

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,<sup>242</sup> distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In some contexts, the Ten Commandments can convey a moral and historical message as well as a religious one, the Justice explained. Although it was “a borderline case” turning on “a practical matter of degree,” the capitol display served “a primarily nonreligious purpose.”<sup>243</sup> The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought that few would be likely to understand the monument to represent an attempt by government to favor religion.<sup>244</sup>

The Court has also considered an Establishment Clause challenge to the display of a Latin Cross—erected to honor American soldiers who died in World War I—on federal land located in a remote section of the Mojave Desert.<sup>245</sup> The legal proceedings leading up to the decision, however, were complicated by congressional attempts to influence the final disposition of the case, including the attempted transfer of the federal land in question to private hands.<sup>246</sup>

<sup>242</sup> Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

<sup>243</sup> 545 U.S. at 700, 704, 703.

<sup>244</sup> 545 U.S. at 702. In *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1140 (2009), Justice Scalia, in a concurring opinion joined by Justice Thomas, wrote that, “[e]ven accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*,” he would find that a Ten Commandments monument displayed in a Utah public park for 38 years amidst 15 permanent displays would not violate the Establishment Clause, even though the monument constituted government speech. The majority opinion did not consider the question, but decided the case on free-speech grounds. See *The Public Forum*, *infra*.

<sup>245</sup> *Salazar v. Buono*, 559 U.S. \_\_\_, No. 08–472, slip op. (2010).

<sup>246</sup> During the course of the litigation, Congress variously passed an appropriations bill forbidding the use of governmental funds to remove the cross, designating the cross and its adjoining land as a “national memorial,” prohibiting the spending of governmental funds to remove the cross, and directing the Secretary of the Interior to transfer the land to the Veterans of Foreign Wars (VFW) as long as the property was maintained as a memorial commemorating World War I veterans. A federal court of appeals ordered the removal of the cross, holding that a reasonable observer would perceive a cross on federal land as governmental endorsement of religion, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), and the government did not seek review of this decision. Subsequently, the court of appeals affirmed a lower court injunction against the transfer of land to the VFW, holding that the underlying statute was an invalid attempt to keep the cross in its existing location. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).