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## Curing a Monumental Error: The Presumptive Unconstitutionality of Ten Commandment Displays

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# OKLAHOMA LAW REVIEW

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## CURING A MONUMENTAL ERROR: THE PRESUMPTIVE UNCONSTITUTIONALITY OF TEN COMMANDMENTS DISPLAYS

PETER IRONS\*

### *Introduction*

I will argue in this essay that any permanent display of the Ten Commandments on public property is presumptively unconstitutional as a violation of the Establishment of Religion Clause of the First Amendment to the United States Constitution.<sup>1</sup> As a prefatory note, among the cases I will discuss is one from Haskell County, Oklahoma, which involved a Ten Commandments monument on the courthouse lawn of the county seat of Stigler.<sup>2</sup> In 2010, the U.S. Supreme Court declined to review an order of the U.S. Court of Appeals for

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1. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

2. *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009), *rev'g* 450 F. Supp. 2d 1273 (E.D. Okla. 2006), *reh'g denied en banc*, 574 F.3d 1235 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

the Tenth Circuit that the monument be removed; it was subsequently moved to nearby private property.<sup>3</sup>

I have divided this essay into five parts. Part I briefly reviews the Supreme Court's rulings on Establishment Clause cases—from *Everson v. Board of Education* in 1947 through more recent cases on prayers in public schools and Christmas-season displays of Nativity scenes and (in a bow to ecumenism) Jewish menorahs—and the various judicial “tests” that have been applied in such cases. Part II discusses the Court's decisions in three Ten Commandments cases: *Stone v. Graham*, decided in 1980, and the conflicting rulings in *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*, jointly argued and decided in 2005.

Part III subjects Justice Stephen Breyer's concurring opinion in *Van Orden* to critical scrutiny; he joined the majority to invalidate the courthouse display of the Ten Commandments in the *McCreary* case, but wrote separately (without joining the plurality opinion) in *Van Orden* to uphold a Decalogue monument on the Texas State Capitol grounds. Part IV examines the “confusion” resulting from Breyer's concurrence and its impact on lower-court judges who were forced, in subsequently decided cases, to determine whether a Ten Commandments display was more like *McCreary* or *Van Orden*, and the results those judges reached.

Part V discusses the case of *Green v. Haskell County Board of Commissioners*, in which a local resident challenged a Ten Commandments monument installed on the courthouse lawn in 2004 with the approval of the county commissioners.<sup>4</sup> A federal district judge upheld the display of the monument in 2006,<sup>5</sup> but a federal appellate panel reversed that decision in 2009.<sup>6</sup>

The County's request for en banc review was denied later that year by a six-to-six vote of the full appellate bench.<sup>7</sup> The county commissioners' lawyers petitioned the U.S. Supreme Court for certiorari, asserting the need to resolve a purported “circuit split” between the Tenth Circuit panel and those in differently decided cases,<sup>8</sup> but the Court denied the certiorari petition on March 1, 2010.<sup>9</sup>

In a brief Conclusion, I will issue a challenge to defenders of Decalogue displays in the form of questions and a “modest proposal” to replace the Haskell County monument with one that is purely secular and will urge the adoption, in

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3. 130 S. Ct. 1687; Rhett Morgan, *Stigler Monument Moves to New Home*, OKLAHOMAN (West), Mar. 18, 2010, at 22.

4. See 568 F.3d at 788.

5. See 450 F. Supp. 2d at 1296-97.

6. See 568 F.3d at 788, 809.

7. See 574 F.3d at 1235.

8. See Petition for Writ of Certiorari, *Haskell County Bd. of Comm'rs v. Green*, 130 S. Ct. 1687 (2010) (No. 09-531), 2009 WL 3614470.

9. See 130 S. Ct. 1687.

pending and future cases, of the rule that such displays are presumptively unconstitutional. Short of that, I argue that judges should apply the “endorsement” test, thus sparing federal judges and Supreme Court Justices the difficult task of deciding whether a challenged display is more like *McCreary* or *Van Orden*.

*I. Looking for Directions: A Brisk Hike Along the Establishment Clause Trail*

*A. Blazing the Trail: From Ratification to Incorporation*

Surprisingly, not until 1947 did the Supreme Court decide its first Establishment Clause case,<sup>10</sup> some 156 years after ratification of the First Amendment.<sup>11</sup> The reason for this lengthy delay requires a brief explanation of the so-called incorporation doctrine. By its terms, the First Amendment applies only to congressional enactments.<sup>12</sup> This presumably leaves state and local governments free to legislate on issues of religion, speech, press, assembly, and petition. And many state and local governments have done so in the past, often in ways that allowed punishment for supposedly harmful expressions of religious and political beliefs. Challenges to such laws on First Amendment grounds were uniformly rejected by federal judges until 1925,<sup>13</sup> when the Supreme Court wrote, in the case of *Gitlow v. New York*, “[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”<sup>14</sup>

This “incorporation” of the Free Speech and Free Press Clauses into the Due Process Clause of the Fourteenth Amendment allowed federal judicial review of state and local laws challenged as First Amendment violations and was followed in 1940 by a similar incorporation of the Free Exercise of Religion Clause in *Cantwell v. Connecticut*.<sup>15</sup> In that case, the Supreme Court struck down a state

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10. *See* *Everson v. Bd. of Educ.* 330 U.S. 1 (1947).

11. *See* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 12 (1999) (observing that the Bill of Rights was ratified December 15, 1791).

12. *See* U.S. CONST. amend I (“Congress shall make no law respecting . . . .” (emphasis added)).

13. *See* PETER IRONS, *GOD ON TRIAL: DISPATCHES FROM AMERICA’S RELIGIOUS BATTLEFIELDS* 16-17 (2007).

14. 268 U.S. 652, 666 (1925). Ironically, the Court in *Gitlow* affirmed the conviction and prison sentence of a Communist activist who had distributed a “Manifesto” advocating a future—but not imminent—revolution against the capitalist system. *See id.* at 655-59, 672.

15. 310 U.S. 296 (1940).

law requiring official licensing for the public distribution of religious literature that was enforced only against Jehovah's Witnesses.<sup>16</sup>

*B. Starting at the Trailhead: The Everson Case and the "Neutrality" Doctrine*

It was only a matter of time after the *Gitlow* and *Cantwell* rulings until the Supreme Court incorporated the Establishment Clause into the Fourteenth Amendment, applying it to state laws. This happened in 1947 in the case of *Everson v. Board of Education*.<sup>17</sup> At that time, the New Jersey township of Ewing had no high schools, either public or private, so high-school students attended public or Catholic parochial schools in the neighboring city of Trenton.<sup>18</sup>

Since the township also lacked school buses, students whose parents or friends did not drive them to school used public buses.<sup>19</sup> To cover the bus-fare costs, Ewing offered tax-funded subsidies to parents who requested them,<sup>20</sup> an average of \$40 per family and a yearly outlay of less than \$1000.<sup>21</sup>

Arch Everson, a taxpayer in the township, challenged the subsidies in state court, arguing that they violated the Establishment Clause.<sup>22</sup> After the New Jersey courts ruled against him, Everson sought review in the Supreme Court.<sup>23</sup> The resulting decision produced an odd split between the Justices. Writing for the majority in a five-to-four decision, Justice Hugo Black upheld the reimbursement program, analogizing the bus-fare subsidies to such taxpayer-funded "public safety" services as police and fire protection, although he conceded that the subsidies provided aid to parents with children in church-run schools and thus indirectly to the churches themselves.<sup>24</sup> The four *Everson* dissenters, in an opinion by Justice Wiley Rutledge, answered that the subsidies gave "aid and encouragement to religious instruction" in parochial schools.<sup>25</sup> In Rutledge's view, the purpose of the Establishment Clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."<sup>26</sup>

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16. *See id.* at 301-03; IRONS, *supra* note 13, at 18-19.

17. 330 U.S. 1 (1947).

18. *See id.* at 30 n.7 (Rutledge, J., dissenting).

19. *See id.* at 19-20 (Jackson, J., dissenting).

20. *See id.* at 3 (majority opinion).

21. *See id.* at 56 n.51 (Rutledge, J., dissenting); IRONS, *supra* note 13, at 21.

22. *See Everson*, 330 U.S. at 3-5 (majority opinion).

23. *See id.* at 4.

24. *See id.* at 3, 17-18.

25. *Id.* at 28, 45 (Rutledge, J., dissenting).

26. *Id.* at 31-32.

Nevertheless, and herein lies the enduring significance of the *Everson* case, not a single Justice took issue with Black's exposition—seemingly at odds with his approval of the bus-fare subsidy program—of the essential meaning of the Establishment Clause.<sup>27</sup> After a lengthy historical review of the persecution inflicted on religious dissenters by the established churches of England and the American colonies, and the revulsion of the First Amendment's framers from these practices, which included fines, imprisonment, torture, and even death, Black quoted the words of Thomas Jefferson.<sup>28</sup> In his famous letter in 1802 to the Baptists of Danbury, Connecticut, who had complained about being taxed to support the established Congregational Church, President Jefferson replied that the Establishment Clause was designed to erect "a wall of separation between church and State."<sup>29</sup> "That wall," Justice Black added, "must be kept high and impregnable."<sup>30</sup>

The most important sentence in Black's opinion affirmed that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."<sup>31</sup> Nor, he might have added, does it require the state to be their advocate. In my opinion, applying the "neutrality" doctrine to the Ten Commandments displays discussed below requires either their removal from public places or, at the least, the adoption of formal policies that allow, on a truly "viewpoint-neutral" basis, the equal display of sentiments by groups such as humanists or (heaven forbid!) even atheists.

### C. *Sticking to the Trail: The School-Prayer Cases*

The *Everson* decision evoked minimal public comment, either favorable or critical; apparently people saw little harm in subsidizing bus fares in New Jersey. Fifteen years later, however, the Court touched a live wire in American society by striking down a longstanding and widely followed practice of beginning school days with the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our

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27. *See id.* at 19 (Jackson, J., dissenting); *id.* at 31-32, 46-47 (Rudledge, J., dissenting).

28. *See id.* at 8-10, 16 (majority opinion).

29. Letter from Thomas Jefferson to Nehemiah Dodge et al., Comm. of the Danbury Baptist Ass'n of Conn. (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>; *see also Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

30. *Everson*, 330 U.S. at 18. Today's Religious Right activists—and historically even some Supreme Court Justices, *see, e.g., Engel v. Vitale*, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting)—make much of the fact that the words "separation of church and state" do not appear in the Constitution. Although this is true, Black's quotation from Jefferson's letter provides a precedential "gloss" on the Court's interpretation of the Establishment Clause, especially considering that *Everson* has not been overruled and remains good law.

31. *Everson*, 330 U.S. at 18 (emphasis added).

Country.”<sup>32</sup> This prayer had been adopted in the 1950s by the New York Regents, who control the state’s education system.<sup>33</sup> It would be hard to imagine a more innocuous prayer, but it offended Steven Engel and other parents in the Long Island suburb of New Hyde Park, who sued the school board and its president, William Vitale, alleging that the “Regents’ Prayer” violated the Establishment Clause.<sup>34</sup> Ruling in 1962, the Supreme Court invalidated this daily religious practice in *Engel v. Vitale*.<sup>35</sup> As he had in the *Everson* case, Justice Black wrote for the Court and again referenced Jefferson’s “wall of separation” for support.<sup>36</sup> Black stated that the Establishment Clause “must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>37</sup>

Although most Jewish and mainstream Protestant leaders applauded the *Engel* ruling,<sup>38</sup> more conservative prelates and pastors reacted with outrage.<sup>39</sup> Cardinal Francis Spellman of New York professed to be “shocked and frightened,”<sup>40</sup> while evangelist Billy Graham claimed that the decision marked “another step toward the secularization of the United States.”<sup>41</sup> George Andrews, Alabama Democratic representative to the U.S. House, complained that the Court had “put the Negroes in the schools and now they’ve driven God out.”<sup>42</sup> Seventy-five congressmen of both parties introduced bills to return prayer to classrooms through legislation or constitutional amendment.<sup>43</sup>

The Supreme Court struck down another devotional ritual in 1963, banishing mandatory recitations of the Lord’s Prayer and Bible verses in public-school classrooms.<sup>44</sup> This case began at the high school attended by Donna and Roger

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32. *Engel*, 370 U.S. at 422; see also Anthony Lewis, *Both Houses Get Bills to Lift Ban on School Prayer*, N.Y. TIMES, June 27, 1962, at 1 (reporting on Congressional reaction to the June 25 *Engel* decision); *Opinion of the Week: Prayers in School*, N.Y. TIMES, July 1, 1962, at 113 [hereinafter *Opinion: Prayers in School*] (collecting responses to the *Everson* ruling from various public figures).

33. *Engel*, 370 U.S. at 422-23.

34. *Id.*

35. *See id.*

36. *Id.* at 425.

37. *Id.*

38. *See Lewis, supra* note 32, at 20 (reporting support from the Synagogue Council of America and the Baptist Joint Committee on Public Affairs).

39. *See id.* (reporting disapproval by two Catholic cardinals, a Catholic bishop, and the National Council of the Churches of Christ in the U.S.A.).

40. *Opinion: Prayers in School, supra* note 32.

41. *Id.*

42. *Church and State*, N.Y. TIMES, July 1, 1962, at 105.

43. *See IRONS, supra* note 13, at 30.

44. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

Schempp in Abington Township, Pennsylvania, a suburb of Philadelphia.<sup>45</sup> Classes began every morning with a reading of ten verses from the Bible and recital of the Lord's Prayer, as required in all schools by state law.<sup>46</sup> The Schempp family belonged to the Unitarian Church, whose members reject the Christian Trinity and are not bound to any creed.<sup>47</sup> Writing for the Court in *School District of Abington Township v. Schempp*, Justice Tom Clark echoed Hugo Black: "In the relationship between man and religion, the State is firmly committed to a position of neutrality."<sup>48</sup> Arguments that Bible reading and prayer were only "minor encroachments on the First Amendment" did not convert Clark.<sup>49</sup> "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent," he replied.<sup>50</sup>

Once again, conservative pastors and politicians decried the ruling,<sup>51</sup> but their attempts to overturn it through constitutional amendment failed to gain the two-thirds majorities needed in both houses of Congress. I mention the critical reaction to the Court's first school-prayer rulings by conservative religious and political leaders because these same groups—and their followers—remain vociferous in defending Ten Commandments displays and denounce efforts to remove them as attacks on God and America's "religious heritage."

#### *D. Stopping for Lemonade: A Break on the Trail*

Three decades elapsed between the *Engel* and *Schempp* rulings and the Supreme Court's return to a case directly addressing school prayer.<sup>52</sup> During this hiatus, the Court decided an important case that crystallized the "neutrality" principle from the *Everson* case into a three-prong judicial "test" for laws challenged on Establishment Clause grounds.<sup>53</sup> In 1971, the Court struck down laws from Pennsylvania and Rhode Island that provided tax-funded subsidies to private schools—almost all Catholic—for textbooks and teacher salaries, even though the private schools affected ostensibly limited the use of these resources

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45. *See id.* at 206.

46. *See id.* at 205-07.

47. *See id.* at 206; IRONS, *supra* note 13, at 30.

48. *Schempp*, 374 U.S. at 226.

49. *Id.* at 225.

50. *Id.*

51. *See Billy Graham Voices Shock over Decision*, N.Y. TIMES, June 18, 1963, at 27; *Congress Reacts Mildly to Ban; Some Ask Amendments to Kill It*, N.Y. TIMES, June 18, 1963, at 27; George Dugan, *Churches Divided, With Most in Favor*, N.Y. TIMES, June 18, 1963, at 1; Fred M. Hechinger, *Wide Effect Due: Decision Will Require Change in Majority of State Systems*, N.Y. TIMES, June 18, 1963, at 1.

52. The Supreme Court decided *Schempp*, 374 U.S. 203, in 1963 and once again considered school prayer nearly thirty years later in *Lee v. Weisman*, 505 U.S. 577 (1992).

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



to “secular” instruction.<sup>54</sup> Writing for the Court in *Lemon v. Kurtzman*, Chief Justice Warren Burger devised what became known as the *Lemon* test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>55</sup> Laws that failed any one of the three prongs of the *Lemon* test would be held unconstitutional.<sup>56</sup> The vice of the Pennsylvania and Rhode Island laws, Burger reasoned, was that they “entangled” state officials in deciding how much—if any—religious content was provided by teachers and textbooks in religious-school classes.<sup>57</sup> Over the years since the *Lemon* decision, the “entanglement” prong has rarely been employed, while the “purpose” and “effect” prongs have been applied in dozens of cases, including the Ten Commandments cases discussed below.<sup>58</sup>

Thirty years after the *Engel* decision, and now wielding the *Lemon* test, the Supreme Court extended its ban on classroom prayers to graduation invocations, ruling in 1992 that clergy-delivered prayers at such events violate the Establishment Clause.<sup>59</sup> The case of *Lee v. Weisman* involved a middle school in Providence, Rhode Island.<sup>60</sup> Christian ministers had delivered sectarian prayers at the school’s graduations for years, but following complaints from the parents of a Jewish student, Deborah Weisman, school officials recruited a rabbi to offer the invocation, thinking that this would placate them.<sup>61</sup> But the Weismans filed a suit against the prayer practice itself, and the Supreme Court, in a narrow five-to-four decision, struck down the graduation prayers.<sup>62</sup> Writing for the majority, Justice Anthony Kennedy held that the Establishment Clause “forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.”<sup>63</sup> In his opinion, Kennedy utilized what became known as the “coercion” test, reasoning that students like Deborah Weisman felt “coerced” to stand with bowed heads during prayers to which they objected.<sup>64</sup> Kennedy believed that this imposed a burden on teenagers who were subjected to “peer

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54. *See id.* at 606-11.

55. *Id.* at 612-13 (citations omitted) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968), and quoting *Watz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

56. *See id.*

57. *See id.* at 615.

58. *See* discussion *infra* Part II.

59. *See Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992).

60. *See id.* at 581.

61. *See id.*; IRONS, *supra* note 13, at 40-41.

62. *See Lee*, 505 U.S. at 579, 599.

63. *Id.* at 596.

64. *See id.* at 592-98.

pressure” to join the invocation.<sup>65</sup> Justice Antonin Scalia responded for the dissenters and accused the majority of driving a judicial “bulldozer” over a hallowed American tradition of invoking God’s blessing on public events.<sup>66</sup>

The Court’s most recent school-prayer ruling illustrates its steadfastness in sticking to precedent and principle on this divisive issue. The case of *Santa Fe Independent School District v. Doe* involved the practice of delivering pregame prayers at high-school football games.<sup>67</sup> Santa Fe is a small Texas town, where the majority of people identify with the Southern Baptist denomination and where football games had traditionally opened with prayers delivered over the school’s public-address system by Baptist ministers.<sup>68</sup> After two sets of parents—one Mormon and one Catholic—filed suit to enjoin this and other “proselytizing practices” encouraged by school officials, the school board “resolved” the pregame prayer issue by conducting elections in which seniors would first choose whether a pregame “invocation” would be given at all, and if so, which fellow student would deliver that “invocation.”<sup>69</sup> The dissenting parents rejected this “popular choice” alternative and continued prosecuting the lawsuit in federal court; fearing harassment of their children, they were protected by the pseudonym “Doe” in the case.<sup>70</sup>

After lower-court judges ruled against the school district, the Supreme Court followed suit and struck down the pregame prayers.<sup>71</sup> Writing for the six-to-three majority in 2000,<sup>72</sup> Justice John Paul Stevens dismissed the district’s claim that the prayers constituted “private” speech, observing that “only those messages deemed ‘appropriate’ under the District’s policy [could] be delivered”<sup>73</sup> and that the “invocations [were] authorized by a government policy and [took] place on government property at government-sponsored school-related events.”<sup>74</sup> Chief Justice William Rehnquist issued a sharp dissent, joined by Justices Antonin Scalia and Clarence Thomas, accusing the majority of distorting precedent.<sup>75</sup> “But even more disturbing than its holding is the tone of the Court’s opinion,” he wrote.<sup>76</sup> “[I]t bristles with hostility to all things religious in public life.”<sup>77</sup>

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65. *Id.* at 593.

66. *See id.* at 631-32 (Scalia, J., dissenting).

67. *See* 530 U.S. 290, 294 (2000).

68. *See id.* at 294-95; IRONS, *supra* note 13, at 136-39.

69. *See Santa Fe*, 530 U.S. at 295-98.

70. *See id.* at 294, 299.

71. *See id.* at 299-301.

72. *Id.* at 293-94.

73. *Id.* at 304.

74. *Id.* at 302.

75. *Id.* at 318 (Rehnquist, C.J., dissenting).

76. *Id.*

77. *Id.*

*E. Straying from the Trail: Nativity Scenes, Menorahs, and “Christmas Clutter”*

A final pair of Establishment Clause rulings will set the stage for the Ten Commandments cases discussed below. Both cases involved challenges to Christmas-season displays on public property. Christmas, of course, is a holiday with both sacred and secular meaning. Christians celebrate the birth of Jesus, and even non-Christians cannot avoid exposure to such trappings of the holiday season as Nativity crèches. Such displays on private property do not offend the Constitution, but their placement on public property has offended some people enough to file lawsuits seeking their removal.

The first challenge to Nativity displays reached the Supreme Court in 1984.<sup>78</sup> For some forty years, city workers in Pawtucket, Rhode Island, had erected a city-owned crèche as part of a Christmas-season display in a downtown park.<sup>79</sup> Surrounding the crèche were such traditional items as candy-striped poles, a cutout figure of a teddy bear, a Santa’s sleigh, and a large banner that offered “Seasons Greetings” to all who viewed the display.<sup>80</sup> Ruling on a suit filed by local ACLU members, with supporting briefs from Jewish groups, the Supreme Court upheld the Pawtucket display by a five-to-four margin in *Lynch v. Donnelly*.<sup>81</sup>

Writing for the majority, Chief Justice Warren Burger conceded that “the crèche is identified with one religious faith,” but he shied from banning its display “at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places.”<sup>82</sup> Christmas, he implied, was so embedded in the nation’s heritage that it had become as much a secular as a religious holiday.<sup>83</sup> Although Burger cited both the *Everson* and *Lemon* cases,<sup>84</sup> the latter written by himself, he focused on the “context” of the crèche among its secular trappings in finding that “the display engender[ed] a friendly community spirit of goodwill” during the Christmas season.<sup>85</sup> Writing for the dissenters, Justice William Brennan noted that “the crèche retains a specifically Christian religious meaning”<sup>86</sup> and reminded the majority that the

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78. *See Lynch v. Donnelly*, 465 U.S. 668 (1984).

79. *Id.* at 671.

80. *Id.*

81. *See id.* at 670-71.

82. *Id.* at 685-86.

83. *See id.* at 685.

84. *See id.* at 672-73.

85. *Id.* at 685, 686.

86. *Id.* at 708 (Brennan, J., dissenting).

*Lemon* test remained “the fundamental tool of Establishment Clause analysis,”<sup>87</sup> arguing that the Pawtucket display violated all three prongs of the test.<sup>88</sup>

More significant than the majority and dissenting opinions in *Lynch*, however, was the concurring opinion of Justice Sandra Day O’Connor. Although she joined the majority to uphold the display, O’Connor wrote separately to offer a “clarification” of the *Lemon* test.<sup>89</sup> She proposed to focus the “purpose” prong on “whether government’s actual purpose is to endorse or disapprove of religion” and the “effect” prong on “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of *endorsement* or disapproval.”<sup>90</sup> O’Connor put her “endorsement” test in these words:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.<sup>91</sup>

Applying this test to the Pawtucket display, O’Connor reasoned that the city “did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions” by including a Nativity scene in its holiday display.<sup>92</sup>

The Court’s most recent foray into Christmas-season displays produced more shifting alignments among the Justices than coaches employ in football games. The primary reason for judicial discord in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, decided in 1989, was that the case involved two separate displays in downtown Pittsburgh, Pennsylvania.<sup>93</sup> One display, located in the rotunda of the county courthouse, consisted solely of an elaborate crèche topped by an angel holding a banner that proclaimed, “Gloria in Excelsis Deo.”<sup>94</sup>

The second display, outside the nearby City-County Building, featured an eighteen-foot Jewish menorah flanked by a forty-five-foot Christmas tree, along with a banner declaring the city’s “Salute to Liberty.”<sup>95</sup>

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87. *Id.* at 696 n.2.

88. *See id.* at 698-704.

89. *Id.* at 687 (O’Connor, J., concurring).

90. *Id.* at 690 (emphasis added).

91. *Id.* at 687-88.

92. *Id.* at 691.

93. *See* 492 U.S. 573, 578 (1989).

94. *Id.* at 579-80.

95. *See id.* at 581-82, 587.

Ruling on the County's appeal from Third Circuit rulings against both displays, the Supreme Court ordered the crèche removed but allowed the menorah to remain.<sup>96</sup> The difference seemed to be the Christmas tree, and the somewhat less sectarian nature of the menorah,<sup>97</sup> which is not a sacred symbol for most branches of Judaism. Candy canes and teddy bears might have saved the crèche in Pawtucket, but the placement of one as "the single element" of the courthouse display in Pittsburgh made its "religious meaning unmistakably clear" to Justice Harry Blackmun, who wrote for the five-Justice majority in *Allegheny*, with several Justices joining one or more parts of his opinion.<sup>98</sup> By contrast, in a separate opinion for six Justices, Blackmun said that the effect of "placing a menorah next to a Christmas tree is to create an 'overall holiday setting' that represents both Christmas and Chanukah—two holidays, not one."<sup>99</sup> Justice O'Connor again employed her "endorsement" test, which yielded different outcomes with regard to the crèche and the menorah.<sup>100</sup> O'Connor joined various parts of Blackmun's opinions, with three other Justices voting to strike down both displays and another four voting to uphold both.<sup>101</sup> Again, "context" mattered for O'Connor, who seemed satisfied with what I call "Christmas clutter" in deciding which displays met her Establishment Clause test.<sup>102</sup>

The eight Establishment Clause cases just discussed, which were selected from scores the Supreme Court has decided since 1947, have great bearing on the Ten Commandments cases discussed below. First, the Court's adoption of the "neutrality" principle in *Everson* provides, in my opinion, a touchstone for decisions in all religion cases, giving neither side an advantage in disputes over the proper role of religion in the public sphere. Second, the school-prayer cases were, in a sense, "easy" for the Court to decide, since public-school students form a "captive audience" in classrooms and even at football games, subject to peer pressure to conform and official "coercion" to participate in religious activities. Third, the Christmas-season display cases proved more difficult to decide, and produced more judicial discord, because they involved a holiday with both religious and secular meaning and a longstanding national "heritage" of celebrating this holiday. Whether permanent displays of the Ten Commandments in public places reflect a similar mixed "heritage" of acknowledging God, or instead serve the sectarian purpose of promoting obedience to his commands, remains a subject of continuing debate and division in American society.

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96. *See id.* at 588-89, 601-02, 620-21.

97. *See id.* at 614-21.

98. *See id.* at 598-99.

99. *Id.* at 614.

100. *See id.* at 626-27, 637 (O'Connor, J., concurring).

101. *See id.* at 577.

102. *See id.* at 626-27 (O'Connor, J., concurring).

## II. “I Am the Lord Thy God”: The Court and the Commandments

### A. *Inscribed in Stone: What Should Have Been—But Wasn’t—The Court’s Only Ten Commandments Decision*

The Supreme Court’s first Ten Commandments case, which the Court decided in 1980, was so “easy” for a majority of five Justices that it was decided in an unsigned, *per curiam* opinion, without benefit of briefs and oral argument.<sup>103</sup> In seven paragraphs, the Court’s opinion in *Stone v. Graham* struck down a Kentucky law that mandated the posting of the Decalogue on the walls of all the state’s public-school classrooms.<sup>104</sup> The statute provided that the documents should be paid for by private contributions, collected by the state treasurer, and that each copy should include, in “small print” after the last commandment, the following statement: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”<sup>105</sup>

Armed with the *Lemon* test, the *Stone* majority rejected the State’s claim, set forth in the State’s petition for certiorari, that this addendum to the Decalogue copies expressed a valid secular purpose for their classroom display. “The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature,” the majority held.<sup>106</sup> “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,” the Court continued, “and no legislative recitation of a supposed secular purpose can blind us to that fact.”<sup>107</sup> The Decalogue’s prohibition of murder, theft, adultery, and perjury could not conceal its primary concern with “the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day.”<sup>108</sup> The majority concluded that the statute violated the “purpose” prong of the *Lemon* test “and thus the Establishment Clause of the Constitution.”<sup>109</sup>

Chief Justice Warren Burger and three colleagues dissented from this summary disposal of the *Stone* case, but only Justice William Rehnquist issued a dissenting opinion.<sup>110</sup> Rehnquist made two points in his reply to the majority. He first argued that the Court should defer to the “secular purpose articulated by the

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103. *See Stone v. Graham*, 449 U.S. 39 (1980).

104. *See id.* at 39-40.

105. *Id.* at 39 n.1, 41 (quoting KY. REV. STAT. § 158.178 (1980)).

106. *Id.* at 41.

107. *Id.* (footnote omitted).

108. *Id.* at 41-42.

109. *Id.* at 43.

110. *See id.*

[state] legislature” and the decision of the State’s supreme court.<sup>111</sup> He then agreed with the State’s claim that “the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World,” dismissing the majority’s “emphasis on the religious nature of the first part of the Ten Commandments [as] beside the point.”<sup>112</sup>

The *Stone* case, incidentally, did not hinge on the supposed “impressionability” of students, as Justice Stephen Breyer mistakenly claimed in his *Van Orden* concurrence, which I will discuss below.<sup>113</sup> In my view, Supreme Court Justices and lower-court judges would have been spared much time and effort in later Decalogue cases had they heeded and followed the Supreme Court’s decision in the *Stone* case. But some of them didn’t, thus extending this essay.

#### *B. A Battle of Two Cousins: The McCreary Case*

McCreary County, Kentucky, is tucked into the Cumberland Mountains in the state’s southeastern corner.<sup>114</sup> It is small and poor, and its residents are overwhelmingly Republican in politics and Southern Baptist in religion.<sup>115</sup> The county seat, Whitley City, with a population of just over one thousand, is dominated by the red-brick county courthouse.<sup>116</sup> It is not the kind of place from which one would expect a major constitutional case to reach the Supreme Court and divide the Justices in their decisions.

Nevertheless, that legal journey began on September 14, 1999, when the county’s elected leader, Jimmie W. Greene, posted a copy of the Ten Commandments on the wall of the courthouse lobby at a ceremony attended by American Legion members and local pastors.<sup>117</sup> Greene, a lifelong Baptist, was “shocked” when he was sued by his own cousin, Louanne Walker,<sup>118</sup> who had been raised in the same Baptist church. “You know,” Walker said, “this is a small county, and I’d say most of the people here are in favor of having the Ten Commandments posted in the courthouse.”<sup>119</sup> “I hope they realize this is not a statement about the Ten Commandments. I’m not against the Ten Commandments. I’m just a firm believer in separation of church and state.”<sup>120</sup>

After the Kentucky ACLU filed suit against both McCreary County and neighboring Pulaski County, which had installed a similar Commandments

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111. *See id.* at 43-44 (Rehnquist, J., dissenting).

112. *Id.* at 45 & n.2.

113. *See Van Orden v. Perry*, 545 U.S. 677, 703 (2005); *see also* discussion *infra* Part III.A.

114. *See IRONS, supra* note 13, at 182.

115. *See id.* at 183-84.

116. *See id.* at 182.

117. *Id.* at 184.

118. *Id.* at 185-86.

119. *Id.* at 186

120. *Id.*

display in its courthouse, the case took an abrupt turn before it reached a judicial hearing.<sup>121</sup> The counties' lawyer, aware of the Supreme Court's ruling in *Stone v. Graham* against posting the Decalogue in Kentucky schools, advised his clients to expand their courthouse displays to include such documents as the national motto of "In God We Trust," a statement by Abraham Lincoln that "the Bible is the best gift God has ever given to man," and the Mayflower Compact.<sup>122</sup> This ploy, however, did not impress federal district judge Jennifer Coffman, named to the bench by President Bill Clinton.<sup>123</sup> After a hearing in April 2000, she issued a preliminary injunction ordering county officials to remove the new displays immediately and not erect any similar displays in the future.<sup>124</sup> "While a display of some of these documents may not have the effect of endorsing religion in another context," she wrote, "they collectively have the overwhelming effect of endorsing religion, in the context of [these] display[s]."<sup>125</sup> Coffman added that "the only unifying element among the documents is their reference to God, the Bible, or religion."<sup>126</sup>

This judicial defeat did not deter the county officials, who were determined to keep the Commandments in their courthouses. Advised by a new volunteer lawyer, Mathew Staver of the religious conservative legal group Liberty Counsel, they again revised the displays to surround the Decalogue with copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, and all four verses of "The Star-Spangled Banner."<sup>127</sup> A poster next to the exhibits identified the documents as "The Foundations of American Law and Government Display."<sup>128</sup> This tactic did not impress Judge Coffman, who ruled in June 2001 that the new displays were a "sham."<sup>129</sup> "[P]lacing [the Decalogue] among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement" of its religious message by county officials, she wrote.<sup>130</sup>

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121. See *ACLU of Ky. v. Pulaski County*, 96 F. Supp. 2d 691, 695 (E.D. Ky. 2000); *ACLU of Ky. v. McCreary County (McCreary I)*, 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000); IRONS, *supra* note 13, at 185, 187-88.

122. IRONS, *supra* note 13, at 187-88; see also *Pulaski*, 96 F. Supp. 2d at 695-96; *McCreary I*, 96 F. Supp. 2d at 684.

123. See IRONS, *supra* note 13, at 188-89.

124. See *Pulaski*, 96 F. Supp. 2d at 703; *McCreary I*, 96 F. Supp. 2d at 691.

125. *Pulaski* 96 F. Supp. 2d at 699; *McCreary I*, 96 F. Supp. 2d at 688.

126. *Pulaski*, 96 F. Supp. 2d at 699; *McCreary I*, 96 F. Supp. 2d at 688.

127. See IRONS, *supra* note 13, at 190-91; see also *ACLU of Ky. v. McCreary County (McCreary II)*, 145 F. Supp. 2d 845, 846-47 (E.D. Ky. 2001).

128. *McCreary II*, 145 F. Supp. 2d at 846.

129. See *id.* at 848-49, 850-51.

130. *Id.* at 851; see also IRONS, *supra* note 13, at 192.



Ruling on the counties' appeal from this decision in December 2003, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit sided with Judge Coffman in a split decision.<sup>131</sup> Writing for the majority, Judge Eric Clay quoted from the poster that explained the "Foundations" display: "The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."<sup>132</sup> Clay found nothing in the displays connecting the two documents, noting that Thomas Jefferson, the Declaration's primary author, did not believe in "the God of the Bible (and thus the Ten Commandments), but the God of deism."<sup>133</sup> The "patently religious purpose" behind the "Foundations" display, Clay concluded, violated the Establishment Clause.<sup>134</sup> In a biting dissent from this ruling, Judge James Ryan accused his colleagues of displaying "an outright hostility to religion in our nation's public life."<sup>135</sup> Posting the Decalogue "in the public square *acknowledges* religion, but does not *endorse* it," he wrote.<sup>136</sup>

*C. The "Homeless Lawyer" and the Van Orden Case*

The counties' petition for Supreme Court review of this adverse ruling crossed paths with another Ten Commandments case, this one from the Texas state capital of Austin.<sup>137</sup> Home to the University of Texas and the nation's sixteenth-largest city, Austin is far more affluent, educated, racially and ethnically diverse, and politically liberal than McCreary and Pulaski counties.<sup>138</sup> All they held in common was the fact that each had a Ten Commandments display that sparked litigation.<sup>139</sup>

Back in 1961, Texas officials authorized the Fraternal Order of Eagles, a national service organization, to install a Ten Commandments monument on the Texas State Capitol grounds.<sup>140</sup> This granite slab, six feet high and three-and-one-half feet wide, is headed by the words "I AM the LORD thy God" and includes carved inscriptions of two Stars of David and the Greek letters Chi and Rho, which are common Christian shorthand symbols for "Christ."<sup>141</sup> Also

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131. See *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 440, 462 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005).

132. *Id.* at 443.

133. *Id.* at 452.

134. See *id.* at 453-54.

135. *Id.* at 481 (Ryan, J., dissenting).

136. See *id.*

137. See *IRONS*, *supra* note 13, at 193 (reporting that the Supreme Court granted review for both cases on October 12, 2004, and set oral argument for March 2, 2005).

138. See *id.* at 193-95.

139. See *id.* at 195.

140. See *Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005) (plurality opinion).

141. See *id.* at 681; see also *id.* at 736 app., image 3 (Stevens, J., dissenting) (reprinting a visual

scattered around the Capitol grounds are seventeen monuments and twenty-one historical markers, celebrating such groups as the Texas Rangers, Confederate soldiers, pioneer women, and Texas cowboys.<sup>142</sup>

More than forty years passed between the installation of the Ten Commandments monument and a suit demanding its removal.<sup>143</sup> Thomas Van Orden filed suit in late 2001, naming Texas governor Rick Perry and other state officials as defendants.<sup>144</sup> A graduate of Southern Methodist University's law school and a Vietnam veteran, Van Orden had his law license suspended by the state bar in 1995 because he was failing to perform work for clients in his criminal-defense practice.<sup>145</sup> After a divorce and suffering from depression, Van Orden lived in a tent, but frequented the state law library, located a few hundred feet from the Capitol, passing the Decalogue monument on his way.<sup>146</sup> His research in the law library convinced him that the monument violated the Establishment Clause.<sup>147</sup>

Dubbed the "homeless lawyer" by the media after his suit attracted publicity,<sup>148</sup> Van Orden explained, "I didn't sue the Ten Commandments. . . . I didn't sue Christianity. I sued the state for putting a religious monument on Capitol grounds. It is a message of discrimination. Government has to remain neutral."<sup>149</sup> His case was assigned to federal district judge Harry Lee Hudspeth, who ruled for the State in an October 2002 opinion.<sup>150</sup> Applying the "purpose" and "effect" prongs of the *Lemon* test, Hudspeth cited a 1961 state legislative resolution commending the Eagles for their "efforts to reduce juvenile delinquency," supposedly the purpose for erecting the monument.<sup>151</sup> Presumably, young people who viewed it would heed its admonitions to worship God and avoid the crimes of murder, theft, adultery, and perjury.<sup>152</sup> The resolution, Hudspeth wrote, "ma[de] no reference to religion" and showed a "valid secular

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image of the monument).

142. *See id.* at 681 & n.1 (plurality opinion).

143. *Id.* at 682.

144. *See Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at \*1-2 (W.D. Tex. Oct. 2, 2002).

145. *See IRONS, supra* note 13, at 196 (noting that Van Orden's law license was under suspension or probation from 1995 until September 2003, when Van Orden decided not to return to the practice of law).

146. *See id.* at 195-97; *see also Van Orden*, 2002 WL 32737462, at 2.

147. *See IRONS, supra* note 13, at 196-97.

148. *Id.* at 198.

149. *Id.* at 197-98.

150. *See Van Orden*, 2002 WL 32737462.

151. *Id.* at \*3-4; *see also infra* note 359.

152. IRONS, *supra* note 13, at 197.

purpose” in allowing the monument’s erection.<sup>153</sup> Noting that the monument was only one of seventeen on the Capitol grounds, Hudspeth added that a “reasonable observer” would not “conclude that the State [was] seeking to advance, endorse or promote religion by permitting its display.”<sup>154</sup>

After hitching a ride to New Orleans with a law student, Van Orden argued his appeal from this decision before a three-judge panel of the Fifth Circuit Court of Appeals.<sup>155</sup> He knew that his chances were slim in this conservative circuit, remarking, “It’s like I’m appealing to the damn Southern Baptist Convention down there.”<sup>156</sup> Writing for all three panel members in November 2003, Judge Patrick Higginbotham proved Van Orden right, upholding Hudspeth’s ruling in terms very similar to those used by the district judge.<sup>157</sup> Applying the “purpose” and “effect” prongs of the *Lemon* test, as had Judge Clay in the *McCreary* case, Judge Higginbotham reached different conclusions.<sup>158</sup> There was nothing in the legislative record “or the events attending the monument’s installation,” he wrote, “to contradict the secular reasons” for placing the Commandments monument on the Capitol grounds to reflect the Eagles’ “concern about juvenile delinquency.”<sup>159</sup> Higginbotham reasoned that a “reasonable viewer” would look at the Capitol and the nearby Texas Supreme Court Building and recognize the monument’s message as “relevant to these law-giving instruments of State government.”<sup>160</sup>

#### *D. The Same Commandments, but Not the Same Outcome*

The Supreme Court often, but not invariably, grants review in cases that involve a “circuit split”—divergent rulings by federal appellate courts in cases that raise similar facts and legal issues—in order to resolve such conflicts and (hopefully) establish uniform standards to guide lower-court judges in future cases.<sup>161</sup> Confronted with such a split between the Fifth and Sixth Circuits in the

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153. See *Van Orden*, 2002 WL 32737462, at \*4-5.

154. *Id.* at \*5.

155. See IRONS, *supra* note 13, at 198.

156. *Id.*

157. Compare *Van Orden v. Perry*, 351 F.3d 173, 182 (5th Cir. 2003) (Judge Higginbotham’s opinion), with *Van Orden*, 2002 WL 32737462, at \*5 (Judge Hudspeth’s opinion).

158. Compare *Van Orden*, 351 F.3d at 180, 182 (finding that the Ten Commandments display had “a valid secular purpose” and that a reasonable viewer would not conclude that Texas was endorsing its religious message), with *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 458, 461 (6th Cir. 2003) (finding that the Ten Commandments display in Kentucky expressed a predominantly religious purpose and had the “impermissible effect of endorsing religion”).

159. *Van Orden*, 351 F.3d at 179.

160. *Id.* at 181.

161. See, e.g., *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 347 (2001) (“We granted certiorari to resolve a split among the Courts of Appeals on this question.” (internal citations

*Van Orden* and *McCreary* cases, the Court granted petitions for certiorari in both cases in October 2004, setting oral argument for both in March 2005.<sup>162</sup>

The Court did not, in fact, resolve the conflicting appellate rulings in the two Commandments cases. Rather, the Court's fractured *McCreary* and *Van Orden* decisions not only echoed the dueling opinions of the Fifth and Sixth Circuit panels—with equally heated rhetoric on both sides—but also left lower-court judges scratching their heads in puzzlement, best illustrated in *Green v. Haskell County Board of Commissioners* discussed below.<sup>163</sup>

Ruling on both the Kentucky and Texas cases on June 27, 2005, by separate majorities of five-to-four, the Court banished the Commandments from the *McCreary* and Pulaski county courthouses, but allowed the Decalogue monument to remain standing on the Capitol grounds in Austin.<sup>164</sup> Writing for the majority in *McCreary*, Justice David Souter—joined by Justices Ruth Bader Ginsburg, Stephen Breyer, John Paul Stevens, and Sandra Day O'Connor—looked to past cases, beginning with *Everson* in 1947, that collectively “mandate[d] governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>165</sup> That principle is violated “when the government’s ostensible object is to take sides,” Souter wrote.<sup>166</sup> It was clear to him that the counties had taken sides by initially posting, by itself, a religious text that rested its commands “on the sanction of the divinity proclaimed at the beginning of the text.”<sup>167</sup>

It was also clear to Souter that subsequent displays of more secular documents did not erase the clearly religious purpose of the first,<sup>168</sup> which exhibited “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.”<sup>169</sup> Souter dismissed the revised displays as a “litigating position” adopted by county officials who “were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.”<sup>170</sup> Rhetorically clearing his throat, Souter concluded that “[n]o reasonable observer could swallow the

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omitted)); *Bousley v. United States*, 523 U.S. 614, 618 (1998) (“We . . . granted certiorari to resolve a split among the Circuits . . .” (internal citations omitted)).

162. See IRONS, *supra* note 13, at 193.

163. See 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010); see also discussion *infra* Part V.

164. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005); *Van Orden v. Perry* 545 U.S. 677, 691-92 (2005).

165. See *McCreary*, 545 U.S. at 849, 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

166. *Id.* at 860.

167. *Id.* at 868.

168. See *id.* at 869-70.

169. *Id.* at 869.

170. *Id.* at 871, 873.

claim that the Counties had cast off the objective so unmistakable in the earlier displays.”<sup>171</sup> In other words, in this case, no amount of camouflage could hide the sectarian message of the Ten Commandments.

In a separate concurrence, Justice O’Connor dusted off her “endorsement” test, adding a few pointed words. “It is true that many Americans find the Commandments in accord with their personal beliefs,” she wrote,<sup>172</sup> tacitly acknowledging the overwhelming public support for their display in public places.<sup>173</sup> “But we do not count heads before enforcing the First Amendment,” she added.<sup>174</sup> The Constitution’s religion clauses, she concluded, “protect adherents of all religions, as well as those who believe in no religion at all.”<sup>175</sup>

Writing for the four dissenters in *McCreary*—including Chief Justice Rehnquist and Justices Anthony Kennedy and Clarence Thomas—Justice Antonin Scalia denounced as “demonstrably false [the] principle that the government cannot favor religion over irreligion.”<sup>176</sup> Scalia expressed his view that the Establishment Clause allows “disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists,” and later noted the “overwhelming majority of religious believers” who support religious practices and symbols in public places.<sup>177</sup> Scalia unabashedly counted heads and found a majority on the side of the Decalogue.<sup>178</sup>

Obviously, the Supreme Court also counts heads when its members vote on cases. The majority coalition in *McCreary* shifted to the other side in the *Van Orden* case, with Justice Breyer jumping over the “wall of separation” to cast the deciding vote to support the Texas monument, although he did not join the plurality opinion of Chief Justice Rehnquist.<sup>179</sup> Rehnquist’s opinion was brief

171. *Id.* at 872.

172. *Id.* at 884 (O’Connor, J., concurring).

173. See IRONS, *supra* note 13, at 208. Numerous polls indicate that roughly seventy percent of the general public support—or at least do not oppose—such displays. See, e.g., Albert L. Winseman, *Americans: Thou Shalt Not Remove the Ten Commandments*, GALLUP, Apr. 12, 2005, <http://www.gallup.com/poll/15817/americans-thou-shalt-remove-ten-commandments.aspx> (reporting polling results showing 76% of Americans in favor of allowing Texas to keep the monument at issue in *Van Orden*).

174. *McCreary*, 545 U.S. at 884 (O’Connor, J., concurring).

175. *Id.*

176. *Id.* at 893 (Scalia, J., dissenting).

177. *Id.* at 893, 900.

178. See *id.* at 894 (noting that “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic” and endorse the Ten Commandments as “divine prescriptions for a virtuous life”). Apparently, it did not occur to Scalia that Southern Baptists like Louanne Walker might object to being “disregarded” by the majority of her fellow Baptists in McCreary County. See *supra* text accompanying notes 118-20.

179. See *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the

but heated and was joined by Justices Kennedy, Scalia, and Thomas.<sup>180</sup> The Chief Justice conceded the “religious significance” of the Decalogue but rejected the premise that such significance should prohibit its public display.<sup>181</sup> “[A]cknowledgments of the role played by the Ten Commandments in our Nation’s heritage are common throughout America,” he wrote.<sup>182</sup> “We need only look within our own Courtroom,” Rehnquist stated, referring to a depiction of Moses holding tablets (inscribed in Hebrew) in a frieze that includes other historic law-givers.<sup>183</sup> “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause,” Rehnquist concluded.<sup>184</sup>

### III. Straddling the “Wall of Separation,” with No Place to Stand

#### A. “Context and Consequences”—A Critical Dissection of Justice Breyer’s Van Orden Concurrence

This essay would probably not have been written, and (more importantly) much subsequent litigation would have been avoided, had Justice Stephen Breyer not switched sides in the *McCreary* and *Van Orden* cases, joining the majority in the former and casting, through his concurring opinion, the decisive vote in the latter.<sup>185</sup> This switch raises an important and intriguing question: why did Breyer switch sides in these cases? A careful reading of his *Van Orden* concurrence (which I urge readers of this essay to do for themselves) reveals, at least to me, both the pretextual nature of his arguments in that opinion and the actual reason for his decision to uphold the Decalogue monument on the Texas State Capitol grounds.

In his *Van Orden* concurrence, Breyer conceded that this was a “difficult, borderline case.”<sup>186</sup> Looking for factors to distinguish it from *McCreary*, he found three that influenced his decision: context, secular purpose, and lack of divisiveness over time.

Five times in his concurrence, Breyer emphasized the importance of the “context” of the Texas monument.<sup>187</sup> Unlike the Kentucky display, in which the Ten Commandments initially stood alone on the courthouse wall and became

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judgment).

180. *See id.* at 680 (plurality opinion).

181. *Id.* at 690.

182. *Id.* at 688.

183. *Id.*

184. *Id.*

185. *See* *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 849 (2005); *Van Orden*, 545 U.S. at 680, 698 (Breyer, J., concurring in the judgment).

186. *Van Orden*, 545 U.S. at 700 (Breyer, J. concurring in the judgment).

187. *Id.* at 701-02.

surrounded only in later displays,<sup>188</sup> the Texas monolith was set aside “in a large park” that contained nearly forty other monuments and historical markers, none with religious meaning.<sup>189</sup> For Breyer, this “physical setting” provided “a strong, but not conclusive, indication that the Commandments’ text on this monument conveys a predominantly secular message” in a “context of history and moral ideas.”<sup>190</sup>

A second weakness in Breyer’s concurrence stems from his repeated reference to the supposedly “secular” nature of the Ten Commandments.<sup>191</sup> In fact, he contradicted himself in making this argument, since he had joined the *McCreary* opinion of Justice Souter, who labeled the Decalogue “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.”<sup>192</sup> Nonetheless, Breyer claimed in his *Van Orden* concurrence that the Decalogue “can convey . . . a secular moral message” concerning “proper standards of social conduct” and “a historic relation between those standards and the law.”<sup>193</sup>

A final distinguishing factor between the Kentucky and Texas cases lies in Justice Breyer’s repeated references in his *Van Orden* concurrence to the supposed community “divisiveness” or “social conflict” engendered by *McCreary* and lacking in *Van Orden*.<sup>194</sup> Citing the fact that forty years had passed between the Texas monument’s installation and Thomas Van Orden’s challenge to it as evidence that it was “unlikely to prove divisive” in Austin (although perhaps not elsewhere in Texas), Breyer revealed in his concurrence his real fear that the monument’s removal “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

188. See *McCreary*, 545 U.S. at 850; see also *supra* text accompanying notes 117-30.

189. See *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment).

190. *Id.* In fairness, it is difficult to fault Justice Breyer for this emphasis on the physical setting and “context” of the Texas monument, since that factor provided the basis for the Court’s decisions on the Nativity-scene and menorah displays in the *Lynch* and *Allegheny* cases. See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 598 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); see also discussion *supra* Part I.E.

191. See, e.g., *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment) (noting that “[i]n certain contexts, a display of . . . the Ten Commandments can convey . . . a secular moral message.”).

192. See *McCreary*, 545 U.S. at 869; see also *supra* text accompanying note 169.

193. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). I will discuss below the falsity of the supposed linkage between the religious and secular provisions of the Commandments as “a source of American law.” See discussion *infra* Part III.B. Suffice it to note here that Breyer, in my view, was simply grasping at straws in trying to conflate these differing components to justify the Decalogue’s display in Texas.

194. See *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment).

religiously based divisiveness that the Establishment Clause seeks to avoid.”<sup>195</sup> But if past and potential “divisiveness” were a proper factor in judicial decisions, the Supreme Court might not have rendered its *Brown v. Board of Education*<sup>196</sup> and *Roe v. Wade*<sup>197</sup> decisions, striking down school segregation and constitutionalizing abortion rights, respectively. In my view, by raising the “divisiveness” issue, Breyer was recoiling from the (probably unfounded) prospect of backhoes and cranes ripping out dozens of Ten Commandments monuments, provoking scenes of resistance by their supporters. In any event, such fears should not deter judges from performing their duties in construing the Constitution.

*B. Are the Ten Commandments A Source of American Law?*

In his *Van Orden* concurrence, Justice Breyer buttressed his claim that display of the Ten Commandments at the Texas State Capitol conveyed a “predominantly secular message” with the assertion that the “proper standards of social conduct” contained in the Decalogue reflect the “historic relation between those standards and the law.”<sup>198</sup> Similar statements have been made in the writings and legal briefs of the Decalogue’s defenders, including the *Van Orden* amicus brief of the United States, which Breyer cited,<sup>199</sup> asserting that “historians” have supported the view “that the Ten Commandments influenced the development of American law.”<sup>200</sup> However, neither Breyer nor the Justice Department brief named a single historian or cited any scholarly publication to support these assertions.<sup>201</sup> In fact, every reputable historian of American law (including professed Christians) has

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195. *Id.* at 704. Though *McCreary* involved a display of more recent vintage, it illustrates the kind of “divisiveness” Justice Breyer apparently feared—though even that case failed to inspire the kind of acrimony witnessed in conjunction with other Commandments cases. IRONS, *supra* note 13, at 187. Still, faced with a lawsuit asking for the removal of the Ten Commandments from the McCreary County courthouse, Jimmie Greene had vowed, “I’m not going to take them down. It’s going to take the big man in the black robe to tell me to take them down.” *Id.* But when the men and women of the Supreme Court upheld the lower courts’ orders for their removal, Greene surrendered his battle to put the Commandments back in the courthouse. *See id.* at 211.

196. 347 U.S. 483 (1954).

197. 410 U.S. 113 (1973).

198. *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment).

199. *Id.*

200. Brief for the United States as Amicus Curiae Supporting Respondents at 19-20, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 263790, at \*19-20 [hereinafter Amicus Brief for the United States], available at <http://www.lc.org/ten/briefs.htm>. This Liberty Counsel website includes links to all the Supreme Court documents in both the *McCreary* and *Van Orden* cases, including certiorari petitions, replies, briefs of parties and amicus groups, oral argument transcripts, and opinions.

201. *See Van Orden*, 545 U.S. at 698-705 (Breyer, J., concurring in the judgment); Amicus Brief for the United States, *supra* note 200, at 7-8.



rejected the idea that the Commandments provided any historical foundation for American law.<sup>202</sup>

The claim that the Commandments have provided a source of American law is simply false. This is not an insignificant or tangential issue in debates over the constitutionality of Decalogue displays. In every case decided thus far, the supposed “nexus between the Commandments and American law,” to quote the Justice Department’s brief in *Van Orden*, has been argued by their supporters.<sup>203</sup>

For example, as noted above, the “small print” at the bottom of the Kentucky classroom displays of the Commandments considered in *Stone v. Graham* made this statement: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”<sup>204</sup> Similarly, the governing bodies of McCreary and Pulaski counties adopted identical resolutions stating that the Commandments were “codified in Kentucky’s civil and criminal laws.”<sup>205</sup> The Supreme Court brief of the *McCreary* defendants asserted that the Supreme Court “has recognized the influence the Ten Commandments has had on our system of law and government.”<sup>206</sup> For authority, the brief cited the dissenting opinion of Justice Rehnquist in *Stone v. Graham*, as well as various other dissenting and concurring opinions—hardly dealing from a strong hand.<sup>207</sup>

If the Ten Commandments were, in fact, a source of American law, the burden should rest upon supporters of their public display to produce some evidence of this purported linkage. They have produced none beyond mere assertion. To the contrary, every reputable historian of American law has disputed any such linkage. Of course, the first, and best, place to look for such evidence is in the proceedings of the Constitutional Convention in 1787. As a historian, I have read every word of the accounts of that convention, which resulted in a Constitution that is “the supreme Law of the Land.”<sup>208</sup> There is not one mention of the Ten Commandments, or of the Bible, anywhere in James Madison’s almost verbatim notes of the convention’s debates.<sup>209</sup>

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202. See *infra* notes 214-24 and accompanying text.

203. Amicus Brief for the United States, *supra* note 200, at 20.

204. 449 U.S. 39, 40 (1980) (quoting KY. REV. STAT. § 158.178 (1980)); see also *supra* text accompanying note 105.

205. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 853 (2005).

206. Brief for Petitioners at 21, *McCreary*, 545 U.S. 844 (No. 03-1693), 2004 WL 2851009, at \*21.

207. See *id.* at 21 n.21.

208. U.S. CONST. art. VI, cl. 2.

209. See generally JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (bicentennial ed., W. W. Norton & Co. 1987) (1966); see also Brief Amicus Curiae of Legal Historians and Law Scholars on Behalf of Respondents at 20, *McCreary*, 545 U.S. 844 (No. 03-1693), 2005 WL 166586, at \*20 [hereinafter Amicus Brief of Legal Historians].

Nor is there any mention of the Commandments in the (admittedly much more fragmentary) reports of the state ratifying conventions, or in the *Federalist Papers*.<sup>210</sup> To be sure, some of the laws in the American colonies were based on biblical precepts, such as laws in the Massachusetts Bay Colony that punished such crimes as idolatry, blasphemy, and witchcraft with death penalties.<sup>211</sup> But such laws, even those that stayed on the books after the Constitution was ratified, have no legal force today. And the crimes of murder, adultery, theft, and perjury, forbidden by the Commandments, have more ancient roots than the Bible, stemming back to the Code of Hammurabi from the sixteenth century B.C. and the pre-biblical laws of ancient Greece and Rome.<sup>212</sup> These prohibitions have been a part of “virtually every culture” in the world.<sup>213</sup>

Other legal historians agree with me on these issues. Marci Hamilton of Cardozo Law School has written extensively on this issue, positioning herself as “a Christian, an American, and a scholar.”<sup>214</sup> She dismisses the argument that the Commandments form “the ground for much of our criminal law, and therefore constitute a legal and historical document—not a religious one” as “so weak it ought to be rejected out of hand.”<sup>215</sup> Hamilton notes that the first four Commandments, as well as the admonitions to honor one’s parents and not to covet one’s neighbor’s goods or wife, “simply *cannot* be enacted into law.”<sup>216</sup> In addition, a criminal prohibition against adultery, (as opposed to provisions designating the act as grounds for divorce in many states) “would likely be struck down as unconstitutional” by today’s Supreme Court.<sup>217</sup> That leaves only murder, theft, and perjury, which were crimes in most societies long before the Bible was written.<sup>218</sup>

Another noted legal historian, Paul Finkelman of Albany Law School, notes that it is even difficult to decide which of the several versions of the

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210. See Amicus Brief of Legal Historians, *supra* note 209, at 21 (citing JAMES MADISON ET AL., *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961) (1788)).

211. See IRONS, *supra* note 13, at 2-7.

212. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* 55 (1997).

213. Amicus Brief of Legal Historians, *supra* note 209, at 10 n.17.

214. See Marci Hamilton, *The Ten Commandments and American Law: Why Some Christians’ Claims to Legal Hegemony Are Not Consistent with the Historical Record*, FINDLAW, Sept. 11, 2003, <http://writ.news.findlaw.com/hamilton/20030911.html>.

215. Marci Hamilton, *The Ten Commandments in Court: Power and Its Abuse*, FINDLAW, Mar. 14, 2002, <http://writ.news.findlaw.com/hamilton/20020314.html>.

216. Hamilton, *supra* note 214.

217. *Id.*

218. See *id.* (observing that “the Ten Commandments echo some of the rules that appear in Hammurabi’s Code,” which was written “roughly one thousand years [before] the Ten Commandments appeared”).

Commandments is accurate, and that Catholics, Protestants and Jews have competing lists.<sup>219</sup> He concludes that

[m]onuments to the Ten Commandments . . . do not reflect an objective or accurate representation of the historical development of American law. Rarely have American lawmakers turned to the Commandments for guidance. . . . Rather than reflecting our legal heritage, to a great extent the Ten Commandments fly in the face of the evolution of American law, which has been towards secular freedoms and liberties and towards greater religious diversity. . . . Thus, there is no historical foundation for a claim that a monument or a plaque to the Ten Commandments, such as the ones at issue in the Kentucky and Texas cases, are rooted in our legal and political history.<sup>220</sup>

Finkelman agrees with Marci Hamilton that “[m]ost of the Commandments . . . could not be enacted into law and withstand a constitutional challenge.”<sup>221</sup>

Steven K. Green of Willamette University Law School, who wrote his Ph.D. history dissertation on this topic, prepared an amicus brief in *McCreary* that was signed by twenty-seven noted legal historians, a veritable “who’s who” of the field.<sup>222</sup> After an exhaustive review of all the available influences on the drafting of the Declaration of Independence and the Constitution, the brief notes that “the Ten Commandments and biblical law received nary a mention in the debates and publications surrounding the founding documents.”<sup>223</sup> The brief’s signers agreed that “the foundation of the law of the United States thus emanates from the nature of representative government—what Jefferson called ‘the consent of the governed’—and needs no external or divine authority for its support.”<sup>224</sup> I could easily list and quote from more scholars on this issue, but I think I have made my point.

Hardly anyone disputes that most of the Constitution’s drafters were Christians of various stripes, largely of heterodox views. But none, with the possible exception of James Wilson of Pennsylvania, subscribed to the biblical inerrancy doctrine of today’s Religious Right activists. This leads me to wonder

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219. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1488-92 (2005). Finkelman notes that the Bible lists “at least thirteen separate admonitions” in the “ten” commandments. *Id.* at 1488.

220. *Id.* at 1517.

221. *Id.* at 1518.

222. See Amicus Brief of Legal Historians, *supra* note 209, at app. A.

223. *Id.* at 20.

224. *Id.*

why Justice Breyer cited the unsupported and conclusory Justice Department brief in his *Van Orden* concurrence,<sup>225</sup> while apparently ignoring the well-supported brief of the nation's leading constitutional and legal historians. My own suspicion is that Breyer wanted to avoid the "social conflict" that he feared would follow a decision to remove the Decalogue monument from the Texas State Capitol grounds and simply closed his eyes to the relevant evidence in the case.<sup>226</sup>

#### *IV. Which Side of the Border? Ten Commandments Cases After Van Orden*

##### *A. Justice Breyer Splits the Circuits*

Justice Breyer's concurrence in *Van Orden* has created the unfortunate but easily foreseeable consequence of forcing lower-court judges to confront a difficult and "fact-intensive" question in deciding pending and future Ten Commandments cases: is this case more like *McCreary* or more like *Van Orden*?<sup>227</sup> This inquiry requires judges to examine a host of subsidiary questions. Was the display located inside or outside of a public building, or in a distant park? Was it standing alone or surrounded by other documents or monuments? Was it erected decades ago or recently? Was it initiated by public officials or private citizens? Was it paid for or maintained by public or private funds? Was its erection accompanied by religious comments from public officials, clergy members, or private citizens? How much time elapsed between its erection and a lawsuit challenging the display? In answering these questions, and deciding on which side of Breyer's "borderline" the answers fell, judges are literally compelled to use a tally sheet, ticking off which factors carry the most weight in reaching their decisions.

It is hardly surprising that federal appellate courts, given the conflicting decisions in *McCreary* and *Van Orden*, and the divergent political and social views among their judges, would inevitably reach different conclusions and a second and similar circuit split would form after the 2005 Supreme Court decisions.<sup>228</sup> Whether the Justices will step into this jurisprudential mine field

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225. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment).

226. See *id.* at 699.

227. Breyer seems to have foreseen these difficulties himself, emphasizing that in any "borderline" case regarding a public display of the Ten Commandments, an inquiry into the factual context of the display is required. See *id.* at 700-01.

228. Compare *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009) (holding Decalogue display on an Oklahoma county courthouse lawn unconstitutional), *cert. denied*, 130 S. Ct. 1687 (2010), with *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) (holding a Fraternal Order of Eagles Decalogue display on the lawn of the former city hall constitutional), and *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en

once again remains to be seen at this writing.<sup>229</sup> We begin by examining two recent cases from Nebraska and Washington state.

*B. The Eagles Monument in Plattsmouth, Nebraska*

Plattsmouth is a town of approximately 7000 residents in eastern Nebraska, across the Mississippi River from Iowa.<sup>230</sup> Back in 1965, the local Fraternal Order of Eagles donated a Ten Commandments monument to the town, which placed it in a forty-five-acre park some ten blocks from city hall.<sup>231</sup> Like the similar monument outside the Texas State Capitol, it was inscribed with two Stars of David and the Greek letters Chi and Rho to signify Christ.<sup>232</sup> There are apparently no surviving records of the town's decision to accept the monument or of remarks made at its installation.<sup>233</sup> Thirty-six years passed before a town resident, known as "John Doe" in court papers, filed suit in 2001 to seek its removal, with the Nebraska ACLU as the lead plaintiff.<sup>234</sup>

After a federal district judge ruled for "Doe" and the ACLU, holding that the monument violated the Establishment Clause,<sup>235</sup> a divided panel of the Eighth Circuit Court of Appeals affirmed that decision.<sup>236</sup> The City was later able, however, to secure en banc review by all thirteen circuit judges, who reversed the panel with only two dissenters in 2005,<sup>237</sup> holding that "*Van Orden* governs our resolution of this case."<sup>238</sup> Citing Justice Breyer's concurrence in that case, the majority found that the monument's location in a park, the time that had elapsed before it was challenged, and its donation by a private group combined to allow the "use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage."<sup>239</sup> The two dissenters viewed the Decalogue as

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banc) (holding another Fraternal Order of Eagles Decalogue display in the city park constitutional).

229. Though the Court denied the county's petition for certiorari in *Green*, see 130 S. Ct. 1687, Liberty Counsel has filed a certiorari petition asking the Court to review the Sixth Circuit's ruling, on remand from the Court's 2005 *McCreary* decision, to uphold Judge Coffman's grant of a permanent injunction, see *ACLU of Ky. v. McCreary County*, 607 F.3d 439 (6th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3286 (U.S. Oct. 27, 2010) (No. 10-566).

230. See COMMUNITY FACTS PLATTSMOUTH, NEBRASKA (2008), available at <http://sites.nppd.com/aedc/FactsBook/Plattsmouthbook.pdf>.

231. See *Plattsmouth*, 419 F.3d at 773-74.

232. See *id.* at 773.

233. See *id.* at 774 (noting that some city officials were involved in the monument's installation, though it is not known whether they were acting in their official capacities).

234. See *id.* at 773-74.

235. *ACLU Neb. Found. v. City of Plattsmouth*, 186 F. Supp. 2d 1024 (D. Neb. 2002), *aff'd*, 358 F.3d 1020 (8th Cir. 2004), *rev'd en banc*, 419 F.3d 772 (8th Cir. 2005).

236. See 358 F.3d at 1042, 1050.

237. See 419 F.3d at 773, 778.

238. *Id.* at 776.

239. See *id.* at 776-78.

“a command from the Judeo-Christian God on how he requires his followers to live.”<sup>240</sup> Labeling the Commandments as simply “an ‘acknowledgement of the role of religion’ diminishes their sanctity to believers and belies the words themselves,” the dissenters wrote, in an apparent reference to the commandment against “graven images.”<sup>241</sup>

### C. Another Eagles Monument in Everett, Washington

Everett, Washington, is a waterfront city north of Seattle whose more than 100,000 residents mostly work in the technology, aerospace, and service industries.<sup>242</sup> In 1959, the Eagles donated a Ten Commandments monument to the city, inscribed like those in Plattsburgh and Austin with two Stars of David and the Chi and Rho symbols of Christ.<sup>243</sup> City officials originally installed it in front of the city hall (now “Old City Hall”) in a ceremony attended by civic leaders and church leaders, who, according to a contemporaneous announcement in a local paper, were slated to offer an invocation and benediction.<sup>244</sup>

After a local resident, Jesse Card, filed suit against the City in 2003, aided by volunteer lawyers from prestigious firms in Seattle and Washington, D.C., a federal district judge ruled for the City in 2005.<sup>245</sup> Ruling in March 2008, a three-judge panel of the Ninth Circuit Court of Appeals unanimously upheld this decision.<sup>246</sup> The lengthy opinion reviewed the *McCreary* and *Van Orden* cases, focusing on Justice Breyer’s concurrence in the latter.<sup>247</sup> Citing such factors as the monument’s private donor, the years that had elapsed before Jesse Card filed suit, and the presence of other—although later-added—monuments around it, the appellate panel found, as Breyer had in *Van Orden*, that the Everett monument conveyed both “a secular moral message” and “a historical message.”<sup>248</sup> Dismissing *McCreary* as factually dissimilar, and looking to the “context” of the monument’s history and surroundings, the panel found it “clear that *Van Orden* control[led the] decision.”<sup>249</sup>

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240. *Id.* at 781 (Bye, J., dissenting).

241. *See id.*

242. Everett Washington USA, About Everett, <http://www.everettwa.org/default.aspx?ID=314> (last visited Oct. 3, 2010).

243. *Card v. City of Everett*, 520 F.3d 1009, 1010-11 (9th Cir. 2008).

244. *See id.* at 1010-12. In 1988, the City moved the monument a few feet from its original location to make room for a war memorial, and it is now flanked by several other historical and patriotic monuments and markers. *See id.* at 1011.

245. *See Card v. City of Everett*, 386 F. Supp. 2d 1171, 1172, 1178 (W.D. Wash. 2005), *aff'd*, 520 F.3d 1009.

246. *Card*, 520 F.3d at 1010, 1021.

247. *See id.* at 1017-21.

248. *See id.* at 1019-21.

249. *Id.* at 1021.

Viewed in tandem, the *Plattsmouth* and *Card* cases, with their primary focus on the factors that Breyer found “determinative” in his *Van Orden* concurrence,<sup>250</sup> established what I would describe—and not entirely facetiously—as the “Breyer test.” Under this test, if a Decalogue display is old, donated by a civic group like the Eagles, and unchallenged for decades, it passes constitutional muster. But what if the display is new, donated by someone with clearly religious motives, and promptly challenged by a lawsuit? Does that make a challenge to the display a *McCreary* case, governed by these factors? What if a Ten Commandments case involves some factors in *Van Orden* and some from *McCreary*? These questions illustrate the dilemma faced by judges who are called upon to resolve the conflicts posed in Decalogue cases.

V. “*The Lord Had Burdened [My] Heart*”—*The Green v. Haskell County Case*

A. “*I’m a Christian and I Believe in This*”

Haskell County, Oklahoma, has much in common with McCreary County, Kentucky. Both are small in population, with roughly 15,000 residents in each, and poor; the median income in both counties is significantly less than the national average.<sup>251</sup> The 2000 census figures show that education levels in both lag well behind other counties in their respective states and the rest of the nation.<sup>252</sup> Neither county is closer than sixty miles to a major city. Both are conservative in politics; approximately seventy percent of the voters in each backed John McCain over Barack Obama in the 2008 presidential election.<sup>253</sup>

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250. See *id.* at 1010; *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776, 778 (8th Cir. 2005) (en banc).

251. Compare U.S. Census Bureau, State & County QuickFacts: Haskell County, Oklahoma, <http://quickfacts.census.gov/qfd/states/40/40061.html> (last visited Oct. 3, 2010) [hereinafter *Haskell Facts*] (estimating Haskell County’s population in 2009 at 12,393 and its 2008 median household income at \$34,327), and U.S. Census Bureau, State & County QuickFacts: McCreary County, Kentucky, <http://quickfacts.census.gov/qfd/states/21/21147.html> (last visited Oct. 3, 2010) [hereinafter *McCreary Facts*] (estimating McCreary County’s population in 2009 at 17,795 and its 2008 median household income at \$22,253), with CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 5 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (estimating the national median household income in 2008 at \$50,303).

252. Compare *Haskell Facts*, *supra* note 251 (pegging the percent of high-school graduates among persons age twenty-five and older at 66.9% in Haskell County, relative to 80.6% in Oklahoma generally), and *McCreary Facts*, *supra* note 251 (placing the high school graduation rate at 52.6% in McCreary County, compared to 74.1% in Kentucky generally), with State & County QuickFacts, USA, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 3, 2010) (showing the national high school graduation rate in 2000 to be 80.4%).

253. See N.Y. Times, Election Results 2008, Oklahoma: Presidential County Results (Dec. 9,

Lastly, both are fundamentalist in religion, with Baptists laying claim to an overwhelming majority of adherents in each county in 2000.<sup>254</sup> Considering the similarities between the two counties, it is not surprising that Ten Commandments displays were installed in both, with local residents expressing surprise and dismay that anyone would file a lawsuit to remove this symbol of the Christian faith.<sup>255</sup>

The Ten Commandments display in Haskell County was erected in 2004 by Mike Bush, a Southern Baptist lay minister who made his living as a construction worker.<sup>256</sup> Bush told the county's three-member Board of Commissioners that "the Lord had burdened [his] heart" to install a Decalogue monument on the courthouse lawn in Stigler, the county seat and a town of some 2500 people.<sup>257</sup> According to the recorded minutes of this meeting, "[t]he Board agreed that Mike could go ahead and have the monument made and Mike is taking care of all the expense."<sup>258</sup> Before the installation, but apparently without the commissioners' knowledge or approval, Bush decided to have inscribed on the other side of the monument the text of the Mayflower Compact, signed by the Plymouth Colony settlers in 1620, and proclaiming, among other things, their devotion to "the glory of God, and advancement of the Christian faith."<sup>259</sup>

The Haskell County monument was dedicated on November 7, 2004, at a ceremony attended by more than 100 people, including two of the three

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2008), <http://elections.nytimes.com/2008/results/states/president/oklahoma.html> (showing that 69% of Haskell County voters voted for McCain); N.Y. Times Election Results 2008, Kentucky: Presidential County Results (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/preident/kentucky.html> [hereinafter Kentucky: Presidential County Results] (showing that 75% of McCreary County voters voted for McCain).

254. See The Association of Religion Data Archives (ARDA), County Membership Report: Haskell County, Oklahoma (2000) [hereinafter ARDA Haskell County Membership Report], [http://www.thearda.com/mapsReports/reports/counties/40061\\_2000\\_Rate.asp](http://www.thearda.com/mapsReports/reports/counties/40061_2000_Rate.asp); ARDA, County Membership Report: McCreary County, Kentucky (2000), [http://www.thearda.com/mapsReports/reports/counties/21147\\_2000.asp](http://www.thearda.com/mapsReports/reports/counties/21147_2000.asp).

255. See IRONS, *supra* note 13, at 186. I mention the similarities between these counties, not to denigrate their residents (and similar small towns and rural communities), but to stress that their religious, racial, cultural, and political homogeneity, coupled with their geographic insularity and isolation, distinguish them from larger cities and urban areas, where greater diversity in these factors arguably engenders a corresponding tolerance of minorities and dissenters.

As an aside, calling the Decalogue a "Judeo-Christian" symbol is misleading; although the Commandments come from the Hebrew scriptures, no Jews, to my knowledge, have initiated their display in public places, and most Jewish groups oppose such displays.

256. See *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

257. See *id.* at 788, 790 (alteration in original).

258. *Id.* at 790.

259. See *id.* at 789-90.



commissioners and representatives of seventeen churches.<sup>260</sup> That same month, one commissioner told a reporter, referring to the monument, “That’s what we’re trying to live by, that right there. . . . I’m a Christian and I believe in this. I think it’s a benefit to the community.”<sup>261</sup>

One person who did not think that the monument benefitted Haskell County was a Stigler resident, James W. Green, who filed a suit against the Board of Commissioners in October 2005, aided by the Oklahoma ACLU and one of its volunteer lawyers, Micheal Salem of Norman.<sup>262</sup> In response, Mike Bush organized a “Support the Ten Commandments Monument” rally at the courthouse the month after Green filed his suit.<sup>263</sup> Attended by over three hundred people, the rally featured local pastors and U.S. Senator Tom Coburn,<sup>264</sup> a far-right Republican, who said, “I wish this was in every courthouse on the lawn . . . . We need more of this, not less.”<sup>265</sup> Mike Bush reported that over 2800 signatures had been collected on a petition supporting the monument.<sup>266</sup> “My heart is thankful to see so many people coming out,” he said.<sup>267</sup> “All our laws are based on the 10 laws up here on our courthouse lawn.”<sup>268</sup> One of the county commissioners stirred the crowd with a defiant pledge: “I’ll stand up in front of that monument and if you bring a bulldozer up here you’ll have to push me down with it,”<sup>269</sup> a pretty clear indication of the “divisiveness” the Supreme Court had identified in *McCreary* and that Justice Breyer sought to avoid in the *Van Orden* case.<sup>270</sup>

Jim Green’s suit came before federal district judge Ronald A. White, named to the bench by President George W. Bush.<sup>271</sup> Sitting in nearby Muskogee, seat of the federal Eastern District of Oklahoma, White conducted a two-day bench trial

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260. *See id.* at 791.

261. *Id.* at 792.

262. *See Green v. Bd. of County Comm’rs of the County of Haskell*, 450 F. Supp. 2d 1273, 1274, 1279 (E.D. Okla. 2006), *rev’d*, 568 F.3d 784.

263. *See Green*, 568 F.3d at 792.

264. *Green*, 450 F. Supp. 2d at 1280.

265. *Coburn Attends Ten Commandments Monument Rally*, FOX NEWS, Nov. 20, 2005, <http://www.foxnews.com/story/0,2933,176158,00.html>.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Green v. Haskell County Bd. of Comm’rs*, 568 F.3d 784, 792 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

270. *See discussion supra* Parts II.D & III.A.

271. *See Green v. Bd. of County Comm’rs of the County of Haskell*, 450 F. Supp. 2d 1273, 1274 (E.D. Okla. 2006), *rev’d*, 568 F.3d 784; Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> [hereinafter FJC Directory] (select “W” hyperlink from alphabetical list; then follow “White, Ronald A.” hyperlink) (last visited Oct. 3, 2010).

in May 2006.<sup>272</sup> Mike Salem appeared for Green; opposing him, and representing Haskell County, was Kevin Theriot, a staff lawyer in Kansas for the Arizona-based Alliance Defense Fund,<sup>273</sup> a Religious Right legal group whose stated mission is to promote “the spread of the Gospel through the legal defense of religious freedom”<sup>274</sup> and that affirms the Bible as “the inspired, infallible, authoritative Word of God.”<sup>275</sup>

Ruling on August 18, 2006, Judge White relied on *Van Orden* in holding that the Haskell County monument “did not overstep the constitutional line demarcating government neutrality toward religion.”<sup>276</sup> He noted that the courthouse lawn featured several other monuments, including those honoring war veterans and recognizing the Choctaw Indians.<sup>277</sup> “A reasonable observer would see that the [Decalogue] Monument is not the focus of the courthouse lawn,” White wrote, adding, “The mélange of monuments surrounding the one at issue here obviously detract from any religious message that may be conveyed by the Commandments.”<sup>278</sup> Revealing his personal view that the *Green* case was hardly worth his time, White dubbed it a “kerfuffle,” implying in effect that it was much ado about nothing.<sup>279</sup>

#### B. “*The Religious Message of the Monument*”

Jim Green’s appeal from Judge White’s ruling was filed in the U. S. Court of Appeals for the Tenth Circuit in September 2006.<sup>280</sup> Almost three years passed before a three-judge panel issued its unanimous opinion on June 8, 2009.<sup>281</sup> Writing for the panel, Judge Jerome Holmes reversed Judge White’s ruling, finding this case more like *McCreary* than *Van Orden*.<sup>282</sup> Holmes focused on the facts that the Haskell County monument had been recently installed, that Green

272. *See Green*, 450 F. Supp. 2d at 1274.

273. *See id.*

274. Alliance Defense Fund, About the Alliance Defense Fund, <http://www.alliancedefensefund.org/About> [hereinafter About ADF] (last visited Oct. 3, 2010).

275. *Id.* (follow “ADF Statement of Faith & Guiding Principles” hyperlink).

276. *See Green*, 450 F. Supp. 2d at 1288-91, 1296-97.

277. *See id.* at 1274-75. Native Americans make up roughly fifteen percent of the county’s residents. Haskell Facts, *supra* note 251.

278. *Green*, 450 F. Supp. 2d at 1295.

279. *Id.* at 1274.

280. 450 F. Supp. 2d 1273, *appeal docketed*, No. 06-7098 (10th Cir. Sept. 20, 2006).

281. *See Green v. Haskell County Bd. of Comm’rs*, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010). All of the members of the panel were named to the bench by President George W. Bush and hardly represent the kind of liberal “activist” judges that conservatives excoriate. *See* FJC Directory, *supra* note 271 (select “H” and “O” hyperlinks from alphabetical list; then follow “Hartz, Harris L.,” “Holmes, Jerome A.,” and “O’Brien, Terrence L.” hyperlinks).

282. *See Green*, 568 F.3d at 807-09.

had filed suit within a year of its erection, and that county commissioners had supported the monument with religious comments.<sup>283</sup> Any “reasonable observer” of the monument, Holmes wrote, “would have been left with the clear impression—not counteracted by the individual commissioners or the Board collectively—that the commissioners were speaking on behalf of the government and the government was endorsing the religious message of the Monument.”<sup>284</sup> On this point, after quoting the commissioners’ religious comments made in support of the monument, Holmes noted that “[i]n a small community like Haskell County, where everyone knows everyone,” such statements of opinion would be perceived as government speech.<sup>285</sup> Indeed, one commissioner described his post as a “24 hours a day, 7 days a week” job.<sup>286</sup> In this regard, Haskell County more resembled McCreary County, Kentucky, than Austin, Texas.

After this judicial setback, Kevin Theriot asked the Tenth Circuit for an en banc review of the panel’s decision by the full bench of twelve active judges.<sup>287</sup> Ruling on July 30, 2009, the judges denied the request by a six-to-six vote.<sup>288</sup> All six judges who voted to rehear the case had been named to the bench by Republican presidents.<sup>289</sup> Between them, the six dissenters issued two lengthy opinions, while the six judges favoring denial of review remained silent, as is normal in voting against en banc review.<sup>290</sup> In both opinions, the dissenters castigated the panel for finding the *Green* case more like *McCreary* than *Van Orden*.<sup>291</sup>

Writing for himself and three colleagues, Judge Neil Gorsuch called the panel decision “simply inconsistent with the most analogous decision of the Supreme Court.”<sup>292</sup> The most important factors to Gorsuch were the secular monuments that surrounded the Ten Commandments on the courthouse lawn, which he felt diminished the Decalogue’s religious message, and the monument’s donation by a

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283. *See id.* at 801-02, 807.

284. *See id.* at 803.

285. *See id.*

286. *Id.* at 801.

287. *See Green v. Haskell County Bd. of Comm’rs*, 574 F.3d 1235, 1235 (10th Cir. 2009) (denying Defendants-Appellees’ Petition for Rehearing En Banc).

288. *See id.* A majority is required to grant en banc review. FED. R. APP. P. 35(a).

289. FJC Directory, *supra* note 271 (select “H,” “K,” “M,” “O,” and “T” hyperlinks from alphabetical list; then follow “Hartz, Harris L.,” “Holmes, Jerome A.,” “Kelly, Paul Joseph Jr.,” “McConnell, Michael W.,” “O’Brien, Terrence L.,” “Tacha, Deanell Reece,” and “Tymkovich, Timothy M.” hyperlinks). Recall, however, as noted above, that all three members of the panel that reversed Judge White’s ruling had also been appointed by Republicans. *See supra* note 281.

290. *See Green*, 574 F.3d 1235.

291. *See id.*

292. *See id.* at 1249 (Gorsuch, J., dissenting).

private citizen, Mike Bush.<sup>293</sup> Admitting that the conflicting decisions in *McCreary* and *Van Orden* were difficult to reconcile and apply, Gorsuch maintained, “[W]e should all be able to agree at least that cases like *Van Orden* should come out like *Van Orden*.”<sup>294</sup>

In an opinion joined by two colleagues, Judge Paul Kelly noted the inscription on the monument, “Erected by Citizens of Haskell County,” and also cited the “context” of nearby monuments, concluding that these factors left “little doubt that the government itself did not communicate a predominantly religious message, but rather was merely providing space for yet another donated monument related to Haskell County’s history.”<sup>295</sup> In my view, Kelly’s statement was more than a bit disingenuous, as if the courthouse lawn were little more than a community bulletin board. Kevin Theriot responded to the en banc denial with a thinly veiled broadside at Jim Green: “Americans shouldn’t be forced to abandon their religious heritage simply to appease someone’s political agenda,” he said.<sup>296</sup> “The emotional response of a single, offended passerby does not amount to a violation of the Establishment Clause.”<sup>297</sup> Theriot did not mention that the Alliance Defense Fund has its own political and religious agenda, which includes “the spread of the Gospel” through legal attacks on abortion rights and same-sex marriage.<sup>298</sup> The ACLU, of course, also has its own political agenda, supporting legal defenses of those divisive issues.<sup>299</sup> Courtroom battles over the Ten Commandments have thus become skirmishes in the wider “culture war” between those with very different views of the proper role of religion in American society.

### C. How Many Times Can You Say “Historical Significance”?

The Supreme Court granted review in the *McCreary* and *Van Orden* cases to resolve a “circuit split” between the appellate courts that struck down the Ten Commandments display in the Kentucky courthouse and upheld the monument on the Texas State Capitol grounds.<sup>300</sup> However, thanks (or no thanks) to Justice Breyer’s concurrence in the latter case, lower-court judges have since been forced

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293. *See id.* at 1246-48.

294. *Id.* at 1249.

295. *Id.* at 1235, 1238-39 (Kelly, J., dissenting).

296. Eric Young, *Christian Legal Group Mulls Appeal Options Following ‘Commandments’ Ruling*, CHRISTIAN POST, June 11, 2009, <http://www.christianpost.com/article/20090611/christian-legal-group-mulls-appeal-options-following-commandments-ruling/>.

297. *Id.*

298. *See* About ADF, *supra* note 274.

299. *See, e.g.*, ACLU, Key Issues, <http://www.aclu.org/key-issues/relationships> (last visited Oct. 3, 2010) (listing “Reproductive Freedom” and “LGBT Rights” among fifteen key issues advocated by the organization).

300. *See supra* notes 273-75 and accompanying text.

to decide, in pending and future Ten Commandments cases, whether challenged displays should be governed by *McCreary* or by *Van Orden*.<sup>301</sup> As we have seen, circuit courts in the *Plattsmouth* and *Card* cases relied on *Van Orden* for guidance,<sup>302</sup> while the Tenth Circuit panel in the *Green* case found the challenged Decalogue monument more like *McCreary*.<sup>303</sup>

This subsequent “circuit split,” among other things, prompted Kevin Theriot to ask the Supreme Court to resolve the lower-court conflicts that Breyer’s concurrence had produced.<sup>304</sup> Theriot filed the certiorari petition in *Green* with the Supreme Court on October 28, 2009, quoting extensively—not surprisingly—from the opinions of Judges Kelly and Gorsuch, dissenting from the Tenth Circuit’s denial of en banc review of the unanimous panel decision.<sup>305</sup> He placed special emphasis on Gorsuch’s statement that “cases like *Van Orden* should come out like *Van Orden*.”<sup>306</sup> Downplaying the undeniable religious message of the Commandments, Theriot stressed instead the purported “historical significance” of the Decalogue in America’s legal heritage, repeating this phrase no less than seven times in his thirty-three-page petition.<sup>307</sup> Whatever “historical significance” the Commandments may have for residents of Haskell County or other communities in which they are displayed depends entirely upon the divine sanction they provide for the criminal prohibitions of murder, adultery, theft, and perjury. Yet, as discussed above, every reputable scholar in this field has shown that this supposed “nexus” between the religious commands of the Decalogue and those prohibitions is simply lacking.<sup>308</sup>

Theriot summed up his appeal for Supreme Court review in these words:

Circuit courts need this Court’s guidance on the proper analysis to apply to monuments passively acknowledging religion’s historical significance that are part of historical displays on government grounds. Otherwise, these cases will continue to be decided on irrelevant facts like those that led to the finding of unconstitutionality in this case.<sup>309</sup>

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301. See discussion *supra* Parts IV, V.A-B.

302. See discussion *supra* Parts IV.B-C.

303. See discussion *supra* Part V.B.

304. See Petition for Writ of Certiorari, *supra* note 8, at 22-28.

305. See, e.g., *id.* at 13 (quoting *Green v. Haskell County Bd. of Comm’rs*, 574 F.3d 1235, 1237 (10th Cir. 2009) (Kelly, J., dissenting)); *id.* at 15 (quoting *Green*, 574 F.3d at 1247 (Gorsuch, J., dissenting)).

306. See *id.* at 9, 33 (quoting *Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting)).

307. See *id.* at 6 n.1, 7, 9, 11, 12, 30. The phrase also appears in the Questions Presented section of the Petition. See *id.* at i.

308. See discussion *supra* Part III.B.

309. See Petition for Writ of Certiorari, *supra* note 8, at 9.

Theriot also identified the facts he found “irrelevant”: “the age of the monument, how quickly it was challenged, whether it was displayed by a small or large town, and the personal religious views of the government officials who allowed it.”<sup>310</sup>

*D. How Many Times Can You Say “Context”?*

Jim Green’s lawyers filed their brief in opposition to Kevin Theriot’s certiorari petition with the Supreme Court on January 11, 2010.<sup>311</sup> Submitted by Dan Mach of the ACLU’s Washington, D.C. office as the Counsel of Record,<sup>312</sup> the brief urged the Justices to deny review of the Tenth Circuit panel decision on two main grounds. First, Mach argued that the religious statements of Mike Bush and the county commissioners, before and after the Ten Commandments monument was installed, demonstrated an official “endorsement” of its sectarian message.<sup>313</sup> Mach devoted four pages of his brief to documenting these statements.<sup>314</sup> Second, and not surprisingly, he argued that the overall “context” of the monument distinguished it from the one on the Texas State Capitol grounds in the *Van Orden* case, making it more analogous to the Kentucky courthouse display in *McCreary*, as the Tenth Circuit panel had concluded.<sup>315</sup> In fact, Mach used the words “context” and “contextual” nearly fifty times in the body of his thirty-four-page brief.<sup>316</sup>

Even if the Tenth Circuit panel “had viewed this case solely through the lens of *Van Orden*,” Mach argued, the Haskell County “monument still would not have passed constitutional muster because there are significant, material distinctions between this display and the monument in *Van Orden*.”<sup>317</sup> He cited such factors as the board members’ public support of the Haskell County monument, the lack of a unifying secular theme on the courthouse lawn, and the community “divisiveness” the monument sparked.<sup>318</sup> Mach did not rely solely on these factors, however, stressing that the Tenth Circuit panel had reviewed “the record as a whole” in the case, and the “totality of circumstances” surrounding the

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310. *Id.* at 8.

311. *See generally* Respondents’ Brief in Opposition, Haskell County Bd. of Comm’rs v. Green, 130 S. Ct. 1687 (2010) (No. 09-531), 2010 WL 169503.

312. *See id.* at cover.

313. *Id.* at 27 (arguing that the commissioners’ public statements and the photograph taken next to the monument constituted “endorsement”).

314. *See id.* at 5-9.

315. *See id.* at 26-31; *see also* Green v. Haskell County Bd. of Comm’rs, 568 F.3d 784 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

316. Respondents’ Brief in Opposition, *supra* note 311, *passim*.

317. *Id.* at 26.

318. *See id.* at 26-30.

monument's erection, and had not singled out any factors as "determinative" in its ruling.<sup>319</sup>

In contrast to Theriot's petition, Mach dismissed the asserted "circuit split" with the decisions in the *Plattsmouth* and *Card* cases with hardly a glance, conceding that those monuments satisfied the factors in Justice Breyer's *Van Orden* concurrence.<sup>320</sup> In effect, the ACLU signaled its willingness to allow these and other "old" monuments, mostly donated by the Fraternal Order of Eagles, to remain standing. In my view, this would be an unfortunate (but understandable) consequence of the ACLU's effort to confine the Supreme Court's decision in the *Green* case, either in denying review or upholding the Tenth Circuit decision on the narrowest possible grounds, a strategy that lawyers often employ in dealing with "circuit-split" cases. What Mach was saying, in essence, was that "cases like *McCreary* should come out like *McCreary*."<sup>321</sup> This one did, Mach concluded, and thus did not warrant Supreme Court review or reversal of the Tenth Circuit's panel decision.<sup>322</sup>

E. "We All Love Jesus Christ"—*The Grayson Case from Kentucky*

Three days after Dan Mach filed the ACLU's opposition brief in the *Green* case, the Sixth Circuit Court of Appeals handed Kevin Theriot a gift-wrapped present for his reply brief, which he submitted to the Supreme Court on January 25, 2010.<sup>323</sup> Ruling on January 14, two members of a three-judge panel reversed a district court decision that ordered the removal of a Ten Commandments display from the courthouse wall in Grayson County, Kentucky.<sup>324</sup>

The Sixth Circuit's ruling in *ACLU of Kentucky v. Grayson County* merits attention for two reasons. First, it reveals the impact on Ten Commandments cases of appellate judges with right-wing ideological axes to grind, who are willing to "distinguish" controlling precedent and distort case records to reach a "result-oriented" outcome.<sup>325</sup> Second, the community response to that decision exposes the sectarian religious motivations of the Christian majority in Grayson County that supported the Decalogue display in their courthouse.

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319. *See id.* at 25.

320. *See id.* at 18-19 (citing with approval *Card v. City of Everett*, 520 F.3d 1009, 1019 (9th Cir. 2008), and *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005)).

321. *Cf. Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting); *see also supra* text accompanying note 294.

322. *See* Respondents' Brief in Opposition, *supra* note 311, at 30-31.

323. *See* Petitioners' Reply Brief, *Haskell County Bd. of Comm'rs v. Green*, 130 S. Ct. 1687 (2010) (No. 09-531), 2010 WL 320373.

324. *See* *ACLU of Ky. v. Grayson County*, 591 F.3d 837, 840-41 (6th Cir. 2010).

325. *See id.* at 861 (Moore, J., dissenting) (rejecting the majority's unconvincing attempt to rely on *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), as precedent).

The *Grayson* case began in September 2001, when Reverend Chester Shartzter, pastor of the Clearview Baptist Church in the county seat of Leitchfield, appeared before the county's governing body, the Grayson County Fiscal Court, expressing "his desire for the County to place the Ten Commandments in the County buildings."<sup>326</sup> Tucked in the coal field region of central Kentucky, Grayson County—much like McCreary County in the state's eastern region—is small and rural,<sup>327</sup> and conservative in politics and religion. Its voters backed John McCain by a two-to-one majority over Barack Obama in the 2008 presidential election,<sup>328</sup> and evangelical Protestants outnumber other denominations by a similar margin.<sup>329</sup>

Reverend Shartzter likely knew that Judge Coffman had ruled that a display of the Decalogue with other "historical documents" in the McCreary County courthouse was a "sham" and violated the Establishment Clause.<sup>330</sup> But he was not dissuaded, explaining to the Fiscal Court members that "the Civil Liberties would look more favorable toward it if [the Ten Commandments] were hanging in a grouping with the other historical documents."<sup>331</sup> The County's attorney, Tom Goff, warned the Fiscal Court members that "there could be law suits filed against the County,"<sup>332</sup> but they unanimously approved Shartzter's request to post the Decalogue in the courthouse along with the "historical documents" that Judge Coffman had rejected in McCreary County,<sup>333</sup> thus setting the stage for another Ten Commandments lawsuit.

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326. See *id.* at 841 (majority opinion); see also Linda B. Blackford, *Ten Commandments Back Up in Courthouse*, LEXINGTON HERALD-LEADER, Jan. 19, 2010, at A1, available at <http://www.kentucky.com/2010/01/19/1100913/crowd-praises-the-return-of-10.html>.

327. Compare U.S. Census Bureau, State & County QuickFacts: Grayson County, Kentucky, <http://quickfacts.census.gov/qfd/states/21/21085.html> (last visited Oct. 3, 2010) (estimating Grayson County's population in 2009 at 25,581 and its 2008 median household income at \$33,791; identifying the high-school graduation rate in 2000 among persons age twenty-five and older as 62.8%), with McCreary Facts, *supra* note 251.

328. See Kentucky: Presidential County Results, *supra* note 253. With 120 counties, most of them small, rural, and conservative, Kentucky is an ideal spawning ground for Ten Commandments cases, with displays in more than a dozen counties.

329. See The Association of Religion Data Archives, County Membership Report: Grayson County, Kentucky (2000), [http://www.thearda.com/mapsReports/reports/counties/21085\\_2000.asp](http://www.thearda.com/mapsReports/reports/counties/21085_2000.asp).

330. See *ACLU of Ky. v. McCreary County*, 145 F. Supp. 2d 845, 848-51; see also *supra* text accompanying notes 129-30.

331. *ACLU of Ky. v. Grayson County*, 591 F.3d 837, 841 (6th Cir. 2010), *rev'g* 2008 WL 859279 (W.D. Ky. 2008).

332. *Id.*

333. Compare *id.*, with *ACLU of Ky. v. McCreary County (McCreary II)*, 145 F. Supp. 2d 845, 846, 853 (E.D.Ky. 2001) (listing identical sets of "historical documents" included in the Grayson County and McCreary County displays); see also *supra* text accompanying notes 127-30.



Shartzter's prediction that the ACLU "would look more favorable toward" the Grayson County display proved wrong. At the request of two county residents, Ed Meredith and Raymond Harper, the Kentucky ACLU filed suit in 2001.<sup>334</sup> Once again, as in the *McCreary* case, Grayson County was represented by Mathew Staver of Liberty Counsel, among others,<sup>335</sup> who had no doubt provided Shartzter with a list of the same "historical documents" that were displayed in McCreary County. The Ten Commandments were removed from the Grayson County courthouse after federal district judge Joseph McKinley granted the ACLU's preliminary injunction request, but further proceedings were placed on hold pending the outcome of appeals to the Sixth Circuit and the Supreme Court in *McCreary*.<sup>336</sup> When he finally ruled in 2008, granting a permanent injunction against displaying the Ten Commandments in the courthouse, Judge McKinley held that county officials had "never considered a secular purpose for the display," thus violating the "purpose" prong of the *Lemon* test.<sup>337</sup>

When the County's appeal from Judge McKinley's ruling came before a three-judge panel of the Sixth Circuit, Staver already had two sure votes in his pocket. Judge David McKeague was a longtime Republican activist and party official in Michigan, and was reportedly named to the bench by President George W. Bush—over the opposition of both Michigan senators—as a reward for legal work on behalf of Bush's father.<sup>338</sup> McKeague is also a member of the Federalist Society,<sup>339</sup> an influential organization of conservative lawyers and judges. Senior district judge Karl Forester of Kentucky, who sat on the panel by designation, had already upheld an identical Ten Commandments display in his district.<sup>340</sup>

Writing for himself and Judge Forester, McKeague conceded that the documents in the Grayson County courthouse "match exactly" those in the McCreary County display the Supreme Court had ruled against.<sup>341</sup> McKeague opined, however, that judges "must be alert to distinguishing facts" in similar

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334. *Grayson*, 591 F.3d at 842.

335. See *Grayson*, 2008 WL 859279.

336. *Grayson*, 2008 WL 859279, at \*3.

337. *Id.* at \*9.

338. See ALLIANCE FOR JUSTICE, SIXTH CIRCUIT NOMINEE DAVID W. MCKEAGUE: DISTRICT COURT JUDGE, WESTERN DISTRICT OF MICHIGAN 1-2, <http://www.statebarwatch.org/docs/afj.pdf> (last visited Oct. 3, 2010).

339. *Id.* at 1.

340. See ACLU of Ky. v. Rowan County, 513 F. Supp. 2d 889, 892, 905 (E.D. Ky. 2007). Compare *id.* at 892, with ACLU of Ky. v. Grayson County, 591 F.3d 837, 841 (6th Cir. 2010) (listing identical collections of "historical documents" in the Rowan and Grayson county courthouse displays).

341. *Grayson*, 591 F.3d at 841 n.1. The identical composition of the displays is not surprising, considering that Liberty Counsel consulted on both.

cases.<sup>342</sup> Lawyers and judges can always “distinguish” two cases if they try hard enough, and McKeague found two facts to “distinguish” the *Grayson County* and *McCreary* cases. First, the Grayson display was donated by a private citizen, Reverend Shartzter; and second, no Grayson County officials made religious remarks about the display’s installation.<sup>343</sup> Finding both “historical and educational” value in the display,<sup>344</sup> McKeague deferred to the County’s “stated secular purpose” and held that the overall display “endorse[d] an educational message rather than a religious one.”<sup>345</sup>

In a pointed dissent, Judge Karen Nelson Moore—named to the bench by President Bill Clinton<sup>346</sup>—took McKeague to task for ignoring the clear evidence in the case record that posting the Decalogue in the courthouse was considered by county officials as separate from and unrelated to the “historical documents” that surrounded it.<sup>347</sup> Citing the minutes of the Fiscal Court meetings, she said that the record “clearly indicate[d] that the predominant purpose was to post the Ten Commandments as a religious text and that the additional, ‘Historical Documents’ were added merely to avoid violating the Constitution.”<sup>348</sup> Nothing was said at these meetings about the “historical” or “educational” nature of the Decalogue, Moore observed.<sup>349</sup> She concluded, “The County’s asserted purpose here—that the Display was posted for educational or historical reasons—is a sham and should be rejected.”<sup>350</sup>

The response of Grayson County residents to their victory in the Sixth Circuit made clear their religious motivation—dismissed by Judge McKeague—in displaying the Decalogue in their courthouse. On January 18, 2010, several hundred people gathered at the courthouse for a jubilant celebration. “Amid anthems, hymns, and plenty of ‘amens,’ a copy of the Ten Commandments was placed back on the wall at the Grayson County courthouse,” one reporter wrote.<sup>351</sup> The same reporter quoted one spectator as saying, “We all love Jesus Christ . . . . This represents our savior, and it’s the law we have to go by.”<sup>352</sup> County magistrate Presto Gary suggested that the long legal battle had been worth the effort: “If we don’t get something back for Christian people to believe

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342. *Id.* at 848.

343. *See id.* at 849-54.

344. *Id.* at 853.

345. *Id.* at 849, 855.

346. FJC Directory, *supra* note 271 (select “M” hyperlink from alphabetical list; then follow “Moore, Karen Nelson” hyperlink).

347. *See Grayson*, 591 F.3d at 857-58 (Moore, J., dissenting).

348. *Id.*

349. *See id.* at 858.

350. *Id.* at 857.

351. *See Blackford*, *supra* note 326.

352. *Id.*

in, what kind of shape will our country be in?" he asked.<sup>353</sup> "But we had faith and kept praying."<sup>354</sup> As the Ten Commandments were placed back in their frame, "the crowd spontaneously broke into *God Bless America*, and *Amazing Grace*. Afterward, everyone crowded around a big sheet cake emblazoned with an American flag."<sup>355</sup> Fittingly, the celebration ended with a prayer by Reverend Shartzter, who exulted, "I'm so proud of the Christian leadership we've had in Grayson County."<sup>356</sup>

Needless to say, Kevin Theriot cited the *Grayson* decision in his reply brief for *Green* as further evidence of the "circuit split" he asked the Supreme Court to resolve in his favor.<sup>357</sup> He noted that the Sixth Circuit "upheld a display identical to the one that this Court considered in *McCreary*."<sup>358</sup> If that were the case, one might ask, why wouldn't *McCreary* control both the *Green* and *Grayson* cases? With *McCreary* as controlling precedent, my opinion, for what it's worth, is that the Tenth Circuit got it right in *Green* and the Sixth Circuit got it wrong in *Grayson*.

#### *Conclusion: A Challenge and a "Modest Proposal"*

My argument for the presumptive unconstitutionality of Ten Commandments displays on public property rests on three facts. First, the Decalogue undeniably is a religious text, taken from the Hebrew scriptures in the Bible and adopted as an article of faith by virtually all Christians, especially those in conservative evangelical denominations. The first three commandments are exclusively religious in nature, with no "secular" meaning or force whatever. Three other commandments contain moral admonitions (observe the Sabbath, honor one's parents, and do not covet one's neighbors' goods or wives) that cannot be enacted into law.

Second, the acts of murder, theft, adultery, and perjury that are prohibited by the other four commandments have been subject to criminal sanction and punishment in virtually every known code of laws, both formal and customary, since long before the Decalogue was incorporated into the Bible, and in societies that are not Jewish or Christian. Legal historians and anthropologists agree that these prohibitions are universal and not culture-specific. They simply reflect common recognition of the obvious harm these acts inflict on individuals and society, and do not depend on divine sanction. Those who worshipped multiple

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353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. See Petitioners' Reply Brief, *supra* note 323, at 3 n.1.

358. *Id.*

gods in ancient Egypt or in Hindu cultures, and even modern atheists who believe in no god, considered or still consider themselves bound by these prohibitions.

Third, and most important for this argument, the alleged “nexus” between the Ten Commandments and contemporary American law simply does not exist. The Decalogue has never been a significant “source” of that law, from the framing of the Constitution until today. Without exception, reputable legal historians agree on this issue. Lacking any “but-for” connection between the Commandments and the criminal law of every American state and the federal government, arguments for their display in public places rest on nothing more than the religious sentiment of Christian majorities.

I welcome those Decalogue defenders who wish to rebut these claims to make that effort. But I also challenge them to answer, with more than mere assertion, the following five questions: First, do you deny that the Decalogue is a religious text and rests its commandments on divine sanction? Second, do you deny that a display of the first three commandments, by themselves, would violate the Establishment Clause? Third, do you deny that prohibitions against murder, theft, adultery, and perjury have been universal in every recorded culture, before and after the Bible was written? Fourth, can you identify a single reputable scholar who has demonstrated that the Constitution’s framers relied on the Decalogue as a significant source of American law? If so, provide names, academic affiliations, and scholarly publications. Fifth, can you identify a single Decalogue display that was not initiated by an individual or group with express religious professions?<sup>359</sup>

I have a final challenge to defenders of the Haskell County monument. In May 2006, the commissioners—clearly on the advice of their lawyers—adopted a policy statement that prohibited the county from denying placement of displays on the courthouse lawn on the basis of viewpoint.<sup>360</sup> Let me propose that a

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359. It is worth noting that the Fraternal Order of Eagles, which donated the Ten Commandments monument at the Texas State Capitol and similar monuments to about 150 other towns and cities, requires that its members profess belief in a “supreme being.” Robert V. Ritter, *Supreme Scandal: How the Supreme Court Blessed the Ten Commandments* (Nov. 23, 2009) (unpublished manuscript), [http://www.jmcenter.org/pages/supreme\\_scandal.html](http://www.jmcenter.org/pages/supreme_scandal.html). The fraternity has also stated in official publications that the Decalogue embodies God’s “rules” and that “the kingdom of heaven belongs to those who live by them. That was Christ’s promise to us.” FRATERNAL ORDER OF EAGLES, ON EAGLE WINGS 93 (1958), available at [http://www.jmcenter.org/comicbook/OEW\\_093.jpg](http://www.jmcenter.org/comicbook/OEW_093.jpg). Thus, despite the ostensibly “secular” purpose of donating the monuments to combat “juvenile delinquency,” the Eagles are clearly a sectarian religious organization. See generally Sue A. Hoffman, *The Real History of the Ten Commandments Project, of the Fraternal Order of Eagles*, <http://www.religioustolerance.org/hoffman01.htm> (last visited Oct. 3, 2010).

360. See *Green v. Bd. of County Comm’rs of the County of Haskell*, 450 F. Supp. 2d 1273, 1275 n.3 (E.D. Okla. 2006), *rev’d*, 568 F.3d 784 (10th Cir. 2009); Michael Smith, *Display Policy*

county resident offer to erect a display that includes these quotes from three of the founding fathers: (1) “[T]he government of the United States is not in any sense founded on the Christian Religion”—The Treaty of Peace and Friendship (Tripoli), signed by President John Adams in 1796;<sup>361</sup> (2) “Christianity neither is, nor ever was a part of the common law”—Thomas Jefferson;<sup>362</sup> (3) “During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution”—James Madison.<sup>363</sup>

This proposal would put the commissioners to the test on their supposedly “viewpoint-neutral” policy. But it would promptly be rejected, unless I’m seriously mistaken. In its place, let me offer a more modest proposal—that the commissioners replace the existing Decalogue monument with one that is headed “Commandments of Oklahoma Law” and states, “1) You shall not commit murder; 2) You shall not steal; 3) You shall not commit adultery; and 4) You shall not commit perjury.”<sup>364</sup> That would convey the Decalogue’s “obey the law” message without any religious surplusage. This obviously won’t happen, either, and the proposal is effectively mooted by the removal of the Haskell County monument in March 2010 to adjoining property of the American Legion. Nonetheless, the proposal still serves to point out (to me, at least) the hypocrisy of those who insist that the “obey the law” message can only be conveyed by display of all ten commandments, and puts supporters of this and other Decalogue monuments (such as that proposed on the Oklahoma State Capitol grounds) to the test for adherence to supposedly “viewpoint-neutral” policies.

Finally, I’m not so naïve as to believe that any federal judge or Supreme Court Justice will agree that public display of the Decalogue is presumptively unconstitutional, although acceptance of my argument would spare them the onerous task of deciding whether a challenged display (like that in Haskell County) is more like *McCreary* or *Van Orden*. However, I would propose that they apply, in pending and future cases, the “endorsement” test of Justice O’Connor and the “purpose” and “effect” prongs of the *Lemon* test. If they do, as did the Tenth Circuit panel in the *Green* case, it seems clear to me that such

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*Is Called a “Sham,”* TULSA WORLD, Apr. 1, 2006.

361. Treaty of Peace & Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, available at [http://avalon.law.yale.edu/18th\\_century/bar1796t.asp](http://avalon.law.yale.edu/18th_century/bar1796t.asp).

362. Letter from Thomas Jefferson to Dr. Thomas Cooper (Feb. 10, 1814), available at <http://etext.virginia.edu/toc/modeng/public/JefLett.html> (follow “Letter Cooper” hyperlink).

363. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT ¶7 (1785), available at [http://religiousfreedom.lib.virginia.edu/sacred/madison\\_m&r\\_1785.html](http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html).

364. See 21 OKLA STAT. §§ 701.7-8 (2001) (murder); *id.* §§ 791, 1701 (theft); *id.* §§ 871 (adultery); *id.* § 491 (perjury).

displays will be struck down as violations of the Establishment Clause. The Supreme Court's denial of Haskell County's certiorari petition in March 2010 leaves a final resolution of this issue still unclear, however, since (at this writing) the Court has not ruled on the certiorari petition filed by Liberty Counsel in the second round of the *McCreary* case, wherein the Counsel has asked for review of the Sixth Circuit's ruling on remand affirming Judge Coffman's grant of a permanent injunction in that case.<sup>365</sup> We should learn the fate of this latest petition by late February or March 2011, but I'm virtually certain the Court will deny it, given the factual similarities of the McCreary County and Haskell County cases. I may, of course, be wrong. In the meantime, I hope readers of this essay will consider seriously the argument I have presented, and I welcome their responses.

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365. See *ACLU of Ky. v. McCreary County*, 607 F.3d 439 (6th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3286 (U.S. Oct. 27, 2010) (No. 10-566); see also *supra* note 229.