THE VAN ORDEN AND MCCREARY COUNTY CASES: CLOSING THE GAPS REMAINING BETWEEN THE ESTABLISHED LINES OF TEN COMMANDMENTS JURISPRUDENCE

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THE VAN ORDEN AND MCCREARY COUNTY CASES: CLOSING THE GAPS REMAINING BETWEEN THE ESTABLISHED LINES OF TEN COMMANDMENTS JURISPRUDENCE

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"Religious liberty is at once the grandparent and the neglected stepchild of international human rights norms."

--Brett G. Scharffs

I. Introduction

The notion of human rights stems from protections initially instituted for the protection of religion. The extension of these rights, however, has resulted in situations in which subsequently recognized human rights sometimes conflict with their theoretical forebears. This conflict presents an issue of social justice worthy of consideration by legal scholarship concerned with the development of civil rights and the origins of social justice. This Note examines the conflicting human rights behind the Ten Commandments cases in order to illustrate the role that religious liberty plays in the religious protections afforded by the First Amendment.

The United States Supreme Court decided two Ten Commandments cases in 2005, generating much confusion in the media and in subsequent legal scholarship. The Washington Post described the decisions as leaving the law "more or less unchanged." The New York Times, however, wrote of a shift—at least in the balance of power on the Court regarding Establishment Clause issues. Furthermore, the press coverage presented the results of these cases as confusing and divisive—even summarizing the results as potentially guiding future decisions to uphold "religious symbols that have been on display for many years, with little controversy . . . while newer displays intended to advance a modern religious agenda will be met with suspicion and disfavor from the Court."

Such portrayals of these decisions could lead casual observers to believe the Supreme Court ignored important issues of equality and justice. A closer reading of the decisions, followed by analysis of the Court's reasoning, therefore seems appropriate. Part II of this Note presents a summary of the two cases, while Part III addresses the issues arising as a result of those decisions. Part IV then analyzes the Court's analytical framework for Ten Commandments cases, presents other tests that lower courts have used, and examines the strengths and weaknesses of the tests. Part V concludes by addressing the propriety and viability of the approach of

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2 Id.
3 Id.
4 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
5 Charles Lane, Court Split Over Commandments; Justices Forbid Copies on Walls of Courthouses but Allow Monument, WASH. POST, June 28, 2005, at A1.
7 Id.
coercion as an alternative to the prevailing frameworks, which could clear up some of the murkiness of the jurisprudence surrounding public displays of the Ten Commandments.

II. The Supreme Court's 2005 Ten Commandments Cases

The twin Ten Commandments cases decided by the United States Supreme Court in 2005, McCreary County v. ACLU\(^8\) and Van Orden v. Perry,\(^9\) provide a recent example of the issues that arise under the Establishment Clause. Many observers viewed these cases as offering the Court an opportunity to clarify its analytical approach, not only in the realm of Ten Commandments cases, but also to the Establishment Clause generally.\(^10\) These decisions, issued the same day, exemplify a jumbled Establishment Clause jurisprudence issuing from a deeply fragmented Court. Neither opinion commands an intact majority of the Court; instead, several pluralities and individual opinions join to reach the holdings of the cases without arriving at a conclusive means for arriving at those resolutions.\(^11\) These opinions present several different approaches to the Establishment Clause, and thus provide an opportunity to evaluate the approaches' conformity with the concept of religious liberty embodied by the religion clauses.

A. McCreary County v. ACLU

The case of McCreary County v. ACLU resolved a conflict arising from the efforts of two Kentucky counties to erect public displays including the Ten Commandments in their county courthouses.\(^12\) Groups opposed to the displays mounted a series of challenges, yielding a complex procedural

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\(^8\) See discussion infra Part II.a.
\(^9\) See discussion infra Part II.b.
\(^10\) See Adam M. Conrad, Note, Hanging the Ten Commandments on the Wall Separating Church and State: Toward a New Establishment Clause Jurisprudence, 38 GA. L. REV. 1329 (2004) ("Because of flaws in the current jurisprudence, no coherent Ten Commandments rule can be salvaged from the present Establishment Clause landscape. Thus, to create a clear consistent Ten Commandments rule, the Supreme Court must articulate a clear and consistent Establishment Clause jurisprudence.").

11 Scharffs, supra note 1, at 1227. McCreary does not present a pure majority in that Justice O'Connor, whose vote contributed to the five-vote majority, felt a need to write separately to clarify her position. Thus, the five votes of the majority opinion do not represent a true consensus on Establishment Clause issues. Likewise, Justice Breyer's position in the two cases also indicates the absence of a solid majority.

12 McCreary County v. ACLU, 545 U.S. 844, 850 (2005).
The buildup to the case and the facts on which the Court decided it warrant careful attention here before turning to the interplay between *McCreary* and its companion case, *Van Orden v. Perry*, and the issues arising when the two are juxtaposed.

In *McCreary*, the controversy began when the two Ten Commandments displays were first posted. Both displays triggered lawsuits that requested the court enjoin the counties from displaying them, which led each county’s legislative body to enact a resolution providing for a more extensive exhibit. The resulting displays were intended to convey the notion that the Ten Commandments constitute Kentucky’s “precedent legal code.” Both counties’ modified exhibits showed the Ten Commandments “surrounded by texts containing religious references as their sole common element.”

Lawsuits filed at that point resulted in orders to remove the displays, with prohibitions against “erect[ing] or caus[ing] to be erected similar displays.” Each of the counties installed a third display which included nine documents of equal size. One of these documents comprised of the Ten Commandments from the King James Version of the Bible. The others included the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The ACLU challenged the displays’ constitutionality and

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13 Id. at 850–59.
14 Id. at 850.
15 Id.
16 Id. (internal citations omitted). McCreary County required that the display “be posted in a very high traffic area of the courthouse.” Id. at 851. Pulaski County hung the commandments in a public ceremony imbued with religious themes. Id.
17 Id. at 850. The modifications added to the Ten Commandments eight other framed documents. Id. at 853–54. The size of the Ten Commandments in this intermediate display dwarfed the other documents. Id. Further, the excerpts of those other documents carried clear religious messages with little other unifying content. Id. The eight accompanying documents were “the ‘endowed by their Creator’ passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, ‘In God We Trust’; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s ‘Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,’ reading that ‘the Bible is the best gift God has ever given to man’; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.” Id. at 854.
18 Id. (internal citations omitted).
19 Id. at 856.
20 Id. at 856. The counties labeled this third exhibit "The Foundations of American Law and Government Display." Id. Each document, displayed in equal sized frames, carried a comment about its significance to the law and to history. Id.
requested a similar injunction to require their removal. The District Court granted that request, which the Sixth Circuit upheld, basing its decision partly on the displays’ contentious history. That court further reasoned that the counties acted pursuant to a religious purpose rather than an educational or secular purpose. It also concluded that the third display failed the tripartite test of Lemon v. Kurtzman, in that there was no genuine secular purpose underlying the third display and it had the effect of an endorsement.

The Supreme Court granted certiorari to decide the constitutionality of the third display. The Court limited the issue on review, refusing to consider the constitutionality of the third display in isolation from its litigious and contentious history. Justice Breyer expressed his justification for reaching disparate results as "judicial judgment" in his concurrence in the companion case to McCreary, the case of Van Orden v. Perry. This exercise of "judicial judgment" led the majority in McCreary to affirm the Sixth Circuit’s decision, finding the displays to violate the Establishment Clause.

Justice Souter wrote for a five-vote majority, finding that the exhibits manifested an unconstitutional religious purpose. The majority opinion analyzed the issue under the "secular purpose" prong of the Lemon analysis. In concluding that the displays failed to manifest a predominantly secular purpose, the Court relied on their development from the first displays

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22 Id. at 858. The district court also based its decision on a reading of Stone v. Graham, 449 U.S. 39 (1980) (per curiam). Under this reading, the counties' decision to post the Ten Commandments partakes of a foundationally religious motivation, rather than of a secular purpose. Id. at 857 (internal quotations omitted). Such reasoning suggests that any display with inherent religious content violates the Establishment Clause. Id. at 854–55. Furthermore, the court argued that when the counties supplemented that unacceptable display with other documents centered on a religious theme, they aggravated their violation of the Establishment Clause. ACLU of Kentucky et al., 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001).

23 Id. at 858.

24 McCreary, 545 U.S. at 854–55.

25 Lemon v. Kurtzman, 403 U.S. 602 (1971). In Lemon, the Court set forth a three-pronged analytical framework for Establishment Clause analysis. First, a reviewing court analyzes whether government has "a secular legislative purpose." Id. at 612. Second, its "principle or primary effect must be one that neither advances nor inhibits religion." Id. at 612–13. And finally, the action must not "foster 'an excessive government entanglement with religion.'" Id. (internal citation omitted).

26 McCreary, 545 U.S. at 854–55.

27 Id. at 858.

28 Id. at 866.


30 McCreary, 545 U.S. at 858.

31 Id. at 859.
that manifested only the Ten Commandments. The Court interpreted this history underlying the counties’ exhibits as evidence of a primarily religious purpose. The majority further reasoned that the notion of neutrality buttresses this result, finding that this concept persuasively ties the two religion clauses together.

Although five justices agreed with this result, Justice O’Connor wrote separately to emphasize her interpretation of how the Establishment Clause should apply to the facts presented. She cites instances in which the Court has interpreted the religion clauses, but defers to the majority’s analysis of this case. Given the five-vote majority (and Justice O’Connor’s concurrence), the McCreary decision points to the history of the displays as the determinative factor in its affirmation of the district court’s holding that the displays violated the Establishment Clause for want of a predominantly secular purpose. In justifying this conclusion, the Court relied on the touchstone of neutrality. If the county action violated this touchstone, the Court would deem it a violation of the Establishment Clause. The Court seemed implicitly to define neutrality as requiring an exclusively secular purpose instead of merely a secular purpose as required by Lemon. Under this analysis, the counties’ actions violated the clause and the displays failed the test.

Justice Scalia’s dissent in McCreary cites numerous historical examples where the American government has consistently acted favorably toward religious practice, generally, without favoring any religion specifically. These examples include the Presidential oath, the traditional opening to sessions of the United States Supreme Court, the opening of legislative sessions of Congress with prayer, the legislation providing for paid chaplains to the armed forces enacted during the same week as the First Amendment, President Washington’s Thanksgiving Proclamation, the Northwest Territory Ordinance, Washington’s first Inaugural Address, Jefferson’s second inaugural address and the prayer with which it began, Madison’s first inaugural address, the Pledge of Allegiance, and the national

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32 Id. at 865–71.
33 Id.
34 Id. at 873.
35 Id. at 881–85 (O’Connor, J., concurring).
36 Id.
37 Id. at 857.
38 Id. at 860 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
39 Id.
40 Id.
41 Id. at 885–88 (Scalia, J., dissenting).
Scalia points out that these examples, together with the continued similar practices of state and federal governments, belie the Court’s conclusion that the Constitution forbids government from favoring religious practice generally. He also notes that a majority of the then-current members of the Court had repudiated the Lemon analysis, which here served as the basis for the Court’s opinion. Scalia goes on to rebut the majority’s criticism of his dissent by claiming that he relies not merely on views of the Founders but on "official acts and official proclamations of the United States or of the component branches of its Government . . . ." He argues that these official acts (just like those cited by Stevens in the majority opinion) do not bear the same weight as the text of the Constitution; however, Scalia urges that the official acts do assist the Court to ascertain the meaning of the Establishment Clause.

According to Justice Scalia’s view, the majority opinion "ratchet[s] up the Court’s hostility to religion." Scalia’s perception of such hostility rests on two main points: first, the majority uses its inquiry into legislative intent to ascertain what appearance the government action would have to a reasonable, detached observer; second, the majority expands the Lemon test to require more than "a secular . . . purpose" as the Court required in Lemon. Here, the majority indicates that having a secular purpose does not suffice; rather, they require that the government’s nonreligious purpose or purposes must "predominate" over the religious purpose or purposes. The developments in Establishment Clause jurisprudence illuminated by Justice Scalia of this "ratcheting" effect and of the distinction between actual and

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42 Id.
43 Id. at 889. Scalia writes: "With all of this reality . . . staring it in the face, how can the Court possibly assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion,' . . . and that 'manifesting a purpose to favor . . . adherence to religion generally' . . . is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words. Surely not even the current sense of our society . . . . Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so . . . ." Id.
44 Id. at 888-89.
45 Id. at 895.
46 Id.
47 Id. at 900.
48 Id. at 901. Scalia notes that under this view, even if the government acted without any actual intent to favor or advance religion, that action would violate the Establishment Clause if it gave the perception of such favoritism to an observer—regardless of whether or not the action actually would favor or advance religion. Id.
49 Id. at 901-02 (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).
50 Id. at 901.
perceived endorsement show the deep divide among jurists regarding the intent and meaning of the religion clauses.

B. Van Orden v. Perry

The Supreme Court’s decision in Van Orden v. Perry presents a very different approach to Establishment Clause analysis, one that reaches the opposite result in a similar legal challenge. This case involved a large monument (six feet tall and three-and-one-half-feet wide) inscribed with the Ten Commandments and placed on the Texas State Capitol grounds. The grounds also housed some sixteen other monuments and twenty-one historical markers. The Ten Commandments monument stood between the Capitol building and the Texas Supreme Court building, where visitors would notice it prominently. The Court noted the other inscriptions on the monument: an eagle grasping the American flag; an eye inside a pyramid; two tablets resembling the Ten Commandments; two Stars of David; and the Greek letters Chi and Rho (representing Christ). This monument had stood for more than forty years without any complaint prior to the lawsuit filed by Van Orden. Van Orden had passed by the monument regularly for approximately six years before challenging its constitutionality.

The Court held that these facts presented a valid, constitutional display by the Texas government. It reached this conclusion after rejecting the applicability of the Lemon test in this instance, distinguishing these facts from those that would trigger Lemon as attributable to the passivity of the monument in question. Once the Court decided that Lemon did not apply, the plurality analyzed the monument and its constitutionality through the dual lenses of the monument’s nature and the Nation’s history. Under this analysis, the Court cited "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life . . . ". Further, the Court recognized that despite the religious aspects of the Ten Commandments, their religious significance does not make all

\[\text{References}\]

52 Id.
53 Id. at 702.
54 Id. at 681.
55 Id. at 681–82.
56 Id. at 682.
57 Id.
58 Id. at 691–92.
59 Id. at 685–86.
60 Id. at 688–92.
61 Id. at 686 (citing Lynch v. Donnelly, 465 U.S. 668 (1984)). The Court gave examples of this unbroken history, including President George Washington’s Thanksgiving Day Proclamation. Id.
government displays of them unconstitutional.\textsuperscript{62} These conclusions allowed the Court to hold that the Texas monument did not violate the Establishment Clause.

Justice Breyer, whose concurring opinion determined the outcome of this case and whose vote gave \textit{McCreary} a majority, wrote a separate concurrence in \textit{Van Orden}.\textsuperscript{63} His concurrence sheds light on both decisions. Justice Breyer agreed with the plurality that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."\textsuperscript{64} Nevertheless, Justice Breyer also disagreed with the dissent (and part of the analysis by the majority opinion in \textit{McCreary}) by rejecting the sufficiency of tests aimed at evaluating the neutrality of a challenged government action.\textsuperscript{65} These two vectors—acknowledging religion in the public sphere to some degree yet retaining an evaluation of neutrality—direct Justice Breyer to the conclusion that no test could substitute for "the exercise of legal judgment" in cases such as these.\textsuperscript{66} This substitution of "legal judgment" for the tests applied in prior cases allowed Justice Breyer to balance the religious content with the history of both displays.\textsuperscript{67} After balancing these factors, he saw the Texas display as "serving a mixed but primarily nonreligious purpose."\textsuperscript{68} His analysis distinguishes the history of the Texas display from that of the McCreary County displays in that "the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them."\textsuperscript{69} This distinction seems to drive Justice Breyer's votes in both cases. His emphasis on the "stormy" history of the McCreary County display suggests that had its history not manifested a religious purpose, the display would fall within the allowable bounds of the Establishment Clause.\textsuperscript{70} Nevertheless, Justice Breyer's reliance on "legal judgment" does not clarify how to find or evaluate this purpose. Similarly, the absence of any such purpose-laden history surrounding the display in \textit{Van

\textsuperscript{62} \textit{Id.} at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

\textsuperscript{63} \textit{Id.} at 698–705.

\textsuperscript{64} \textit{Id.} at 699.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.} at 700.

\textsuperscript{67} \textit{Id.} at 700–02.

\textsuperscript{68} \textit{Id.} at 703.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}
Orden led Justice Breyer to conclude that it does not violate the Establishment Clause.\footnote{Id.}

Justice Stevens dissented in Van Orden, arguing that the monument served no function other than presenting the text of the Ten Commandments and that, as such, it violated the Establishment Clause.\footnote{Id. at 707–36 (Stevens, J., dissenting).} He argued that, without either an explicit or an implicit tie to Texas' state history or to the founding of the nation, the monument served a solely religious purpose and thus violated principles of neutrality and endorsement.\footnote{Id. at 707 (Stevens, J., dissenting).} Stevens adamantly asserted that Scalia's proposed construction of the Establishment Clause would lead to "unpalatable result[s]."\footnote{Id. at 729 (Stevens, J., dissenting).}

Justices Souter and O'Connor also dissented.\footnote{Id. at 737 (Souter, J., dissenting).} Justice Souter's dissent adopted neutrality "as a general rule," although recognizing that the Constitution does not mandate "absolute governmental neutrality toward religion."\footnote{Id. at 737; Stone v. Graham, 449 U.S. 39 (1980).} Justice Souter expressed the view that a display of the Ten Commandments cannot comport with the Establishment Clause requirement of neutrality except when the display can be proven to carry primarily nonreligious purposes.\footnote{Id. The Court noted the religious nature of the displays at issue in both cases. McCreary County v. ACLU, 545 U.S. 844, 868 (2005); Van Orden, 545 U.S. at 690.} His dissent emphasized a prior Supreme Court case that held unconstitutional the display of the Ten Commandments in a classroom setting.\footnote{Id.}

### III. Issues Arising from McCreary and Van Orden

The Court's divided resolution to the twin Ten Commandments cases raises several issues. Because the Ten Commandments are religious tenets, cases involving government displays of the Ten Commandments pose the fundamental question of whether symbolic government endorsement of religion is proper.\footnote{Id.} A display of religious messages or monuments constitutes government action with some religious purpose or effect. The
Court has found some government actions with religious purpose or effect, such as the erection of a crèche on public property, to withstand constitutional scrutiny. Therefore, the question of how to determine when a government action affecting religion violates the Constitution remains open, subject to refinement and development of Establishment Clause jurisprudence.

The interplay of the two cases and their combined potential effect on Establishment Clause jurisprudence raises several issues. One such issue concerns whether dissenters must opt out of situations similar to those presented by McCreary and Van Orden, as dissenters to offensive visual material, whose remedy is to avert their eyes. Whether such dissenters feel ostracized by such displays can contribute to the analysis. If dissenters to objectionable visual imagery feel alienated from society by their discomfort in its presence, their situation does not differ substantially from those whose discomfort arises from the presence of a Ten Commandments display. Further, a requirement that a party take affirmative steps to avoid the discomfort associated with such a display could seem to aggravate any encroachment on the dissenters; however, such a requirement would not vary from the comparable situation of those in the presence of objectionable visual imagery being required to avert the eyes.

To expand on the opting out requirement, a reversal of roles can prove illuminating. We can consider the issue of whether mandatory inclusion of evolution in public school curriculum violates the Establishment Clause as endorsing the belief-choices of adherents to "secularism" and opposing the alternative belief choice of "creationism." Stated as such, the requirement that an adherent to another religion opt out, or simply silently reject the position being presented, could seem reasonable. When addressing this issue, evaluating whether the dissenters' opting-out actions or their sensitivity to a feeling of ostracism should invalidate otherwise

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80 See Marsh v. Chambers, 463 U.S. 783 (1983) (holding that the Nebraska legislature's practice of opening each session with a prayer did not violate the Establishment Clause); see also County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that the display of a Chanukah menorah outside a city and county building did not violate the Establishment Clause).

81 I phrase this as "government action affecting religion" to include both actions that favor and that disfavor religion in violation of the principles underlying the Establishment Clause.

82 See Erznoznik v. Jacksonville, 422 U.S. 205, 208-12 (1975) (holding that a city ordinance violated the First Amendment where it prohibited the display of potentially offensive movies when observers had the option of averting their eyes).

83 Secularism has no denomination, nor does it espouse any religious organization. I merely label it as "religion" to present a parallel construction. Depending on one's definition of religion, secularism might be labeled either a religion, if the choice whether to believe or not is labeled one of faith, or as a quasi-religion in the alternative.
acceptable action becomes enlightening. If the reverse position were presented to a court (e.g., proposing creationism over evolution), the result seems likely to result in a finding that instruction centered on "creationism" would violate the Establishment Clause. Justice O'Connor's concurrence in McCreary points to this anomaly:

When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs.8

This view suggests that governmental religious or nonreligious expressions form part of a larger "marketplace of ideas" in which private religious belief must compete with other ideas for broader public support and acknowledgment. The imposition of Establishment Clause restrictions that require some degree of privatization of religion and religious belief, but preclude religion from serving as an adequate justification for public actions, would effectively eliminate religion from the public sphere and would violate the integrity of such a marketplace.83 Because any opinion on the religious involves an epistemic belief choice, restricting the expression of a subset of such choices based on the choice to believe in God seems to violate the ideals espoused in the Religion Clauses.

The weight given to the history of each display presents another issue highlighted by the interplay of the two cases. The Court's use of this factor suggests that it can have two separate effects on a Ten Commandments display. McCreary suggests that the history of a display can render unconstitutional an otherwise constitutional display. Because Justice Breyer uses this point as a distinction, it seems that the Court deems the counties' otherwise valid action in producing its third display as unconstitutional because the county's earlier attempts to display the Ten Commandments did not pass constitutional muster. This point suggests a fundamental difference between the cases and presents a problematic

8 McCreary, 545 U.S. at 883 (O'Connor, J., concurring).
83 See Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 678-79 (1992) ("Keeping religion and religious belief confined to private life enables the . . . state to marginalize religion without eliminating it . . . . [G]overnment . . . treats religion neutrally—as a subjective value preference restricted to private life, rather than as objective knowledge proper to public life. This position can be genuinely neutral, however, only if the boundary between the private world of subjective preference and the public world of objective fact is natural, fixed, and inevitable.").
question: why should an action with no independent constitutional violation fail the Establishment Clause test because of past missteps? Justice Breyer proposes no answer to this question. The Constitution's condemnation of behavior wholly contained in past actions can be seen to violate notions of fairness and justice. It is unclear how a county could possibly overcome its history in such instances.

Furthermore, the result that government displays containing the Ten Commandments are constitutional in some states but unconstitutional in others yields confusing and anomalous results. As an example, the issue of states allocating time during the school day for students to observe a moment of silence has been ruled unconstitutional by the Supreme Court because the modification to the statute added "and prayer" to the prior allowance for a "moment of silence." However, the Commonwealth of Virginia has enacted a statute allowing for daily observance of one minute of silence, which courts have upheld. As a result, the same legislative action may be constitutional in some states, but unconstitutional in others.

Justice Scalia's dissent in McCreary noted that "[f]ederal, state, and local governments across the Nation have engaged in such display[s]." To hold here that the display violates the Constitution seems to create a similar legal anomaly as the moment of silence example, suggesting the time has come for a change in the law. The display that the Court struck down in the Kentucky counties might be found constitutional in a different jurisdiction. Such a result is at best arbitrary and at worst unjust.

The determinative nature of the history of the display presents further difficulties. Justice Breyer, by using the history of the display as a conclusive distinguishing factor between McCreary and Van Orden, presents

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88 McCreary, 545 U.S. at 907, n11. Scalia's footnote states:

The significant number of cases involving Ten Commandments displays in the last two years suggests the breadth of their appearance. See, e.g., Books v. Elkhart County, 401 F.3d 857, 858–59 (7th Cir. 2005) (Ten Commandments included in a display identical to the Foundations display); Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005) (Ten Commandments monument in city park since 1965); Modrovich v. Allegheny County, 385 F.3d 397, 399 (3d Cir. 2004) (Ten Commandments plaque, donated in 1918, on wall of Allegheny County Courthouse); Freethought Soc. Of Greater Philadelphia v. Chester County, 334 F.3d 247, 249 (3d Cir. 2003) (Ten Commandments plaque, donated in 1920, on wall of Chester County Courthouse); King v. Richmond County, 331 F.3d 1271, 1273–74 (11th Cir. 2003) (Ten Commandments depicted in county seal since 1872).

Id.
an under-inclusive analysis that might preclude the government from acting favorably with respect to religions without a longstanding tradition in this country or to religions that fall outside the mainstream of socially acceptable beliefs. This would result from the acceptability of the Texas display in Van Orden based on its forty-year history. Justice Breyer's conclusion can be interpreted as finding that any monument with a sufficiently long history would not violate the Establishment Clause. Such an implication would yield the incongruous result that government may act in ways that passively support longstanding religions, but not in support of newer religions without such a history.

It is questionable whether courts should be in the business of assessing what length of time constitutes an adequate history to withstand challenge under the Establishment Clause. Justice Breyer's opinion does not address the fallout of this type of distinction. Religions with a less entrenched history in the United States could justifiably oppose this sort of framework. These religions could assert that a classification based on the history of a religious display should not relate to the Court's decision as to whether the display passively supports or favors a religion.

On the other hand, Justice Breyer's conclusion might alternatively imply that passive government action favoring religion violates the Establishment Clause when the action results in significant protests, as suggested in the New York Times. Surely Justice Breyer would not intend this result, but his opinion allows for the inferential leap nevertheless. Such an implication would raise different issues from the previous one; however, the issues raised under both interpretations yield similar results. If government actions are acceptable so long as they generate few protests, the result is a rule supporting tyranny of the majority. If the prevailing viewpoint raised enough criticism of the action or had sufficient resources to

90 See id. at 703 (Breyer, J., concurring) ("[I]n today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.").
91 Linda Greenhouse, Justices Allow a Commandments Display, Bar Others, N.Y. TIMES, June 28, 2005, at A1 (stating "it appear[s] that religious symbols that have been on display for many years, with little controversy, are likely to be upheld, while newer displays intended to advance a . . . religious agenda will be met with suspicion and disfavor from the court.").
92 See Van Orden, 545 U.S. at 704 (stating "[t]his display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive. And this matter of degree is, I believe, critical to a borderline case such as this one.").
challenge an action with which it did not agree, that majority could invalidate otherwise valid action. Such a result could yield disproportionate power to majority religions and to those religious and nonreligious organizations wielding the most resources to wage the sort of intellectual or spiritual warfare that may cause a court to find that an action violates the Constitution solely because of the history surrounding the action.

IV. Methods of Analysis under the Establishment Clause

These issues raised by the 2005 Ten Commandments cases can help in an evaluation of the propriety of various legal frameworks with respect to the Establishment Clause cases. The desirability of each approach is largely determined by which issues one seeks to give consideration and weight. Although more approaches have been proposed than those analyzed here, three prominent approaches have most often been applied or suggested in relation to Ten Commandments cases and to Establishment Clause cases generally: the Lemon test; the "endorsement" test; and the "coercion" test.

A. Lemon test

The Lemon test mentioned in both McCreary and Van Orden is a three-prong analysis derived from Lemon v. Kurtzman. The test imposes requirements on government action challenged for being violative of the Establishment Clause. The government must show: (1) that the action had

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93 See, e.g., Steven K. Green, Federalism and the Establishment Clause: A Reassessment, 38 CREIGHTON L. REV. 761 (June 2005) (advocating federalism as the proper analytic approach to the Establishment Clause). Federalism as a solution to religious freedom jurisprudence seems to sidestep the true problem of arriving at an acceptable criterion for deciding such cases. As such, the merits and drawbacks of such a solution remain the topic for another article.


95 Id. at 612.
"a secular... purpose", 96 (2) that the action's "principal or primary effect... neither [advances] nor [inhibits] religion"; and (3) that the action does not result in undue entanglement between government and religion. 97 The Supreme Court's leading case on Ten Commandments displays applied this test. 98 In subsequent cases, the Court extended this test to require more than merely "a secular purpose" as it had written in Lemon; instead, the action must demonstrate a genuine secular purpose. 99 The holding in McCrery added to this judicial gloss by requiring more than merely a genuine secular purpose, striking the counties' displays because "the secular purpose [was] secondary." 100

In evaluating the Lemon test, however, the Court's tendency to abandon it becomes important. As indicated by Chief Justice Rehnquist, writing for the majority in Van Orden, the Court began disregarding the Lemon approach soon after its inception. 101 Justice Scalia further observed that by 2005, a majority of the Court already rejected Lemon as the controlling test. 102 Scholars also indicate that the Court has generally abandoned the Lemon test—one even indicating that it may already be dead. 103 Nevertheless, the McCrery decision clearly indicates that the test is still breathing.

96 Commentary and criticism of this prong of the test comes later, in the analysis of the endorsement approach to the Establishment Clause, because of its particular relevance to that discussion. Furthermore, criticism of the Lemon test has reached levels where the viability of the test as a whole is in question, making analysis of its component parts less relevant where this will appear below. See infra note 103.

97 Lemon, 403 U.S. at 612-13 (citations omitted).
98 Stone, 449 U.S. at 39. In Stone, the Court addressed the public display of the Ten Commandments and held unconstitutional Kentucky's displays. Id. Stone involved a statute requiring the display of a large copy of the Decalogue in school classrooms throughout the state. Id. at 39 n1. This display would also include small print stating that the Ten Commandments form a part of the foundation for Western legal traditions and for the common law of the United States. Id. The Court noted that the use of the Ten Commandments in this statute, despite Kentucky's avowed secular purpose, could not escape its inherent religious nature. Id. at 41-42. Thus, the statute failed the purpose prong of the Lemon test, and the Court held it unconstitutional. Id.
100 McCrery v. ACLU, 545 U.S. 844, 864 (2005).
101 Van Orden v. Perry, 545 U.S. 677, 686 (2005) (stating that "just two years after Lemon was decided, we noted that the factors identified in Lemon serve as no more than helpful signposts") (internal citations omitted).
102 McCrery, 545 U.S. at 890 (Scalia, J., dissenting) ("[The Lemon test] is discredited... because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun 'Lemon test' that embodies the supposed principle of neutrality between religion and irreligion.").
B. Endorsement

The prevailing alternative to the Lemon test in Establishment Clause analysis asks whether the government action constitutes an "endorsement" of a religion or of religion in general. Justice O'Connor authored this approach, which has become the prevailing view regarding Ten Commandments cases. The test essentially reduces the three prongs of Lemon to two: secular purpose and effect of endorsement.

Justice O'Connor's reduction of the test into two prongs largely retains Lemon's analytical content, but diminishes the required analysis. She described her endorsement approach as:

Prohibit[ing] 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. Disapproval sends the opposite message.

Her endorsement-based test retains the secular purpose prong. This prong of the Lemon test has received much criticism, including questioning of the ability of a court to determine legislative intent.

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105 See 16A Am. Jur. 2d § 436 (2005) ("In considering whether the erection, maintenance, or display of religious structures or symbols on public property constitutes a violation of religious freedom, the Supreme Court has said that, to withstand the strictures of the establishment clause, state action asserted to violate that clause must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.").
107 Wallace, 472 U.S. at 75 (O'Connor, J., concurring).
108 See Scott C. Idleman, Religious Premises, Legislative Judgments, and the Establishment Clause, 12 CORNELL J.L. & PUB. POL'Y 1 (Fall 2002). Idleman indicates that the determination of legislative purpose creates several problems. Id. Among these, the determination of original legislative intent does not end the inquiry; a secular contemporary legislative purpose can cure a statute enacted for purely religious purposes. Id. at 14–15. Likewise, the potential of confusion or conflation between the legislative purposes and the individual or collective legislators' purposes poses a significant difficulty in applying the purpose prong. Id. at 18–19. For example, a statute's language itself might proclaim one purpose, contrasted with the varying purposes of the legislators voting for its passage. In determining whether this statute has a secular purpose (or, depending on the variation of the purpose prong being applied, a genuinely secular purpose or a genuine, primarily secular purpose), the weight attached to the legislation's wording versus the legislators' individual or collective intentions in passing it presents no clear solution.
Additionally, the general notion of prohibition on endorsement allows for multiple interpretations of the word "endorsement." Indeed, Steven D. Smith comments, "[T]he concept of endorsement seems both elusive and elastic." This elasticity of the general concept of endorsement may be one of its stronger qualities because of the flexibility it gives to the analytical framework applied to the Establishment Clause. On the other hand, this flexibility causes the predictability of Establishment Clause cases to suffer. Further, the possibility that each Justice could interpret "endorsement" differently depending on the case "threatens to aggravate existing doctrinal confusion." 

10 See Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266 (Nov. 1987). Professor Smith outlines four varieties of endorsement: "exclusive preferment, ... endorsement of truthfulness, ... value endorsement, ... [and] accommodation endorsement." Id. at 276-77. Smith also notes that Justice O'Connor's Wallace v. Jaffree opinion gave "analytical content" to the endorsement test, emphasizing "deferential and limited" review of legislative intent and elaborating on the "perception" prong. Id. at 272. This opinion proposes an "objective observer"—familiar with the text, legislative history, and implementation of the law in question, not to mention familiarity with the values recognized in the free exercise clause. Id. Under the endorsement approach, "the constitutionality of a measure helpful to religion would depend on whether the legislators acted—and were perceived as having acted—because they believe in religion (in which case the measure would probably be considered an invalid endorsement) or because they believe their constituents believe in religion (in which case the measure would be a permissible accommodation)." Id. at 279. As such, the purpose prong exhibits problematic elements, which undermine its useful attributes. Id. at 301. Although Smith's argument that "inquiries into the intent of government officials are inherently treacherous" fails to persuade most who acknowledge the value of ascertaining legislative intent as a means of evaluating the validity of a piece of legislation, the deeper issues surrounding the Lemon purpose prong and its counterpart in the endorsement test render these analytical frameworks less valuable. Id. at 284.

11 Id. at 276.

12 Id.

13 Id. at 278. Smith elaborates, pointing out that "a sweeping prohibition ... would force government to ignore religion's distinctive interests and needs ... Moreover, in a polity in which government regularly acknowledges and accommodates citizen interests of various sorts, deliberate indifference toward one class of interests may easily shade into, and become indistinguishable from, disapproval—which Justice O'Connor's test would also forbid." Id. Further, in evaluating an accommodation endorsement prohibition, Smith states, "the line separating accommodation endorsements from endorsements of truthfulness or value is so thin as to be virtually invisible." Id. at 279. An approach allowing endorsements of value, but not of truthfulness walks a fine line as "there is no reliable way for a court to determine whether school prayer, or aid to parochial schools, or publicly sponsored nativity scenes [or Ten Commandments displays], indicate that the religious ideas or causes they represent are 'true' or merely that such ideas or causes are 'good.'" Id. Finally, an analysis that allows exclusive preferment of religion or nonreligion dispenses with the religious freedom protections of the First Amendment altogether. Id. at 283. Moreover, the insertion of Justice O'Connor's intermediary for direct endorsement—perception of endorsement—"raises a critical question: Whose perceptions count?" Id. at 291. Some might perceive this intermediary as overcoming the difficulties inherent in the purpose prong. See Smith, supra note 110 and accompanying note. Once one acknowledges the question 'Whose perceptions count?,' however, the two proposed responses provide no additional help. These responses suggest that either real human beings or a "hypothetical 'objective observer'" could be used to determine whether an action is perceived as endorsing religion. If real human beings provide this perception, the problem becomes how to assess the perception. They possibility of public opinion polls deciding when
Justice O'Connor’s development of the endorsement test addresses these difficulties specifically. She suggests that courts determine whether the action had the effect of endorsement through an objective observer. The insertion of a hypothetical "objective observer" has not cured this problem; such an imagined outsider can only observe as much as its creator observes, thus collapsing the observer-modified test back to the original endorsement test prior to this insertion. Indeed, one critic suggests that Justice O'Connor’s objective observer is none other than Justice O'Connor herself. Furthermore, Justice O'Connor’s supposition that this "objective" observer also has familiarity with the text of any challenged statute, with its legislative history, with the implementation of the law in question, and with the Supreme Court’s prior decisions on the Establishment Clause stretches the objectivity requirement far beyond the "typical" observer. This heightened objectivity seems to explicitly collapse the test to its first prong in that the hypothetical observer with familiarity with the statute and its surrounding purpose would merely validate the judge who reached the second prong, giving an affirmation of his or her correct assessment of the purpose prong. This would make the interposition of this hypothetical observer a purely intellectual exercise designed to appease the conscience of any given action endorses religion so as to render the action unconstitutional opens the door to a tyranny of the majority. See Lynch v. Donnelly, 465 U.S. 668, 690–92 (1984) (stating that to fulfill the Lemon two-prong test one must find what the "objective" meaning of the statement was to the community). Id.; see also Note, Context is in the Eye of the Beholder: Establishment Clause Violations and the More-Than-Reasonable Person, 80 Chi.-Kent. L. Rev. 981 (2005) (criticizing the hypothetical "objective observer" as inevitably and invariably subjectively influenced). See Robert A. Holland, A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty, 80 Cal. L. Rev. 1595, 1663 (1992) (commenting that "a fictitious observer who embodies only those qualities that the judge chooses to attribute to that observer is either the 'average person' with a new name or a vehicle for the judge’s own biases"). Id.; see also Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment of Neutrality and the 'No Endorsement' Test, 86 Mich. L. Rev. 266, 293 (1987) (stating that the "objective observer" will be familiar with the text, legislative history, and background of the statute under review). Id.
the judge creating it, but never solving the problems necessitating its existence.\textsuperscript{119} In addition, the application of the test with its "objective observer" component does not clarify the analysis. Other justices have applied the endorsement test without reaching the same result as one another.\textsuperscript{120} Thus, Justice O'Connor's endorsement approach faces significant obstacles.

Beyond these criticisms, however, the purpose prong allows for the potential of hostility toward religion in general. As Professor Gedicks has noted, "the privileging of secular knowledge in public life as objective and the marginalization of religious belief in private life as subjective has been a foundational premise of American jurisprudence under the Religion Clause of the First Amendment."\textsuperscript{121} A court might strike down some displays that seem supportive of religion even when not perceived to be intended as such or when their actual effect did not endorse religion but their perceived effect was one of endorsement. Such a result presents a paradox of reasoning. One built-in problem with such reasoning questions is determining whose perceptions count. Justice Breyer answers that with a simple phrase: "judicial judgment."\textsuperscript{122} Setting that issue aside, whether the action actually affects the endorsement does not alter the perception. This would lead to the result that an action that in fact alienates a religious group, if not perceived as intentional or if not viewed as having an effect of endorsement, could be held not to violate the Constitution despite its actual effect. Surely this confused analysis under the endorsement approach does not either clarify or simplify the current state of First Amendment jurisprudence.\textsuperscript{123}

Furthermore, the underlying notion of neutrality espoused in \textit{McCreary} and implied in the endorsement analysis presents similar problems.\textsuperscript{124} This neutrality is the foundation of the nondiscrimination

\textsuperscript{119} Id. at 292.

\textsuperscript{120} See, e.g., Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 807-08 (1995) (Stevens, J., dissenting) (asserting that the objective observer need not be familiar with the statute's text, legislative history, and implementation or with Supreme Court Establishment Clause jurisprudence).


\textsuperscript{122} See Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (describing how complex the goals of the Establishment Clause are and concluding that no test can substitute the exercise of legal judgment).

\textsuperscript{123} See Smith, supra note 117, at 301 ("[D]isparate conclusions underscore the analytical deficiencies which destroy the test's usefulness as a practical doctrinal tool.").

suggestion as well. In McCreary, the majority assigned a high degree of importance to neutrality, describing it as "an interpretive guide." The concept of neutrality defies easy definition; indeed, "[w]hen considering its meaning in any particular context, one must invariably ask: 'Neutral how and as to what?'" When imposing a standard of neutrality, one might mean that the decision-maker must impose on him or herself an artificial, intentional indifference toward the parties involved in the dispute. Another interpretation may suggest that neutrality means "undertaking or justifying political action on the ground that it neither promotes nor enables individuals a religious idea or practice unless there is a valid independent reason other than favoring or hindering the same." Neutrality could also mean "intentional noninterference by the state with the religious" or "the state ensuring for all citizens equal opportunity to advance in the public square any permissible religious idea or practice they freely affirm."

In sum, the concept of neutrality within the context of religious freedom "stamps with the air of public legitimacy any underlying political theory that it serves to conceal, whether the theory is classical liberalism, communitarianism, revised liberalism, de facto establishmentarianism, or some intermediate position." Such a conclusion illustrates the fundamental difficulties with the notion of neutrality. These difficulties compound when a test involving neutrality reaches the application phase. At that stage, one might legitimately ask who decides what definition should apply. Among the possible replies to this inquiry are the religious observer, the nonreligious observer, both (a compromise position, possibly reached through some form of mediation), a referendum election, or a judge. The only reasonable outcome would leave it up to a judge to decide which variety of neutrality to apply, which could possibly lead to different kinds of neutrality to be applied under varying circumstances. Such an approach may

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126 McCreary County v. ACLU, 545 U.S. 844, 874 (2005).
128 Id. at 817.
129 Id.
130 See id. (elaborating that these theories indicate the possibility of either a "positive" or a "negative" neutrality). Smith asserts that between these four generic meanings of neutrality could exist a "continuum of intermediate meanings" that would stretch the scope of his (and this) work infinitely beyond its bounds). Id. at 818. He goes on to analyze the historical underpinnings of each approach to neutrality. Id. at 820.
131 Id. at 869.
have some residual appeal initially, but seems to fall short in light of studies indicating that the most dispositive influence on judicial decision-making in the religious freedom context is:

religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community . . . . [The] findings indicate that, viewing the federal judiciary collectively and evaluating the tipping point of difficult and contested religious freedom cases at the margins, religious factors are meaningfully associated with judging outcomes.  

This being the case, the issue of neutrality remains salvageable. Steven D. Smith has aptly pointed to the metaphor of a judge as neutral decision-maker as indicative of the true meaning of neutrality: "adherence to accepted or proper criteria of decision." Thus, the insertion of a neutrality requirement into the analysis applicable the Religion Clauses begs the question of what criteria of decision—or analysis—should be applied.

C. Coercion

A final approach that the Court has employed, and that remains available as an alternative analytical framework for Establishment Clause cases, centers on the compulsion or coercion element of religious freedom. Justice Kennedy implemented the "coercion" test in a 1992 opinion. The test simplifies Establishment Clause analysis, reducing it to the question of whether:

the government may . . . require or restrict conduct that either is intrinsically religious or is regulated by the government because of its potential religious meaning. More specifically, [the test asks whether] the government may . . . compel participation in religious programs, . . . [or] compel religious profession or observance outright, and [if] it may . . . impose legal penalties upon persons because they claim adherence to a particular religion or to no religion at all.

133 Smith, supra note 117, at 328.
135 See Scott C. Idleman, Religious Premises, Legislative Judgments, and the Establishment Clause, CORNELL J.L. & PUB. POL'Y 1, 49 (Fall 2002) (criticizing the purpose and effect prongs of analysis under other approaches, analyzing the coercion test, indicating the prevalence of moral judgments
This question splits the horns of the dilemma created, perhaps artificially, through the division of the religious protection provisions of the Constitution into the warring Establishment and Free Exercise Clauses. Rather than pitting one against the other, the coercion approach unifies the analysis, allowing the clauses to operate without introducing the schizophrenia of purpose into the Framers’ draft of the First Amendment. Joining the two religion clauses of that amendment under the overarching theme of government non-coercion not only frees religion clause analysis from this conflict, it also simplifies the test applicable to cases arising under the religion clauses. Whereas the current system applies some variation of the endorsement and *Lemon* tests to questions of whether government action establishes religion, the coercion test would approach such questions without that characteristic disunity. Furthermore, the coercion framework is considerably easier to apply than the fragmented approaches tied together under the current approaches. Coercion avoids the difficulties of attempting to define neutrality. Likewise, the coercion test does not concern itself with purposes underlying government action. The test focuses on actual results and real infringements on liberties instead of intended (but perhaps not actual) endorsements of religion.

Criticisms of such an approach focus on the inability of a coercion test to provide adequately for the varieties of circumstances presented by increasingly divisive and complex questions of religious liberties. Some have proposed a stronger version of this unified approach by advocating an analytical backdrop to the religion clauses that precludes government action that uses religion as a basis for classification. Such a framework might address the situations arising under the religion clauses more forcefully; however, this approach seems to eliminate any differentiation between religious freedom analysis and approaches addressing other freedoms, dissolving any difference in approach for the First Amendment from that of the Fourteenth Amendment Equal Protection Clause. As such, an analytical approach reducing the mode of analysis applicable under the First Amendment to that introduced by the Fourteenth seems to dissolve the

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136 See Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 SUP. CT. REV. 373 (1989) (updating Kurland’s research and suggesting that prohibiting government action based upon a classification using religion as its basis would have produced a clearer and more unified Establishment Clause jurisprudence than the current approach).
distinct protections included in the Bill of Rights into those encompassed by the Fourteenth Amendment.

Despite the criticisms, the coercion test appears to offer a viable alternative to the current murky Establishment Clause jurisprudence.\textsuperscript{137} Notwithstanding its apparent viability, however, the test retains problematic elements that would require more detailed analysis and definition before the test could be viable. One of these elements carries over from any other approach to religious freedom issues: the problem of defining religion, which the Supreme Court will not address. Just as in the other tests, the fringes of the analytical framework of the coercion test present problems. In any test calculated to address freedom of religion, the definition of religion itself creates philosophical and intellectual difficulties. This definitional problem cannot be overcome simply through adoption of a new test such as coercion; however, approaching cases under a coercion analysis will not aggravate those problems. Thus, the coercion approach cannot provide all of the answers, but one cannot fault it for the inherent difficulties of the overriding problem it attempts to address more efficiently.

Similarly, the scope of the test would require elaboration through judicial interpretation. This is necessary to understand the degree to which courts may intervene. Because the definition of coercion has not already been concretely established, the test could ultimately yield results that would make it less desirable than other alternative approaches to the religion clauses. More likely, however, the judicial definition of "coercion" would allow for judicial intervention when government action either unduly rewarded or penalized based upon one's faith. Under such a definition of coercion, the courts would have sufficient flexibility to balance liberty interests and to strike down any action that impinges on religious liberties, irrespective of the religion's majority or minority status.\textsuperscript{138} Therefore, despite its inherent difficulties, coercion offers a viable and desirable alternative to the current doctrinal rules, minimizing inconsistencies and comporting well with public policy considerations. Judge Easterbrook of the Seventh Circuit has helped in elaborating this scope, writing that

"Establishment" entails coercion . . . . Words do not coerce. A barrage of advertisements tempting young people to join the military does not

\textsuperscript{137} See Smith, supra note 117, at 331 n.236, 332 (suggesting an exploration of "other doctrinal alternatives" to the Court's current approach, particularly advocating the coercion test as one of the more viable alternatives).

oblige anyone to do so; no more does display of the Ten Commandments coerce support for religion . . . . No one would understand any document's presence in [a] display to suggest that [the government] imposes either legal or social sanctions on nonbelievers.\textsuperscript{139}

Easterbrook's statement reveals some advantages of the coercion test and its positive results on Establishment Clause jurisprudence. Under this type of test, the Court would gain clarity and avoid the anomalous results of the secular purpose prong of the \textit{Lemon} and endorsement tests. Further, neutrality would no longer be an issue, yielding a more reliable guidepost to lower court judges.

Despite these advantageous aspects of the coercion test, much remains uncertain in its implementation due to its never having commanded a pure majority of the Court. Consequently, the practical concerns of its effect, should the Court adopt it, could cast a long shadow over the test's viability. In applying the test, the Court might emphasize direct coercion to the neglect of indirect means of coercing religious belief choices on others. Such a result would likely please many who would advocate the test, but would ignore the fundamental principles of religious freedom that the test should protect. In spite of these uncertainties, the current state of the law indicates that it is time for a change in Establishment Clause jurisprudence. Given the Court's inability to reach a consensus in adoption or application of either the endorsement test \textit{or} the \textit{Lemon} test, the Court should now look to other alternatives to bring uniformity to the law and clarity to lower court judges. The coercion test shows promise as a viable alternative.

\textbf{V. Coercion and the Ten Commandments}

\textbf{A. The 2005 Ten Commandments Cases}

The \textit{McCreary} case applied the endorsement test and rejected the display as having failed the purpose prong of that test.\textsuperscript{140} Such an approach characterizes the government action of displaying a series of documents including the Ten Commandments as government endorsement of religion.

\textsuperscript{139} City of Elkhart v. Books, 401 F.3d 857, 869–70 (Easterbrook, J., dissenting) (internal citations omitted).

\textsuperscript{140} McCreary County v. ACLU, 545 U.S. 844, 850–51 (2005).
This result contradicts that reached in *Van Orden* and other cases. Under the approach used in *Van Orden*, which adopted an analysis evaluating the display in the totality of the circumstances and in the context of its surrounding history and tradition, the display was deemed harmonious with that history and not violative of the Establishment Clause.

These results might differ if the coercion test were applied instead of the Court's compromise approaches. In *McCreary*, the coercion test would ask whether the display imposed some sanction on those whose beliefs differed with the display. The stormy history of that display would be irrelevant to the coercion analysis because the way the display came into being has no bearing on whether action coerces or sanctions belief choices. Thus, the display would likely pass the coercion test. Such a result should not, however, shock the conscience of the Court because it comports with the underlying principle of religious liberty embodied in the two religion clauses. Judge Easterbrook's explanation of the coercion approach indicates that its

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141 See *Van Orden* v. Perry, 545 U.S. 677, 681 (2005) (stating that the Ten Commandments display did not violate the Establishment Clause). The conflicting results of Ten Commandments cases did not begin with *Van Orden* and *McCreary*. For a summary of Ten Commandments jurisprudence, see 107 A.L.R.5th 1; see also ACLU v. City of Plattsmouth, 358 F.3d 1020, 1042 (8th Cir. 2004) (striking down a Ten Commandments monument as violative of the Establishment Clause under the *Lemon* test); ACLU v. City of Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005) (reversing the earlier decision and holding that a Ten Commandments monument did not violate the Establishment Clause given its similarities to the monument in question in *Van Orden* and under the history and tradition test); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 773 (7th Cir. 2001) (holding a monument violative of the Establishment Clause under the *Lemon* test); ACLU v. Mercer County, 240 F. Supp. 2d 623, 626 (E.D. Ky. 2003) (granting summary judgment to the county in a suit alleging that its display violated the Establishment Clause); ACLU v. Pulaski County, 96 F. Supp. 2d 691, 700–02 (E.D. Ky. 2000) (granting a motion for preliminary injunction of a display similar to that in *McCreary* as a violation of the Establishment Clause under the endorsement test); Adland v. Russ, 307 F.3d 471, 488–89 (6th Cir. 2002) (holding a Ten Commandments display to be an impermissible endorsement of religion and thus violative of the Establishment Clause); Anderson v. Salt Lake City Corp., 475 F.2d 29, 32–34 (10th Cir. 1973) (upholding a Ten Commandments monument under the *Lemon* test); Byar v. Lee, 336 F. Supp. 2d 896, 905 (W.D. Ark. 2004) (striking down the posting of the Ten Commandments in a courtroom as the rules of that courtroom under the *Lemon* test); City of Elkhart v. Books, 401 F.3d 857, 869 (7th Cir. 2005) (upholding a Ten Commandments display under *Lemon* as secularly motivated and as effecting secular results); Freethought Society v. Chester County, 334 F.3d 247, 267–68 (3d Cir. 2003) (vacating the injunction against a plaque displaying the Ten Commandments, justifying this decision under the *Lemon* test); King v. Richmond County, 331 F.3d 1271, 1273 (11th Cir. 2003) (upholding the use of the county seal as not violative of the Establishment Clause even though it includes the Ten Commandments); Modrovich v. Allegheny County, 385 F.3d 397, 406–11 (3d Cir. 2004) (holding that under the endorsement test, the Ten Commandments plaque displayed by Allegheny County did not violate the Establishment Clause); State of Colorado v. Freedom From Religion Foundation, 898 P.2d 1013, 1026–27 (Colo. 1995) (holding that the Ten Commandments monument passed the endorsement test); Stone v. Graham, 449 U.S. 39, 42–43 (1980) (holding that the posting of the Ten Commandments in Kentucky schools violated the purpose prong of the *Lemon* test); Suhre v. Haywood City, 55 F. Supp. 2d 384, 399 (W.D.N.C. 1999) (holding that under the *Lemon* test, the display did not endorse or inhibit a particular religious belief or lack thereof).

142 See *Van Orden*, 545 U.S. at 691 ("Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history.").
ease of application and consistency would render it desirable and would make its results likely to comport with principles of fairness.\textsuperscript{143}

The twin decisions in 2005 regarding the Ten Commandments raise the issue of what to do about religions that lack sufficient public support until recently to incentivize public officials to display their symbols or speech. These newer religions have no opportunity to have the history behind their displays cure its otherwise invalidity. This leads to the question of whether we should allow some displays to stand because they have a sufficiently engrained history to make them historic landmarks, despite that this historic nature only came about as a result of selective (if not discriminatory) displaying of certain religious views and symbols. Similarly, one wonders whether the inability of a government entity to format a display appropriately the first time should negate its subsequent attempts to offer passive acceptance of an otherwise constitutionally permissible display. Such a result would seem counterintuitive at best, absurd at worst. Under the combined approaches of McCreary and Van Orden, this result represents the current state of the law. Under a coercion analysis, however, the Court could avoid this undesirable end while maintaining doctrinal integrity.

As indicated throughout this Note, there is no perfect solution to conflicts involving the religious liberties protected by the First Amendment. Notwithstanding the impossibility of arriving at a one-size-fits-all resolution to such issues, the coercion test presents a workable and satisfactory approach to Ten Commandments cases specifically, if not to the Establishment Clause cases more generally. As presently constituted, the jurisprudence surrounding the Ten Commandments cases presents problems of the viability of both the purpose prong and the notion of neutrality included in both the \textit{Lemon} and endorsement approaches. Furthermore, the inconsistencies and incoherencies in the McCreary and Van Orden cases render the current state of the law problematic. Under an alternative approach such as the coercion test, the Court could most easily remedy such problems. Additionally, the coercion test's approach would eliminate much of the uncertainty and murkiness surrounding Establishment Clause jurisprudence. Adoption of coercion would not occur without difficulty; such a development would require judicial interpretation of the term "coercion." Nevertheless, under an approach similar to those indicated in this note, the religion clauses could gain coherence and consistency. Further studies could pick up the details of how to effectively implement such an

\textsuperscript{143} \textit{See Elkhart}, 401 F.3d at 871 (Easterbrook, J., dissenting) (arguing that the Establishment Clause bars governmental coercion and any claim short of that should fail for lack of standing).
analytical framework and define such terms as well as addressing the practical considerations of how to neutralize judicial participation in the process of defining and rendering judgment on religious freedom issues. Furthermore, other hypotheses could surface that might present a more desirable alternative to any of the approaches presented here. As circumstances currently stand, however, coercion appears to offer the most fruitful avenues for the future of Ten Commandments jurisprudence.