

**COMPETING JUDICIAL PHILOSOPHIES AND
DIFFERING OUTCOMES: THE U.S. SUPREME COURT
ALLOWS AND DISALLOWS THE POSTING OF THE TEN
COMMANDMENTS ON PUBLIC PROPERTY IN *VAN
ORDEN V. PERRY* AND *MCCREARY COUNTY V. ACLU***

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“Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof.”¹

INTRODUCTION

The U.S. Supreme Court issued two contradictory decisions on the posting of the Ten Commandments on public property in the 2005 term. On June 27, 2005, the last day of the term, the U.S. Supreme Court ruled five-to-four in *Van Orden v. Perry* that a six foot monument inscribed with the Ten Commandments could stay on the property of the Texas State Capital.² On the same day, the court held five-to-four in *McCreary County, Kentucky v. ACLU* that framed copies of the Ten Commandments in Kentucky county courthouses must come down.³ In *Van Orden*, the court did not apply the three-prong *Lemon* test,⁴ but it did in *McCreary County*.⁵ The Court deemed the posting in *Van Orden* to be a passive display, which was donated by a private group, which went unchallenged for forty years.⁶ Contrarily, the posting in *McCreary County* was a government action with a religious, rather than secular, purpose not negated by reposting the

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This article is dedicated to my cousin, Father Fred Nietfeld, the relentless researcher and faithful servant, who inspires me and challenges me to think.

1. U.S. CONST. amend. I.
2. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).
3. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).
4. *Van Orden*, 125 S. Ct. at 2861.
5. *McCreary County*, 125 S. Ct. at 2732.
6. *Van Orden*, 125 S. Ct. at 2864.

framed commandments beside other framed documents.⁷ Competing judicial philosophies also contributed to the divergent outcomes.

In this showdown at the Supreme Court, ten opinions were authored by the nine justices. Chief Justice Rehnquist wrote the plurality opinion for *Van Orden*, joined by Justices Scalia, Kennedy and Thomas,⁸ Justice Breyer concurring.⁹ Justice Souter wrote the majority opinion in *McCreary County*, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer.¹⁰ Justice Breyer was the swing vote.

This article will conduct a brief historical review of the Supreme Court's Establishment Clause jurisprudence as applied to the states, and in particular, the posting of the Ten Commandments in *Stone v. Graham*.¹¹ This article will then analyze *Van Orden* and *McCreary County*, their outcomes, and their underlying and competing judicial philosophies. This article will conclude with thoughts on where the two cases leave this nation on the issue of posting the Ten Commandments in public places, where this issue may head with the changing composition of the Court, and the judicial philosophy may prevail. This issue leaves the country and the Court divided, and with the changing composition of the Court, the balance on the Court may shift towards the plurality in *Van Orden*.

BRIEF RECENT HISTORY OF SUPREME COURT JURISPRUDENCE ON THE ESTABLISHMENT CLAUSE

The First Amendment to the Constitution starts by stating "Congress shall make no law respecting an establishment of religion."¹² The Supreme Court, through the 14th Amendment extended the applicability of the Establishment Clause to the states in 1940.¹³

In *Everson v. Board of Education*, the Court held the use of tax revenues used to reimburse parents for transportation to private and religious schools as not a violation of the Establishment Clause.¹⁴

7. *McCreary County*, 125 S. Ct. at 2738, 2745.

8. *Van Orden*, 125 S. Ct. at 2857.

9. *Van Orden*, 125 S.Ct. at 2868 (Breyer, J., concurring).

10. *McCreary County*, 125 S. Ct. at 2727.

11. *Stone v. Graham*, 449 U.S. 39 (1980).

12. U.S. CONST. amend. I.

13. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

14. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (citing *Cantwell v. Connecticut*, 310 U.S. 296) (1940).