with *In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000) ("[W]here an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation.").

127. See *Buono v. Kempthorne* (*Buono IV*), 502 F.3d 1069, 1085 (9th Cir. 2007).

128. See *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1039 (9th Cir. 2007).

129. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

130. *Buono v. Norton* (*Buono I*), 212 F. Supp. 2d 1202 (C.D. Cal. 2002).

the Mojave Desert Preserve to honor World War I veterans violated the Establishment Clause.¹³¹ In 2007, after a series of intermediate appeals, the Ninth Circuit ultimately affirmed the district court, citing *McCreary* and *Van Orden*.¹³²

The procedural history of this case is a bit complicated, as there are four different *Buono* opinions. To summarize, *Buono I* and *II* evaluated whether the desert cross violated the Establishment Clause, and both cases were decided before *McCreary* and *Van Orden*.¹³³ In *Buono I*, the district court struck down the display. In *Buono II*, the Ninth Circuit affirmed the district court's holding. *Buono III* and *IV* evaluated whether Congress's actions to cure the Establishment Clause violation by transferring the memorial to a private veteran's group were valid.¹³⁴ *Buono III* was the district court opinion and *Buono IV* was the Ninth Circuit opinion. *Buono IV* was decided after *McCreary* and *Van Orden*, cited those cases, and held that the land transfer was invalid and that the cross violated the Establishment Clause, even though it was in the process of becoming a privately-maintained war memorial.¹³⁵

Buono II was issued before *McCreary* and *Van Orden* were decided, but the Ninth Circuit seemed to anticipate the impending changes in Establishment Clause jurisprudence when it conducted an expansive and actor-focused review of the record.¹³⁶ The Ninth Circuit held that the war memorial was unconstitutional, stating that:

defendants suggest that a reasonable observer aware of the history of the cross—such as its placement by private individuals—would believe that the government is not endorsing Christianity by allowing the cross to remain at the site. However, a reasonable observer who is *that* well-informed would know the full history of the cross: that Congress has

131. See *id.* at 1217.

132. See *Buono IV*, 502 F.3d at 1082 n.13, 1086.

133. See *Buono v. Norton (Buono II)*, 371 F.3d 543, 544 (9th Cir. 2004); *Buono I*, 212 F. Supp. 2d at 1204–05.

134. *Buono IV*, 502 F.3d at 1071; *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005).

135. See *Buono IV*, 502 F.3d at 1069.

136. See *Buono II*, 371 F.3d at 550.

designated the cross as a war memorial and prohibited the use of funds to remove it¹³⁷

The Ninth Circuit appeared to consider Congress's actions to preserve the cross as *per se* evidence of an intent to violate the Establishment Clause. Under another view, Congress's purpose in designating the cross as a war memorial was *because it was one*. The original cross was erected by the Veterans of Foreign Wars in 1934 with a plaque in memory of "the Dead of All Wars."¹³⁸ In *Buono II*, the Ninth Circuit seemingly foreshadowed Justice Scalia's prediction in *McCreary* that the "reasonable observer" test would swallow actual government purposes.¹³⁹

For the Ninth Circuit in *Buono II*, the most damning aspect of the government's actions to preserve the cross seemed to be that "the [National] Park Service . . . denied similar access for expression by an adherent of the . . . Buddhist faith."¹⁴⁰ The court stated that acting to save the cross while denying permission for a Buddhist shrine in the same area showed a preference for Christianity in violation of the Establishment Clause.¹⁴¹ Yet this conclusion ignores some facts. Although it was a monuments case, *Buono* also involved a power struggle between the Park Service and Congress. The Park Service denied permission for construction of a Buddhist shrine near Sunset Rock on the grounds that a regulation prohibited the "installation of a memorial without authorization" while also indicating that the Park Service intended to remove the cross.¹⁴² Only after the Park Service stated its intention to remove the cross after sixty-five years at the site did Congress step in to preserve it.¹⁴³ The Ninth Circuit presumed in *Buono II* that a reasonable observer would be aware of all the actions taken by both the Park Service and Congress¹⁴⁴ but does not mention their power struggle, even though that conflict is central to the story.

137. *Id.*

138. *Buono IV*, 502 F.3d at 1072–73.

139. *See McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

140. *Buono II*, 371 F.3d at 550.

141. *See id.*

142. *See Buono IV*, 502 F.3d at 1072.

143. *See id.* at 1073.

144. *See Buono II*, 371 F.3d at 550. Given the history of the conflict between Congress and the Park Service, the court's observation that the plaintiff is a retired Park Service official and former Assistant Superintendent of the Mojave Desert Preserve is interesting. *See Buono IV*, 502 F.3d at 1073 n.4.

The Ninth Circuit's inference that the cross's display constituted the establishment of Christianity also ignored many secular reasons Congress may have had in seeking to preserve the decades-old private war memorial, while at the same time not objecting to the Park Service's determination that new memorials on the same site were inappropriate. Even under Justice Breyer's concurrence in *Van Orden*, the context of the memorial and the reasons for which it was originally placed are potentially dispositive.¹⁴⁵ As such, the court gives insufficient weight to important historical and contextual factors in concluding that permitting the existing war memorial but prohibiting a new religious monument constituted per se evidence of an Establishment Clause violation.

The Ninth Circuit's purpose analysis in *Buono II* is not completely unsurprising given that the court also concluded that, under circuit precedent, the cross violated Justice O'Connor's "endorsement" test in *Lynch v. Donnelly*.¹⁴⁶ The role that the purpose analysis played in the subsequent appeal, *Buono IV*, however, is significant.¹⁴⁷ *Buono IV* evaluated whether Congress's action in trading the land on which the war memorial sat to a private veterans group was merely an attempt to "evade" the *Buono I* injunction against government display.¹⁴⁸ In *Buono IV*, the Ninth Circuit emphasized Congress's previous actions to preserve the cross—each of which had an arguably secular purpose—to conclude that the land transfer was merely another attempt to preserve the war memorial without curing the Establishment Clause violation.¹⁴⁹ The court held that a "reasonable observer aware of the history of the cross" would perceive the land transfer as an endorsement of religion.¹⁵⁰ A critic might argue that the Ninth Circuit was so determined to see this cross removed from a rock in the middle of the desert that it held that the government could not even *give* it away. As

145. See *Van Orden v. Perry*, 545 U.S. 677, 701–03 (2005) (Breyer, J., concurring in the judgment).

146. See *Buono II*, 371 F.3d at 548 (citing *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)).

147. See *Buono IV*, 502 F.3d at 1085.

148. See *id.* at 1076.

149. See *id.* at 1085. In a dissent from the refusal to grant en banc review in *Buono IV*, Judge O'Scannlain offered a critique of the panel's treatment of the property-transfer issue. *Buono v. Kempthorne*, 527 F.3d 758, 760–68 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of en banc review).

150. *Buono IV*, 502 F.3d at 1086.

such, Justice Thomas's observation in *Van Orden* that "no religious observance is safe from challenge"¹⁵¹ would be even more true of *Buono IV* than it was of *Buono I*.

B. *Purpose-Sensitive Approach: Access Fund*

Contrasting the Ninth Circuit's purpose analysis in the *Buono* cases with its discussion of government purpose in *Access Fund v. U.S. Department of Agriculture*¹⁵² proves interesting. Their respective holdings can be compared and contrasted on a number of grounds.¹⁵³ The way that the court treated the government's asserted purposes for protecting the respective religious monuments is a particularly illuminating difference.

In *Access Fund*, the United States Forest Service prohibited climbing on Cave Rock, a site near Lake Tahoe that is sacred to the Washoe Tribe.¹⁵⁴ Many Washoe consider the "intimate sustained contact with the rock that is inherent in climbing" objectionable, and view "the placement of a single climbing bolt as a defacement" of the sacred site.¹⁵⁵ Cave Rock was also used for hiking, picnicking, and as a path for area transportation, but it was not alleged that rock climbing interfered with any of the nonreligious activities at the rock.¹⁵⁶ The Forest Service banned climbing after it found that climbing was inconsistent with the period of Cave Rock's history it wished to preserve—an historical period defined with reference to the life span of a famous Washoe shaman who frequented Cave Rock until the

151. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

152. 499 F.3d 1036 (9th Cir. 2007).

153. For example, the monument in *Access Fund* was eligible for inclusion on the National Register of Historic Places, while the war memorial in *Buono* was not. *Buono IV*, 502 F.3d at 1073; *Access Fund*, 499 F.3d at 1040. *Buono IV* noted that:

[The Park Service] determined that neither the [Sunset Rock] cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, [the Park Service] recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Buono IV, 502 F.3d at 1073.

154. *Access Fund*, 499 F.3d at 1039.

155. *Id.* at 1040.

156. *See id.* at 1041.

1960s.¹⁵⁷ A group of climbers sued and alleged that the Forest Service climbing ban violated the Establishment Clause.¹⁵⁸

The Ninth Circuit applied *Lemon*, *Van Orden*, and *McCreary* to hold that the climbing ban was not an establishment of the Washoe religion.¹⁵⁹ The court held that the government's predominant purpose in prohibiting rock climbing was to preserve an "historic cultural area."¹⁶⁰ The court noted that in 1996 the Forest Service had feared rock climbing might affect the eligibility of Cave Rock for inclusion in the National Register of Historic Places.¹⁶¹ The court credited this concern as a secular purpose for the Forest Service's climbing ban, even though the Forest Service's fear was apparently unfounded—Cave Rock was confirmed eligible for inclusion on the National Register in 1998, well before the ban was enacted in 2003.¹⁶²

According to the Ninth Circuit, the Forest Service's goal of protecting the "cultural, historical and archeological features of Cave Rock" was permissible even though Cave Rock "derives its historical and cultural force in part from its role in Washoe religious belief and practice."¹⁶³ The Ninth Circuit stated that the sacred status of Cave Rock to the Washoe did not change its analysis because "[h]istorical and cultural considerations motivate the preservation of national monuments that may have religious significance to many or even most visitors."¹⁶⁴ The court went further, observing that:

even if the ban on climbing were enacted in part to mitigate interference with the Washoe's religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation. The fact that Cave Rock is a sacred site to the Washoe does not diminish its importance as a national cultural resource.¹⁶⁵

The Ninth Circuit also held that the climbing ban did not violate Justice O'Connor's "endorsement" test. The court stated that

157. *See id.* at 1042.

158. *See id.*

159. *See id.* at 1042–43, 1046.

160. *Id.* at 1043.

161. *See id.* at 1040.

162. *See id.*

163. *Id.* at 1044.

164. *Id.*

165. *Id.*

“the climbing ban cannot be fairly perceived as an endorsement of Washoe religious practices” because, although the ban accommodated part of such practices, it did not ban all recreational use of Cave Rock, as the Washoe Tribe requested.¹⁶⁶ The Ninth Circuit emphasized that the mere fact “[t]hat a group of religious practitioners benefits in part from the government’s policy does not establish endorsement.”¹⁶⁷ Overall, by focusing on the motivation of the Forest Service rather than the physical characteristics of the site, the Ninth Circuit took the lead of *McCreary* and *Van Orden* with an analysis that focused on the actor rather than the display.

In *Access Group*, the Forest Service prevailed because the court separated the religious motivation of a non-governmental third actor (the Washoe Tribe) from the Forest Service’s motivation to protect a culturally and historically important site. The Washoe actively lobbied the Forest Service to protect their sacred site, but the Ninth Circuit declined to conclude that the Forest Service acted with an improper motive when it partially accommodated their request by banning climbing.¹⁶⁸ Instead, the court held that “the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site’s importance derives at least in part from its sacredness to certain groups.”¹⁶⁹

Access Group succeeded where *Buono* failed in avoiding Justice Scalia’s prediction that the expanded purpose analysis in *McCreary* would lead courts to ignore the actual motives of government actors in favor of the potential misperceptions of outside observers.¹⁷⁰ It will be interesting to see how the Ninth Circuit handles a pending appeal from a California district court’s July 2008 approval of a famous cross at a public veterans memorial in San Diego, particularly because the district court engaged in both *Lemon* and *Van Orden* analyses.¹⁷¹

166. *Id.* at 1045.

167. *Id.* at 1045–46.

168. *See id.* at 1041.

169. *Id.* at 1046 (internal quotation marks omitted).

170. *See McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

171. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal docketed*, No. 08-56436 (9th Cir. Sept. 3, 2008).

IV. FUTURE QUESTIONS

McCreary and *Van Orden* have changed purpose analysis under the Establishment Clause, marking a shift away from display-focused analysis with an emphasis on the physical characteristics of religious monuments and the tendency to produce rules applicable to large categories of monuments installed at different times by different actors. Instead, these two cases, and in particular *McCreary*, show the Court engaging in an actor-focused analysis that emphasizes the motives and actions of the government officials who placed and defended the monuments. The shift is further evident in the cases decided by the courts of appeals after *McCreary* and *Van Orden*, and for appellate courts there are practical consequences that accompany it.

Whether the government may favor religion over nonreligion will likely prove a further area of tension in purpose analysis. This question has the potential to cause yet another dramatic shift in Supreme Court Establishment Clause jurisprudence. The *McCreary* majority emphasized that the government must be neutral as between religion and nonreligion.¹⁷² Justice Scalia responded in his dissent:

Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.¹⁷³

In contrast to the *McCreary* majority, the *Van Orden* four-Justice plurality argued that “[o]ur institutions presuppose a Supreme Being” and that the government may acknowledge this without violating the Establishment Clause.¹⁷⁴ Evidence in the case law and in American history supports both positions. Now that Justice O’Connor, who sided with the majority in *McCreary*, has been replaced by Justice Alito, the Court may take the opportunity to revisit this question.

172. See *McCreary*, 545 U.S. at 860.

173. *Id.* at 902–03 (Scalia, J., dissenting).

174. *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005) (Rehnquist, C.J., plurality opinion).

If the Court does revisit this issue, it may conclude, like Justice Stevens, that the Framers intended the term “religion” in the Establishment Clause to refer only to various denominations of Christianity.¹⁷⁵ In *Van Orden*, Justice Stevens argued in his dissent that, in light of the alleged narrowness of the Framers’ views, the Court should not be bound by their interpretation and should instead rely on the broad principle of neutrality that, in his view, includes neutrality between religion and nonreligion.¹⁷⁶

On the other hand, many scholars have argued that a principle that permits the government to favor religion generally is the only principle that can make sense of longstanding practices, including legislative prayers and the reference to God in the Pledge of Allegiance. This view has taken many forms. Professor Andrew Koppelman makes a case that the Constitution permits the government to favor religion over nonreligion and defines religion broadly to include atheism, agnosticism, and non-theistic religions such as Buddhism.¹⁷⁷ Professors Robert George and Gerard Bradley argue that the Framers understood the Constitution to permit favorable treatment of “biblical ethical monotheism,” which they define as the idea that “the objective moral law [is] the effect or deliverance of God.”¹⁷⁸ In their view, government-sponsored religious displays, such as the Ten Commandments, do not establish any one religion, but merely underscore America’s historic national dependence on “God’s continuing care.”¹⁷⁹ If Professors George and Bradley are correct, then the current Establishment Clause jurisprudence is depriving this generation of important historical, and perhaps even spiritual, resources.

175. See *id.* at 726–27 (Stevens, J., dissenting). Beyond neutrality under the Establishment Clause, a collateral dilemma has also arisen in challenges by those wishing to add their own displays to settings with existing religious monuments. One such challenge was argued before the Supreme Court on November 12, 2008 in a case in which a religious group sought to add its own monument to a park that already contained an Eagles’ Ten Commandments display. See *Pleasant Grove City v. Summum*, No. 07-665 (U.S. argued Nov. 12, 2008). A decision is expected by June 2009.

176. See *Van Orden*, 545 U.S. at 733–34 (Stevens, J., dissenting).

177. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 90 (2002).

178. Brief for The Family Research Council, Inc. and Focus on the Family as Amici Curiae Supporting Petitioners at 6, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693), 2004 WL 2851013.

179. *Id.* at 5.

The late Chief Justice Rehnquist observed in *Van Orden* that “[o]ur cases, Januslike, point in two directions in applying the Establishment Clause.”¹⁸⁰ He continued:

Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.¹⁸¹

It is too early to tell if the actor-focused approach to analyzing religious monuments will be applied with enough sensitivity and flexibility to respect both faces of the Establishment Clause, or if we have yet another sea change in Establishment jurisprudence awaiting us in the years to come.

180. *Van Orden*, 545 U.S. at 683 (plurality opinion).

181. *Id.* at 683–84.