

THE TEN COMMANDMENTS CASES AND THE FUTURE OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT

Richard S. Myers
Ave Maria School of Law

This article explores the implications of the Supreme Court's June 2005 decisions involving the public display of the Ten Commandments. The article first explains that the decisions will do little to alleviate the confusion that currently exists about the constitutionality of the public display of religious symbols. The article then focuses on a major problem with the Court's Establishment Clause jurisprudence—viz., that the Court is unwilling to acknowledge the special value of religion. The article closes with some observations about the opinions of Justices Scalia and Thomas and suggests that their opinions offer the prospect of a much-needed reorientation of the Court's approach to the Establishment Clause.

Introduction

The proper interpretation of the Religion Clauses of the First Amendment has long been a contentious issue. More broadly, as the uproar over issues such as the Pledge of Allegiance illustrates, the relationship between religion and public life has assumed a prominent place in the culture wars. In recent years, these two issues have arisen in debates about the legality and the prudence of displaying the Ten Commandments on public property.

In June 2005, the United States Supreme Court decided two cases involving the public display of the Ten Commandments—*McCreary County v. American Civil Liberties Union of Kentucky*¹ and *Van Orden v. Perry*.² In this paper, I will examine these two cases in some detail. I will also discuss briefly a few of the cases that have been decided since June 2005 to illustrate the way in which these Supreme Court cases have been interpreted by the lower courts. I will, in addition, offer some reflections about the broader meaning of these cases.

Prior Religious Display Cases

Prior to these June 2005 decisions, the Supreme Court had decided several cases involving the public display of religious symbols. I will briefly describe these cases.

In 1980, in *Stone v. Graham*,³ the Court held unconstitutional a Kentucky law that required that a copy of the Ten Commandments be posted on the wall of each public classroom in the state. The Court noted that “the Ten Commandments are undeniably a sacred text.”⁴ The conclusion that the statute was unconstitutional was based on the Court’s finding that “the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.”⁵ The Kentucky statute therefore failed the first prong of the *Lemon* test.⁶

The other two Supreme Court cases I will mention in this brief survey did not involve the Ten Commandments. In 1984, in *Lynch v. Donnelly*,⁷ the Court held that it did not violate the Establishment Clause for Pawtucket, Rhode Island to sponsor a Christmas display that included a Santa Claus house, a reindeer, a clown, an elephant, a teddy bear, a talking wishing well, Christmas lights, and a Nativity scene. In 1989, in *County of Allegheny v. ACLU*,⁸ the Court considered the constitutionality of two holiday displays on public property. The Court held that it did violate the Establishment Clause to display a crèche on the Grand Staircase of the Allegheny County Courthouse, but that it did not violate the Establishment Clause to place a Jewish menorah just outside the City-County building next to a Christmas tree and a sign saluting liberty.

These Supreme Court cases generated much confusion. The courts struggled with how to understand the Supreme Court’s seemingly conflicting approach in these cases. The subsequent lower court opinions would typically focus on the religious intensity of the display. In the context of Christmas displays, the presence of non-religious symbols (e.g., a Santa Claus or a snowman, or perhaps Snow White and Seven Dwarfs) would sometimes sufficiently dilute the religious aspect of the display to avoid an Establishment Clause violation. This focus on how many secular symbols are needed (one commentator referred to this as “the two plastic reindeer rule”⁹) drew the ire of Justice Scalia who complained that it is an “embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to ‘require scrutiny more commonly associated with interior decorators than with the judiciary.’”¹⁰

The same sort of inquiry also has characterized the lower courts’ treatment of Establishment Clause challenges to the Pledge of Allegiance, the National Motto (“In God We Trust”),¹¹ and various state mottoes (Ohio’s motto—With God All Things Are Possible¹²). The courts ask, for example, whether the Pledge has sufficient religious content so that it ought to be treated as a “religious” as opposed to a “patriotic” exercise.¹³ The Supreme Court dodged this bullet in the *Newdow*¹⁴ case, but the issue is working its way back up to the Court.¹⁵

The lower courts had a particularly difficult time with cases involving challenges to the public display of the Ten Commandments. In 2004, one commentator noted that the “lower federal and state courts . . . are sharply divided over the constitutionality of displaying the Ten Commandments on government property.”¹⁶ This division made it almost inevitable that the Supreme Court would address the issue.

The Supreme Court Decisions of 2005

In June 2005, the Court decided *McCreary County v. American Civil Liberties Union of Kentucky*¹⁷ and *Van Orden v. Perry*.¹⁸ To no one’s surprise, the Court was closely divided. In *McCreary County*, the Court (by a 5-4 vote), held that the displays of the Ten Commandments in two county courthouses in Kentucky violated the Establishment Clause. The majority opinion by Justice Souter was joined by Justices Stevens, O’Connor, Ginsburg, and Breyer. The displays evolved through three separate versions during the litigation and the displays before the Court included the Ten Commandments and other documents (e.g., Magna Carta, the Declaration of Independence, and the National Motto) as part of “The Foundations of American Law and Government Display.” The conclusion that there was an Establishment Clause violation was based on the majority’s view that the third display violated the purpose prong of the *Lemon* test because according to the Court’s review of the record there was “ample support for the District Court’s finding of a predominantly religious purpose behind the Counties’ third display”¹⁹ With an eye to the Supreme Court’s courtroom frieze that includes Moses holding the Ten Commandments, the majority did allow that its opinion did not mean “that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history.”²⁰

In contrast, in *Van Orden v. Perry*, the Court (again by a 5-4 vote) upheld the constitutionality of “the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds.”²¹ Chief Justice Rehnquist’s opinion for three other Justices (Justices Scalia, Kennedy, and Thomas) did not think that the *Lemon* test was “useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds [Rather, the Court’s] analysis . . . [was] driven both by the nature of the monument and by our Nation’s history.”²² Although he did admit that the Ten Commandments are religious, Chief Justice Rehnquist emphasized that the monument was an acceptable part of “‘an unbroken history of official acknowledgement by . . . government of the role of religion in American life from at least 1789.’”²³ *Stone* was limited to the public school setting.²⁴

The deciding vote was cast by Justice Breyer who declined to apply any “test” and instead exercised “legal judgment” in what he characterized as a “difficult borderline case[.]”²⁵ After examining the way in which the text was used, the context of the display, and the history of the display (that is, that it had stood without generating apparent controversy for over 40 years), Justice Breyer concluded that the religious aspect of the Ten Commandments was “part of what is a broader moral and historical message reflective of cultural heritage.”²⁶

These 2005 decisions did not clarify much. The subsequent lower court cases seem to support the conclusion that there will continue to be much litigation over these displays. A Tenth Circuit opinion noted the “fact-intensive analysis prescribed by the Court’s recent decisions” and remanded for development of the record regarding the “myriad factual considerations dictated by the Court in *Van Orden* and *McCreary*.”²⁷ Federal district courts have upheld displays of the Ten Commandments in Fargo, North Dakota²⁸ and Everett, Washington.²⁹ The most extensive treatment of *McCreary* and *Van Orden* occurred in *ACLU Nebraska Foundation v. City of Plattsmouth*, in which the Eighth Circuit, sitting en banc, split 10-2 and upheld Plattsmouth, Nebraska’s decades-old display of the Ten Commandments.³⁰ The dissenters noted factual distinctions between the display in Plattsmouth and Texas’s display considered in *Van Orden* and concluded that “without the contextualizing presence of other messages or some indicia of historical significance, there is nothing to free the display from its singular purpose of advancing its religious message.”³¹

The message of these very recent cases seems to be that long-standing displays are far more likely to withstand Establishment Clause challenges. This is perhaps the clearest message of *McCreary County* and *Van Orden*, and in particular the message of Justice Breyer’s key concurrence. This reading is not inevitable, however, as the dissents in the Eighth Circuit indicate. There will, undoubtedly, be many more such cases to follow.

Reflections about the Broader Meaning of *McCreary* and *Van Orden*

A. Symbol cases are Important

Some say that too much emphasis is placed on cases involving the public display of religious symbols. According to this view, we would do well to focus on issues that are more central to religious liberty—such as choice in education³² or the plight of health care professionals who are increasingly being asked to subordinate their conscience to the demands of a wholly secular view of health care.³³

While I have some sympathy for this position, I think it would be a mistake to downplay the significance of these cases. Cases involving the public display of religious symbols have long provided a framework for judges and scholars to examine widely varying theoretical approaches to the Establishment Clause. Moreover, the importance of symbols in shaping public culture should not be underestimated.³⁴

B. The Fate of the Lemon Test

One of the great difficulties in this area is that a majority of the Supreme Court has not been able to settle upon a “test” to guide resolution of these controversies. In theory, since 1971, the governing standard has been the *Lemon* test. Under that test, governmental conduct must pass three requirements to withstand an Establishment Clause challenge: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”³⁵ This test has been subject to withering criticism from both on³⁶ and off the Court.³⁷ In certain cases, the Court has ignored the test altogether (e.g., *Marsh v. Chambers*³⁸—involving legislative prayer, *Zelman v. Simmons-Harris*³⁹—the Ohio voucher case). In other cases, the Court has used differing tests. In certain cases, the Court has seemingly adopted Justice O’Connor’s endorsement approach.⁴⁰ In others, the Court has seemingly adopted the coercion test advanced by Justices such as Scalia, Thomas, and Kennedy.⁴¹ The Court has been asked to abandon the *Lemon* test on many occasions, most recently this last Term.

The June 2005 decisions will, unfortunately, do little to alleviate this confusion. Justice Souter’s majority opinion in *McCreary County* used the infrequently invoked “purpose” prong of the *Lemon* test. In *Van Orden*, Chief Justice Rehnquist’s opinion (although here he spoke for only three other Justices) said that the *Lemon* test was “not useful” in the context presented. The key fifth vote was supplied by Justice Breyer and he stated that he could “see no test-related substitute for the exercise of legal judgment.”⁴² As one lower court judge commented in late September 2005, the Court’s Establishment Clause jurisprudence “is convoluted, obscure, and incapable of succinct and compelling direct analysis. There currently exist numerous tests, with varying levels of applicability in various contexts, each of which stakes some claim of suitability to discern whether a government action is violative of the Establishment Clause.”⁴³

C. Changes in Personnel

It is particularly hazardous to venture predictions about this area because of the changes in the membership of the Supreme Court. The Court has been closely divided on these issues for years, with many of the key cases being decided by 5-4 votes. With the death of Chief Justice Rehnquist, who has been replaced by John Roberts (who becomes the third Catholic to serve as Chief Justice and the fourth sitting Catholic on the Court) and the departure of Justice O'Connor,⁴⁴ who has been replaced by Samuel Alito (who becomes the fifth Catholic on the Court), the situation is even more fluid than it has been for some time.

The Court (excluding Rehnquist and O'Connor) is closely split on these issues. There are four of the current Justices who typically take a more separationist approach—Justices Stevens, Souter, Ginsburg, and Breyer. There are three others who tend to take a view that is more accepting of a public role for religion—Justices Scalia and Thomas and to a lesser degree Kennedy. I won't speculate in detail about what perspective John Roberts and Samuel Alito might bring to these issues, although it seems clear that their views will generally control the outcome of these cases. Most of the current speculation views both of the new Justices as more likely to be closer to Justices Scalia, Thomas, and Kennedy and if that is true (which I think is likely), then the separationist strain in the Court's decisions might be a thing of the past.

D. General Trends

I think that the general trend in Religion Clause cases over the last twenty years has been positive. In the mid-1970s, the Supreme Court's decisions were contributing greatly to the privatization of religion. The title of Stephen Carter's book—*The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*⁴⁵—captures this evaluation of the Court's work product. In that book, Professor Carter wrote about how American law treats religion as a hobby—like building model airplanes. In this view, religion is “something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults.”⁴⁶ Gerry Bradley had earlier noted that “the Court is now clearly committed to articulating and enforcing a normative scheme of ‘private’ religion.”⁴⁷

I think there was much truth to this diagnosis as recently as the early 1980s. I do think, and I have explored this topic in some detail in a couple of articles (one that I presented at the annual meeting of the Society of Catholic Social Scientists in 2000),⁴⁸ that in general the law has improved in this area. The Court no longer seems to place religion

under special disabilities—which was true under the Court’s cases dealing with aid to religious institutions through about 1985. The Court’s approach—and this is most readily seen in the *Zelman* case (the Ohio voucher case)—is that there is no Establishment Clause violation if religion is treated on equal terms with secular alternatives.⁴⁹ Unfortunately, this neutrality is not required by the Constitution—equal treatment seems to be largely a matter of legislative grace, as the 2004 decision in *Locke v. Davey* demonstrated. There, a 7-2 majority (only Justices Scalia and Thomas dissented) had no problem permitting the state of Washington to discriminate against religion.⁵⁰

In general, though, the Court no longer expresses the negative views of religion that characterized the earlier cases. The Court seems willing to allow religion an equal role in the political process, and that improvement is worthy of note. We have moved from hostility towards a public role for religion to neutrality.

Unfortunately, this situation is highly unstable. Some decisions, such as the 2003 decision in *Lawrence v. Texas*,⁵¹ seem to condemn the state’s reliance on religiously informed moral norms, a development that seemed a thing of the past at the time of the Court’s assisted suicide cases in 1997.⁵² And, in the Establishment Clause context, some recent opinions have revived the divisiveness doctrine.

This latter point is worthy of some more extended treatment. At one point, the Court expressed concern that political divisiveness that might be engendered by religious involvement in the political process was a warning signal of Establishment Clause problems.⁵³ As I stated in an earlier article, “the Court seems to have rejected the view that political division along religious lines is an evil, reasoning that such divisiveness is a normal part of the political process and not a cause for concern. The Court’s more recent cases reflect an increasing receptivity to religious activism in politics.”⁵⁴ In *McCreary County* and in some of the opinions in *Van Orden*, in contrast, there are constant references to concerns about divisiveness. Justice Souter, for example, noted (in *McCreary County*) with great alarm that “the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.”⁵⁵ The solution, for Justice Souter, is privatization. This reemergence of a focus on divisiveness is, therefore, a cause for concern.

My most serious reservation about the Court’s Establishment Clause opinions is that a majority of the Court still seems far removed from being able to acknowledge a special role for religion. The Court is still worlds away from the view expressed in *Dignitatis Humanae* that

“Government . . . ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare.”⁵⁶

In *McCreary County*, Justice Souter explained that since *Everson* in 1947 the central Establishment Clause value has been “official religious neutrality,”⁵⁷ that is, that the government must be neutral between religion and nonreligion. One of the more interesting features of the Court’s June 2005 decisions was that Justice Scalia took on this view (official religious neutrality) in some detail. In his dissent in *McCreary County* (and this portion of his dissent was only joined by Chief Justice Rehnquist and Justice Thomas—Justice Kennedy did not join this portion of Justice Scalia’s opinion), Justice Scalia explained just how foreign this sentiment (that the government must remain neutral between religion and nonreligion) is from the worldview of people such as George Washington. As Justice Scalia’s opinion explained in some detail, the Framers thought that religion had a unique role to play in maintaining the health of our society.⁵⁸ Under this view, there is nothing objectionable about a “governmental affirmation of the society’s belief in God”⁵⁹ In fact, such an acknowledgement could be understood as an act of humility. These acknowledgements help to reinforce the society’s view that our nation is “under God” and subject to a transcendent order.⁶⁰ They help, then to “underscore the idea that the health of a political community depends on its acknowledgement that there are ‘at least a minimum of objectively established rights not granted by way of social conventions, but antecedent to any political system of law.’”⁶¹ Justice Scalia’s concern about the Court being committed “to a revisionist agenda of secularization”⁶² resonates well with the warning of Pope John Paul II’s account of the risks inherent in the exclusion of God from the cultural life of a nation. In *Evangelium Vitae*, the late Pope stated: “When the sense of God is lost, there is also a tendency to lose the sense of man, of his dignity and his life; in turn, the systematic violation of the moral law, especially in the serious matter of respect for human life and its dignity, produces a kind of progressive darkening of the capacity to discern God’s living and saving presence The eclipse of the sense of God and of man inevitably leads to a practical materialism, which breeds individualism, utilitarianism and hedonism [This loss of a sense of God and of man has the effect of promoting the toleration and fostering of behavior contrary to life, and] encourage[ing] the ‘culture of death,’ creating and consolidating actual ‘structures of sin’ which go against life.”⁶³ So, the stakes in these symbol cases are quite high.

What is objectionable, for Justice Scalia, is when governmental conduct crosses the line from acknowledgement to establishment. For Justice Scalia—and this was also expressed well in Justice Thomas’s concurrence in *Van Orden*—an establishment must involve coercion. As Justice Thomas put this in *Van Orden*, many of the problems in this area “would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry.”⁶⁴

The very helpful thoughts expressed by Justices Scalia and Thomas do not, obviously, command the support of a majority of the Court. Justice Thomas’s opinion in *Van Orden* was not joined by any other Justice, and the more wide-ranging part of Justice Scalia’s opinion in *McCreary County* was only joined by one member of the current Court—Justice Thomas. As noted earlier, however, the Court’s membership is changing and perhaps the articulation of these views in the recent Ten Commandments cases may help to prompt the reorientation that is so sorely needed in this area. Justice Thomas closed his opinion in *Van Orden* with this thought: “While the Court correctly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Established Clause jurisprudence remains in order.”⁶⁵ Justice Thomas is surely correct about that and one can hope that his opinions and those of Justice Scalia will serve as guides in this pursuit.

Notes

1. 125 S. Ct. 2722 (2005).
2. 125 S. Ct. 2854 (2005).
3. 449 U. S. 39 (1980).
4. Id. at 41.
5. Id.
6. The *Lemon* test was articulated in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). According to the *Lemon* test, a statute must pass three requirements in order to withstand an Establishment Clause challenge: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. at 612-13 (citation omitted)(quoting *Walz v. Tax Comm.*, 397 U. S. 664, 674 (1970)).
7. 465 U. S. 668 (1984).
8. 492 U. S. 573 (1989).
9. Daniel Parish, *Note, Private Religious Displays in Public Fora*, 61 U. Chi. L. Rev. 253, 260 n. 52 (1994).
10. *Lee v. Weisman*, 505 U. S. 577, 636 (1992)(Scalia, J., dissenting)(citations omitted)(quoting *American Jewish Congress v. Chicago*, 827 F. 2d 120, 129 (7th Cir. 1987)(Easterbrook, J., dissenting)(alteration in original)).
11. See, e.g., *Lambeth v. Board of Commissioners of Davidson County*, 407 F. 3d 266 (4th Cir.) (rejecting an Establishment Clause challenge to the display of the National Motto on the façade of the County’s government center), cert. denied, 126 S. Ct. 647 (2005).
12. See *ACLU of Ohio v. Capitol Square Review and Advisory Board*, 243 F. 3d 289 (6th Cir. 2001)(en banc)(rejecting by a 9-4 vote a constitutional challenge to Ohio’s motto).

13. See *Myers v. Loudoun County Public Schools*, 418 F. 3d 395 (4th Cir. 2005)(rejecting an Establishment Clause challenge to a Virginia statute providing for the recitation of the Pledge in public schools).

14. *Elk Grove United School District v. Newdow*, 542 U. S. 1 (2004)(concluding that noncustodial father lacked standing to challenge the recitation of the Pledge in public schools).

15. See *Newdow v. Congress of the United States*, 383 F. Supp. 2d 1229 (E. D. Cal. 2005)(reaffirming the conclusion that recitation of the Pledge in public schools violates the Establishment Clause).

16. Bradley M. Cowan, Note, *The Decalogue in the Public Forum: Do Public Displays of the Ten Commandments Violate the Establishment Clause?*, 2 Ave Maria L. Rev. 183, 189 (2004)(footnote omitted).

17. 125 S. Ct. 2722 (2005).

18. 125 S. Ct. 2854 (2005).

19. *McCreary County*, 125 S. Ct. at 2745.

20. *Id.* at 2741.

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

22. *Id.* at 2861 (opinion of Rehnquist, C. J.).

23. *Id.* at 2861 (opinion of Rehnquist, C. J.)(quoting *Lynch v. Donnelly*, 465 U. S. 668, 674 (1984)).

24. *Id.* at 2863-2864 (opinion of Rehnquist, C.J.).

25. *Id.* at 2869 (Breyer, J., concurring in the judgment).

26. *Id.* at 2870-2871 (Breyer, J., concurring in the judgment).

27. *Society of Separationists v. Pleasant Grove City*, 416 F. 3d 1239, 1240-1241 (10th Cir. 2005).

28. *Twombly v. City of Fargo*, 388 F. Supp. 2d 983 (D. N. Dak. 2005).

29. *Card v. City of Everett*, 386 F. Supp. 2d 1171 (W. D. Wash. 2005).
30. 419 F. 3d 772 (8th Cir. 2005). See also *ACLU of Kentucky v. Mercer County*, 432 F. 3d 624 (6th Cir. 2005)(rejecting an Establishment Clause challenge to a display identical to the third display involved in the *McCreary County* case).
31. *ACLU Nebraska Foundation*, 419 F. 3d at 781 (Bye, J., dissenting).
32. See Richard S. Myers, *School Choice: The Constitutional Issues*, 8 Cath. Soc. Sci. Rev. 167 (2003).
33. See Richard S. Myers, *United States Law and Conscientious Objection in Healthcare*, in COOPERATION, COMPLICITY, AND CONSCIENCE: MORAL PROBLEMS IN HEALTHCARE, SCIENCE, LAW, AND PUBLIC POLICY 296-315 (H. WATT ed., 2005).
34. See Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U. L. Rev. 19, 44 (1991).
35. *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971)(citation omitted)(quoting *Walz*, Tax Comm., 397 U. S. 664, 674(1970)).
36. For references to criticisms from Supreme Court Justices, see *ACLU of Kentucky v. Mercer County*, 432 F. 3d at 635-636 (collecting criticisms of *Lemon*).
37. See generally Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 Fla. L. Rev. 1 (2005); Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993).
38. 463 U. S. 783 (1983).
39. 536 U. S. 639 (2002).
40. *County of Allegheny v. ACLU*, 492 U. S. 573 (1989).
41. *Lee v. Weisman*, 505 U. S. 577 (1992).
42. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment).

43. *Twombly*, 388 F. Supp. 2d at 986.

44. Justice O'Connor was frequently the swing vote on Establishment Clause issues, although Justice Breyer's views controlled in the most recent cases involving the Ten Commandments.

45. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

46. *Id.* at 22.

47. Gerard V. Bradley, *Dogmatomachy—A “Privatization” Theory of the Religion Clauses*, 30 St. Louis U. L. J. 275, 276-277 (1986).

48. Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 Cath. Soc. Sci. Rev. 223 (2001); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U. L. Rev. 19 (1991).

49. See Garry, *supra* note 37, at 11-12.

50. *Locke v. Davey*, 540 U. S. 712 (2004).

51. 539 U. S. 558 (2003).

52. For a discussion of this point, see Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 Cath. Soc. Sci. Rev. 223, 230 (2001).

53. For a discussion of this point, see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U. L. Rev. 19, 37-38; Myers, *supra* note 52, at 228.

54. Myers, *supra* note 52, at 228.

55. *McCreary County*, 125 S. Ct. at 2745. See, e.g., *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment)(“[The Religion Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”). For a recent discussion of divisiveness, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Georgetown L. J. (forthcoming 2006).

56. *Dignitatis Humanae* section 3 (1965).
57. *McCreary County*, 125 S. Ct. at 2733.
58. *McCreary County*, 125 S. Ct. at 2748-2757 (Scalia, J., dissenting).
59. *Id.* at 2750 (Scalia, J., dissenting).
60. See Richard S. Myers, *A Comment on the Death of Lemon*, 43 Case W. Res. L. Rev. 903, 909 (1993).
61. Myers, *supra* note 60, at 909.
62. *McCreary County*, 125 S. Ct. at 2763 (Scalia, J., dissenting).
63. Pope John Paul II, *Evangelium Vitae* (1995), reprinted in 24 *Origins* 689, 697-698 (Apr. 6, 1995).
64. *Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring).
65. *Van Orden*, 125 S. Ct. at 2868 (Thomas, J., concurring).