THOU SHALT NOT POST THE TEN COMMANDMENTS? *MCCREARY COUNTY*, *VAN ORDEN*, AND THE FUTURE OF RELIGIOUS DISPLAY CASES

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I. INTRODUCTION

On August 1, 2001, Alabama Supreme Court Chief Justice Roy Moore proudly unveiled a two-and-a-half ton, granite monument depicting the Ten Commandments.[1] The evening before, under the cover of darkness and without the approval or knowledge of his eight fellow high court justices, Chief Justice Moore had moved the monument into the rotunda of the building housing the Alabama Supreme Court. The event was something of a triumph for the chief justice. As a state court judge, he had been the target of two American Civil Liberties Union lawsuits, which had attempted to prevent him from opening trials with a prayer and to force the removal of a small Ten Commandments plaque he displayed in his courtroom. Chief Justice Moore had managed to turn his notoriety from those lawsuits into a successful campaign as "the Ten Commandments Judge" that culminated in his election as chief justice and the prominent placement of his Ten Commandments monument. His victory, however, would prove to be short lived. Subsequent litigation forced the removal of "Roy's Rock" from the Alabama Judicial Building. The United States Supreme Court refused to hear his appeal, and Chief Justice Moore himself was removed from the bench by a judicial ethics panel for "willfully and publicly" flouting the order to move the monument from the state judicial building.

Chief Justice Moore's failed effort did not take the issue of Ten Commandments displays out of the public eye or the courts. The same day it rejected his appeal, the United States Supreme Court agreed to hear two other Ten Commandments display cases. On the last day of its 2004–2005 term, the Supreme Court ruled unconstitutional a pair of Kentucky displays, which had been inspired in part by Chief Justice Moore's early legal battles, but upheld a Ten Commandments monument on the grounds of the Texas State Capitol. The cases, which produced a total of ten opinions, mark a significant

1. For a discussion of the history of Chief Justice Roy Moore's attempt to display the Ten Commandments see, for example, Stan Bailey, *Judge Rules Monument Violates Constitution-Removal Ordered; Moore Plans to Appeal*, BIRMINGHAM NEWS, Nov. 19, 2002, § News.

moment in church-state jurisprudence. They crystallized the deep divisions within the Rehnquist Court regarding the Establishment Clause's fundamental purpose and historical intention. The cases also brought forth significant but unannounced doctrinal developments. After discussing the relevant facts and lower court opinions of *McCreary County v. ACLU*[2] and *Van Orden v. Perry*,[3] this Article examines and evaluates the Supreme Court's Ten Commandments decisions, with particular attention given to the Court's use of the Founding Fathers and to the unannounced doctrinal alterations made in Establishment Clause jurisprudence. The Article also speculates as to how the Supreme Court might decide future Ten Commandments cases and other religious display cases in light of the appointments of Chief Justice John Roberts and Justice Samuel Alito to the bench. The future of Establishment Clause jurisprudence, the Article concludes, remains very much unsettled.

II. FACTS OF THE CASES AND LOWER COURT OPINIONS

A. McCreary County v. American Civil Liberties Union of Kentucky

McCreary County involved twice-revised Ten Commandment displays erected in two Kentucky county courthouses. The first displays, which were set up in the summer of 1999, consisted of large, gold-framed copies of an abridged text of the King James Version of the Ten Commandments.[4] In November 1999, the American Civil Liberties Union of Kentucky sued the counties in federal district court, charging that the displays violated the First Amendment's Establishment Clause. Within a month and before

2. 125 S. Ct. 2722 (2005).

3. 125 S. Ct. 2854 (2005).

4. Details of the counties' displays are discussed in the *McCreary County v. ACLU of Kentucky* opinion. 125 S. Ct. at 2728–32. The eight other documents were: the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

the district court had responded to the ACLU's request for a preliminary injunction against maintaining the displays, the legislative body of each county authorized a second, expanded display. As directed by the resolutions, eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element, were added to the first display's framed copy of the Ten Commandments.[5] After argument, the district court entered a preliminary injunction ordering that the "display . . . be removed from [each] County Courthouse IMMEDIATELY" and that no county official "erect or cause to be erected similar displays."[6] The counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it upon obtaining new counsel.

The counties then installed a third display in each courthouse entitled, "The Foundations of American Law and Government Display."[7] This third display, which was not authorized by a new legislative resolution, consisted of nine framed documents of equal size: the King James Version of the Ten Commandments, 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. Each document, including the Ten Commandments, had a statement about its historical and legal significance.

In response to another ACLU legal challenge, the counties offered several explanations for the new display, including their intention "to demonstrate that the Ten Commandments were part of the foundation of American law and government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."[8] The district court rejected these explanations, finding the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" under *Stone v. Graham*.[9] The district court also found that the counties' assertion of broader secular,

5. *McCreary County*, 125 S. Ct. at 2728–32.

6. ACLU of Ky. v. McCreary County, 96 F. Supp. 2d 679, 691, (E.D. Ky. 2000); ACLU of Ky. v. Pulaski County, 96 F. Supp. 2d 691, 702–03 (E.D. Ky. 2000).

7. *See infra* Appendices 1 and 2.

8. ACLU of Ky. v. McCreary County, 145 F. Supp. 2d 845, 848 (citing Stone v. Graham, 449 U.S. 39 (1980)).

9. *Id.* at 849 (citing *Stone*, 449 U.S. at 41).

educational goals "crumble . . . upon an examination of the history of this litigation."[10]

The Sixth Circuit Court of Appeals affirmed the district court's decision. The circuit court's majority stressed that under *Stone*, displaying the Commandments bespeaks a religious objective unless they are integrated with other material so as to carry "a secular message."[11] The majority found no integration in the counties' displays because of a "lack of a demonstrated analytical or historical connection [between the Commandments and] the other documents."[12] The majority also noted that the history of the litigation showed evidence of the counties' religious objective.[13]

B. Van Orden v. Perry

Van Orden involved a more straightforward case of a long-standing Ten Commandments monument on the grounds of the Texas State Capitol building. The six-foot high and three-foot wide monument was donated to the state in 1961 by the Fraternal Order of Eagles, a national social, civic, and patriotic organization.[14] In addition to the text of the Commandments, the monument included two Stars of David and the superimposed Greek letters *Chi* and *Rho*, representing Christ. Beneath the text and symbols was the inscription, "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." The monument was placed between the Capitol and Supreme Court buildings on the recommendation of the state organization responsible for maintaining the Texas State Capitol grounds. The Eagles paid the cost of erecting the monument, which was one of seventeen monuments and twenty-one historical markers on the capitol grounds commemorating the "people, ideals, and events that compose Texan identity."[15]

In 2001, Thomas Van Orden, an Austin resident who frequently encountered the monument in his visits to the

10. *Id.*

11. ACLU of Ky. v. McCreary County, 354 F.3d 438, 449 (6th Cir. 2003).

12. *Id.* at 451.

13. *Id.* at 457.

14. The facts of the case discussed here may be found at *Van Orden v. Perry*, 125 S. Ct. 2854, 2858–59 (2005).

15. H.R. 38, 77th Leg. (Tex. 2001).

Supreme Court's law library, challenged its constitutionality. The district court determined that the state had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency and, therefore, held that the monument did not violate the Establishment Clause. The district court also found that a reasonable observer, mindful of the monument's history, purpose, and context, would not conclude that it conveyed the message that the state was seeking to endorse religion. The circuit court affirmed the district court holdings with respect to the monument's purpose and effect.[16]

III. THE SUPREME COURT DECISIONS

In separate 5-4 decisions, the U.S. Supreme Court struck down the Kentucky courthouse displays but upheld the Texas monument. The two cases produced ten opinions with every Justice except Anthony Kennedy and Ruth Bader Ginsburg writing one, and three Justices—Sandra Day O'Connor, Antonin Scalia, and David Souter—authoring opinions in both cases. Only Justice Souter's *McCreary County* majority opinion received five votes. Chief Justice William Rehnquist wrote the plurality opinion in *Van Orden.* Justice Stephen Breyer, who signed on to Justice Souter's majority opinion in *McCreary County*, switched sides to provide the fifth vote in *Van Orden*, writing a concurring opinion that employed sharply different reasoning than that used by Chief Justice Rehnquist. The votes of the Justice are summarized below:

McCreary County:
Unconstitutional: Souter, Stevens, O'Connor, Ginsberg, Breyer.
Constitutional: Rehnquist, Scalia, Thomas, Kennedy.
Van Orden:
Unconstitutional: Souter, Stevens, O'Connor, Ginsberg.
Constitutional: Rehnquist, Scalia, Thomas, Kennedy, Breyer.

At least three different approaches to the Establishment Clause can be seen in the Justices' various opinions. Justices Stevens, Souter, Ginsburg, and Breyer find the prevention of political division based on religion to be a core purpose of the Establishment Clause. They interpret it, accordingly, to prohibit the state from advancing one religion over others or to prefer religion in general over irreligion. Justice O'Connor, who

16. Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).

announced her retirement four days after the decisions were handed down, reaches a similar result through her endorsement test. Justices Scalia and Thomas reject those approaches and results. They approach the Establishment Clause in light of their understanding of its original purpose and the nation's traditions, which they interpret to allow governmental acknowledgment and preference for religion over non-religion.

A. *Divisiveness and Neutrality: Justices Souter, Breyer, and Stevens*

Because it was the only opinion to receive five votes, we shall begin with Justice Souter's majority opinion in *McCreary County*.

1. Justice Souter

According to Justice Souter, the "touchstone" of the Court's Establishment Clause analysis is,

> the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. 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.[17]

Justice Souter traces his neutrality interpretation to "one of the major concerns" that prompted adoption of the Religion Clauses, "to guard against the civic divisiveness that follows when the Government weighs in on one side of the religious debate."[18]

To apply neutrality in *McCreary County*, Justice Souter invokes the *Lemon* test, which requires that government actions: (1) have a "secular legislative purpose"; (2) have as their "principal or primary effect . . . one that neither advances nor inhibits religion"; and (3) do "not foster 'an excessive government entanglement with religion.'"[19] Justice Souter focuses almost exclusively on *Lemon*'s secular purpose prong, finding that the context of the Kentucky displays reveals a "predominantly"

17. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2733 (2005).

18. *Id.* at 2742. Justice Souter identifies two "major concerns" behind the Establishment Clause, the other being "to protect the integrity of individual conscience in religious matters." *Id.* For a critical examination of the argument that civic divisiveness along religious lines should inform Establishment Clause jurisprudence see, Rick Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. (forthcoming 2006).

19. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citation omitted).

religious purpose.[20] Noting that "the world is not made brand new every morning" and that "reasonable observers have reasonable memories," he rejects the counties' contention that only the third displays should be considered because it "just bucks common sense" and it would require the Court "to turn a blind eye to the context in which [the] policy arose."[21] That context, according to Justice Souter, reveals that the counties' educational statements of purpose "were presented only as a litigating position."[22] The counties, he further points out, did not pass a new authorization for the third display or repeal or otherwise revoke the previous authorizing resolutions, which were passed in a "sectarian spirit."[23] Justice Souter finds that even the material selected for the third display fails to suggest a non-religious theme as it lacked documents obviously "foundational" to American government, including the Constitution of 1787 and the Fourteenth Amendment. A reasonable observer knowledgeable of the context, accordingly, "would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."[24]

Justice Souter does note that the Court's opinion does not hold "that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history."[25] His dissenting opinion in *Van Orden*, however, suggests that he would have the Court maintain a strong presumption against all governmental displays with exclusively religious content regardless of their context or generating history.

His *Van Orden* dissent begins by citing *Stone*, which he says underscores "the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same."[26] The Texas monument's religious message,

20. *McCreary County*, 125 S. Ct. at 2734.
21. *Id.* at 2737 (internal citations omitted).
22. *Id.* at 2740.
23. *Id.*
24. *Id.* at 2741.
25. *Id.*
26. Van Orden v. Perry, 125 S. Ct. 2854, 2892 (2005) (Souter, J., dissenting) (citing Stone v. Graham, 449 U.S. 39, 39–40 (1980)).

he argues, is further emphasized by the manner of its display. The first sectarian reference: "I AM the LORD thy God," is written in slightly larger letters; the words "Lord" and "am" appear in all capital letters; the text is framed by religious symbols—two Stars of David and the superimposed Greek letters *Chi* and *Ro*, the familiar monogram of Christ. The monument's placement among sixteen other monuments on the twenty-two acres surrounding the State Capitol, Justice Souter contends, does not blunt its religious message, because the collection as a whole lacks a "common denominator" and thus is not museum-like.[27] That *Stone* involved public schools that students were required to attend does not limit that case's applicability, because "if neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion."[28] The religious nature of the monument itself, in Justice Souter's judgment, reveals its unconstitutional religious purpose.

2. Justice Breyer

Justice Breyer signs on to the majority opinion in *McCreary County*, but he evaluates the facts of *Van Orden* differently than Justice Souter, which leads him to vote to uphold the Texas monument. Nonetheless, Justice Breyer's *Van Orden* concurrence reveals a fundamental agreement with Justice Souter and a sharp disagreement with those Justices with whom he sides in *Van Orden*.

Justice Breyer implicitly disagrees with Justice Souter's finding that the religious nature of the Ten Commandments necessarily entails an unconstitutional religious purpose. The context of the Texas monument and how it is used, according to Justice Breyer, "communicates not simply a religious message, but a secular message as well."[29] To support this conclusion, he highlights that the monument was donated to the state by a primarily secular organization, that its physical setting suggests little or nothing of the sacred and does not lend itself to meditation or religious

27. *Id.* at 2895.
28. *Id.* at 2897.
29. *Id.* at 2870 (Breyer, J., concurring).

activity, and that the capitol grounds include other monuments and historical markers.[30]

The key for Justice Breyer, however, seems to be that the Texas monument, unlike the Kentucky courthouse displays, stood for two generations without being challenged. According to Justice Breyer, this length of time indicates that few individuals are likely to have understood the monument as amounting to a government effort "to favor a particular religious sect, primarily to promote religion over nonreligion, to engage in any religious practice, to compel any religious practice, or to work deterrence of any religious belief."[31] The forty years the monument has stood, instead, "suggest[s] 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."[32] A page later in his opinion, he again refers to how long the monument stood without controversy: "This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one."[33]

Like Justice Souter, Justice Breyer identifies the prevention of civic division along religious lines as a core purpose of the Establishment Clause. But a judgment requiring the removal of the Texas monument, he contends, "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[34] Thus, though agreeing with Justice Souter as to the purposes of the Establishment Clause, Justice Breyer's legal judgment in the Texas case led him to reach a different result.

3. Justice Stevens

Civic divisiveness also is emphasized by Justice Stevens, whose spirited dissent in *Van Orden* reflects a fundamental agreement

30. *Id.*
31. *Id.* (internal citations omitted).
32. *Id.* at 2870–71.
33. *Id.* at 2871.
34. *Id.*

with Justice Souter. The government's obligation to avoid civic divisiveness and exclusion in the religious sphere, according to Justice Stevens, "is compelled by the Establishment Clause and Free Exercise Clauses, which together erect a wall of separation between church and state."[35] Like Justice Souter, the principles that Justice Stevens identifies to maintain the "wall" include "neutrality" and "non-endorsement," which he interprets, again like Justice Souter, to require that government not show a preference for one religious faith over another or aid or promote religion generally over non-belief systems.[36]

Although he did not cite *Lemon* as precedent, Justice Stevens seems to employ its secular-purpose prong to conclude that the Texas display violates the Establishment Clause. "The sole function of the monument on the grounds of Texas' State Capitol," he begins his opinion, "is to display the full text of one version of the Ten Commandments."[37] The message thereby conveyed "is quite plain: This State endorses the divine code of the 'Judeo-Christian' God."[38] Even if the Eagles and Texas had the legitimate secular interest of combating juvenile delinquency when they erected the monument, "achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor."[39] The government cannot "effectuate [legitimate secular] purposes through an explicitly religious medium,"[40] and the Ten Commandments, Justice Stevens continues, are "undeniably a sacred text" that for many followers "represent the literal word of God."[41]

An additional problem with the display for Justice Stevens is that the monument "projects not just a religious, but an inherently sectarian message."[42] In a footnote, he compares the Jewish version of the Sixth Commandment, "You shall not murder," with the King James Version, "Thou shalt not kill."[43] This difference, Justice Stevens writes, "is not merely semantic;

35. *Id.* at 2875 (Stevens, J., dissenting).
36. *Id.* at 2875–76.
37. *Id.* at 2873.
38. *Id.* at 2874.
39. *Id.* at 2878.
40. *Id.*
41. *Id.* at 2879.
42. *Id.* at 2881.
43. *Id.* at 2880 n.16.

rather, it is but one example of a deep theological dispute."[44] Specifying any text, even one that is the product of compromise, "invariably places the State at the center of a serious sectarian dispute," because different religions and denominations embrace distinctive versions of the Ten Commandments.[45] The Commandments, he also notes, prescribe a code of conduct from one God, but polytheistic sects such as Hinduism as well as non-theistic religious like Buddhism reject the idea of monotheism. And even if all religious believers could accept the display, "at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion."[46] "God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner," Justice Stevens concludes, "speak with one voice for a common purpose—to encourage Texans to abide by the divine code of a 'Judeo-Christian' God. If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow."[47]

B. *No Endorsement: Justice O'Connor*

Justice Stevens' *Van Orden* opinion is especially notable in that he finds that the Establishment Clause *and* the Free Exercise Clause erect a "wall of separation" between church and state.[48] Justice O'Connor's *McCreary County* concurrence also begins by identifying a single purpose of the Religion Clauses. Unlike Justice Stevens, however, Justice O'Connor does not emphasize separation, but rather individual freedom: "[T]he goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society."[49] Justice O'Connor says that the First Amendment champions religious voluntarism, in her words, keeping "religion a matter for the individual conscience, not for the prosecutor or bureaucrat."[50] For years she has encapsulated her approach to establishment jurisprudence in the endorsement

44. *Id.*
45. *Id.* at 2880.
46. *Id.* at 2881.
47. *Id.* at 2882.
48. *Id.* at 2875.
49. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).
50. *Id.*

test, which prohibits government from "endorsing religion or a religious practice," or "mak[ing] adherence to religion relevant to a person's standing in the political community."[51]

Analysis along the lines of "no endorsement" instead of civic divisiveness, however, does not lead Justice O'Connor to reach a different result than Justices Souter and Stevens. Her *McCreary County* opinion finds that "the purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer."[52] She provides almost no analysis to explain or defend her reasonable observer's perceptions—her *McCreary County* opinion is only two pages long and speaks in general terms rather than offering an analysis of the facts of the case—but she does join Justice Souter's majority opinion, which indicates her agreement with his analysis.

C. *Tradition and Text Means No Coercion: Chief Justice Rehnquist, Justices Scalia and Thomas*

1. Chief Justice Rehnquist

Unlike Justices Stevens and O'Connor, who identify a single principle animating the First Amendment's religion clauses (separation and freedom as voluntarism, respectively), Chief Justice Rehnquist begins his *Van Orden* opinion by noting the Janus-like[53] nature of the Court's no-establishment jurisprudence.[54] One face, he says, looks to the strong role played by religious traditions in the nation's history and thus allows government acknowledgement of religion; the other face sees the danger that governmental intervention in religious matters poses to religious freedom and thus seeks to separate church and state.[55]

The Chief Justice does not propose a principle capable of reconciling these seemingly conflicting views or even suggest that a single principle could do so. Instead, he insists that the Constitution's division of church and state does not require the

51. *Id.* (quoting Wallace v. Jeffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)).

52. *McCreary County*, 125 S. Ct. at 2747 (O'Connor, J., concurring).

53. Janus is the Roman god of gates and doors (*ianua*), beginnings and endings. He is represented with a double-faced head, each looking in opposite directions.

54. Van Orden v. Perry, 125 S. Ct. 2854, 2859 (2005).

55. *Id.*

Court to "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[56] Much in his opinion then supports his contention that there exists "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," and that the Court's jurisprudence has reflected that tradition and allowed practices consistent with it.[57] He offers the following examples: President George Washington's prayerful Thanksgiving Day Proclamation of 1789 and the congressional resolutions requesting it;[58] various governmental buildings in which the Ten Commandments are depicted—including the Supreme Court's own courtroom,[59] the Library of Congress,[60] and the National Archives;[61] Supreme Court dicta acknowledging that "religion has been closely identified with our history and government,"[62] and that "the history of man is inseparable from the history of religion;"[63] and, finally, that prior Establishment Clause decisions have permitted a state legislature to open its daily sessions with prayer by a chaplain paid by the state[64] and have upheld laws that originated from one of the Ten Commandments.[65] Such examples would seem to indicate that Chief Justice Rehnquist favored the traditional face of the Court's jurisprudence, but he did not suggest that cases decided according to the separation face ought to be overturned. Regarding *Lemon*, he dismissed its relevance without explanation, curtly asserting that "we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[66]

56. *Id.*
57. *Id.* at 2861.
58. *Id.*
59. *Id.* at 2862.
60. *Id.*
61. *Id.*
62. *Id.* at 2861 (quoting School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212 (1963)).
63. *Id.* at 2862 (quoting Engel v. Vitale, 370 U.S. 421, 434 (1962)).
64. *Id.* at 2862 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
65. McGowan v. Maryland, 366 U.S. 420, 431–40 (1961) (upholding a law that prohibited the sale of merchandise on Sunday).
66. *Van Orden*, 125 S. Ct. at 2861.

What is useful, according to Chief Justice Rehnquist, is the "rich American tradition of religious acknowledgments."[67] This tradition demonstrates that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[68] In the public school arena, he notes, the Court has been "particularly vigilant in monitoring compliance with the Establishment Clause."[69] But nothing in *Stone*, he concludes, suggests that its holding should extend to capitol grounds, and, therefore, the Texas display does not violate the Establishment Clause.[70]

2. Justice Scalia

Whereas Chief Justice Rehnquist mentioned but ultimately ignored the Court's previous separationist jurisprudence, Justice Scalia challenges it head on. His dissenting opinion in *McCreary County* begins by stating that "the Court's oft repeated assertion that the government cannot favor religious practice is false."[71] Consistent with his "text and tradition" jurisprudential approach,[72] Justice Scalia offers numerous instances from the founding era of governmental acknowledgement and endorsement of religion. "Those who wrote the Constitution," he contends, "believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[73]

According to Justice Scalia, the Establishment Clause does not demand neutrality between religion and irreligion, and it does not require non-denominationalism in public acknowledgments of the Creator. "If religion in the public forum had to be entirely nondenominational," he asserts, "there could be no religion in the public forum at all."[74] Even mentioning "God" or "the Almighty" contradicts the beliefs of those who believe in many

67. *Id.* at 2863.

68. *Id.*

69. *Id.* at 2863–64.

70. *Id.* at 2864. *See also* Stone v. Graham, 449 U.S. 39, 43 (1980).

71. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

72. For a recent analysis of Scalia's "text and tradition" jurisprudential approach, see RALPH ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (University Press of Kansas 2006).

73. *McCreary County*, 125 S. Ct. at 2749 (Scalia, J., dissenting).

74. *Id.* at 2752.

gods.[75] In perhaps the most controversial sentence of his opinion, Justice Scalia opines, "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."[76] Public acknowledgements of the divine seem to consist of a special category for Justice Scalia, as he says that the state may not prefer one sect over others "where public aid or assistance to religion is concerned or where the free exercise of religion is at" stake.[77]

Even under the *Lemon* test, Justice Scalia continues, the Kentucky counties' Ten Commandments displays pass constitutional muster. "On its face," he says, the displays "manifested the purely secular purpose that the Counties asserted before the District Court: 'to display documents that played a significant role in the foundation of our system of law and government.'"[78] To suggest that not the displays themselves but the counties' purpose in erecting them is what violated the Constitution is an "absurdity in practice," because it makes the exact same action constitutional in one instance and unconstitutional in another. "Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional"; a result that "trivializes the Clause's protection against religious establishment."[79]

Justice Scalia's *McCreary County* dissent makes clear that he disagrees with the principles that the Court's majority employs and the way it employs them. It fails to make clear, however, what principle he would use to interpret the Establishment

75. *Id.*

76. *Id.* at 2753.

77. *Id.* at 2752.

78. *Id.* at 2759.

79. *Id.* at 2761. Justice Scalia contends that even the first displays, which contained only the Ten Commandments, could be conceived to have been civically motivated. As passive displays, he says that they do not proselytize or coerce religion, which are the types of actions the Court found unconstitutional in *Marsh* and *Lee*, respectively. *See* Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783 (1983). The displays did not advance only one faith since the Ten Commandments are recognized by Judaism, Christianity, and Islam. *McCreary County*, 125 S. Ct. at 2762. Similarly, Justice Scalia would have found the second displays, which featured a number of statements in historical documents reflecting a religious influence, to have the permissible purpose of focusing on the historic role of religious belief in America's national life. *Id.* at 2762–63.

Clause. In fairness to Justice Scalia, he previously set forth his "legal coercion" approach in *Lee v. Weisman*,[80] but in the Ten Commandments cases, he seems to have left it to Justice Thomas to articulate how the cases should have been adjudicated.

3. Justice Thomas

Justice Thomas's short concurring opinion in *Van Orden* begins with a consideration of the Establishment Clause's original meaning. In the 2004 Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*, Justice Thomas argued that the Establishment Clause was originally no more than a statement of federalism meant to protect state authority over matters of religious establishments.[81] He repeats that argument, stating that if the Clause does not restrain the states it has no application in a case involving only state action.[82] Even if either the Establishment Clause is incorporated or the Free Exercise Clause limits the power of the states to establish a religion, Justice Thomas continues, the Court's "task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses."[83]

According to Justice Thomas, the hallmark of historical religious establishments is "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[84] Establishments at the time of the founding, he says, involved "mandatory observance or mandatory payment of taxes supporting ministers."[85] In light of the text's original meaning, Justice Thomas concludes, "There is no question that . . . the Ten Commandments display at issue here is constitutional," because "[t]he mere presence of the monument along [Mr. Van Orden's] path involves no coercion and thus does not violate the Establishment Clause."[86]

The rest of Justice Thomas's opinion criticizes the Court's Establishment jurisprudence for: elevating the trivial to

80. 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).
81. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).
82. Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring).
83. *Id.*
84. *Id.* (citing *Lee*, 505 U.S. at 640).
85. *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709 (2005)).
86. *Id.*

constitutional significance;[87] being incoherent,[88] "impenetrable and incapable of consistent application,"[89] unintelligible,[90] and "fraught with futility";[91] denying the obvious religious nature of religious symbols and language;[92] failing to respect fully religious belief or disbelief;[93] and for deciding cases, or at least appearing to decide cases, on grounds no firmer than "the personal preferences of judges."[94] "Much, if not all, of this," Justice Thomas concludes, "would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry."[95]

D. *The Historical Arguments*

Ever since the Supreme Court incorporated the Establishment Clause to apply against the states in *Everson v. Board of Education*,[96] the Framers have been cited as authoritative guides to the meaning of the Constitution's prohibition against religious establishment.[97] Consistent with this practice, Justices Scalia and Thomas, on one side, and Justices Souter and Stevens, on the other, appeal to the Founders in their Ten Commandment opinions, though in different ways and with different results.

Justices Scalia and Thomas enthusiastically embrace the Founders and unambiguously claim that their interpretation of the Establishment Clause is consistent with that of the Founders. Justice Scalia, as mentioned above, devotes much of his *McCreary*

87. *Id.* at 2866.
88. *Id.*
89. *Id.*
90. *Id.* at 2867.
91. *Id.*
92. *Id.* at 2866.
93. *Id.* at 2867.
94. *Id.*
95. *Id.*
96. 330 U.S. 1 (1947).
97. This is not to say that every approach to the Establishment Clause claims the patrimony of the Founders. In championing her endorsement test, for example, Justice O'Connor does not attempt to draw a specific connection between her approach and the principles of the Founders. Even Justices who do not usually defend their jurisprudence with history often suggest that their Establishment Clause jurisprudence is somehow derived from general principles set forth by the Founders. Justice Breyer, for example, has claimed that his emphasis on the prevention of social conflict along religious lines "reflect[s] the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe." Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J. dissenting).

County opinion to listing examples of how the Founders acknowledged and endorsed religious belief. He gives no fewer than twelve such instances of official or quasi-official government action,[98] including:

- President Washington's addition of "so help me God" to the oath of office.[99]
- The U.S. Supreme Court under John Marshall opening with the prayer, "God save the United States and this Honorable Court."[100]
- The First Congress instituting the practice of beginning its sessions with prayer.[101]
- The First Congress enacting legislation providing for paid chaplains in the House and Senate during the same week that it submitted the Establishment Clause as part of the Bill of Rights for ratification by the States.[102]
- That same Congress requesting, the day after the First Amendment was proposed, President Washington's proclamation of "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God."[103]
- President Washington's first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 "to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be."[104]
- The First Congress reenacting the Northwest Territory Ordinance of 1787, which provided, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[105]

98. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2754 (2005) (Scalia, J., dissenting).
99. *Id.* at 2748.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 2748–49.
105. *Id.* at 2749.

- The adoption of the First Amendment, which accords religion (and no other manner of belief) special constitutional protection.[106]
- President Washington's first inaugural address, which opened his presidency with a prayer, and his farewell address, which reminded his fellow citizens at the conclusion that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle."[107]
- Writings of John Adams, including a letter to the Massachusetts Militia stating, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[108]
- President Jefferson's second inaugural address, which he concluded by inviting his audience to pray: "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations."[109]
- President Madison's first inaugural address stating that he placed his confidence "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

> the past, as well as our fervent supplications and best hopes for the future."[110]

Such examples, according to Justice Scalia, "reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[111] He concludes that if the Establishment Clause is to be interpreted consistently with the nation's traditions, it cannot be construed to require government neutrality between religion and non-religion or to prohibit governmental favoritism of religion generally. Taking aim at *Lemon* and *Everson*, he asks with characteristic pointedness:

> With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that "the First Amendment mandates governmental neutrality between . . . religion and nonreligion,"and that "manifesting a purpose to favor . . . adherence to religion generally," is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. . . . 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.[112]

Justice Thomas supplements Justice Scalia's attack on the Court's twentieth-century strict-separationist precedents by offering what he says is the approach consistent with the original meaning of the word establishment. Justice Thomas contends that the Framers understood an establishment of religion to involve active legal coercion of religious belief or practice, or payment of special religious taxes.[113] Note that he does not claim that the Framers primarily intended to prohibit religious establishments through the First Amendment's Establishment Clause. In his *Van Orden* concurrence, Justice Thomas repeats the position he staked out most clearly in *Newdow*: that the Establishment Clause's text and history resist incorporation

110. *Id.* at 2749–50.
111. *Id.* at 2749.
112. *Id.* at 2750 (internal citations omitted).
113. Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) (citing Lee v. Weisman, 505 U.S. 577, 640 (1992)).

against the states.[114] Rather than elaborating on his anti-incorporation interpretation—to which he devotes only two sentences in *Van Orden*—he states that the Court's task "would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses."[115]

Not willing to concede the support or authority of history, Justices Souter and Stevens offer a three-fold response to Justices Scalia and Thomas based on a different interpretation of the Founders' thought and a competing appreciation of the relevance of history. They argue that the Framers' thought is more diverse than Justices Scalia and Thomas realize and that it is too narrow to apply directly to modern controversies, but that it can be appropriated, at the proper level of generality, to support "neutrality."[116]

Justice Souter accuses Justice Scalia of failing to consider "the full range of evidence showing what the Framers believed."[117] Justice Stevens similarly accuses Justice Scalia and the Chief Justice of "ignor[ing] the separationist impulses"[118] that Madison brought to the debates surrounding the adoption of the Establishment Clause. Justice Souter admits that some founders, such as George Washington, thought morality could not prevail without religion, but "there is also 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."[119] Evidence introduced by Justice Souter[120] includes the following:

- When it drafted the Establishment Clause, the First Congress rejected proposed language that merely prohibited a single national religion.
- President Thomas Jefferson refused to issue Thanksgiving Proclamations because he thought they were unconstitutional.

114. *Id.*
115. *Id.*
116. *McCreary County*, 125 S. Ct. at 2743–45.
117. *Id.* at 2743.
118. *Van Orden*, 125 S. Ct. at 2884–85 (Stevens, J., dissenting).
119. *McCreary County*, 125 S. Ct. at 2743–44.
120. *Id.*

- James Madison wrote his "Memorial and Remonstrance" against a proposed general religious assessment tax.
- Madison's letters reveal that he thought, "[r]eligion & [g]ovt. will both exist in greater purity, the less they are mixed together."[121]

Justice Stevens adds that Madison left writings indicating that he thought legislative and military chaplains violated the Constitution.[122]

Justice Stevens argues, furthermore, that some of the historical evidence cited by Justice Scalia is inapposite. Public speeches given by governmental officials cannot be considered "exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity."[123] Moreover, Justice Stevens says such views were not espoused at the Constitutional Convention in 1787 or enshrined in the Constitution's text.[124] Relying on the religious statements and proclamations made by some Founders, therefore, "is bound to paint a misleading picture."[125] Justice Souter similarly concludes that from the available historical evidence,

> The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined.[126]

Justices Souter and Stevens next argue that a literal quest for the Founders' intention reveals that their views are too narrow to apply to modern First Amendment law. History shows, according to Justice Souter, "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

121. *Id.* at 2744.
122. *Van Orden*, 125 S. Ct. at 2884.
123. *Id.* at 2883.
124. *Id.*
125. *Id.*
126. *McCreary County*, 125 S. Ct. at 2744 (citations omitted).

takes as a premise for construing the Religion Clauses."[127] Similarly, Justice Stevens states:

> many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.
>
> The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their various constitutions. Many of those provisions, however, restricted "equal protection" and "free exercise" to Christians, and invocations of the divine were commonly understood to refer to Christ. That historical background likely informed the Framers' understanding of the First Amendment.
>
> . . . .
>
> The original understanding of the type of "religion" that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred "monotheistic" religions Justice Scalia has embraced in his *McCreary County* opinion.[128]

The Framers are also too narrow, Justice Stevens continues, in that their original intentions "would also leave us with an unincorporated constitutional provision—in other words, one that limits only the *federal* establishment of 'a national religion.'"[129] He seems to admit agreement with Justice Thomas's interpretation that the Framers were primarily concerned with federalism when they adopted the Establishment Clause. But such a finding, Justice Stevens claims, would "eviscerate the heat of the Establishment Clause. It would replace Jefferson's 'wall of separation' with a perverse wall of exclusion—Christians inside, non-Christians out."[130]

Justices Souter and Stevens do not go so far as to say that the Founders' narrowness means that they are simply irrelevant. Rather, they suggest that the Court must now "deriv[e] from the [Establishment] Clause's text and history the broad principles that remain valid today."[131] Justice Stevens attributes to Joseph Story—and by association the Framers—the idea that states

127. *Id.* at 2745.
128. *Van Orden*, 125 S. Ct. at 2885–86 (Stevens, J., dissenting).
129. *Id.* at 2887.
130. *Id.*
131. *Id.*

should not discriminate between Christian sects. That idea, he says, "has as its foundation the principle that government must remain neutral between valid systems of belief."[132] Justice Souter is careful not to attribute "neutrality" to the Framers directly, but he does say that "a sense of the past" points to it and that neutrality "is a prudent way of keeping sight of something the Framers of the First Amendment thought important."[133] Perhaps most importantly for Justice Souter, neutrality "responds to one of the major concerns that prompted adoption of the Religion Clauses," namely, "to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate."[134]

IV. EVALUATION

It is nearly impossible to decide who interpreted the Establishment Clause "correctly" without presupposing the answer in the selection of criteria for judgment. Nonetheless, we can point to accurate interpretation of history, unannounced alterations to precedent, and inconsistent or unstated standards for judgment. One's appreciation of these measures will likely dictate one's evaluation of who reaches the "right" result in the Ten Commandment cases.

A. *The Use and Abuse of the Framers*

Justice Souter's turn to the Founders in *McCreary County* is notable for the distance he acknowledges between his neutrality principle and the Framers' intentions. In a concurring opinion to the 1992 school prayer case, *Lee v. Weisman*,[135] and in a dissenting opinion to the 1995 aid to religious student organizations case, *Rosenberger v. University of Virginia*,[136] Justice Souter strongly argued that his interpretation of the Establishment Clause was derived directly from the debates over the text of what became the First Amendment and from James Madison's articulation of the principle of religious freedom. In *McCreary County*, Justice Souter references the First Congress's

132. *Id.* at 2890.

133. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2743 (2005) (majority opinion).

134. *Id.* at 2742.

135. 505 U.S. 577, 612–16, 620–26 (1992) (Souter, J., concurring).

136. 515 U.S. 819, 868–76 (1995) (Souter, J., dissenting).

debates and Madison's writings, but, as mentioned above, he only suggests that neutrality reflects a "sense of the past," not that it captures the Founders' intentions.[137] He concludes that the Framers themselves were divided, implicitly suggesting that appeals to them cannot decisively determine Establishment Clause matters.

Justice Souter may have backpedaled because of the overwhelming evidence against his former use of the Founders. Justice Scalia's examples illustrate that many Framers did not believe that government musts be neutral between religion and irreligion because they thought that republican government requires morality and that morality depends upon religion. Such sentiments were written into the Massachusetts Constitution of 1780, which included a provision authorizing "the public worship of God" because "the happiness of a people and the good order and preservation of civil government, essentially depend upon piety, religion and morality."[138] Even Thomas Jefferson, probably the Founder most skeptical of the political utility of religion, rhetorically asked: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?"[139]

Not every Framer agreed that religion required public support to perform its political function. Madison doubted whether government aid to religion would be good either for religion or for the state. Justice Souter is thus correct to note that the Framers disagreed over the proper and prudential relationship between church and state,[140] but this disagreement does not mean that Madison shared Justice Souter's principle of neutrality. Madison championed the principle of religious non-cognizance.[141] Madison argued that man does not give up his inalienable right to religious liberty when entering into the social compact, and, therefore, that government cannot

137. *McCreary County,* 125 S. Ct. at 2742.

138. Mass. Const. of 1780, art. III, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 77–78 (Philip B. Kurland & Ralph Lerner eds., 1987).

139. Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII, *in* JEFFERSON: WRITINGS 289 (Merrill D. Peterson ed., 1984).

140. *See McCreary County*, 125 S. Ct. at 2744.

141. Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AMER. POL. SCI. REV. 17 (2003).

legitimately classify citizens on account of their religious belief or write into the text of laws explicitly religious criteria.[142] Madisonian non-cognizance differs from Justice Souter's neutrality in that Madison would allow religions and religious citizens to participate in public programs so long as they did so along non-religious terms. Justice Souter's neutrality, by contrast, necessarily requires government cognizance of religion in order to prevent governmental advancement of it.[143]

In the Ten Commandments cases, Madisonian non-cognizance likely would have reached the same results as Justice Souter's "neutrality," but the Madisonian approach would have approached the cases differently. It would not have inquired about advancement of religion but instead asked whether, in posting the Ten Commandments, the state become cognizant of religion as such. The answer in *Van Orden* would turn on the determination of whether Texas recognized only the Eagles' civic contribution when accepting and erecting their Ten Commandments monument or whether the state also—as is likely—recognized religion as such. *McCreary County* would seem to contain a much more straightforward example of impermissible government cognizance of religion. But if Madisonian non-cognizance would strike down either Ten Commandments display, it would not be for the same reasons Justice Souter sets forth.[144] Justice Souter is correct to note that the Framers disagreed on church and state, but he fails to offer persuasive evidence to demonstrate that any Framer championed his principle of neutrality. His appeal to Madison in particular, and the Founders in general, lacks historical support.

Even more problematic is the suggestion that the Framers' views should be discounted because they understood religion only in terms of Christianity. Justice Stevens's contention that the leading Framers understood the Constitution's protection of religious freedom as extending only to Christians[145] nakedly distorts the truth. He cites President Washington's letter to the Hebrew Congregation in Newport, Rhode Island, but he fails to

142. *Id.*

143. *Id.* at 29–31.

144. It also should be noted that no evidence exists to suggest that when the First Congress drafted the Establishment Clause, it understood itself to be adopting Madison's position of "non-cognizance."

145. Van Orden v. Perry, 125 S. Ct. 2854, 2885 (2005) (Stevens, J., dissenting).

quote from it.[146] If he had, he might have drawn attention to the following passage by President Washington:

> The citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy—a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support. . . . May the children of the stock of Abraham who dwell in this land continue to merit and enjoy the good will of the other inhabitants—while every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid.[147]

This unequivocal statement clearly illustrates that the father of our country thought that non-Christians were protected by the Constitution and equally possessed the constitutional and natural rights to religious liberty.

It is true that several states, though not all, at the time of founding limited office holding to believers or to Christians.[148] But this fact makes the Federal Constitution's prohibition of religious tests for office all the more remarkable. It reflects that those who drafted the Constitution of 1787 did not mean to limit its privileges or protections to Christians alone. One of the anti-Federalist criticisms of the un-amended Constitution, in fact, was that it would allow non-Protestants to hold federal office.[149] Madison and other ratification supporters did not deny

146. *Id.* at 2890.

147. George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *in* 6 PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 285 (Dorothy Twohig, ed., 1987).

148. For a chart of the various state religious tests for office at the time of the Founding see MURRAY DRY, CIVIL PEACE AND THE QUEST FOR TRUTH: THE FIRST AMENDMENT FREEDOMS IN POLITICAL PHILOSOPHY AND AMERICAN CONSTITUTIONALISM 37 (2004).

149. This criticism was especially ardent in New England. The Massachusetts anti-Federalist "Samuel," for example, objected to the absence of a religious test for federal office on the grounds that, "If civil rulers won't acknowledge God, he won't acknowledge them." *See Essay by Samuel*, in 4 THE COMPLETE ANTI-FEDERALIST 95–96 (Herbert Storing & Murray Dry eds., 1981). In the Massachusetts ratifying convention, one delegate "shuddered at the idea that Roman Catholics, Papists, and Pagans might be introduced

this charge, but rather rejected the anti-Federalist assumption that limiting office-holding to Christians was legitimate.[150] Equally important, Jefferson's Virginia Statute for Religious Freedom and Madison's "Memorial and Remonstrance"—the most philosophical documents from the founding era on religious freedom—explain and defend the right to religious freedom in terms of universal human rights that belong to individuals on account of their nature.[151] The Framers of the Constitution—following the arguments made by Washington, Jefferson, and Madison—did not limit political rights only to Christians because they believed the right to religious liberty was a natural right belonging to all individuals regardless of their creed or lack thereof. By attributing a false and narrowly sectarian view to the Framers, Justices Souter and Stevens unfairly and unjustly undermine one of the Founding Fathers' greatest achievements.

Equally dubious is Justice Souter's claim that neutrality furthers the Founders' "major concern . . . to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate."[152] As discussed above, many of the leading Founders thought that religion was good for republican government and, therefore, that the state could legitimately endorse and encourage religion. The Founders sought to end religious persecution and the civic strife it caused, but their strategy was different than the policy advanced by Justice Souter.

Broadly speaking, the Founders aimed to secure civil peace by limiting the ends and reach of government. The Framers sought to allow citizens of all religious beliefs—or lack thereof—to

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into office; and that Popery and the Inquisition may be established in America." *See* JONATHAN ELLIOTT, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (2d ed. 1988).

150. For discussion of Federalist Party responses defending the absence of religious tests for office, see Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article IV Religious Test Ban*, 38 J. CHURCH & STATE 273 (1996); DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT 204–09 (2000).

151. *See, e.g.*, DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: FROM SETTLEMENT THROUGH RECONSTRUCTION 83-85 (Melvin Urofsky ed., 1989) ("[Y]et we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind . . . ."); JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 298, 304 (Robert A. Rutland ed., 1973) ("Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature . . . .").

152. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2742 (2005).

deliberate over, contribute toward, and share the fruits of the public good on terms of equal citizenship. Justice Souter's neutrality breaks from the Framers' approach by limiting religious citizens' participation in politics and by removing from political consideration those issues that might cause division along religious lines. Stated differently, Justice Souter would remove a particular kind of strife and a particular kind of disagreement from public deliberation even if that deliberation pertained to the legitimate ends of government. His approach is directly opposite from the one articulated in *Federalist No. 10.* Aware that religion was one of the primary causes of faction, Madison explicitly rejects the idea of removing the causes of disagreement by limiting the liberty that gave it birth.[153] Madison's solution is to open political participation to all and thereby allow citizens of different interests and religions to check-and-balance one another.[154] Madison's approach allows religious disagreement and channels it through the normal political process. Justice Souter, by contrast, would remove disagreement along religious lines from the political process by restraining the participation of religious citizens in public life.

Justice Scalia's approach to the Establishment Clause is more in line with some of the Framers' intentions, but it too is not without problems. Justice Scalia demonstrates that leading Founders such as George Washington clearly would not have accepted Justices Souter's and Stevens's neutrality doctrine.[155] The various historical examples he cites reveal that many of the Founders believed in government endorsement of religion because they thought religion a necessary support to republican government. Not all the Founders, however, embraced this position. Madison, in particular, did not, a point insufficiently addressed by Justice Scalia. Justice Souter's contention that the Framers disagreed about the proper relationship between church and state may not support his own neutrality doctrine, but it does suggest that Justice Scalia is selective in his appeal to the Founders.

Justice Scalia's response is to minimize Madison's relevance,[156] and while this approach is not altogether incorrect, it elides the

153. *See* THE FEDERALIST NO. 10 (James Madison).
154. *Id.*
155. *See McCreary County*, 125 S. Ct. at 2748–50 (Scalia, J., dissenting).
156. *Id.* at 2754 (calling Madison's "Memorial and Remonstrance" "irrelevant").

deeper problem with his appeal to history. The fact that the Framers disagreed about the proper relationship between church and state necessarily means that the application of any one of their principles to modern church-state jurisprudence is bound to be partial. Justice Scalia adopts the "Washingtonian" approach to church and state.[157] This approach may be philosophically sound, sensibly prudent, and compatible with most of the nation's traditions, but it cannot be said to completely capture the Framers' thought simply or even to reflect the original meaning of the Establishment Clause.

Justice Thomas is the only Justice who has offered an interpretation that appreciates the diversity of the Founders' disagreement about church and state and what that diversity implies about the Establishment Clause's original meaning. Because they disagreed, the Founders agreed to live with disagreement—that is, they agreed to keep matters pertaining to religious establishments at the state level. The Establishment Clause was drafted to recognize explicitly that religious establishments were the exclusive jurisdiction of the states.[158] A jurisprudence faithful to this original meaning would require the dis-incorporation of the Establishment Clause, something that no Justice other than Justice Thomas seems willing to consider.

As a compromise, Justice Thomas suggests that either the Establishment Clause or the Free Exercise Clause may be understood to prohibit religious establishments, precisely and historically defined, at all levels of government. This interpretation fails to apply the historical meaning or purpose of the Establishment Clause and is contrary to the beliefs of those Framers who thought a mild religious establishment was compatible with religious free exercise.[159] Nevertheless, Justice Thomas's approach captures one of the Framers' core constitutional values: the protection of religious liberty through the prohibition of religious coercion. Despite their

157. For an elaboration of the "Washingtonian" approach to church and state, see Vincent Phillip Muñoz, *George Washington on Religious Liberty*, 65 REV. POL. 11 (2003).

158. For a defense of the federalist interpretation of the original meaning of the Establishment Clause, see Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. (forthcoming 2006).

159. The Massachusetts Constitution of 1780, which contained both provisions allowing for a kind of religious establishment and the protection of religious free exercise, is representative of this understanding.

disagreements, the leading Founding Fathers agreed that the coercion of religious belief and practice violated the right to religious liberty.[160] Justice Thomas's approach is most consistent with the thought and practice of the Founding Fathers, although he recognizes that it is not an exact application of the First Amendment's original meaning.

The manner in which Justice Thomas emphasizes the connection between establishment and coercion also avoids Justice Scalia's unfortunate suggestion that the First Amendment offers a different level of protection for monotheists than it does for polytheists and atheists. Justice Scalia claims that, "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."[161] His use of the word "disregard" suggests that the groups mentioned are not protected by the Establishment Clause or that they are protected differently than monotheists. But this suggestion is inconsistent with Justice Scalia's own legal coercion approach to the text.[162] Presumably, under the legal coercion standard approach, all non-coercive public acknowledgments of religion—whether monotheistic, polytheistic, or atheistic—would be constitutional. Thus understood, the Establishment Clause would no more disregard polytheistic religious acknowledgements than it would monotheistic ones. America's tradition of non-denominational, monotheistic religious acknowledgements does not imply that only monotheistic acknowledgements are permissible today; rather, it indicates that many—if not most—of the men who wrote the Constitution did not think religious acknowledgements of any sort violated the First Amendment. The absence of a long American tradition of specifically Catholic or Jewish religious acknowledgements clearly does not indicate less Establishment Clause protection for these faiths, so Justice

160. *See, e.g.*, Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 5 THE FOUNDERS' CONSTITUTION 77 (P. Kurland & R. Lerner eds., 1987) ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ."); MADISON, *supra* note 151, at 299 ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . .").

161. *McCreary County*, 125 S. Ct. at 2753.

162. Lee v. Weisman, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting).

Scalia's singling out of polytheists, believers in unconcerned deities, and atheists for "disregard" seems unnecessary. His suggestion of different levels of Establishment Clause protection for different religious beliefs is contrary to both the text and the best of America's traditions.

B. *Developments in Establishment Clause Doctrine*

While appeals to history take center stage in the Ten Commandments cases, other developments in Establishment Clause doctrine are also noteworthy.

1. The Resurgence of an Invigorated *Lemon* Test

As Justice Scalia notes,[163] the *Lemon* test had been harshly criticized by at least six Justices who heard *McCreary County* and *Van Orden*.[164] Although it had never been overturned and remained in use by lower courts, at the Supreme Court *Lemon* appeared all but dead.[165] With *McCreary County*, it returns in good standing.

Not only is *Lemon* back, it possesses renewed vigor and meaning. Justice Souter's opinions infuse *Lemon*'s secular purpose prong with an expansive sweep. *Lemon* required only that government action have "*a* secular . . . purpose."[166] In Justice Souter's hands, the mere assertion of a secular purpose is inadequate and the articulation of a secular purpose in addition to a religious purpose does not suffice. The Court, he notes, previously rejected claims of secularity that turned out to be a sham, implausible, or inadequate. From this he concludes that "in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a

163. *McCreary County*, 125 S. Ct. at 2750–51.

164. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring); Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (collecting criticism of *Lemon*); County of Allegheny v. ACLU, 492 U.S. 573, 655–56, 672–73 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). *See also* Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (disparaging "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

165. Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993).

166. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

predominantly religious one."[167] Subtly but significantly, Justice Souter adds the requirement that government action have a non-predominant secular purpose, a much more exacting standard of review than *Lemon*'s "*a* secular purpose."

Justice Souter also reads into *Lemon* an expansive approach to locating unconstitutional purposes. He interprets *Lemon* to require scrutiny of government actors and government actions. If either one or the other lacks a primarily secular purpose, the action fails his *Lemon* test.

In *McCreary County*, Justice Souter finds the county's third display—the Foundations of American Law and Government exhibit—unconstitutional because "reasonable observers have reasonable memories."[168] He criticizes the display for inadequately representing the foundations of American law and government, but gives no indication that the exhibit itself, if isolated and separated from its generating context, would have been unconstitutional. What violated the Constitution is the intention of those who erected the display. Justice Souter measures those intentions not only by statements made by the actors themselves, but primarily by the conclusions drawn by a reasonable observer aware of the context in which the policy arose.[169] To be precise, the content of the third display did not violate the Constitution, but rather the religious intentions—discerned by a reasonable, objective observer—exhibited in the context of the display generating history trespassed the Establishment Clause.

By contrast, in *Van Orden*, Justice Souter does not inquire into the motivations of those who accepted and erected the Eagles' monument in its placement on the capitol grounds.[170] Instead, he focuses on how the monument itself conveys a religious purpose. He emphasizes the inherently religious message of the Ten Commandments, the particular prominence given to the First Commandment, the capitalization of "AM" and "LORD," and the religious symbolism accompanying the text.[171] From

167. *McCreary County*, 125 S. Ct. at 2736.

168. *Id.* at 2737.

169. *Id.*

170. In a footnote, Justice Souter does suggest that "a religious purpose was evident on the part of the donating organization," but he does not suggest that the government adopted or was otherwise infected by this purpose when accepting or erecting the monument. Van Orden v. Perry, 125 S. Ct. 2854, 2892 n.1 (2005) (Souter, J., dissenting).

171. *Id.* at 2893.

these attributes, Justice Souter concludes that the monument conveys the message "that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it."[172] Whether or not this was the actual intention of the Texas legislators who accepted the Eagles' donation in 1962 does not appear in his analysis.

Violations of Justice Souter's secular purpose test, accordingly, can be committed both by legislators and by the effects of legislation. At first glance, Justice Souter appears only to collapse *Lemon*'s purpose and effects prongs into a single purpose test. But this is more than a slight alteration. As originally formulated, in addition to non-entanglement, government action had to: (1) have a secular purpose, and (2) have the primary effect of neither advancing nor inhibiting religion.[173] By collapsing *Lemon*'s effects prong into the secular purpose test, Justice Souter changes the effects test: having the *primary* effect of advancing religion becomes *merely* advancing religion; and having the primary effect of *inhibiting* religion drops out completely. By merging *Lemon*'s effects prong into secular purpose analysis, Justice Souter transforms *Lemon* from a two-way, purportedly neutral standard to a one-way test used only against government advancement of religion. This transformation allows him to avoid having to ask whether the Texas monument has the *primary* effect of advancing religion or if prohibiting its placement on the capitol grounds would have the primary effect of inhibiting religion. These lines of inquiry may have not altered Justice Souter's conclusions in the Texas case, but they would seem to complicate his argument considerably. His changes seem to significantly enhance *Lemon*'s distrust of religion in the public square.

Justice Stevens, similarly, adds a means test to his purpose analysis. He acknowledges that the Eagles were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "code of conduct or standards by which to govern their actions,"[174] and that such a purpose is "both admirable and unquestionably secular."[175] "But," Justice Stevens continues, "achieving that goal through biblical

172. *Id.*
173. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
174. *Van Orden*, 125 S. Ct. at 2878 (Stevens, J., dissenting).
175. *Id.*

teachings injects a religious purpose into an otherwise secular endeavor."[176] Under Justice Stevens's analysis, government action must contain a secular purpose and effectuate that purpose without employing explicitly religious means.

If pushed to its logical conclusion, Justice Stevens's reasoning would seem to eliminate all religious statements attributable to the state. Justice Stevens found fault with the Texas Ten Commandments monument because its text included the King James Version of the Sixth Commandment, "Thou shalt not kill," as opposed to the Jewish version, "You shall not murder." Such a preference, Justice Stevens states, "invariably places the State at the center of a serious sectarian dispute."[177] He holds: "The Establishment Clause, if nothing else, forbids government from 'specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'"[178] If the government cannot specify religious "details" upon which religious individuals are known to differ, then it would seem that it cannot specify anything with regard to religion. Surely every aspect of religion meets disagreement from someone. Even a statement seemingly as harmless as "God bless America" may be objectionable to those who do not believe in the existence of a god, those who do not believe in a providential god, and those who do not believe in a god that would bless America. Justice Stevens would make disagreement alone a measure of unconstitutionality, which is tantamount to a blanket prohibition of any and all religious statements made by the government.

2. The Recognition of Religion as Religion

In the 2004 Pledge of Allegiance Case, *Elk Grove School District v. Newdow*, Chief Justice Rehnquist argued that "under God" was constitutionally permissible because the Pledge was patriotic.[179] His argument seemed to suggest that the Pledge, even with "under God," was not religious. Justice O'Connor, similarly, voted to uphold "under God" on the grounds that it was merely

176. *Id.*
177. *Id.* at 2880.
178. *Id.* (citing Lee v. Weisman, 505 U.S. 577, 641 (1992)).
179. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring).

"ceremonial deism" and therefore not worship or prayerful.[180] Some critics contended that Chief Justice Rehnquist and Justice O'Connor eliminated religion from an obviously religious phrase and thereby treated religion without due seriousness.[181] Neither Justice attempted such a maneuver with the Ten Commandments; both avoided the argument that posting the Commandments is constitutional because they are merely historical or that they lack serious religious meaning. Chief Justice Rehnquist emphasized their religious nature, stating, "Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain."[182] Justice O'Connor voted to strike down all the displays in question because she thought that a reasonable observer would perceive them to endorse religion.

3. The End of the Endorsement Test?

The Ten Commandments cases not only mark the last Establishment Clause cases heard by Justice O'Connor, they also could mark the end of her endorsement test as an independent standard for Establishment Clause jurisprudence. Justices Scalia and Thomas ignore her approach in their opinions, which is consistent with their known disagreement with it. Justice Kennedy, likewise, has long been a critic of the endorsement test. Justice Souter, meanwhile, absorbs the endorsement test approach within his neutrality version of the *Lemon* test. When the government fails to advance a secular purpose in its action, Justice Souter says it then impermissibly "sends the . . . 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."[183] Justice Souter would require the Court's inquiry as to the government's purported secular purpose rather than whether an action endorses religion.[184] He thereby shifts endorsement from an independent test to enforce the Establishment Clause to a goal that the First Amendment seeks to achieve, effectively

180. *Id.* at 37 (O'Connor, J., concurring).
181. Vincent Phillip Muñoz, *One Nation, Under God?*, 5:3 CLAREMONT REV. BOOKS 30 (2005).
182. *Van Orden*, 125 S. Ct. at 2863.
183. McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2733 (2005).
184. *Id.* at 2732–33.

eliminating the test employed by Justice O'Connor. Justices Breyer and Stevens, similarly, do not ground their opinions on endorsement reasoning. If Chief Justice Roberts or Justice Alito eschew the test, Justice O'Connor's approach may accompany her into retirement.

C. *The Future of Religious Display Jurisprudence*

Justice O'Connor's retirement and Chief Justice Rehnquist's death also raise doubt about the lasting impact of *McCreary County* and *Van Orden*. Justice Breyer temporarily assumed possession of the swing vote in religious display cases, and with Justice Breyer's ascendancy it appeared that old religious displays would be grandfathered in and new religious displays—at least if they proved divisive—would be struck down. Although perhaps politically understandable, Justice Breyer's standard necessarily included fundamental jurisprudential weaknesses. Under it, the exact same action could be constitutional and unconstitutional depending on when it occurred. Moreover, since the level of divisiveness over any particular display could change over time, the same display could be constitutional at one time and unconstitutional at another. A display could remain non-controversial for years, and thus presumably be constitutional; then—say, because of a change in demographics or a change in political or religious opinions—become contentious and thus become unconstitutionally divisive. Additionally, if divisiveness alone is the measure for constitutional violation, those opposed to religious displays could seem to manufacture a constitutional violation by sheer fact of their vocal and continuous opposition and litigation. Furthermore, the potential removal of a public religious display itself can be divisive. It would seem that once a display becomes divisive, *both* its continued existence and its removal could violate Justice Breyer's test. On top of these difficulties, Justice Breyer failed to articulate a standardized measure by which to assess the level of divisiveness and he failed to provide a standard by which to determine when divisiveness becomes unconstitutionally excessive. Instead he lamely appealed to his "legal judgment"[185] without providing an objective rationale to explain how that judgment was reached given the facts at issue.

185. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring).

The numerous analytical problems with Justice Breyer's approach, of course, do not mean that it will necessarily be eschewed by one of the Court's new Justices. Both Justices seem to be in a position to direct future religious display jurisprudence. The Court's remaining seven Justices stand in a 4-3 deadlock over the basic purpose of the Establishment Clause. Justices Souter, Stevens, Ginsburg, and Breyer see the prevention of civic divisiveness along religious lines as a core purpose of the Establishment Clause. They interpret it, accordingly, to require strict governmental neutrality toward religion, which means that the state cannot aid, endorse, or promote one religion over others or aid, endorse, or promote religion in general over irreligion. Justices Scalia, Thomas, and Kennedy, by contrast, see the purpose of the Establishment Clause as protection of an individual's religious liberty by preventing religious coercion. They would allow varying degrees of aid, endorsement, and promotion of religion in general and, in some cases, to specific religions so long as that aid does not involve governmental coercion of religious belief, practice, or participation.

Either Chief Justice Roberts or Justice Alito could provide the fifth vote for Justice Souter's neutrality approach or Justice Breyer's "old is okay, new is not" standard for religious displays. Such an outcome would seem unlikely, however, given that President George W. Bush professed preference for Justices like Scalia and Thomas and that from their confirmation hearings both Chief Justice Roberts and Justice Alito would seem to sit closer to Justices Scalia and Thomas than to Justices Souter, Stevens, or Breyer.

Chief Justice Roberts and Justice Alito will more likely vote together with Justices Scalia, Thomas, and Kennedy to form a new majority. In that five-member voting block, neither Justice Scalia nor Justice Thomas would be the controlling member as each stands to the right of Justice Kennedy. If Justice Kennedy controls the fifth vote, religious display cases will most likely be adjudicated according to the psychological coercion approach he delineated in *Lee v. Weisman*.[186] Under that approach, the state may not place individuals, and especially public school students, in a position of having to participate in or protest

186. 505 U.S. 577 (1992).

against a religious exercise.[187] The permissibility of Ten Commandments displays in public schools would depend on the degree to which Justice Kennedy's reasonable observer finds them to indirectly coerce students to participate in a religious exercise. Outside of the public school setting, passive religious displays such as Christmas nativity scenes would likely pass constitutional muster and probably be decided along the lines of Justice Kennedy's opinion in *County of Allegheny v. ACLU*. In that case, Justice Kennedy voted to uphold a crèche—a representation of the nativity of Jesus—displayed alone inside Pittsburgh's county courthouse on the grounds that a "noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing [religious] symbols does not violate the Establishment Clause."[188] One should note that Justice Kennedy would control religious display jurisprudence only if Chief Justice Roberts and Justice Alito reason to the "right" right of him; if not, either of them could be the decisive fifth vote and individually or together control religious display jurisprudence.

Whatever the future holds, *McCreary County* and *Van Orden* reflect the deep divisions that existed at the end of the Rehnquist era. The Court's narrow 5-4 decisions reveal the Court's disagreement over the fundamental ends that the Establishment Clause aims to achieve and the means by which that end ought to be attained. The Court was divided over the utility of its previous decisions, the meaning of those decisions, and when those decisions should be cited to govern subsequent cases. When the Justices cited the Founders for guidance, they were divided over the meaning and scope of the lessons of history. Even those Justices who approach the Clause in the same way were divided over the application of their shared principles to specific cases. And with regard to the Ten Commandments, Justice Breyer himself divided his votes over what the prevention of division requires.

The Ten Commandments cases thus left Establishment Clause jurisprudence in the same place as Justice Roy Moore's granite monument: in limbo, up for grabs, and seeking a more solid foundation on which to be placed.

187. *Id.* at 593.

188. County of Allegheny v. ACLU, 492 U.S. 573, 662 (1989) (Kennedy, J., dissenting in part and concurring in part).

APPENDIX 1

THIRD TEN COMMANDMENTS DISPLAY
"FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT"
MCCREARY COUNTY

APPENDIX 2

THIRD TEN COMMANDMENTS DISPLAY
"FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT"
PULASKI COUNTY

APPENDIX 3

TEN COMMANDMENTS MONUMENT

TEXAS STATE CAPITAL