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# Take Two Tablets and Do Not Call for Judicial Review Until Our Heads Clear: The Supreme Court Prepares to Demolish the 'Wall of Separation' Between Church and State


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# TAKE TWO TABLETS AND DO NOT CALL FOR JUDICIAL REVIEW UNTIL OUR HEADS CLEAR: THE SUPREME COURT PREPARES TO DEMOLISH THE “WALL OF SEPARATION” BETWEEN CHURCH AND STATE

Terence J. Lau\*  
William A. Wines\*\*

## I. INTRODUCTION

“Congress shall make no law respecting an establishment of religion,  
or prohibiting the free exercise thereof[] . . . .”<sup>1</sup>

“I contemplate with sovereign reverence that act of the whole  
American people which declared that their legislature should make no  
law respecting an establishment of religion, nor prohibiting the free  
exercise thereof, *thus building a wall of separation between church and state.*”<sup>2</sup>

“At a time when we see around the world the violent consequences  
of the assumption of religious authority by government, Americans may  
count themselves fortunate: Our regard for constitutional boundaries  
has protected us from similar travails, while allowing private religious  
exercise to flourish. . . . *Those who would renegotiate the boundaries between  
church and state must therefore answer a difficult question: Why would we*

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> Thomas Jefferson, *Letter to Danbury Baptists* (Jan. 1, 1802), in STEPHEN MANSFIELD, TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT’S HAPPENED SINCE 37 (2007) (emphasis added).

*trade a system that has served us so well for one that has served others so poorly?"*<sup>3</sup>

"We have built no temple but the Capitol. We consult no common oracle but the Constitution."<sup>4</sup>

"Preserve me, O God: for in thee do I put my trust."<sup>5</sup>

Pleasant Grove, Utah's "City of Trees[,]"<sup>6</sup> is a nice place to raise a family. Established by Mormon pioneers in 1850, it is now a prosperous upper-middle class community, 93% white, with a median household income of \$70,000 and median home price of \$247,900.<sup>7</sup> Minor inconveniences are easily overcome in Pleasant Grove. When town founders felt the original name of the settlement, Battle Creek, was too contentious, they readily agreed to the much more appealing "Pleasant Grove."<sup>8</sup> When the town stopped growing strawberries, no one saw any reason to stop the annual summer celebration of "Strawberry Days[,]" which was, after all, "the longest continuing community celebration in Utah to date."<sup>9</sup> When the Fraternal Order of Eagles donated a monument of the Ten Commandments in 1971 to Pleasant Grove as part of a broad campaign to place thousands of monuments throughout the country, the city readily displayed the monument in a public park, Pioneer Park.<sup>10</sup> Decades later, however, when a little-known religious organization calling itself the Summum asked to display a monument of its own religious precepts (called the "Seven Aphorisms") alongside the Ten Commandments, the City of Pleasant Grove politely declined.<sup>11</sup> But this time, the minor inconvenience will not be resolved as easily or economically as a name change or the decision to continue a summer strawberry festival in spite of the dearth of local strawberry farms. The

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<sup>3</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) (emphasis added).

<sup>4</sup> The Architect of the Capitol, *Quotations and Inscriptions in the Capitol Complex*, [http://www.aoc.gov/cc/cc\\_quotations.cfm](http://www.aoc.gov/cc/cc_quotations.cfm). (last visited Oct. 17, 2008) (quoting Rufus Choate).

<sup>5</sup> *Id.* (quoting Psalm 16:1).

<sup>6</sup> Pleasant Grove: Utah's City of Trees, <http://www.plgrove.org> (last visited Oct. 17, 2008).

<sup>7</sup> *Id.* (follow "Business & Development" hyperlink; then follow "Economic Profile" hyperlink).

<sup>8</sup> *Id.* (follow "Unique to Pleasant Grove" hyperlink; then follow "Pleasant Grove History" hyperlink).

<sup>9</sup> *Id.*

<sup>10</sup> Respondent's Brief in Opposition to Petition for Writ of Certiorari at 10, *Pleasant Grove City v. Summum*, No. 07-665 (Feb. 21, 2008) [hereinafter Respondent's Brief].

<sup>11</sup> *Id.* at 5.

Summum filed suit in a federal district court in 2005, seeking declaratory and injunctive relief, claiming that a city that accepts one group's religious message for public display must equally accept another group's religious message.<sup>12</sup>

The District Court ruled in favor of Pleasant Grove.<sup>13</sup> That decision was later overruled by the Tenth Circuit Court of Appeals, which held that the City's placement policies were subject to strict scrutiny because Pioneer Park is a traditional public forum.<sup>14</sup> The Summum prevailed again by a razor-sharp (6-6) margin upon a motion for rehearing en banc, prompting unusual dissents and opinions from the Justices.<sup>15</sup> The Summum's success has caused conservatives endless hand-wringing at the prospect of our nation's public parks facing the Hobbesian choice of either removing existing privately donated monuments or allowing all privately donated monuments to be displayed. Conservative legal foundations have gleefully assumed the fight,<sup>16</sup> sensing an opportunity to make headway in their frustrated battle to reintroduce displays of piety into public governmental life. Casting their bait, the foundations chummed the waters by dangling the horrific prospect of a Statue of Tyranny being erected next to the Statue of Liberty and the Alice in Wonderland statue in Central Park being dismantled.<sup>17</sup> The United States Supreme Court, newly constituted after the longest period in its history (since 1823<sup>18</sup>) without a change in membership,<sup>19</sup> faithfully bit, and granted certiorari<sup>20</sup> in spite of the fact that the *Summum* litigation had not progressed beyond denial of the preliminary injunction request in the United States District Court for Utah.<sup>21</sup>

In this Article, we examine the issues that bring First Amendment jurisprudence to this fascinating and troubling case. For the most part, our examination proceeds chronologically. Part II of this Article

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<sup>12</sup> *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), *aff'd en banc*, 499 F.3d 1170 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).

<sup>13</sup> *Id.* at 1048.

<sup>14</sup> *Summum*, 499 F.3d at 1174.

<sup>15</sup> *Id.* at 1170.

<sup>16</sup> See generally Jon Meacham, *Golly, Madison*, NEWSWEEK, Mar. 17, 2008, at 63 (quoting STEVEN WALDMAN, *FOUNDING FAITH* (2008)). This is ironic, as "separation of church and state would not exist if not for the efforts of eighteenth-century evangelicals." *Id.*

<sup>17</sup> Petition for Writ of Certiorari at 3, 13, *Pleasant Grove City v. Summum*, No. 07-665 (Nov. 20 2008).

<sup>18</sup> JOHN G. ROBERTS, JR., *BIOGRAPHY*, [http://www.oyez.org/justices/john\\_g\\_roberts\\_jr/](http://www.oyez.org/justices/john_g_roberts_jr/) (last visited Oct. 17, 2008).

<sup>19</sup> Linda Greenhouse, *Under the Microscope Longer Than Most*, N.Y. TIMES, July 10, 2005, at 43.

<sup>20</sup> *Summum*, 128 S. Ct. at 1737.

<sup>21</sup> Respondent's Brief, *supra* note 10, at 17.

examines the historical basis of America's "religious heritage." We examine the role of the Western frontier as a safety valve for free-thinkers and others from governmental intervention in religion, and the ongoing tension between the Adams and Jefferson views on how pious government should be. In Part III, we explore historic judicial treatment of the religion clauses of the First Amendment and the twenty-five year degradation of the wall of separation between church and state, including the successful efforts by religious conservatives to cast the debate in terms of the Free Speech clause rather than the Establishment or Free Exercise Clauses. We also trace the short-lived and curious life of the "expressive association" doctrine in the Supreme Court's jurisprudence as a possible predictor of the limits of the Free Speech argument *Sumnum* advances. In Part IV, we examine the Ten Commandments and the inherent discrimination present in modern-day attempts to advance a particular version of the Ten Commandments as secular. We also examine the Court's twin 2005 decisions on the public display of the Ten Commandments, and we look at the manner in which *Van Orden v. Perry* paved the road for *Sumnum*. In Part V, we lay out the facts of the *Sumnum* litigation and examine the questions both raised and begged by the *Sumnum* case. Finally, in Part VI, by drawing upon Rousseau's civic religion, we suggest alternative routes for the Court to pursue in similar cases in the future, including a resolution of the vexing questions posed by the *Sumnum* and the monument in Pleasant Grove. We argue that in light of America's increasing religious diversity<sup>22</sup> and our rising religious intolerance,<sup>23</sup> the Supreme Court should set aside

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<sup>22</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 62 (120th ed. 2000). In 1980, Protestant was the religious preference of 61% of Americans; 28% were Catholic; 2% were Jewish; 2% reported themselves as other; and 7% had no religious preference. *Id.* In 1999, those numbers had shifted to 55% Protestant; 28% Catholic (back up from 25% in 1990); 2% Jewish; 6% other; and 8% had no religious preference. *Id.* Only 43% of Americans were weekly church/synagogue attendees. *Id.* In twenty years, those Americans who described themselves as "[o]ther" or having no religious preference jumped from 9% to 16%, an increase of 55.5 percent. *Id.* Since 1991, the annual net immigration rate in the United States has been running between 3.1% and 3.9%. *Id.* at 8.

<sup>23</sup> See, e.g., U.S. DEPT. OF JUSTICE, F.B.I., HATE CRIME STATISTICS (2005). In 2005, law enforcement agencies reported that 15.7% of reported hate crimes were motivated by religious bias. *Id.* Of those, 68.5% were anti-Jewish; 11.1% were anti-Islamic; 7.8% were anti-other (unspecified) religions; 4.6% were anti-Catholic; 4.4% were anti-Protestant; 3.2% were anti-multiple religions; and 0.4% were anti-Atheism/Agnosticism. *Id.* The U.S. Census lumped Muslims in with "[o]ther" – Buddhist, Hindu, etc. See U.S. CENSUS, *supra* note 23, at 62. Yet, the percentage of anti-Islamic hate crimes exceeded the total percentage of other in the 2000 Census. *Id.* A reporter for the Office of the U.N. High Commissioner for Human Rights issued a report in 1998 that found religious intolerance in the United States and specifically "an islamophobia reflecting both racial and religious intolerance." ABDELFATTAH AMOR, CIVIL AND POLITICAL RIGHTS, INCLUDING: FREEDOM OF EXPRESSION 1

conservative ideology in order to better serve the long-term interests of an increasingly diverse American polity.

## II. AMERICA’S RELIGIOUS HERITAGE

Before the ink on the First Amendment was dry, the country began its earnest debate about the meaning of religion in public life. The debate has taken on a new urgency in modern times, with conservatives claiming the country was founded as a Christian nation,<sup>24</sup> and liberals arguing otherwise.<sup>25</sup> In this Section, we trace this debate as it played out between founding fathers Thomas Jefferson and John Adams and its effect on the expanding Western frontier. We narrow the discussion by concentrating on how the debate has affected the controversy surrounding Ten Commandment displays around the country.

### A. *Jefferson’s Wall of Separation v. Adams’s Public Piety*

Two prominent founding fathers had very different ideas about how to reconcile the Free Exercise and Establishment Clauses of the First Amendment.<sup>26</sup> Thomas Jefferson’s thoughts can be traced to his 1779 Bill for Establishing Religious Freedom.<sup>27</sup> His views on church-state relations were influenced by his own personal views—although he believed in Jesus and called himself a Christian, he believed that “power-hungry monarchs and corrupt ‘priests’ had despoiled the original, pristine teachings of Jesus.”<sup>28</sup> Jefferson thought that true religious freedom required both free exercise and the disestablishment of religion by the state.<sup>29</sup> “Almighty God hath created the mind free,” Jefferson wrote, and consequently,

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(1998) <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/3129ccf9f586f71680256739003494e4?Opendocument>. We note that these figures are before the anti-Muslim feelings spiked in the U.S. after the events of September 11, 2001.

<sup>24</sup> See, e.g., MICHAEL NOVAK, *ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING* (2002).

<sup>25</sup> See, e.g., CHRIS RODDA, *LIARS FOR JESUS: THE RELIGIOUS RIGHT’S ALTERNATIVE VERSION OF AMERICAN HISTORY* (2006).

<sup>26</sup> See generally John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499 (2004) [hereinafter *Freedom of Public Religion*]; John Witte, Jr., *Public Religion: Adams v. Jefferson*, FIRST THINGS: A MONTHLY J. RELIGION & PUB. LIFE, 29–34 (Mar. 2004) [hereinafter *Public Religion*]; John Witte, Jr., ‘A Most Mild and Equitable Establishment of Religion’: *John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213 (1999) [hereinafter *John Adams and the Massachusetts Experiment*].

<sup>27</sup> *Freedom of Public Religion*, supra note 26, at 501–04.

<sup>28</sup> DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* 82 (2006).

<sup>29</sup> *Freedom of Public Religion*, supra note 26, at 501.

no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.<sup>30</sup>

During his presidency, Thomas Jefferson coined the term “wall of separation” in his famous letter of January 1, 1802 to the Danbury Baptists.<sup>31</sup> Jefferson’s viewpoint seems to take the broader reading of the First Amendment’s command that “Congress shall make no law respecting an establishment of religion”—a reading that includes in its ambit a prohibition against recognizing the mere existence of religion as opposed to a narrower reading that Congress shall make no law respecting an establishment of *a* religion, which would seem to provide no such protection.<sup>32</sup> Indeed, Jefferson explicitly endorsed the notion that religion is a strictly private matter “which lies *solely* between man and his God, and that man owes account to none other for his faith or his worship.”<sup>33</sup>

John Adams, the second president and Jefferson’s chief political rival, presented an international treaty to the country that included the famous words, “[T]he government of the United States of America is not, in any sense, founded on the Christian Religion . . . [.]”<sup>34</sup> A Puritan at heart, he did not even visit his first Catholic church until the Continental Congress, when he, George Washington and others visited St. Mary’s Church in Philadelphia.<sup>35</sup> “Both repelled and moved,” he

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<sup>30</sup> *Id.* (citing *A Bill for Establishing Religious Freedom (1779)*, in *THE COMPLETE JEFFERSON: CONTAINING HIS MAJOR WRITINGS, PUBLISHED AND UNPUBLISHED, EXCEPT HIS LETTERS* 946, 947 (Saul K. Padover ed. 1943)).

<sup>31</sup> *Letter to Danbury Baptists*, *supra* note 2.

<sup>32</sup> U.S. CONST. amend. I. For further discussion of this distinction, see George L. Alexander, *Separation of Church and State*, <http://www.friendsjournal.org/separation-church-and-state> (last visited Oct. 17, 2008).

<sup>33</sup> *Letter to Danbury Baptists*, *supra* note 2 (emphasis added).

<sup>34</sup> See Ed Buckner, *Does the 1796-97 Treaty with Tripoli Matter to Church/State Separation?*, [http://www.stephenjaygould.org/ctrl/buckner\\_tripoli.html](http://www.stephenjaygould.org/ctrl/buckner_tripoli.html) (last visited Oct. 17, 2008). The language of the treaty was meant to persuade Tripoli (now Libya) that the United States would not engage in a religious war with Muslims. *Id.* The treaty language was ratified by the Senate and there is no record of a public outcry in any major city or city newspaper. *Id.*

<sup>35</sup> Holmes, *supra* note 28, at 2.

later described the service as "aw[e]ful and affecting."<sup>36</sup> In contrast to Jefferson, however, Adams did not support the idea of a wall of separation (if one stream of modern scholarship is correct).<sup>37</sup>

Professor John Witte, Jr.<sup>38</sup> wrote the following summary of Adams's views:

The notion that a state could remain neutral and purged of any public religion was, for Adams, equally a philosophical fiction. Absent a commonly adopted set of values and beliefs, politicians would invariably hold out their private convictions as public ones. It was thus essential for each community to define and defend the basics of a public religion. In Adams's view, its creed was honesty, diligence, devotion, obedience, virtue, and love of God, neighbor, and self. Its icons were the Bible, the bells of liberty, the memorials of patriots, and the Constitution. Its clergy were public-spirited ministers and religiously committed politicians. Its liturgy was the public proclamation of oaths, prayers, songs, and election and Thanksgiving Day sermons. Its policy was state appointment of chaplains for the legislature, the military, and prisons; state sanctions against blasphemy, sacrilege, and iconoclasm; state administration of tithes, collections, test oaths, and clerical appointments; and state sponsorship of religious societies, schools, and charities. "Statesmen may plan and speculate for liberty," Adams wrote in defense of his views, "but it is religion and morality alone which can establish the principles upon which freedom can securely stand." A "Publick Religion" sets the "foundation[s], not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society."<sup>39</sup>

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<sup>36</sup> *Id.* at 3.

<sup>37</sup> See generally *Freedom of Public Religion*, *supra* note 26; *Publick Religion*, *supra* note 26; *John Adams and the Massachusetts Experiment*, *supra* note 26.

<sup>38</sup> Witte is the Jonas Robitscher Professor of Law, Director of Law and Religion Program, and Director of Center for the Interdisciplinary Study of Religion at Emory University, Atlanta, Georgia.

<sup>39</sup> *Freedom of Public Religion*, *supra* note 26, at 504 (citing THE WORKS OF JOHN ADAMS (Charles Francis Adams, ed.1850-56) (footnote omitted)).



Witte posited these two models of religious liberty, justifying his emphasis on the two by citing the prominence of their proponents and the importance of their respective states, Virginia and Massachusetts.<sup>40</sup> However, Professor Witte judiciously noted the common ground and beliefs shared by Jefferson and Adams: both men were consciously engaged in a new experiment in religious liberty; both started with the credo of the American Declaration of Independence, which Jefferson drafted<sup>41</sup> and Adams signed;<sup>42</sup> and both insisted on providing constitutional protection for every peaceable, private religious belief and the holder thereof in their era.<sup>43</sup>

However, the contrasts are as significant as the shared ground: whereas Jefferson proposed a robust freedom of expression, Adams approved only a moderate or “tempered” religious freedom; whereas Jefferson pushed for a complete separation of church and state, Adams wanted only a division of religious and political offices; and whereas Jefferson sought the complete disestablishment of all religions, Adams campaigned for a modest, “mild” establishment of one public religion as a balance or check on individual religious freedom.<sup>44</sup>

Based upon an impressive array of information and scholarship, Professor Witte declared that “[f]or the first century and a half of the republic, it was Adams’s style of argument about religious liberty . . . that dominated the nation . . .”<sup>45</sup> By the time of America’s fourth President, Madison, the culture of religious freedom had firmly taken root. Madison would go on to become “a kind of Adam Smith of church and state: he believed that the marketplace, if left to its own devices without government interference, would produce stronger religious belief, not weaker.”<sup>46</sup> He argued “that only liberty of conscience could guarantee civil and political liberty.”<sup>47</sup> In an interesting antecedent to today’s debate, Madison’s “belief that citizens should voluntarily support religion led him to oppose the appointment of

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<sup>40</sup> *Id.* at 505.

<sup>41</sup> *See, e.g.*, WILLIAM A. WINES, *ETHICS, LAW, AND BUSINESS* 28–29 (2006). Jefferson wrote the bulk of the document by himself for a committee composed of John Adams, Benjamin Franklin, Jefferson, Robert R. Livingston, and Roger Sherman. *Id.* Only Franklin and Adams made minor changes to Jefferson’s draft, which he worked on and completed in two weeks. *Id.* at 29. *See also Freedom of Public Religion, supra* note 26, at 505. Professor Witte, in a minor oversight, wrote that “they [Adams and Jefferson] drafted[]” the Declaration of Independence. *Id.*

<sup>42</sup> Wines, *supra* note 41, at 378.

<sup>43</sup> *Freedom of Public Religion, supra* note 26, at 505.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 505, 506–10.

<sup>46</sup> Meacham, *supra* note 16, at 63.

<sup>47</sup> Holmes, *supra* note 28, at 93.

chaplains for Congress and for the army and navy.”<sup>48</sup> In arguing against assessments for funding religion, Madison observed:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that [sic] the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?<sup>49</sup>

It turns out that “[Madison] was right: once the federal government declined to establish a church and the states moved to disestablish (Massachusetts was the last, in 1833), religious belief grew.”<sup>50</sup>

*B. After 150 Years, a Wall of Separation Goes Up in Public Places*

Horace Greeley is attributed with the famous aphorism: “Go West, young man, and grow up with the country.”<sup>51</sup> Until the end of the nineteenth century, states were free to use assimilation and accommodation to clamp down on dissenters,<sup>52</sup> who responded by using the “escape . . . valve” of moving west.<sup>53</sup> “The right and duty to emigrate was a basic assumption of the early American experiment in religious liberty[]”<sup>54</sup>—at least, John Adams’s style. Frederick Jackson Turner, the historian, famously observed in 1893 that the American frontier had

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<sup>48</sup> *Id.* at 94.

<sup>49</sup> MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS BY JAMES MADISON, <http://teachingamericanhistory.org/> (last visited Oct. 17, 2008) (follow “Founding Era” hyperlink; then follow “James Madison” hyperlink; then follow “Memorial and Remonstrance Against Religious Assessments” hyperlink).

<sup>50</sup> Meacham, *supra* note 16, at 63.

<sup>51</sup> David H. Fenimore, *Horace Greeley*, (1996), <http://wolfweb.unr.edu/homepage/fenimore/greeley.html>.

<sup>52</sup> *Freedom of Public Religion*, *supra* note 26, at 506–09.

<sup>53</sup> *Id.* at 508. Professor Witte observed:

One of the saving assumptions of this system was the presence of the frontier, and the right to emigrate thereto. Religious minorities who could not abide by a community’s religious restrictions or accept its religious patronage were not expected to stay . . . They moved—sometimes at gunpoint—to establish their own communities on the frontier[.]

*Id.*

<sup>54</sup> *Id.*

disappeared.<sup>55</sup> Curiously, Jackson, a University of Wisconsin Professor, was right in the sense that there no longer was a sharp demarcation on the U.S. Census map indicating a “frontier” in terms of population density per square mile;<sup>56</sup> however, in a larger sense, the American frontier had not closed.<sup>57</sup> For our purposes, the “frontier” – in the sense of an open and virtually unsettled wilderness where one could go to escape forced participation in a community with an established public religion – was on the verge of disappearing; but 1893 has no talismanic significance.<sup>58</sup>

As a consequence of the closing of the traditional geographic safety valve for free thinkers, heretics, and iconoclasts, the Supreme Court needed to intervene to protect the Free Speech and religious freedoms of minorities, particularly unpopular minorities. The seeds for such a process can be found in the Holmes dissent (from the Espionage Act convictions of the petitioners in the *Abrams* case), which resulted in the “clear and imminent danger” standard for free speech.<sup>59</sup> As late as 1940, the Supreme Court upheld requirements that public school children salute the flag.<sup>60</sup> Undeterred, Jehovah’s Witnesses brought another case to the Court just three years later. In that case, the Court reversed its course and by a 6-3 margin expressly overruled its 1940 decision, reasoning that the First Amendment protects individuals from state compulsion to salute the flag.<sup>61</sup> As we discuss below, however, the role of the Court in protecting unpopular religious minorities has sharply reversed since the 1940s.

### III. CONSTITUTIONAL HISTORY OF THE RELIGION CLAUSES

In spite of the desire to escape religious tyranny, America’s early history demonstrates a fair amount of religious intolerance. Nine colonies had official religions,<sup>62</sup> and in some, such as Maryland, denying the existence of Jesus Christ was punishable by death.<sup>63</sup> In other

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<sup>55</sup> See *FMC Program Segments 1990–1930: Frederick Jackson Turner’s Frontier Thesis*, <http://www.pbs.org/fmc/segments/progseg1.htm> (last visited Oct. 17, 2008).

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

<sup>58</sup> See *WORLD ALMANAC AND BOOK OF FACTS* 451 (2007). In 1893, for example, there were only 44 stars on the U.S. flag. Wyoming had become the 44th state in 1890. *Id.* New Mexico and Arizona became the 47th and 48th states, respectively, in 1912. *Id.*

<sup>59</sup> *Abrams v. United States*, 250 U.S. 616, 627 (1919).

<sup>60</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>61</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>62</sup> Holmes, *supra* note 28, at 34.

<sup>63</sup> Alexander, *supra* note 32, at 8.

colonies, only professed Christians could run for public office.<sup>64</sup> The Declaration of Independence is replete with references to God, a necessity "to mobilize the citizenry in a time of war."<sup>65</sup> In the Constitution itself, however, there is not a single mention of God; but there is a prohibition on any religious test as a qualification for office under the United States<sup>66</sup> and, after 1791, the First Amendment provided for the free exercise of religion and required the separation of church and state.<sup>67</sup> Containing the avant-garde ideas of Roger Williams and his followers, the Rhode Island Charter of 1663 was the first broad declaration of religious freedom in the colonial settlements.<sup>68</sup> From Charles II, the Rhode Island and Providence plantations solicited and received the guarantee that "everye person may . . . freelye and fullye have and enjoye his . . . owne judgments and consciences, in matters of religious concernments[.]"<sup>69</sup> Williams might have considered the charter provision an opening wedge for other rights. At any rate, he did not limit his vision to religious freedom, but rather expounded the radical doctrine calling for broad liberties that would permit the widest latitude for personal freedom.

In a similar vein, the "fundamental laws of West New Jersey" were granted in 1676 "by the proprietors on the specific condition that they were 'to be the foundation of the government . . . not to be altered by the Legislative authority' under any circumstances."<sup>70</sup> In these laws, the West New Jersey proprietors agreed to a provision assuring broad religious freedom.<sup>71</sup> No freeholder, or inhabitant of the province, could be deprived of life, liberty, or property without due process of law.<sup>72</sup>

Two colonial charters issued in the 1680s followed the West New Jersey pattern.<sup>73</sup> The New Hampshire Charter of 1680, though not mentioning other personal rights, did grant liberty of conscience to all Protestants.<sup>74</sup> Pennsylvania was the scene of a more forthright

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> U.S. CONST. art. VI, § 3.

<sup>67</sup> U.S. CONST. amend I.

<sup>68</sup> ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* 17 (1955).

<sup>69</sup> *Id.* at 17 (quoting BENJAMIN P. POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1596-97* (1878)).

<sup>70</sup> *Id.* at 18-19 (quoting FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2548-51* (1909)).

<sup>71</sup> *Id.* at 19.

<sup>72</sup> *Id.* (quoting FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2548-51* (1909)).

<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Id.* (quoting BENJAMIN P. POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1277* (1878)).

experiment in freedom, for there William Penn, a former West New Jersey proprietor, applied the ideas that had worked so well in New Jersey.<sup>75</sup> Also “termed a ‘charter of liberties,’” the Pennsylvania Frame of Government of 1683 granted extensive personal rights.<sup>76</sup> Freemen were authorized to elect a General Assembly to make laws and were permitted to plead their own cases in court before a jury of twelve men.<sup>77</sup> By 1770, Pennsylvania would be filled with many small religious groups, many from Germany, all believing “that they had restored practices of apostolic Christianity that mainstream Christianity had wrongly abandoned[.]”<sup>78</sup> It should be noted, however, that religious toleration in Pennsylvania was limited to those “who confess[ed] and acknowledge[d] the one Almighty and eternal God, to be the Creator, Upholder, and Ruler of the world.”<sup>79</sup> Despite its restrictive character, this and similar religious provisions of other charters represented a notable break from the narrow conception of tolerance prevailing throughout most of Europe.<sup>80</sup>

A “‘Charter of Libertyes and Priviledges[.]’” passed by the New York General Assembly in 1683, guaranteed substantive personal rights to freeholders.<sup>81</sup> The charter assured accused persons the right to a trial by a jury of peers with “‘reasonable [c]hallenges.’”<sup>82</sup> Bail was allowed in all cases except those involving treason or felony.<sup>83</sup> The quartering of troops in private dwellings during peacetime was forbidden.<sup>84</sup> Another provision forbade trial and punishment of civilians under martial law.<sup>85</sup> Free exercise of faith was guaranteed to Christians as long as they did not disturb the peace.<sup>86</sup>

The Duke of York, now turned king, refused to approve this legislation.<sup>87</sup> Undaunted, New York citizens continued to press for the personal protection already enjoyed by other colonies.<sup>88</sup> Then in 1691, the provincial Legislative Council approved a second declaration of rights which included liberty of conscience for all (except for professed

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Holmes, *supra* note 28, at 5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Rutland, *supra* note 68, at 21.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Roman Catholics) and repeated the personal rights guarantees of the enactment of 1683.<sup>89</sup> With James II removed by the revolution, this bill, although it lacked permanency, appears to have become law.<sup>90</sup>

When a young America adopted the Bill of Rights in 1791, the First Amendment prohibited the establishment of state-sponsored religion. At the time, it was only intended "'to apply to the federal government, not the local governments that regulate schools, local courthouses and town squares.'"<sup>91</sup> (We note as an aside that the originalist jurisprudence adopted by Justices Scalia,<sup>92</sup> Thomas,<sup>93</sup> and Alito,<sup>94</sup> if adopted, would not stop cities or states from establishing government-sponsored religion.) In 1947, however, a different United States Supreme Court incorporated the Establishment Clause of the First Amendment into the Fourteenth Amendment, thereby applying its prohibitions to state governments as well as the federal government.<sup>95</sup> It is also significant that the Court's 1947 decision laid the foundation for modern Establishment Clause jurisprudence by reviewing the history of the clause and adopting Thomas Jefferson's and James Madison's "wall of separation" language.<sup>96</sup>

The Supreme Court's endorsement of a wall of separation picked up momentum, and seemed to peak in the 1960s under the Warren Court. In 1963, for example, the Court invalidated South Carolina's application of its Unemployment Compensation Act because the Act authorized the denial of benefits to a Seventh Day Adventist who was fired for refusing to work on Saturdays, her Sabbath.<sup>97</sup> In 1965, the Court broadly

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<sup>89</sup> *Id.* (quoting THE COLONIAL LAWS OF NEW YORK 113 (1894-96)).

<sup>90</sup> *Id.*

<sup>91</sup> Meacham, *supra* note 16, at 63 (quoting STEVEN WALDMAN, FOUNDING FAITH (2008)).

<sup>92</sup> Justice Scalia has said that he believes "'[Y]ou give the text the meaning it had when it was adopted.'" Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C. (Mar. 14, 2005), [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.html](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.html).

<sup>93</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (arguing that *Tinker v. Des Moines*, 393 U.S. 503 (1969), should be overturned because the First Amendment, as originally understood, does not protect speech in public schools).

<sup>94</sup> See Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, at D1 (noting Justice Samuel Alito's remark that "'[t]he principles don't change. The Constitution itself doesn't change. But the factual situations change.'").

<sup>95</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

<sup>96</sup> *Id.* at 18 (writing for the majority, Justice Hugo Black declared: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."). For a history of the evolution of Establishment Clause doctrine and for criticisms of the *Everson* case, see Adam M. Conrad, *Hanging the Ten Commandments on the Wall Separating Church and State: Toward a New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1337-41 (2004).

<sup>97</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

construed the “belief” required to qualify for the status of a conscientious objector to encompass any sincere and meaningful belief in “a Supreme Being” that would occupy a parallel place in the life of the possessor as that of the orthodox belief in God.<sup>98</sup> In a concurring opinion, Justice Douglas agreed with the majority’s interpretation and stressed that any interpretation that embraced one religious faith and not another would violate the Free Exercise Clause.<sup>99</sup> He further argued that such an interpretation would “result in a denial of equal protection by preferring some religions to others—an invidious discrimination that would run afoul of the Due Process Clause of the Fifth Amendment.”<sup>100</sup> In 1968, the Warren Court went so far as to carve out an exception to the longstanding rule that taxpayers lack standing to challenge the use of taxpayer funds if the challenger alleges a violation of the Establishment Clause.<sup>101</sup>

This jurisprudence has been under attack in recent years,<sup>102</sup> and lower courts appear to have responded in kind. Decisions addressing faith-based initiatives and school voucher programs provide the clearest examples of the recent deterioration of the wall of separation between church and state. In a 5-4 decision, the United States Supreme Court in 2002 reversed a Sixth Circuit decision<sup>103</sup> and upheld a voucher system that favored the placement of students in sectarian schools put in place by the State of Ohio.<sup>104</sup> Similarly, the Wisconsin Supreme Court upheld the constitutionality of the state’s amended Milwaukee Parental Choice Program, which allows students to attend, at no charge, private sectarian and nonsectarian schools.<sup>105</sup>

The so-called “[f]aith-[b]ased [i]nitiatives[.]”<sup>106</sup> spearheaded by President George W. Bush spawned numerous federal and state cases.

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<sup>98</sup> United States v. Seeger, 380 U.S. 163, 165 (1965).

<sup>99</sup> *Id.* at 188–89 (Douglas, J., concurring).

<sup>100</sup> *Id.* at 188.

<sup>101</sup> Flast v. Cohen, 392 U.S. 83 (1968).

<sup>102</sup> See generally Terence Lau, *Judicial Independence: A Call for Reform*, (forthcoming in NEV. L.J.). Judicial interpretation of the Establishment and Free Exercise clauses, in keeping with the constitutional scheme for courts and *Marbury*, have raised the ire of conservatives. *Id.* This anger has translated into endorsement by so-called men of faith for acts of violence against judges and multiple legislative attempts to remove these cases from the jurisdiction of the courts. *Id.*

<sup>103</sup> Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *rev’d*, 536 U.S. 639 (2002).

<sup>104</sup> *Zelman*, 536 U.S. at 639.

<sup>105</sup> Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

<sup>106</sup> See, e.g., Carol J. De Vita & Sarah Wilson, *Faith-Based Initiatives: Sacred Deeds and Secular Dollars*, (July 1, 2001) <http://www.urban.org/url.cfm?ID=310351&renderforprint=1>. We do not comment on the effectiveness of the faith-based initiatives beyond referring to the studies done on them by the Urban Institute, a non-partisan, non-profit think tank established to study the effectiveness of government programs. *Id.* One

For example, on January 25, 2006, the U.S. District Court for the Western District of Virginia held that Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA) was constitutional on the ground that it was a proper exercise of Congress’s spending power.<sup>107</sup> On January 7, 2002, the U.S. District Court for the Western District of Wisconsin upheld a grant of funds by the Department of Corrections to Faith Works, Milwaukee, Inc., a faith-based, long-term alcohol and drug treatment program, but struck down a similar grant from the Department of Workforce Development.<sup>108</sup>

The highest-profile challenge to the faith-based initiatives, however, resulted in a procedural attack on standing rather than a substantive challenge based on the Establishment Clause. Relying on the *Flast* exception that permits taxpayer standing in cases challenging the unconstitutional use of taxpayer funds in violation of the Establishment Clause,<sup>109</sup> the Freedom From Religion Foundation (“FFRF”) challenged President Bush’s White House Office of Faith-Based and Community Initiatives.<sup>110</sup> Created by Executive Order,<sup>111</sup> the Office of Faith Based and Community Initiatives provided financial support to, among other groups, MentorKids USA, an organization with a stated mission “[t]o exalt the Lord Jesus Christ as the Son of God, the Savior of the World[,]” hired only Christians as mentors, and required mentors to provide monthly reports to assess whether their mentee was progressing in their relationship with God.<sup>112</sup> During oral argument, the Solicitor General Paul Clement sought to distinguish *Flast* by arguing that taxpayer standing is only appropriate when Congress, pursuant to its taxing and spending power, passes a statute that enables money to be disbursed outside of the government in violation of the Establishment Clause.<sup>113</sup>

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problem that an early Urban Institute study highlighted, beyond that of funneling taxpayer dollars to organizations that are exempt from the fair hiring requirements of Title VII of the 1965 Civil Rights Act, was that inner city, poor churches lack the staff and financial resources to prepare the grant requests necessary to participate in faith-based initiatives with the unfortunate result in the D.C. area that much of the money went to suburban mega-churches whose programs did not reach the very poor and needy in the central city.  
*Id.*

<sup>107</sup> *Madison v. Riter*, 411 F. Supp. 2d 645 (2006), *remanded to* 474 F.3d 118 (4th Cir. Va. 2006).

<sup>108</sup> *Freedom From Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002).

<sup>109</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>110</sup> *Petition for Writ of Certiorari at 3, Dennis Grace v. Freedom From Religion Found., Inc.*, No. 06-157 (Sept. 9, 2004).

<sup>111</sup> *Exec. Order No. 13,199*, 3 C.F.R. 752 (2002).

<sup>112</sup> *Petition for Writ of Certiorari, supra* note 110, at 44a-45a.

<sup>113</sup> *Transcript of Oral Argument at 17, Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (No. 06-157).



An incredulous Justice Breyer asked if standing would exist where “Congress passes a statute and says in every city, town, and hamlet, we are going to have a minister, a Government minister, a Government church . . . dedicated to the proposition that this particular sect is the true sect[.]”<sup>114</sup> General Clement replied that even in that case, there would not be taxpayer standing under *Flast*.<sup>115</sup>

In a 5-4 decision, with a plurality opinion by Justice Alito joined by Chief Justice Roberts and Justice Kennedy, the Court accepted General Clement’s arguments, holding that because the White House Office of Faith-Based Initiatives was established by an action of the executive branch pursuant to “general Executive Branch appropriations[.]” FFRF lacked standing.<sup>116</sup> The plurality’s refusal to overrule *Flast*<sup>117</sup> led to a separate concurrence, authored by Justice Scalia and joined by Justice Thomas, complaining: “We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it.”<sup>118</sup> Thus, it would appear, Justice Stewart’s contention that “every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution[.]” no longer rings true in 2008.<sup>119</sup>

The modern Supreme Court’s erosion of the wall of separation took an interesting turn in 2000 when, in a 5-4 decision, it held that Boy Scouts of America (“BSA”) had a First Amendment right to exclude gay scoutmasters.<sup>120</sup> The case involved the termination of an openly gay man as an assistant troop leader solely on the basis of his sexual orientation.<sup>121</sup> The scout leader had prevailed at every step of the litigation up through the New Jersey Supreme Court, arguing that under New Jersey Human Rights Law,<sup>122</sup> BSA engaged in illegal discrimination.<sup>123</sup> Brushing aside the New Jersey Supreme Court’s interpretation of state law, a majority of the United States Supreme Court held that the right to associate under the First Amendment must also include the right not to associate.<sup>124</sup> In an opinion authored by Chief Justice Rehnquist, the Court held that requiring BSA to retain the scoutmaster would significantly burden the

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<sup>114</sup> *Id.* at 17–18.

<sup>115</sup> *Id.* at 18.

<sup>116</sup> *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007).

<sup>117</sup> *Id.* at 2571–72 (“We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.” (plurality opinion)).

<sup>118</sup> *Id.* at 2584 (Scalia, J., concurring).

<sup>119</sup> *Id.* at 2585 (Souter, J., dissenting) (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J. concurring)).

<sup>120</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>121</sup> *Id.* at 645.

<sup>122</sup> N.J. Stat. Ann. §§ 10: 5–4 (2000).

<sup>123</sup> *Dale*, 530 U.S. at 646.

<sup>124</sup> *Id.*

organization’s right to teach boys “that homosexual conduct is not morally straight[.]”<sup>125</sup>

In dissent, Justice Stevens, joined by Souter, Ginsburg, and Breyer, observed that, because BSA did not endorse any position on sexual matters, requiring BSA to retain the scoutmaster (1) did not impose any serious burden on BSA’s shared goals; (2) did not compel BSA to endorse a particular message; and (3) abridged no right of BSA under the Constitution.<sup>126</sup> Moreover, Justice Stevens pointed out that BSA claimed to be non-sectarian.<sup>127</sup> Indeed, many diverse religious organizations sponsor local Boy Scout Troops, and “[b]ecause a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that [BSA] nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation.”<sup>128</sup>

The result in this case is that by the slimmest margin, the Court permitted BSA to endorse a religious message of some of its sponsoring organizations over the conflicting message of other sponsoring organizations and justified it all by relying on the First Amendment. This sleight of hand provides a prelude to the majority decision in *Van Orden v. Perry*,<sup>129</sup> which also involved the promotion of one group’s religious interpretations over equally valid but different interpretations.

In a case described as a “predictable fallout from the Boy Scouts’ victory before the [United States] Supreme Court[.]” the United States District Court for the Southern District of California invalidated the City of San Diego’s long-term lease of prized public parklands to the Boy Scouts on the grounds that such a lease violated the Establishment Clause of the Federal Constitution and the No Aid and No Preferences Clauses of the California Constitution.<sup>130</sup> The case remains on appeal before the Ninth Circuit, which in turn has asked the California Supreme Court to clarify the meaning of the relevant portions of the California Constitution.<sup>131</sup>

#### IV. RELIGIOUS PUBLIC DISPLAYS AND THE CONSTITUTION

The debate over, and resulting experiment in, religious freedom, that has made “[t]he United States . . . among the most religious and most

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<sup>125</sup> *Id.* at 651.

<sup>126</sup> *Id.* at 669 (Souter, J., dissenting).

<sup>127</sup> *Id.* at 670.

<sup>128</sup> *Id.* at 670–71 (footnote omitted).

<sup>129</sup> See *infra* Part IV.C.

<sup>130</sup> *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003).

<sup>131</sup> *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008).

tolerant of nations,"<sup>132</sup> is in sharp focus in the *Sumnum* case. Religious conservatives, angry and hurt over a perceived deviation from the originalist meaning of the Establishment Clause, have fought for years to re-introduce piety into public life. In the 1950s, at the height of the country's fear of the spread of atheism attendant with Communist rule, President Eisenhower began a new Washington tradition of prayer breakfasts.<sup>133</sup> Congress responded by establishing a prayer room in the Capitol.<sup>134</sup> In 1954, the words "under God" were added to the Pledge of Allegiance.<sup>135</sup> In 1955, Congress added the words "In God We Trust" on all paper money.<sup>136</sup> In 1956, Congress replaced "E Pluribus Unum" with "In God We Trust" as the country's national motto.<sup>137</sup> Despite the fall of Communism in the 1980s, the fight over public displays of piety continues to this day at both the state level (witness Ohio's 2006 statute requiring school districts to display any donation of a plaque with either "In God We Trust" or "With God, All Things Are Possible" in a classroom, auditorium, or cafeteria)<sup>138</sup> and federal level (such as efforts in the House of Representatives to recognize the importance of Christmas and the Christian faith)<sup>139</sup>.

Discontent with the lack of public displays of piety, evangelical Christians have forced the issue of the *government's endorsement* of religion squarely back into the public eye. In recent years, we have witnessed attempts by school boards to outlaw the teaching of evolution in public schools,<sup>140</sup> the introduction of a creationist-based philosophy called "Intelligent Design" into school-science curricula,<sup>141</sup> public displays of piety on vehicle license plates such as South Carolina's "I Believe" license plates,<sup>142</sup> righteous indignation every December at the "War on Christmas,"<sup>143</sup> public harangues of atheists,<sup>144</sup> and even the

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<sup>132</sup> Meacham, *supra* note 16, at 63 (emphasis omitted).

<sup>133</sup> David Greenberg, *The Pledge of Allegiance: Why We're Not One Nation Under God*, (2002) <http://www.slate.com/?id=2067499>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> OHIO REV. CODE ANN. § 3313.801 (West 2006).

<sup>139</sup> Recognizing the Importance of Christmas and the Christian Faith, H.R. Res. 847, 110th Cong. (2007).

<sup>140</sup> See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga., 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

<sup>141</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

<sup>142</sup> Sean Hamill, *South Carolina to Offer Cross on Car Plates*, N.Y. TIMES, June 6, 2008, at A14.

<sup>143</sup> See, e.g., *Airport Christmas Trees Make Comeback*, <http://www.cbsnews.com/stories/2006/12/12/national/main2249724.shtml>.

mass relocation of evangelicals to South Carolina in hopes of seceding from the United States and creating a new Biblical republic.<sup>145</sup> The First Amendment paradox appears as alive today as it has ever been in our nation's history, as the prohibition against government validation of religiosity squares off against an intolerant strain of the Christian majority that raises conversion to the level of a fundamental tenet, a pillar of the faith.

The main act in this drama, however, remains the Ten Commandments. Woefully misunderstood and often framed erroneously, it remains the flashpoint between those who seek the aggrandizement of religious public displays and those who oppose such expansion. The battle over the Ten Commandments has cost at least one Alabama State Supreme Court justice his job,<sup>146</sup> and the proper role for the Ten Commandments in public life continues to give impetus for much legislative action.<sup>147</sup> In this Section, we examine the Ten Commandments in some detail, and conclude that they are inherently religious precepts, in spite of efforts to cast them as nonsectarian. Armed with that conclusion, we examine the Supreme Court's Ten Commandments jurisprudence, and argue that unless the Court overturns its 2005 *Perry* decision, the outcome in *Sumnum* will almost certainly result in the city prevailing and a startling rise in government-endorsed public displays of piety.

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<sup>144</sup> See generally Eric Zorn, *Representative Tries to Put Fear of God in Atheist*, CHI. TRIB., April 8, 2008, [http://www.chicagotribune.com/news/local/chi-change\\_atheist\\_bd06apr06,0,1260452.story](http://www.chicagotribune.com/news/local/chi-change_atheist_bd06apr06,0,1260452.story). In April 2008, Illinois state representative Monique Davis interrupted testimony by atheist activist Rob Sherman before the House State Government Administration Committee in Springfield by telling him:

"What you have to spew and spread is extremely dangerous . . . it's dangerous for our children to even know that your philosophy exists! "This is the Land of Lincoln where people believe in God[]" . . . "Get out of that seat . . . You have no right to be here! We believe in something. You believe in destroying! You believe in destroying what this state was built upon."

*Id.*

<sup>145</sup> Ron Barnett, *Christian Movement Moving In*, USA TODAY, Feb. 21, 2006, at 3A.

<sup>146</sup> *Ten Commandments Judge Removed From Office*, (Nov. 14, 2003), <http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/>.

<sup>147</sup> See, e.g., S. Res. 483, 110th Cong. (2008) (recognizing the first weekend of May 2008 as Ten Commandments Weekend); H.R. Res. 12, 110th Cong. (2007) (requiring the display of the Ten Commandments in the United States Capitol). See also Diana Henriques, *In the Congressional Hopper: A Long Wish List of Special Benefits and Exemptions*, N.Y. TIMES, Oct. 11, 2006, at A20 (listing pending federal legislation concerning religious freedom); Diana Henriques, *Religion-Based Tax Breaks: Housing to Paychecks to Books*, N.Y. TIMES, Oct. 11, 2006, at A1 (reporting preferential tax treatment for clergy members and their religious employers).

A. *The Ten Commandments*

In 1956, Cecil B. DeMille was searching for a way to promote his Paramount Pictures production, *The Ten Commandments*.<sup>148</sup> The nearly four-hour movie, featuring the parting of the Red Sea in technicolor, was “by far the largest and most expensive” DeMille production.<sup>149</sup> In an “ingenious” public relations campaign, he established a partnership with the Fraternal Order of Eagles (“FOE”), commissioned the construction of several thousand Ten Commandments monuments, and donated them around the country.<sup>150</sup> The FOE was no stranger to this form of donation, making national news in 1952 for donating an “illuminated print” of the Ten Commandments to President Truman (himself an Eagle), who commented that the U.S. “[g]overnment was patterned to some extent on the laws given to Moses on Mount Sinai.”<sup>151</sup> The donations took place during gala events attended by the movie’s stars—Yul Brynner attended the Milwaukee party, and Charlton Heston attended a party in North Dakota.<sup>152</sup> The public displays prompted one *New Yorker*, a stenographer at the New York Life Insurance Company living at home with her mother, to pay for subway car advertisements to publicize the Ten Commandments from her life savings, earning her the International Civic Award from the FOE.<sup>153</sup> When the Order presented Rev. Billy Graham with a civic service award in 1957, he “praised the [O]rder for its program of placing framed copies of the Ten Commandments in schools and public buildings.”<sup>154</sup>

Ironically, while the FOE was interested in using the Ten Commandments to spread morality and virtue, DeMille was more interested in selling sex on the silver screen. He wrote:

“I am sometimes accused[] . . . of gingering up the Bible with large and lavish infusions of sex and violence. I can only wonder if my accusers have ever read certain parts of the Bible. If they have, they must have read them through that stained-glass telescope which

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<sup>148</sup> Frank Rich, *The God Racket, From DeMille to DeLay*, N.Y. TIMES, Mar. 27, 2005, at B1.

<sup>149</sup> Bosley Crowther, *Screen: The Ten Commandments; DeMille’s Production Opens at Criterion*, N.Y. TIMES, Nov. 9, 1956, at 35.

<sup>150</sup> Rich, *supra* note 148.

<sup>151</sup> *Truman Gets Decalogue Print*, N.Y. TIMES, Aug. 19, 1952, at 16.

<sup>152</sup> Rich, *supra* note 148.

<sup>153</sup> *Commandments Ad Honored by Eagles*, N.Y. TIMES, Sept. 1, 1956, at F19.

<sup>154</sup> *Wagner Praises Order of Eagles*, N.Y. TIMES, July 26, 1957, at 17. The Order was not just involved in promoting the Ten Commandments. *Id.* The Order also supported and lobbied for laws such as Social Security benefits, pensions, worker compensation, and age discrimination. *Id.*

centuries of tradition and form have put between us and the men and women of flesh and blood who lived and wrote the Bible."<sup>155</sup>

The movie was still playing in theaters five years after its release and spawned a whole generation of Bible-based Hollywood blockbusters, including *King of Kings*, *Barabbas*, *David and Goliath*, and *Ben Hur*.<sup>156</sup> The Ten Commandments movie would become the fifth highest grossing movie in history, behind *Gone With the Wind*, *Star Wars*, *The Sound of Music*, and *E.T.*<sup>157</sup>

President Truman may have been stretching the truth when he compared U.S. laws to the Ten Commandments. In fact, Americans are not bound by law to follow seven of the Ten Commandments. By its very nature, the Ten Commandments is an aggregation of ideals rather than law. Close examination of the substance of the Ten Commandments reveals that some of those ideals are in direct conflict with modern American values.

The First Commandment, for example, reflects a central tenet of Christianity: to bring "the world[] to adopt a single, uniform system of belief and conduct. For some believers the commitment to spread the 'Word' is intrinsic to their religious practice."<sup>158</sup> One need read no further to see the evident tension between the First Commandment and the First Amendment, which proclaims the right of Americans to do exactly what the Commandment prohibits.

The Ten Commandments have been criticized by some liberal theologians as being grossly unfair. The Second Commandment, for example, commands that future generations shall be held responsible for the sins of an ancestor, a notion that we would find immoral and unfair.<sup>159</sup>

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<sup>155</sup> Bosley Crowther, *The Good Book Is a Great Script*, N.Y. TIMES, Dec. 31, 1961, at SM10.

<sup>156</sup> *Id.*

<sup>157</sup> All Time Box Office Adjusted for Ticket Price Inflation, [http://www.boxofficemojo.com/alltime/adjusted.htm?adjust\\_yr=0&p=.htm](http://www.boxofficemojo.com/alltime/adjusted.htm?adjust_yr=0&p=.htm).

<sup>158</sup> Alexander, *supra* note 32, at 9.

<sup>159</sup> See Dan Bilefsky, *In Feuds, Isolation Engulfs Families*, N.Y. TIMES, July 10, 2008, at A6. The ancient Albanian "Kanun[]" code of blood feud, which states that "'blood must be paid with blood,'" is still alive in some parts of Albania today, resulting in over 1,000 children deprived of schooling because they have been locked indoors for fear of reprisal for their fathers' crimes. *Id.*

*B. The Protestant Ten Commandments Is Inherently Religious*

Examination of various religious texts further reveals the sectarian nature of the Ten Commandments. As commentator Allan Sloan recently wrote:

You may think that the Supreme Court ruled last week that the state of Texas could continue to display a Ten Commandments monolith on its capitol grounds in Austin. But you'd be wrong. Look at the monolith . . . and you'll notice that it doesn't contain 10 commandments. It has 11. And if you count "I am the Lord thy God" as a commandment, which Jews do but Christians don't, the Supreme Court has approved a Twelve Commandments monolith, rather than the traditional Decalogue. . . .

. . . [T]he text is a compromise drawn up by Jewish and Christian clergy to respect everyone's beliefs. So rather than bearing Ten Commandments that are the Word of God, the monolith bears 11 or 12 commandments that are the Word of a Committee.<sup>160</sup>

This is not mere semantics nor is it hairsplitting.<sup>161</sup> The so-called Ten Commandments are a vital part of Judeo-Christian heritage and culture.<sup>162</sup> As Sloan further observed in his commentary, "it's one thing to be in favor of ethics and morality in public life, [but] it's a whole different thing to think—as I suspect most Americans do—that there is one single Decalogue."<sup>163</sup> Sloan may have been too tactful or his editors too careful not to offend. The difference is not subtle: the former is a valid belief or political opinion; but the latter is simple ignorance.

As Sloan also points out, there are two versions of the Ten Commandments contained in the Bible and they are different.<sup>164</sup> The version in Exodus, chapter 20, directs observance of the Sabbath because

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<sup>160</sup> Allan Sloan, *The Commandment Mystery*, NEWSWEEK, Jul 11, 2005, at 58.

<sup>161</sup> *Id.* See also David C. Pollack, Note, *Writing on the Wall of Separation: Understanding the Public Posting of Religious Duties and Sectarian Versions of Sacred Texts as an Establishment Clause Violation in Ten Commandment Cases*, 31 FORDHAM URB. L.J. 1363, 1366–78 (2004) (providing a thorough discussion of the various versions of the Ten Commandments amongst religious groups and remarking that the Fraternal Order of Eagles and Cecil B. DeMille erected as many as 2000 graphite monuments during their campaign containing "at least three distinct versions of the Commandments").

<sup>162</sup> Sloan, *supra* note 160.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (citing Exodus 20:2–14 and Deuteronomy 5:6–18).

after the Lord created the world He rested on the seventh day.<sup>165</sup> In the second version, contained in Deuteronomy, chapter 5, the Lord decrees observance of the Sabbath because he brought the Israelites out of bondage in Egypt.<sup>166</sup>

Moreover, observant Jews did not consistently apply the Commandments in their dealings with Gentiles. One scholar of Jewish theology in the last century of the Second Temple has described this area as very complex and abstruse.<sup>167</sup> There are, at least, three different numbering systems for the Commandments; the Jews have one, the Roman Catholics and Lutherans have a second; and Protestants (generally) have a third.<sup>168</sup> Finally, theologians cannot agree on how these Commandments should be translated; and the differences in the translations are not insignificant.<sup>169</sup> As one author emphasized:

"The division of the commandments themselves is not certain. There are altogether thirteen sentences in the accepted Jewish versions (seventeen in the Christian) but we cannot conclude from the text itself what comprises the first commandment, what the second, and so forth. For while there are thirteen *mitzvot* [commandments] to be found in the text, their allocation to ten commandments can be done in various ways. It is not surprising, therefore, that there are different traditions in this respect."<sup>170</sup>

For example, the Sixth Commandment<sup>171</sup> or the Fifth Commandment (depending on the religious group in question)<sup>172</sup> is translated either "You shall not murder[.]"<sup>173</sup> "Thou shalt not kill[.]"<sup>174</sup> "You shall not kill[.]"<sup>175</sup> or "You shall not murder."<sup>176</sup> Even the religious groups that

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<sup>165</sup> *Exodus* 20:10–11.

<sup>166</sup> *Deuteronomy* 5:12–15.

<sup>167</sup> See E. P. SANDERS, *JUDAISM: PRACTICE AND BELIEF*, 63 B.C.E. – 67 C.E. (1992).

<sup>168</sup> Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1485–94 (2005).

<sup>169</sup> *Id.* at 1493–99.

<sup>170</sup> *Id.* at 1488 (quoting *THE TORAH: A MODERN COMMENTARY* 534 (W. Gunther Plaut, ed., 1981) (1962)).

<sup>171</sup> *Id.* at 1489 (citing the numbering in the Jewish and Protestant versions of the Ten Commandments).

<sup>172</sup> *Id.* at 1490–91 (citing the numbering in the Protestant, Roman Catholic, and Lutheran versions of the Ten Commandments).

<sup>173</sup> *Id.* at 1489 (citing the Jewish version).

<sup>174</sup> *Id.* (citing the Protestant version).

<sup>175</sup> *Id.* at 1490 (citing the Roman Catholic version).

<sup>176</sup> *Id.* at 1491 (citing the Lutheran version).



may agree upon the Commandments numbering (for instance, Lutherans and Roman Catholics call this the Fifth Commandment) differ on whether the correct translation is “not kill” or “not murder.”<sup>177</sup> The meaning of this Commandment, of course, is also subject to manifold interpretations, especially as it relates to wartime killing, execution of prisoners, and abortion.<sup>178</sup>

Any claims that a display of the Ten Commandments is secular or nonsectarian are thus demonstrably false. Even the choice of numbering and translation on any such display is an endorsement of one religion over another. If State Y erects a granite slab with the Hebrew version of the so-called Ten Commandments, that action favors Judaism over Christianity, Buddhism, and atheism or non-religion. If State Y does not pay for the granite slab, it does not alter the result.

The controversy over public displays of the Ten Commandments, then, boils down to this: is the First Amendment violated when a statue of the Protestant version of the Ten Commandments (an inherently religious text central to the belief of several major world religions), commissioned by a partnership of a Hollywood movie studio and a civic organization for the duplicitous purpose of promoting a movie and promoting morality among America’s youth, is displayed to the public in space owned by the government? In 2005, the Supreme Court confronted this question squarely, and handed down a decision that was inconclusive at best, and at worst, all but rolled out a red carpet invitation to the sort of litigation presented in *Sumnum*.

### C. *Twin Ten Commandments Cases of 2005*

Almost twenty-five years after its last decision on the Ten Commandments,<sup>179</sup> the Supreme Court spoke again in the cases of *McCreary County v. ACLU*<sup>180</sup> and *Van Orden v. Perry*,<sup>181</sup> both decisions issued on June 27, 2005, just one month and two days before the

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<sup>177</sup> *Id.*

<sup>178</sup> *See, e.g.*, Historical Abortion Beliefs of the Christian Church, [http://www.religioustolerance.org/abo\\_hist.htm](http://www.religioustolerance.org/abo_hist.htm) (last visited Oct. 17, 2008).

<sup>179</sup> *See Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that a Kentucky law requiring the posting of Ten Commandments in public schools violated the First Amendment). Justices Brennan, White, Marshall, Powell, and Stevens concurred in the order reversing the decision of the Supreme Court of Kentucky. *Id.* Chief Justice Burger and Justice Blackmun dissented and would have granted certiorari in order to give the cases plenary consideration. *Id.* at 43. Justices Stewart and Rehnquist dissented from summary reversal. *Id.* Justice Rehnquist would have upheld the trial court relying on the legislature’s statement of secular purpose was supported by the facts of the case. *Id.*

<sup>180</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

<sup>181</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion).

Sumnum filed suit in Utah. These decisions did nothing to clarify where the line should be drawn regarding the appropriateness of displaying the Ten Commandments. In *McCreary's* 5-4 decision, the Court held that two Kentucky counties had to take down copies of the Ten Commandments posted in courthouses; but in *Van Orden*, another 5-4 decision, the Court held that Texas could leave a 6-foot-high "monolith" inscribed with the Ten Commandments on its Capitol grounds in Austin. The difference? Ostensibly, Texas had a secular purpose, and the two Kentucky counties did not.

In *McCreary*, two Kentucky counties (McCreary and Pulaski) displayed in their respective courthouses large, gold-framed copies of an abridged text of the King James Version of the Ten Commandments, including a citation to the Book of Exodus.<sup>182</sup> The placement in McCreary County was done at the direction of the county legislative body. In Pulaski County, the Commandments were hung in a ceremony presided over by the county Judge-Executive, accompanied by his church's pastor.<sup>183</sup> The Judge-Executive "called them 'good rules to live by'"; and his pastor said they were "'a creed of ethics[.]'"<sup>184</sup>

The following is the version of the commandments posted by both counties:

*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.*  
*Honor thy father and thy mother.*  
*Thou shalt not kill.*  
*Thou shalt not commit adultery.*  
*Thou shalt not steal.*  
*Thou shalt not bear false witness.*  
*Thou shalt not covet.*  
*Exodus 20:3-17.*<sup>185</sup>

When we turn to Exodus 20:3-17, we find a much longer and more involved version of the commandments, starting with "I am the Lord, thy God, which have brought thee out of the land of Egypt, out of the house of bondage." This version seems to have been addressed to the

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<sup>182</sup> *McCreary*, 545 U.S. at 851.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 852.

<sup>185</sup> *Id.* (internal quotation marks omitted) (emphasis added). The Court noted a finding of the District Court that determined the displays in each county were functionally identical. *Id.* at n.2.

Israelites; moreover, it settled the question of the Sabbath by saying it is on the seventh day (not Sunday but Saturday, starting at sundown on Friday evening until sundown on Saturday evening, for people who lived before clocks and standardized time zones). Also, note the choice of the version of the Ten Commandments is from Exodus instead of the somewhat different version found in Deuteronomy.<sup>186</sup>

In November 1999, the ACLU of Kentucky sued the counties seeking an injunction against maintaining the displays because they violated the Establishment Clause of the First Amendment.<sup>187</sup> Before the district court acted, the legislative bodies of both counties authorized an expanded display and resolution with recitations that the Ten Commandments were “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded[.]”<sup>188</sup>

After argument, the district court entered a preliminary injunction on May 5, 2000, directing that the displays be removed “IMMEDIATELY[.]”<sup>189</sup> and enjoining county officials from erecting similar displays.<sup>190</sup> The counties responded by posting a third display consisting of the Commandments and eight other framed documents of equal size.<sup>191</sup> Each document included a statement about its historical and legal significance.<sup>192</sup> The ACLU of Kentucky moved to supplement the preliminary injunction to enjoin the new displays. As requested, the trial court supplemented the original injunction, and a divided panel of the Sixth Circuit affirmed.<sup>193</sup>

In a 5-4 decision the Supreme Court affirmed the grant of the preliminary injunction. In Justice O’Connor’s concurrence, she noted: “Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. The

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<sup>186</sup> See *Deuteronomy* 5:6–21. For discussion of the differences between the Exodus and Deuteronomy versions of the Decalogue, see *supra* text accompanying notes 160–78. For discussion of the different traditions for counting the Commandments, see *supra* text accompanying notes 168–77. Based on the above discussion, the numbering and translation used by McCreary and Pulaski counties seems to have embraced the Protestant rather than the Roman Catholic or Jewish versions. The presence of “Thou” and “thy” suggest that it is a heavily edited, vastly reduced version taken in small pieces from the King James version.

<sup>187</sup> *McCreary*, 545 U.S. at 852.

<sup>188</sup> *Id.* at 853.

<sup>189</sup> *ACLU v. Pulaski County*, 96 F. Supp. 2d 691, 703 (E.D. Ky. 2000).

<sup>190</sup> *McCreary*, 545 U.S. at 855.

<sup>191</sup> *Id.* The other documents were copies of 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. *Id.* at 856.

<sup>192</sup> *Id.* at 857.

<sup>193</sup> *ACLU v. McCreary County*, 354 F.3d 438, 444 (6th Cir. 2003).

purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”<sup>194</sup> She continued, “[While] [i]t is true that many Americans find the Commandments in accord with their personal beliefs. . . . we do not count heads before enforcing the First Amendment.”<sup>195</sup>

In *Van Orden*, the Court held by a 5-4 margin that a 6-foot high monolith inscribed with the Ten Commandments standing on the grounds of the Texas State Capitol in Austin did not violate the Establishment Clause of the First Amendment.<sup>196</sup> Chief Justice Rehnquist wrote for a plurality that included Justices Scalia, Kennedy, and Thomas; Justice Breyer concurred in the judgment by separate opinion; and Justices Stevens, Ginsburg, O’Connor, and Souter dissented and filed three separate dissenting opinions.<sup>197</sup>

In a passage with which we have some difficulty, the late Chief Justice Rehnquist<sup>198</sup> described the Supreme Court case law on the Establishment Clause as “Januslike, point[ing] in two directions[.]”<sup>199</sup> He continued with the observation, “One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.”<sup>200</sup>

In the next passage, the Chief Justice managed to magically morph the neutrality of non-establishment into a principle of not “disabling the government from in some ways recognizing our religious heritage[.]”; he stated it in the *singular*, as if all Americans share one religious heritage:<sup>201</sup>

This case, like all Establishment Clause challenges,  
presents us with the difficulty of respecting both faces.  
Our institutions presuppose a Supreme Being, yet these

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<sup>194</sup> *McCreary*, 545 U.S. at 883–84 (O’Connor, J., concurring).

<sup>195</sup> *Id.* at 884.

<sup>196</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion).

<sup>197</sup> *Id.* at 681.

<sup>198</sup> See Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST, Sept. 4, 2005, at A1 (discussing in detail the events that gave rise to the death of the late Chief Justice). Chief Justice William Rehnquist died on the evening of Saturday, September 3, 2005, during the Senate hearings on President Bush’s nomination of John G. Roberts, Jr. to be an Associate Justice of the Court. *Id.* Mr. Rehnquist had been receiving treatment for thyroid cancer. *Id.*

<sup>199</sup> *Van Orden*, 545 U.S. at 683 (plurality opinion).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 684. That Americans do not share one religious heritage seems patently obvious. See *infra* note 239 and accompanying text.

institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage[.]<sup>202</sup>

For this sweeping re-interpretation of the Establishment Clause of the First Amendment, the Chief Justice cited the little-noted 1952 decision of *Zorach v. Clauson*.<sup>203</sup>

There is substantial support for the position that government cannot be hostile to any one religion or accommodate any one religion. However, the last phrase, "by disabling the government from in some ways recognizing our religious heritage," deserves more analysis. A critical reading of the *Zorach* decision lends no substantial support for the proposition advanced by the Chief Justice that the First Amendment does not prohibit the government from recognizing our religious heritage.<sup>204</sup>

The Chief Justice acknowledged that various places in the nation's Capitol held replicas of Moses with the Ten Commandments including three places in the Supreme Court building and grounds.<sup>205</sup> The Chief also observed that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."<sup>206</sup> He noted that the placement of the monument on the Texas State Capitol Grounds was a fairly passive use of them.<sup>207</sup> He concluded, "We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment."<sup>208</sup>

The most important vote in the *Van Orden v. Perry* decision, however, belonged to Justice Breyer, a Clinton appointee, who was the decisive swing vote and wrote only for himself—reminiscent of Justice

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<sup>202</sup> *Van Orden*, 545 U.S. at 683–84 (plurality opinion).

<sup>203</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>204</sup> *Van Orden*, 545 U.S. at 684 (plurality opinion). The *Zorach* decision, a 6-3 result with Mr. Justice William O. Douglas writing for the majority, held that New York City's decision to release students to attend religious training on school days upon written request of the parents did not violate the Establishment clause. *Zorach*, 343 U.S. at 306.

<sup>205</sup> *Van Orden*, 545 U.S. at 689 (plurality opinion).

<sup>206</sup> *Id.* at 690.

<sup>207</sup> *Id.* at 692.

<sup>208</sup> *Id.*

Powell’s timeless and prescient position in *Bakke v. Regents of University of California* in 1978.<sup>209</sup> Justice Breyer opined that when one decides a case under the First Amendment’s religion clauses one cannot apply a mechanical test but “must refer . . . to the basic purposes of those Clauses.”<sup>210</sup> Those basic purposes, he wrote, are threefold: (1) to “assure the fullest possible scope of religious liberty and tolerance for all[]”; (2) to “avoid that divisiveness based upon religion that promotes social conflict[]”; and (3) to maintain “separation of church and state.”<sup>211</sup>

In *Van Orden*, Justice Breyer saw a “borderline case[]”<sup>212</sup> that would permit “no test-related substitute for the exercise of legal judgment.”<sup>213</sup> After reviewing the physical setting and donative history of the display, Justice Breyer wrote, “For these reasons, I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily ‘advanc[ing]’ or ‘inhibit[ing]’ religion,’ and not creating an ‘excessive government entanglement with religion’—might satisfy this Court’s more formal Establishment Clause tests.”<sup>214</sup>

Next, Justice Breyer portended that a contrary conclusion might light the fires of hostility toward religion and “encourage disputes concerning the removal of longstanding depictions of the Ten Commandments” and similar themes from public buildings.<sup>215</sup> He further acknowledged the danger of a slippery slope but said the case presented “only [a] shadow[]” of the real dangers the First Amendment was designed to prevent.<sup>216</sup> He stated flatly that he disagreed with the plurality’s analysis but that—for reasons all his own—he agreed with the result.<sup>217</sup>

#### D. Where the Individual Justices Stand

The seven *Van Orden* opinions and three *McCreary* opinions reveal profound differences amongst the justices as to the proper role of religion in American public life and as to the proper application of the two religion clauses of the First Amendment. Let us review the spectrum.

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<sup>209</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion).

<sup>210</sup> *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 700.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 703.

<sup>215</sup> *Id.* at 704.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

## 1. Justice Scalia

Justice Scalia is on one extreme of the Court's varied positions on religious freedom. During oral argument in *Van Orden*, he stated that the Ten Commandments are "a symbol of the fact that government comes—derives its authority from God. And that is, it seems to me, an appropriate symbol to be on State grounds."<sup>218</sup> He argued that the Constitution does *not* mandate governmental neutrality between religion and non-religion.<sup>219</sup> Justice Scalia indicated that he would also repeal the third prong of the *Lemon* test.<sup>220</sup> According to the Justice "even an *exclusive* purpose to foster" advancement of religion does not necessarily make a display unconstitutional so long as people are not significantly taxed or forced to observe the posting.<sup>221</sup> In his concurring opinion in *Van Orden*, Justice Scalia posited that a state should be able to favor religion generally, engage in public prayer, or "venerat[e] the Ten Commandments[]" without violating the Establishment Clause.<sup>222</sup> The Justice has criticized the Court's Establishment Clause jurisprudence by accusing his colleagues of relegating religion to "some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room."<sup>223</sup> Though an avowed originalist, Justice Scalia ignores the fact that some of the Framers of the Constitution believed religion to be a purely private affair.<sup>224</sup> Justice Scalia, therefore, would appear to permit any public endorsement of religion as long as it stops short of compelled worship under penalty of law.<sup>225</sup> On the rare occasion that Justice Scalia may concede that government may not favor one particular religion over another, his concurrence in *McCreary* suggests that this generosity only extends toward monotheistic religions,<sup>226</sup> seemingly contradicting the text of the Constitution itself.<sup>227</sup>

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<sup>218</sup> Transcript of Oral Argument at 16, *Van Orden v. Perry*, 545 U.S. 677 (No. 03-1500).

<sup>219</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. at 889 (Scalia, J., dissenting).

<sup>220</sup> *Id.* at 900.

<sup>221</sup> *Id.* at 902.

<sup>222</sup> *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

<sup>223</sup> *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

<sup>224</sup> *See supra* Part II.A (noting Jefferson's belief that religion should be a strictly private and personal matter).

<sup>225</sup> *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

<sup>226</sup> *McCreary*, 545 U.S. at 894 (Scalia, J., dissenting).

<sup>227</sup> For a critique of Justice Scalia's bias towards monotheism, see Michael C. Dorf, *Does the Constitution Permit Government To Favor Religion over Nonreligion? Justice Scalia Says Yes*, <http://writ.news.findlaw.com/dorf/20080604.html> (last visited Oct. 17, 2008).

## 2. Justice Thomas

Justice Thomas's position mirrors that of Justice Scalia's. But Justice Thomas's willingness to overrule 65 years of Establishment Clause jurisprudence by un-incorporating the Establishment Clause as it applies to the states merited mention by Justice Stevens, the ideological antithesis of Thomas and Scalia, as "at least[]" facing the "problem head on."<sup>228</sup>

Justice Thomas believes that, in order "to abandon the inconsistent guideposts"<sup>229</sup> that the Supreme Court has established under the Establishment Clause and "return to the original meaning of the Clause[.]"<sup>230</sup> the Supreme Court should reverse its course by holding that the Establishment Clause is not incorporated against the states through the Fourteenth Amendment.<sup>231</sup> In the alternative, absent this complete reversal, Justice Thomas would restrict the Establishment Clause to its meaning in 1791, i.e., prohibiting state-mandated religious observance or use of taxes in support of ministers of a denomination endorsed by the state.<sup>232</sup> Justice Thomas has not publicly discussed how to correct the inaccuracies that may arise when the Justices fail as historians.<sup>233</sup>

## 3. Chief Justice Rehnquist

Writing for the plurality in *Van Orden*, Chief Justice Rehnquist argued for more tolerance of government sponsored speech in the area of religion primarily because of "the strong role played by religion and religious traditions throughout our Nation's history."<sup>234</sup> The Chief Justice's opinion in *Van Orden* has been reviewed at length above.<sup>235</sup> The most troubling portions of his opinion are his reading of the Establishment Clause as not reaching passive religious speech by government and his finding that the Establishment Clause does not disable the government from "in some [unspecified] ways recognizing our religious heritage."<sup>236</sup>

The concept of a singular religious heritage is fundamentally flawed. A cursory surveillance of any U.S. military cemetery would reveal the

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<sup>228</sup> *Van Orden*, 545 U.S. at 731 n.32 (Stevens, J., dissenting).

<sup>229</sup> *Id.* at 692 (Thomas, J., concurring).

<sup>230</sup> *Id.* at 693.

<sup>231</sup> *Id.* at 694.

<sup>232</sup> *Id.*

<sup>233</sup> See David Savage, *Supreme Court Finds History Is a Matter of Opinions*, L.A. TIMES, July 13, 2008.

<sup>234</sup> *Van Orden*, 545 U.S. at 683 (plurality opinion).

<sup>235</sup> See *supra* Part IV.C (discussing the dimensions of Chief Justice Rehnquist's opinion).

<sup>236</sup> *Van Orden*, 545 U.S. at 684 (plurality opinion).



presence of stone crosses and Stars of David<sup>237</sup>—evidence of, at a *minimum*, two distinct religious heritages. And yet, in what ways has the American government recognized a singular religious heritage? “In God We Trust” was added to American coins at the suggestion of a clergyman during the Union’s darkest days of the Civil War.<sup>238</sup> Later, “Under God” was added to the Pledge of Allegiance<sup>239</sup> in response to national hysteria generated by the “Red Scare” of the McCarthy era.<sup>240</sup> The purpose, of course, had little or nothing to do with a religious heritage<sup>241</sup> and everything to do with “distinguishing” Americans from the “Godless Commies.” Should we now leverage this disgraceful period<sup>242</sup> of our history to justify the infusion of more “God-talk” into constitutionally-protected public discourse simply to please a vocal minority who embraces evangelical Christianity?

#### 4. Justice Kennedy

Justice Kennedy was an active questioner during oral arguments in *Van Orden*. He suggested that requiring a disclaimer with any display of the Ten Commandments stating that the display is secular is “hypocritical” because it “ask[s] religious people to surrender their beliefs and . . . is not [a form of] accommodation.”<sup>243</sup> He voted with Rehnquist, Scalia and Thomas on both cases but did not write an opinion in either. As for the *McCreary* decision, Justice Kennedy disassociated himself from Part I of Justice Scalia’s dissent.<sup>244</sup> Part I of Scalia’s dissent<sup>245</sup> borders on

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<sup>237</sup> See, e.g., Burial and Memorial Benefits: Veterans Benefits & Services, <http://www.cem.va.gov/>.

<sup>238</sup> See *Coin Symbols*, N.Y. TIMES, Nov. 15, 1907, at 8. On Feb. 12, 1873, Congress granted the Secretary of the Treasury the approval to inscribe “In God We Trust” on U.S. coins. See *Coin Symbols*, N.Y. TIMES, Nov. 15, 1907, at 8. *Id.*

<sup>239</sup> See *President Hails Revised Pledge: He Endorses Congress’ Action in Inserting Words ‘Under God’ in Allegiance Vow*, N.Y. TIMES, June 15, 1954, at 31. A joint Congressional resolution passed on June 14, 1954 added the words “under God” to The Pledge of Allegiance. *Id.*

<sup>240</sup> *Oxnam Cites Fight of Church on Reds: Says It Has Done More Than All Congress Committees – Other Bishops Back Him*, N.Y. TIMES, Jul. 20, 1953, at 10. Protestant church bishops spoke out against the godless philosophy of Communists infiltrating America. *Id.*

<sup>241</sup> See, e.g., Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9,6871 (2004) for an excellent analysis of the error in the argument that “In God We Trust” has lost religious meaning. One basic underlying problem with the statement, as Professor Shiffrin so elegantly points out, is that “any English speaker knows that ‘under God’ and ‘In God We Trust’ carry theological meaning.” *Id.* at 69. In short, it is not true and other attempts to sidestep the problem are equally futile.

<sup>242</sup> See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

<sup>243</sup> Transcript of Oral Argument, *supra* note 220, at 11.

<sup>244</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).

<sup>245</sup> *Id.*

preferentialism when he advocates that the First Amendment does not mandate governmental neutrality on religion<sup>246</sup> and argues that historic practices justify “disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”<sup>247</sup> Parts II and III, joined by Justice Kennedy, reject the extension of the scope (as Justice Scalia sees it) of the principle that Government cannot favor religious practices over non-religious practices and argues for a different result based upon the Establishment Clause principles used by the majority.<sup>248</sup> Justice Kennedy’s voting pattern, coupled with his previously authored opinions in this area<sup>249</sup> suggest that he may be the most moderate, or the most undecided, of the block of four Justices permitting governmental speech in the area of religion.

### 5. Justice Breyer

Justice Breyer takes a moderate position in the two Ten Commandments cases. He wrote separately, and provided the pivotal vote to resolve *Van Orden* holding that the Texas display was constitutional; Justice Breyer also provided the fifth vote in *McCreary* concurring with Justice Souter’s majority opinion holding that the Kentucky display was unconstitutional. Justice Breyer expressed exasperation with the conservative direction of the Court following a critical affirmative action decision when he remarked in open court, “‘It is not often in the law that so few have so quickly changed so much,’” an unusual observation not included in his written dissent.<sup>250</sup> Because he did not write his own opinion in *McCreary*, it is not possible to fully detail his views; however, one can surmise that his doctrinal views may not be substantially different than that of Justices O’Connor and Stevens. In fact, he agreed with Justice O’Connor’s statement of principles in *McCreary* but not how she applied them in *Van Orden*.<sup>251</sup> It appears he is in the middle—even if he leans left toward the governmental-neutrality gang of four. Justice Breyer’s concurring opinion in *Van Orden*, detailed above,<sup>252</sup> suggests (maybe in our mildly reductionist manner) that he

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<sup>246</sup> *Id.* at 889.

<sup>247</sup> *Id.* at 893.

<sup>248</sup> *Id.* at 900.

<sup>249</sup> *See, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992). This is a 5–4 decision holding that allowing invocation and benediction prayers at public school graduation exercises violated the First Amendment’s Establishment Clause. *Id.* Justice Kennedy wrote the majority opinion which was joined by Blackmun, Stevens, O’Connor, and Souter. *Id.* at 580–609.

<sup>250</sup> Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 29, 2007, at 8A.

<sup>251</sup> *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

<sup>252</sup> *See supra* Section III.C.

would not disturb passive displays that have been up for decades—thereby emphasizing his desire to avoid divisiveness.

#### 6. Justice Ginsburg

Justice Ginsburg is one of two justices who did not write a single opinion in the Ten Commandments cases (Kennedy being the other one). Justice Ginsburg, a Clinton appointee, was General Counsel to the ACLU from 1973–1980 when she was appointed to the U.S. Court of Appeals for the D.C. Circuit.<sup>253</sup> Because Justice Ginsburg voted with the block of four in favor of governmental neutrality in the area of religious expression, we will (somewhat arbitrarily) place Justice Ginsburg here in the spectrum.

#### 7. Justice Stevens, O'Connor, and Souter

Unless one parses out sentences and weighs subtleties, it appears there is not much difference between these three Justices—Stevens, O'Connor, and Souter—insofar as their responses to the two Ten Commandments cases are concerned. Though not advocates of a *complete* “wall of separation” between church and state (as described by Thomas Jefferson<sup>254</sup>), they are nonetheless opposed to governments’ endorsement of one religion over another through displays or other types of speech.

#### E. *The New Justices: After October 2005 Term*

##### 1. Chief Justice Roberts

When William Rehnquist died on the night of September 3, 2005, the Senate was holding hearings on the nomination of John G. Roberts, Jr. to succeed Sandra Day O'Connor as an Associate Justice of the Supreme Court.<sup>255</sup> On Monday, September 5, 2005, President George W. Bush re-nominated Roberts to succeed William Rehnquist as Chief Justice.<sup>256</sup> Roberts was then a sitting judge on the D.C. Circuit Court of Appeals where he had served since 2001.<sup>257</sup> The author of 49 opinions while on the D.C. Circuit, Mr. Roberts was seen as a “judicial minimalist.”<sup>258</sup> He

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<sup>253</sup> See *Biography of Ruth Bader Ginsburg, Associate Justice of the U.S. Supreme Court*, <http://www4.law.cornell.edu/supct/justices/ginsburg.bio.html>.

<sup>254</sup> See *Letter to Danbury Baptists*, *supra* note 2.

<sup>255</sup> Lane, *supra* note 198.

<sup>256</sup> Jan Crawford Greenburg, *Roberts Gets Nod as Chief*, CHI. TRIB., Sept. 6, 2005, at 1.

<sup>257</sup> JOHN G. ROBERTS, JR., BIOGRAPHY, *supra* note 18.

<sup>258</sup> *Id.*

had clerked for Chief Justice Rehnquist in 1980–1981 after his graduation from Harvard Law, where he had served as Managing Editor of the Harvard Law Review.<sup>259</sup>

Chief Justice Roberts has sterling Republican credentials. After clerking for Chief Justice Rehnquist, Roberts was hired as a special assistant to the U.S. Attorney General (William French Smith), and then as Associate Counsel to the President.<sup>260</sup> He also served two years in the first Bush presidency as Deputy Solicitor General.<sup>261</sup> Evangelical Christian groups greeted his nomination to the Supreme Court with approval.<sup>262</sup>

While serving in the Reagan White House, Roberts was asked to provide an opinion on a request for President Reagan to publicly approve legislative efforts in Kentucky to require placement of "In God We Trust" plaques in public schools.<sup>263</sup> Roberts urged the President to refrain from issuing such an approving message, writing that it was "inappropriate" for the President to interfere with Kentucky's legislative processes and that "the President should not gratuitously opine on the constitutionality" of legislation that implicates the Establishment Clause.<sup>264</sup> Anticipating his position on the *Sumnum* case, it is probably fair to say that he may not be much different than his predecessor, Chief Justice William Rehnquist. He will likely lean toward the conservative side of the Court by voting to uphold the City of Pleasant Grove's right to limit public expression in city parks.

## 2. Justice Alito

Associate Justice Samuel Alito was sworn in as the nation's 110th Supreme Court Justice on Tuesday, January 31, 2006 after being confirmed by a mostly party-line vote of 58 to 42.<sup>265</sup> Justice Alito was a judge on the Third Circuit Court of Appeals when President George W.

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See Americans United for Separation of Church and State, *Supreme Court Nominee John G. Roberts: Why the Religious Right Likes What it Sees*, [http://blog.au.org/2005/07/21/supreme\\_court\\_n/](http://blog.au.org/2005/07/21/supreme_court_n/) (July 21, 2005).

<sup>263</sup> Memo Regarding a Request to Support "In God We Trust" Plaques in Kentucky Schools, [http://www.washingtonpost.com/wp-srv/nation/documents/roberts/roberts\\_kentucky\\_schools.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/roberts/roberts_kentucky_schools.pdf).

<sup>264</sup> *Id.*

<sup>265</sup> CNN, *Alito Sworn In as Nation's 110<sup>th</sup> Supreme Court Justice*, (Feb. 1, 2006), <http://www.cnn.com/2006/POLITICS/01/31/alito/index.html>.

Bush nominated him to the Supreme Court.<sup>266</sup> Justice Alito succeeds retiring Justice Sandra Day O'Connor, the first woman appointed to the Court.<sup>267</sup> Justice Alito was confirmed by the closest vote since Justice Clarence Thomas's confirmation of 52 to 48 in 1991.<sup>268</sup>

In the *Sumnum* case, it is more than likely that Justice Alito will vote with Justices Scalia, Thomas, and Chief Justice Roberts to find in favor of Pleasant Grove. Jay Sekulow, representing Pleasant Grove, called Justice Alito's nomination a "grand slam."<sup>269</sup> Justice Alito's decisions from the Third Circuit on separation of church and state "fall squarely in the conservative camp."<sup>270</sup> In 1999, he wrote an opinion finding that a city-sponsored crèche and menorah did not violate the Establishment Clause.<sup>271</sup> In 2000, he authored a dissent in a case involving a kindergarten student at a public school, who created a poster being thankful for Jesus when students were asked to make posters depicting what they were thankful for.<sup>272</sup> Alito chastised the majority for not addressing the constitutional issues raised by the case, and expounded his conservative views in dicta.<sup>273</sup> He quickly declared that displaying the child's poster does not raise any Establishment Clause problems because "[t]he Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion."<sup>274</sup> He would hold that "discrimination based on the religious content of speech is viewpoint discrimination."<sup>275</sup>

The swing votes in the *Sumnum* case could belong to Justices Kennedy and Ginsburg, the only two Justices who did not write opinions on the so-called Twin Ten Commandments cases. Justice Breyer may be a "wild card"—as he was in *Van Orden*. If Justices Stevens and Souter stand resolute, they will need to strike common ground with Justices Breyer, Ginsburg, and Kennedy if they hope to garner five votes.

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<sup>266</sup> CNN, *Alito Hearings Wrap Up*, (Jan. 13, 2006), <http://www.cnn.com/2006/POLITICS/01/13/alito/>.

<sup>267</sup> *Id.*

<sup>268</sup> *Alito Sworn In*, *supra* note 265.

<sup>269</sup> *All Things Considered: For Alito: The More Religion, the Better*, (NPR radio broadcast Nov. 17, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5017091>.

<sup>270</sup> *Id.*

<sup>271</sup> *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999).

<sup>272</sup> *C.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000).

<sup>273</sup> *Id.* at 209.

<sup>274</sup> *Id.* at 212.

<sup>275</sup> *Id.* at 211.

## V. THE SUMMUM, THE SEVEN APHORISMS, AND THE ROAD TO THE HIGH COURT

In *Van Orden*, Justice Stevens presciently observed that there are many different versions of the Decalogue, "ascribed to by different religions[.]"<sup>276</sup> The Summum, for example, believe that Moses felt the Israelites were not ready to receive the Seven Principles of Creation handed down by God to him, so he destroyed the tablets containing the Seven Aphorisms, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.<sup>277</sup> Therefore, the Seven Aphorisms and the Ten Commandments are "two different points of view on the same subject."<sup>278</sup> One of these "different" points of view, however, has been silenced by Pleasant Grove through its denial of Summum's request to display its Seven Aphorisms next to a Ten Commandments display.

Pleasant Grove is represented by the American Center for Law & Justice ("ACLJ") and its Chief Counsel, Jay Sekulow.<sup>279</sup> "Founded by televangelist Pat Robertson in 1990, the ACLJ has an annual budget of \$35 million and employs about 130 people, including 37 lawyers[.]"<sup>280</sup> Sekulow describes himself as an aggressive litigator, driven by his own faith as a Brooklyn-born Jewish convert to Christianity, and a member of Jews for Jesus.<sup>281</sup> After making his fortune in real estate tax shelters, he signed on as general counsel for Jews for Jesus, and in that role helped to craft the start of a revolution in First Amendment law, arguing that public displays of piety were protected not by the Free Exercise Clause, but by the Free Speech Clause.<sup>282</sup>

In 1987, Sekulow argued that a Los Angeles city resolution banning leafleting by groups, including Jews for Jesus, at the Los Angeles International Airport violated the First Amendment's Free Speech Clause.<sup>283</sup> A unanimous Supreme Court, in an opinion authored by Justice O'Connor, agreed.<sup>284</sup> In 1990, he used the free speech argument again to advocate for the student's rights to hold Bible club meetings after-hours on school premises, and again the Supreme Court agreed.<sup>285</sup>

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<sup>276</sup> *Van Orden v. Perry*, 545 U.S. 677, 717 (2005) (Stevens, J., dissenting).

<sup>277</sup> The Aphorisms of Summum and the Ten Commandments, <http://www.summum.us/philosophy/tencommandments.shtml>.

<sup>278</sup> Respondent's Brief, *supra* note 10, at 21.

<sup>279</sup> Petition for Writ of Certiorari, *supra* note 17.

<sup>280</sup> Lisa Anderson, *Legal Groups Putting God on the Docket*, CHI. TRIB., Sept. 5, 2007, at C1.

<sup>281</sup> *Id.*

<sup>282</sup> JEFFREY TOOBIN, *THE NINE* 91 (2007).

<sup>283</sup> *Id.*

<sup>284</sup> *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

<sup>285</sup> *Westside Cmty. Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990).

He successfully used the same argument in a case involving the use of public school facilities to show Christian films and the use of public university funds to subsidize some student groups but not Christian-based groups.<sup>286</sup> In 2007, he deployed an extension of the Free Speech argument in successfully representing a pharmacist who refused to sell Plan B, an emergency contraceptive the pharmacist considered equivalent to abortion.<sup>287</sup>

*Summum* also comes before the Court on ostensibly free speech grounds. After the Court's decision in *Van Orden*, an Establishment Clause challenge to Pleasant Grove's policy on public displays at Pioneer Park was duly dismissed.<sup>288</sup> With that obstacle removed, the City next turned its defense of its denial to *Summum* by referring to a policy called "Criteria for Placement," under which it would permanently display a privately-donated monument if either the donated item has historical relevance to the community, the donor is an established Pleasant Grove civic organization with strong ties to the community, or has a historical connection with Pleasant Grove City.<sup>289</sup> In spite of the fact that at the time the Fraternal Order of Eagles donated the Ten Commandments statue to the city in 1971 the local chapter had only existed for two years,<sup>290</sup> and in spite of the fact that the Ten Commandments display would not be endorsed by Mormons,<sup>291</sup> the City cites its policy for allowing the Fraternal Order of Eagles's monument to stand while rejecting the *Summum* monument. The arguments in the merit and amici briefs, therefore, center around issues related to government speech, public forums, and whether or not an outcome in favor of *Summum* will result in a Statue of Tyranny being erected next to the Statue of Liberty.<sup>292</sup> Although not briefed by the parties, the Court could also presumably, though it would be a stretch, revive its curious "expressive association" doctrine, first announced in *Dale*, to posit that forcing the City to permit the *Summums* to erect their monument would violate the City's free speech rights.<sup>293</sup> We note simply that a win by

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<sup>286</sup> TOOBIN, *supra* note 282, at 94.

<sup>287</sup> Anderson, *supra* note 280.

<sup>288</sup> *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005) (remanding in light of *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), and *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005)). The lawsuit was eventually dismissed with prejudice. See Brief of Petitioner, at 8 n.4, *Pleasant Grove City v. Summum*, No. 07-665 (June 16, 2008).

<sup>289</sup> Respondent's Brief, *supra* note 10, at 5.

<sup>290</sup> *Id.* at 3.

<sup>291</sup> *Id.* at 24.

<sup>292</sup> See generally Respondent's Brief, *supra* note 10, and Brief of Petitioner, *supra* note 288.

<sup>293</sup> These speech issues are beyond the scope of this Article. For an excellent analysis, see Caroline Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 101 (2008).

Pleasant Grove will mean that any public Ten Commandments display can easily withstand a First Amendment challenge, on either Establishment Clause or Free Speech grounds.

The Sekulow game plan, then, is as follows. For any city in the United States that wishes to display the Christian Ten Commandments in a public space, to the exclusion of all other religious artifacts, the goal is to remove the display from the realm of the Establishment Clause. If *Summum* goes as planned and the Court finds in favor of Pleasant Grove, any city seeking to erect a Ten Commandments display should adopt a content-neutral policy that purports to consider for acceptance any monument, regardless of its message, as long as the speaker of the monument has longstanding ties to the city or community. Under these criteria, the City can readily accept a Ten Commandments display, claiming blithely it is not the message that matters, but the speaker. Since the criteria for selection is content-neutral, a facial Establishment Clause challenge to the display will fail. Once out of the realm of the Establishment Clause, the only avenue of challenge left is the public forum argument advanced by *Summum*. Assuming a favorable outcome in *Summum*, the City needs only claim that the display, once donated to the City (i.e., title of ownership of the display passes to the city), and that the selection of the display itself (again, careful to avoid endorsing the contents itself) is government speech and therefore no equal access rights are granted to other speakers. The end result is a Ten Commandments display, on public grounds, without any consideration of religious motivation. If the strategy succeeds, it can easily be adapted and deployed to inject other religious displays into the public sphere.

The Brief in Opposition contemplates this outcome in a footnote, barely daring to suggest that the City's strategy could be that daring: "It is not the purpose of the First Amendment to ensure that governmental entities remain free to disclaim speech as purely private when it suits their Establishment Clause needs while simultaneously avoiding the rules that generally govern the regulation of private speech."<sup>294</sup> The facts, however, seem to plainly speak for themselves. *Summum*, described by Sekulow as the "most significant" Ten Commandments case in the Supreme Court's history,<sup>295</sup> is the logical next step in a multi-faceted and choreographed attack on Jefferson's Wall of Separation. Even more appealing for the Roberts's Court, with its purported sense of "judicial modesty," the result is achieved without overruling prior

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<sup>294</sup> Respondent's Brief, *supra* note 10, at 32 n.9.

<sup>295</sup> Videotape: Chief Counsel Jay Sekulow at the Supreme Court!, available at American Center for Law & Justice, *In the Courts: Pleasant Grove City v. Summum* (2007), <http://www.aclj.org/Cases/default.aspx?Section=120>.



Establishment Clause precedents. Perhaps most importantly, *McCreary* will be rendered impotent without a direct assault by the Roberts Court.<sup>296</sup> While this may evoke grumbling from Justice Scalia, surely even he would be pleased with such an outcome.

#### VI. ROUSSEAU'S "CIVIL RELIGION" AND CONSTITUTIONAL ALTERNATIVES FOR THE SUMMUM

A leading scholar in sociology cited Jean-Jacques Rousseau as the original source for the concept of a "Civil Religion."<sup>297</sup> In his essay on "The Social Contract," Rousseau argued for a civil religion with only five (5) simple precepts, or dogmas if you prefer:

1. The existence of God;
2. The life-to-come;
3. The reward of virtue;
4. The punishment of vice; and
5. The exclusion of religious intolerance.<sup>298</sup>

Note that the Holy Bible is not on the list, and neither are Moses or Jesus. However, religious intolerance is specifically excluded by Rousseau's civil religion. Also, a number of practices that concerned members of the Court, such as opening prayer for Congress and printing "In God We Trust" on our money, would come clearly within the umbrella of Civic Religion, as proposed by Rousseau.

One reading of an episode in early U.S. history might support the idea that the Founders embraced either a civic religion or the Public Religion of John Adams, the second President.<sup>299</sup> The initial request to open every session of the Continental Congress with prayer was refused until it was re-framed as a request by Sam Adams of Boston for an essentially non-denominational prayer by a man of good character, piety, and virtue.<sup>300</sup> We have yet to make substantial inroads against

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<sup>296</sup> It is worth noting that the City's Petition for Writ of Certiorari does not cite *Van Orden* but does cite *McCreary*. See Petition for Writ of Certiorari, *supra* note 17. The same is true for the Brief of the United States as amicus supporting the City. See Brief amicus curiae of United States, Pleasant Grove City v. Summum, No. 07-665 (June 23, 2008). The brief for the Summum, on the other hand, cites *Van Orden* but not *McCreary*. See generally Respondent's Brief, *supra* note 10.

<sup>297</sup> See Robert N. Bellah, *Civil Religion in America*, DAEDALUS 1-21 (Winter 1967), available at [http://www.robertbellah.com/articles\\_5.htm](http://www.robertbellah.com/articles_5.htm).

<sup>298</sup> *Id.* (citing JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT, Chap. 8, Book 4).

<sup>299</sup> See Jon Meacham, *supra* note 16, at 52-55.

<sup>300</sup> *Id.* at 53.

religious intolerance, particularly the current virulent prejudice against the followers of Islam.<sup>301</sup>

Intolerance aside, one can see from Table 1.0 that Rousseau's proposed "civil religion" seems to fall roughly midway between the "Publick Religion" of John Adams and the wall of separation endorsed by both Thomas Jefferson and the father of the Bill of Rights, James Madison. Civil Religion also has the advantage of more closely paralleling the historical tracks in the relationship between State (U.S. style) and Church.

Finally, we should note that the future demographics of the U.S. seem to point to more, rather than less, diversity. One estimate is that racial and ethnic minorities will make a majority of this country's population by 2042.<sup>302</sup> This is not a good time to embrace John Adams's stance that leans toward a general Protestant Christian "Publick Religion." This was a stance, historically, that dogged both Jefferson and Madison. It may have historically provoked their rather extreme stance of separation. If we were to speculate, Madison and Jefferson might have embraced the extremism of complete separation with an eye toward a distant compromise that might have looked like Rousseau's civil religion.

	Civil Religion (Rousseau)	"Publick Religion" (John Adams)	Wall of Separation (Thomas Jefferson)
1. Prayer at Inaugural & Opening of Congress	YES	YES	NO
2. Mention "God" on coinage	YES	YES	NO
3. "Praise to God" on Washington Monument	YES	YES	NO

<sup>301</sup> See, e.g., Neil MacFarquhar, *Arab-Americans Sue U.S. Over Re-Entry Procedures*, N.Y. TIMES, June 20, 2006, at A12 (describing the events that have spurred the onslaught of lawsuits by Arab-Americans alleging persecution and mistreatment by members of the Department of Homeland Security and the FBI in a "climate of suspicion and fear"); Marjorie Connelly, *There's Still a Chill in New York for Arab-Americans, Poll Says*, N.Y. TIMES, Sept. 14, 2003, at CY5 (showing two-thirds of New Yorkers feel persons of Middle Eastern descent are likely to be unfairly singled out); Jodi Wilgoren, *Going by Joe, not Yussef, but Still Feeling Like an Outcast*, N.Y. TIMES, Sept. 11, 2002, at A15 (discussing how Arab-Americans in Detroit are facing racial discrimination).

<sup>302</sup> Eli Saslow and Robert Barnes, *In a More Diverse America, a Mostly White Convention*, WASH. POST, Sept. 4, 2008, at A1.

(in Latin)			
4. Any preferment of Judeo-Christian tradition	NO	YES	NO
5. Printing Masonic symbols on paper money	NO	YES	NO
6. Leaving "under God" in the Pledge of Allegiance	YES	YES	NO
7. Texas Monolith	NO	YES	NO
8. Kentucky posting of 10 Commandments in Courthouses	NO	YES	NO
9. Putting Bible quotations up in federal buildings	NO	YES	NO
10. Permitting a spirituality festival with all interested religious groups having exhibits at a state university	YES	NO	NO
11. Putting a slogan "I believe," with Christian cross on state license plate	NO	YES	NO
12. Allowing installation of the Summum's Seven Aphorisms in City Park	NO	NO	NO

We believe the better-reasoned position for the Court would be to embrace the civil religion philosophy propounded by Rousseau and elaborated for the American experience by Professors Robert Bellah<sup>303</sup> and Henry Steele Commager.<sup>304</sup> Such a position would reflect American experience and again re-assert the ultimate principle of religious tolerance, namely, that governments cannot prefer one religion to another; neither can governments prefer religion to non-religion.

To endorse the concept of "ten" commandments is to prefer Christianity to Judaism and religious tradition, and to promote "The Decalogue" over rationalism. To argue that Pleasant Grove's display of the Fraternal Order of Eagles' Ten Commandments in Pioneer Park is not

<sup>303</sup> See Bellah, *supra* note 297.

<sup>304</sup> Henry Steele Commager, *Take Care of Me When I am Dead, 3 Free Inquiry* (no. 3, 1983), in *JAMES MADISON ON RELIGIOUS LIBERTY* 331-36 (Robert S. Alley ed., 1985).

government endorsement of religion requires a suspension of common sense. If a vandal spray-paints hate speech on the side of a business building, it is graffiti and vandalism. If the business owner allows a reasonable time to pass without removing the hate speech, he endorses it implicitly and the hate speech becomes his. Similarly, if someone places a yard sign on a neighbor's property without the neighbor's permission, it is trespass to property. If the neighbor permits the sign to remain, the neighbor then surely accepts and endorses the sign as his own. Even if the purpose of erecting a Ten Commandments statue is secular, but the objective result is the promotion of one religion over another by the government, the First Amendment is violated just as surely as if the intent had been otherwise. The secular versus religious purpose is a chimera. It is a red herring to obscure the movement of our government deeply into the area of religious speech and expression where it is prohibited from going.

We conclude that there is no place in American society for a governmental endorsement of the so-called Ten Commandments. They are a minefield of problems under the First Amendment. Moreover, leading scholars agree that ethics are independent of religion.<sup>305</sup> As for Chief Justice Rehnquist's and Justice Scalia's prostrating themselves before the icons of "Religious Tradition" and majority religious sentiments respectively, there is no substantial constitutional or historical support for either. Religious tradition flies in the face of American history and may be an attempt to resurrect John Adams's public piety. It must fail on the second front because, as Professor Witte noted, Adams's public piety (dominated by a strong leaning toward a non-denominational Protestantism) *requires* a frontier as an essential safety valve for non-conformists and free-thinkers. The frontier has disappeared. The safety valve necessary for such public policy no longer exists.

We believe that Justice Breyer's concern about stirring religious fires of discontent by taking down long-standing engravings of the Ten Commandments might be met by "grand fathering" older public piety displays. Such a prospective application of the wall of separation would, in time, be dominant—without any need to sandblast every public square in every county seat. The grandfathering proof could be used as a defense to any Establishment contention, making the *Sumnum* decision prospective only in application.

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<sup>305</sup> See JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 48–62 (4th ed. 2003).

## VII. CONCLUDING OBSERVATIONS

Louis Brandeis once said, “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>306</sup> We can assume that if the *Summum* possess sufficient resources to litigate matters before the Supreme Court that they can also utilize those resources to purchase billboards and land to put up their Seven Aphorisms anywhere besides Pioneer Park. In reality, what they seek in their petition is equal government endorsement of the Seven Aphorisms and the Ten Commandments. This unfortunate case is the logical outcome of government-sanctioned religious expression. The twin 2005 Ten Commandments Supreme Court decisions do not seem to be particularly helpful in getting our country to “come to grips”—so to speak—with the social and political tension between two usually well-intentioned groups, those who want more religion in our public life and those who want less public piety in our public life. In a sense, the decisions have prolonged the debate and have postponed the day of reckoning.

Governmental posting of the Decalogue in public, as we have demonstrated above, displays theological and Biblical ignorance, is chauvinistic, and—ultimately—is divisive. A superior idea would be for the Supreme Court to embrace Rousseau’s limited concept of a Civil Religion. Religion is alive and well in the United States; and it neither requires nor deserves any assistance or hindrance from the government. However, some respect for tradition, as well as some awareness of our current diversity, should support the Court to embrace Rousseau’s limited Civil Religion and to eschew both John Adams’s “Publick Religion” and Mr. Jefferson’s Wall of Separation.

The Court’s answer in *Summum*, if explicit and clear enough, will provide guidance for lower courts as similar issues percolate. In South Carolina, for example, a federal lawsuit has been filed against the state legislature for adding a license plate option with the words “I Believe” along with a Christian cross superimposed over a stained glass window.<sup>307</sup> Under our adoption of a civil religion standard, if South Carolina decides to permit religious groups to exercise their free speech rights on a license plate, then that right must be afforded to all other religious groups on an equal basis. This result would be in line with *stare decisis* and the Court’s longstanding jurisprudence on both free speech and establishment clause jurisprudence. A contrary ruling in *Summum*, however, holding that the government has no obligation to

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<sup>306</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

<sup>307</sup> Sean Hamill, *Group Sues To Keep Cross Off Car Plates*, N.Y. TIMES, June 20, 2008, at A16.

provide an equal voice to other religious organizations once it has adopted one particular voice as its own, would upend those decisions. Such an activist decision would no doubt please religious conservatives, but the fallout of such a decision would be that South Carolina can offer license plates that endorse only one religion over all others. The torturous outcome would mean that under the First Amendment, free speech protects Christians who wish to express their Christianity on license plates to the exclusion of Muslims, Jews, Buddhists, atheists, and yes, even Summums, while the free exercise clause protects no one.

Chief Justice Roberts wrote in a recent opinion on affirmative action that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>308</sup> We observe the same may be said of religious discrimination: The way to stop discrimination on the basis of religion is to stop discriminating on the basis of religion. A ruling in favor of Pleasant Grove in *Summum* may deal a fatal blow to the wall of separation. At the very least, it would blast open a hole through which government may endorse the most startling rise of public displays of religiosity in well over a hundred years. A government that can endorse the Protestant Ten Commandments over all other religious artifacts is a government that can fine its citizens for not observing religious faith (a fine for not celebrating Christmas, perhaps?). We urge otherwise.

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<sup>308</sup> Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007).