TEN COMMANDMENTS, NINE JUDGES, AND FIVE VERSIONS OF ONE AMENDMENT — THE FIRST. ("*NOW* WHAT?")

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I.

When the annual Spring Symposium of the Bill of Rights Institute at the Marshall-Wythe School of Law took up the two Ten Commandments cases then on the docket of the Supreme Court, I ventured a forecast of the outcomes and even of the manner in which the Court would divide. My forecast was that the "Ten Commandments"[1] displays installed with a hastily arranged cluster of accompanying framed documents on the interior courthouse walls in two Kentucky counties by recent orders of county executives would be disallowed, even as the federal district court itself had previously held.[2] I also suggested that the outcome in this case would turn on a divided vote in the Supreme Court, 5–4, with Justice O'Connor — in effect — deciding the case by her single vote.

My forecast in respect to the case from Texas was that the State's maintenance of an imposing Ten Commandments granite monument on the Capitol grounds in Austin would not be regarded in the same way.[3] A gift from a private organization widely promoting such monuments in public places, the monument had been accepted and installed on the Capitol grounds four decades earlier in 1961. It was both larger in size and somewhat more strategically placed — alongside a sidewalk pathway from the Capitol building to the state supreme court building — than any of the sixteen other monuments and twenty-one historical markers. Nevertheless, I predicted that the Court would affirm the federal district court's decision rejecting a citizen's suit seeking its removal,[4] and it would do so in still *another* closely

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[1] The use of "Ten Commandments" within quotation marks here is just to acknowledge that there is no such single agreed-upon set, and indeed, there are strongly felt differences among rival sects. *See, e.g.*, ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1032–33 (8th Cir. 2004), *rev'd*, 419 F.3d 772 (8th Cir. 2005) (en banc). Accordingly, were particular "Ten Commandments" cases tested seriously even for the minimum requirement of "nonsectarianism," they all must fail inasmuch as there is no "nonsectarian" set. *See also* Larson v. Valente, 456 U.S. 228, 246 (1982) (discussing that putative requirement in Establishment Clause cases).

[2] *See* McCreary County v. ACLU of Ky., 145 F. Supp. 2d 845 (E.D. Ky. 2001), *aff'd*, 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005).

[3] *See* Van Orden v. Perry, No. A-01-CA-833-H, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002), *aff'd*, 351 F.3d 173 (5th Cir. 2003), *aff'd*, 125 S. Ct. 2854 (2005).

[4] *Id.*

divided vote. The vote would be either 5–4 or 6–3. The one-vote variance in this second hedged forecast[5] turned only on my uncertainty of how Justice O'Connor would vote in this case from Texas, it being reasonably clear to me, on the other hand, as to how the other eight justices most likely would divide.

As matters turned out, on June 27, 2005, both forecasts were substantially, albeit not exactly, proved correct. Thus, in *McCreary County v. American Civil Liberties Union of Kentucky*,[6] pursuant to an opinion for the Court by Justice Souter,[7] the studied efforts of local Kentucky officials to promote the status and sectarian commands of a jealous Judeo-Christian god[8] in composing the indoctrinative decor of the county's courthouses were brought up short.[9] Oppositely,

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[5] "Hedged," that is, just as to whether it would be 5–4 or 6–3.

[6] 125 S. Ct. 2722 (2005).

[7] *Id.* Justice Souter was joined by Justices Stevens, Ginsburg, Breyer, *and* O'Connor, with Justice O'Connor concurring separately but expressly joining in the Court's opinion. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, filed a dissenting opinion, and Justice Kennedy joined the dissent in part.

[8] The posted versions of the Ten Commandments each begin with these particular demands: "Thou shalt have no other gods before me. Thou shalt not make unto thee any graven images. Thou shalt not take the name of the Lord thy God in vain. Remember the sabbath day, to keep it holy." *Id.* at 2728.

[9] *Id.* at 2737–40. There are several noteworthy features of Justice Souter's opinion for the Court in *McCreary*. First, it affirms the continuing relevance of the standards provided by *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), for the general run of Establishment Clause cases. *McCreary*, 125 S. Ct. at 2732–35. Thus, Justice Souter begins his review of the case with the observation that "*Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims . . . ." *Id.* at 2732. And, still again, directly invoking *Lemon* and its criteria as the point of departure for resolving this case, Justice Souter declares, "*Lemon* said that government action must have a . . . secular purpose . . . ." *Id.* at 2735.

Second, and perhaps even more noteworthy, the opinion for the Court re-establishes with renewed significance the first part of the "three familiar considerations" set out in *Lemon*, namely, that to be sustained the government action must have a secular purpose as distinct from a religious purpose. *Id.* at 2735. Specifically, following *McCreary*, it may no longer be sufficient that *some* sort of secular purpose is enough for the government's action to survive the first part of the *Lemon* test; rather, if it is at best "merely secondary to a religious objective," it is insufficient. *Id.* Stated differently, if the evidence demonstrates that the *predominant* purpose was to ally the government with religious interests as distinct from advancing neutral secular purposes, the action must be held to violate the [no] Establishment Clause and fail the requirements of this first branch of the *Lemon* test. *Id.*

This latter point should provide good reason for some lower courts to reconsider what they currently do. For example, just a month before the Court's release of its decision in *McCreary*, a panel of the Fourth Circuit rejected a suit brought against a North Carolina board of county commissioners for authorizing the inscription of "In God We Trust" in foot-and-a-half sized letters on the facade of the county government center (i.e., where everyone with public business enters). Lambeth v. Bd. of Comm'rs, 407 F.3d 266, 267–68 (4th Cir. 2005). Plaintiffs' allegation that the "dominant" purpose of the commission's action was religious (i.e., that the principal objective was to identify the county government center as aligned with "God") was deemed inadequate. *Id.* at 270. The Court of Appeals affirmed the

however, in *Van Orden v. Perry*, announced on the same day, in a very different opinion[10] issued by Chief Justice Rehnquist,[11] the Austin Capitol grounds monolith

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district court's dismissal of the suit for failure to state a claim insofar as the Complaint did not allege that the *only* purpose, rather than simply the dominant purpose, of the monotheistic credo was to align the State itself with a particular religious belief (e.g., "We believe in [a] God. . . . Do you?"). *Id.* "[W]e will deem the first prong of the *Lemon* test to be contravened '*only* if [the action] is "*entirely* motivated by a purpose to advance religion."'" *Id.* (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (emphasis added)). In the (after)light of *McCreary*, this is plain error, but it is also error of a sort shared by a substantial number of other courts.

[10] "Very different" because the controlling opinion by Justice Souter in *McCreary* specifically invokes the criteria for adjudicating Establishment Clause claims familiarly expressed in the so-called "*Lemon*" test and, indeed, even infuses a new rigor into the first part of that test. *Id.* at 2732–35. In *Van Orden*, Chief Justice Rehnquist's opinion, joined by three others, goes out of its way to declare expressly that the Court did *not* decide the Texas case through *any* use whatsoever of the *Lemon* test (rather than that, in this instance, application of the *Lemon* test produces a different result based on these facts). *See Van Orden*, 125 S. Ct. at 2860–61 ("Many of our recent cases simply have not applied the *Lemon* test. . . . Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful [here].").

To be sure, the late Chief Justice's antagonism to and rejection of the *Lemon* test is not new. Twenty years earlier, in an elaborate dissent, he explained why, in his view, neither *Lemon* nor the foundation case of the Court's modern Establishment Clause cases — *Everson v. Board of Education*, 330 U.S. 1 (1947) — reflected even an approximately correct understanding of what were, in his view, the quite modest objectives of the Establishment Clause. Wallace v. Jaffree, 472 U.S. 38, 91–113 (1985). Chief Justice Rehnquist observed that "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . . ." *Id.* at 92. And the Chief Justice specifically rejected the Court's reformulations in *Lemon*: "[T]he purpose and effect prongs [of *Lemon*] have the same historical deficiencies as [*Everson*] itself; they are in no way based on either the language or intent of the drafters." *Id.* at 108. That antagonism is more than well-shared by Justice Scalia, who memorably recorded his distaste in *Lamb's Chapel v. Center Moriches Union Free School District*: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." 508 U.S. 384, 398 (1993).

All of this being so, it therefore is *not* surprising that, in announcing the judgment for the Court in *Van Orden*, the Chief Justice would go out of his way to make clear that the decision of the Court respecting the Ten Commandments monument on the Texas state capitol grounds, and sustaining the display, would *not* reflect an application of *Lemon* or of its requirements. *Van Orden*, 125 S. Ct. at 2861. Yet, it is on the very same day that the *express* basis for the decision of the Court in *McCreary* was the failure of the State to *meet* the requirements of the *Lemon* test, exactly as elaborated by Justice Souter. *McCreary*, 125 S. Ct. at 2732–35. So, evidently, in two otherwise quite indistinguishable cases, the *Lemon* test was both useful (*McCreary*) and not useful (*Van Orden*). A more vivid example of the severe doctrinal schism splintering the Court into factions, and even shards, would be difficult to imagine.

[11] Chief Justice Rehnquist was joined by Justices Scalia and Thomas and substantially by Justice Kennedy as well with a *dubitante* separate concurring opinion by Justice Breyer, as discussed *infra*.

was left to stand intact (even as it doubtless does today) so to declare in letters etched large into its granite face its bold assertion of intimidating authority ("*I AM the LORD thy GOD*"), swiftly followed by laying down as its first demand (i.e., "commandment") that "*Thou shalt have no other gods before me!*" And having presumed to settle both of those questions, the inscribed monolith proceeds canonically down through its remaining peremptory list of God-decreed "*dos*"[12] and God-decreed "*don'ts*."[13]

As I say, however, neither of the outcomes respectively in *McCreary* and in *Van Orden* came as any surprise. Nor, to be sure, was there anything particularly impressive in respect to my facile confidence in presuming to predict not merely the outcome in each case, but even how the Court would divide. Indeed, it is merely fair to say that the most casual student of the doctrinal schisms[14] that have gradually

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[12] *See, e.g.*, *Van Orden*, 125 S. Ct. at 2874 (including *do* keep the "sabbath day . . . holy" and *do* "Honor thy father and thy mother").

[13] *See, e.g.*, *id.* (including *don't* "covet thy neighbor's wife, nor his manservant" and *don't* "commit adultery").

[14] A clear marker case illustrating one such major doctrinal schism is provided by *Lynch v. Donnelly*, 465 U.S. 668 (1984). Dividing 5–4 — Chief Justice Burger writing for himself and three others, Justice O'Connor concurring in a distinctive opinion of her own, Justice Brennan writing the principal dissent for himself and Justices Marshall, Blackmun, and Stevens, and still a separate dissent by Justice Blackmun, joined by Justice Stevens — the Court in *Lynch*, speaking through the bare majority opinion, first provided a long list of examples of state and national religiously-linked practices, and then proceeded to utilize that recitation in formulating a new test (the "no more than" test) in deciding the case at hand. *Id.* at 685.

The *Lynch* case concerned a Christmas display centrally featuring a life-size Christian nativity scene (a "crèche") purchased by the city of Pawtucket, Rhode Island, with taxpayer funds and annually installed under city authority by the city's own employees in a prominent place — a park located in the heart of the downtown shopping district. *Id.* at 671–72, 685. Reversing the court of appeals (which had affirmed a district court judgment in favor of citizen-taxpayer plaintiffs), Chief Justice Burger invoked a new test, namely, the "*no more than*" test. So, the Chief Justice declared in explaining and applying this new test, even if — as he conceded to be true — the use of public money, public employees, and public park city sponsorship (jointly with a local retail merchant association) to construct and maintain the birth scene of Christ, at Christmastime, officially and conspicuously identified the city with a particular religion and particular religious faith, it did so "*no more than*" was substantially true of many *other* sorts of local, state, or national government practices that were, by this time, altogether commonplace, such as the payment of a Protestant minister to recite prayers in opening state legislative sessions, a practice the Court had upheld only a year before. *Id.* at 685. That being so, he declared for the Court, the city-owned crèche display was entitled to be treated likewise and deemed to be beyond successful taxpayer or citizen complaint. *Id.* at 686.

To put this bizarre "test" another way, perhaps it (the city's sponsorship of its crèche) did violate the Establishment Clause, but still "no *more* than" was obvious in *other* practices the Court was evidently unwilling to permit to be successfully challenged in the courts. *See infra* note 15 (discussing practices such as legislative prayers by salaried Protestant ministers favored by the prevailing majority of state legislators voting them into that post, a practice

shaped up within the Supreme Court itself over the past twenty years of Establishment and Free Exercise Clause cases, beginning even before the elevation of Justice Rehnquist to the post of Chief Justice,[15] would have wagered the outcomes and the votes of the several justices in these cases in very much the same fashion as did I.

Rather, if there were any surprise — and there was some — it was to be found principally in the decision by Justice O'Connor in the Texas case *not* to enlist on her own last day of service on the Supreme Court with Chief Justice Rehnquist, as she might reasonably have been expected to do.[16] The Chief Justice held that the fixed,

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the Court had upheld just the year before in *Marsh v. Chambers*, 463 U.S. 783 (1983)). Accordingly, following *Lynch*, to the extent that *other* state or local government entities also may want symbolically to align themselves with religion (or even, as in *Lynch*, with one particular religion), they plausibly might concede that, indeed, *they have chosen to do exactly that*. They may then defend the practice, however, by observing that, in doing so, "no *more* than" evidently did not trouble the Court in *Lynch*; and so much being true, they, too, should be relieved of, and insulated from, any merely vexatious Establishment Clause citizen or taxpayer complaints. *See also* William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770 (1984) (providing a fuller critical review of *Lynch v. Donnelly*).

[15] *See, e.g.*, *Marsh*, 463 U.S. at 786–93 (sustaining a state legislature's practice of using taxpayer funds to pay its own designated chaplain — a named Presbyterian minister — to open every session with a Judeo-Christian prayer, reversing the court of appeals, declining to apply its own previously stated three-part *Lemon* test, and creating a "history" exception that the Establishment Clause will not be applied to instances of government religious practice enjoying a lengthy de facto history). Currently, even where there has been *no* such "history," a county board of supervisors, beginning only in 1984 and simply emboldened by the Court's decision in *Marsh* to imitate the practice upheld in that case, evidently may institute a practice of opening every public meeting with a prayer suitably composed by various, rotating mainstream clergy, but excluding non-mainstream clergy who are deemed ineligible. *See* Simpson v. Chesterfield Bd. of Supervisors, 404 F.3d 276, 280–88 (4th Cir. 2005) (rejecting a suit brought by offended residents, taxpayers, and excluded clergy and basing that rejection on the *Marsh* ("history") exception such as it is seen to be).

[16] Even Justice Breyer (whose opinion and conclusions are discussed *infra* in the text accompanying notes 18–26) found a sufficient basis to join Chief Justice Rehnquist. Moreover, in several of the more recent — and indeed, most significant — 5–4 Establishment Clause decisions (i.e., decisions sustaining the use of very substantial amounts of public taxes to subsidize pervasively sectarian religious schools), Justice O'Connor already had migrated to provide the crucial fifth vote with the somewhat predictable quartet of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (sustaining tax-funded vouchers redeemable from public treasury by parochial schools established and operated under pervasively indoctrinative sectarian religious auspices); Agostini v. Felton, 521 U.S. 203 (1997) (overruling two previous Supreme Court cases and sustaining tax-funded educational services and state educational personnel integrated in parochial school curricula and premises); *see also* Mitchell v. Helms, 530 U.S. 793 (2000) (upholding provision of large amounts of school equipment purchased by government agencies with taxpayers' public funds to pervasively religious parochial schools). In this plurality decision, which overruled two prior Supreme Court cases, Justice Thomas was joined by Chief

monumental, capitol grounds display, despite its theocratic declamations and prominent location (fronting the walkway between the capitol building and the state supreme court), was exempt from a valid First Amendment complaint. Justice O'Connor was unable to agree. In one of her final votes on the Supreme Court in this critical area — one of the most vexed areas of constitutional law during her very substantial tenure on the Supreme Court — Justice O'Connor came 'round to join with Justices Souter, Ginsberg, and Stevens to reaffirm the constitutional imperative of "religious neutrality" on the part of government, even as the Court had once unanimously approved that imperative a half-century earlier,[17] before beginning its lengthy slide into what is now its utter doctrinal disarray. The second surprise in *Van Orden*, perhaps more consequential as I think it was (and is[18]), came wrapped within the vote — and

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Justice Rehnquist and Justices Scalia and Kennedy, and a separate concurring opinion was filed by Justice O'Connor, in which Justice Breyer joined.

[17] The following compelling paragraph, authored by Justice Hugo Black, appears in *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947). At the time, it was subscribed to by all nine justices of the Supreme Court (namely, in addition to Justice Black, Chief Justice Vinson and Justices Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, and Burton). To be sure, there were divided votes in particular cases, including *Everson* itself, but the division of votes differed on the application of these statements and not on any disagreement with the following statements as they appeared in *Everson*, provided by Justice Black, and substantially derived from a unanimous nineteenth century decision relying on Madison's and Jefferson's views:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

Among the seven sentences of this paragraph, one may now draw a line through the second sentence, the fifth sentence, and the seventh. They are all substantially inaccurate representations, or false statements, as of the summer of 2005. Moreover, as it happens, even this degree of severe editing will not quite suffice, as parts of three of the four remaining sentences in the paragraph are now quite doubtful in certain respects as well.

[18] In part, this is because Justice O'Connor is now retiring from the Court, while Justice Breyer obviously is not.

"explanation" for that vote — by Justice Breyer in providing the critical fifth vote, sustaining the Texas Capitol ground monument display, as would *not* have been the outcome without his vote. Justice Breyer distanced himself from the Rehnquist-Thomas-Scalia overall version of the First Amendment's religion clauses.[19] Instead, he expressly embraced the views of Justice O'Connor as they had just been expressed by her in the *McCreary* case.[20] Justice Breyer nevertheless also conjectured that a

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[19] Under this vision, identification of civil government with the religious foundations of "judeo-Christian" doctrines, texts, iconography, rituals, scriptures, observances, prayers, etc., at least when not coercively imposed on nonadherents, ought in general not be thought to be foreclosed by the First Amendment, but, rather, merely reflective of long-standing traditions (thus, a constitutionally acceptable practice as such). The Rehnquist-Thomas-Scalia view is roughly — though not completely — aligned with Joseph Story's interpretative preference of the Establishment Clause — namely, that "the real object" of the [no] Establishment Clause was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 991, at 701 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833). In Story's recorded view, "Christianity is indispensable to the true interests & solid foundations of all free governments. I distinguish . . . between the establishment of a particular sect, as the Religion of the State, & the Establishment of Christianity itself, without any preference of any particular form of it." Letter from Joseph Story to Jasper Adams (May 14, 1833), *in* RELIGION AND POLITICS IN THE EARLY REPUBLIC 115 (Daniel L. Dreisbach ed., 1996).

Additionally, Justice Thomas maintains his own separate view, namely, that the Establishment Clause does not apply to the states at all. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring). Rather, in his view, the Establishment Clause essentially *secures* each state from any act of Congress that would presume to interfere with the manner in which each state may resolve to favor — or not to favor — particular religions. In brief, the Establishment Clause is essentially a "federalism" clause, neither more nor less. *Id.* ("I have previously suggested that the [no establishment] Clause's text and history 'resis[t] incorporation' against the States." (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 46 (2004) (Thomas, J., concurring in judgment))); Zelman v. Simmons-Harris, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring).

[20] *See, e.g.*, *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring) (agreeing that "[t]hey [the First Amendment's Religion Clauses] seek to further the basic pinciples set forth today by Justice O'Connor in her concurring opinion in *McCreary*.") In Justice O'Connor's restatement of her views in *McCreary County*, citing James Madison's Memorial and Remonstrance Against Religious Assessments, she put the controlling principle this way: "Government . . . may not prefer one religion over another or promote religion over nonbelief. . . . And government may not, by 'endorsing religion or a religious practice,' 'mak[e] adherence to religion relevant to a person's standing in the political community.'" *McCreary*, 125 S. Ct. at 2746 (quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985)) (explaining the "no endorsement" feature of her Establishment Clause test). James Madison may have put the proposition in even more compelling prose. He denied that "the Civil Magistrate is a competent Judge of Religious truth," and he suggested the deep impropriety of government attempts to ally itself with even

holding requiring the removal — or even relocation — of the Austin Capitol grounds monument "might . . . encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings"[21] in other locations, i.e., *numerous* "Ten Commandment" depictions already maintained in *many* places, through *much* of the United States. The political repercussions of such additional disputes — including repercussions for the Court itself — could be substantial.[22] The prospect of setting a precedent (as Breyer declared it could be set by this very case unless he were to find nothing unconstitutional on the facts of the case) that would lend new encouragement to others to seek relief from those numerous governmental practices was too much for Justice Breyer. Indeed, he declared, so to hold against the permissibility of the Austin Capitol grounds monolith "could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."[23] So, then, how best to avoid that divisiveness? What would be best for the Court to do?

What followed, for Justice Breyer, was for him to find a way to split the difference, so to speak. In his view, as he had just spoken to it, the proliferation of other "divisive" lawsuits such as this could best be discouraged simply by *finding* no conflict (or at least no *sufficient* conflict) with the Establishment Clause. Thus, by *finding* no sufficient conflict in this case (and in his view possibly *not otherwise*), the Court might suitably signal to others that it would be pointless for any of them to bring other such "divisive" suits of a similar sort, and so spare the Court itself, as well as the greater polity, more acrimony and grief.[24]

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the Christian Religion as such, calling all such attempts "an unhallowed perversion of the means of salvation" by the civil state and simultaneously an action that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Everson*, 330 U.S. at 63–69. The full Memorial and Remonstrance by Madison is reprinted as an Appendix in *Everson*. *Id.* at 63–72.

[21] *Van Orden*, 125 S. Ct. at 2871.

[22] For example, a "jurisdiction-stripping statute" enacted by Congress or an amendment to the Constitution itself might be contemplated.

[23] *Van Orden*, 125 S. Ct. at 2871.

[24] On the other hand, of course, to have *sustained* the propriety of setting aside prime capitol ground premises for the frankly larger-than-life special promotional display presented on the facts of *Van Orden v. Perry*, as Justice Breyer decided to do in this case (and by his vote, caused to be the very outcome of the case), may itself merely add fuel to such efforts, i.e., to repeat the scene elsewhere and engender still more rounds of controversy and "divisive effects." For example, one might now expect equivalent offers to donate "Ten Commandment" monuments for prominent placement on other government premises, here, there, everywhere, even to be increased. And, even as these events may predictably transpire, as they already had well before the *Van Orden* case, as discussed in *ACLU Nebraska Foundation v. Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *rev'd*, 419 F.3d 772 (8th Cir. 2005) (en banc), others may likewise press more aggressively, surely, in order that *their* religious monuments, *their* sacred documents, texts, etc., at least be given similar treatment or demand to be told why that just cannot be — whether in Texas or anywhere else. If others merely

So, in the end, while Justice Breyer did *not* accept the reasoning of the Rehnquist opinion, he acquiesced in the outcome. And he did so by "reasoning" (i.e., declaring) that "the Texas display . . . serv[ed] a mixed but primarily *non*religious purpose, *not* primarily 'advanc[ing]' or 'inhibit[ing] religion,' and *not* creating an 'excessive government entanglement with religion,'"[25] and therefore also *not* subject to any valid Establishment Clause citizen or taxpayer complaint. Yet, since he "reasoned" in this fashion only after first effectively declaring why, in his opinion, to hold against the state in this instance might be singularly ill-advised (because too "divisive" and productive of more backlash and grief), Justice Breyer may not in fact persuade any disinterested reader that the dissenting justices (including Justice O'Connor herself) were wrong in concluding differently on the merits of the case itself. Instead, he may have merely managed, albeit inadvertently, to show why he would *say* they were wrong — even supposing they were not.

Some may find that Justice Breyer's opinion is merely a good example of commendable candor and pragmatism at work on the Court. Perhaps quite unreasonably, however, I am more inclined to count it as a regrettable sign of a failed judge. For what Justice Breyer actually managed to do, I think, was to try to preserve his standing in identifying himself with the strong views held by some of his colleagues (Justices Stevens, Ginsburg, Souter, and O'Connor) even while openly suggesting that he was capable of a goodly degree of political truckling, i.e., to try *very* hard to find a way to sustain the state action, by "finding" it met their criteria after all — though none of them thought that it did, and neither is the reader likely to think so either.

To put the same matter only a little differently, if just for emphasis, if in fact Justice Breyer simply and actually believed the Texas case passed muster under the *Lemon* criteria (as embellished by Justice O'Connor's insights which he joined), he should have said so and have *left it at that.* And if not, *then not.* In the actual case, however, his public breast-baring — of "concerns" over possible new rounds of lawsuits and adverse reaction to a decision *if* it went against Texas — was unseemly at best. And, offered as furnishing an "explanation" for his vote, it strikes me as unlikely to win either much public admiration or, indeed, any great degree of professional respect.[26]

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want "equal treatment" for "their" religion, whether Hindu, Moslem, Rastafarian, or Wiccan, what is then to be the appropriate response? And how then shall the Court itself respond? In brief, it is not at all implausible that Justice Breyer's particular brand of pragmatism — "sustain this arrangement and hope it is enough to buy peace" — may itself be seriously counterproductive and quite off the mark.

[25] *Van Orden*, 125 S. Ct. at 2871 (emphases added).

[26] The "message" more likely to be communicated insofar as a justice on the Supreme Court suggests that he or she will stretch to assess the facts of a case in a manner enabling a decision less likely to rile agitated segments of the public than a decision he or she would in fact reach otherwise (which is just what I think Justice Breyer did, virtually openly, in *Van Orden*), is not admirable. Even if it is sometimes reasonable for a judge to consider public

II.

With this brief review of the recent Ten Commandments cases now completed, aided by several quite lengthy footnotes[27] that were surely more than adequate to show the collapse of consensus and the very sharp disparity of views among the nine justices who shared in adjudications of Establishment Clause cases brought to the Court since these justices first assembled together in 1994,[28] it is nonetheless difficult to know how best to summarize where we now find ourselves. One way of doing so, I suppose, is to note still one more time the solid consensus seemingly shared by *all* the members of the Court more than a half-century earlier in Justice Black's memorable summary in *Everson v. Board of Education*,[29] proceed from there to quote

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reaction as an element to be taken into account in deciding cases, it is nonetheless a serious mistake to announce that that is so. Such announcement virtually instructs "the public" (and confirms its low regard for judges) what is best to do insofar as it wants to influence the resolve of judges to apply (or, rather, *not* apply) the law as best they understand it, even as their colleagues remain more steadfast in their willingness so to do, as was illustrated in *Van Orden* itself.

To be sure, a recent major work warmly embraces the resource of hostile popular agitation as a wholly legitimate means of checking and influencing the decisions of the Supreme Court. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). Even if it is legitimate, however, the idea does not easily translate into a suggestion that the judges should themselves also declare in deciding cases that come before them, insofar as a decision one way would meet with less litigative fallout and greater public acceptance than a decision the other way, that they will receive evidence on that question and, at least in close cases, be guided by what the preponderance of that evidence may show in exactly that regard. And the Kramer thesis itself hardly provides a basis for expecting any more enlightened constitutional decisions (rather than less enlightened decisions) from the Supreme Court. For an able and sharply critical review, see Lucas A. Powell, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005).

[27] *See supra* notes 9–10, 14–17, 19–20, 24, 26.

[28] 1994 marks the year of Justice Breyer's confirmation (following Justice Ginsburg's appointment in 1993).

[29] 330 U.S. 1 (1947).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause

usefully from William Butler Yeats's cautionary poem, "The Second Coming,"[30] then note the useful comparisons that suggest themselves, and pretty well just leave it at that. And, in favor of that idea, it is certainly true that since 1947, "Things" (i.e., judicial consensus regarding the Establishment Clause) *have* "fall[en] apart." I suppose it may likewise be true that "the centre *cannot* hold," if just because, all other things aside, it is quite hard these days even to identify a *real* center as such *at all*, since so frequently a single justice (or perhaps two) effectively decides most of the cases today. And, given that much, perhaps all one *can* do now is to wonder, indeed, "what [sort of] rough beast" even now may "*slouch*" — if not toward Bethlehem, then nonetheless toward Washington — "to be born."[31]

These comparisons are tempting, but I think them not the most suitable. Rather, I think it better not to be so dour (or so trite) to call still again on W.B. Yeats, when there is a much more suitable metaphor — or image — I think far better describes our nearly zany current situation with the Supreme Court. It is an image provided in the closing scene from a recent and deservedly popular animated children's film, *Finding Nemo*.[32] The final frames, alas, quite perfectly describe the current Supreme Court in its fractured views on the separation (or fusion) of church and state.

As this genuinely funny and quite charming full-length motion picture nears its end, little Nemo (a small clown fish with a most mischievous grin) is reunited with his father, Marlin, and with Dory, a loopy, loyal friend, after all manner of harrowing misadventures they have somehow managed to overcome. From the opening scary scenes, in which a shadowy barracuda claims Nemo's mother and all of her eggs, save only the last from which little Nemo is hatched, to Nemo's truancy in wandering too

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> against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 16.

[30] For the forgetful reader, here are a few of the lines from Yeats's famous apocalyptic work:

> Turning and turning in the widening gyre,
> The falcon cannot hear the falconer;
> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world . . .
> The best lack all conviction, while the worst,
> Are full of passionate intensity. . . .
> And what rough beast, its hour come round at last,
> Slouches towards Bethlehem to be born?

W.B. Yeats, *The Second Coming*, *in* 1 THE COLLECTED WORKS OF W.B. YEATS 187 (Richard J. Finneran ed., 1989).

[31] The point is the obvious one, i.e., that the Court is even now undergoing a change, with the passing of Chief Justice Rehnquist, the confirmation of Judge John Roberts as the new Chief Justice of the United States, and the pending retirement of Justice O'Connor (the most frequent "swing" vote) as soon as some successor is confirmed to take her seat.

[32] FINDING NEMO (Disney/Pixar 2003).

far from the safe shelter of the coral reef when he is caught by a commercial scuba diver, carried away, and sold to a dentist to add to his office aquarium overlooking Sydney Harbor, the story unfolds in the grand tradition of Homer's *Odyssey* itself. Eventually, though, and just as one truly wants — any other ending would just be so utterly wrong one would not forgive the producers — Nemo and Marlin (and of course Dory too) are returned to their thriving coral reef community. It is a wonderful story, winningly told, virtually from beginning to end.

However the movie is not yet quite over with the last scene as I just now described it. Instead, there is one last short series of frames at the very end, when we are taken away from Nemo's happy habitat with Marlin and Dory, suddenly to be whisked briefly back to Sydney Harbor one last time. There, in these closing frames, just in the water beside the pier, bobbing like so many corks nearby the building from which they, too, made their escape from the mad dentist's office in water-filled transparent bags of the very sort one uses to carry tropical fish home from any ordinary aquarium shop, are Nemo's former fellow captives from the dentist's office tank, in which they, too, were previously held. Each one of these former aquarium mates now floats freely in his own transparent bag, after successfully having bounced over the dentist's office window sill, down to the pier, over the side, and into the water below. As the last of this happy band of piscatorial escapees clears the edge of the pier, a hearty cheer goes up for the last arrival. So, even here, it seems, everything is just wonderful as well.

But just as one expects the usual words ("The End") to begin to scroll across the screen, for another moment nothing happens. Instead, the camera remains briefly but closely fixed on the harbor scene — of Nemo's former friends, each safely inside his separate transparent, water-filled bag in which each has made his escape, and each one now bobbing, gently, in the sea beside the pier. What remains now takes less than a minute, in the closing of this sweet, sweet last scene.

The last celebrative cheer for the whole of our tiny group's seemingly successful escape has just died away. It is now all quiet. Only the slight sounds of the gently lapping waters are audible on the soundtrack. Finally, however, as each of Nemo's finny friends looks out through the sheer transparent plastic membrane of his own floating aquarium bag at each of the others similarly bobbing, but then also takes the measure of the very large sea surrounding them all, the very last words of the film are given voice. Blinking, looking somewhat bemused but perhaps also just a little worried, happy to have come this far but afflicted with a sudden thought, one of them suddenly declares: "*Now* what?" And, then, to be sure, there is no more. And, then, also, as to the question ("*Now* what?"), we are not to learn the answer. We have no idea how they will get free of their tiny prisons, although we have come to love these little heroes and now hope — and quite believe — that somehow they will.

It is this image, not something more solemn, that I mean to leave with the reader from our now-completed brief review of last term's fractured pair of Ten

Commandment cases just down from the Supreme Court: the last funny scene from this movie for children, yet also a movie for all of us — of whatever age, or party, or point of view.

In our own version of *Finding Nemo*, from the common consensus articulated more than a half-century ago, in *Everson v. Board of Education*, there are now just three justices (Souter, Stevens, and Ginsburg) who remain reliably committed to the strong "neutral" civil state idea of the Establishment Clause, reflected in the original passages by Justice Black — who, at that time, spoke for the entire Court. Three other justices (Chief Justice Rehnquist, and Justices Thomas and Scalia) long ago dismissed Justice Black's *Everson* statement as simply wrong. They have set an entirely different course for the Court whenever they could pick up any two of the remaining three less-certain votes. There was, moreover, no common bridge to connect these sets of judges. And despite all manner of argumentative efforts from each side within the Court (as well as by teams of academic commentators outside the Court), there was also frankly little basis on which to expect them to find common ground or even for one to declare which side was right and which wrong. Rather, each side repeatedly marshaled mutually impressive materials to support its view.

But, of course, neither have these been the only distinctive points of view represented on the Supreme Court, much less are they the only views that count. There are, and have been, several others, at least three more (perhaps even as many as four), as we have already detailed them in the course of our brief review. Thus, just by way of very quick recapitulation, there is the separate view, consistently maintained by Justice Thomas, that the Establishment Clause of the First Amendment simply does not speak to the states at all (rather, just to the national government).[33] For Justice Thomas, therefore, *no* state action is to be judged as prohibited by this particular constitutional provision, regardless of what the state action may do. Quite separately, in turn, Justice Kennedy, while generally more disposed to the generic view common to Rehnquist, Scalia, and Justice Thomas, is nevertheless quite at odds with them when he finds evidence that government has brought some degree of "coercion" to bear in its various religious preferments.[34] And we have already noted

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[33] *See supra* note 19.

[34] *See* Lee v. Weisman, 505 U.S. 577, 588 (1992). Writing the lead opinion for the Court, Justice Kennedy observed, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise," *id.* at 587, and concluded that where, as in this case, "coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation," in a school sponsored prayer (i.e., a formal prayer delivered at school graduation exercises), taken together with other entangling facts (the school principal directed the content of the prayer by providing "guidelines" to which the selected clergyman, a local rabbi, would need to conform or risk not being invited back again), the line had been crossed between what was constitutionally permissible and what was not. *Id.* The case is nevertheless still just another 5–4 decision, acrimoniously dividing the Court, with a lengthy

that Justice O'Connor occupied a separate chamber of thought in her consistent articulation (though not altogether predictable application) of a "no religious endorsement" test for the establishment clause.

Following *Van Orden*, moreover, one may need also to locate Justice Breyer in a distinguishable jurisprudence reserved to himself, namely, that of the roving "reasonable" judge standing more aloof from doctrine and tending more strongly to take the measure of the possibly troubling political effects of particularly divisive cases, to be guided accordingly, at least in marginally close cases, even as he illustrated in *Van Orden* itself. Moreover, not even this description is complete. For among other flotsam still afloat in the harbor waters of Establishment Clause controversies is former Chief Justice Burger's risible "no more than" test, fully accepted by Justice Kennedy, as he has expressly taken care so to say.[35]

And now, as we view this scene, as one of the former aquarium members can be seen gently drifting away after somehow freeing herself from her transparent pouch as it had bobbed and jostled alongside the others, a newcomer can be seen finning nearby, apparently of a mind to join our little band of heroes still adrift on the harbor wavelets. Surely the scene as we have laid it out should stir no panicky thoughts,

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dissent by Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, scathingly dismissing the claim of coercion as a mere chimera of Kennedy's imagination, nothing more.

[35] For example, Justice Kennedy (still very much an active member of the Court) expressly adopted the "no more than" test in dissenting from the Court's decision in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). A 5–4 majority applied the [no] Establishment Clause to disallow a county's collaboration with a Roman Catholic group for the installation of a full-scale Christian Nativity Scene with its banner, "Gloria in Excelsis Deo" (Glory to God in the Highest), on the Grand Staircase of the Allegheny Courthouse (its most prominent interior public space). In his dissent, joined by Chief Justice Rehnquist and Justices Scalia and White, Justice Kennedy begins by noting that there is no claim in this case "that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way." *Id.* at 664. Absent that feature, he declares that the case should be decided under the terms as laid out in Chief Justice Burger's "no more than" test in *Lynch v. Donnelly*. *Id.* at 665. He then declared that the Court's opinion by Burger in *Lynch* is "*precisely the same analysis* as that I apply today." *Id.* at 665 n.4 (emphasis in original). He proceeded accordingly to state that, in order to find a violation in this case consistent with the *Lynch* test, the Court would have to view this county's actions "as *more* beneficial to and *more* an endorsement of religion . . . than . . . the legislative prayers upheld in *Marsh v. Chambers*," which he declares it is not and therefore is exempt from the Establishment Clause on that account. *Id.* (first emphasis added). And to leave no doubt of the matter, he adds: "I accept and indeed approve both the holding *and the reasoning* of Chief Justice Burger's Opinion in *Lynch*, and so I must dissent." *Id.* at 667 (emphasis added). Assuredly there continues to be strong support for the "history exception" as well — i.e., that whatever the apparent inconsistency of a government practice with the Establishment Clause, if it can claim a suitable lineage, it will not now be found constitutionally wanting by (a majority of) the Supreme Court.

much less apocalyptic visions of sheer anarchy let loose, as in the famous poem by Yeats. Not at all. Such visions as these are vastly overwrought. But it may do good service and certainly support our mutual bemused interest in pressing this perfectly suitable *Finding Nemo* question, instead, wondering a little anxiously, even as one expects it might also be pondered among the cloaked figures, severally seated in their dark robes, spaced out upon the Court:

"*Now* what?"