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THOU SHALT NOT?

MARK STRASSER*

I. INTRODUCTION

In *Van Orden v. Perry*¹ and *McCreary County v. ACLU*,² the United States Supreme Court (Court) issued two decisions respecting the constitutionality of Ten Commandments displays, upholding the constitutionality of one but striking down the other as a violation of First Amendment³ guarantees. That the Court might reach a compromise about such a contentious matter should not be surprising. What is surprising, however, is that the Court could not decide the appropriate test to apply in this kind of case, making a jurisprudence that was confusing even more convoluted and increasing the likelihood that there will be inconsistency in the lower courts regarding similar cases implicating Establishment Clause guarantees.

Part II of this Article discusses the Court's Establishment Clause jurisprudence, examining the *Lemon* Test, the Endorsement Test, and the Coercion Test in the various incarnations articulated by the Court over the years. Part III analyzes the Court's three main cases involving Ten Commandments displays, noting some of the disturbing turns that the Court's jurisprudence has recently taken. The Article concludes that the Court's jurisprudence undermines the very purposes of the Religion Clauses, because the Court's opinions in both content and tone can only weaken respect for the diversity of religious belief in this country and promote divisiveness along religious lines, results which neither accord with the intentions of the Framers nor good public policy.

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. 545 U.S. 677 (2005).
2. 545 U.S. 844 (2005).
3. U.S. CONST. amend. I.

II. ESTABLISHMENT CLAUSE JURISPRUDENCE

Contemporary Establishment Clause jurisprudence⁴ begins with *Everson v. Board of Education*,⁵ in which the Court examined whether New Jersey could reimburse the travel expenses of students attending parochial schools.⁶ The Court articulated a very demanding principle for deciding Establishment questions, writing, “Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁷ However, there are at least two reasons to believe that Establishment Clause doctrine is not nearly as demanding as might be inferred from such a principle. First, notwithstanding that this principle seems to prohibit the state from aiding religion in any way, the Court upheld the challenged practice,⁸ noting that to hold otherwise might imply that a whole host of services could not be provided to religious institutions, e.g., police, fire, and sanitation.⁹ By stating that the Constitution precluded aid to religion but upholding the statute at issue, the Court made clear that the Constitution does not prohibit the state from benefiting religion at all but merely that there are (not clearly specified) limits on state aid to religion.

Second, the principle articulated by the Court for determining whether there has been an Establishment Clause violation has itself evolved over time, and the current standards are not as demanding as

4. See Kevin Pybas, *Two Concepts of Liberalism in Establishment Clause Jurisprudence*, 36 CUMB. L. REV. 205, 216 (2005-2006) (“[T]he issue that launched the Court’s modern Establishment Clause jurisprudence was one involving public aid to parents of children enrolled in Catholic Schools. . . . in *Everson v. Board of Education*.”); Nina S. Schultz, Note, *Davey’s Deviant Discretion: An Incorporated Establishment Clause Should Require the State to Maintain Funding Neutrality*, 81 IND. L.J. 785, 788 (2006) (describing *Everson* as the Court’s “first modern Establishment Clause challenge”).

5. 330 U.S. 1 (1947).

6. *Id.* at 3.

The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools.

Id.

7. *Id.* at 15.

8. *Id.* at 18 (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”).

9. *Id.* at 17.

the *Everson* standard. Indeed, some Justices have bemoaned the loss of the principle announced in *Everson*, believing the current standard too malleable. For example, Justice Stevens expressed his longing for the days of *Everson*—“Rather than continuing with the Sisyphean task of trying to patch together the ‘blurred, indistinct, and variable barrier’ described in *Lemon v. Kurtzman*, I would resurrect the ‘high and impregnable’ wall between church and state constructed by the Framers of the First Amendment.”¹⁰

The *Lemon* Test is supposedly the current test for Establishment Clause questions¹¹ and, indeed, was the test used in *McCreary County*.¹² That test focuses on the purpose and effect of the challenged state action. The *Lemon* Test initially involved three prongs: (a) whether the predominant purpose behind the action was to promote or undermine religion; (b) whether the primary effect of the action was to promote or undermine religion; and (c) whether excessive entanglement between Church and State would be required in order to assure that the effects prong would not be violated,¹³ but the Court has since suggested that the second and third prongs can be collapsed.¹⁴

Two other tests for determining whether there has been an Establishment Clause violation have been proposed: (a) the

10. *Comm. for Pub. Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (citing *Everson*, 330 U.S. at 18). *See also* *Wolman v. Walter*, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part).

I am now convinced that *Allen* [Board of Education v. Allen, 392 U.S. 236 (1968)] is largely responsible for reducing the “high and impregnable” wall between church and state erected by the First Amendment, *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), to “a blurred, indistinct, and variable barrier,” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), incapable of performing its vital functions of protecting both church and state.

Id.

11. *But see* *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (“Many of our recent cases simply have not applied the *Lemon* test.”).

12. The Court held that the display at issue violated *Lemon’s* purpose prong. *See* *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (“Given the ample support for the District Court’s finding of a predominantly religious purpose behind the Counties’ third display, we affirm the Sixth Circuit in upholding the preliminary injunction.”).

13. *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987).

14. *See* *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (“[O]ur cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon’s* entanglement inquiry as simply one criterion relevant to determining a statute’s effect.”) (citing *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997)). Some lower courts still treat entanglement as a separate prong, however. *See, e.g.,* *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005) (“*Lemon’s* final prong provides that a challenged governmental action must not foster an excessive government entanglement with religion.”) (citation omitted).

Endorsement Test¹⁵ and (b) the Coercion Test. The Endorsement Test concerns whether the state action at issue would lead an informed observer to believe that the state was endorsing religion and was making non-adherents feel like second-class citizens.¹⁶ The Coercion Test concerns whether the action at issue would somehow coerce an individual to profess a religious belief or engage in a religious practice against her will.¹⁷ The three tests in their various formulations are discussed below.¹⁸

A. *The Lemon Test*

Initially, the test discussed in *Lemon v. Kurtzman*¹⁹ was a three-pronged test. The *Aguillard* Court provides a nice summation of the *Lemon* test:

The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.²⁰

In order for a state action to pass constitutional muster, it must pass each prong of the test.²¹

15. Actually, it is not clear whether to treat the Endorsement Test as an elaboration of *Lemon* or an alternative to it. See Kristi L. Bowman, *Seeing Government Purpose through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 443 (2006) ("it remains unclear whether the endorsement test is a replacement for the *Lemon* test or merely a new iteration of the effects prong").

16. See, e.g., *Smith v. Lindstrom*, 699 F. Supp. 549, 560 (W.D. Va. 1988) ("Endorsement by the state apparatus of a sect or a religious ideology strikes at the very heart of the guarantees of the Establishment Clause because such endorsement provides a very real threat of the symbolic disenfranchisement of a portion of the community.").

17. Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7 U. PA. J. CONST. L. 473, 511 (2004) (suggesting that the coercion test "proscribes government policies that coerce anyone to support or participate in religion or its exercise.").

18. See *infra* Part II.A-D.

19. 403 U.S. 602 (1971).

20. *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987) (citing *Lemon*, 403 U.S. at 612-613).

21. *Id.* at 583 ("State action violates the Establishment Clause if it fails to satisfy any of these prongs.").

1. The "Purpose" Prong

A state will violate *Lemon*'s first prong if its intention was to promote religion. The First Amendment's Establishment guarantee is not respected when the state is attempting to promote religion generally²² or, instead, attempting to advance a particular religious belief.²³ However, where the state has more than one intention, the analysis is more complicated. For example, the state may meet the first *Lemon* prong if it has both a religious and a secular motivation. As Justice Powell explains, "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate."²⁴ On the other hand, the Court has not suggested that any secular purpose, however secondary, will act to immunize a religious purpose. As Justice O'Connor explains, "The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes."²⁵

2. The "Effects" Prong

The effects prong of the *Lemon* test is more difficult to assess because the Court has adopted several different approaches when doing the analysis under this prong. Sometimes, the Court has asked whether the challenged action has a primary or principal effect of benefiting religion.²⁶ At other times the question is whether a particular action directly benefits religion,²⁷ which might mean that an action which primarily but indirectly benefits religion would nonetheless pass constitutional muster.²⁸ At still other times the Court

22. *Id.* at 585.

23. *See id.*

24. *Id.* at 599 (Powell, J., concurring).

25. *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

26. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) ("To pass constitutional muster under *Lemon* a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion.").

27. *Comm. for Pub. Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) ("It is equally well established, however, that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid.").

28. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

has asked whether a particular state action is more beneficial to or more of an endorsement of religion than practices whose constitutionality the Court has already upheld — a type of comparative approach.

While the Court's primary-or-principal-effect test may occasionally yield different dictates than the Court's direct-benefit-to-religion test, the Court's comparative approach has had the most radical effect on this prong, making it so open-ended that it seems incapable of doing much work. Indeed, this prong is especially more open-ended given the Court's tendency to recharacterize what it had previously done. Thus, when deciding whether the state's according a particular benefit to a religious group passed muster, the Court would say that as a matter of neutrality the Constitution permitted religious groups to receive benefits which similarly situated non-religious groups were already permitted to receive. However, when looking back at what had been held constitutionally permissible, the Court would suggest that it had already held that the conferral of special benefits to religious groups did not offend constitutional guarantees. This would mean that in another case in which the state's conferral of special benefits to a religious group was being challenged, the Court could uphold the practice after pointing to past cases in which the conferral of allegedly comparable benefits had already been upheld.

*Lynch v. Donnelly*²⁹ is paradigmatic of what is described above, both in how the Court recharacterized many of the previous cases and in how open-ended the Effects prong was thereby made. In *Lynch*, the Court considered whether including a crèche in a Holiday display³⁰ conferred an impermissible benefit on religion in general or Christianity in particular.³¹ The Court compared the benefit at issue to some of the benefits whose constitutionality it had previously upheld,³² suggesting:

[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the

Id.

29. 465 U.S. 668 (1984).

30. *Id.* at 671 ("The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things . . . the crèche at issue here. All components of this display are owned by the City.").

31. *Id.* at 681 ("The District Court found that the primary effect of including the crèche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular.").

32. *Id.* at 681-82.

Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education v. Allen*, [392 U.S. 236 (1968);] expenditure of public funds for transportation of students to church-sponsored schools, *Everson v. Board of Education*, [330 U.S. 1 (1947);] federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, [*Tilton v. Richardson*, 403 U.S. 672 (1971);] noncategorical grants to church-sponsored colleges and universities, *Roemer v. Board of Public Works*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976); and the tax exemptions for church properties sanctioned in [*Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970)]. It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); . . . the release time program for religious training in [*Zorach v. Clauson*, 343 U.S. 306 (1952)]; and the legislative prayers upheld in *Marsh*.³³

One might infer from the *Lynch* Court's comparative analysis that in the previous decisions the Court had expressly upheld the listed practices as constitutionally permissible conferrals of religious benefits. However, that is false. In many of the examples offered, the Court had not viewed the statute at issue as conferring a special benefit on religion but instead had suggested that the State was simply maintaining its neutrality by permitting religious groups to receive benefits that others similarly situated were also receiving. Consider the following brief analysis of many of the cases in which the Court had allegedly upheld conferrals of benefits on religion.

In *Board of Education v. Allen*,³⁴ in which the Court upheld New York's providing secular textbooks to students in parochial schools, the Court characterized the law as "merely mak[ing] available to all children the benefits of a general program to lend school books

33. *Id.*

34. 392 U.S. 236 (1968).

free of charge.”³⁵ The Court understood that “free books [might] make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.”³⁶ Thus, the *Allen* Court likened the provision of textbooks to the provision of bus services that it had upheld in *Everson*,³⁷ and implied that striking down either on constitutional grounds would be unfair to religion.

The *Everson* Court admitted that the provision of bus services to children attending parochial school conferred a benefit on religion,³⁸ and understood that the provision of this benefit might make the difference between a child attending a private versus a public school.³⁹ However, the Court pointed out, the same argument might be made about a state-supported policeman who was directing traffic near the school.⁴⁰ Basically, the Court treated the benefit at issue as one being accorded to all,⁴¹ and implied that it would be unfair and, perhaps, hostile to religion for the Court to strike down the provision of this benefit to religion when everyone else has access to it.⁴²

In *Tilton v. Richardson*,⁴³ the Court upheld the provision of an Act authorizing federal grants and loans to higher education institutions for the construction of academic facilities.⁴⁴ The Act made

35. *Id.* at 243.

36. *Id.* at 244.

37. *Id.* at 241-42 (“*Everson v. Board of Education*, 330 U.S. 1 (1947), is the case decided by this Court that is most nearly in point for today’s problem.”).

38. *Everson*, 330 U.S. at 17 (“It is undoubtedly true that children are helped to get to church schools.”).

39. *Id.* (“There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets when transportation to a public school would have been paid for by the State.”).

40. *Id.*

Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children’s welfare.

Id.

41. *Cf. id.* at 16 (“[W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.”).

42. *Id.* at 18 (“That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”).

43. 403 U.S. 672 (1971).

44. *Id.* at 675.

clear that “no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school.”⁴⁵ That said, the Act was broad in scope: “Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body”⁴⁶ — that is, the Act was conferring a benefit on both religious and non-religious institutions. Permitting the religious institutions to receive these benefits as well only involved treating them neutrally.

The Court understood that helping religious institutions to build facilities would aid them in their mission, but pointed out that “bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services.”⁴⁷ But the relevant point for the Court’s analysis was not whether the religious institutions would be forced to find other sources but rather that the state was neutrally affording benefits to both religious and non-religious institutions.

In *Roemer v. Board of Public Works*,⁴⁸ the Court upheld the provision of public funding to religious schools based on a finding below that the funds would only be expended on the “secular side.”⁴⁹ The Court again spoke in terms of neutrality — “Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity”⁵⁰ — and again made clear its understanding that the provision of this aid would free up monies to be used for other purposes — “The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution’s resources to be put to sectarian ends.”⁵¹ The Court reasoned, however, that “[i]f this were impermissible . . . a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.”⁵² The Court suggested that striking down the aid on constitutional grounds would require interpreting the Constitution to mandate that “religious

45. *Id.*

46. *Id.* at 676.

47. *Id.* at 679.

48. 426 U.S. 736 (1976).

49. *Id.* at 759 (accepting District Court finding that the moneys at issue would only be extended to the “secular side”).

50. *Id.* at 747.

51. *Id.*

52. *Id.*

activities must be discriminated against in this way,"⁵³ a view to which the Court had never subscribed.⁵⁴

In *Walz v. Tax Commission of the City of New York*,⁵⁵ the Court upheld a tax exemption for properties owned by religious institutions which were used solely for religious purposes.⁵⁶ The Court characterized the exemption at issue as a prophylactic measure to prevent discrimination *against* religion.⁵⁷ The Court viewed its decision as an exercise in neutrality,⁵⁸ noting that religion had not been picked out for a special benefit but, rather, had been included "within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."⁵⁹ Thus, the Court reasoned that religious institutions must be treated like other non-profits promoting the public good, and that giving a tax exemption to the latter but not the former would unfairly discriminate against religion.

In *McGowan v. Maryland*,⁶⁰ the Court offered a neutrality approach in upholding Sunday Closing Laws. While admitting that such laws were originally passed to serve religious purposes,⁶¹ the Court suggested that the relevant question was whether the current legislation, "having undergone extensive changes from the earliest forms, still retains its religious character."⁶² Convinced that most of the Sunday Closing Laws "as presently written and administered . . . are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words

53. *Id.*

54. *Id.*

55. 397 U.S. 664 (1970).

56. *Id.* at 666.

57. *See id.* at 673.

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms--economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.

Id.

58. *Id.* at 669 ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.").

59. *Id.* at 673.

60. 366 U.S. 420 (1961).

61. *Id.* at 431 ("There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces.").

62. *Id.* ("There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces.").

are used in the Constitution of the United States,"⁶³ the Court construed those laws as promoting the general welfare of society and merely coinciding or harmonizing with the tenets of some religions.⁶⁴

In *Zorach v. Clauson*,⁶⁵ the Court upheld a release-time program in which students would be allowed to leave school and receive religious training at another site. The Court suggested that to refuse to permit this program "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups."⁶⁶ The Court invoked the neutrality argument, suggesting that holding otherwise "would be preferring those who believe in no religion over those who do believe."⁶⁷

In almost all of the cases cited by the Court in *Lynch*,⁶⁸ the "benefits" at issue were characterized as generally available, such that denying them to religious organizations would be treating the latter in a less than neutral manner.⁶⁹ Even when the benefits were not open to all (as in *Zorach*, where students could only leave school to receive religious training but not other kinds of training⁷⁰) the Court suggested that striking down the program at issue would have given a preference to those who did not believe in religion.

In *Lynch*, the Court implied that the benefits to or endorsement of religion involved in having a holiday display including a crèche among other Christmas symbols⁷¹ would have to exceed the benefits to or endorsement of religion involved in the other cases cited.⁷² Yet, in

63. *Id.* at 444.

64. *Id.* at 442.

65. 343 U.S. 306 (1952).

66. *Id.* at 314.

67. *Id.*

68. The remaining case, *Marsh v. Chambers*, 463 U.S. 783 (1983), is discussed below. See *infra* notes 77-91 and accompanying text.

69. *Cf. Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968) ("Government . . . may not be hostile to any religion or to the advocacy of nonreligion The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

70. See *Zorach*, 343 U.S. at 323-324 (Jackson, J., dissenting).

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes.

Id.

71. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) ("The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas.").

72. *Id.* at 681-82.

almost all of those cases,⁷³ the Court was insisting that religion was not receiving a special benefit and that for it to hold otherwise would be to disfavor religion.

Perhaps the *Lynch* Court believed that precluding the City of Pawtucket from sponsoring a Christmas display would somehow be to favor non-religion over religion, as if the City had erected many displays and the only question was whether to allow the religious one in addition to the non-religious ones.⁷⁴ But at issue here was only *one* display of elements commonly associated with Christmas.⁷⁵ Indeed, the Court noted that “[e]ven the traditional, purely secular displays extant at Christmas, with or without a crèche . . . inevitably recall the religious nature of the Holiday.”⁷⁶ Yet, it could hardly be said, then, that this benefit or endorsement was one being accorded to all, and it is difficult to understand how the cases in which the Court had claimed to be acting neutrally could be used to justify the special treatment upheld in *Lynch*.

Perhaps the *Lynch* Court was adopting a much different tack, namely, suggesting that the benefits to religion which the Court in a whole host of cases had done its best to minimize by suggesting that they were merely benefits to which everyone was entitled, were actually both special and very weighty. Yet, the *Lynch* Court offered no reason for this radical recharacterization of the benefits. If no reason is needed, e.g., because it is simply obvious that those previously approved benefits were great aids to religion, then one wonders why the Court did not realize this at the time it was making the decisions or, perhaps, why the Court did not overrule those previous decisions now that the Court had realized that what it had previously thought were mere neutral extensions of benefits were actually great aids to religion. Either the *Lynch* Court is suggesting that

73. For a discussion of the case that cannot be described this way — *Marsh v. Chambers* — see *infra* notes 77-91 and accompanying text.

74. *Cf.* County of Allegheny v. ACLU, 492 U.S. 573 (1989) (upholding a display just outside a City-County Building of a Chanukah menorah next to a Christmas tree and a sign saluting liberty). *But see id.* (striking down a display of a crèche on the Grand Staircase of the Allegheny County Courthouse).

75. *See Lynch*, 465 U.S. at 671.

The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "Seasons Greetings," and the crèche at issue here.

Id.

76. *Id.* at 685.

striking state-sponsored religious displays somehow discriminates against religion or that previously minimized benefits are in reality special, weighty, and nonetheless constitutional, so that significant aid to religion does not offend constitutional guarantees. Either way, the *Lynch* analysis undermines the Court's credibility and appearance of impartiality, because either position radically alters the then-existing jurisprudence without any justification.

All but one of the cases cited by *Lynch* to justify conferral of a special benefit to religion were, when decided, allegedly merely upholding the "neutral" treatment of religion. One case cited by the *Lynch* Court does not fit that mold. In *Marsh v. Chambers*,⁷⁷ in which the Court upheld legislative prayer, the Court did not focus on the *Lemon* test but instead noted that the practice had had an unbroken history since the Framers.⁷⁸

The unbroken history test is quite different from the other tests that the Court has used when explicating the Effects prong of *Lemon*. There might be an unbroken history of the state's engaging in a particular practice, even though that practice directly benefits religion and, further is more beneficial to and more of a general endorsement of religion than is any practice whose constitutionality has been upheld by the Court. Thus, there might be an unbroken history of a practice even though that practice violates the *Lemon* Effects prong in light of any of the characterizations of that prong offered by the Court. Indeed, had the *Marsh* Court determined the practice's constitutionality in light of its benefit to or endorsement of religion rather than its history,⁷⁹ the ruling on its constitutionality might have been much different.⁸⁰

The *Marsh* Court suggested that a practice in which the Framers themselves had engaged would be unlikely to violate the very constitutional provision that they themselves had written.⁸¹ Yet, as Justice Brennan points out in his *Marsh* dissent,

77. 463 U.S. 783 (1983).

78. *Id.* at 786 ("From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.")

79. *Id.* at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause.")

80. *Id.* (Brennan, J., dissenting) ("For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.")

81. *Id.* at 788 ("Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for

Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other.⁸²

Then as now, legislators might have had the view that it was up to the courts to decide whether something was constitutional,⁸³ especially because there might have been conflicting views about the constitutionality of a particular practice.⁸⁴ Thus, the mere fact that the First Congress engaged in a practice does not establish its constitutionality.

Even if one could be certain that Congress acted in light of what the Framers intended the Constitution to permit,⁸⁵ that would not establish whether the practice at issue is currently constitutional.⁸⁶

the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”)

82. *Id.* at 814-15 (Brennan, J., dissenting).

83. *Cf. Bipartisan Campaign Reform Act of 2002*, 148 CONG. REC. S2096-02, S2106 (2002) (statement of Sen. Nickles: “We will let the courts decide whether or not it is constitutional.”); *Sense of Congress Supporting Prayer at Public School Sporting Events*, 145 CONG. REC. H11325-01, H11327 (1999) (statement of Rep. Edwards: “Let us also recognize that the Constitution, in Article III, makes it clear that the Supreme Court, not the Congress, has the power to determine what is or is not constitutional.”); *Conference Report on H.R. 2267, Departments Of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998*, 143 CONG. REC. H10918-07, H10933 (1997) (statement of Rep. Hastert: “[I]f there is an issue of whether this is constitutional or not constitutional, we probably ought to let the Supreme Court decide that issue.”).

84. *See Congressional Spending Limit and Election Reform Act of 1993*, 139 CONG. REC. S6412-01, S6412 (1993) (statement of Sen. McConnell noting that constitutional theorists might disagree about the constitutionality of a particular proposed law).

85. *Marsh*, 463 U.S. at 790.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress — their actions reveal their intent.

Id.

86. *See id.* at 816 (Brennan, J., dissenting).

[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.

Consider the Establishment Clause criterion that some Framers endorsed, namely, that the State was precluded from favoring one Christian sect over another but could certainly favor Christianity over other religions.⁸⁷ Given that this is not the kind of principle that anyone currently on the Court seems willing to embrace,⁸⁸ it is not at all clear what should be made of the fact that a particular practice was approved by the Framers.

If the Court accepts the constitutionality of a practice because it was engaged in by the Framers even though some of the practices which the Framers thought constitutional would never pass muster now, then the permitted practice is more sensibly considered an exception to a constitutional rule rather than itself creating a rule in light of which other challenged practices might be judged.⁸⁹ Yet, that means that the Court should not compare a challenged practice to legislative prayer to see which is more of an endorsement of religion but instead should examine the challenged practice in light of the current Establishment Clause test. While the Court has offered different tests to determine whether the *Lemon* Effects prong has been violated,⁹⁰ it should be clear that *Marsh* should not play a role in determining whether the Effects prong precludes the state from engaging in a particular practice.⁹¹

3. The "Entanglement" Prong

According to one understanding of the Entanglement prong of *Lemon*, the Court scrutinizes the steps that a state would have to take to avoid violation of the Effects prong, and seeks to preclude excessive entanglements between the state and the institution it regulates.⁹²

Id.

87. See *infra* notes 192-195 and accompanying text.

88. See *McCreary County v. ACLU*, 545 U.S. 844, 880 (2005) ("history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses").

89. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.").

90. See *supra* notes 26-76 and accompanying text.

91. This point assumes that the challenged practice itself cannot also be traced back to the Framers.

92. See *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) ("[O]ur cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect." (citing *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997))).

Because the Constitution precludes funding religious activities, the Court considers how much oversight is required to assure that funds received by religious institutions would only be used to fund secular activities.⁹³ Where significant and continuing surveillance would be required, the Court might well find that the entanglement between the state and the religious institution would simply be too great.⁹⁴ Where little or no surveillance is required, the Court might well find that the Entanglement prong has been met.⁹⁵

A different understanding of the Entanglement prong involves how politically divisive a particular program might be,⁹⁶ e.g., because the program would likely cause division along religious lines⁹⁷ or because it might give certain religious groups special political power.⁹⁸ Justice O'Connor explains that "excessive entanglement with religious institutions . . . may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."⁹⁹

A straightforward application of the political divisiveness element may prove to be less useful than was originally thought, if only because the refusal to permit support of religion might also be

93. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) ("The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion--indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions.")

94. *See id.*

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id.

95. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (discussing the degree of oversight that would be required to make sure that the facilities at issue would in fact be devoted to secular education).

96. *Marsh v. Chambers*, 463 U.S. 783, 799 (1983) (Brennan, J., dissenting) ("Second, excessive 'entanglement' might arise out of 'the divisive political potential' of a state statute or program.")

97. *See Lemon*, 403 U.S. at 622 (discussing the "devisive political potential of these state programs").

98. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) ("[T]he concept of a 'wall' of separation is a useful signpost. Here that 'wall' is substantially breached by vesting discretionary governmental powers in religious bodies.")

99. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

thought divisive.¹⁰⁰ In any event, this element has sometimes been used in a nonstandard way¹⁰¹ — the lack of prior litigation concerning the constitutionality of a particular display has been seen as an indicator of its lack of divisiveness, which in turn has been viewed as evidence that the display at issue has not been understood to be an endorsement of religion.¹⁰²

B. *The Endorsement Test*

Although the *Lemon* Test is currently the test by which to determine Establishment Clause violations,¹⁰³ the Court has sometimes used the Endorsement Test for this same purpose, without clearly explaining the relationship between the Endorsement Test and the *Lemon* Test. It is simply unclear whether the Endorsement Test is an explanation of the *Lemon* Test, a modification of that test or, instead, a substitute test.¹⁰⁴ Each of these characterizations of the Endorsement Test has some proponents, and at this point the law is unsettled as to how best to characterize the Endorsement Test.¹⁰⁵

Justice O'Connor herself has described the Endorsement Test as the best way to understand both the Purpose and Effects prongs of

100. See Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 717-18 (2001) (noting that "divisiveness is a two-way street."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 347 (1986) (noting that "'divisiveness' is a double-edged legal sword").

101. See Leading Cases, *Government Display of Religious Symbols--Ten Commandments*, 119 HARV. L. REV. 248, 253 (2005) ("Justice Breyer inverted the traditional divisiveness inquiry by rendering nondivisiveness conclusive of constitutionality.") [hereinafter *Government Display of Religious Symbols*].

102. See, e.g., *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the crèche does not have the effect of communicating endorsement of Christianity.

Id. See also *Van Orden v. Perry*, 545 U.S. 677, 702-03 (2005) (Breyer, J., concurring).

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). . . . 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.

Id.

103. *But see supra* note 11 and accompanying text.

104. *See infra* notes 106-12 and accompanying text.

105. *See supra* note 15.

Lemon. Regarding the Purpose prong, she writes, “The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion.”¹⁰⁶ With respect to the Effects prong, O’Connor suggests the following:

[T]he effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.¹⁰⁷

Thus, according to Justice O’Connor, the Endorsement Test offers a way to understand both the Purpose and the Effect prongs of the *Lemon* Test.

Some courts have read the Endorsement Test to do away with the Purpose prong of *Lemon*. For example, in *Freethought Society of Greater Philadelphia v. Chester County*,¹⁰⁸ the Third Circuit explained,

Under the “endorsement” approach, we do not consider the County’s purpose in determining whether a religious display has violated the Establishment Clause; instead, we focus on the *effect* of the display on the reasonable observer, inquiring whether the reasonable observer would perceive it as an endorsement of religion.¹⁰⁹

106. *Lynch*, 465 U.S. at 691 (O’Connor, J., concurring).

107. *Id.* at 691-92 (O’Connor, J., concurring).

108. 334 F.3d 247 (3d Cir. 2003).

109. *Id.* at 261.

In a different case, the Third Circuit suggested that the Endorsement Test combines the *Lemon* Purpose and Effect prongs into one test which only considers the effect on the informed observer.¹¹⁰

Still other courts have understood the Endorsement Test simply to be a modification of the *Lemon* Effects prong.¹¹¹ Finally, some read the Endorsement Test as a different test altogether.¹¹²

Regardless of whether the Endorsement Test is viewed as a characterization of, modification of, or alternative to *Lemon*, the test itself must be understood. Justice O'Connor explains the Endorsement test in the following way: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."¹¹³ However, she does not believe that endorsement is established merely because a particular state practice makes an individual feel as if she is an outsider. Justice O'Connor notes that "adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."¹¹⁴ Here, Justice O'Connor is suggesting that there "is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."¹¹⁵

110. See *Modrovich v. Allegheny County, Pa.*, 385 F.3d 397, 401 (3d Cir. 2004). [Finally,] [t]he "endorsement" test modifies *Lemon* in cases involving religious displays on government property. The endorsement test dispenses with *Lemon*'s "entanglement" prong and, combining an objective version of *Lemon*'s "purpose" prong with its "effect" prong, asks whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion.

Id. (citation omitted).

111. See, e.g., *ACLU v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2004) ("In order to ascertain the primary effect of the action under the second prong of the *Lemon* test, we apply the "endorsement" test, asking whether or not a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government."); *Lambeth v. Bd. of Comm'r of Davidson County*, 407 F.3d 266, 269 (4th Cir. 2005) ("we have treated *County of Allegheny*'s endorsement test as an enhancement of *Lemon*'s second prong.") (citation omitted).

112. See *Wynne v. Town of Great Falls*, 376 F.3d 292, 302 n.8 (4th Cir. 2004) (treating the *Lemon* Test, the Endorsement Test, and the Coercion Test as three separate tests).

113. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

114. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring) (citing *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)).

115. See *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring).

Justice O'Connor seems to be suggesting that an individual with a particular quantum of knowledge might reasonably understand a particular action to be an endorsement, even though that same individual would not so perceive it were she to have more information. Justice O'Connor explains that "the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape."¹¹⁶

The Endorsement Test's including a knowledge requirement seems reasonable — it is easy to imagine that individuals might feel alienated by a whole host of practices if they misunderstand what those practices are or what they are supposed to do. Yet, this knowledge requirement can also be used to invalidate the felt experiences of fully informed religious minorities,¹¹⁷ e.g., by saying that no reasonable person could feel less a member of the community when the State endorses the belief that there is one God.¹¹⁸ Thus, while it is fair to suggest that it would be an abuse of the Endorsement Test to invalidate a practice on Establishment Clause grounds merely because someone who misunderstood the practice felt alienated by it, there is a great danger that including a criterion involving the "Nation's cultural landscape" will erase the experiences of those in non-majority cultures.

C. *The Coercion Test*

The Coercion Test is yet another test sometimes employed to determine whether the Establishment Clause has been violated. As a general matter, it is a more forgiving test than either the *Lemon* Test or

116. See *Newdow*, 542 U.S. at 35 (O'Connor, J., concurring).

117. Cf. *Pinette*, 515 U.S. at 799-800 (Stevens, J., dissenting).

It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. . . . If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display.

Id. (citation omitted).

118. Cf. *County of Allegheny v. ACLU*, 492 U.S. 573, 672-73 (1989) (Kennedy, J., concurring in part and dissenting in part).

[T]he Pledge of Allegiance to the Flag describes the United States as "one Nation under God." To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the " 'reasonable' " atheist would not feel less than a " 'full membe[r] of the political community' " every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Id. (citation omitted).

the Endorsement Test, although there might be particular circumstances in which it turns out to be more stringent than the Endorsement Test, e.g., when state practices in the primary or secondary school setting are challenged.¹¹⁹

The disagreement about the proper application of the Coercion Test centers on at least two different factors: (a) who is doing the coercing, i.e., state versus private actor, and (b) what kind of coercion must be involved to trigger Establishment Clause protections. Thus, all agree that fines or imprisonment by the state would suffice to trigger Establishment Clause protections but not all agree that peer pressure to participate in a religious program occurring in the context of a public school would also suffice.¹²⁰

If the Coercion Test is only triggered by state-imposed fines or imprisonment, the state is free to promote a variety of beliefs and practices without violating Establishment Clause guarantees. For example, Justice Thomas has suggested that the state's merely displaying a religious symbol does not coerce anyone to do anything and thus cannot offend Establishment Clause guarantees.¹²¹

D. Establishment Clause Jurisprudence: Conclusion

One difficulty posed by the Court's occasional use of each of these Establishment Clause tests is that the *Lemon* Test, the Endorsement Test, and the Coercion Test do not always yield the same dictates with respect to what violates constitutional guarantees. For example, a particular state action might violate the *Lemon* Test if its primary effect was to promote religion. However, if that action would not make an informed observer feel like a second-class citizen, then

119. See Kevin P. Hancock, Comment, *Closing the Endorsement Test Escape-Hatch in the Pledge of Allegiance Debate*, 35 SETON HALL L. REV. 739, 741-42 (2005) (suggesting that requiring the Pledge of Allegiance to be recited in primary schools might pass muster under the Endorsement Test but not the Coercion Test).

120. Compare *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (noting that a school district's control of a graduation ceremony places pressure on the students who attend and that "[t]his pressure, though subtle and indirect, can be as real as any overt compulsion"), and Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 158 (1992) ("I would have thought that gathering a captive audience [at a graduation ceremony] is a classic example of coercion; participation is hardly voluntary if the cost of avoiding the prayer is to miss one's graduation."), with *Weisman*, 505 U.S. at 640 (Scalia, J., dissenting) ("The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced 'peer-pressure' coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question.").

121. See *Van Orden v. Perry*, 545 U.S. 677, 694 (2005). For further discussion of this view, see *infra* notes 242-45 and accompanying text.

that state action might nonetheless be permissible under the Endorsement Test.¹²² An action that might make an observer feel like a second-class citizen might nonetheless not coerce the individual into professing or appearing to profess a belief she did not hold and thus might pass muster under the Coercion Test.¹²³

Given that the different tests articulated by the Court to determine Establishment Clause violations do not always yield similar dictates, it would seem important for the Court to announce clear guidelines with respect to the conditions under which the different tests should be used. Regrettably, no clear guidelines have been forthcoming from the Court.

That the Court has not made clear which test to apply in which situation does not preclude the possibility that certain basic themes run through the jurisprudence. Yet, there is no agreement about what those basic themes are. Dean Sullivan argues that the Establishment Clause "prohibits official partiality toward religion."¹²⁴ Judge McConnell disagrees, merely suggesting that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,"¹²⁵ a view which is quite compatible with religion's being favored over non-religion.

The focus of this article is on whether a state may display the Ten Commandments without violating constitutional guarantees. One

122. See *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring). Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Id.

123. See *Allegheny*, 492 U.S. at 609 ("Thus, when all is said and done, Justice Kennedy's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases.").

124. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 206 (1992).

125. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1130 (1990) (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)). See also Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3 (2005) ("As history demonstrates, the Establishment Clause aims to keep the government from singling out certain religious sects for preferential treatment, but it does not prevent the government from showing favoritism to religion in general.").

might expect that although discussing the different tests articulated by the Court in the abstract may not be helpful, examining how the Court has dealt with this particular issue will be more instructive. Regrettably, even when the focus is specifically on the constitutionality of state displays of the Ten Commandments, members of the Court cannot agree about which test to use, much less whether or under what conditions those displays pass constitutional muster.

III. THE CASE LAW

The Court has issued three decisions on the merits during the past thirty years regarding displays of the Ten Commandments, two of which were handed down in 2005. Each of those decisions is discussed below. The Court could have reached the same results that it in fact reached, differentiating the factual scenarios in each case so that the circumstances under which displays of the Ten Commandments pass muster are clear. Regrettably, the recent decisions give the lower courts contradictory signals regarding which test to apply and how to apply it, making it even more likely that relevantly similar cases will be decided inconsistently. The Court has wasted an excellent opportunity to clarify Establishment Clause jurisprudence, almost guaranteeing confusion in this area of law for years to come.

A. *Stone v. Graham*

Before 2005, the major Ten Commandments case decided by the Supreme Court¹²⁶ was *Stone v. Graham*,¹²⁷ in which a Kentucky law requiring the posting of a copy of the Ten Commandments on the walls of all public classrooms was at issue.¹²⁸ That the copies were to be purchased with private contributions did not immunize the postings from constitutional challenge.¹²⁹ The Court held that the statute was unconstitutional,¹³⁰ after noting the sacred role played by the Ten Commandments within Judaism and Christianity¹³¹ and finding that

126. *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005) (“*Stone* [is the Court’s] . . . only case dealing with the constitutionality of displaying the Commandments.”).

127. 449 U.S. 39 (1980).

128. *Id.* at 39.

129. *Id.*

130. *Id.* at 41.

131. *Id.*

the primary purpose for posting the Ten Commandments in schools was religious.¹³²

In addition to mentioning the sacred role of the Ten Commandments, the *Stone* Court analyzed the contents of the posted Commandments themselves. The Court noted that the Commandments did not only address secular concerns like honoring one's parents or refraining from stealing or committing adultery or murder,¹³³ but also addressed religious matters.¹³⁴ By focusing on the contents, the Court implicitly suggested that a partial posting of the Ten Commandments, e.g., the latter five which concern more secular matters,¹³⁵ might not violate constitutional guarantees, whereas a display which includes or perhaps emphasizes the first Commandments would be more likely to offend the Constitution because they involve matters of a more religious nature such as observing the Sabbath and avoiding idols.¹³⁶

The *Stone* Court made clear that the Ten Commandments could be "integrated" into a public school curriculum where the document is treated as a historical text in a broader context of secular study.¹³⁷ However, the posting at issue did not serve that kind of educational function.¹³⁸ Instead, if having any effect at all, the posting would "induce the schoolchildren to read, meditate upon, perhaps to venerate

132. *Id.* at 41.

133. *Id.* at 41-42.

134. *See id.* at 42. (noting that the amendments concern "the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.").

135. The frieze in the Supreme Court courtroom includes these secular amendments. *See* Greg Abbott, *Upholding the Unbroken Tradition: Constitutional Acknowledgment of the Ten Commandments in the Public Square*, 14 WM. & MARY BILL RTS. J. 51, 61-62 (2005) (noting that the frieze on the south wall of the Supreme Court courtroom includes partial representations of Commandments 6-10).

136. *Cf.* Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 5 (2005).

[T]he format of the Ten Commandments monument conveys its religious message, not its secular role. For example, the size of the lettering on the monument emphasizes the religious aspect of the Ten Commandments over the secular. The prefatory words, "I AM the LORD thy GOD," appear larger on the monument than the commandments that have been incorporated into secular law. The Commandments' prohibitions on murder, adultery, and theft are smaller than the text which identifies God as the source of the commandments. By visually emphasizing the religious aspects of the Ten Commandments relative to the arguably secular aspects, the monument belies the claim that it is commemorating any secular role of the Ten Commandments in American law.

Id.

137. *Stone*, 449 U.S. at 42.

138. *Id.*

and obey, the Commandments . . . [which] is not a permissible state objective under the Establishment Clause.”¹³⁹

After admitting in his dissent that the Ten Commandments are sacred within some religious traditions,¹⁴⁰ Justice Rehnquist noted that the Commandments “have had a significant impact on the development of secular legal codes of the Western World.”¹⁴¹ Because the Kentucky Legislature had required that each display of the Commandments include a notation about their secular application,¹⁴² Justice Rehnquist argued that Kentucky had not violated the Constitution by placing a document with such secular importance before its students.¹⁴³ An issue which continues to complicate and confuse constitutional analyses of state displays of the Ten Commandments is whether and under what conditions an articulated secular purpose can make such a display pass constitutional muster.¹⁴⁴

In 2005, the Court was handed a golden opportunity to clear up Establishment Clause jurisprudence more generally or, at least, clarify the conditions under which the state can display the Ten Commandments in particular. In that year, the Court issued two Ten Commandments decisions, *McCreary County v. ACLU*¹⁴⁵ and *Van Orden v. Perry*.¹⁴⁶ While not creating a clear change in Establishment Clause jurisprudence, the decisions were striking in some of the ways in which they were at odds, e.g., in whether the *Lemon* Test should be used in this kind of case. Instead of clarifying an area which is notoriously obscure and confusing,¹⁴⁷ the Court made matters worse, making what seemed to be a hopelessly confusing area even murkier.¹⁴⁸

139. *Id.*

140. *Id.* at 45 (Rehnquist, J., dissenting) (citation omitted).

141. *Id.* (Rehnquist, J., dissenting).

142. *See id.* at 41 (citing 1978 KY. ACTS ch. 436, § 1 (1978) (codified at KY.REV.STAT. § 158.178 (1980))).

143. *Id.* at 45 (Rehnquist, J., dissenting).

144. *See, e.g.,* *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) (“Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature, and a particular governmental use of them is permissible under the Establishment Clause only if it withstands scrutiny under the prevailing legal test.”).

145. 545 U.S. 844 (2005).

146. 545 U.S. 677 (2005).

147. *See* William F. Marshall, “*We Know It When We See It: The Supreme Court Establishment*,” 59 S. CAL. L. REV. 495, 495 (1986) (“From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common.”).

148. *See*

Jay

A.

B. McCreary County v. ACLU

At issue in *McCreary County* was a posting of the Ten Commandments on the walls of two counties' courthouses.¹⁴⁹ In both counties, the following textual version of the Ten Commandments was posted:

Thou shalt have no other gods before me.
 Thou shalt not make unto thee any graven images.
 Thou shalt not take the name of the Lord thy God in vain.
 Remember the sabbath day, to keep it holy.
 Honor thy father and thy mother.
 Thou shalt not kill.
 Thou shalt not commit adultery.
 Thou shalt not steal.
 Thou shalt not bear false witness.
 Thou shalt not covet.
 Exodus 20:3-17.¹⁵⁰

The Ten Commandments were accompanied by other displays such as “framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.”¹⁵¹ The Court did not itself analyze the effect of including the Ten Commandments with all of these other exhibits, e.g., by discussing whether the inclusion of these additional documents made the display as a whole secular,¹⁵² but focused instead on the purpose behind the

WLD&DocName=0226647401&FindType=h&AP=&mlac=FY&fn=_top&rs=WLW6.05&mt=LawSchoolPractitioner&vr=2.0&sv=Split & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 50 (2005) (discussing the “post-*McCreary* and *Van Orden* morass in which we now find ourselves”).

149. *McCreary County*, 545 U.S. at 850.

150. *Id.* at 851-52.

151. *Id.* at 856.

152. The Court noted without comment the lower court's having done so. *See id.* at 857-58.

The Circuit majority stressed that under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry “a secular message,” 354 F.3d 438, 449

inclusion of the Ten Commandments, striking down the display as a violation of the purpose prong of *Lemon*.¹⁵³

The *McCreary* Court explained that the touchstone of Establishment Clause jurisprudence is state neutrality among religions and between religion and nonreligion,¹⁵⁴ noting that when the “government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”¹⁵⁵ The Court considered the history behind the display when attempting to discern the state’s purpose, noting that at first the Ten Commandments had been displayed alone, unaccompanied by other documents.¹⁵⁶ It was only after a suit had been filed challenging the displays that the exhibits were modified.¹⁵⁷ Further, the Court made clear that it should look at the evolution of the display when seeking to determine whether the motivation behind the final display was constitutionally permissible.¹⁵⁸ That is not to say that once a state has manifested a religious motivation it will forever have that motivation imputed to it.¹⁵⁹ Rather, the Court expressed confidence that a court would be able to discern when there had been a genuine, constitutionally relevant change in motivation.¹⁶⁰

Analysis of legislative purpose is often a difficult task. In many cases, there will be no dispositive statements establishing the state’s

(2003). The majority judges saw no integration here because of a “lack of a demonstrated analytical or historical connection [between the Commandments and] the other documents.” *Id.* at 451. They noted in particular that the Counties offered no support for their claim that the Ten Commandments “provide[d] the moral backdrop” to the Declaration of Independence or otherwise “profoundly influenced” it. *Id.* (internal quotation marks omitted). The majority found that the Counties’ purpose was religious, not educational.

Id.

153. *See id.* at 881 (affirming the Sixth Circuit after discussing “the ample support for the District Court’s finding of a predominantly religious purpose behind the Counties’ third display”).

154. *Id.* at 860 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

155. *Id.* (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

156. *See id.* at 850.

157. *See id.*

158. *Id.* at 850-51.

159. *Id.* at 873-74 (“we do not decide that the Counties’ past actions forever taint any effort on their part to deal with the subject matter”).

160. *See id.* at 874. (“It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.”).

purpose,¹⁶¹ although a statute's wording itself may provide a basis for ascertaining the intent, especially in light of comments made by those promoting the measure.¹⁶² Sometimes, it will be too difficult to establish improper motivation even when such a motivation was indeed behind the action at issue. The *McCreary* Court admits that under the jurisprudence an Establishment Clause challenge may fail if the existing religious purpose has been well-disguised¹⁶³ and the "objective" observer cannot discern it,¹⁶⁴ although the Court offers the consolation that non-adherents will not feel like outsiders if the religious purpose is extremely well-hidden.¹⁶⁵

In his dissent, Justice Scalia does not worry about instances in which state action was secretly motivated by a desire to promote religion but instead about instances in which the reasonably informed observer would wrongly believe that a particular action was motivated by religion. He writes:

Because in the Court's view the true danger to be guarded against is that the objective observer would feel like an "outside[r]" or "not [a] full membe[r] of the political community," its inquiry focuses not on the *actual purpose* of government action, but the "purpose apparent from government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.¹⁶⁶

161. See, e.g., *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995) ("[T]he record contains no direct evidence of the State's purpose in accepting the monument because, as found by the trial court, the State has no record of how the monument came to be in Lincoln Park.").

162. *McCreary County*, 545 U.S. at 862.

In *Wallace*, for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. And in *Edwards*, we relied on a statute's text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution.

Id. (citation omitted).

163. *Id.* at 863.

164. *Id.* (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (O'Connor, J., concurring)).

165. *Id.*

166. *Id.* at 900-01 (Scalia, J., dissenting) (citation omitted).

Thus, Justice Scalia suggests, the constitutionality of a government action with wholly secular effects might depend on whether some “imaginary” observer misperceived that the action had been intended to promote religion.¹⁶⁷

Justice Scalia’s points are not persuasive. First, he fails to explain why the *informed* observer would misunderstand the state’s purposes, notwithstanding the state’s ability to establish its secular purposes. Second, Justice Scalia fails to show how the allegedly new standard changes anything, since it has always been true that the trier-of-fact might misperceive the “true” purposes of the state. The traditional *Lemon* test requires that the state meet each prong. If, for example, a state action was found by a court to have been motivated by a desire to promote religion, then it would not matter whether that in fact was the state’s purpose. Given the difficulty in discerning motivation and the likelihood that individuals might wish to mask illicit motivation, it would hardly be surprising to find that there would be mistakes about a state actor’s true motivation — sometimes, it would be inferred that the state did not have a motivation to promote or undermine religion when in fact the state did have such a motivation and at other times it would be inferred that the state did have such a motivation when in fact the state did not.

Incorporating the notion of an objective observer into *Lemon*’s purpose prong is not particularly surprising, at least in the sense that the trier-of-fact would in any event be forced to try to figure out whether the state’s motivation was illicit.¹⁶⁸ However, this interpretation of the endorsement theory is much different from at least how some courts had understood it. For example, the Third Circuit had understood the Endorsement Test to discount motivation and instead focus on effect—basically, the court suggested that even if a particular state practice was motivated by a desire to promote religion, the practice would not violate establishment Clause guarantees unless it

167. *Id.* at 901 (Scalia, J., dissenting).

168. Some commentators overestimate the significance of this change. *See, e.g., Government Display of Religious Symbols, supra* note 101, at 258-59.

Although ostensibly reaffirming its commitment to the *Lemon* test, the Court subtly but substantially reshaped the resilient doctrine by altering its most controversial and problematic element: the “purpose prong.” Departing from earlier versions of the *Lemon* test, the Court established a rule that turns not on actual government purpose but on the “objective observer’s” perception of that purpose.

Id.

would have the effect of causing the informed rational observer of feeling like a second-class citizen.¹⁶⁹

The *McCreary* Court began its analysis by citing *Stone*,¹⁷⁰ which suggested that a display of the Ten Commandments should presumptively be viewed as intended to promote religion.¹⁷¹ The *McCreary* Court noted that the display at issue before it (prior to the First Amendment challenge) was relevantly similar to the display at issue in *Stone* in two important ways: (1) each set out the text of the Ten Commandments rather than a symbolic representation of that text; and (2) each stood alone and was not part of a secular display.¹⁷² The Court explained that *Stone* had emphasized the importance of integrating the Commandments into a secular display. Otherwise, the message would clearly be religious,¹⁷³ e.g., declaring the existence of one god or specifying religious obligations such as observing the sabbath or not worshipping idols.¹⁷⁴ Indeed, even the secular prohibitions, e.g., against stealing and murder, would derive their force from having been prohibited by God.¹⁷⁵

The *McCreary* Court suggested that the way the amendments themselves were depicted was important — a display of the text itself suggests a religious message whereas a symbolic representation such as ten roman numerals might be seen as representing a general notion of law.¹⁷⁶ The Court was not denying the influence of the Ten Commandments on secular law,¹⁷⁷ but was merely noting that the original text is an unmistakably religious statement,¹⁷⁸ and that the purpose behind the state's publicly displaying such a religious statement without any other accompanying displays is unmistakable.¹⁷⁹

Two very different points might be made about the Court's suggestion that roman numerals rather than actual text be used. When symbols rather than particular text are used, there is no commitment to one version of the Ten Commandments over another, whereas when

169. *See supra* notes 108-10 and accompanying text.

170. *McCreary County*, 545 U.S. at 867 (“We take *Stone* as the initial legal benchmark.”).

171. *Id.*

172. *Id.* at 868.

173. *Id.* (citing *Stone v. Graham*, 449 U.S. 39, 42 (1980)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 869 (“This is not to deny that the Commandments have had influence on civil or secular law.”).

178. *Id.*

179. *Id.*

particular text is used, a choice must be made among the differing versions.¹⁸⁰ Thus, by using roman numerals, no choice would have to be made between, for example, “Do Not Murder” and “Do Not Kill.”¹⁸¹

The second point was made by the *Stone* Court, namely, that certain amendments are more readily viewed as secular than others. Thus, a representation of amendments 6-10, as is represented in the Supreme Court frieze containing the amendments, is farther removed from the Commandments concerning obligations to the Deity than are the first few amendments.¹⁸² Indeed, the *McCreary* Court mentions the Court’s own courtroom frieze which includes Moses holding tablets exhibiting the secularly phrased Commandments,¹⁸³ and, further, which puts Moses with 17 other lawgivers, most of whom are secular figures.¹⁸⁴ The Court suggested that there was no risk that this image of Moses would suggest that the Government was somehow violating its obligation to remain neutral.¹⁸⁵ By mentioning all of these points, the Court offered several ways to differentiate the image in its frieze from the depiction at issue in *McCreary*.¹⁸⁶

180. *Van Orden v. Perry*, 545 U.S. 677, 717-18 (2005) (Stevens, J., dissenting) (“There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance.”); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1478-79 (2005) (“[A]ny display of the Commandments is inherently sectarian, because it must choose a translation, ordering, and numbering system that will favor, or endorse one or more religions, and therefore disfavor other religions.”).

181. *Id.* at 1494-95.

Jewish Bibles, following well accepted Jewish theological traditions and careful scholarly attention to the original Hebrew, translate this line as “You shall not murder.” Some modern Protestant Bibles, such as the New Revised Standard Bible and The Living Bible, which is used in many Protestant churches in the United States, also use the term “murder” instead of “kill.”

Id. (citation omitted).

182. *See supra* note 134.

183. *McCreary County*, 545 U.S. at 874.

184. *Id.*

185. *Id.*

186. *See also* *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part).

Placement of secular figures . . . alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

Id.

The *McCreary* Court reiterated that the key to Establishment Clause jurisprudence is state neutrality among religions and between religion and non-religion,¹⁸⁷ although not all members of the Court agree that this is the correct understanding of Establishment Clause jurisprudence. In his *McCreary* dissent, Justice Scalia writes, “Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century.”¹⁸⁸ However, Justice Scalia is not only suggesting that the state may prefer religion over non-religion; he is also suggesting that the state can prefer some religions over others. He writes:

If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.¹⁸⁹

The *McCreary* Court responded to Justice Scalia’s challenge in two ways. First, the Court noted that there is a historical basis for its position, since “there is . . . evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion.”¹⁹⁰ The Court did not claim that the evidence supporting its position was conclusive, but merely that the “fair inference is that there was no common understanding about the limits of the establishment prohibition.”¹⁹¹

187. *McCreary County*, 545 U.S. at 874-89.

188. *Id.* at 889 (Scalia, J., dissenting).

189. *Id.* at 892 (Scalia, J., dissenting).

190. *Id.* at 878.

191. *Id.* at 879.

Second, the Court noted that if historical practice is to be the guide, then Justice Scalia is misleading when suggesting that the Constitution permits the state to privilege monotheism,¹⁹² since historical practice suggests that the state is permitted to privilege Christianity over the other religions.¹⁹³ The Court explains, “[H]istory shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses.”¹⁹⁴ Indeed, the Court quotes Justice Story’s suggestion that “the purpose of the Clause was ‘not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects,’”¹⁹⁵ not to support it, but to suggest that Justice Scalia has not accurately represented the views of the Framers and, further, that there is good reason not to let the views of the Framers determine the meaning of the Establishment Clause in contemporary society.

Needless to say, there is no agreement among the Justices with respect to what the Framers intended. For example, Justice O’Connor discusses the Founders’ plan to protect religious liberty to the greatest extent possible.¹⁹⁶ She, too, suggests that the Establishment Clause requires state neutrality among religions and between religion and non-religion,¹⁹⁷ although, as Justice Scalia points out, the Court has

192. *See id.* at 894 (Scalia, J., dissenting).

The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.

Id. (citation omitted). *See also id.* at 877 (“The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments.”).

193. *See County of Allegheny v. ACLU*, 492 U.S. 573, 604 (1989) (“The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically.”).

194. *McCreary County*, 545 U.S. at 880.

195. *Id.* (citing R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 13 (1988)).

196. *Id.* at 881-83 (O’Connor, J., concurring).

197. *Id.* (O’Connor, J., concurring).

certainly upheld practices which had the effect of benefiting religion.¹⁹⁸

Justice O'Connor worries about the potential divisiveness which might be caused by government's taking a particular side in religious disputes. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.¹⁹⁹

Were *McCreary* the only post-*Stone* Supreme Court decision dealing with the Ten Commandments, there still would be many questions left unanswered. For example, the Court addresses the constitutionality of posting the Ten Commandments alone, because the decision to include other elements in the display was in response to the legal challenge to the Ten Commandments being posted without any other accompanying displays. The evolution of the display occurred over a relatively short period, so it is unclear, for example, whether *McCreary* would have any implications for a display that evolved over a longer period or, perhaps, whose evolution was not in response to a court challenge. Further, because *McCreary*'s focus was on the *Lemon* test's purpose prong, there is no helpful discussion on the effects of displaying the Ten Commandments with other non-religious symbols of the State. It would be helpful to know, for example, when combining religious and non-religious displays dilutes the religious message sufficiently to avoid Establishment Clause difficulties and when such a combination aggravates such difficulties because Church and State are viewed as intertwined.²⁰⁰

198. *Id.* at 891 (Scalia, J., dissenting).

Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice-but we have approved it.

Id.

199. *Id.* at 883 (O'Connor, J., concurring).

200. *See, e.g.,* *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001).

Yet, the lessons of *McCreary* are utterly unfathomable in light of *Van Orden*, leaving lower courts without direction or, perhaps, with contradictory directions so that they can do whatever they have an inclination to do. Thus, the claim here is not, for example, that it would have been impossible for the Court to have offered an internally consistent position in which it struck down the display at issue in *McCreary* and upheld the display at issue in *Van Orden*. On the contrary, the Court could have done so but did not, which suggests that the Establishment Clause jurisprudence offered over the next several years may well continue to be the antithesis of clarity and consistency.

C. *Van Orden v. Perry*

In *Van Orden v. Perry*,²⁰¹ the Court addressed whether the Ten Commandments could be displayed on the Texas State Capitol grounds without violating Establishment Clause guarantees.²⁰² The Court upheld the display,²⁰³ noting that the 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers commemorating the “people, ideals, and events that compose Texan identity.”²⁰⁴ The Court tried to account for the existing jurisprudence by suggesting that the cases are “Januslike,”²⁰⁵ one face looking toward the role played by religion in the Nation’s history²⁰⁶ and the other looking toward the principle that “governmental intervention in religious matters can itself endanger religious freedom.”²⁰⁷ The *Van Orden* plurality explained,

One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state.

Moreover, an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement.

Id. See also *ACLU v. Ashbrook*, 375 F.3d 484, 494 (6th Cir. 2004) (“By placing the Decalogue in apparent equipoise with the Bill of Rights in this manner, DeWeese has created the effect of an endorsement of a particular religious code, vis a vis the Ten Commandments, by the government.”).

201. 545 U.S. 677 (2005).

202. *Id.* at 681-82.

203. See *id.*

204. See *id.* (citing TEX. H. CON. RES. 38, 77th Leg. (2001)).

205. *Id.* at 683.

206. *Id.*

207. *Id.*

Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.²⁰⁸

While one might quibble with this characterization unless, for example, religious freedom is meant to include the freedom to believe in many gods or in no god,²⁰⁹ it nonetheless might be consistent with any of the traditional tests used to determine whether the Establishment Clause has been violated. Yet, the *Van Orden* plurality is not simply finessing the difficulty posed by the Court's having articulated several Establishment Clause tests without ever having specified which was appropriate in which circumstances. On the contrary, the plurality wrote, "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."²¹⁰

The difficulty posed by the plurality's statement is not in limiting the conditions under which *Lemon* will be used, e.g., saying that it is the test in cases involving state aid but not in cases in which the posting of a display with a religious message is at issue. Rather, the difficulty is that *Van Orden* suggests that in a case involving a passive display of the Ten Commandments *Lemon* should not be used while *McCreary* suggests that in a case involving the passive display of the Ten Commandments *Lemon* should be used.

It is at best regrettable that the *Van Orden* plurality describes *Marsh v. Chambers* — in which the Court held that a state can open its daily session with a prayer by a state-paid chaplain²¹¹ — as merely implicating the recognition of the role that belief in God has played in this Nation's heritage.²¹² If the paradigmatically religious exercise — prayer²¹³ — is merely a recognition that the belief in God has played

208. *Id.*

209. *But see* *McCreary County v. ACLU*, 545 U.S. 844, 892-94 (2005) (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

210. *Van Orden*, 545 U.S. at 685.

211. *Id.* at 688-89.

212. *Id.* at 686.

213. *See* *Marsh v. Chambers*, 463 U.S. 783, 797-98 (1983) (Brennan, J., dissenting).

an important role in the Nation's development or even that many people believe in God,²¹⁴ then it is difficult to imagine what the Establishment Clause forbids.

While recognizing that the Ten Commandments are religious²¹⁵ the *Van Orden* plurality noted that they also have an historical meaning.²¹⁶ Because the Ten Commandments have both meanings, there are contexts in which they might be permissibly displayed. For example, as the *Stone* Court noted, the Ten Commandments can be integrated into a school curriculum²¹⁷ Yet, given that there are contexts in which the Ten Commandments may not be displayed²¹⁸ and other contexts in which they may be displayed, one might have expected the *Van Orden* plurality to have offered a careful analysis explaining why this display was permissible. Regrettably, no such analysis was offered.

The *Van Orden* Court did differentiate what was before it from what had been at issue in *Stone*, suggesting that the placement at issue before it was "far more passive" than was the *Stone display*.²¹⁹ Yet, it is not as if the Ten Commandments "did" anything in *Stone* other than remain passively on the wall.²²⁰ Nor is it clear that the Ten

That the "purpose" of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play – formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose – could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

Id.

214. See *id.* at 792 ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

215. *Van Orden*, 545 U.S. at 689.

216. *Id.*

217. *Stone v. Graham*, 449 U.S. 39, 42 (1980).

218. *Van Orden*, 545 U.S. at 690.

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. . . . In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose.

Id. (citation omitted).

219. *Van Orden*, 545 U.S. at 691.

220. See *id.* at 745 (Souter, J., dissenting).

Nor can the plurality deflect *Stone* by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in *Stone*, where

Commandments in *Van Orden* were any more passive than the Ten Commandments in *McCreary*.

The *Van Orden* plurality might not have been trying to distinguish what was at issue in *McCreary* from what was at issue in *Van Orden*, because the *Van Orden* plurality²²¹ disagreed with the holding in *McCreary*.²²² Of course, it is also true that then-Justice Rehnquist dissented in *Stone*, so he might not have been expected to try to distinguish *Stone* either.

The discussion of passive displays in *Van Orden* raised more questions than it answered. However, it may well not have been designed to explicate the notion of what counts as passive for Establishment Clause purposes but instead merely to secure Justice Kennedy's vote.

In *County of Allegheny v. ACLU*,²²³ Justice Kennedy suggested in his dissent that "where the government's act of recognition or accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."²²⁴ Of course, even Justice Kennedy believes that some passive displays might violate constitutional guarantees, for example, the permanent placement of a large Latin cross on a city hall roof,²²⁵ although he does not make clear why such a display would be unconstitutional. While he suggests that such a display would place the government behind an obvious attempt to proselytize for a particular religion, one does not know which features would make such a display unconstitutional. Would it matter, for example, if a large Latin cross and a Star of David were permanently erected on the roof of city hall, since it would then not be the case that the state was trying to proselytize on behalf of a particular religion? Would it matter if year after year the City erected a large

the text confronted elementary school students every day." Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it.

Id. (citation omitted).

221. Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas comprised the plurality. *See id.* at 680.

222. *See McCreary County v. ACLU*, 545 U.S. 844, 885 (2005) (Chief Justice Rehnquist and Justice Thomas signed onto Justice Scalia's dissent and Justice Kennedy signed onto Parts II and III of the dissent.).

223. 492 U.S. 573 (1989).

224. *Id.* at 662 (Kennedy, J., dissenting).

225. *Id.* at 661 (Kennedy, J., dissenting).

Latin cross on the city hall roof for six months of the year? Would it matter if the cross were in a park rather than on top of city hall?

Justice Kennedy referred in his *Allegheny* opinion to three decisions:²²⁶ *Friedman v. Board of County Commissioners of Bernalillo County*,²²⁷ in which the Tenth Circuit struck down a county government's use of a seal bearing a cross and the words, "With This We Overcome,"²²⁸ on Establishment Clause grounds;²²⁹ *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*,²³⁰ in which the Eleventh Circuit held that maintaining a cross in a state park violates the Establishment Clause;²³¹ and *Lowe v. Eugene*,²³² in which the Oregon Supreme Court struck down the issuance of building permits for the erection of a cross on city-owned park property as a violation of the Establishment Clause.²³³ Justice Kennedy did not mention whether he agreed with these decisions, although his citing them might be taken to suggest that he would find a cross standing alone in a state- or city-owned park to be a violation of constitutional guarantees.

While Justices Scalia and Thomas signed onto Justice Rehnquist's plurality opinion in *Van Orden*, their concurrences made clear that they were not exactly endorsing Rehnquist's analysis. Justice Scalia writes, "I join the opinion of The Chief Justice because I think it accurately reflects our current Establishment Clause jurisprudence-or at least the Establishment Clause jurisprudence we currently apply some of the time."²³⁴ Of course, given the variation in the Court's Establishment Clause jurisprudence,²³⁵ it is not a ringing endorsement to say that a decision captures how the Establishment Clause is sometimes applied. In any event, on Justice Scalia's view, the Establishment Clause is rather forgiving. He suggests that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a

226. *Id.*

227. 781 F.2d 777 (10th Cir. 1985) (en banc).

228. *Id.* at 779.

229. *Id.* at 782.

230. 698 F.2d 1098 (11th Cir. 1983).

231. *Id.* at 1111.

232. 463 P.2d 360 (Or. 1969).

233. *See id.* at 363 ("Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship.").

234. *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

235. *See id.* at 694 (Thomas, J., concurring) ("the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application").

nonproselytizing manner, venerating the Ten Commandments.”²³⁶ While he does not specify what would count as venerating the Ten Commandments in a non-proselytizing manner, one infers that Ten Commandments which do not represent the views of one sect in particular but, instead, represent an amalgam of beliefs would not count as proselytizing.²³⁷ Ironically, this is exactly the kind of position rejected in *Lynch* in which the Court denied that there could be a kind of civil religious language which could somehow bypass Establishment Clause guarantees.²³⁸

When considering whether there can be civil religious language which could bypass Establishment Clause guarantees, it is helpful to distinguish between a non-sectarian version of the Ten Commandments, e.g., one which incorporates Jewish, Catholic and Protestant views,²³⁹ and a secularized version of the Ten Commandments. While the Ten Commandments in *Van Orden* might be viewed as nonsectarian,²⁴⁰ they certainly should not be viewed as secular, since they did concern the nature of God and human relations to God.²⁴¹ The Establishment Clause requires more than mere

236. *Id.* at 692 (Scalia, J., concurring).

237. *See* *McCreary County v. ACLU*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting) (“This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative.”).

238. *See* *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.

Id.

239. *See* *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 768 (7th Cir. 2001) (“the Fraternal Order of the Eagles donated plaques inscribed with a version of the Ten Commandments (developed by representatives of Judaism, Protestantism, and Catholicism) to communities across the United States during the 1950s.”).

240. *See* *Van Orden*, 545 U.S. at 701 (noting the “Eagles' consultation with a committee composed of members of several faiths in order to find a nonsectarian text”).

241. *See id.* at 707 (Stevens, J., dissenting).

The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:

I AM the LORD thy God.

Thou shalt have no other gods before me.

neutrality among several religious faiths — nonsectarian should not be thought the equivalent of secular.

Justice Thomas joined the opinion because Chief Justice Rehnquist “recognizes that the monument has ‘religious significance’ . . . [and] the role of religion in this Nation’s history and the permissibility of government displays acknowledging that history.”²⁴² However, Justice Thomas’s view of the Establishment Clause is even more forgiving than that of Justice Scalia’s in that Justice Thomas does not believe that the Establishment Clause restrains state (as opposed to federal) action.²⁴³ Further, Justice Thomas believes that the only coercion prohibited by the Establishment Clause is actual legal coercion.²⁴⁴ Justice Thomas notes,

In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.²⁴⁵

Thus, on Justice Thomas’s view, even Justice Kennedy’s example of the Latin Cross permanently erected on City Hall would not violate Establishment Clause guarantees.

Thou shalt not make to thyself any graven images.
Thou shalt not take the Name of the Lord thy God in vain.

Id.

242. *Id.* at 692 (Thomas, J., concurring).

243. *See id.* at 692-93 (Thomas, J., concurring).

244. *See id.* (Thomas, J., concurring).

245. *Id.* (Thomas, J., concurring). *See also* County of Allegheny v. ACLU, 492 U.S. 573, 644 (1989) (Kennedy, J., concurring in part and dissenting in part).

There is no suggestion here that the government’s power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

Id.

Justice Breyer's *Van Orden* concurrence in the judgment is perhaps the most difficult to read insofar as one wishes prospective guidance. He mentions the basic purposes of the Religion Clauses, which he suggests include: assuring the greatest possible religious liberty and tolerance for all,²⁴⁶ avoiding divisiveness that is based upon religion,²⁴⁷ and maintaining separation of church and state.²⁴⁸ While noting that the government must avoid excessively interfering with or promoting religion,²⁴⁹ he also suggests that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."²⁵⁰ Yet, no one suggests that everything remotely religious must be kept out of the public sphere, and it is unclear why a discussion of matters that in any way partake of the religious is relevant in a discussion of something paradigmatically religious like the Ten Commandments, especially because the real question before the Court is when *rather than if* something paradigmatically religious such as the Ten Commandments can be in the public sphere.²⁵¹

Justice Breyer suggests that in borderline cases there is no substitute for the exercise of "legal judgment."²⁵² The case before the Court was borderline because the text of the Ten Commandments is undeniably religious on the one hand,²⁵³ but on the other such a display can convey an historical or a "secular moral message"²⁵⁴ in addition to a religious one. Justice Breyer noted that in the instant case the tablets were part of a display communicating both a religious and a secular message,²⁵⁵ and that the group that had donated the monument had sought to highlight the role of the Ten Commandments in shaping public morality in an effort to combat juvenile delinquency.²⁵⁶ As

246. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (Goldberg, J., concurring)).

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

248. *Id.* (citing A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282-83 (1835) (H. Mansfield & D. Winthrop trans. and eds. 2000)).

249. *Id.* at 699 (Breyer, J., concurring).

250. *Id.* (Breyer, J., concurring).

251. *See, e.g., id.* at 2894 (Souter, J., dissenting) ("And the Decalogue could, as *Stone* suggested, be integrated constitutionally into a course of study in public schools.>").

252. *Id.* at 742 (Breyer, J., concurring).

253. *Id.*

254. *Id.* at 679 (Breyer, J., concurring).

255. *Id.* at 701 (Breyer, J., concurring).

256. *Id.*

evidence of their nonreligious motivation, he noted the group had consulted with members of several faiths to find a nonsectarian text.²⁵⁷

Justice Breyer seems to conflate a nonsectarian motivation with a nonreligious one. It may be, for example, that the group wanted to reach (or at least not offend) a broad base of religious groups, but that hardly speaks to whether the group's motivation was religious rather than non-religious. Further, even were the Ten Commandments viewed as broadly nonsectarian (rather than as favoring some religions over others), the state's displaying the Commandments might well violate an obligation to remain neutral between religion and non-religion.

As further evidence of the secular nature of the message, Justice Breyer noted that forty years had gone by without a legal challenge to the display.²⁵⁸ Indeed, he found that silence "determinative,"²⁵⁹ apparently believing that "[t]hose 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."²⁶⁰ Yet, there might be a variety of reasons that such a display would not be challenged. As Justice Souter notes, "Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent."²⁶¹ Thus, it is hardly safe to infer that no one was religiously offended by the Ten Commandments merely because no one was willing to spend dollars, time, energy, and social standing to challenge them in court.

Numerous concerns might have motivated Justice Breyer's concurrence. For example, he noted that the Ten Commandments are displayed in many of the Nation's courthouses, including the United States Supreme Court,²⁶² and perhaps feared that any other decision would result in challenges to those displays as well as to a number of displays in other public buildings,²⁶³ thereby creating the kind of divisiveness based on religion that the Establishment Clause is

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 702 (Breyer, J., concurring).

261. *Id.* at 747 (Souter, J., dissenting).

262. *Id.* at 701 (Breyer, J., concurring).

263. *Id.* at 704 (Breyer, J., concurring) ("Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation").

designed to prevent.²⁶⁴ Yet, it may well be that Justice Breyer's concurrence in the judgment will not reduce the amount of litigation and divisiveness but will simply result in a modification of the kinds of cases that will come before the courts. There are a great many factors to be taken into account when one exercises "legal judgment," and a difference in any one of them might be reason to bring a challenge to a particular display. Suppose, for example, that a display of the Ten Commandments was not surrounded by other secular displays. Would that be enough to make it unconstitutional?²⁶⁵ Suppose that we are not discussing a longstanding display but a new one, although this time the display will not be the Ten Commandments but instead a motto like "With God All Things Are Possible." Would that pass constitutional muster?²⁶⁶

In his dissent, Justice Stevens argued that the "sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments."²⁶⁷ Noting that the monument, "does not refer to any event in the history of the State,"²⁶⁸ he explained,

264. *Id.* (Breyer, J., concurring). See also William Van Alstyne, *Ten Commandments, Nine Judges, and Five Versions of One Amendment – The First. ("Now What?")*, 14 WM. & MARY BILL RTS. J. 17, 24 (2005).

What followed, for Justice Breyer, was for him to find a way to split the difference, so to speak. In his view, as he had just spoken to it, the proliferation of other "divisive" lawsuits such as this could best be discouraged simply by finding no conflict (or at least no sufficient conflict) with the Establishment Clause. Thus, by finding no sufficient conflict in this case (and in his view possibly not otherwise), the Court might suitably signal to others that it would be pointless for any of them to bring other such "divisive" suits of a similar sort, and so spare the Court itself, as well as the greater polity, more acrimony and grief.

Id.

265. See *ACLU v. Plattsmouth, Neb.*, 358 F.3d 1020, 1039 (8th Cir. 2004) (reh'g granted and vacated Apr. 6, 2004) ("Nor is this monument affixed to a historical building; rather, it sits alone in a park without a secularizing context."). This display of the Ten Commandments was ultimately upheld. See *ACLU Neb. Found. v. Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. 2005), an opinion based on *Van Orden*, see *id.* at 776-78, notwithstanding some of the key differences between the cases. See *id.* at 780-81 (Bye, J., dissenting).

266. Associated Press, *Governor signs mandate to display donated mottoes in schools*, AP ALERT-OH, July 11, 2006 available at WL 7/11/06 APALERTOH 22:47:10.

Governor Taft signed a bill today requiring all public and community schools to display any donated copies of the national and state mottoes, despite constitutional concerns. The mottoes 'In God We Trust' and 'With God, All Things Are Possible' have withstood court challenges suggesting they violate the separation of church and state.

Id.

267. *Van Orden*, 545 U.S. at 707 (Stevens, J., dissenting).

268. *Id.* (Stevens, J., dissenting).

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.²⁶⁹

One of the factors which divides the Court is how to explain the "religious neutrality" demanded by the First Amendment.²⁷⁰ Under one understanding of the view that "government may not exercise a preference for one religious faith over another,"²⁷¹ First Amendment guarantees are not violated as long as no *particular* religion is privileged. When the Fraternal Order of Eagles consulted with a committee composed of individuals of different religions to come up with a nonsectarian version of the Ten Commandments, they were seeking not to privilege *one* religious view, although they would nonetheless privilege some religious views over others.²⁷² For example, those religions which do not have a tenet that there is one and only one God would seem to have their views undermined by the Ten Commandments display.²⁷³

Consider the analysis offered by Justice Blackmun as to why the government is precluded from favoring one religion. "When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons

269. *Id.* (Stevens, J., dissenting).

270. *Id.* at 709 (Stevens, J., dissenting) ("the Establishment Clause demands religious neutrality-government may not exercise a preference for one religious faith over another").

271. *Id.* (Stevens, J., dissenting).

272. *But see* County of Allegheny v. ACLU, 492 U.S. 573, 614-15 (1989).

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.

Id.

273. *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting) ("This Nation's resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God.").

are created equal when it asserts that God prefers some.”²⁷⁴ Yet, by the same token, if the government were to favor two or three religions, the same difficulty arises, namely that the government cannot be premised on the belief that all are equal when it asserts that God favors the views of some religions over others.

Like the majority, Justice Stevens argued that the “wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public view just because they also have religious significance.”²⁷⁵ Yet, the question at hand is what must be done to make sure that a paradigmatically religious display such as the Ten Commandments does not offend constitutional guarantees.

Part of the analysis involves whether the Ten Commandments are being displayed for a secular purpose. In *Van Orden*, the donors were motivated by a desire to inspire youth and curb juvenile delinquency,²⁷⁶ goals which are certainly secular in nature.²⁷⁷ However, having secular goals does not somehow immunize the method by which one seeks to achieve those goals. As Justice Stevens suggests, “But achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor.”²⁷⁸ Otherwise, missionary work would seem immune from constitutional challenge, since “missionaries expect to enlighten their converts, enhance their satisfaction with life, and improve their behavior.”²⁷⁹

In *School District of Abington Township v. Schempp*,²⁸⁰ Justice Brennan wrote, “What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends, where secular means would suffice.”²⁸¹ Justice Stevens is making a similar suggestion in *Van Orden* when writing, “Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly

274. *Lee v. Weisman*, 505 U.S. 577, 606-07 (1992) (Blackmun, J., concurring).

275. *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting).

276. *Id.* at 714 (Stevens, J., dissenting).

277. *Id.*

278. *Id.*

279. *Id.*

280. 374 U.S. 203 (1963).

281. *Id.* at 294-95 (Brennan, J., concurring).

want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium.”²⁸²

The dissenting Justices in *Van Orden* were not arguing that the Ten Commandments can never be displayed by the State; instead, they wanted the state to take steps so that it would not be viewed as sending a religious message. Thus, Justice Souter suggests that a “governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.”²⁸³ For example, suppose that a state wants to call attention to the influence of the Ten Commandments on current secular law. Justice Souter writes,

Government may, of course, constitutionally call attention to this influence, and may post displays or erect monuments recounting this aspect of our history no less than any other, so long as there is a context and that context is historical. Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable.²⁸⁴

One issue that divides courts is what steps must be taken to make a religious display such as the Ten Commandments less religious.²⁸⁵ Given that a state’s purpose in displaying the Ten Commandments might have been secular rather than religious, a separate question is whether in a given instance the state’s purpose was in fact to promote religion.²⁸⁶ It is not at all clear that merely

282. *Van Orden*, 545 U.S. at 715 (Stevens, J., dissenting).

283. *Id.* at 737 (Souter, J., dissenting).

284. *Id.* at 740-41 (Souter, J., dissenting). *See also* *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (“the Court acknowledged in *Stone* that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.”).

285. *Cf. Books v. Elkhart, Ind.*, 235 F.3d 292, 303 (7th Cir. 2000) (“Here, the record discloses no significant attempt by the City of Elkhart to present the text of the Ten Commandments in a way that might diminish its religious character.”).

286. *See* *ACLU v. Plattsmouth, Neb.*, 358 F.3d 1020, 1039 (8th Cir. 2004) (reh’g granted and vacated Apr. 6, 2004) (“Just because there are permissible secular purposes for displaying the Ten Commandments, however, does not mean there is always a secular purpose for such a display.”).

including different types of displays²⁸⁷ would make clear that the purpose behind their being displayed was secular without some kind of writing which explains how the displays are related.²⁸⁸

One example of such a writing would be the explanation described by Justice Souter, although the Court should not require particular “talismanic”²⁸⁹ language to “secularize” religious displays,²⁹⁰ both because such wording might be included to mask a secret purpose to promote religion and because other wording might nonetheless provide the requisite secularizing context. Nonetheless, the *Van Orden* plurality could have been helpful in at least pointing to examples of how to secularize rather than in simply implying that because it is possible to include religious display for non-religious purposes the state should therefore be assumed to have included the religious display for non-religious purposes.²⁹¹

287. See *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771-72 (7th Cir. 2001) (“We start by saying that the display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular.”).

288. See, e.g., *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1032 (Colo. 1995) (Lohr, J., dissenting).

While the other monuments commemorate actual historical events in American history, the Ten Commandments monument does not. . . . Likewise, the state has not accompanied the Ten Commandments monument display with a statement of purpose explaining the intended message of the monument as it relates to the other monuments within Lincoln Park. Because the other monuments neither relate to nor secularize the meaning of the Ten Commandments monument, a reasonable observer would not understand the undeniably religious message of the Ten Commandments monument to be neutralized by the monument's setting.

Id.

289. Cf. *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 81 (1985) (“The various linguistic formulae and evidentiary mechanisms we have employed . . . are not talismanic nor can they substitute for analysis.”).

290. Actually, it is not making the object itself secular, see *Books*, 235 F.3d at 302 (“As a starting point, we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document.”), but making clear that the purpose for its display is secular. See *id.*

The display of a religious symbol still may . . . have a secular purpose. The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.

Id.

291. The district court found that the State had not had the appropriate secular purpose. See *Van Orden*, 545 U.S. at 712 n.9 (Stevens, J., dissenting).

Though this Court has subscribed to the view that the Ten Commandments influenced the development of Western legal thought, it has not officially endorsed the far more specific claim that the Ten

A separate issue is which version of the Ten Commandments to include. One cannot create a neutral version of the Ten Commandments in the sense that it would accord with the beliefs of all those for whom the Commandments play an important religious role,²⁹² although that difficulty might be skirted by refraining from using particular text and instead using symbols to stand for the differing amendments.²⁹³ Of course, that modification might detract from a display if, for example, the point was to include a copy of the Ten Commandments which were thought to influence particular Framers. In any event, even a display of a nonspecific version of the Ten Commandments would disfavor those religions not having an analog within their belief system²⁹⁴ unless the secular purpose for including that version was made very clear.

IV. CONCLUSION

Some commentators suggest that the Ten Commandments have not played a role in the development of our law²⁹⁵ and should not be

Commandments played a significant role in the development of our Nation's foundational documents (and the subsidiary implication that it has special relevance to Texas). . . . Whatever the historical accuracy of the proposition, the District Court categorically rejected respondent's suggestion that the State's actual purpose in displaying the Decalogue was to signify its influence on secular law and Texas institutions.

Id.

292. See Finkelman, *supra* note 180, at 1492 ("it is quite impossible to have a theologically neutral version of the Ten Commandments"). Cf. Leslie C. Griffin, *Their Own Prepossessions: The Establishment Clause, 1999-2000*, 33 *LOY. U. CHI. L.J.* 237, 265 (2001).

On public support, citizens should not be required to provide their tax dollars for the benefit of religious practices, whether in public or private institutions. Religious practices are particular. The ideal of a common prayer or a common theology is illusory, and the government may not establish a civil religion.

Id.

293. See *supra* notes 180-81 and accompanying text (discussing symbolic representation of the amendments).

294. Cf. Finkelman, *supra* note 180, at 1481-82.

[S]uch a monument, even if neutral, would seem like an establishment of religion to Hindus, Buddhists, Sikhs, Taoists, followers of many Native American faiths, and practitioners of other faiths that are not based on Judaism or Christianity A Ten Commandments monument thus sends a message to these Americans that they are not considered to be part of the mainstream of society, but are "outsiders."

Id.

295. See Chemerinsky, *supra* note 136, at 6 ("Nor is there any indication that the Ten Commandments were regarded as a source of secular law in the founding of this nation. They

displayed for that reason. Yet such a claim would of course depend upon the criteria used to determine which works have played a role in the development of our law. For example, to argue that the Ten Commandments have played no role because the Court has never cited them as legal authority²⁹⁶ is to impose an unfair burden on those wishing to establish that the Ten Commandments have played such a role. As a general matter, when members of the Court mention or discuss the Ten Commandments, they tend to *downplay* their role in our law if only to avoid Establishment Clause difficulties.²⁹⁷ Thus, Justices would be more likely to discuss the State's purposes as coinciding or harmonizing with religious purposes as a way of demonstrating that the Ten Commandments did not have undue influence on the development of the law.²⁹⁸ Yet, their downplaying the influence is more a testament to their believing that the Commandments have had a great influence than that they have had no influence.

It is a matter of some dispute among members of the Court as to how foundational the Ten Commandments are,²⁹⁹ but it simply is not credible to believe that the Establishment Clause would preclude the exhibition of the Ten Commandments solely because of some

are not mentioned in the records of the Constitutional Convention nor in the history of state legislatures drafting their initial statutes.”); Finkelman, *supra* note 180, at 1514.

296. See *Id.* at 1514 (“The claim that the Ten Commandments is a foundational document is not supported by the Supreme Court’s jurisprudence. The U.S. Supreme Court has only used the term ‘Ten Commandments’ in twenty-two cases. In none of these cases does the Court use the Ten Commandments as legal authority.”).

297. See, e.g., *McGowan*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) (“Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue.”).

298. See, e.g., *id.* at 442-43 (“However, it is equally true that the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.”); *Hennington v. Ga.*, 163 U.S. 299, 307 (1896) (“That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation”); *Griswold v. Conn.*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (“To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated.”). See, e.g., *Exodus* 20:2 (King James) (the Ten Commandments).

299. See *Van Orden v. Perry*, 545 U.S. 677, 712 n.9 (2005) (Stevens, J., dissenting).

Though this Court has subscribed to the view that the Ten Commandments influenced the development of Western legal thought, it has not officially endorsed the far more specific claim that the Ten Commandments played a significant role in the development of our Nation’s foundational documents (and the subsidiary implication that it has special relevance to Texas).

Id.

implicit requirement regarding the degree to which they must be foundational for them to be displayed publicly. Any plausible standard would be extremely difficult to articulate and even more difficult to justify in light of the relevant history, case law, or even good public policy.

Suppose that one could get past the difficulties involved in spelling out this foundationalism requirement. Further, suppose that the Ten Commandments met the relevant test. Their being displayed might nonetheless violate Establishment Clause guarantees, at least in light of the *Lemon* Test, the Endorsement Test, or the Coercion Test. Basically, the relevant question is not whether the Framers or others were influenced by religious texts. Rather, the important questions would involve what the State was trying to do and what effects the state action would have.

The Court's recent Ten Commandments decisions are not disappointing merely because they appear to have been a compromise but because they made it so obvious that the current Establishment Clause jurisprudence does no work,³⁰⁰ and because members of the Court continue to engage in conclusory name-calling merely because others disagree with them, instantiating the kind of religious discord which the Establishment Clause seeks to avoid. Not only do Chief Justice Rehnquist and Justice Scalia suggest that those disagreeing with them are hostile to religion,³⁰¹ but even Justice Breyer suggests that the dissenters in *Van Orden* interpret "the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."³⁰² Yet, one would expect that in a "borderline" case requiring "legal judgment," even reasonable Justices open to religion might nonetheless disagree about the disposition of a close case.

Under the best of circumstances, it is very difficult to offer a plausible interpretation of the Religion Clauses which gives due

300. See *id.* at 694-95 (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.").

301. See *McCreary County v. ACLU*, 545 U.S. 844, 900 (2005).

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion.

Id. See also *Van Orden*, 545 U.S. at 683-84 (suggesting that the Court must "neither abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage").

302. *Id.* at 704 (2005) (Breyer, J., concurring).

respect to the Framers' intentions, our history, the developing case law, and the widely differing faith traditions represented in this country. But these are not the best of circumstances. When the Court refuses to apply the tests it claims applicable or applies the applicable tests in ways belied by its own jurisprudence, the Court, conscientious belief, and society itself are all losers. We can only hope that the Court in the not-too-distant future will seek to emulate the goals of the Establishment Clause rather than the evils which that Clause was designed to avoid.