

Establishment Clause and *Van Orden v Perry*

Overview

In this lesson, students will consider the implications of the Establishment Clause of the First Amendment by learning about the landmark Supreme Court case *Van Orden v. Perry*. Through the documentary of *Van Orden v. Perry*, students will begin to examine whether or not a Ten Commandments monument on government property violates the US Constitution. Students will continue their exploration of the issue by creating and administering a poll to gauge the school community's opinions on the issue. Using information gathered from the poll, students will create a mock editorial page that displays their findings. The lesson culminates in a class discussion of the Supreme Court of the United States' ruling.

Grades

10-11

NC Essential Standards for American History: The Founding Principles, Civics & Economics

- FP.C&G.1.4: Analyze the principles and ideals underlying American democracy in terms of how they promote freedom
- FP.C&G.2.3: Evaluate the U.S. Constitution as a "living Constitution" in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- FP.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- FP.C&G.3.4: Explain how individual rights are protected by varieties of law
- FP.C&G.3.8: Evaluate the rights of individuals in terms of how well those rights have been upheld by democratic government in the United States.
- FP.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process.

NC Essential Standards for American History II

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

Materials

- Establishment Clause warm up (attached)
- Wall images (attached)
- Documentary of *Van Orden v. Perry* (Voices of American Law DVD available at www.voicesofamericanlaw.org)
- *Van Orden v. Perry* viewing guide (attached)
- Poll and editorial instructions handout (attached)
- Tabbed manila folders
- Markers, pens, colored pencils, crayons
- *Van Orden v Perry* Supreme Court ruling handout (attached)

Essential Questions:

- How does the Bill of Rights offer protection for citizens?
- How are the rights granted in the Bill of Rights limited by interpretation of the judiciary branch?

- What is the Establishment Clause?
- What did Thomas Jefferson mean by “a wall of separation between Church and State?”

Duration

Two 90-minute block periods

Student Preparation

- Option #1: An optional anticipatory homework activity is to assign the *Freedom from Religion Foundation's* “What Do You Know about the Separation of State and Church?” online quiz (<http://ffrf.org/quiz/ffrfquiz.php>) or a paper copy of the quiz (attached). This will give students a brief introduction to and get students thinking about the relationship between church and state throughout America's history. It can also be used as a tool to assess students' prior knowledge. Before assigning the quiz, students should be aware of the group's purpose. (Taken from the *Freedom from Religion Foundation's* website):
 - *The Freedom From Religion Foundation, Inc. is an educational group working for the separation of state and church. Its purposes, as stated in its bylaws, are to promote the constitutional principle of separation of state and church, and to educate the public on matters relating to nontheism.*
 - It may be beneficial to discuss how this organization's point of view may affect the way the questions are posed. This point can be revisited later when discussing political polling.
- Option#2: Another optional anticipatory homework activity is to assign a “Freedom of Religion Quiz” from *NOW on PBS*; online quiz available online at <http://www.pbs.org/now/quiz/quiz2.html> and paper quiz attached. This will give students a brief introduction to and get students thinking about the relationship between church and state. It can also be used as a tool to assess students' prior knowledge.

Procedure

Day 1

Warm Up: A Wall of Separation

1. As students walk into the classroom, have the “Establishment Clause Warm Up” handout projected so that all the students can see it. Select students to read the Establishment Clause Warm Up aloud while the rest of the class follows along. Tell students to pay special attention to the second paragraph of “*Jefferson's Letter to the Danbury Baptists.*” After completing the reading, ask students the following questions:
 - What is an “established religion?”
 - What does “prohibiting free exercise thereof” mean?
 - Why do you think Thomas Jefferson wrote this letter?
 - What phrases or words stand out when you read this letter?
 - Does the Establishment Clause apply only to the Federal Government or to the states as well?
 - Ask students if they can think of some examples where religion and government intersect. Possible answers include:
 - School/Federal Holidays
 - Ten Commandments artwork in various state and federal government buildings – Specifically the Supreme Court
 - Public displays of menorahs, Christmas trees, crèche scenes, etc.
 - Christmas concerts in schools
 - Federal funding of faith based initiatives
 - Pledge of allegiance phrase “one nation under God.”
 - “In God We Trust” printed on US currency
 - Tax exemptions for religious groups
 - Being sworn in on the Bible

2. Next project the “What Type of Wall?” handout (attached). The handout contains two images: a small sitting wall and the Israeli West Bank Wall. Tell students to take out a piece of paper and something to draw with. Then allow students a minute to quietly examine the images. Pose the following questions to the class:
 - What type of “wall of separation” do you think Jefferson was talking about in his “Letter to the Danbury Baptists?” A small sitting wall or a giant wall of separation?
 - Should the church and state intermingle or should they be completely separate?

Instruct students to answer these questions by drawing a cartoon that conveys their opinion. Allow students five minutes to create their cartoon. At the conclusion of five minutes, select a few students to share their cartoons and opinions with the class.

Documentary: *Van Orden v Perry*

3. Tell students that they are now going to watch a documentary which discusses the Establishment Clause of the First Amendment. Tell them that they should pay close attention to the facts of the case and the arguments being presented. No further introduction is necessary for the documentary. The following basic facts are provided for your convenience and below are two options for how you may present the documentary. Do not reveal the Supreme Court’s decision in regards to the case yet.

- **Teacher Reference – Synopsis of the Case**

Thomas Van Orden sued the State of Texas in federal court, requesting the removal from the grounds of the state capitol a granite monument in which the Ten Commandments are etched. Van Orden alleged that the monument, because of its content and location, violates the First Amendment prohibition against a state establishment of religion. The district court ruled in favor of the state. The Fifth Circuit Court of Appeals affirmed, finding no First Amendment violation because the state had a secular purpose for allowing the monument to be erected on the grounds of the state capitol, and because a reasonable viewer touring the capitol grounds, informed of the history and placement of the monument, would not conclude that the state was endorsing the religious rather than the secular message of the Ten Commandments. (Source: <http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2004/vanvper.html>)

- **Viewing Options**

There are two ways you can choose to have the class view the documentary.

- **Option 1:** You may choose to have the class watch the video with no pauses and have students work on the attached Viewing Guide while watching.
- **Option 2:** You may choose to pause the video at the times outlined below and ask the class to discuss the questions listed. Students may complete the questions below in addition to or instead of the questions on the Viewer’s Guide.
 - **Discussion Point #1:** (*Pause at 2:27 after Van Orden talks discusses Stone v. Graham*) Ask students what situation *Stone v. Graham* dealt with. Why would Van Orden reference the *Stone v. Graham* case in regards to his situation? How would they feel if they saw the Ten Commandments posted on the walls throughout school?
 - *Posting the Ten Commandments in a public school.*
 - *Both situations deal with the display of the Ten Commandments in public places.*
 - **Discussion Point #2:** (*Pause at 5:28 after Van Orden talks discusses combating juvenile delinquency*) Who donated the monument? What was their purpose for donating the monument? How many monuments did the Eagles donate? Who did they donate them to? What was Texas legislature’s purpose in accepting the Ten Commandments monument according to Ted Cruz? Why do you think the monument’s purpose is important in regards to its constitutionality?
 - *Fraternal Order of the Eagles – to combat juvenile delinquency*
 - *Hundreds to state and local governments all over the country*
 - *The legislature issued a statement explaining that they accepted the monument to honor the Eagles for their work with the youth.*

- **Discussion Point #3:** *(Pause at 9:53 after Laycock discusses the monument park)* What was Cruz's point in relation to the Ten Commandments and US law? What counter argument does Laycock offer? What was the main argument for the state about the monument? In your opinion, what difference does the setting of the monument make, if any?
 - *The Ten Commandments are an important foundation for the development of law and western civilization. They are specifically placed between the State Capitol and State Supreme Court to highlight this connection.*
 - *The Ten Commandments mostly deal with religious obligations, not legal ones. Only three of the ten are embedded in the law (killing, stealing, bearing false witness) and they are not unique to the Ten Commandments.*
 - *The Capitol grounds are like a museum and the monument is one part of the display. Taken in context with all of the other displays, it does not promote one religion, but events and ideals that have contributed to the history and diversity of Texas.*
- **Discussion Point #4:** *(Pause at 17:42 after Justice Kennedy describes a "classic avert your eyes.")* What conclusion did Chemerinsky reach after actually visiting the monument? How is this important for his argument? What did Cruz argue about religious symbols in public places? What was his example? What was Chemerinsky's response to Cruz's argument? Who do you agree with, Cruz or Chemerinsky?
 - *"When you stand in front of the monument, you don't see any other displays or monuments. It is a monument that stands alone and it is the only religious message on government property." He's arguing that since it stands alone and there are no other non-religious monuments visible, it can be understood that the state is endorsing religion.*
 - *Religious symbols are found throughout public settings. His example was the Ten Commandments appearing 43 times throughout the US Supreme Court building.*
 - *That if part of an overall display, the Ten Commandments is permissible. The display violates the Establishment Clause if it stands alone.*
- **Discussion Point #5:** *(At the conclusion of the video)* What did Justice Breyer find it hard to do regarding religious monuments on government property? How do you think the Court decided?
 - *Draw set lines; each case must be looked at on a case by case basis and then decided.*

Opinion Polling and Newspaper Front Page

4. Explain to students that they will be creating an opinion poll regarding *Van Orden v. Perry* and they will administer it to their classmates, parents, neighbors, etc. Each student will be assigned to one of five groups based on a real polling organization. The five groups are Gallup, Quinnipiac University Polling Institute, Rasmussen Reports, American Research Group and Zogby International. After they complete the polling process, each group will create a newspaper editorial page based upon the results of the poll. Assign mixed ability groups and then pass out the following worksheets: "Van Orden v Perry Opinion Poll and Editorial Page instructions" and "Creating Good Interview and Survey Questions Handout." Review the expectations and instructions with students. **(Note: The instruction sheets contain identical information; the only differences are the polling company headers.)**
5. Once students have been assigned their groups they should spend the remaining class time creating their surveys. Be sure to remind them that the surveys should be completed before the start of class tomorrow.

Day 2

6. At the beginning of class students should meet with their groups to share the results of their surveys and determine the school community's opinions surrounding *Van Orden v Perry*. Allow the students approximately ten minutes to analyze the data and then assign each group member a role for the editorial page (attached). Give each group a tabbed manila folder to use as the "newspaper." The group should

decide on the layout, but all the information should fit on one folder. Explain to students that they have 45 minutes to complete their assignment. This includes finishing their contribution to the editorial and compiling the editorial page.

7. Once all the groups have completed their editorial pages, hang them in various points throughout the room. Then allow each group to view another group's editorial page for two minutes. The groups should continue rotating until all the groups have viewed all the editorial pages.
8. Bring the class back together for a debriefing session. Ask the following questions:
 - What were some similarities you noticed between the editorial pages?
 - What were some differences you noticed between the editorial pages?
 - After conducting your research, how strongly does our school community feel about the separation of church and state? Is it an important issue?
 - Did you notice any differences in opinions based upon the respondents' age?
 - Do you think Justices listen to polls when making their decisions?
 - Why do you think the founding fathers felt it was important to include the Establishment Clause of the Constitution?
 - How do you think the Justices ruled in the *Van Orden v. Perry* case?
9. Project or handout the Supreme Court's ruling (attached). Review the Court's decision with the class and ask a few students if they agree or disagree with the Court.

Additional Activities

- Have students read Justice Breyer's concurrent opinion and hold a discussion responding to it.
- Examine *Stone v. Graham* and *McCreary County v. ACLU* and compare them to *Van Orden v. Perry*. What were the similarities and differences between the three cases?

Differentiation

Students with Special Needs

- Ensure mixed ability groups
- Students who have difficulty writing can be assigned the political cartoon role

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- Allow students to read Justice Breyer's opinion and write a response to it (attached). Do they agree or disagree with his opinion?
- Allow students to research similar Ten Commandments and the Establishment Clause cases and create a presentation that compares and contrasts the different cases. See *Stone v. Graham* and *McCreary County v. ACLU* handout for more information (attached).

What Do You Know About the Separation of State and Church?

1. The US Constitution says that the United States was founded as a Christian nation, based on the sovereign authority of God
 - a. In the First Amendment
 - b. In Section VI
 - c. In the Preamble
 - d. Nowhere
2. How many times does the word "God" appear in the US Constitution?
 - a. 0
 - b. 1
 - c. 3
 - d. 6
3. How many times does the Declaration of Independence refer to Christianity or Jesus?
 - a. 0
 - b. 1
 - c. 3
 - d. 8
4. The US Constitution guarantees religious liberty for
 - a. Christians
 - b. All religions
 - c. Atheists & agnostics
 - d. All of the above
5. Where did the separation of church and state originate?
 - a. France
 - b. Soviet Union
 - c. United States of America
 - d. Nazi Germany
6. What does the First Amendment say about religion?
 - a. Nothing
 - b. The US is founded upon Christian principles
 - c. Congress shall make no law respecting an establishment of religion, or prohibiting free exercise
 - d. That there is no national religion, but each state may set up its own religious practices
7. The phrase "wall of separation between church and state" originated with:
 - a. The Soviet constitution
 - b. A dissenting opinion by former Supreme Court Justice Felix Frankfurter
 - c. A letter written by President Thomas Jefferson
 - d. A speech by US President Ulysses S. Grant
8. Which early colonies practiced freedom of religion?
 - a. The Pilgrims and the Puritans in Massachusetts
 - b. The colony in Virginia
 - c. Roger Williams' Providence (Rhode Island) settlement
 - d. All of them
9. The Puritans escaped religious persecution and, in their own colony, allowed religious freedom for
 - a. Everyone
 - b. All Christians
 - c. Puritans only
 - d. Puritans and Anglicans
10. "... the government of the United States is not, in any sense, founded on the Christian religion, ..." Where does this phrase appear?
 - a. The US Communist party platform
 - b. A speech by Abraham Lincoln
 - c. American Jewish Congress
 - d. US treaty signed by President John Adams
11. By an Act of Congress, US Currency has carried the motto "In God We Trust" since
 - a. The very beginning
 - b. 1862
 - c. 1914
 - d. 1957
12. The Pledge of Allegiance, first published in 1892, has included the words "under God" since
 - a. 1892
 - b. 1914
 - c. 1942
 - d. 1954

13. Who made the following statement? "Secular schools can never be tolerated because such a school has no religious instruction and a general moral instruction without a religious foundation is built on air, consequently, all character training and religion must be derived from faith... We need believing people."
- Pat Robertson
 - Abraham Lincoln
 - Adolf Hitler
 - Rev. Jerry Falwell
14. In 1890, bible reading was outlawed from Wisconsin schools. Who was responsible?
- A Lutheran family
 - A Roman Catholic family
 - An atheist family
 - A Jewish family
15. The US Supreme Court outlawed student-initiated prayers at high school football games in 2000. Who were the plaintiffs in the lawsuit?
- Roman Catholic and Mormon Families
 - Two Jewish families
 - A Unitarian (agnostic) family
 - An atheist organization
16. According to the "Lemon test," in order to be constitutional, a law or public act must
- Have a secular purpose
 - Have a primary effect that neither advances nor inhibits religion
 - Not result in excessive governmental entanglement with religion
 - All of the above
17. All American Presidents have been practicing Christians
- True
- False
18. The US Constitution says there shall be no religious test for public office
- True
- False
19. John Adams declared Christmas to be a national holiday
- True
- False
20. A president, being sworn in, is required to place a hand on the Holy Bible and say "so help me, God."
- True
- False
21. Since the First Amendment deals with "Congress," states are free to advance religion if they wish
- True
- False

Source

Freedom From Religion Foundation

<http://ffrf.org/quiz/ffrfquiz.php>

What Do You Know About The Separation of State and Church? Answer Key

1. The US Constitution says that the United States was founded as a Christian nation, based on the sovereign authority of God
 - d. **nowhere. Our nation was founded as a secular government, based on the authority of "We, the People," not a god, king, or dictator.**
2. How many times does the word "God" appear in the U.S. Constitution?
 - a. **0. The U.S. Constitution is a godless document.**
3. How many times does the Declaration of Independence refer to Christianity or Jesus?
 - a. **0. There is no mention of Jesus, Christ, Christianity, religious persecution, or religious freedom in the Declaration of Independence.**
4. The US Constitution guarantees religious liberty for
 - d. **all of the above. Religious liberty is meaningless unless we all have it. Freedom From Religion Foundation president Anne Gaylor says, "There can be no religious freedom without the freedom to dissent."**
5. Where did the separation of church and state originate?
 - c. **United States of America. The USA was the first nation in history to separate church and state.**
6. What does the First Amendment say about religion?
 - c. **Congress shall make no law respecting an establishment of religion, or prohibiting free exercise. The First Amendment begins with these words:**
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." The two clauses are referred to, respectively, as the Establishment Clause and the Free Exercise Clause.
7. The phrase "wall of separation between church and state" originated with
 - c. **a letter written by President Thomas Jefferson. President Thomas Jefferson coined this phrase in a carefully crafted letter to the Danbury Baptists of Connecticut in 1802. It has since been widely picked up and invoked in major Supreme Court decisions.**
8. Which early colonies practiced freedom of religion?
 - c. **Roger Williams' Providence settlement. Trick question! Roger Williams' Providence settlement founded in 1636 expressly guaranteed religious freedom. However, the Pilgrims originally were a tolerant people, when they founded Plymouth in 1620. By 1691, the Pilgrims had adopted the theocratic, intolerant Calvinism of the Puritans, who founded the Massachusetts Bay Colony in 1628. The Puritans came to this land expressly to establish a bible commonwealth, and banished "heretics" and dissenters. In Virginia, heresy was a capital offense punishable by death by burning. Quakers were particularly persecuted. People who were not orthodox Christians were not legally protected, could be denied civil rights and jailed. The founders of the new nation of the United States of America, conversant with extreme religious intolerance and violence in the several colonies, were determined to put an end to it. That is why they established state/church separation.**
9. The Puritans escaped religious persecution and, in their own colony, allowed religious freedom for
 - c. **Puritans only. Puritans (Congregational Calvinists) only were allowed. Even practicing Puritans were held to strict litmus tests. (The Puritans loved religious freedom so much that they kept it all to themselves.)**
10. ". . . the government of the United States is not, in any sense, founded on the Christian religion; . . ." Where does this phrase appear?

- d. U.S. treaty signed by President Adams. In 1797 the United States entered into a treaty with Tripoli, in which it was declared:

"As the government of the United States is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion or tranquility [sic] of Musselmen . . . it is declared . . . that no pretext arising from religious opinion shall ever produce an interruption of the harmony existing between the two countries." This treaty was written under Washington's presidency, and it was ratified by Congress under John Adams, signed by Adams.

11. By an Act of Congress, U.S. currency has carried the motto "In God We Trust" since

- d. 1957. In 1955, Congress passed a law requiring that "In God We Trust" appear on all U.S. coins and currency. The first paper currency with the motto appeared in 1957. This was right after the McCarthy era, during the early Cold War, when no congressperson would dare be seen voting against "God." "In God We Trust" did appear occasionally on a few coins, starting with a 2-cent piece in the 1860s, in an attempt (it is surmised) to put "God" on the side of the north during the Civil War. In 1956, an Act of Congress adopted "In God We Trust" as a national motto. The original motto, "E Pluribus Unum" ("out of many, [come] one,") celebrating plurality, still appears on the Presidential Seal and on some paper currency.

12. The Pledge of Allegiance, first published in 1892, has included the words "under God" since

- d. 1954. As with "In God We Trust," "under God" is also a Johnny-come-lately. It was inserted into the Pledge of Allegiance during the McCarthy era. The original pledge was first published on September 8, 1892 in the magazine "Youth's Companion" with no reference to a deity.

13. Who made the following statement: "Secular schools can never be tolerated because such a school has no religious instruction and a general moral instruction without a religious foundation is built on air; consequently, all character training and religion must be derived from faith ... We need believing people."

- c. Adolf Hitler. April 26, 1933, from a speech made during negotiations leading to the Nazi-Vatican Concordat of 1933.

14. In 1890, bible reading was outlawed from Wisconsin schools. Who was responsible?

- b. a Roman Catholic family. A Roman Catholic family objected to the exclusive use of the Protestant King James Version of the bible. The court barred all bible reading from Wisconsin public schools. [*State ex rel. Weiss vs. District Board*, 76 Wisc. 177 (1890)]. Catholicism was a small minority in 19th-century America. It is usually minority groups who need the protection of the Bill of Rights.

15. The U.S. Supreme Court outlawed student-initiated prayers at high-school football games in 2000. Who were the plaintiffs in that lawsuit?

1. Roman Catholic and Mormon families. The Texas lawsuit was taken by a Catholic family and a Mormon family who had children who were being harassed by the born-again majority in the public schools.

16. According to the "Lemon test," in order to be constitutional, a law or public act must:

- d. all of the above. The 3-pronged Lemon test (*Lemon v. Kurtzman*, 1971, which dealt with public aid to private schools) has almost consistently been utilized by the Supreme Court since the early 1970s. ALL THREE prongs of the test must be satisfied.

17. All American Presidents have been practicing Christians

False. John Adams, John Q. Adams, Millard Fillmore and William H. Taft were Unitarians*. Jefferson was a Deist/Freethinker. Harrison, Johnson, Grant and Hayes were not members of a church. Lincoln was a Deist. Etc. (*Although some Unitarians of that time considered themselves "Christians," they rejected the Trinity and other doctrines that most Christians today consider essential.)

18. The U.S. Constitution says there shall be no religious test for public office

True. Article VI: " . . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

19. John Adams declared Christmas to be a national holiday

False. Christmas was outlawed in some colonies. December 25 was approved as a federal holiday in June 1870. (See: clerkkids.house.gov/laws/inspectLaw/inspect_TextAll.html) Notice the wording designates the date as "the twenty-fifth day of December, commonly called Christmas day," so saying that "Christmas is a federal holiday" is not quite accurate as to intent. Even the name of the Act doesn't say the word "Christmas." According to *From Christmas in America: A History* by Penne L. Restad, (pages 104 and 96), "Louisiana was the first to declare it an official holiday. In 1837, it designated December 25 along with January 1, January 8, February 22, July 4, Sundays, and Good Friday as 'Day[s] of public rest and days of grace.' . . . Arkansas passed a similar law . . . in 1838."

20. A president, being sworn in, is required to place a hand on the Holy Bible and say "so help me, God."

False. The oath of office does not mention a deity or the bible: "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' " [U.S. Constitution, Article II, Section 1] This is the only oath given in the Constitution, and it is entirely secular.

21. Since the First Amendment deals with "Congress," states are free to advance religion if they wish.

False. The 14th Amendment makes the entire Bill of Rights applicable to the states. The first Supreme Court case to declare a state's religious practices illegal under the 14th Amendment was the *McCullum* case (1948) which removed religious instruction from the public schools.

Now on PBS Freedom of Religion Quiz

1. What does separation of church and state mean?
 - a. Religious activities and government activities must be kept strictly separate.
 - b. Religion and government activities can overlap, but that overlap must be carefully choreographed
2. Who decides whether a law violates separation of church and state principles?
 - a. The US Supreme Court
 - b. The state legislature
 - c. Congress
 - d. All of the above
 - e. A council made up of representatives from the government and several different religious organizations.
3. My local government cannot display Santa Claus and a menorah in city hall, since that would violate the separation of church and state.
 - a. True
 - b. False
4. Public schools can't mandate prayer or bible reading in school.
 - a. True
 - b. False
5. High school students can lead prayers before their football game.
 - a. True
 - b. False
6. Public schools can require a minute of silence to pray or meditate.
 - a. True
 - b. False
7. According to a 2002 Supreme Court ruling, students will be able to use their federal vouchers to pay for religious schools.
 - a. Absolutely
 - b. No way
 - c. Who knows?
8. Senator Joe Lieberman was out on the campaign trail talking about the importance of religion in public life and (former) Attorney General John Ashcroft has portrayed the war against terrorism in religious terms. They can't say those things – religion and government must be kept separate.
 - a. True
 - b. False

Source: <http://www.pbs.org/now/quiz/quiz2.html>

Now on PBS Freedom of Religion Quiz Answer Key

1. What does separation of church and state mean?

B. Religion and government activities can overlap, but that overlap must be carefully choreographed

Strictly speaking, there isn't a wall between church and state. Religion and government do mix. It's a matter of understanding the boundaries. The First Amendment of the United States Constitution prohibits Congress from passing laws establishing religion, commonly called the Establishment Clause, or prohibiting its free exercise.

The Supreme Court has interpreted the Establishment Clause to mean that when the government passes laws or creates programs involving religion or religious groups, those laws or programs must (1) have been passed for a secular (non-religious) purpose like collecting tax money or regulating zoning, (2) have a primary effect that doesn't help or hurt religion and (3) must not excessively entangle government in the business of religion.

As to the free exercise bit, this just means that the government can't punish someone because of her/his religious beliefs.

2. Who decides whether a law violates separation of church and state principles?

a. The US Supreme Court

It is the United States Supreme Court that created and continues to give definition to the ideas discussed above. They decide which laws and programs involve government too deeply in the business of religion and are therefore invalid. Note, through the Fourteenth Amendment, the First Amendment's prohibitions regarding the establishment and free exercise of religion apply to state governments as well.

3. My local government cannot display Santa Claus and a menorah in city hall, since that would violate the separation of church and state.

False

Actually, so long as both religious symbols (the menorah) and non-religious symbols (Santa Claus) are displayed during the winter holidays, it's all perfectly kosher. In *County of Alleghany v. American Civil Liberties Union*, the Supreme Court held that a mixing of religious and non-religious symbols served a secular purpose (furthering the government's long-standing tradition of recognizing holidays); had a primary effect that was not religious (the government wasn't endorsing religion — after all it had non-religious symbols of holiday-time too) and did not excessively entangle government with religion. If, however, the display only included religious symbols, it would be invalid. That would be government endorsement of religion.

4. Public schools can't mandate prayer or bible reading in school.

True

In the 1960s, the Supreme Court held that prayer and bible reading in school are impermissibly close to establishments of religion. In 1992, the Court invalidated clergy-led prayers at public school graduations. However, the nuances of these issues continue to be litigated in courts.

5. High school students can lead prayers before their football game.

False

In *Santa Fe Independent School District v. Jane Doe*, decided in June 2000, the Supreme Court held that student-led, student-initiated prayer before football games also violated the Establishment Clause of the Constitution. Because the school administration had mandated a student election to determine whether

the football game prayers would be delivered and who would deliver them, the Court held that the school's actions had a primary religious effect: the endorsement of religion. Notwithstanding, the Supreme Court's ruling, in *Batesburg-Leesville, South Carolina*, the school's student body president recently led a pre-football game prayer over the public address system. No doubt cases like this one will continue to present challenges to the Supreme Court.

6. Public schools can require a minute of silence to pray or meditate.

False

In 1985, in *Wallace v. Jaffree*, the Supreme Court struck down an Alabama law requiring a minute of silence for public school students to pray or meditate. Not willing to give up the fight, Virginia recently passed a law that would require public school students to take a minute of silence to pray, meditate or engage in other silent activity. According to Virginia's lawyers, the Virginia statute, unlike the Alabama statute, does not endorse religion because students could stare out the window or do their homework as a silent activity. The case is making its way through the Virginia Court system.

7. According to a 2002 Supreme Court ruling, students will be able to use their federal vouchers to pay for religious schools.

a. Absolutely

Until 2002 this had been one of those gray areas of Constitutional law. Voucher programs enable students in public schools to receive their federal dollars to use at private schools. The big question was whether students can use these vouchers to attend private religious schools. Throughout the nation, courts have been upholding and striking down various programs — including programs that allow students to attend religious schools and those that don't. The Supreme Court ruled on the case in point, *Zelman v. Simmons-Harris/Hanna Perkins School*, in favor of the use of federal dollars in private religious schools. The case centered on a Cleveland voucher program, in which 96% of the participants used their vouchers to attend religious schools. It was heard under the Establishment of Religion clause discussed in question 1.

8. Senator Joe Lieberman was out on the campaign trail talking about the importance of religion in public life and (former) Attorney General John Ashcroft has portrayed the war against terrorism in religious terms. They can't say those things — religion and government must be kept separate.

False

Although they are government officials, Senator Lieberman and Attorney General Ashcroft can talk about religion and public life all they want. It's protected speech.

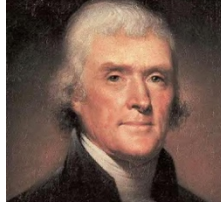
Source: <http://www.pbs.org/now/quiz/quiz2.html>

Establishment Clause Warm Up

1st Amendment of the US Constitution:

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

Source: <http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti>



Jefferson's Letter to the Danbury Baptists The Final Letter, as Sent

To messrs. Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.

Gentlemen

The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. my duties dictate a faithful and zealous pursuit of the interests of my constituents, & in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem.

Th Jefferson
Jan. 1. 1802.

Source: <http://www.loc.gov/loc/lcib/9806/danpre.html>

What Type of Wall?



1. What troubled Thomas Van Orden? Why?
2. What Supreme Court Case supported Van Orden's views? What did that case deal with?
3. Who donated the monument? What was the reason for donating the monument? How many monuments were donated?
4. According to Ted Cruz, what relationship do the Ten Commandments have to American Law? How is this significant for the placement of the monument? What is Douglas Laycock's counter argument regarding the Ten Commandments and American Law?
5. What two arguments about the Capitol grounds and the monument did Ted Cruz use?
6. Describe the test that the Supreme Court used to determine the constitutionality of similar religious displays.
7. According to Erwin Chemerinsky, what was the significant underlying question of the Ten Commandments monument in the Alabama Supreme Court?
8. What did Chemerinsky learn from visiting the Ten Commandments monument?
9. What was a key point for Cruz to convey to the Supreme Court regarding the Ten Commandments? What was Chemerinsky's response to Cruz's assertion?
10. What did Justice Breyer say in about drawing lines regarding religious displays in public? Do you agree or disagree with his opinion?

Creating Good Interview and Survey Questions Handout

If you are conducting primary research using surveys or interviews, one of the most important things to focus on is creating good questions.

When creating questions you want to avoid:

- **Biased questions:** Biased questions are questions that encourage your participants to respond to the question in a certain way. They may contain biased terminology or are worded in a biased way.
 - **Biased question:** Don't you agree that campus parking is a problem?
 - **Revised question:** Is parking on campus a problem?
- **Questions that assume what they ask:** These questions are a type of biased question and lead your participants to agree or respond in a certain way.
 - **Biased question:** There are many people who believe that campus parking is a problem. Are you one of them?
 - **Revised question:** Do you agree or disagree that campus parking is a problem?
- **Double-barreled questions:** A double-barreled question is a one that has more than one question embedded within it. Participants may answer one but not both, or may disagree with part or all of the question.
 - **Double-barreled question:** Do you agree that campus parking is a problem and that the administration should be working diligently on a solution?
 - **Revised question:** Is campus parking a problem? (If the participant responds yes): Should the administration be responsible for solving this problem?
- **Confusing or wordy questions:** Make sure your questions are not confusing or wordy. Confusing questions will only lead to confused participants, which leads to unreliable answers.
 - **Confusing questions:** What do you think about parking? (This is confusing because the question isn't clear about what it is asking--parking in general? The person's ability to park the car? Parking on campus?) Do you believe that the parking situation on campus is problematic or difficult because of the lack of spaces and the walking distances or do you believe that the parking situation on campus is ok? (This question is both very wordy and leads the participant.)
 - **Revised question:** What is your opinion of the parking situation on campus?
- **Questions that do not relate to what you want to learn:** Be sure that your questions directly relate to what it is you are studying. A good way to do this is to ask someone else to read your questions or even test your survey out on a few people and see if the responses fit what you are looking for.
- **Unrelated questions:** Have you ever encountered problems in the parking garage on campus? Do you like or dislike the bus system?

Source: Driscoll, Dana Lynn. "Creating Good Interview and Survey Questions." *The Owl at Purdue*. 30 September 2008. Purdue University. 24 Jul 2009 <<http://owl.english.purdue.edu/owl/resource/559/06/>>.

Facts of the Case:

Thomas Van Orden sued Texas in federal district court, arguing a Ten Commandments monument on the grounds of the state capitol building represented an unconstitutional government endorsement of religion. Orden argued this violated the First Amendment's establishment clause, which prohibits the government from passing laws "respecting an establishment of religion." The district court and the Fifth Circuit Court of Appeals ruled against Orden and said the monument served a valid secular purpose and would not appear to a reasonable observer to represent a government endorsement of religion.

Question:

Does a Ten Commandments monument on the grounds of a state capitol building violate the First Amendment's establishment clause, which barred the government from passing laws "respecting an establishment of religion?"

Pictures of Ten Commandments Monument and Texas State Grounds



GALLUP POLL

Name _____

Date _____

Van Orden v Perry Opinion Poll and Front Page

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2. Now each group member should take five minutes to create five questions that deal with *Van Orden v. Perry*. Each question should have the same responses – Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree.
3. After five minutes, each group member should present their questions to the group. After all the questions have been read the group should determine the five best questions to ask their poll participants.
4. Each group member should now create five questionnaires to hand out to the participants. Use the sample questionnaire below as a guide:

<p><i>Van Orden v Perry</i> Poll</p> <p>Question 1: _____ (Circle One Answer) Strongly Agree Agree Neutral Disagree Strongly Disagree</p> <p>Question 2: _____ (Circle One Answer) Strongly Agree Agree Neutral Disagree Strongly Disagree</p>
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5. Once all the group members have completed the questionnaires obtain a copy of the ***Van Orden v Perry* Information Sheet**.
6. Between classes and after school find people within the school community (students, teachers, counselors, administrators, support staff, etc) to take your group's poll. You should try to poll a diverse group of people; it will help increase the sample size and make the poll more reflective of the school community's make up. **Be sure that you do not disturb other classes while conducting interviews.** The interview procedure should be as follows:
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7. **All the interviews should be completed by the start of class tomorrow.** Once all of the interviews are completed, tally the results for each question and analyze the percentages for each question. For example:

Your group interviews a total of 30 people. The results for question one:

17 Strongly Agree
3 Agree
0 Neutral
6 Disagree
4 Strongly Disagree

To figure out what percentage of the school population strongly agrees you need to use the following equation:

$$\frac{17}{30} = \frac{?}{100}$$

Rearrange it, and Reduce it:

$$\frac{100 \times 17}{30} \rightarrow \frac{1700}{30} \rightarrow 57$$

So 57% of the school strongly agrees with question one.
Continue until all the percentages are finished.

8. Once your group is finished analyzing the percentages, your teacher will assign you a role for the newspaper editorial page and give you a manila folder that will act as your “newspaper.” The layout of the paper is up to the group, just make sure that all the parts fit on the folder. The roles are as follows: political cartoon, chart or graph that displays the poll results, keep the Ten Commandments editorial, remove the Ten Commandments editorial, and a mock interview with Thomas Van Orden.
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Van Orden v Perry Poll

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American Research Group

Name _____

Date _____

Van Orden v Perry Opinion Poll and Front Page

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Supreme Court on a Shoestring

Homeless Man Takes On Texas, Religious Display

By Sylvia Moreno

Washington Post Staff Writer

Monday, February 21, 2005; Page A01

The Washington Post

AUSTIN -- Comes now the plaintiff, surely one of the most unusual to get a case to the highest court in the land. He's homeless; he's destitute; and his law license is suspended.

But never mind all that, Thomas Van Orden admonishes anyone who gets stuck on the fact that he sleeps nightly in a tent in a wooded area; showers and washes his clothes irregularly; hangs out in a law library; and survives on food stamps and the good graces of acquaintances who give him a few bucks from time to time. What is important, Van Orden says, is "I wrote myself to the Supreme Court."

That he did and with a case that involves an issue that has divided liberals and conservatives as well as lower federal courts for decades: the display of a Ten Commandments monument on government property.

On March 2, the Supreme Court will hear *Van Orden v. Perry*, a case born of Van Orden's daily meanderings around the Texas state Capitol grounds. There, between the Capitol and the Texas Supreme Court, stands a 6-foot-tall, 3-foot-wide pink granite monument etched with the commandments and Christian and Jewish symbols. Carved in the shape of stone tablets, the monument was presented to "the Youth and the People of Texas" in 1961 by the Texas chapter of the Fraternal Order of Eagles.

One day in 2002, as Van Orden walked to the State Law Library in the Supreme Court building, where he seeks peaceful and dry refuge daily, the lawsuit dawned on him. Somebody had to challenge the state of Texas for what he believed to be a governmental endorsement of Judeo-Christian doctrine and a violation of the separation between church and state.

Why not him? As he likes to say, "I have time; my schedule is kind of light."

Van Orden is a self-declared religious pluralist who was raised Methodist in East Texas and joined the Unitarian church in Austin in the 1990s. That was before he sank into a major depression that destroyed his family life and legal career and rendered him homeless. "I miss it," he said about church. "But it's hard to get up and go on Sunday morning when you live in a tent."

He speculated that even the Texas chapter of the liberal American Civil Liberties Union would never challenge the commandments monument on the Capitol grounds.

"If you're in private practice in Austin and file this suit, you're going to be radicalized -- even in liberal Austin. But look at me; I'm the perfect person. I don't have anything to lose," he said recently as he stood outside the court building. He is 59 or 60 but will not say which. He needed a shave, and his teeth and fingers were stained dark from tobacco, but he looked rather lawyerly in his second-hand slacks, blue-striped shirt and scuffed brown wingtips. "It's like God called me to do it. How could I walk away from that?" he said. "It just looked to me like the light shined on me."

Now the U.S. Supreme Court will decide the question presented in the Van Orden case: whether a monument bearing the Ten Commandments, which has stood for more than 40 years and is surrounded by 16 other monuments on the Texas Capitol grounds, "constitutes an impermissible establishment of religion in violation of the First Amendment." To be heard at the same time is *McCreary County v. ACLU of Kentucky*, a case that challenges the exhibition of the Ten Commandments along with other historical documents in two courthouses.

In the Texas case, the U.S. Court of Appeals for the 5th Circuit ruled in November 2003 that the commandments monument conveyed both a religious and secular message and did not violate the Constitution. In the Kentucky case, the U.S. Court of Appeals for the 6th Circuit ruled in December 2003 that two counties must remove framed copies of the Ten Commandments from courthouse walls because they constituted religious displays. These are just two of more than two dozen cases involving the Ten Commandments that lower courts have decided since the U.S. Supreme Court last agreed to address the issue in 1980. It was then the high court struck down a Kentucky law that required public schools to post the commandments in classrooms.

Van Orden's case will be argued at the Supreme Court by constitutional law scholar Erwin Chemerinsky of Duke University. Van Orden called Chemerinsky shortly after the 5th Circuit ruled against him in late 2003, and Chemerinsky agreed to take the case pro bono. Last spring, Chemerinsky petitioned the Supreme Court to review the appellate ruling in the Van Orden case and last October, the court announced it would hear the Texas and Kentucky cases together.

"I have nothing but the greatest admiration and respect for him," Chemerinsky said of Van Orden. "He genuinely cares about this issue. He's extremely intelligent and articulate, and I think he did an excellent job of briefing and arguing the case on the trial level and the appellate level. . . . A large Ten Commandments monument sitting between the Texas Capitol and the Texas Supreme Court violates the establishment clause."

In recent months, Van Orden's direct involvement in the case has been in the form of suggestions made to Chemerinsky in e-mails sent from the public computers at the Texas State and the University of Texas law libraries. Chemerinsky has mailed Van Orden the briefs submitted in the case and welcomed his comments.

Last November, almost a year after he spoke to Van Orden originally by telephone and began working on the case, Chemerinsky flew to Austin to meet the plaintiff and get a tour of the monument and the Capitol grounds. "He and I have never talked about his living circumstances," Chemerinsky said. "It has nothing to do with the case. He's asked me to do something very important and that is take his case to the Supreme Court."

Texas's case will be argued by State Attorney General Greg Abbott. State Solicitor General R. Ted Cruz, who faced Van Orden during arguments in the Court of Appeals for the 5th Circuit, said the monument does not endorse a specific religion. According to the brief filed by Abbott in the Supreme Court, the Ten Commandments monument and the 16 others on the Capitol grounds commemorate the "people, events and ideals that have contributed to the history, diversity and culture of Texas."

"The Ten Commandments are unquestionably a sacred religious text, but they equally, unquestionably, have made important historical contributions to the development of Western legal codes and civilization," Cruz said. "That's why one finds the Ten Commandments in courthouses throughout the nation."

But as Van Orden often says, he did not sue the Ten Commandments. "I sued the state . . . to uphold the values found in the First Amendment." And he did it on less than a shoestring, using the public resources of the Texas State Law Library, a dollar here and there from friends and some small donations from supporters of his cause. He got his U.S. District Court filing fee waived after being certified as a pauper and used a \$4 disposable camera to take the pictures of the monument that he submitted into evidence. He walked to the federal court in Austin, where he initially argued his case, and then got a ride from a sympathetic UT law student to New Orleans so he could argue his appeal before the 5th Circuit. He said the experience was exhilarating yet stressful.

"The subject was to me like strawberry pie. I love it; I love constitutional law. But the practicality of it, that wears on you," he said. "Even if you get money to make copies [of briefs], then how are you going to get postage to mail them? Each time, it was a different thing, but somehow I managed."

For Van Orden, this case was not just about fighting for a constitutional right. It was about redemption.

"I felt alive again," said Van Orden, who graduated from Southern Methodist University law school in 1970, then served in the U.S. Army's Judge Advocate General's office for two years during the Vietnam War. He practiced criminal defense law in Tyler, Houston and Dallas, got his pilot's license and was a flight instructor before moving to Austin in 1993. But by then, his life had begun to unravel.

Texas State Bar records show Van Orden's law license was suspended in 1985, in 1989 and in 1999 -- mostly for taking money from clients for work that he did not perform and for failing to pay fees ordered in disciplinary judgments. The 1995 suspension also ordered him to provide a psychiatric opinion certifying that his "current state of mental health does not render him incapable of routine law practice."

Van Orden remains on active suspension, prohibited from representing anyone in court other than himself, because he has failed to pay fees ordered in the 1995 disciplinary judgment, a bar official said. He also has not paid the bar dues to reactivate his license.

Van Orden would not discuss the disciplinary cases other than to say, "That's in the past, when I was sinking into oblivion." He said he overcame his depression, but won't discuss how. "Unfortunately, your life is destroyed by then," he said.

He has two ex-wives and two children, none of whom he has seen in years, and he considers himself a loner. He chafes at the fact that the Ten Commandments case has gained him fame as "the homeless lawyer," saying: "Where I sleep at night, is this important compared to what I read during the day? What do you think defines me: Where I slept or what I did all day?"

For him, the important story is that of "the little guy" who went up against the powerful state.

"You can still do it with a piece of paper, a pen and a law book," Van Orden said. "But that will be lost in all the hoopla of the Ten Commandments."

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Editorial Page Roles

<p>Political Cartoon</p> <p>It is your job to create a political cartoon based upon the issues surrounding <i>Van Orden v Perry</i>. Some ideas you may want to explore are the school community's feelings about the issue, Thomas Jefferson's feelings about the monument, the Establishment Clause, and what you think the court's decision will be. Be sure that your cartoon's meaning is clear and colorful.</p>	<p>Pro Ten Commandments Argument</p> <p>It is your job to write a three paragraph argument that supports the placement of the Ten Commandments at the Texas State Capitol. Each paragraph should contain one argument for keeping the monument. Some guiding questions to think about: Why should the Ten Commandments be allowed to stay? Why are they not offensive to you? What purpose do they serve? Include references to the information gathered from the polls. Be sure that your spelling and grammar are correct for you final draft.</p>	<p>Anti-Ten Commandments Argument</p> <p>It is your job to write a three paragraph argument that opposes the placement of the Ten Commandments at the Texas State Capitol. Each paragraph should contain one argument for removing the monument. Some guiding questions to think about: How do the Ten Commandments violate the Establishment Clause? What is the purpose of the monument? Why is there placement offensive to you? Include references to the information gathered from the polls. Be sure that your spelling and grammar are correct for you final draft.</p>
<p>Chart or Graph That Displays Poll Results</p> <p>It is your job to compile all of the poll results and create a chart or graph that displays your group's findings. The chart should be easy to understand and eye catching.</p>	<p>Mock Interview with Thomas Van Orden</p> <p>It is your job to stage a mock interview with Thomas Van Orden. Before conducting the interview, read the attached <i>Washington Post</i> article. Then create five questions and answers. Use information from the article to answer for Van Orden.</p>	

Summary of the Court's Decision in *Van Orden v Perry*

Question:

Does a Ten Commandments monument on the grounds of a state capitol building violate the First Amendment's establishment clause, which barred the government from passing laws "respecting an establishment of religion?"

Conclusion:

No. In 5-4 decision, and in a four-justice opinion delivered by Chief Justice William H. Rehnquist, the Court held that the establishment clause did not bar the monument on the grounds of Texas' state capitol building. The plurality deemed the Texas monument part of the nation's tradition of recognizing the Ten Commandments' historical meaning. Though the Commandments are religious, the plurality argued, "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."

Source:

The Oyez Project, *Van Orden v. Perry*, 545 U.S. ____ (2005)
available at: (http://oyez.org/cases/2000-2009/2004/2004_03_1500)
(last visited Monday, July 27, 2009).

Breyer's Concurrence

In *School Dist. of Abington Township v. Schempp* (1963), Justice Goldberg, joined by Justice Harlan, wrote, in respect to the First Amendment's Religion Clauses, that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." One must refer instead to the basic purposes of those Clauses. They seek to "assure the fullest possible scope of religious liberty and tolerance for all." They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. They seek to maintain that "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil." They seek to further the basic principles set forth today by Justice O'Connor in her concurring opinion in *McCreary County v. American Civil Liberties Union of Ky.*

The Court has made clear, as Justices Goldberg and Harlan noted, that the realization of these goals means that government must "neither engage in nor compel religious practices," that it must "effect no favoritism among sects or between religion and nonreligion," and that it must "work deterrence of no religious belief." The government must avoid excessive interference with, or promotion of, religion. But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Thus, as Justices Goldberg and Harlan pointed out, the Court has found no single mechanical formula that can accurately draw the constitutional line in every case. Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are insufficient, both because it is sometimes difficult to determine when a legal rule is "neutral," and because "untutored 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."

Neither can this Court's other tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, see *Marsh, supra*; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.

If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts--and might well lead to the same result the Court reaches today, --no exact formula can dictate a resolution to such fact-intensive cases.

The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)--a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency. The Eagles' consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscores the group's ethics-based motives. The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments' message.

The physical setting of the monument, moreover, suggests little or nothing of the sacred. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, the context suggests that the State intended the display's moral message--an illustrative message reflecting the historical "ideals" of Texans--to predominate.

If these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 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, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, 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 this longstanding, pre-existing monument has not.

For these reasons, I believe that the Texas display--serving a mixed but primarily nonreligious purpose, not primarily "advanc[ing]" or "inhibit[ing]" religion," and not creating an "excessive government entanglement with religion,"--might satisfy this Court's more formal Establishment Clause tests. But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two

generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

At the same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Justices Goldberg and Harlan concluded in *Schempp* that "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have meaningful and practical impact." That kind of practice is what we have here. I recognize the danger of the slippery slope. Still, where the Establishment Clause is at issue, we must "distinguish between real threat and mere shadow." Here, we have only the shadow.

In light of these considerations, I cannot agree with today's plurality's analysis. Nor can I agree with *Justice Scalia's* dissent in *McCreary County*. I do agree with *Justice O'Connor's* statement of principles in *McCreary County*, though I disagree with her evaluation of the evidence as it bears on the application of those principles to this case.

I concur in the judgment of the Court.

Source:

Van Orden v Perry (Breyer, Concurring). Exploring Constitutional Law. 10 Jul 2009
<<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/VanOrden.html>>.

Stone v Graham

Facts of the Case:

Sydell Stone and a number of other parents challenged a Kentucky state law that required the posting of a copy of the Ten Commandments in each public school classroom. They filed a claim against James Graham, the superintendent of public schools in Kentucky.

Question:

Did the Kentucky statute violate the Establishment Clause of the First Amendment?

Conclusion:

In a 5-to-4 per curiam decision, the Court ruled that the Kentucky law violated the first part of the test established in *Lemon v. Kurtzman*, and thus violated the Establishment Clause of the Constitution. The Court found that the requirement that the Ten Commandments be posted "had no secular legislative purpose" and was "plainly religious in nature." The Court noted that the Commandments did not confine themselves to arguably secular matters (such as murder, stealing, etc.), but rather concerned matters such as the worship of God and the observance of the Sabbath Day.

Source: The Oyez Project, *Stone v. Graham*, 449 U.S. 39 (1980) available at: (http://oyez.org/cases/1980-1989/1980/1980_80_321) (last visited Friday, July 10, 2009).

McCreary County v. ACLU

Facts of the Case:

The American Civil Liberties Union (ACLU) sued three Kentucky counties in federal district court for displaying framed copies of the Ten Commandments in courthouses and public schools. The ACLU argued the displays violated the First Amendment's establishment clause, which prohibits the government from passing laws "respecting an establishment of religion." The district court and the Sixth Circuit Court of Appeals ruled the displays violated the establishment clause.

Questions:

1. Do Ten Commandments displays in public schools and in courthouses violate the First Amendment's establishment clause, which prohibits government from passing laws "respecting an establishment of religion?"
2. Was a determination that the displays' purpose had been to advance religion sufficient for the displays' invalidation?

Conclusion:

Yes and yes. In a 5-4 opinion delivered by Justice David Souter, the majority held that the displays violated the establishment clause because their purpose had been to advance religion. In the case of each of the displays, the Court held, an observer would have concluded that the government was endorsing religion. The first display for presenting the Ten Commandments in isolation; the second for showing the Commandments along with other religious passages; the third for presenting the Commandments in a presentation of the "Foundations of American Law," an exhibit in which the county reached "for any way to keep a religious document on the walls of courthouses."

Source: The Oyez Project, *McCreary County v. ACLU*, 545 U.S. ____ (2005) available at: (http://oyez.org/cases/2000-2009/2004/2004_03_1693) (last visited Friday, July 10, 2009).