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THE MONUMENT AND THE MESSAGE: PRAGMATISM AND PRINCIPLE IN ESTABLISHMENT CLAUSE TEN COMMANDMENTS LITIGATION

I. INTRODUCTION

Public displays of the Ten Commandments have been touchstones of Establishment Clause litigation ever since the Supreme Court ordered a public school to remove a plaque in 1980.[1] In response, attorneys, academics, and judges, viewing themselves as defenders of religious expression, have put forward arguments purporting to explain why the courts should allow such displays. The arguments have

1. *See* Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

generally centered on the historical importance of the Decalogue in either the development of law or American society. The point of the historical argument is to paint the Commandments as neutral documents, displayed with a valid secular purpose. If this is established, the display is constitutional under the Court's precedent and will be allowed to stand.[2] The success of the historical argument in the courts has been extremely (some would say notoriously) fact dependent, as the Supreme Court demonstrated in its divided (and divisive) 2005 decisions, *McCreary County v. ACLU* and *Van Orden v. Perry*.[3]

Opponents of Decalogue displays argue that the religious interests that want to see the Commandments displayed are being disingenuous in their legal arguments, disserving the very interests of religious expression they claim to defend. Specifically, the opponents suggest that reducing the Ten Commandments to historical artifacts practically extinguishes the meaning of the religious text. Justice Stevens made this point clearly in his *Van Orden* dissent:

> The message at issue . . . is fundamentally different from either a bland admonition to observe generally accepted rules of behavior or a general history lesson. The reason this message stands apart is that the Decalogue is a venerable religious text . . . . Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.[4]

Such criticisms[5] have gone largely unheeded by the Decalogue defenders, who generally are much more a part of mainstream evangelical Christianity than critics like Justice Stevens. But recently, in the well-publicized case *Glassroth v. Moore*,[6] a religious-liberty team defending a display of the Commandments specifically voiced the same concerns as Justice Stevens when deciding on their litigation strategy.[7] Moore's approach caused divisions in the religious liberty community, even before the case took a turn for the sensational when Moore refused to remove the monument.

This Comment's objective is not primarily to say why the Commandments are desirable to display, nor to frame a detailed legal case

2. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860, 875–76 (2005) (neutrality is "the touchstone" of Establishment Clause jurisprudence).

3. Van Orden v. Perry, 545 U.S. 677 (2005).

4. *Id.* at 716–17 (Stevens, J., dissenting).

5. Another incisive statement of the issue was made by Professor Laycock in 1981: "Those who take religion seriously have reason to be alarmed when public officials proclaim that crosses and Christmas carols have no religious significance, or that the Ten Commandments are a secular code." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1384 (1981).

6. Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff'd*, 335 F.3d 1282 (11th Cir. 2003).

7. *See* ROY S. MOORE WITH JOHN PERRY, SO HELP ME GOD: THE TEN COMMANDMENTS, JUDICIAL TYRANNY, AND THE BATTLE FOR RELIGIOUS FREEDOM 179–80 (2005).

as to how they can be defended. The inquiry is limited to the interplay of theology and law in the historical argument for the Commandments—are public displays of the Commandments trapped between theological indifference on the one hand, or legal failure on the other? With the modest belief that the legal practitioners should take note of the theological implications of their arguments,[8] and that the arguments should be informed by both the principle and the practical, we shall proceed: first, to examine the state of the court precedent; second, to consider the theological problems with the "historical" defense of the Commandments; and third, to suggest some routes which would avoid the theological problem.

II. The Monument or the Message

Titters of amusement were heard across the political landscape when the Court handed down two Ten Commandments decisions on the last day of its 2005–2006 term, one upholding and one striking down as unconstitutional the respective displays.[9] Whatever the public's perception of schizophrenia on the high court, the majority and plurality opinions were in harmony on at least one component of their analysis: both evaluated the historical nature of the monuments.[10] They just happened to take differing perspectives on details of the history.

A. McCreary: *Religion over History*

At issue in *McCreary* were displays on the "Foundations of Law" in two county courthouses in Kentucky, each featuring a framed copy of the Ten Commandments.[11] The majority opinion centered on whether the monument violated the "secular legislative purpose"[12] test from *Lemon v. Kurtzman*.[13] Basic to the inquiry was the historical nature of the Ten Commandments, for it was on this ground that the counties defended the displays.

The counties' "Foundations" displays at first featured a framed copy of an abbreviated King James Version of the Ten Commandments. After the suit was filed against the counties, the display was modified twice, each time adding more historical documents into the mix.[14]

8. *See generally* David A. Skeel, *The Unbearable Lightness of Christian Legal Scholarship*, 57 Emory L.J. 1471 (2008) (reviewing the history of Christian legal scholarship).

9. *See* Linda Greenhouse, *Justices Allow a Commandment Display, Bar Others: Context is Cited in the Divided Decisions*, N.Y. Times, June 28, 2005, at A1, A17.

10. *See* Van Orden v. Perry, 545 U.S. 677, 683, 687, 689–90; *id.* at 692 (Scalia, J. concurring); *id.* at 692 (Thomas, J. concurring); *id.* at 701 (Breyer, J. concurring in judgment).

11. McCreary County v. ACLU, 545 U.S. 844, 856 (2005).

12. *Id.* at 859 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

13. *Id.* at 867–74.

14. *Id.* at 851–57.

Obviously the counties' behavior looked very much like the creation of a sham secular purpose—a bad start from any perspective, and a significant factor for the Court in evaluating the counties' "historical, *ergo* secular, *ergo* constitutional" argument.

The tone was set by the Circuit decision, which the Supreme Court affirmed:

> The Circuit majority stressed that . . . displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry a 'secular message.' 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.'[15]

When the Court proceeded to its own analysis, it likewise found the historical documents to be insufficient to eradicate the "unmistakable" religious object of the exhibit.[16]

The Court considered the three versions of the display in order. The first display, with the Decalogue appearing "solo,"[17] was hardly taken seriously as historical: "This is not to deny that the Commandments have had influence on civil or secular law . . . . The point is simply that the original text viewed in its entirety is an unmistakably religious statement . . . ."[18]

The second display added some "American historical documents with theistic and Christian references" to the display.[19] The counties were now clearly trying to set the Commandments in a historical context, emphasizing the religious heritage of the United States as a whole and Kentucky in particular.[20] This was no help. Justice Souter, author of the majority opinion, noted that the "sole common element" binding together the Commandments and the historical documents in the display was the "highlighted references to God."[21] "The display's unstinting focus was on religious passages" and thus displayed an "impermissible" religious purpose.[22]

The counties changed tack a third time, with a revised display titled "Foundations of American Law and Government," in which the Commandments were accompanied by a collection of documents which expanded the theme far beyond "religious" history or heritage.[23] The additional documents included "the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Ban-

15. *Id.* at 857–58 (alteration in original) (citation omitted) (quoting McCreary County v. ACLU, 354 F.3d 438, 449, 451 (6th Cir. 2003)).
16. *Id.* at 872.
17. *Id.* at 868.
18. *Id.* at 869.
19. *Id.* at 869–70.
20. *Id.*
21. *Id.* at 870.
22. *Id.*
23. *Id.* at 870–73.

ner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice."[24] Not surprisingly, the Court viewed the change (effected by the counties after changing lawyers) and the additional documents as so much window dressing. There was no "clear theme that might prevail over evidence of the continuing religious object."[25] The Commandments had not been properly "integrated with other material so as to carry 'a secular message,'"[26] and the Court viewed the counties' primary purpose as consistently religious.[27] The historical documents approach had failed.

B. Van Orden: *History That Meets the Test*

The tables were turned in *Van Orden*, in which Chief Justice Rehnquist authored a plurality opinion that bypassed the *Lemon* test and centered solely on the historical nature of the Decalogue.[28] "As we explained in *Lynch v. Donnelly*," Rehnquist noted, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life . . . ."[29] Rehnquist then surveyed this history, referring to Washington's first thanksgiving proclamation[30] and reciting a string of cases in which the Court referred to America's religious heritage generally.[31] He noted the various Decalogue illustrations at the Supreme Court building and stated, "Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage."[32]

The key issue of course was whether the "profoundly sacred message"[33] that Justice Stevens objected to in his forceful dissent overshadowed the historical message of the Commandments. The concern was only briefly addressed in the plurality opinion:

> Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance . . . . But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate.[34]

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24. *Id.* at 856.
25. *Id.* at 872.
26. *Id.* at 857.
27. *Id.* at 870–73.
28. Van Orden v. Perry, 545 U.S. 677, 685–686 (2005).
29. *Id.* at 686 (citation omitted) (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984)).
30. *Id.* at 686–87.
31. *Id.* at 687–88.
32. *Id.* at 689.
33. *Id.* at 717 (Stevens, J., dissenting).
34. *Id.* at 690 (plurality opinion).

The final sentences of the opinion reiterate the point that the Decalogue monument was an acknowledgment of historical fact, not an impermissible, primarily religious expression by the Texas legislature:

> Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display . . . violates the Establishment Clause of the First Amendment.[35]

C. Glassroth v. Moore: *Acknowledging God, Not History*

Standing in stark contrast to the mainstream historical approach were the arguments put forward in defense of a Decalogue display in *Glassroth v. Moore*.[36] Roy Moore, chief justice of the Supreme Court of Alabama, had installed a two-and-a-half ton granite monument in the rotunda of the State Judicial Building. On top were the Ten Commandments; on the sides, historical quotations from American and legal history on the connection between God and law.[37]

In defending the display, Moore frequently emphasized the historical value of the Commandments in American and legal history.[38] What made the case unusual was that Moore steadfastly refused to make the argument that the display had a "secular, historical purpose."[39] Moore believed that the Commandments were primarily an acknowledgment of God, not a history lesson. As he stated in a speech when the monument was first unveiled, "You'll find no documents surrounding the Ten Commandments because they stand alone as an acknowledgement of that God that's contained in our Pledge, contained in our motto, and contained in our oath."[40]

Many erstwhile supporters of public Commandments displays cringed upon learning that Moore would not argue any secular purpose.[41] But to do so would be to compromise Moore's main goal in

35. *Id.* at 691–92.

36. Glassroth v. Moore, 229 F. Supp. 2d 1290, 1301 (M.D. Ala. 2002), *aff'd*, 335 F.3d 1282 (11th Cir. 2003).

37. *Glassroth*, 229 F. Supp. 2d at 1294–95, *Glassroth*, 335 F.3d at 1285–86; MOORE, *supra* note 7, at 140–42.

38. *See, e.g.*, *Glassroth*, 229 F. Supp. 2d at 1300, 1306–08.

39. *Id.* at 1301.

40. MOORE, *supra* note 7, at 147–48. This statement was used against Moore in *Glassroth*, 229 F. Supp. 2d at 1303.

41. *See, e.g.*, Ted Haggard, *Decalogue Debacle: What We Can Learn From a Monument Now Locked in an Alabama Closet*, CHRISTIANITY TODAY, April 2004, at 98 (supportive of public Commandments displays, but "*Moore* should have known that, as a public official, he should not favor one religion over another"). Others (not necessarily sympathetic) were simply flabbergasted at Moore's legal strategy. *See, e.g.*, Andrew Cohen, *The Legal Battle Over "Roy's Rock,"* CBSNEWS.COM, Aug. 29, 2003, http://www.cbsnews.com/stories/2003/08/29/news/opinion/courtwatch/main570895.shtml.

posting the Commandments: to demonstrate that the acknowledgment of God is not an "establishment of religion." His defense of the monument was a long shot effectively calling for the rejection of Supreme Court precedent. But to argue the case in order to meet the neutrality standard would be to concede the key issue from the outset, in Moore's view.

Not surprisingly, both the trial and appellate courts rejected Moore's arguments. The opinions are filled with expressions of surprise at the openness of Moore's religious message. They also indicated that the outcome might have been different if Moore had played the historical card right:

> [A]s the evidence in this case more than adequately reflected, the Ten Commandments have a secular aspect as well . . . . While the secular aspect of the Ten Commandments can be emphasized, this monument leaves no room for ambiguity about its religious appearance.[42]
>
> . . .
>
> This case is not as difficult as those in which the evidence reflected that the Ten Commandments display at issue had an arguably secular, historical purpose, for the evidence here does not even begin to support that conclusion . . . .[43]
>
> . . .
>
> The court appreciates that there are those who see a clear secular purpose in the Ten Commandments . . . . If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational purpose (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different case before it.[44]

None of this is surprising. Yet the course taken by Moore raises important issues for consideration. Are the courts' decisions upholding Ten Commandments displays really reducing them to ceremonial deisms, historical relics robbed of meaning by long repetition? Under the current precedent, may a government official who views the Commandments as merely historical documents—rather than the word of God—post the Decalogue, while a government official with strong religious beliefs may not? Are religious liberties litigators who attempt to meet the *Lemon* test really gaining anything in the way of meaningful involvement of religious expression in the public? And what are the theological implications of shoehorning the Decalogue into a proper *Lemon* test display? These tend to be uncomfortable issues

42. *Glassroth*, 229 F. Supp. 2d at 1300.
43. *Id.* at 1301.
44. *Id.* at 1318.

for the religious liberty litigator, yet recognizing and dealing with them is an essential task.

III. Ten Commandments as History Lesson

A. *The Neutrality Standard*

Neutrality is the paradigm in which Establishment Clause jurisprudence has operated for over half a century, ever since *Everson v. Board of Education*[45] was decided in 1947.[46] The main matter of debate has been how to implement neutrality. The *Lemon* test is undoubtedly the most familiar test the courts have used in evaluating the constitutionality of public religious expression: the expression must have a secular purpose, a secular effect, and must not create entanglement with religion.[47] It has been frequently criticized,[48] and alternate views abound, with varied influence on the cases.[49] Most influential has been the "endorsement test,"[50] championed by Justice O'Connor.[51] Most recent has been the historical approach, completely detached from *Lemon*, adopted by the *Van Orden* plurality.[52] (The *Van Orden* plurality relied in part on *Lynch v. Donnelly*, the somewhat enigmatical case "nominally applying"[53] *Lemon* and at the same time purporting to reject fixed tests,[54] which ended up relying substantially on a contextual-historical approach that could function

45. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

46. *See also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 216–17 (1963); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); McCreary County v. ACLU, 545 U.S. 844, 860 (2005).

47. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

48. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005); *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting) (noting that a majority of members of the then-current Court had criticized *Lemon*); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment); *Van Orden*, 545 U.S. at 692–93 (Thomas, J., concurring); Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment); Allegheny County v. ACLU, 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

49. *See* Marcia S. Alembik, Note, *The Future of the* Lemon *Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 Ga. L. Rev. 1171, 1180–88 (2006). *See also Van Orden*, 545 U.S. at 686.

50. Adopted in *Allegheny*, 492 U.S. at 597.

51. *Id.* at 624–25 (O'Connor, J., concurring in judgment); Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring in judgment). *See also* ACLU v. Schundler, 104 F.3d 1435, 1444–45 (3d Cir. 1997) (applying the endorsement test).

52. *Van Orden*, 545 U.S. at 685–86.

53. Douglas W. Kmiec et al., The American Constitutional Order: History, Cases, and Philosophy 192 (2d ed. 2004). *See Lynch*, 465 U.S. at 679 (citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)).

54. *Lynch*, 465 U.S. at 678.

without much reliance on *Lemon*.[55]) When the courts do apply *Lemon*, the test has been often modified. Sometimes the entanglement and effect prongs are merged together;[56] other cases have combined the purpose and effect prongs.[57] The common thread amidst this chaos, running through all of the post-*Everson* Establishment Clause jurisprudence, has been a professed commitment to neutrality.[58]

In analyzing the Ten Commandments cases, the *Lemon* test remains predominant. But for our purposes, it may be helpful to think in the broader terms of *neutrality* in general,[59] a philosophical neutrality in which the government supposedly abstains from aligning itself with one religious group over another. Within neutrality, we are including (1) the *Lemon* test; (2) the endorsement test; and (3) the ill-defined "historical test," as used in the *Van Orden* plurality opinion. Justice Thomas's coercion test[60] is not included in this neutrality category, for while it is presented as a method of neutrality analysis, it really does not operate in the same philosophical neutrality paradigm.[61] Within the neutrality framework, we wish to quickly look at the common arguments that are made to show that the Commandments do not violate the neutrality standard when posted on public grounds.

B. *Fitting the Commandments into the Neutrality Paradigm: The Legal Approach*

The common charge is that by posting the Commandments, the government takes sides with the Judeo-Christian scriptures over and against all other religions—thus, no neutrality.[62] In defense of the Commandments displays, it is usually argued that the defendant dis-

55. *See also* Glenn S. Gordon, Note, Lynch v. Donnelly: *Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185, 185 (1985); Joshua D. Zarrow, Comment, *Of Crosses and Creches: The Establishment Clause and Public Displays of Religious Symbols*, 35 AM. U. L. REV. 477, 479 (1986).

56. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 218, 232–33 (1997).

57. *See, e.g.*, Freethought Soc'y v. Chester County, 334 F.3d 247, 258–59 (3d Cir. 2003); Modrovich v. Allegheny County, 385 F.3d 397, 401–02 (3d Cir. 2004). *See also* Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609, 635 (2005).

58. *See, e.g.*, Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097, 1099–1101 (2006).

59. This should not to be confused with an explicit "neutrality test," as discussed in Alembik, *supra* note 49, at 1185–87, and adopted in Rosenberger v. Rector, 515 U.S. 819, 845–46 (1995). This test fits within the general "philosophical neutrality" classification scheme.

60. Distinct from Justice Kennedy's coercion test (introduced in Lee v. Weisman, 505 U.S. 577 (1992)). *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2003) (Thomas, J., concurring in judgment).

61. See discussion *infra*, Part IV.

62. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 708–09 (2005) (Stevens, J., dissenting). *See also* Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001); Adland v. Russ, 307 F.3d 471, 486, 489 (6th Cir. 2002).

played the Commandments with one or another (or all) of several historical purposes in view.[63] The goal of the display is thus educational rather than religious, and the education is historical, not religious. If this is done effectively, the requirement of neutrality is met (whether this means satisfying the *Lemon* test, the endorsement test, or an historical analysis). The arguments identifiable from the cases can be roughly classed into three groups: legal history, American history, and the history of ethics. This Comment will examine these arguments in descending order of their success in the courts.

1. Legal History

First, the Commandments may be considered *neutral* when the Commandments are presented as a part of *legal history*. The frieze in the Supreme Court is the ultimate example,[64] showing Moses with the Ten Commandments in the midst of seventeen other lawgivers from world history, including Hammurabi and Confucius.[65] Numerous Decalogue decisions (and dissents) have included some reference to the Commandments' "influence[ ] on the development of Western legal thought."[66] The display in the Supreme Court has been cited frequently as the ideal integration of the Commandments into such a properly secular display.[67]

2. American History

The Commandments may be considered *neutral* when presented as a part of *American history*. This argument has been presented from two angles: (1) America's strong religious heritage in public and private life[68] or (2) a key influence on America's legal history.[69]

When the Commandments are displayed as representative of American social-religious heritage, the courts have split. In *Van Orden*, the

63. *See infra*, notes 64–80, and accompanying text.

64. *See* Dokupil, *supra* note 57, at 614, 649–50.

65. *See* Courtroom Friezes, North and South Walls, http://www.supremecourtus.gov/about/north&southwalls.pdf (last visited October 27, 2007).

66. *Van Orden*, 545 U.S. at 712, n.9 (2005) (Stevens, J., dissenting); *see, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 869 (2005); Books v. Elkhart County, 401 F.3d 857, 865–66 (7th Cir. 2005); Christian v. City of Grand Junction, No. 01-D-685, 2001 U.S. Dist. LEXIS 25349, at *15–16 (D. Colo. June 26, 2001) (finding sufficient secular purpose under the *Lemon* test where the goal "in displaying the monument is not to endorse a religious message, but instead, to memorialize the rule of law"); Suhre v. Haywood County, 55 F. Supp. 2d 384, 385, 394 (W.D.N.C. 1999); State v. Freedom from Religion Found., 898 P.2d 1013, 1018, 1024 (Colo. 1995). An early case is *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (10th Cir. 1973).

67. *See, e.g.*, *McCreary County*, 545 U.S. at 874; *Van Orden*, 545 U.S. at 688; Lynch v. Donnelly, 465 U.S. 668, 677 (1984); Allegheny County v. ACLU, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part); *Adland*, 307 F.3d at 481; ACLU v. McCreary County, 354 F.3d 438, 449 (6th Cir. 2002). *See also* Dokupil, *supra* note 57, at 614, 649–50.

68. *See, e.g.*, *Van Orden*, 545 U.S. at 681, 691.

69. *See, e.g.*, *McCreary*, 545 U.S. at 856–57.

plurality found that this purpose was sufficiently neutral.[70] However, the dissent argued that the message conveyed to non-adherents is that of exclusion, placing the government behind one religious tradition (Judeo-Christianity, to the exclusion of all others).[71] Such an acknowledgment of American religious heritage is not neutral and hence impermissible.

Caution must also be exercised in arguing that the Commandments are a key component of American legal history. Despite the fact that the courts often strike down a display for failing to integrate the Commandments with the history on display, claims that the Commandments were influential on the Declaration of Independence or the Constitution have not been well received by the courts: as Justice Stevens wrote in his *Van Orden* dissent, courts have been wary of the "specific claim that the Ten Commandments played a significant role in the development of our Nation's foundational documents . . . . [A]t the very least the question is a matter of intense scholarly debate."[72] In other words, courts may not view the Commandments-as-legal-history favorably when they are presented in an American-specific context.[73] It is safer not to push beyond the general legal history category and stay within the limits of the Supreme Court's frieze.[74]

Distinguished from these first two American history arguments is the idea that the particular Commandments display at issue is *itself* a work of art, or historical artwork. In this case, there may be a legitimate secular purpose in preserving the display for the sake of art itself.[75] As one court noted, "Given our national interest in historical preservation, we believe we would set a dangerous precedent if we

70. *Van Orden*, 545 U.S. at 691–92. *See also* ACLU v. City of Plattsmouth, 419 F.3d 772, 776–79 (8th Cir. 2005); *Freedom from Religion Found.*, 898 P.2d at 1018, 1020–21. *See also Lynch*, 465 U.S. at 674–75 (showing the acknowledgement of God and religion throughout American history).

71. *Van Orden*, 545 U.S. at 718–19 (2005) (Stevens, J., dissenting). *See also Adland*, 307 F.3d at 486, 489; Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001).

72. *Van Orden*, 545 U.S. at 712, n.9 (2005) (Stevens, J., dissenting).

73. *See, e.g., McCreary*, 545 U.S. at 858, 872–73 (acknowledging the Commandments as influential legal documents, but rejecting argument that they directly influenced the Declaration of Independence). *See also* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1318 (M.D. Ala. 2002) (evidence established that the Commandments were a source of American secular law). *But see* Books v. Elkhart County, 401 F.3d 857, 864–66 (7th Cir. 2005) (finding secular purpose where county displayed Commandments for their importance for the Western legal tradition generally and the Declaration of Independence in particular); *Freedom from Religion Found., Inc.*, 898 P.2d at 1018, 1026.

74. *See* Dokupil, *supra* note 57, at 614, 649–50.

75. *See* Modrovich v. Allegheny County, 385 F.3d 397, 410–11 (3d Cir. 2004); Freethought Soc'y v. Chester County, 334 F.3d 247, 265–66 (3d Cir. 2003). *See also* Stephanie Francis Ward, *In With the Old, Out With the New: Courts Allow Ten Commandments Display When It's Historical, But Not When It's Recently Installed*, 2 ABA JOURNAL EREPORT 26 (July 3, 2003), *available at* 2 No. 26 ABAJEREP 1 (Westlaw).

were to hold that any relic containing a religious message should be removed . . . ."[76]

3. History of Ethics

Third, the Commandments may be considered neutral when the Commandments are presented for their historical contribution to ethics and philosophy generally. This is often mentioned separately in the cases.[77] Breyer's eccentric concurring opinion in *Van Orden* was at least in the mainstream in conveying this sentiment: "In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)."[78] The Court alluded to this in *Stone v. Graham* when it noted that the "Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[79] However, the Commandments generally are cited for their historic contribution to understanding "standards of social conduct," not for being the current embodiment of "proper standards."[80] Logically, then, the "universal morality" theme is just one more historical base for the Commandments to rest on.

C. *Fitting the Commandments into the Neutrality Paradigm: The Theological Problem*

It is appropriate to change gears here and turn from the cases to the theological concerns they raise. Does a public display of the Commandments as a non-religious document violate theological principles and offend religious sensibilities? Should it? From opposite ends of the ideological spectrum, Justice Stevens and Justice Roy Moore have agreed that the neutrality requirements effectively eliminate the religious element of the monument, or at least render it incidental to the

76. *Modrovich*, 385 F.3d at 410.

77. *See, e.g., Books*, 401 F.3d at 865–66; *Freedom from Religion Found., Inc.*, 898 P.2d at 1024.

78. Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in judgment).

79. Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam). *Compare* McCreary County v. ACLU, 545 U.S. 844, 853 (2005) (rejecting an attempt to display the Commandments as the foundation of Kentucky's civil and criminal laws), *with* ACLU v. Ashbrook, 375 F.3d 484, 491 (6th Cir., 2004) (stating that the Commandments could be used to teach in the classroom but the particular display was not posted with a valid secular purpose), Glassroth v. Moore, 229 F. Supp. 2d 1290, 1318 (M.D. Ala. 2002) (recognizing a secular purpose for the Commandments but rejecting the display at issue), Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001) (holding Ten Commandments posting not constitutional because of primarily religious purpose), *and* Edwards v. Aguillard, 482 U.S. 578, 593–94 (1987) (implying that teaching creationism with other theories of the origin of humankind was constitutionally acceptable).

80. Pushing those bounds, however, is *ACLU v. Board of Commissioners*, 444 F. Supp. 2d 805, 812 (N.D. Ohio 2006).

secular message. This is the outcome that Justice Stevens said, "def[ies] credibility and disserve[s] people of faith."[81]

Indeed, there are very good reasons to see a "secular" version of the Decalogue as troubling in light of just two of the most familiar sources in the Christian tradition: the Lord's Prayer and the Decalogue itself.

The Third Commandment[82] states, "Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain."[83] To take God's name in vain, many theologians have noted, is not limited to merely using it in a profane manner.[84] It applies to using God's name for a purpose irrespective of the honor accorded to His name.[85] As Calvin put it:

> There is a manifest *synecdoche* in this Commandment; for in order that God may procure for His name its due reverence, He forbids its being taken in vain . . . . Whence we infer on the other hand an affirmative commandment . . . . His name is to be reverently honoured . . . whenever mention of it is made.[86]

This emphasis is also familiar in Judaism: the fear of the Lord, being a combination of what Westerners typically think of as fear, reverence, and love, is basic in Jewish theology and practice.[87]

In Christian theology, this point is reinforced by the precepts underlying the Lord's prayer, "Hallowed be thy name."[88] Commenting on this passage, Augustine wrote:

> And this is prayed . . . not as if the name of God were not holy already, but that it may be held holy by men; i.e., that God may so become known to them, that they shall reckon nothing more holy, and which they are more afraid of offending . . . . And so there His

81. *Van Orden*, 545 U.S. at 717 (Stevens, J., dissenting).

82. For convenience, adopting the Protestant numbering system. *See* 3 CHARLES HODGE, SYSTEMATIC THEOLOGY 272–75 (photo. reprint 1975) (1872).

83. *Exodus* 20:7.

84. 2 C.F. KEIL & F. DELITZSCH, BIBLICAL COMMENTARY ON THE OLD TESTAMENT 118 (James Martin trans. 1949).

85. *See, e.g.*, 1 JOHN GILL, EXPOSITION OF THE OLD TESTAMENT 429 (1810) (stating that "in vain" refers to making "use of the name Lord or God . . . in a light and trifling way, without any shew of reverence of him, and affection to him"); KEIL & F. DELITZSCH, *supra* note 84, at 118 (noting that "vain" "denotes that which is waste and in disorder, hence that which is empty, vain, and nugatory, for which there is no occasion."); JOSEPH S. EXELL, THE PREACHER'S COMPLETE HOMILETIC COMMENTARY ON THE BOOK OF EXODUS 353 (n.d.) (God's name taken in vain "when it is not made use of to good purpose; that is, to God's honour").

86. 2 JOHN CALVIN, COMMENTARIES ON THE FOUR LAST BOOKS OF MOSES, ARRANGED IN THE FORM OF A HARMONY 408 (Charles William Bingham trans., 1853). *See also* 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, 333–34 (Henry Beveridge trans., 1989).

87. *See, e.g.*, HAYIM HALEVY DONIN, TO BE A JEW: A GUIDE TO JEWISH OBSERVANCE IN CONTEMPORARY LIFE 143 (1972).

88. *Matthew* 6:9. *See also Luke* 11:2.

> name is said to be holy, where He is named with veneration and the fear of offending Him.[89]

If our foremost duty when mentioning the name of God is giving Him honor, then clearly there will be trouble when the Commandments are displayed within the neutrality paradigm. When the Commandments are displayed as a secular document, the word and name of God are a secondary message at best or meaningless at worst.

IV. The Myth of Neutrality

But is the situation really so bad? Of course the Ten Commandments are religious, but they also have a secular significance, and the fact that they have secular significance does not extinguish the religious meaning. It seems quite plausible that you can display the Commandments for a secular purpose *and* a religious purpose and thereby get around the problem of reducing the Commandments to meaninglessness.[90] However, in practice, the broad neutrality requirement (as we are using the term) does tend to force the religious purpose into oblivion if the monument is to be upheld.[91]

A. *Purpose, Meaning, and the Reduction of the Commandments*

Meaning and purpose should be clearly distinguished. Although religious and secular meanings may coexist, it is rare that religious and secular purposes can, in the way the courts currently use the terms. To gain perspective, let's leave the Commandments for a moment and consider instead a public display on the history of law that features a copy of the Magna Carta. It includes the clause calling for the elimination of the "fish-weirs" in the Thames.[92] In the normal instance at least, we are displaying the Magna Carta for its historical significance in the development of Anglo-Saxon law, not because we today are concerned with the fish-weirs that were in the Thames in 1215. However, the fact that we are posting the Magna Carta, fish-weirs and all,

89. 6 St. Augustin, *Our Lord's Sermon on the Mount*, in 6 Nicene and Post-Nicene Fathers, First Series 40 (Philip Schaff ed., William Findlay trans., Wm. B. Eerdmans Publ'g Co. 1979) (1888). *See also* 1 John Calvin, Commentary on a Harmony of the Evangelists, Matthew, Mark, and Luke 318–319 (William Pringle trans., 1949); The Wycliffe Bible Commentary 939 (Charles F. Pfeiffer & Everett F. Harrison eds., 1962) ("the meaning [of the word *hallowed*] is, 'be held in reverence, treated as holy'"); 1 Albert Barnes, Notes on the New Testament: Explanatory and Practical 66 (Robert Frew ed. 1949) ("God's name is essentially holy; and the meaning of this petition is, 'Let thy name be celebrated, venerated, and *esteemed as holy* everywhere, and receive from all men proper honour.'").

90. *See* Van Orden v. Perry, 545 U.S. 677, 690 (2005).

91. *See* Dokupil, *supra* note 57, at 627–28. *See also* Herbert W. Titus, *Restoring the Rule of Law to the Religion Clauses of the First Amendment to the United States Constitution*, 5 Oak Brook C. J. L. & Gov't Pol'y 1, 51–53 (2006).

92. The "fish-weirs" or "kydells" included generally all obstacles to navigation of the Thames. *See* R.H. Helmholz, *Magna Carta and the* Ius Commune, 66 U. Chi. L. Rev. 297, 355–56 (1999).

for a reason quite beyond its face-value message hardly implies that the Magna Carta's statement about the "fish-weirs" is meaningless. It just means that we can display a written document for a reason apart from its *prima facie* literary meaning without taking away that meaning. So far, so good: by analogy, we can post the Commandments for their historical value without declaring their words meaningless. We may *acknowledge* the meaning. Yet the meaning of the text is also distinct from the *purpose* in posting the document. The purpose of posting the Magna Carta is its historical value in the development of Anglo-Saxon law.

But suppose that the public official posting the display actually believes, as well, that the government must enforce the removal of "fish-weirs" in some local river. The public official believes that the Magna Carta's *prima facie* literary meaning is relevant, perhaps obligatory, for us to act on today. Now the meaning of the document has become entwined with the purpose for which it was posted. This is the problem with the Commandments: generally, the people who care about the role the Commandments played in history—who care enough to post them in public—care precisely because they believe in the God the Commandments acknowledge. Under neutrality analysis, we may be able to acknowledge that the Commandments have religious meaning. But to take this next step and say, "I believe in, support, and adhere to that meaning," suddenly changes everything.

First, despite professing a "deference" to the professed purposes of the displayers, in practice, courts have not infrequently found the professed purpose to be a "sham" when the displayer's religious beliefs become known.[93] The display would thus fail the purpose prong of *Lemon*.[94] Second, the courts often employ a "reasonable person" standard to determine if the display has the prohibited effect.[95] This reasonable person is generally well informed of the relevant facts surrounding the display, and if this means that the observer knows of the displayer's religious intent, this may convert an otherwise historical display into an endorsement of religion (failing the "effect" prong of

93. *See* Dokupil, *supra* note 57, at 627–28. *See also* Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam); McCreary County v. ACLU, 545 U.S. 844, 864, 865 n.13 (2005) ("deference to legislatures" that "credits any valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment"); Adland v. Russ, 307 F.3d 471, 480 (6th Cir. 2002); Baker v. Adams County/Ohio Valley Sch. Bd., 86 F. App'x 104, 110 (6th Cir. 2004). *Compare* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (courts have a duty "to 'distinguis[h] a sham secular purpose from a sincere one'"), *with* Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (requiring courts to examine the stated purpose and ensure that the legislature omitted all sectarian endorsement).

94. *See generally* Dokupil, supra note 57 (discussing sham secular purposes throughout the history of Supreme Court Establishment Clause jurisprudence).

95. *See McCreary*, 545 U.S. at 866; Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring); Granzeier v. Middleton, 173 F.3d 568, 573 (6th Cir. 1999) (collecting cases).

Lemon).[96] Finally, though it may not effect entanglement,[97] it may send a message of exclusion to non-adherents,[98] thereby failing the endorsement test.[99]

To put this conundrum in somewhat different terms, you may display the Commandments for a *purpose* (such as their impact on legal history) that is distinct from their *meaning*. But this leaves open the question of whether your purpose also includes the promotion of the Commandment's *prima facie* message. To answer "Yes" means you support the theistic First Commandment, and courts generally find that this violates neutrality under one analysis or another.[100] But to answer "No" means you are displaying the Commandments without agreeing with them, which for the believer is a violation of the Third Commandment and the duty Scripture tells us we owe to God. It appears, then, that under current precedent, the Christian public official has a choice between constitutional impermissibility and theological impermissibility.

B. *Predominant Secular Purpose: Sacred and Secular Are Not Equals*

The situation looks even worse from a theological standpoint when the courts have looked for a *predominant* secular purpose in posting the Commandments, rather than just "*a* secular . . . purpose."[101] The *McCreary* Court spoke of the secular and religious purposes predominating over each other, with the implied requirement that "secular purpose 'predominate' over any purpose to advance religion."[102] This approach goes beyond the already-problematic *Lemon* requirements by rejecting the premise that, at least theoretically, religious and secular purposes may be of equal importance. The new "predominant" terminology requires that any religious message be secondary to the secular purpose. Little room exists for a devout Christian to post the Commandments in a manner acceptable to the Court, without at the same time violating his religious duty to honor God. In fact, the courts' current neutrality analyses present us with the somewhat

96. *See McCreary*, 545 U.S. at 866.

97. The entanglement prong of *Lemon* is not usually at issue in the Commandments cases. *See, e.g.*, Books v. Elkhart County, 401 F.3d 857, 859 n.1 (7th Cir. 2005); ACLU v. Rutherford County, 209 F. Supp. 2d 799, 805 n.6 (M.D. Tenn. 2002); ACLU v. Mercer County, 432 F.3d 624, 627 n.2 (6th Cir. 2005).

98. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); Allegheny County v. ACLU, 492 U.S. 573, 595 (1989).

99. *See* Adland v. Russ, 307 F.3d 471, 484–87 (6th Cir. 2002).

100. *See, e.g.*, Glassroth v. Moore, 335 F.3d 1282, 1296 (11th Cir. 2003) ("Chief Justice Moore testified candidly that his purpose . . . was to acknowledge the law and sovereignty of the God of the Holy Scriptures," and therefore violated the Establishment Clause).

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

102. McCreary County v. ACLU, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting). *See id.* at 865 (majority opinion).

anomalous possibility that a non-believer defendant who posted a Commandments display would be more successful in getting it upheld than would a believer.

C. *Ceremonial Deism: Commandments Without Meaning*

Third, and perhaps most disturbing, is the occasional use of the "ceremonial deism" analysis by the courts. Under this rationale, a religious expression is accepted only because it has lost its meaning.[103] Justice O'Connor gave a revealing discussion of ceremonial deism in the context of the Pledge of Allegiance, explaining that long use and historical ubiquity can make a theistic reference constitutionally acceptable because it has lost its religious meaning.[104] Justice O'Connor said of the Pledge, "Any religious freight the words may have been meant to carry originally has long since been lost."[105] Clearly, the possibility of having a Commandments monument upheld on similar grounds is distressing (more distressing than having it struck down) from a theological perspective.[106]

In sum, it appears that the courts, as they currently treat the issue, leave little room for those who wish to keep both the monument and the message in a public display. The root problem is not so much the specific tests, but rather the guiding philosophical presuppositions underlying them. "Neutrality," as the courts use the term, is not neutral. In practice, it is the absence of theism from the public sphere. Philosophers and theologians have argued that genuine philosophical neutrality has never been possible;[107] it is not surprising that the courts are unable to deliver on their promise of providing an absolutely neutral public sphere.

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103. *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091–96 (1996) (discussing several courts' analyses on ceremonial deism).

104. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37–43 (2003) (O'Connor, J., concurring in judgment). *See also* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (ceremonial deisms "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content").

105. *Newdow*, 542 U.S. at 41 (O'Connor, J., concurring in judgment).

106. Thus far, the Commandments have been found to fail to qualify as "ceremonial deisms." *See* ACLU v. Ashbrook, 375 F.3d 484, 495 (6th Cir. 2004); Freethought Soc'y v. Chester County, 334 F.3d 247, 264–65 (3d Cir. 2003).

107. *See generally* GREG L. BAHNSEN, ALWAYS READY: DIRECTIONS FOR DEFENDING THE FAITH 3–9 (Robert R. Booth ed., 1996) (arguing that Christians should not be neutral); GREG L. BAHNSEN, VAN TIL'S APOLOGETIC: READINGS AND ANALYSIS 101–02, 127–28, 145–54 (1998) [hereinafter BAHNSEN, VAN TIL] (discussing Van Til's beliefs regarding neutrality); ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEF IN THEORIES (rev. ed. 2005) (discussing the effect of religious beliefs on the development of theories).

V. Monument and Message: Acknowledging God in Public

If, as this Comment has argued, it is not theologically permissible for a committed Christian (or Jew) to post the Ten Commandments with the typical profession of secular, historical purpose, then the options available are:

(1) Do not post the Commandments as a government official; or
(2) Post the Commandments and forthrightly state all the purposes for which they are posted.

Our starting point has been that some people wish to post the Commandments when in government office, and given this, they wish to do so without violating their religious duty to honor God. This is not the place for an extended discussion of why believers may wish, or believe themselves to have a religious obligation, to acknowledge God *in public*. Suffice it to say that the option of not posting the Commandments is the position advocated by those who are generally critics of religion in the public sphere (Justice Stevens in his *Van Orden* dissent, for example).[108] This position appears to advocate "separation" of religion and government out of theological sensitivity to believers, as well as out of a desire to protect offended minorities. Behind the superficial appeal of this approach is the inconvenient fact that Christians have long recognized that the acknowledgment of God is a duty.[109] Psalm 2 poetically commands, "Be wise now therefore, O ye kings: be instructed, ye judges of the earth. Serve the Lord with fear, and rejoice with trembling. Kiss the Son . . . ."[110] Without belaboring the point, there is a strong tradition across denominational lines that the believer is to honor God in every station of life, including in the position of judge, mayor, or other civil magistrate. So option (1), not posting the Commandments at all, is not the one in which to look.

A. *A Principled Approach: Worth Trying?*

It appears that the only option left for a religious believer posting the Commandments—stating all the purposes for which the Decalogue is posted—is doomed under the current precedent. While there are alternate legal paths that offer hope, the Author freely concedes the obvious fact that trying a new legal argument would increase the difficulty of succeeding in Ten Commandments litigation. Despite this

108. *See* Van Orden v. Perry, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting).

109. Compare two strong statements of this duty, from the Protestant and Catholic traditions, respectively: 1 John Calvin, Commentary on the Book of Psalms 22–27 (James Anderson trans., photo. reprint 2005) (1845) [hereinafter Psalms] (commenting on the Protestant view of the individual's duty of acknowledgement), *and* Pope Leo XIII, *The Christian Constitution of States, Encyclical Letter Immortale Dei*, Nov. 1, 1885, *in* John A. Ryan & Moorhouse F.X. Millar, The State and the Church 1, 2–4 (1924) *available at* http://www.ewtn.com/library/encyc/l13sta.htm (stating the Catholic view of the individual's duty of acknowledgement).

110. *Psalms* 2:10–11; *see* 1 Calvin, Psalms, *supra* note 109, at 22–27.

fact, there are merits to arguing a principled position which may rely on a less-established legal theory.

This is obviously a choice between principle[111] and pragmatism.[112] From a Christian ethical perspective, the choice is clear: principle must control.[113] It would be ironic—and sad—to have the Decalogue, the epitome of moral absolutes, defended by arguments which ignore the principles in favor of pragmatism.

Beyond even the theological consideration, it is worth pointing out that to win a decision that reaches the right result on the wrong grounds—which compromises the principle—is really quite meaningless. It is rather like an attorney, hoping for school integration (in pre-*Brown v. Board of Education*[114] days), who takes the case of Johnny, an African-American who wishes to be admitted to a hypothetical White Elementary School. The well-intentioned attorney argues that the school board should allow Johnny into the school because he is "white," within the meaning of that term as established by prior case law. Maybe the attorney will get Johnny into White Elementary, but little has been accomplished; the racist presuppositions of segregation have not been disturbed. If public Commandments displays deserve legal defense, they should receive a defense that preserves their meaning.

B. *A Pragmatic Principled Approach: Reasons for Hope*

Up to this point, the Author has been pressing the antithesis between a theologically sound principle-based approach and a pragmatic results-oriented approach. Antithesis is necessary,[115] yet it often creates misunderstandings. While emphasizing the difference between the pragmatic and the principled approaches to legal defense of the Commandments, there is a danger of creating a false principle-pragmatism dichotomy.

The clarification that is necessary at this point is that principle is to control the course taken, but that one can be pragmatic in the way that one honors the principle. In other words, faithfulness to principle

111. Referring generally to an ethically absolutist approach. For an overview and discussion of the major classifications of Christian absolutism, see NORMAN L. GEISLER, CHRISTIAN ETHICS 79–132 (1989).

112. Referring generally to an ethical approach emphasizing expedience. *See id.* at 45.

113. *See generally id.* at 17–27 (contrasting different ethical and moral views with Christianity and explaining the Christian ethical duty to do what is right even if the correct result may not be reached). Those who would disagree, e.g., JOSEPH FLETCHER, SITUATION ETHICS: THE NEW MORALITY 36 (1966), are not representative of traditional, or mainstream, Christian ethics.

114. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding race-based segregation in public schools to be unconstitutional).

115. *See* BAHNSEN, VAN TIL, *supra* note 107, at 276–77 (discussing a Christian philosophy of antithesis).

does not mean that one must make a martyr of oneself. It is possible to force the antithesis while avoiding the dichotomy.

In adopting a pragmatic-principled approach, one may not be able to work entirely within the current court precedent. But on the other hand, one may not have to invent theories entirely new to the courts either. Without proposing an "ideal" test that the courts *ought* to use to decide Commandments cases, one may start by looking at ways of working with ideas already current in the courts that would avoid the theological problems.

The root problem in current Establishment Clause jurisprudence is the mythical ideal of neutrality. As this Comment has shown, the courts tend to view the neutrality requirement as violated whenever a government actor gives meaningful recognition to God—and such "neutrality" is quite discriminatory against meaningful religious expression. The goal of the religious-liberty litigator defending a Commandments display must be, then, to argue his case so as to bypass the absolute neutrality requirement. There are at least two ways this can be done. First, the "purpose" prong of the *Lemon* test, when separated from the neutrality goal, can actually be presented to the courts in a manner compatible with both the language of *Lemon* and theological concerns. That is, it may be possible to operate within the terms of the *Lemon* test while subtly shifting away from the neutrality paradigm. Second, it is always an option to work for an outright rejection of *Lemon* and the adoption of an alternate test. Justice Thomas's coercion test may fit the bill ideally, both for its straightforward application[116] and for the way in which it alters the courts' traditional and problematic neutrality standard.

C. *Remaking the Purpose Test*

The urge to reduce the religious aspect of a Decalogue display arises not so much from the language of *Lemon's* purpose test as it does from the neutrality presupposition. *Lemon* merely requires that a monument be erected for "a secular . . . purpose."[117]

First of all, it should be clarified that it is not necessary to *deny* secular purpose in honoring the principle of acknowledging God first and foremost. The courts generally use the term "secular purpose" to denominate a purpose related to education and to history.[118] "Secular" purpose does not, as the courts have used it, mean "godless" purpose. Rather, it indicates a purpose from a "secular" area of life:

116. This is a point acknowledged even by critics. *See, e.g.*, Colby, *supra* note 58, at 1101.

117. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

118. *Compare* Stone v. Graham, 449 U.S. 39, 42 (1980), *and* McCreary County v. ACLU, 545 U.S. 844, 854, 857–58, 871 (2005) (education as a secular purpose), *with* Van Orden v. Perry, 545 U.S. 677, 691 (2005), *and McCreary*, 545 U.S. at 871, 874 (history as secular purpose).

education in history is "secular," and education about the duty to God is "religious." This is unfortunate terminology.[119] Leading Christian intellectuals have decried the twentieth-century trend to divide life into the "secular" and the "sacred," a legacy of many factors, including notably the Fundamentalist withdrawal from the public sphere in the 1920s.[120] Christian faith applies to all of life.[121] History[122] and education[123] are not outside its ambit. Therefore, it is entirely valid for a Christian to post a monument with a purpose of educating the public and honoring history. This is theologically a "religious" act in the sense of being under God but is still what the courts would term "secular." Admittedly, no one enjoys such semantic tangles, but given the current court precedent, such a careful parsing of the terminology is necessary. So, there is nothing inherently wrong theologically in admitting to what the court calls "secular purpose." What is problematic is to claim that there is no purpose or meaning in the acknowledgment of God.

So, the religious-liberties litigator should not argue that the Commandments are ceremonial deisms, that they are religiously neutral, or that they are posted for *secular purpose alone.* A theologically self-conscious litigator may forthrightly state that they are a meaningful religious statement. A Christian defendant who has posted a Commandments display may admit to having the primary purpose of honoring God with the display, with a secondary secular purpose. If the courts uphold the monument, they will be departing from the judicial trend of looking for a "*predominant* secular purpose" but will not be departing from the terminology of *Lemon.* The key in this argument is to recognize the theological limits of the argument: God must be first; secular purpose is fine as long as it is used as shorthand for history and education, which the Christian recognizes to be under God anyway. Once these presuppositions are clearly established, the job of the litigators is to convince the court to stick with the original *Lemon* language. In the process, "neutrality," *qua* a theism-free public sphere, is bypassed. To all of this, a caveat should be added: working within the terminology of *Lemon* is an option that does not violate the Christian's duty to acknowledge God, but remaking a test originally forged in the neutrality paradigm is a minimal advance forward. This

119. *See* Titus, *supra* note 91, at 51–53.

120. *See generally* MARK A. NOLL, THE SCANDAL OF THE EVANGELICAL MIND 109–14 (1994) (discussing the withdrawal of clergymen from the educational arena).

121. *See generally* DAVID F. NAUGLE, WORLDVIEW: THE HISTORY OF A CONCEPT 4 (2002) (commenting on the recognition of Christianity as a total worldview).

122. *See, e.g.*, DAVID A. NOEBEL, UNDERSTANDING THE TIMES: THE RELIGIOUS WORLDVIEWS OF OUR DAY AND THE SEARCH FOR TRUTH 763–90 (1991); C. Gregg Singer, *The Problem of Historical Interpretation, in* FOUNDATIONS OF CHRISTIAN SCHOLARSHIP: ESSAYS IN THE VAN TIL PERSPECTIVE 53 (Gary North ed., 1976) [hereinafter FOUNDATIONS].

123. *See, e.g.*, William N. Blake, *Van Til's Vision for Education, in* FOUNDATIONS, *supra* note 122, at 103.

type of reworking is the least a theologically self-conscious religious-liberties litigator should settle for, but he should not stop there.[124] Some much more substantial change in Establishment Clause analysis is the ultimate goal.

D. *Neutrality Deflated*

Remaking *Lemon* is a partial solution; it allows the Christian public official to honor God with the monument, but it leaves the courts with a test that is far from ideal. Justice Scalia's concurrence in *Van Orden* suggests the correct goals: "I would prefer to . . . adopt[ ] an Establishment Clause jurisprudence that . . . [recognizes] that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."[125]

Fortunately for these purposes, the *Lemon* test is not the be-all, end-all of Establishment Clause jurisprudence, and other ways of analysis that are not entirely foreign to the courts offer promising alternatives. Justice Scalia's dissent in *McCreary* offers a history-focused analysis designed to allow for a genuine acknowledgment of God.[126] Unlike the regular "neutrality" history analysis, Scalia's approach is historical in the sense that it looks at the historic practice of sincerely acknowledging God (a practice accepted by the framers of the First Amendment) as indicative of the Amendment's meaning.[127]

While Scalia's approach is appealing to those of a conservative bent, it is less likely to win judicial acceptance than is Justice Thomas's coercion test.[128] The coercion test as Thomas offers it would also be comfortable with a meaningful religious acknowledgment in a Commandments display.[129] As Justice Thomas has argued, a display of the Commandments does not coerce people to look at them; if they do, it does not coerce them to venerate either the text or the principle the Commandments enunciate.[130] "The mere presence of the monu-

124. Among other things, the *Lemon* test is weighed down with the baggage of the theologically problematic and intellectually stifling sacred-secular dichotomy, discussed above.

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

126. McCreary County v. ACLU, 545 U.S. 844, 885–900 (2005) (Scalia, J., dissenting).

127. *Id.* at 885–94.

128. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52–53 (2003) (Thomas, J., concurring in judgment); *Van Orden*, 545 U.S. at 692–96 (Thomas, J., concurring). *See also* Vincent Phillip Munoz, THOU SHALT NOT POST THE TEN COMMANDMENTS? McCreary, Van Orden, *and the Future of Religious Display Cases*, 10 TEX. REV. LAW & POL. 357, 374–75, 388–89 (2006).

129. *See Van Orden*, 545 U.S. at 695–97 (Thomas, J., concurring).

130. *Id.* at 694. *See also* Richard F. Duncan, *Justice Thomas and the Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. 37, 46–47 (2007–2008) (citing *Van Orden*, 545 U.S. at 694).

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ment along his path involves no coercion and thus does not violate the Establishment Clause."[131]

Significantly, Thomas's approach ostensibly operates within the neutrality paradigm.[132] Neutrality, as this Comment discussed earlier, is problematic because it is a philosophical approach in which the government supposedly abstains from aligning itself with one religious group over another—a philosophically naive, theologically problematic approach that necessitated the reduction of the Commandments. However, Thomas's coercion test escapes this pitfall by effectively transforming "neutrality" into simple non-coercion. The trick is to allow non-coercion to *define* neutrality, rather than allowing itself to be defined *by* neutrality. If non-coercion can succeed as the definition of neutrality, as opposed to some mythical absolute philosophical neutrality, then the Christian public official has won a significant base of operations.

Justice Thomas's coercion approach has hopeful prospects on the Court itself. Justice Scalia has suggested an approach to coercion similar to Thomas's[133] and would be practically certain to support Thomas's approach in a decision. Thomas may also have an ally in Justice Kennedy. Kennedy has advocated a coercion test considerably broader than Thomas's[134] version, but has expressed similar views to those of Thomas on religious displays.[135] If Thomas, Scalia, and Kennedy would join in a Commandments decision based on non-coercion, the only question remaining is whether Chief Justice Roberts and Justice Alito would also join. If the widespread speculation regarding their conservative views is anywhere near accurate, it appears possible—indeed, hopeful—that a carefully presented coercion test argument would be adopted by the Supreme Court.[136]

VI. Conclusion

The neutrality paradigm has reigned supreme in the courts' Establishment Clause jurisprudence for over fifty years. It has resulted in many decisions that have generally removed meaningful acknowledgment of God from the public square, even when a display of an ostensibly religious document like the Decalogue is allowed to remain. The theological implications have gone unnoticed for too long; identifying and discussing this has been this Comment's first objective. The Au-

131. *Van Orden*, 545 U.S. at 694.

132. *See Newdow*, 542 U.S. at 53 (Thomas, J., concurring in judgment).

133. *See* Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); Munoz, *supra* note 128, at 373–74.

134. *See, e.g.*, *Lee*, 505 U.S. at 593–94 (extending coercion to include "psychological coercion"). *See also id.* at 632, 636–40 (Scalia, J., dissenting).

135. *See* Allegheny County v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., dissenting).

136. *See* Munoz, *supra* note 128, at 396–97.

thor does not pretend that the legal alternatives suggested here are a formula for immediate reception in the courts. But hopefully, what is proposed will provide plausible legal routes to explore, routes which are cognizant of and consistent with the theological implications of the Ten Commandments.

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