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*Symposium: Signs of the Times: The First Amendment and Religious Symbolism*

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## Panel Discussion

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## PANEL DISCUSSION AT “SIGNS OF THE TIMES: THE FIRST AMENDMENT AND RELIGIOUS SYMBOLISM”\*

*Moderator:* Joseph Thai, Presidential Professor, University of Oklahoma  
College of Law

*Speakers:* Peter Irons, Professor Emeritus of Political Science, University  
of California, San Diego

Thomas C. Berg, St. Ives Professor of Law and Associate  
Dean for Academic Affairs, University of St. Thomas School  
of Law

*Panelists:* Carl H. Esbeck, R.B. Price Professor and Isabelle Wade &  
Paul C. Lyda Professor of Law, University of Missouri School  
of Law

Eduardo Peñalver, Professor, Cornell University Law School

Kevin Theriot, Senior Counsel, Alliance Defense Fund

Micheal Salem, Attorney, Salem Law Offices

Rick Tepker, Professor of Law, Calvert Chair of Law and  
Liberty, and Associate Dean of Scholarship and Enrichment,  
University of Oklahoma College of Law

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PROFESSOR THAI: In this part of the symposium, each panelist will have about ten minutes to speak, and then we will open up the floor for questions and comments from the audience, which now includes the previous speakers.

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\* Partial transcript of the symposium held at the University of Oklahoma College of Law, Norman, Okla., Feb. 12, 2010.

Our first panelist is Carl Esbeck, who is the R.B. Price Professor and Isabelle Wade & Paul C. Lyda Professor of Law at the University of Missouri. As detailed in our program, Professor Esbeck has had an extensive and distinguished academic, public-interest, and public-service career centered on law and religion.

Professor Esbeck, welcome.

PROFESSOR ESBECK: Good afternoon.

I want to start my remarks by drawing very briefly a picture of the Establishment Clause when it's working properly. I see the Establishment Clause as policing the boundary between church and state. We have these two centers of authority in society, and the purpose of the clause is to order those two centers in their appropriate relationship with each other. And that means, in part, keeping an eye on government.

When government crosses that line which we're policing between church and state, it means that government has violated the clause by moving into religious affairs or intervening into inherently religious matters. On the one hand, it's not a relationship which is strict separationist, but, on the other hand, there is a very definite demarcation of authority between these two centers of power.

Now, with that in mind, I'll move to the case before us: *Green v. Haskell County*. I think that the three-judge panel got it right. I do think that the Ten Commandments monument is a violation of the Establishment Clause. However, the panel's decision, in certain ways, distorts what church-state relations ought to be about. I really want to reserve my time for two points.

The first point is historical. The principal reason why Americans resisted establishment was that government was interfering with institutional religion and the practice of religion by individuals and associations. It was government-regulated religion.

In fact, if you pause to think about it, you can't get more regulation of religion than when you have an established church. So when we successfully remonstrated—and it was over quite a long period of time, about forty years from the Revolution forward—there were nine different states that went through a disestablishment effort.

That effort of disestablishment then brought about a liberation for institutional religion. That, of course, is what, in our modern sense, we mean by “deregulation”—a liberation of institutional religion.

But if government was to no longer interfere with religion, how was religion to be supported? And that's where we get the word “volunteerism.” Religion was to be supported by the private sector. Those who were moved by a particular religious faith naturally supported that faith; those who were not did

not support religion at all. But the support came entirely from the private sector, and so we get that word “volunteerism.”

Now, I know we use “voluntary” in a somewhat different sense today, but I want you to be sure and get a grip on how it was used 200–220 years ago. They said that when the private sector supported religion, it was a voluntary act. That’s what they meant by “volunteerism”.

Now, we’ve talked about the process, but not what deeply motivated disestablishment. What deeply motivated this disestablishment—not the only factor, but the primary factor—was that religion was harmed by establishment.

Religion was harmed in at least two ways. One was that government used religion. And I mean “used” here in its most pejorative sense. The church became an arm of Caesar. It did Caesar’s bidding.

Establishment also corrupted religion. When the established church, the clergy, acquired the power of the state, that power was abused in a variety of ways. It was used to force people into conversion. But it also was used to discriminate and to oppress those outside the established church, who at the time were called religious dissenters.

The dissenters may have defended themselves using the word “conscience,” but they also defended themselves using the words “We want disestablishment” or “We are opposed to the establishment.”

Now, let me bring that up to the present. The panel opinion in *Green* had none of this in it. Not even a hint that this particular display harmed religion. And that’s a travesty. That’s ahistorical. And if they had looked, it was there.

On two separate occasions as I was reading the opinion, it came to my attention that there’s harm to religion. One was when I saw a picture of the monument in the appendix.

The Mayflower Compact was on one side and the Ten Commandments on the other, but what immediately caught my eye was that the memorial was flanked by two United States flags. That kind of thoughtless, indiscriminate mixing of God and country nearly always means that the church ends up—or God ends up—serving country. That’s using religion for purposes of the state.

The other thing that caught my eye was the mentioning of a poster that was apparently printed and put up throughout the county. The poster had two purposes. It was meant to draw people to a rally, but it was also intended to encourage people to give money to help pay for a particular memorial display.

The poster had on it a little girl, and she was kneeling in prayer. She was praying before a United States flag. Now, just think of the irony of that. Here’s the Ten Commandments. One of the first things it says is no idolatry. Then you have a little child, and she’s praying before the quintessential symbol of the nation. You know, Caesar’s mark here. I think that’s just ironic that this should escape the people who put together this poster.

Now, I want to move to a second point: the endorsement test. Of course, the three-judge-panel opinion is the endorsement test on steroids. And as was said earlier by Professor Irons, the endorsement test comes from Justice O'Connor's concurring opinion in the 1984 case of *Lynch v. Donnelly*.

Justice O'Connor says the reason we need to use the endorsement test instead of the two-part or three-part *Lemon* test—which is really the two-part *Schempp* test from 1963; *Lemon* borrowed the first two parts and added a third—is because we don't want to alienate people from the body politic because of their faith.

Now, this makes no sense at all. No doubt Mr. Green in his affidavit said, "I'm alienated because of my faith," but when the Tenth Circuit said, "You've got to take down the Ten Commandments," I'm sure there were hundreds of people in Haskell County that felt alienated because of their faith as well.

There's victimhood all around here if you're wanting to feel alienated because of your faith. We are a divided people. And many of the divisions are rooted in religion—abortion, same-sex marriage, stem-cell research, capital punishment, and on and on.

We are a diverse people. Courts are not the place to resolve feelings of alienation because of something the government has done. If you don't feel alienated by what your government has done, you're not paying attention. All of us feel that.

Courts cannot be the place to resolve that kind of dispute. The way to resolve that dispute is at the ballot box, not the courthouse. Thank you.

PROFESSOR THAI: Thank you very much, Professor Esbeck.

Our next panelist is Eduardo Peñalver, a professor from Cornell Law School. He is a former Rhodes Scholar, and Professor Peñalver writes on law and land use as well as law and religion. He also had to suffer through a year of clerking with me.

Eduardo Peñalver.

PROFESSOR PEÑALVER: Thank you for inviting me. I find it really hard to feel much of anything or get too worked up about these Ten Commandments cases. The law and religion professors here can probably sympathize with this.

One of the reasons I don't write as often about religion as I might is it's very hard to say anything new because a lot of it has already been said. In looking at the case and thinking about what to say today, I really struggled to come up with something decisive because, to me, Professor Esbeck is right—this operates at the level of politics and not the law. This is the politics of culture war. It's red state/blue state stuff; the law is often beside the point. In fact, it's even more useful for some activists if courts order them to take things down

because then they can go stand there in front of the bulldozer and feel edified by that.

But I'm sympathetic to both sides in some ways on the legal issues—the concerns about the state's role in endorsement of religion or the sense of coercion that can result from that. I'm sympathetic to those concerns and I'm also sympathetic to the importance of maintaining a place for religious expression in the public square.

But even from the standpoint of all these efforts and concerns, I think the stakes in these Ten Commandments cases couldn't seem much lower. This is not to say that there aren't real principles implicated on some level, but these have operated beside the point.

In thinking about the dispute, it might be helpful to move away from a binary analysis and instead think about it from the perspective of four hypothetical positions. I'm sure I could divide it into six or eight, but four is illustrative. My argument is that from any of these four positions, I can't quite understand why people choose this particular battle.

On one end, we have a sort of aggressive secularizing character who is very quickly offended and alienated by any kind of public religious expression. Michael Newdow comes to mind here as someone who is maybe exaggeratedly upset by the use of the term “under God.” And so this person goes around and polices de minimis religious expression and brings lawsuits to try to stop them. That's a familiar enough character.

On the other side from the secularizer, we have the proselytizer, who is equally cartoonish. This is someone who is virtually always evangelical Christian, believes that it's his duty to proclaim the good news to others, and believes the United States was founded as a Christian nation and bears witness to that and tries to maintain itself as such. And this person has little or no concern for the impact of this on those who do not share his particular commitment. So those are the two extremes. There are also two middle characters here.

On the one hand, we have a kind of liberal pluralist, who I think shares the secularized concerns about state-sponsored religious expression and probably would like to police as much of that out of the public square as possible. But the motivation here is not a discomfort with that expression as such, but usually a more instrumental right, a concern about the impact that particular form of expression will have on individuals, on religious minorities in particular, whether they be atheists, Orthodox Jews, or Catholics—whatever the local minority is.

And so the concern is not religious expression as such, but the impact of religious expression, and so there's a little more room there for kinds of

ceremonial deism—*de minimis* religious expression that we all recognize as very innocuous and vague.

And then on the other side, we're all familiar with the inclusive conservative, someone who's even less troubled in some ways than the pluralist by public religious expression. He understands religious expression in the public square even to be positively desirable and important, but he's aware of the pluralist nature of modern American society and is sensitive to other people's religious commitments and the ways in which public affirmations—especially state-sponsored public affirmations—can make these people feel like second-class citizens and push them away from engagement. And so he's especially sympathetic to the limitations of state-sponsored speech.

I think the primary difference between these two people may be their attitudes towards policy and public reason, with the progressive or liberal pluralist being much more in favor of self-restraint in the religious expression of political views and the inclusive conservative being more comfortable with those kinds of public religious expressions about political issues. And so that's really the distinction where both of them may be united in concern about the impact of state-sponsored religious speech on religious minorities.

I think of Joe Thai as my sort of liberal pluralist, and on the inclusive conservative side, someone like Steven Carter or Philip Hamburger. Of course you have religious people in both of those groups.

Now, that's obviously a kind of cartoonish typology, but I think it captures different ways of approaching these Ten Commandments cases. Any one of these people could have different, reasonable bases to either think the Ten Commandments displays are okay or deeply problematic, but I think really from any of these four perspectives there are good reasons to back off from creating these kinds of conflicts. This is most obvious for the two middle positions. The pluralist and the conservative would be likely to shy away from picking this particular type of fight, even though, like I said, they may disagree on the merits ultimately.

So the liberal pluralist, obviously, is opposed to most state-sponsored religious expression, but creates some room for *de minimis* expressions that don't harm anyone. He may put this case in that category, although I kind of doubt it.

Looking at this from the point of view of coercion, monuments standing in the park are clearly not as coercive as prayer in schools. Right? Or even the display of the Ten Commandments in public school, where you are required to be there and there's social pressure to conform.

And for the same reason, the inclusive conservative is likely to be ambivalent about the importance of these cases. He's cognizant of the unique problems posed by state-sponsored religious expression, but he's also probably very

uncomfortable with the state sponsorship of highly sectarian forms of expression.

And, clearly, the Ten Commandments in any form are going to fall in that category. You have to choose which version, which translation, which numerology to display. Invariably, it's the King James Bible Ten Commandments, always with the Protestant numbering, and so it's sort of intrinsically sectarian in ways that "under God" is not.

But I think that in terms of prioritizing this conservatively, we're going to really focus on other kinds of cases, particularly cases involving safeguarding existing public fora from discrimination against religious expression; cases like *Rosenberger* or *Lamb's Chapel* are useful.

So this type of fight is mostly likely to arise between the aggressive secularizer and the proselytizer. This former category is always on the lookout for those forms of expression, however trivial. But even for these groups, I think that these cases don't make much sense.

For the secularizer, I think the Ten Commandments, especially in these particular contexts of monument parks and such, have to be seen as the last ten percent. They've won a lot of battles; there's more risk than reward in continuing to bring these cases. They're risking a legal setback for diminishing returns.

The proselytizer puzzles me as well. On one hand, why wouldn't they pick this kind of fight? They want to push the envelope of religious expression. I have a couple of reactions to this. One is theological. Why the Ten Commandments? From the standpoint of proselytizing or expressing your faith, these are not the most significant religious texts.

If you go to a Sooners game, you're not going to see someone holding up an Exodus 5 sign. Right? Never; you'll never see it. You'll see John 3:16 or something like that, but you're not going to see Exodus 20 or Deuteronomy 5.

From the standpoint of Christianity, it is not the most important text in terms of social structure or the most important text in terms of claiming your faith. So, it seems like the primary motivation is really to pick fights, especially to get under the skin of people like Newdow and Green.

The Ten Commandments are just plausibly secular enough that monument backers hold out the hope that they can pass legal muster by talking about their legal tradition like you couldn't do with John 3:16. But given the importance of intent in putting these things up, it's funny to watch the kind of legal histrionics that proponents of monuments go through to try to protect that right—to the point of denying the religious motivation for putting them up, which is clearly there.



I'll end on this irony: I think it odd to honor the Ten Commandments by violating one of them. But whether you call it the eighth or the ninth is dependent on whether you're Catholic or Protestant.

PROFESSOR THAI: We're very blessed today in a strictly secular way not only to have fantastic legal scholars on law and religion, but also to have two preeminent litigators on law and religion issues. And in fact, the two litigators in the *Haskell County v. Green* case.

First up, we have Kevin Theriot, who is senior counsel with the Alliance Defense Fund. He heads the Fund's Church Project, which litigates church free speech and religious autonomy matters. As I mentioned, he represented Haskell County in the case that the Tenth Circuit just decided.

Mr. Theriot, welcome.

MR. THERIOT: Micheal and I are over there laughing because he refers to the scholars and then the attorneys. We kind of think, well, that's probably pretty true.

We're really about practical things. Of course, I view these issues from the standpoint of what the law is instead of what the law should be. Generally speaking, professors don't have to go before a judge and have a judge determine whether their opinions are right or wrong, but we do. So most of the time I'm thinking, "What is the law right now and how can I make that work for my client?" not, "What do I hope it is?" or, "What should it be?"

In the spirit of discussion, I'd like to talk a little bit about what the law is in this particular case. I can start with explaining why we took this case. The Alliance Defense Fund is mainly an organization that defends free speech and free exercise rights. We do a lot of that. It's pretty much all I've done throughout my career.

I say "defends" in a liberal use of the word. Usually that means we're the plaintiff. So when a county calls us and asks us to represent them, our antennae go up because we're usually suing counties.

The reason why we took this case was because if the county had denied Mike Bush permission to put up this Ten Commandments display, we would have represented Mike Bush and sued the county. So we thought it only fair, since they allowed him to do it, that we would defend them. And the Tenth Circuit law in effect during that time—the *Sumnum v. Pleasant Grove* line of cases—essentially said that in the Tenth Circuit, if a county like Haskell County allowed Ten Commandments displays to be put up, then it had to allow other religious displays including those that were clearly not Christian.

The City of Pleasant Grove didn't want to put up the Sumnum display, but the Tenth Circuit said, "You have to put it up. You've opened up this forum,

you have other historical displays, and you've allowed the Ten Commandments to be displayed. Once you open up the forum, you must allow other types of monuments to be displayed, whether they're religious or not."

Based upon the nine other monuments that had been on the Haskell County courthouse for years, we thought that the county had opened a forum. As a matter of fact, the commissioners actually told us that they had opened the forum and that they would allow anybody to donate a monument as long as they paid for it, as long as it had some sort of historic significance, and as long as it wasn't something that was not protected, like obscenity. So we took the case.

And that was our primary argument going forward. If the commissioners had denied Mike Bush the opportunity to erect this monument, then they would have violated his free speech rights.

Of course, we were relying on the *Pleasant Grove* case. Well, while the Tenth Circuit case was pending, after we had already done oral argument, I believe, the *Summum* case went to the Supreme Court and the Supreme Court reversed and basically said, "No, these Ten Commandments displays are always governmental speech in almost all situations." There are some exceptions, but *Pleasant Grove* really cut the legs out from our argument in that regard.

If you're offended by the Ten Commandments monument, I think the best way to handle these displays is to ask permission to put up your own monument. The best response to being offended in these types of situations is not to censor speech, but to allow more speech. I think that's the best way to handle these narrow type of issues where you have a forum or an area that the government has opened up for citizens to be able to donate monuments, pay for them, and display them along with other citizen-donated monuments. Allow them all.

Unfortunately, that's not the law. I wish it were the law now, but it's not anymore. Generally speaking, it's very difficult for a government to create that type of open forum now.

What we have now is a state of disarray. As you've already heard, in 2005 the Supreme Court decided two cases that came to essentially two opposite conclusions. This left my clients in the position of wondering, "Where does this leave us? In hindsight, if we had denied the opportunity for Mr. Bush to be able to put up this Ten Commandments display, we would have been sued by him. We allowed him to put it up, and we were sued by Mr. Green. How do we know if this Ten Commandments display is going to be constitutional?"

Unfortunately, the Supreme Court has given very little guidance in that regard, because you have some Ten Commandments displays, like *McCreary*, inside the courthouse, initiated by the government, paid for by the government. Those were unconstitutional.

But in *Van Orden*, a monument outside the courthouse, initiated by a private organization, and paid for by a private organization was okay. Well, that's what we had in this case, so we think we're good even though we don't have this free speech argument.

But unfortunately, the Tenth Circuit came to a different conclusion. Interestingly, that conclusion is contrary to other court of appeals opinions. For instance, the Ninth Circuit in the *Card v. City of Everett* case came to the conclusion to not even apply the *Lemon* test.

The *Card* court applied the *Van Orden* test to a Ten Commandments display. It was acceptable under *Van Orden* because it had been in existence for a long time, even though it was only displayed among four other monuments and even though there wasn't some sort of overarching theme.

The Eighth Circuit came to the same conclusion in the *ACLU v. City of Plattsburgh* case—they said they weren't not going to apply *Lemon*. And, of course, that's in conflict with the Tenth Circuit, which says we have to apply *Lemon*. And then just recently the Sixth Circuit came down in the *ACLU of Kentucky v. Grayson County* case and said, "You know what, we're not sure whether to apply the *Lemon* test in *McCreary* or the historical analysis in *Van Orden*, so we're going to try to do both."

So we have a whole lot of confusion, not only in courts, but also among government officials right now. I'm hopeful that eventually the Supreme Court will take a case. It may be this one. But I think the Court clearly signaled in the *Sumnum* case that it is going to take one soon and clarify this area of the law.

I agree with Professor Esbeck that the endorsement analysis is not the way to go because it turns on the reasonable observer standard, and I hope the Court rejects it. Since the reasonable observer is a subjective determination, the reasonable observer ends up being the judge you get.

And so whether a particular Ten Commandments display is constitutional depends on what judge you get. And that's exemplified in our case. Judge White ruled at the trial level that it was constitutional. But a three-judge appellate panel says it was unconstitutional.

At the rehearing en banc, there was a six-six split. At least four judges said it is constitutional, and at least two more said, "We ought to at least reconsider this thing because we've got a problem." And so it really is luck of the draw.

And that kind of subjective analysis does nothing to help people comply with the law and certainly doesn't help in this particular instance. As I said, I'm not usually on the side of the county, but I can see what they're saying: "Hey, we need some direction here because we're not sure what kind of displays to allow. Should we not allow any religious displays and risk a claim that we're being hostile toward religious individuals, or should we allow them? If so, how do we do it and make sure we don't express any personal views about what they might

mean to us? We've got to make sure we don't live in a small town. We have to make sure the display didn't go up any time recently."

So along with that, I'd just like to reiterate one more thing that Professor Esbeck said. Part of what makes these cases so difficult is that standing is so wide open. Anybody who's offended can challenge these displays.

And because whether you're offended is a subjective determination, that necessarily makes the ruling of the court a subjective analysis. And it varies on a case-by-case basis—a "know it when we see it" kind of analysis. There's no real predictable way to figure out whether these things are constitutional.

And so, in my opinion, one of the things the Court needs to do—and I hope it will be soon—is narrow the standing requirement. That will help with this being such a subjective issue.

I have one more minute, and whenever I get a chance to talk to law students, I like to mention three things that I wish somebody would have told me in law school.

Number one, writing is important. Learn how to write. It is becoming more and more important as judges increasingly don't want trials and don't do trials.

Many judges do not hear oral arguments. You are only able to influence the judge in your case by briefing well. So learn how to be a good writer. Do your best to write for law review. Get a clerkship. Writing is very important.

Second, when you work, work as hard as you can, but work for something that you believe is bigger than yourself. Because it doesn't matter whether you agree with me and my Christian worldview or not. I'm sure there is something you would like to do that is above and beyond litigating for yourself. The great thing about having that type of motivation is that it makes your work more fun, and you're better at it because you're enjoying it.

Lastly, when you're litigating, civility is much more productive than hostility. And I'd just like to say that Micheal and I disagree, probably pretty strongly, on this Establishment Clause issue, but from my perspective we've had a great working relationship through this case. It actually has been a pretty enjoyable case to litigate despite our diametrically opposed views.

Thank you for having me today.

PROFESSOR THAI: Thank you, Kevin, for your advice for law school students.

Our next panelist is Micheal Salem. And I say this without exaggeration, he is the leading civil rights attorney in the State of Oklahoma as well as good friend and alum of the law school. And, of course, he serves as counsel for Mr. Green in the *Haskell County* Ten Commandments case.

Micheal, welcome.

MR. SALEM: Thank you, Professor Thai.

I feel like I should begin, “May it please the symposium and counsel.” I do want to say that I’m not here to represent any official litigation position of the American Civil Liberties Union. My comments are my own, and they are just intended to provoke a lively discussion among the crowd.

I do want to say that I am honored to be here today because, first of all, I graduated in 1975; and, second, this symposium is going to be published in the *Oklahoma Law Review*. And so I want to say that I hope this is an encouraging matter for those law students to know that even C students can make the Law Review. But it might take thirty-five years to do it. And I might add that I will be by next week to pick up my certificate—honorary, of course. And I guess I probably am doing it the lawyer way—I’m going to talk myself onto it, right?

Now, I do want to echo one thing, though, that Kevin said. Judges make different decisions, but sometimes judges make different decisions based on different facts. And I think that the cases that he cited to you as being something different were probably decided because the facts were different in those cases.

As Professor Irons suggested, you go out and you measure things. Well, yes, it might be true that the cases are a little bit in disarray as a result of that, but that doesn’t mean you can’t apply an objective instead of a subjective observer test. You use an objective test.

And I might add that the difference between *McCreary* and *Van Orden* is that *McCreary* is a decision regarding purpose. We argued purpose when we presented our case first to the district court and then to the Tenth Circuit.

The Tenth Circuit took the evidence that was submitted as to purpose and analyzed it as to effect under the second prong of the *Lemon* test. And that’s okay because I think it’s equally applicable in this instance. It seems to me that you could make an argument for both.

But, like H.L. Mencken said, “Judges are law students who get to grade their own papers.” And so the decisions that you get may sometimes vary—perhaps based upon the judge’s view of the law. Well, judges make objective tests in opinions all the time.

I do want to make some other points, and these are the three points that I meant to talk about in the first part. I want to make a brief observation about the district court’s decision that I thought was interesting. It’s on the symposium website and you’ll have an opportunity to read it if you like.

Second, I want to talk a little bit about the Establishment Clause and a viewpoint not entirely practical, but perhaps pragmatic, using the views of the founders, in particular Thomas Jefferson, to synthesize some kind of a version or result consistent with that viewpoint.

And then as time might permit, I want to talk a little bit about the evidence in the case, specifically the comments that were made, some of which you can read in the Tenth Circuit decision, some of which the district court never analyzed.

The district judge, for those of you who read it—and I'll be brief about this—used headings from Dante Alighieri's *Divine Comedy*: "Cantica," "Canto," and all of this. The thing about it is that Dante had a prose work that presents him as a strong proponent of the separation of church and state.

In fact, in the prose work on monarchy, *De Monarchia*, Dante states that mankind needs two guides corresponding to his two-fold goals—the Supreme Pontiff to lead mankind to eternal life in conformity with revealed truth, and the Emperor to guide mankind to temporal happiness in conformity with the teachings of philosophy.

But then Dante talks about the fact that these two guides come into irreconcilable differences, the discussion that we've been having between church and state here, the irreconcilable differences between the government and the religious leaders.

Then Dante says there has to be some kind of third party. And in Chapter Ten, he says that you have a third party. But is the third party a monarchy, the monarch, or is the third party also a person who has another equal?

Well, then they're going to be in conflict. And he says, essentially, "And so this procedure will continue ad infinitum." So we finally must have a first and supreme judge whose judgment resolves all disputes. He says, "Monarchy is necessary to the world."

Now, in Stanza Six of Chapter Ten, Aristotle sees the force of this argument when he said things do not have to be badly ordered: "A plurality of reigns is bad; therefore, let there be one ruler."

So the district court's adaption of that, to me, seemed to be kind of strange if you really understood the history of Dante. And I might add that I think what Dante is really pointing out to us is that perhaps really there are two realms—one that governs the religious aspects of our life and one that governs those secular portions of our life that we relate to government.

Now, the second thing I want to talk about is what the founders themselves contemplated. Well, when we look at the words "respecting an establishment of religion," what do we mean when we say "religion"?

Religion is an ultimate loyalty or an ultimate concern, according to the theologian Paul Tillich, and the signs, symbols, and practices directed toward expressing that loyalty or that concern. Signs, symbols, and practices are what we've been talking about.

When we talk about an ultimate loyalty or an ultimate concern, we're talking about those kinds of things that cannot be resolved by political debate. Angels

on the head of a pin or the various depths of religious belief—aspects of these things that just cannot be resolved.

Those irreconcilable differences are generally referred to as “dogma.” These are established beliefs or doctrines held by religion, ideology, or any kind of an organization. They’re authoritative. They are not to be disputed. They are not to be doubted or diverged from.

But we dispute dogma because my dogma is different from yours. Even persons within the same religious community might have different dogma or views of their joint faith.

John Locke, in his essay “A Letter Concerning Toleration,” said, “I may grow rich by an art that I take not delight in, I may be cured of some disease by remedies that I have not faith in, but I cannot be saved by a religion that I distrust and by a worship that I abhor.” Because religion sparks this allegiance or loyalty toward the unseen order, it starts the debate that never ends.

And now, finally, I would like to discuss some photos related to the Haskell County display. This is a different exhibit than was used, but it was part of the record. I think it’s exactly in keeping with what Professor Esbeck said about the injury to religion that occurs. This is the front side of the Ten Commandments monument, surrounded by American flags. The circuit didn’t use this one.

The next one shows the three commissioners standing next to the monument. We had multiples of these pictures. The district judge only let us introduce a couple of them. He said they were cumulative. But they weren’t cumulative. They were not cumulative to the effect of the endorsement on the part of the commissioners, because *Sumnum v. Pleasant Grove* says this is their monument.

So what did the commissioners say? Well, the district court recites some of the examples about what they did and the things that they said.

And, by the way, the question of standing wasn’t just a question of the offense of James Green. In addition to that, Mr. Green himself tried to place his own monument several years before and was told by the commissioners that it would just clutter up the lawn. Now, that is more than just being offended by the monument itself and by the Ten Commandments.

Green indicated that the Ten Commandments itself demonstrated suffering and violence. If you read some versions of the Bible, three thousand people were supposedly slain when Moses came back down from the mountain.

Green had a genuine reason for objecting to this. The commissioners had very positive things to say about it. And I think that it’s that kind of genuine display of debate that gave him legitimate standing—and, of course, the endorsement, the comments that were made by the particular commissioners with regard to their monument.

I see my time is up. I appreciate the opportunity to be here. Mr. Speaker, I would ask unanimous consent to the extension and revision of my remarks, as they would do in Congress.

PROFESSOR THAI: We saved our own First Amendment authority, Rick Tepker, for last. Rick Tepker is the Calvert Chair of Law and Liberty here at the law school and associate dean for scholarship and enrichment.

Among his many accomplishments, Professor Tepker successfully argued *Thompson v. Oklahoma* in 1988. That was the first case in which the Supreme Court overturned the death sentence of a juvenile offender on Eighth Amendment grounds.

Professor Tepker.

PROFESSOR TEPKER: I want to thank the Law Review for all their efforts. It's been wonderful to see them work so hard, beginning what I hope to be an important tradition for the law school in the years to come.

The debate about the meaning of the Establishment Clause has been a debate about American history and about the utility of originalism as a method of constitutional interpretation.

As a result of debates about other constitutional provisions and also an attack on the historical accuracy of Hugo Black's vision of religious freedom in the *Everson* case of 1947, defenders of church and state have lost confidence that their view of the past carries much weight.

The *Haskell County* case and the Ten Commandments cases generally fit into this conflict over original meaning, but I hear more agreement than dispute in the presentations today. And let me just generally suggest that Madison, Jefferson, Backus, and Leland would have been pleased, because dissension about the amendment for which they fought so passionately has narrowed so completely. The dispute about intellectual freedom and religious freedom in this country is hardly worth calling "the cultural civil war" if you listen to the voices in this room.

In *Elk Grove Unified School District v. Newdow*, the United States Supreme Court considered a claim by Michael Newdow that including the words "under God" in the Pledge of Allegiance turned that policy into a promotion of religious doctrine. The court decided not to decide. It punted.

The father lacked custody of the child and, therefore, he lacked standing to bring a suit. Justice Clarence Thomas was one of many Justices who wrote concurring opinions filled with dicta about the merits of the case. His argument was plain and pointed. And I think it is a danger to the consensus we've seen today.



He wrote that the Establishment Clause is best understood as a federalism provision. It protects state establishments from federal interference, but does not protect any individual right. As a result, Justice Thomas inferred that a sensible incorporation of the Establishment Clause probably covers little more than the Free Exercise Clause.

It is trite but true that each generation rewrites history for its own purposes. Revisionist history has its uses. But maintaining a constant, stable, constitutional law is not one of them. Settled doctrine ought not to change based on recent Ph.D. points of view in a thesis or a new shuffling of framers' ideas—or worse, a convenient perspective designed to serve an ideological end.

Some originalists understand this and shun detailed analysis of the framers' undisclosed hopes and seek an objectified original meaning. It can be textualism without history. It is rarely original in intent or original in understanding guided by the disciplines of historical fidelity.

The entire Bill of Rights relates to federalism, at least in one sense. The amendments restricted the federal government, not the states. What is different about Justice Thomas's claim is his insistence that the Establishment Clause had little to do with the liberties of the individual. This narrow view ignores the fact that many of the advocates of individual religious liberty you heard quoted here today also supported broader legal, statutory, and constitutional policies of disestablishment.

Clarence Thomas has the wrong focus. At stake is the Fourteenth Amendment, not the First. The original meaning of the Fourteenth Amendment was forged after the national policy of disestablishment took root, spread through the land, rewrote state constitutions, and became indisputably a matter of individual rights. Incorporation was never a textual process.

Neither the Privileges and Immunities Clause nor the Due Process Clause of the Fourteenth Amendment enumerates rights. Justice Black thought all the provisions of the Bill of Rights were incorporated and nothing but. Raoul Berger thought none of them were incorporated.

The academic debates continue today, and I do not propose to summarize them for you, but the Court has generally followed the middle course. The Court consults history and tradition. And Justice Frankfurter suggested the way to search for fundamental rights based on what's implicit in the concept of ordered liberty—the text in the Bill of Rights is only a guide.

Some clauses in the first ten amendments are not fundamental; some rights not mentioned are. Courts study whether we, the people, can live in a free republic without certain fundamental rights. Is freedom from government-organized, government-directed, government-subsidized, government-regulated religion, teaching of religion, a fundamental right?

That's the question. And it requires more respect for history than Clarence Thomas's reading of a few words.

In *Newdow*, Clarence Thomas noted accurately that more extreme notions of separation of church and state might be attributable to Madison. Indeed, many of Madison's most cherished and passionate beliefs about religious liberty clearly stem from arguments reflecting concepts of natural law, natural rights, the social contract between government and civil society, rather than the principle of nonestablishment.

Justice Thomas concludes that Madison's extreme views are to be ignored, but doing so is not a search for original history. It is turning away from original aspiration and original values.

True, Madison believed religious discrimination violated the equality and equal dignity of the human being, as Professor Berg noted. He also believed in religious liberty for all, including atheists. Madison's words in the *Memorial and Remonstrance*: "We cannot deny equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."

Madison was a man of faith. He was a believer and is quite right to point out that religious freedom is born of religious belief. But he also believed that for religion to remain healthy, it had to remain free from the interfering hand of government.

"Religion and government," quoting Madison, "will both exist in greater purity unless they are mixed together." Madison wanted religious liberty for the sake of religion.

In the words of George Washington, "It is now no more that toleration is spoken of, as if by indulgence of one class of people that another enjoy the exercise of their inherent rights." Washington and other founding statesmen agreed with Madison on the fundamentals.

Rights of religious belief and practice belong to all human beings, because the rights spring from a duty to God precedent both in order of time and degree of obligation to the claims of civil society. It followed that these rights could neither be granted nor denied by government.

Again, Madison: "The religion of every man must be left to the conviction and conscience of every man. It is the duty of every man to render to the Creator such homage and such only as he believes is acceptable to him."

Last but not least, last but most important, the principles of the First Amendment are articles of peace, as the distinguished Catholic theologian John Courtney Murray wisely wrote.

Madison sought a constitution that contained factionalism and disunion. His strategies were to use structure, pluralism, and diversity to bring civic peace. The First Amendment and a broader policy of disestablishment were instruments to promote religion without potential for a theocratic tyranny.

He wanted to ensure that the states' political conflict would not include the divisive, acrimonious elements of religion. Madison wanted religious freedom for the sake of peace and order. Clarence Thomas does not appear to understand this. And as a result of faux originalism, he somehow ignores and denies as irrelevant the careful teachings of James Madison.

It is Justice Sandra O'Connor who is the true conservative and the true originalist, who seeks and values Madison's vision of a single peace: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate. Our regard for constitutional boundaries has protected us from similar travails while allowing private religious exercise to flourish. Those who would renegotiate the boundaries between church and state must, therefore, answer a difficult question. Why would we trade a system that has served us so well for one that has served others so poorly?"

Thank you all very much for coming.

PROFESSOR THAI: Thank you to all of our panelists and a special thank you to the audience. You've been wonderfully respectful and patient and attentive, and I hope that you have lots of questions and comments for our panelists. And here I'll include the panelists as audience as well for purposes of asking each other questions. So I'll open up the floor.

Professor Irons.

PROFESSOR IRONS: Could I ask Kevin the questions that I posed in the outline? I certainly don't mean to be a pest or pick on you, but these are serious questions and they are sort of central to the article that I've written for the Law Review, and most of them, I think, are simply yes and no answers. Shouldn't take more than a minute. But, anyway, could you attempt that for us?

MR. THERIOT: All right. Thank you. I'll read them to you and then give you my best shot.

First, "Do you deny that the Decalogue is a religious text and rests its commandments on divine sanction?"

The answer to that is no, I don't deny it. However, I agree with Justice Rehnquist and Justice Breyer, who said they not only have religious significance, but they also have some secular significance. And, of course, the question is, how much?

And as I told you, as a litigator, that really doesn't matter to me. If the Supreme Court says it, that's what I go by. I have to go by what they say, not what I think. However, I do think that they clearly have had some secular import.

The Supreme Court has recognized this in the case involving the Sabbath day off, *McGowan v. Maryland*. The Supreme Court acknowledged that Sunday closing laws were based upon the admonition in the Bible—obviously the Ten Commandments—to have the Sabbath day off and upheld those laws because they have now gained some secular significance.

Also, I think that in popular culture Ten Commandments not only are religious but also have come on to take a secular significance. You can go to Amazon.com and you can see—I just did a quick search—*The Ten Commandments for Business Failure*. The Eighth Circuit even has “The Ten Commandments of Oral Argument.” They’ve taken on a symbol of the rule of law. So while I certainly agree that the Ten Commandments are very religious, they also have some secular significance.

Second, “Do you deny that a display of the first three commandments by themselves would violate the Establishment Clause?”

I have to confess that I don’t know what the first three commandments are. Let me read them to you:

“Thou shalt have no other gods before me.”

The second one is “Thou shalt make unto thee no graven image.”

Third is “Thou shalt not take the name of the Lord thy God in vain.”

As an aside, there is a suggestion that the commissioners were really looking for the Protestant and the King James version of the Ten Commandments, but that was based on a deposition Micheal did a very good job on of Commissioner Coal, who’s no longer with us. Micheal didn’t hurt him. Unfortunately, he died about three weeks later. He was a good man.

But he had no idea there were other versions of the Ten Commandments out there. So he wasn’t purposefully trying to push his version of the Ten Commandments. Of course, he’s the only one that said anything about that. The trial court and Justice Scalia have all said the same thing—they didn’t realize there were multiple versions. So this wasn’t a purposeful attempt to try to say that the Protestant King James Version of the Ten Commandments is the Ten Commandments.

Back to the first three commandments. Is there any way that those could be displayed by themselves and still be constitutional?

I think the answer is yes, because certainly they are religious, but I do have to think that they have some historical significance in our society. The first one and the second one actually have to do with, of course, no other gods. Actually, Thomas Paine used those commandments when he was talking about the fact that we should no longer pay allegiance to King George because that’s idolatry. And Thomas Paine, from what I understand, was not a believer. So it had some significance other than religious.

Obviously, it is more difficult to explain a secular purpose for the last one, “Don’t take the name of the Lord thy God in vain” but at least one federal judge has said in a dissent that our oaths, “so help me God,” are based upon the Ten Commandment admonition not to take the Lord thy God in vain. I don’t know if that’s true or not. I’m just saying, that’s just one view.

Next question: “Do you deny that a prohibition against murder, theft, adultery, and perjury have been universal in every recorded culture before and after the Bible was written?”

I’m not a historian. I don’t know the answer to that. But I certainly do know that just because other documents have had an influence on our law doesn’t mean that the Ten Commandments hasn’t had an influence also. That would be my response to that.

Fourth, “Can you identify a single reputable scholar who’s demonstrated the that the Constitution framers relied on the Decalogue as a significant source of American law?”

And the simple answer to that is no, I’m not a historian. However, I do believe that’s really the wrong question. The question is, has the Decalogue had an influence on our heritage and on our law? And once again, I have to go with the five Supreme Court Justices that have specifically held that they have. And that’s certainly the answer that I would have to that. Doesn’t really matter what I think, but it does matter what they think.

And then, fifth, “can you identify a single Decalogue display that was not initiated by an individual or group with express religious professions?”

First of all, you point out here that the Fraternal Order of Eagles did have express religious motivation, and I think that’s exactly right. They certainly did. But I don’t think that that matters. I think what matters is the motivations of the commissioners when they allowed it to be displayed.

You know, the only displays that I can possibly think of, and I don’t know this, but I’m just guessing, are the displays we’ve already talked about, like in the Supreme Court frieze and the other ones that Justice Rehnquist spoke about. Apparently, there are some I’ve never seen in the State House and several other places around the Capitol that apparently were initiated and funded by the government. They weren’t privately donated.

So, hopefully that was quick enough. I didn’t mean to dominate the conversation here.

PROFESSOR THAI: I’ll let the panel members who would like to respond have a quick response.

PROFESSOR PEÑALVER: The comment was about the danger for religion, but this sort of tortured attempt to make especially the first three of the Ten Commandments secular is oddly kind of counterproductive.

From a religious standpoint, it reminds me of the colloquy in a recent oral argument where Justice Scalia was talking about the cross case and said the cross is a secular symbol of cemeteries or something. I mean, who would look at that and think of Christianity? That's what he was saying in oral argument. He was shocked that anyone would view a cross as a sign of Christianity.

As a religious person, I just find that ridiculous. But the law pushes in that direction. Obviously, you've got to make legal arguments, but at the same time it sort of shows the nature from a religious standpoint of pushing the law and trying to fight these battles.

PROFESSOR THAI: My students know that I'm a big *Simpsons* fan. Bart Simpson captures the cultural confusion and the constitutional confusion over Christmas and Christian displays in the public square. And Bart Simpson once said something like, "Come on, everyone knows what the true meaning of Christmas is—it's the birth of Santa."

But Bart Simpson, like the Supreme Court, is also allowed to contradict himself, and I think in another episode he said, "Christmastime is a time when people of all religions come together to worship the Lord Jesus Christ." And I think we see both strains in the Supreme Court case law in these struggles.

Which is the better way to go? I think under the current Establishment Clause case law, our endorsement test, what you end up with is something close to the first vision of Christmas, which is that as long as public displays of religion are neutralized and conventionalized in a museum setting, then it's okay.

But in a way it harms religion because it takes the spirituality out and vitiates the spiritual content of the religious symbols, which to some who are religious is very important.

On the other hand, are we willing to go way in the other direction where we have government actively promoting, though we're not coercing people into acknowledging or professing religion? If not, then where should we go?

I guess this is moving beyond what the lawyers talked about, which is, "Well, we have to obey what the Court says today is the Establishment Clause," into the realm of the academic, but not so much because the Supreme Court will probably reexamine the Establishment Clause in the near future.

Where should we take it? And I'll just let any panelist answer. And then Professor Esbeck had a question to ask.

MR. THERIOT: My concern is that the rationale that might be used to overturn prayer or take it in a direction to allow more popular discretion over promotion of religion will so dramatically reduce the limitations that not only would we no longer be arguing about the particular facts and Santa next to reindeer, but many of the values that have been expressed here today would be compromised, including the traditions of volunteerism and choice and equality.

If you think about what is necessary to uphold a Ten Commandments monument or a crèche, candidly, I think it does an awful lot of damage to the policies of the Establishment Clause. That's what I fear.

PROFESSOR THAI: Thank you.  
Professor Esbeck.

PROFESSOR ESBECK: I wanted to come back to the endorsement test vis-à-vis the two-part purpose and effect test. Professor Irons and perhaps others were, in their remarks, clearly devotees or enthusiasts of the endorsement test, and clearly I'm not.

I think that what we have to do is go back to the two-part purpose and effect test, which really started in 1963 in the *Schempp* case, and sort of muddle our way forward. And I can explain what I mean by that if need be, but I want to come back to the endorsement test.

First, a lot of people look to the endorsement test to provide a remedy for harm to a religiously based conscience. That's a harm which is already protected by the Free Exercise Clause. We don't need to protect that with the Establishment Clause.

So when you take away the cases where religiously informed conscience is injured, and you put those over in the column for the Free Exercise Clause, there is still under the Establishment Clause a line of cases, which I agree with, that recognize rights protected by that clause but not protected by the endorsement test if the endorsement test is simply this business about being alienated because the government has done something and you are a person outside the religious faith that the government has in some sense endorsed.

There's a series of Establishment Clause cases that have nothing to do with religious harms, and I think that they are rightly decided. For example, there's the public school teacher who was teaching Darwinism and challenged the law against that. That's academic freedom. That's not religious harm. And that was protected by the Establishment Clause in *Epperson*. Rightly so, I think.

There was a liquor licensure case called *Larkin v. Grendel's Den*. The tavern was protected by the Establishment Clause. The tavern didn't have religious injury; they had injury because they couldn't get a liquor license

because the church was given veto power over who got a liquor license within, I think, 500 feet of the church. So that was a property injury, if you will.

There was Connecticut case, *Estate of Thornton v. Calder*, where a chain store, Calder, sued because a certain law had been passed that said they had to do this or that in order to accommodate, first and foremost, people that had religious burdens because they had to work on their Sabbath or something like that. The law was struck down because of the property injury to the department store. That is an example of the Establishment Clause properly protecting injuries that are nonreligious injuries.

If you limit yourself to the endorsement test, you're just cutting out all those case which I think are rightly decided. I think that's a big mistake. I think we have to struggle forward as best we can with the purpose and the effect test.

And, by the way, it's not a three-part test. *Lemon* added a third part, but in 1997, *Agostini* ripped that third part off and put that part back under the second part where it belongs. So it's back to purpose and effect; it's the two-part *Schempp* test. Get that right. Now, we have to continue to trudge forward with that.

It is very difficult for judges, so they came up with this myth of the objective observer. I think we need to stop playing with that myth. These are federal judges doing the best they can, like they do in most cases. And, yes, their backgrounds, their training, and their own personal value systems are going to creep into their decisions. Okay. We're human; it happens.

That's why we have courts of appeal and that's why we have appellate courts above courts of appeal. But those judges doing the best they can ought to say, "Look, there's no mystical, objective observer. This is just us, the same people that are here day after day on the bench with the black robes on trying to do the best we can to lay down the unachievable: neutral principles of law. But we can at least aspire to it."

"Let's quit playing this little game of objective observer. We are going to do the best we can. If we make a mistake, the Supreme Court is going to have to rectify it. And we're asking whether there is a secular purpose and whether the primary effect advances religion or not."

What would a neutral principal of law look like? Let me give you an example: Justice Goldberg in the *Schempp* case, concurring opinion, public schools, public-school prayer, and devotional Bible reading struck down—I think correctly so. And Goldberg explained the rule that we ought to have, the neutral principle of law. He didn't call it that. I'm going to call it that. He said that in our public schools, you ought to be able to teach about religion as part of the curriculum, but you can't teach religion. Okay? That's it. Simple as that. You can teach about religion, but you can't teach religion.



So what would teaching about religion be? Well, that's religion as history; how religion, Christianity, with its influence from Judaism, has shaped Western civilization; its art; its architecture; its poetry; how it has caused wars and how it has caused peace. All that is about religion. That is entirely appropriate in the public schools. But if you're teaching Luther's Catechism, that's not about religion; that's teaching religion.

PROFESSOR THAI: Questions or comments from the audience?

AUDIENCE MEMBER: I'm a little bit on the fence on the issue we're facing today and I respect both sides and both opinions. But if I was going to be talked into thinking like Mr. Irons—I heard what he said about the things on the Supreme Court and his daughter's recital in the public school. He said, "I have no problem with that."

I'd just be happy if in the fight in twenty years or thirty years or forty years we were to think that way. You know, why isn't that offensive? Are we going to get to a point where we totally discuss nothing about these things, the Ten Commandments or anything, where we kind of lose all the fact of tradition?

So, pretty much the question is, what do you think we'll be talking about in twenty years? What do you think we'll be talking about in thirty years? What might some of the students here be arguing in front of the Supreme Court when this fight is done, whichever side prevails?

PROFESSOR THAI: Professor Irons?

PROFESSOR IRONS: Well, that question could have been directed at any of us who have the crystal ball to look ahead twenty or thirty years. Mine is still in California, but it's a very good question.

What are we going to be arguing about? I think it basically comes down to two paths that may divert you—a little Robert Frost here. One is that we will come increasingly to appreciate and understand and respect the growing diversity—religious, cultural, and otherwise—in our society, so that the expression of any opinion by any person, the practice of any religion, is protected.

As I said, I'm a firm supporter of the Free Exercise Clause, even to the extent where the Santería religion can practice animal sacrifice. I'd stop at human sacrifice, but you have to draw a line somewhere. But we need to appreciate and respect that kind of diversity, particularly because everyone knows the largest growing religious group in the country is nonbelievers.

We're the largest growing segment of the population, not because people are losing their faith, but because the younger people are not getting their faith.

They're becoming more secularized. I can look at my own two girls and see that.

So the other path is one of increasing polarization and division. Now maybe I'm being a Chicken Little here, as opposed to Pollyanna, but what I really fear is the resurgence of the nativist tradition. We've had this at various times in our history, it goes in cycles, but a resurgence of the fundamentalist persuasion, the election to public office of people who—like Sally Kern, my favorite Oklahoma legislator—really believe in this total myth—I call it a lie, but I'm trying to be polite—of the “Christian nation” and who are trying to impose that.

She even introduced a bill, according to the *Oklahoma Daily*, yesterday in the legislature that said you can't get divorced if you've got living children. Why not? I don't know. But at any rate, this is the other path we can take.

Now, which one will we go down? Will we muddle along, as Carl said, somewhere in the middle and make some choices that we like and some choices we don't like? Will we all basically get along? I don't know. But either one is possible. I like the pluralism path. But maybe not everybody else does.

PROFESSOR THAI: I'll let Professor Berg take a swing.

PROFESSOR BERG: I think that's a great question you asked. I think that conservative Christians who have been a major force behind displays of the Ten Commandments and school prayers and so on over the next few decades will find themselves increasingly under pressure from government and society.

I think they will increasingly represent, at least culturally, a minority view, and they will face the kind of pressures that Catholic Charities found in Massachusetts over the adoption of children by same-sex couples. And there are lots of other conflicts like that coming down the road.

I think it would be far better and wiser for conservative Christians to argue for strong free exercise rights for their ability to live out their faith through their institutions and keep those institutions' identity in the face of pressures from government than to chase after the goals of majoritarian symbols. Because just on strategic grounds, if you want to argue that it's particularly harmful to you for the government to interfere with your religious practice, as I believe Christians will have to argue, then you have to give that same consideration to atheists and non-Christians.

And that's why I agree really strongly with Eduardo that whatever the constitutionality of a symbols case, it's ill advised in the long term to put stock in those from a Christian's perspective—I speak not necessarily of conservative Christians in all respects, but any Christian.

PROFESSOR THAI: Another question from the audience.

AUDIENCE MEMBER: Moving on, this is a comment that invites response to a little bit of what Micheal said and maybe a little bit more of what Rick said.

If I understood Micheal correctly, and this was a minor point of yours, in religion there are those dogmas that can't be questioned at all. I think that's a caricature or a misunderstanding, because throughout the Christian tradition there's been a great dialectical argument. I mean, just look at the synthesis of Athens and Rome, hundreds and hundreds of years of arguments about that. Many of these dogmas can be challenged.

And then to Rick, on O'Connor's argument about divisiveness and the divisive nature of religions, I think that's overplayed. I think the framers saw disputes over property division. I mean, there were lots of fights over wealthy versus nonwealthy, urban versus rural.

There are lots of things that divide people, and the framers saw these things. And I got in a discussion with Madalyn Murray O'Hair about this one time when she was still alive. She had been giving this talk about how religion was the cause of all these divisions in the world and she was talking about the Crusades and the Inquisition and all this.

This was when the Soviet Union was fairly strong and I think they had just invaded Afghanistan. So I asked her afterwards, "What about the Soviet Union?" And her response was, "I've never been there; I don't know."

And I was thinking, "Well, maybe you're old enough to have been in the Inquisition or the Crusades, but I'm sorry you haven't gone over to the Soviet Union." So, anyway, I offer those comments.

PROFESSOR THAI: Micheal.

MR. SALEM: With regard to dogma, I think the point that I was trying to make is who makes the decision about what the dogma is. In England, the government made the decision about the dogma. And my response is that government has no business making dogma.

When Justice Black talked about the *Book of Common Prayer*, he talked about it in the sense that the sheriff in England could walk down the street, and if he saw a gathering, he could walk in there and with a *Book of Common Prayer* he could compare it. With the government-sponsored and the government-determined dogma, debated in Parliament, he could determine from looking at the gathering whether somebody was going to get arrested in that tent.

But my point, really, is that, yes, absolutely, dogma is debated. I mean, we saw in the newspapers here in Oklahoma about six months or so ago the debate within the Church of Christ over issues such as somebody using music within

their corporate worship service, which was prohibited, at least in their belief. But somebody had varied from it, and so they were buying full-page advertisements to advertise their dogma.

But the question there is, who decides? And my response is that it's the religious leaders and that political debate never resolves the issue.

PROFESSOR TEPKER: When looking at the past, it's difficult to evaluate who should be given weight, but it is a fact that Madison, Washington, Adams, and Jefferson all identified civic peace and worries about potential for religious civil war as primary reasons, not the only reasons, for their views on separation of church and state. So I think we overlook their wisdom, and particularly if we caricature it by turning to Madalyn Murray O'Hair, who bears no resemblance to what they were trying to say.

I think Sandra Day O'Connor's point is the truer, wiser assessment, both of the original understanding, but also the real contribution of the First Amendment to what has been a relatively stable and positive development of American history.

PROFESSOR THAI: Any other questions or comments from the audience?

AUDIENCE MEMBER: With Sandra Day O'Connor off the bench and no longer really being able to move forward the endorsement test idea, do you think there's any future on the Supreme Court in Establishment Clause cases in endorsement, or do you think it's really an exercise in futility to continue that line of discussion at this point?

MR. SALEM: Or is there any possibility of survival in the Supreme Court for the Establishment Clause? I mean, we have a Court that has a great deal of dynamics right now. And, obviously, precedent doesn't seem to be respected, I guess, as Courts have in the past.

We just saw the Court reverse two precedents—a precedent with regard to corporate donations and corporate speech. And I might add that I read those, and they just read kind of like First Amendment cases to me. I'm not really sure that it's not the right reasoning, but there is some evil that McCain-Feingold and those other kinds of cases restrict.

But to answer your question, obviously when a Justice moves off the Court there is a change, and it depends on whether there's anybody who remains on the Court who's an adherent to it. Tests come and tests go.

You know, I agree with the result in *Lee v. Weisman* where Justice Kennedy wrote about the coercion test. It involved students attending a graduation ceremony and being forced to listen to some kind of religious matter, but I'm

not sure that that was an Establishment Clause case as much as it was, in reality, some kind of a free exercise case.

So that was the question that I was going to pose initially. And really, what does coercion have to do with the Establishment Clause? Black says that there is no issue of coercion.

But in response to your question, I heard Justice White one time say that he was glad when a new Justice came on the Court because there were new ideas. This is something they talk about. And, certainly, there are new ideas at the Court right now.

In fact, Kevin asked in his brief for the circuit to foreshadow the change in personnel at the Supreme Court. And it was kind of entertaining because Judge Hartz on the circuit panel said, “Well, what law do you want me to follow? You want me to follow the law that’s the law right now, or do you want me to follow some new law that you think is going to be there?”

And circuit judges change, too. But Judge Hartz didn’t want to foreshadow that. And I think that’s the reason the opinion really read the way it did, because he was trying to follow—at least between him and Judge Holmes—what they thought was the current state of law, whatever that is and whether it changes or not.

MR. THERIOT: Really, my understanding is that the endorsement test is probably not going to survive. And I just saw another law review article that indicated that it’s just a simple matter of votes. But I know especially Justice Scalia has been critical of it. And Justice Alito, who you can say took Justice O’Connor’s seat, doesn’t seem to be all that enamored with it, either. So I think that’s probably the case.

The question is, what are they going to replace it with? And, you know, as a litigator, I’m not sure exactly what I’m real excited about. I wouldn’t be opposed to the original understanding of *Lemon*, a secular purpose and primary effect without advancing religion and entanglement. I think I know what those mean now.

MR. SALEM: I agree with that, because we can have some kind of an idea at least.

MR. THERIOT: Right. But if your question was whether I think the endorsement test is on the way out, I think the answer is yes.

PROFESSOR THAI: Let me just take a quick straw poll. Who thinks the endorsement test is out on the Supreme Court?

(Hands are raised)

MR. SALEM: Well, it is here.

PROFESSOR THAI: Right. And who thinks it'll be replaced by some form of a coercion test, say Kennedy and indirect psychological coercion, the lowest common denominator?

MR. SALEM: That's a good point. Hadn't thought about that.

PROFESSOR THAI: Yeah. What's interesting to me—I pondered this beforehand and would not have injected myself into this discussion, but maybe it's a good last point on which to conclude—is that if we're reading the tea leaves right now at the Supreme Court level, they're probably going to pull back on the constitutional restraints on religious displays in the public square and other acknowledgments of religion in the public square.

At the same time, culturally, I think we're going in the opposite direction, where I think that with a more secular and more diverse society, the issues of those battles increasingly become pushed to the margins rather than center of the society.

So we have a Court that's moving probably in one direction for the next generation, and I think the next generation is moving in the opposite direction.

MR. SALEM: I think the point you make further emphasizes the point of your question. Justice O'Connor no longer enjoys the view from the bench, and Justice Kennedy does.

I mean, there's sort of a proximity rule here, I guess. The closer you are to the control where you've got your actual hands on the levers, even though you're just one of nine, it's possible that Kennedy's test, which I think is completely wrong for an Establishment Clause issue, could get greater emphasis.

And I think what will actually happen is, as happens so frequently with the Court, all of a sudden tests that they don't like seem to fade as they ride off into the sunset never to be heard from again or to be resurrected when it might become important. But that's most likely. It's not very often that they directly repudiate, as they have recently, doctrine that they have adopted over many, many years.

PROFESSOR PEÑALVER: That gets back to the question about twenty years from now and also Professor Berg's point that the strength of this country in addressing these issues is the existing religious diversity and increasing religious diversity we're likely to see. And that is more of a safeguard on the establishment side, I think.

You're not going to be able to go that far down many paths before you start alienating most people, because there's so much disagreement. Where I think there's less comfort is on the free exercise side, because so much happens on the other side because people aren't aware of the conflicts they are creating for minority groups.

So the guy in Haskell County who doesn't know that there's any other version of the Ten Commandments than the King James Bible version, I believe that you can do a lot of harm on religious grounds by being ignorant, as in the peyote case or with the Amish.

So a robust free exercise protection seems more essential, even in a religious society, where we're not aware of that diversity.

PROFESSOR THAI: And I think both sides seem to agree. Whether they are separatists or accommodationists, both sides seem to agree we need robust free exercise protection. Great common ground.

PROFESSOR PEÑALVER: Except for the Supreme Court and except for the sort of political ideologues who get a lot of traction out of ginning up controversy.

MR. THERIOT: I think there's a third road and that is that religion becomes marginalized completely. For instance, right now you've got the dispute in France over whether Muslim women can wear their garb in public. And it's clear that's a road we can take, too. Say, "Okay, no more religion in public." And that's definitely something that a robust Free Exercise Clause would take care of, and I sure am in agreement with that.

MR. SALEM: One of the things, though, that we can just look at is these inflection points. For example, after Massachusetts was the last state to disestablish, I believe in 1833, there was a significant growth of churches, from about 38,000 in 1850 to about 72,000 churches in 1870. I mean, that's a very significant growth. That sort of emphasizes Lyman Beecher's point that disestablishment was the best thing for that kind of diversity.

Constitutional law sometimes doesn't change very often, but constitutional facts do. And so the constitutional fact is that the growth in different religious beliefs and diversity hopefully will provide its own protection, but the problem is that there is a very homogenous population in Haskell County, and, unfortunately, the Ten Commandments has some special significance for them and they don't "cotton to" dissenters. I looked this up, and statistically the population was very significantly skewed, as you would expect in a southern state.

PROFESSOR THAI: We're going to wind down. If there's any last and brief comments by panelists or speakers, I would hear them.

One last question.

AUDIENCE MEMBER: We've talked a lot about the academic interplay and the theory interplay. I'm concerned about the practical effect, especially of changing tests or utilizing one over the other.

PROFESSOR THAI: You mean for bar exam purposes?

AUDIENCE MEMBER: Well, that too. For example, Mr. Theriot, you kind of advocated this open pluralism: "Well, let everybody else put theirs up, too, not just the Ten Commandments." And I'm less concerned with this qualitative slippery slope—what happens when the KKK wants to actually burn a cross or what happens when the Nazi Party hangs their flag. I'm more concerned with the quantity of that slippery slope. What happens when the courthouse lawn is out of room?

Mr. THERIOT: Well, I think the simple answer is that the forum's closed. But until then, everybody has this shock effect. Closing forums and not having enough room in forums happens all the time. First come, first served. I don't think there's anything wrong with that.

PROFESSOR PEÑALVER: Rotating room.

MR. SALEM: Let me ask you this, though. I wasn't really going to mention this, but in August of last year the district court entered an order that said that the county shall remove the monument, and it's still up. I mean, there's been no stay. And, in fact, the Tenth Circuit rejected a stay pending the application for certiorari. And then Kevin filed an application that said, "Well, if we remove it, it might break."

So when are we going to start rotating here, Kevin?

MR. THERIOT: Well, just to be clear, the district judge didn't put a date on when it should be removed.

MR. SALEM: Five, six months to obey a court order of a federal district judge?

(Simultaneous colloquy)

(Laughter)



PROFESSOR THAI: Thank you so much to the speakers and to the panel members. You've all enlightened us.

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