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Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU

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Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU

Christopher B. Harwood

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INTRODUCTION

Imagine the following: In 1975, a charitable organization donated a large (twenty-by-twenty-five-inch), framed document containing the text of the Ten Commandments (primarily taken from the King James version of the Bible) to a county in New York State. In addition to the Commandments' generally recognized standards, for example, "Thou shalt not kill," the document also contained its more sectarian dictates, for instance, "Thou shalt have no other Gods before me." Moreover, the document began with the sectarian statement, "I am the Lord thy God." Soon after receiving the document, the county hung it on a wall in a corridor in its courthouse. Directly beneath the document, the county posted a framed, five-by-seven-inch card on which it unambiguously explained that the display was meant to illustrate the historic relationship between the Commandments' standards of social conduct and the law. Nothing other than the Commandments and the explanatory statement was posted on the walls of the corridor in question. In September 2005, a county resident initiated a lawsuit in federal court seeking a declaration that the display violates the Establishment Clause and an injunction requiring its removal. In the thirty years since the display's posting, there have been no other legal challenges to its placement, but every day for one week in 1995, members of a Buddhist organization – who do not adhere to the Ten Commandments – handed out flyers in front of the courthouse protesting the display.

Imagine further that a federal district court found the display constitutional but that, on expedited review, a federal appellate court reversed. Finally, imagine that the Supreme Court agreed to hear the case. How would the Court resolve this hypothetical in the wake of Van Orden v. Perry\(^3\) and McCreary County v. ACLU,\(^4\) the two cases from the 2005 term addressing the constitutionality of public displays of the Ten Commandments? More importantly, how will it resolve actual Establishment Clause challenges in the shadow of Van Orden and McCreary? What method of analysis will the Justices use to decide issues implicating the Establishment Clause? What method should they use? Will the method embraced by a majority of the Justices produce rulings that are consistent with the purposes underlying the Establishment Clause? What impact will the recent appointment of two new Justices – Chief Justice Roberts and Justice Alito – have on the Court's Establishment Clause jurisprudence?\(^5\) Were Van Orden and McCreary rightly decided? This Article will address these and other Establishment Clause questions.

2. The full text of the document is identical to that which is set forth infra in note 41, with the exception that the first sentence reads “I am the Lord thy God,” rather than “I AM the LORD thy God.”


5. Chief Justice Roberts and Justice Alito were appointed to fill the vacancies left by Chief Justice Rehnquist and Justice O'Connor. On September 29, 2005 and January 31, 2006, respectively, Chief Justice Roberts and Justice Alito took their seats.
The First Amendment to the Federal Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion" (the "Establishment Clause"). However, the Amendment does not contain a textual definition of or otherwise explain what constitutes an "establishment." And, the term is by no means self-defining. Of course, by now, it is clear that the Establishment Clause prohibits more than merely the designation of a national or, through the Fourteenth Amendment, a state religion or religious institution, but what is unclear is how much more it prohibits.

Over the years, the Court has struggled when attempting to clarify the scope of the establishment ban. This difficulty is due, in large part, to the fact that the prohibition on establishment is relevant to a number of diverse issues, including the constitutionality of: releasing public school students during the school day for religious instruction; providing for prayer during the school day and at school activities; manipulating the school curricu-

6. U.S. CONST. amend. I. Although the Establishment Clause expressly prohibits only "Congress" from making a "law" "respecting an establishment of religion," it has been broadly interpreted to preclude all government actions "respecting an establishment of religion," id. See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (invalidating a public school policy of including religious invocations in graduation ceremonies).

7. McCreary, 125 S. Ct. at 2742.

8. Id.

9. Id. In Everson v. Board of Education, the Court held that the Due Process Clause of the Fourteenth Amendment renders the Establishment Clause applicable to the states. 330 U.S. 1, 8 (1947).

10. See McCreary, 125 S. Ct. at 2742.

11. The Justices' inability to agree on the scope of the establishment prohibition has been manifested in decisions that appear, at least at first glance, difficult to reconcile. For example, in Estate of Thornton v. Caldor, 472 U.S. 703 (1985), the Court struck down a state statute providing that no person may be required to work on his or her Sabbath on the ground that it favored religion (over irreligion), while in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), the Court upheld an exemption for religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. The Title VII exemption in Amos benefits religion, and religion alone, and thus, appears to run afoul of Caldor. See Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.2.3, at 1161-62 (2d ed. 2002); see also Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (observing that Court decisions concerning the constitutionality of aid to parochial elementary and secondary schools are difficult to reconcile).

12. See Zorach v. Clauson, 343 U.S. 306 (1952) (upholding the release of students during the school day for religious instruction conducted outside the school); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (invalidating a school policy of releasing students during the school day for religious instruction conducted in the school by outside teachers).

13. See Wallace, 472 U.S. at 60-61 (declaring unconstitutional a state statute authorizing public school teachers to hold a moment of silence for meditation and voluntary prayer at the beginning of each school day because the statute's purpose
lum\(^{15}\) and the creation of school districts\(^{16}\) to serve religious purposes; placing religious symbols on government property;\(^{17}\) permitting tax exemptions that benefit religion;\(^{18}\) allowing the use of school facilities for religious worship or discussion;\(^{19}\) opening legislative sessions with a prayer;\(^{20}\) requiring was to promote religion); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (striking down school programs calling for voluntary Bible reading and the use of the “Lord’s Prayer”\(^{21}\) at the start of each school day); Engel v. Vitale, 370 U.S. 421 (1962) (finding unconstitutional a school’s policy of causing a non-denominational prayer to be said by each class at the beginning of each school day).


16. See Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (invalidating a state law that created a separate school district for a small village inhabited by Hasidic Jews so that the village’s children could receive special educational services without having to attend school with children of other faiths).

17. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (plurality opinion) (overturning a state agency’s refusal to allow the Ku Klux Klan to erect a Latin cross in a public park near the state capitol); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (finding that the placement of a crèche on the staircase of a county courthouse violated the Establishment Clause, but that the placement of a menorah next to a decorated evergreen tree and a sign referring to the display as a “Salute to Liberty” in front of the entrance to a government building was constitutional); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a municipal policy under which a city park was decorated with a holiday display that included a nativity scene); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (invalidating a state statute mandating the posting of a copy of the Ten Commandments in each public school classroom in the state).


19. See Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that an elementary school’s refusal to allow a religious group to meet after hours at the school because of the group’s religious nature was unconstitutional viewpoint discrimination in violation of the First Amendment’s Free Speech Clause and that the school’s viewpoint discrimination was not justifiable as a way to avoid violating the Establishment Clause); Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding unconstitutional a school’s refusal of a church’s request to use school facilities for a religious-oriented film series); Widmar v. Vincent, 454 U.S. 263 (1981) (striking down a state university’s practice of precluding student groups from using school facilities for religious worship or discussion).
that businesses be closed on Sunday;\textsuperscript{21} and providing government aid to parochial schools,\textsuperscript{22} parochial school students,\textsuperscript{23} and student religious groups.\textsuperscript{24} Moreover, in addressing these and other issues implicating the establishment ban, the Court has been confronted with and forced to interpret the indeterminate language of the Establishment Clause.\textsuperscript{25} And, it has had to balance an array of “competing values, each constitutionally respectable, but none” providing a clear picture of the intended scope of the establishment prohibition.\textsuperscript{26}

One competing value is that of free exercise. In addition to proscribing the establishment of religion, the First Amendment prohibits government interference with the “free exercise thereof” (the “Free Exercise Clause”).\textsuperscript{27} On occasion, the Establishment Clause and the Free Exercise Clause compete: for example, “spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to

\begin{itemize}
  \item \textsuperscript{20} See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding a state legislature’s practice of opening its sessions with a prayer by a chaplain paid by the state).
  \item \textsuperscript{21} See McGowan v. Maryland, 366 U.S. 420 (1961) (finding that, despite their religious origin, state laws requiring businesses to be closed on Sunday do not contravene the Establishment Clause because of their contemporary secular goals).
  \item \textsuperscript{22} See Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (allowing government to give instructional equipment to parochial and non-parochial schools, so long as the equipment is not used for religious instruction) overruling Wolman v. Walters, 433 U.S. 229 (1977), and Meek v. Pittenger, 421 U.S. 349 (1975); Agostini v. Felton, 521 U.S. 203 (1997) (approving a program sending public school teachers to parochial and non-parochial private schools to provide remedial instruction) overruling Aguilar v. Felton, 473 U.S. 402 (1985).
  \item \textsuperscript{23} See Zelma v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a state program providing tuition and other aid to students attending parochial and non-parochial schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (permitting the government to provide sign interpreters for parochial and non-parochial school students); Mueller v. Allen, 463 U.S. 388 (1983) (declaring constitutional a state law authorizing taxpayers to deduct certain expenses they incurred as a result of their children’s education, regardless of whether their children attended public or private, or sectarian or nonsectarian schools); Sloan v. Lemon, 413 U.S. 825 (1973) (invalidating a state law providing financial assistance exclusively to families of children attending parochial schools); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (same).
  \item \textsuperscript{24} See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (finding unconstitutional a state university’s refusal to give activity funds to a religious student group that published an expressly religious magazine).
  \item \textsuperscript{25} See Walz v. Tax Comm’n, 397 U.S. 664, 668 (1970) (observing that “[t]he Establishment . . . Clause[] . . . [is] not the most precisely drawn portion[] of the Constitution”).
  \item \textsuperscript{26} McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005).
  \item \textsuperscript{27} U.S. CONST. amend. I.
\end{itemize}
exercise their chosen religions.”\textsuperscript{28} When these Clauses compete, the Court must balance Establishment Clause and Free Exercise Clause values against one another. The First Amendment also prohibits government from “abridging the freedom of speech” (the “Free Speech Clause”)\textsuperscript{29} and, in so doing, provides an additional competing value: free speech. Importantly, there are circumstances where a practice that appears to be a reasonable exercise of government authority to avoid contravening the Establishment Clause violates the Free Speech Clause: for instance, refusing to allow a religious group access to a public school’s facilities when those facilities are open to other groups is viewpoint discrimination in violation of the Free Speech Clause.\textsuperscript{30} In addition, there exist in this Nation a myriad of longstanding and revered historical practices that can be viewed as an establishment: for example, concluding the Presidential Oath with the words “so help me God,”\textsuperscript{31} opening Supreme Court sessions with the prayer “God save the United States and this Honorable Court,”\textsuperscript{32} and beginning legislative sessions with a prayer.\textsuperscript{33} These historical practices provide yet another competing value. Thus, in answering a question that implicates the Establishment Clause, the Court may have, and has had, to take into account not only the values associated with that Clause, but also, \textit{inter alia}, those associated with the Free Exercise Clause, the Free Speech Clause, and the existence of time-honored, historical traditions.

Given the Establishment Clause’s indeterminate language, the number of diverse issues in which it is implicated, and the existence of the abovementioned competing values, it is not at all surprising that the Court has had difficulty clarifying the scope of the establishment ban. It also is not surprising that the Court has been unable to formulate a single standard through which to evaluate all Establishment Clause challenges. Indeed, it would be impractical to expect the Court to fashion an elegant, bright-line rule to apply to every Establishment Clause challenge. But, in resolving such challenges, the Court still must provide direction to future Courts, lower courts, and policymakers. Therefore, in the absence of a bright-line rule, the Court must clearly embrace

\textsuperscript{28} \textit{McCreary}, 125 S. Ct. at 2742. Moreover, total government subsidy of religious institutions almost certainly would violate the Establishment Clause, but the refusal on the part of government to provide any public services (including police, fire, and sanitation services) to religious institutions likely would violate the Free Exercise Clause. See Chemerinsky, \textit{supra} note 11, § 12.2.6, at 1182.

\textsuperscript{29} U.S. CONST. amend. I.

\textsuperscript{30} See \textit{supra} note 19.

\textsuperscript{31} It was none other than George Washington who added these words to the Presidential Oath. Robert F. Blomquist, \textit{The Presidential Oath, The American National Interest and a Call for Prerogitude}, 73 UMKC L. REV. 1, 34 (2004).

\textsuperscript{32} See Marsh v. Chambers, 463 U.S. 783, 786 (1983). The Court has opened its sessions with this prayer for approximately 200 years. See \textit{McCreary}, 125 S. Ct. at 2748 (Scalia, J., dissenting).

\textsuperscript{33} \textit{Marsh}, 463 U.S. at 787-88 (observing that the “First Congress . . . adopted the policy of selecting a chaplain to open each session with a prayer”).
and consistently and honestly employ as an interpretive guide in all Establishment Clause cases a principle (or "method of analysis" or "approach") that remains faithful to the Establishment Clause's core values. Unfortunately, there has been much disagreement among the Justices about what that principle should be. As of last term, there were two principles favored by a bitterly divided Court. One group of Justices advocated neutrality as the guiding principle. They maintained that in deciding issues implicating the Establishment Clause, the Court should adhere to the general rule that "government may not favor one religion over another, or religion over irreligion." The other Justices favored accommodation as the guiding approach. They insisted that government policies that recognize, accommodate, and even honor the central role that religion plays in society are consistent with historical traditions, national expectations, and most importantly, the Establishment Clause. As one might expect, the principle used by a majority of the Justices usually determines the result in a given case because application of the same principle commonly leads to the same result and different principles to different results.

The most recent skirmish between the supporters of these two Establishment Clause principles occurred last term in connection with the cases addressing the constitutionality of public displays of the Ten Commandments: Van Orden v. Perry and McCreary County v. ACLU. The opinions from these two cases are the Establishment Clause debate in microcosm. They set forth the competing principles; reveal their supporters (and opponents); describe the justifications given for their use; and illustrate their outcome determinative nature (that is, the opinions show that the principle used by a majority of the Justices usually dictates the result in a case because advocates of one principle generally resolve Establishment Clause challenges similarly and differently from advocates of the other approach). In demonstrating the principles' outcome determinative nature, the opinions provide a clear indication of their importance and of the need for the clear embrace and consistent and honest application of a single guiding approach. In addition, the opinions reveal that, in the past, the Court has not consistently been faithful to any one guiding principle. And, they show that there always exists the

34. McCreary, 125 S. Ct. at 2742. See infra Part II.A for a more complete description of the neutrality principle.

35. See infra Part II.A for a more complete account of the accommodation approach.

36. The above should not be read to imply that, as of last term, the Justices all favored the same formulation of either the neutrality principle or the accommodation approach. They did not. There exist – and the Justices have embraced - variants of each principle. See infra note 146. However, the Justices who favor the neutrality principle all agree on and adhere to the same foundational tenets. The same holds true with respect to the supporters of the accommodation approach. See infra Part II.A.

37. 125 S. Ct. 2854 (2005) (plurality opinion).

38. 125 S. Ct. at 2722.
possibility of disagreements among Justices who adhere to the same basic principle when it comes to discrete questions of establishment.

Part I of this Article provides an account of the Van Orden and McCreary opinions (and, in so doing, lays the foundation for the remainder of the Article). Part II describes the predominant Establishment Clause principles – neutrality and accommodation. Then, using the Van Orden and McCreary opinions, it identifies the supporters and opponents of each principle (as of last term) and, thus, shows which principle enjoyed majority support; sets forth the justifications given by the Justices for their positions; and illustrates the principles’ outcome determinative nature. Part II concludes by considering whether the death of Chief Justice Rehnquist and the retirement of Justice O’Connor will have a significant impact on the Court’s approach to Establishment Clause issues. In other words, it examines whether the appointment of Chief Justice Roberts and Justice Alito will result in the embrace of a new guiding principle by a majority of the Court. Part III demonstrates that, heretofore, the Court has not consistently applied any one principle; concludes (based on the results in, among other cases, Van Orden and McCreary) that neutrality is more faithful than accommodation to the purposes underlying the Establishment Clause (and, thus, to the Framers’ intent); and argues for the consistent and honest application of the neutrality principle. Part IV begins by using Van Orden (specifically, the dissenting opinions and Justice Breyer’s concurring opinion therein) to show that, on occasion, followers of the same principle – in Van Orden, the neutrality principle – resolve Establishment Clause challenges differently. However, Part IV then demonstrates (through an analysis of the aforementioned opinions) that faithful adherence to the tenets of the neutrality principle and the purposes underlying the Establishment Clause should circumscribe such occurrences with respect to followers of that approach. Part IV concludes by proposing a new approach for addressing Establishment Clause challenges that is consistent with the neutrality principle. The Article itself then concludes by resolving the hypothetical posed at the outset and offering some parting remarks.

I. 2005 Ten Commandments Cases: Van Orden and McCreary

Last term, the Supreme Court opined on the constitutionality of public displays of the Ten Commandments. In Van Orden, it upheld the placement of a monolith inscribed with the text of the Ten Commandments on the grounds of the Texas state capitol,\(^{39}\) while in McCreary, it struck down Kentucky courthouse displays containing the text of the Ten Commandments.\(^{40}\) This Part provides an account of the factual circumstances of the two cases and of the opinions the Court issued in connection therewith. It turns first to Van Orden.

---

39. *Van Orden*, 125 S. Ct. at 2858 (plurality opinion).
The monument at issue in Van Orden—a six-foot high and three-and-a-half-foot wide monolith containing the text of the Ten Commandments (mostly taken from the King James version of the Bible)\(^\text{41}\) is located on the grounds of the Texas state capitol in Austin, which span twenty-two acres.\(^\text{42}\) In addition to the Ten Commandments monument, there are sixteen other monuments and twenty-one historical markers, all dedicated to the “people, ideals, and events that compose Texan identity,” dispersed throughout the capitol grounds.\(^\text{43}\)

In 2001, Thomas Van Orden, a resident of Austin, challenged the placement of the Ten Commandments monument.\(^\text{44}\) He sought a declaration that the monument contravenes the Establishment Clause and an injunction requiring its removal.\(^\text{45}\) Van Orden initiated his challenge six years after he first began to encounter the monument on a regular basis, and forty years after its erection.\(^\text{46}\) Further, Van Orden was the first person to initiate a legal challenge.

41. The text inscribed on the monument reads:
I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make to thyself 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, that thy days may be long upon the land which the Lord thy God giveth thee. Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbor. Thou shalt not covet thy neighbor’s house. Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.

Van Orden, 125 S. Ct. at 2873-74 (Stevens, J., dissenting). Also inscribed on the monument are

[a]n eagle grasping the American flag, an eye inside of a pyramid, [] two small tablets with what appears to be an ancient script[,] . . . two Stars of David[,] . . . the superimposed Greek letters Chi and Rho, which represent Christ[,] . . . [and] the inscription “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.”

Id. at 2858 (plurality opinion).

42. Id.
43. Id. The other monuments commemorate:

Id. at 2858 n.1.
44. Id. at 2858.
45. Id.
46. Id.
challenge to the monument. A federal district court and, then, a federal court of appeals upheld the constitutionality of the monument,\(^\text{47}\) and the Supreme Court affirmed.\(^\text{48}\) However, the Court affirmed without a majority opinion.

Chief Justice Rehnquist, speaking for the Plurality, which also included Justices Kennedy, Scalia, and Thomas,\(^\text{49}\) observed that the Court’s Establishment Clause precedent points in two directions: “one [respecting] the strong role played by religion and religious traditions throughout our Nation’s history,” and the other honoring “the principle that governmental intervention in religious matters can itself endanger religious freedom.”\(^\text{50}\) “Reconciling these two [directions],” Chief Justice Rehnquist cautioned, “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.”\(^\text{51}\) Importantly, Chief Justice Rehnquist emphasized that the Establishment Clause does not forbid “any and all governmental preference for religion over irreligion.”\(^\text{52}\)

The Plurality’s finding as to the monument’s constitutionality was based on “both . . . the [‘passive’ (or nonproselytizing)] nature of the monument and . . . [on the Commandments’ secular and religious significance to] our Nation’s history.”\(^\text{53}\) The Plurality characterized the monument as a legitimate government acknowledgment of the role of religion in American life, much like, for example: George Washington’s Thanksgiving Day Proclamation of 1789, in which he implored the citizenry to give thanks to “that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be”,\(^\text{54}\) the Court-sanctioned practices of opening legislative sessions with a prayer by a chaplain paid by the state\(^\text{55}\) and prohibiting the sale of merchandise on Sunday (the latter being a practice that originated from one of the Ten Commandments),\(^\text{56}\) and the representation of Moses holding two tablets containing portions of the text of the Ten Commandments written in Hebrew on the frieze in the courtroom within the Supreme Court building.

\(^{47}\) Id. at 2859; see also Van Orden v. Perry, No. A-01-CA-833-H, 2002 WL 32737462, at *4-6 (W.D. Tex. Oct. 2, 2002), aff’d 351 F.3d 173 (5th Cir. 2003); Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), aff’d 125 S. Ct. 2854 (2005).

\(^{48}\) Van Orden, 125 S. Ct. at 2864 (plurality opinion).

\(^{49}\) Id. at 2858.

\(^{50}\) Id. at 2859.

\(^{51}\) Id.

\(^{52}\) Id. at 2860 n.3.

\(^{53}\) Id. at 2861.

\(^{54}\) Id. (quoting A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 64 (James D. Richardson ed., 1899)).

\(^{55}\) Id. at 2862; see Marsh v. Chambers, 463 U.S. 783, 792 (1983).

\(^{56}\) Van Orden, 125 S. Ct. at 2862-63 (plurality opinion); see McGowan v. Maryland, 366 U.S. 420, 431-40 (1961).
Thus, the Plurality recognized the "religious significance" of the Ten Commandments and, therefore, of the monument, but the Justices who comprised the Plurality did not view the monument's religious nature as problematic because "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Moreover, in upholding the monument as a "passive" (or nonproselytizing) expression of the Commandments' secular and religious importance, the Plurality found it significant that Van Orden had encountered the monument for a number of years before challenging its constitutionality; that the Ten Commandments have both religious and secular significance; and that this monument is but one of a number of monuments on the grounds of the Texas state capitol "representing the several strands in [Texas's] political and legal history," thus indicating that "[t]he inclusion of the Ten Commandments monument in this group [in fact] has a dual significance, partaking of both religion and government."

Notably, the Plurality limited the holding of Stone v. Graham, a case decided in 1980 in which the Court struck down a Kentucky statute that mandated the posting of the Ten Commandments in every public school classroom, and the only previous Court case addressing the constitutionality of a Ten Commandments display, to its facts. In addition, the Plurality opted not

57. The Plurality listed other examples of similar representations reflecting the prominent role of religion in and around the Nation's Capital. For instance, "a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897...[,] and a] medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives." Van Orden, 125 S. Ct. at 2862 (plurality opinion). However, each of the representations cited can be distinguished from the monument in question. For example: Moses is one of many lawgivers depicted in close proximity on the frieze in the courtroom within the Supreme Court building; the statues of Moses and the Apostle Paul in the Library of Congress are but two of sixteen statues set in close proximity representing "men illustrious in the various forms of thought and activity" (the other fourteen statues include, inter alios, Beethoven and Shakespeare); and the medallion in the National Archives does not contain the text of the Ten Commandments and is one of a set of four discs that "symbolize the various types of Government records that were to come into the National Archive" (the four discs represent "war and defense, history, justice, and legislation"). Id. at 2894 & n.4 (Souter, J., dissenting) (citations omitted).

58. Id. at 2863 (plurality opinion).
59. Id.
60. Id. at 2864; cf. id. at 2864 n.11 (stating that the Court "need not decide in this case the extent to which a primarily religious purpose would affect [its] analysis because it is clear from the record that there is no evidence of such a purpose in this case").
62. Van Orden, 125 S. Ct. at 2863-64 (plurality opinion) (Stone "stands as an example of the fact that we have been particularly vigilant in monitoring compliance
to apply the *Lemon* test – the test that, over the last thirty-five years, the Court has most frequently invoked when ruling on Establishment Clause challenges.\(^63\) Refusing to opine on “the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence,” the Plurality stated that the test is of no use when “dealing with the sort of passive monument” at issue in this case.\(^64\)

Justice Scalia filed a short concurring opinion in which he criticized the Court’s disjointed Establishment Clause jurisprudence\(^65\) and emphasized that “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”\(^66\)

Justice Thomas also filed a concurrence in which he argued that a “fundamental rethinking of our Establishment Clause jurisprudence [is] in order.”\(^67\) He maintained that the Establishment Clause should never have been applied to the states,\(^68\) and that “[e]ven if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions,” the Court should “return[] to the original meaning of the [Establishment Clause]” and strike down only government action that “involve[s] actual legal coercion.”\(^69\) Because “Texas [does not] compel [the] petitioner . . . to [express his

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63. *Id.* at 2861. The *Lemon* test was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and was designed to ensure that government neither favors nor disfavors religion. *See generally id.* The test requires that a reviewing court determine whether the challenged government action has a religious purpose; has a primary effect that either advances or inhibits religion; or results in excessive government entanglement with religion. *Id.* at 612-13. If the challenged action has any of these characteristics, then it violates the Establishment Clause. *See id.* *In Agostini v. Felton*, the Court folded the entanglement inquiry into the primary effect inquiry. 521 U.S. 203, 232-33 (1997).

64. *Van Orden*, 125 S. Ct. at 2861 (plurality opinion).

65. *Id.* at 2864 (Scalia, J., concurring) (noting that the Plurality opinion “reflects . . . the Establishment Clause jurisprudence [the Court] . . . appl[i]es some of the time”).

66. *Id.*

67. *Id.* at 2868 (Thomas, J., concurring).

68. *Id.* at 2865 (“[T]he Clause’s text and history resist incorporation against the States . . . [, and i]f the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.”) (alteration omitted) (citation omitted) (quotation marks omitted); *see generally Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (asserting that the Establishment Clause should not constrain the states); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-80 & n.3 (2002) (Thomas, J., concurring) (same).

69. *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring) (citation omitted) (quotation marks omitted); *see Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion
support for the Commandments, adhere to the Commandments' dictates, or for that matter,] do anything," there can be no Establishment Clause violation, according to Justice Thomas.  

In addition, Justice Thomas criticized the Court's Establishment Clause jurisprudence, labeling it "incoherent[t,...] impenetrable and incapable of consistent application." He complained that the "Court's precedent permits even the slightest public recognition of religion to constitute an establishment"; often trivializes religious words and symbols by declaring that they contain little religious significance in order to avoid finding government action unconstitutional; is so flexible and unintelligible that it can be used to justify any desired result; and due to its "unintelligibility," "raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on... the personal preferences of judges."  

Justice Breyer, who concurred only in the judgment, wrote separately and stressed that while the Establishment Clause forbids government to engage in or compel religious practices, favor one religion over others or religion over irreligion, or deter any religious belief, it "does not compel the government to purge from the public sphere all that in any way partakes of the religious." Justice Breyer acknowledged that, as a general matter, government must remain neutral towards religion, but he argued that the tests that the Court has used to measure neutrality (for example, the Lemon test and the endorsement test) should not be applied in every case both because: (1) it can be difficult to determine, and these tests may not always accurately determine, whether government action is indeed neutral; and (2) "untutored devotion to the concept of neutrality" (and these tests) can lead to results that appear to -- or in fact -- evidence "passive, or even active, hostility to the religious." Such hostility, according to Justice Breyer, is not only inconsistent with our national traditions but also tends to lead to the kind of social conflict

was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." (emphasis in original)).

70. Van Orden, 125 S. Ct. at 2865 (Thomas, J., concurring).
71. Id. at 2866; see also id. at 2867 (observing that "[t]he inconsistency between the decisions the Court reaches today in this case and in McCreary... only compounds the confusion" (citation omitted)).
72. Id. at 2866.
73. Id. at 2866-67.
74. Id. at 2867.
75. Id.
76. Id. at 2868 (Breyer, J., concurring in the judgment).
77. See supra note 63 for an account of the Lemon test; see infra note 151 for an account of the endorsement test.
78. Van Orden, 125 S. Ct. at 2868-69 (Breyer, J., concurring in the judgment) (quotation marks omitted). The erection of a religious symbol may send a message of endorsement to nonbelievers, but the forced removal of a religious symbol may send the opposite message (not merely a neutral message) to believers.
the Establishment Clause seeks to avoid. Justice Breyer also asserted that none of the neutrality tests can

readily explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.

Consequently, at least with respect to “difficult borderline cases,” such as the one in question, Justice Breyer insisted that courts must eschew the use of formal tests and, instead, “exercise . . . legal judgment.” This legal judgment “must reflect and remain faithful to the underlying purposes of the [religion] Clauses, and it must take account of [the] context and consequences [of each case] measured in light of those purposes.” As to their purposes, the religion clauses primarily seek to “assure the fullest possible scope of religious liberty and tolerance for all . . . [and] avoid that divisiveness based upon religion that promotes social conflict.”

Justice Breyer voted to uphold the monument in question because: (1) “[t]he circumstances surrounding [its] placement on the capitol grounds and its physical setting suggest that the State intended it to convey a predominantly secular message, that is, a moral message concerning proper standards of social conduct; and (2) the fact that it stood unchallenged – legally speaking – for forty years indicates that it did in fact convey a primarily secular message and that it is “unlikely to prove divisive.” Moreover, Justice Breyer

79. See id. at 2868.
80. Id. at 2869 (citation omitted).
81. Id.
82. Id.
83. Id. at 2868 (citation omitted) (quotation marks omitted). See infra Part II.A and note 150 for a review of the predominant purposes underlying the Establishment Clause.
84. “The group that donated the monument, . . . while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment).
85. See supra notes 41-43 and accompanying text.
86. Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment).
87. See id.
88. Id. at 2870-71. Justice Breyer’s reliance on the monument’s forty-year history should worry those who have recently erected religious symbols or who hope to erect such symbols in the future. The erection of religious symbols nowadays is a divisive issue that inflames passions on all sides of the religion debate. Thus, Justice Breyer is not likely to vote in favor of a more modern display. See id. at 2871 (“[A] more con-

https://scholarship.law.missouri.edu/mlr/vol71/iss2/2
observed that a finding that this monument contravenes the Establishment Clause could send a message of hostility towards religion and, thus, "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." 89

Dissenting, Justice Stevens, who was joined by Justice Ginsburg, argued that the message conveyed by the monument – that is, "[t]his State endorses the divine code of the ‘Judeo-Christian’ God" – violates the Establishment Clause's command that government remain neutral in the face of religion. 90 Justice Stevens rejected the Plurality's "wholehearted validation of an official state endorsement of the message that there is one, and only one, God" as irreconcilable with "[t]his Nation's resolute commitment to neutrality with respect to religion." 91 In addition, Justice Stevens disagreed with any notion that this display, which ignores the beliefs of, inter alios, polytheists and nonbelievers, is not divisive. 92 What is more, Justice Stevens found the placement of the Ten Commandments, an obviously religious text, not merely on government property but on the grounds of the Texas state capitol – the seat of Texas government – particularly offensive to and at odds with the neutrality principle. 93

Justice Stevens also insisted that the Plurality's reliance on some of the Founders' and founding institutions' early religious statements, proclamations, and acts is problematic because, for example, other Founders criticized those statements as inconsistent with the prohibition on establishment 94 and there were "substantial debates that took place regarding the constitutionality of [those] early proclamations and acts." 95 Further, Justice Stevens commented that citation to the Founders' views on the Establishment Clause is fraught with difficulty because many of them viewed the Establishment Clause as nothing more than a narrow prohibition on government preference for one sect of Christianity over the others; that is, they regarded America as

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89. Id. at 2871.
90. Id. at 2874 (Stevens, J., dissenting).
91. Id. at 2877. Justice Stevens identified several reasons why the monument violates the neutrality principle. He observed that the monument's version of the Decalogue is one of many versions and that "[i]n choosing to display this version . . . , Texas tells the observer that the State supports this side of the doctrinal religious debate." Id. at 2880. What is more, he noted that even if the version of the Commandments inscribed on the monument were the only version, the display still would violate the Establishment Clause because it would endorse one God (the Judeo-Christian God) over others and religion over nonreligion. Id. at 2880-81.
92. See id. at 2881-82 & n.19.
93. See id. at 2882.
94. See id. at 2883-84.
95. Id. at 2884; see also id. at 2888 (concluding that "the historical record . . . is too indeterminate to serve as an interpretive North Star").
a Christian nation and did not read the Establishment Clause as permitting government to favor, for instance, all monotheistic religions over polytheistic ones or religion generally over irreligion.96

Justice Stevens concluded by arguing that, in giving meaning to the Establishment Clause, it is necessary that the Court keep "one eye towards our Nation’s history and the other fixed on its democratic aspirations."97 He maintained that the Court should be bound not by what the Framers believed – or rather, by what some of them believed – but instead, by the broader principles "they enshrined in our Constitution."98 And, he insisted that, with regard to the Establishment Clause, that principle should be neutrality.99

Justice Souter also wrote a dissent, which was joined by Justices Stevens and Ginsburg.100 In Justice Souter’s view, the monument, with its obviously religious text emphasized and enhanced,101 could not be squared with the principle of neutrality, which, he maintained, should be the general rule applied in all Establishment Clause cases.102 Justice Souter argued that the monument’s emphasis of the Commandments’ religious nature set it apart from “any number of perfectly constitutional depictions of [the Decalogue],” including the representation on the frieze in the courtroom within the Supreme Court building.103 According to Justice Souter, the constitutionality of the monument was further undermined by its location on the grounds of the Texas state capitol104 and by the fact that an individual walking those grounds, which contain seventeen monuments “with no common appearance,

96. Id. at 2885-87; but see McCreary County v. ACLU, 125 S. Ct. 2722, 2750-53 & n.3 (2005) (Scalia, J., dissenting) (according preferred constitutional status to all monotheistic religions and to religion generally). Moreover, to defer to the views of the Founders, Justice Stevens observed, would “leave us with an unincorporated constitutional provision . . . , one that limits only the federal establishment of ‘a national religion.’” Van Orden, 125 S. Ct. at 2887 (Stevens, J., dissenting) (emphasis in original).

97. Id. at 2889.
98. Id. at 2890.
99. Id. at 2889-90.
100. Id. at 2892 (Souter, J., dissenting).
101. Id. at 2893 (“To ensure that the religious nature of the monument is clear to even the most casual passerby, the word ‘Lord’ appears in all capital letters (as does the word ‘am’), so that the most eye-catching segment of the quotation is the declaration ‘I AM the LORD thy God.’ . . . To drive the religious point home, . . . the [monument’s text] is framed by religious symbols . . . .”).
102. Id. at 2892.
103. Id. at 2893-94 (“Since Moses enjoys no especial prominence on the frieze, viewers can readily take him to be there as a lawgiver in the company of other lawgivers; and the viewers may just as naturally see the tablets of the Commandments (showing the later ones, forbidding things like killing and theft, but without the divine preface) as background from which the concept of law emerged, ultimately having a secular influence in the history of the Nation.”).
104. See id. at 2897.
history, or esthetic role" dispersed over twenty-two acres, would not likely
discern a nonreligious purpose to it.\textsuperscript{105} Moreover, Justice Souter saw no rea-
son to limit the holding of \textit{Stone} to the classroom setting, particularly given that
"the \textit{Stone} Court failed to discuss the educational setting, as other opin-
ions had done when school was significant."\textsuperscript{106} As a final matter, Justice
Souter found misplaced any reliance on the fact that the monument had stood
on the capitol grounds for forty years before facing legal challenge.\textsuperscript{107}

Justice O'Connor dissented for the "reasons given by Justice Souter, . . .
as well as the reasons given in [her] concurrence in \textit{McCreary}."\textsuperscript{108}

Having set forth the facts underlying, and summarized the opinions is-
sued in connection with, \textit{Van Orden}, this Part now shifts its focus to
\textit{McCreary}.

\textbf{B. McCreary}

\textit{McCreary} addressed the constitutionality of public displays containing
the text of the Ten Commandments erected at the same time in two state
courthouses.\textsuperscript{109} In 1999, two Kentucky counties put up in their courthouses
"large, . . . framed copies of an abridged text of the King James version of the
Ten Commandments."\textsuperscript{110} After the displays were challenged in a federal dis-
trict court as violating the Establishment Clause, but before the court had
ruled on the challenge, the counties' legislative bodies called for the removal
of the displays and the erection of "a more extensive exhibit meant to show
that the Commandments are Kentucky's 'precedent legal code.'"\textsuperscript{111} The legis-
latures said they were acting, among other reasons, out of respect for the
Founders' expectation that elected officials would "publicly acknowledge
God as the source of America's strength and direction."\textsuperscript{112} In addition to the
large, framed copies of the Ten Commandments from the first displays, the
second displays included "eight other documents in smaller frames, each ei-
either having a religious theme or excerpted to highlight a religious ele-

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 2895.
\item \textsuperscript{106} \textit{Id.} at 2896.
\item \textsuperscript{107} \textit{Id.} at 2897 (noting that "[s]uing a State over religion puts nothing in a plain-
tiff's pocket and can take a great deal out").
\item \textsuperscript{108} \textit{Id.} at 2891 (O'Connor, J., dissenting).
\item \textsuperscript{109} \textit{McCreary County v. ACLU}, 125 S. Ct. 2722, 2728 (2005).
\item \textsuperscript{110} \textit{Id.} In both counties, the text read:
\begin{quote}
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.
\end{quote}
\item \textsuperscript{111} \textit{Id.} at 2727.
\item \textsuperscript{112} \textit{Id.} at 2729 (quotation marks omitted).
\end{itemize}
Following the erection of the second displays, the district court entered a preliminary injunction ordering the removal of the displays and prohibiting the future placement of similar displays. Acting without express legislative authorization, the counties subsequently installed new displays, each entitled, “The Foundations of American Law and Government Display,” consisting of nine framed documents of equal size: the Ten Commandments, "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." Beneath each document was a statement about its “historical and legal significance.” On request, the district court supplemented the previous injunction to include the third displays and a divided court of appeals panel affirmed. The Supreme Court also affirmed and issued a majority opinion in which it found that none of the abovementioned displays passed constitutional muster.

Justice Souter, speaking for the majority, which also included Justices Stevens, O’Connor, Ginsburg, and Breyer, invoked the Lemon test – a test, as mentioned supra, designed to ensure that government remains neutral towards religion and found that none of the displays satisfied its secular purpose prong. This is because, in erecting the displays, the counties did

113. id. The following were the eight documents:
the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

Id. at 2729-30 (alteration in original).
115. McCreary, 125 S. Ct. at 2730-31.
116. The Ten Commandments were quoted at greater length than before. Compare id. at 2728, with id. at 2730-31.
117. id. at 2730-31.
118. Id. at 2731. The statement beneath the Ten Commandments read: “The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.” Id.
120. See McCreary, 125 S. Ct. at 2732.
121. See supra note 63 for an account of the Lemon test.
122. McCreary, 125 S. Ct. at 2738-41.
not have a genuine, nonreligious purpose, and they certainly did not have one that a reasonable and informed observer would perceive. The majority stated that the evolution of a display should be considered when determining its purpose, but it also acknowledged that “past actions [do not] forever taint any effort . . . to deal with the [Ten Commandments].” The majority concluded by expressing its support for neutrality as an interpretive guide and criticizing the dissent’s opposing position.

Concurring, Justice O’Connor emphasized the importance of government refraining from weighing in on religion. She observed that maintaining a division between government and religion is necessary because it “safeguard[s] the freedom of conscience and belief” and, thereby, avoids the “violent consequences [that accompany] the assumption of religious authority by

123. See id. at 2737 (stating that the Lemon test asks whether a reasonable and informed observer would see a religious purpose behind government action); see also Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring) (asserting that a challenged practice or display should be evaluated from the viewpoint of an objectively reasonable individual who is aware of the relevant history and circumstances surrounding the practice or display).

124. See McCready, 125 S. Ct. at 2738-41. The majority found that the first displays, which consisted of framed copies of the text of the Ten Commandments standing alone in public view, had an unmistakably religious purpose. Id. at 2738-39; cf. id. at 2738 (“Displaying th[e] text is . . . different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith.”). According to the majority, the second displays likewise had an obvious religious purpose, as evidenced by their “unstinting focus . . . on religious passages” and the legislative resolutions calling for their erection. Id. at 2739. And, in finding an unconstitutional religious purpose behind the third displays, the majority noted that a reasonable observer would likely view them as no more than a means “to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality,” given that, inter alia, (1) the legislative resolutions authorizing the second displays were never repealed and no new resolutions were enacted; (2) the third displays “quoted more of the purely religious language of the Commandments than the first two displays had done”; and (3) the third displays, which were said to contain documents “foundational” to American government, contained lyrics to a patriotic anthem but not the original Constitution of 1787 or the text of the Fourteenth Amendment, “the most significant structural provision adopted since the . . . Framing.” Id. at 2740-41.

125. See id. at 2736-37 (refusing to adopt a standard that looks to “an absent-minded objective observer [rather than] one presumed to be familiar with the history of the government’s actions”). Of course, “[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage.” Id. at 2737 n.14.

126. Id. at 2741.

127. See id. at 2742-45.

128. Id. at 2746 (O’Connor, J., concurring).
government."129 Thus, she agreed with the majority that "[t]he purpose behind the counties' display[s] is relevant because it conveys an unmistakable message of endorsement to the reasonable observer," and such a message is an unacceptable threat to freedom of conscience and social accord.130

Justice Scalia wrote a dissenting opinion, which was joined in full by Chief Justice Rehnquist and Justice Thomas and in part by Justice Kennedy.131 After providing examples of the Founders’ invocations of religion—for instance, Washington adding the concluding words “so help me God” to the Presidential Oath—and noting that “[i]nvocation of the Almighty by . . . public figures, at all levels of government, remains commonplace,”132 Justice Scalia questioned how the majority could "assert that the First Amendment mandates governmental neutrality between religion and nonreligion and that manifesting a purpose to favor adherence to religion generally is unconstitutional."

Justice Scalia argued that “[n]othing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century.”134 Moreover, Justice Scalia denounced not only the view that government “cannot favor religion over irreligion” but also the absolute belief that government cannot favor one religion over another.135

Justice Scalia then specifically criticized the Lemon test, observing that it has been “discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”136 He noted that, despite the neutrality principle, the Court has upheld, among other things, a law that permits students to be dismissed early from public school to take religious classes,137 a law that exempts church property from property

129. Id.
130. Id. at 2747.
131. Id. at 2748 (Scalia, J., dissenting).
132. Id. at 2748-50. Justice Scalia also observed that our coinage and national Pledge make reference to “God.” Id. at 2750.
133. Id. (alteration omitted) (citations omitted) (quotation marks omitted).
134. Id.
135. Id. at 2752 (The principle that “government cannot favor one religion over another . . . is indeed . . . valid . . . where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator.” (citations omitted)).
136. Id. at 2751. Moreover, Justice Scalia complained that in this case, the majority applied a modified Lemon test to reach its desired result. First, Justice Scalia observed, the Court’s inquiry into government purpose “focus[ed] not on the actual purpose of government action, but [on] the purpose apparent [to an objective observer].” Id. at 2757 (emphasis omitted) (quotation marks omitted). And second, “the Court replace[d] Lemon’s requirement that the government have a secular purpose . . . with the heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion.” Id. (citation omitted) (quotation marks omitted).
taxes, a statutory exemption for religious organizations from otherwise applicable prohibitions of religious discrimination, and a state legislature’s practice of paying a chaplain to lead a prayer at the beginning of its sessions.

In addition, Justice Scalia responded to Justice Stevens’ denunciation — in Van Orden — of reliance on the historical record to discredit the neutrality principle and justify the accommodation approach. And, finally, Justice Scalia maintained that the courthouse displays at issue passed constitutional muster even under Lemon test principles.

II. LEADING ESTABLISHMENT CLAUSE PRINCIPLES, THEIR ADHERENTS (AS OF LAST TERM), THE JUSTIFICATIONS GIVEN FOR THEIR USE, THEIR OUTCOME DETERMINATIVE NATURE, AND THEIR FUTURE ROLE IN THE COURT’S JURISPRUDENCE

There are a number of competing principles that have been used by Supreme Court Justices as interpretive guides when addressing Establishment Clause questions. In recent years, the two most popular have been neutrality and accommodation. Indeed, last term, all nine Justices used one of these two principles when considering the constitutionality of the displays at issue in Van Orden and McCreary; five employed the neutrality approach and four the accommodation approach. Significantly, as mentioned supra, and as this Part will show (through an examination of the Van Orden and McCreary

141. See McCreary, 125 S. Ct. at 2753-57 (Scalia, J., dissenting).
142. See id. at 2763-64 ("The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third."); see also id. at 2759 ("Even an isolated display of the Decalogue conveys, at worst, an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." (quotation marks omitted))
143. See generally CHEMERINSKY, supra note 11, § 12.2.1, at 1149 (describing neutrality, accommodation, and strict separation as the "three major competing approaches to the establishment clause").
144. See Van Orden v. Perry, 125 S. Ct. 2854 (2005) (plurality opinion); McCreary, 125 S. Ct. at 2722. This is not to say that the Justices who adhered to the neutrality principle all applied the same formulation of that principle or that the Justices who adhered to the accommodation approach all applied the same formulation of that approach. See infra note 146. Nevertheless, the Justices who applied the neutrality principle did agree on and adhere to the same foundational tenets of that principle. And, the same can be said as to the Justices who applied the accommodation approach. See infra Part II.B.
opinions), the principle used by a majority of the Justices usually determines the outcome of a given case because advocates of the same principle commonly resolve Establishment Clause questions similarly and differently from advocates of the other principle. For example, in McCreary, the Justices who comprised the majority all adhered to the neutrality approach and voted to strike down the Ten Commandments displays there at issue, while the dissenters all followed the accommodation principle and voted in favor of the displays.145

This Part first describes the neutrality and accommodation principles. It then identifies the supporters and opponents of each principle (as of last term), thus showing which principle enjoyed majority support; sets forth the justifications given for each principle’s application; and demonstrates the principles’ outcome determinative nature. Finally, it addresses whether the appointment of Chief Justice Roberts and Justice Alito – to fill the vacancies left by Chief Justice Rehnquist and Justice O’Connor – will lead to the embrace of a new majority approach.

A. Leading Principles: Neutrality and Accommodation146

Generally speaking, the neutrality principle calls for government to remain nonaligned with respect to religion – that is, government must not favor one religion over another, religion over secularism, or secularism over religion.147 Neutrality does not require total noninvolvement on the part of gov-

145. See McCreary, 125 S. Ct. at 2727-45, 2748-64. But compare Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (adhering to a variant of the neutrality principle and voting in favor of the constitutionality of the monument there in question), with id. at 2892 (Souter, J., dissenting) (invoking the neutrality principle and voting against the monument). See infra Part IV.B for a critique of Justice Breyer’s position in Van Orden.

146. It is important to recognize at the outset that there exist variants of each principle. See, e.g., infra note 155 (revealing that followers of the accommodation principle agree that government may not coerce religious participation but disagree over the types of activities that are coercive). Thus, this sub-Part sets forth only the foundational aspects of each principle. In addition, one must remember that these are not the only Establishment Clause principles; they are merely the ones that are presently favored. Indeed, in the not too distant past, the principle of strict separation (which calls for the separation of government from religion to the greatest extent possible) was a leading Establishment Clause approach. See Ira C. Lupu, The Lingering Death of Separationism, 62 GEO. WASH. L. REV. 230, 233 (1994) (arguing that from 1947 to 1980, strict separation was the predominant Establishment Clause approach).

147. The principle has been stated to require that

Government . . . be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not . . . foster[1] or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government[1] neutrality between religion and religion, and between religion and nonreligion . . . .
ernment with respect to religion; rather, it demands only that government not advance or inhibit religion. Supporters of this principle assert that it serves the primary purposes of the establishment prohibition. That is, it fosters individual right to conscience in the religious sphere and avoids the divisiveness that results when government involves itself in matters of religion.

Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); see County of Allegheny v. ACLU, 492 U.S. 573, 605 (1984); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 216 (1963); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947); Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961); see also Douglas Laycock, Formal, Substantive and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001 (1990) ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.").

148. A complete separation between government and religion would violate, inter alia, the Free Exercise Clause. See supra note 28.

149. There is a significant difference between government recognizing (and even in some ways aiding) religion and government communicating a preference for religion (or irreligion), with only the latter being forbidden. Thus, for example, government may provide instructional materials of a secular nature to parochial and non-parochial schools, see Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion), and sign interpreters for parochial and non-parochial school students, see Zobrest v. Cat- lina Foothills Sch. Dist., 509 U.S. 1 (1993), but may not provide similar aid exclusively to parochial schools or parochial school students, see Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (striking down a tax exemption available only to religious organizations).

150. Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment); see McCreary, 125 S. Ct. at 2742 (The Establishment Clause was enacted "not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate."); Zelman v. Simmons-Harris, 536 U.S. 639, 711-15 (2002) (Souter, J., dissenting) (listing as objectives underlying the establishment ban the maintenance of "freedom of conscience" and the avoidance of "social conflict"); id. at 718 (Breyer, J., dissenting) (same); County of Allegheny, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("The freedom to worship as one pleases without government interference or oppression is the great object of [the Establishment Clause]."); Marsh v. Chambers, 463 U.S. 783, 803-806 (1983) (Brennan, J., dissenting) (identifying the preservation of individual "right to conscience" and the avoidance of divisive "political battles" as primary purposes of the Establishment Clause); Walz v. Tax Comm' n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) (observing that the Establishment Clause seeks to "prevent[] that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point"); McCollum v. Bd. of Educ., 333 U.S. 203, 217, 228 (1948) (Frankfurter, J., concurring) (describing government actions that "sharpen[] the consciousness of religious differences" as the "precise[] . . . consequence[] against which the [Establishment Clause] was directed"); Everson, 330 U.S. at 26-27 (Jackson, J., dissenting) (stating that the Establishment Clause "was intended . . . above all[] to keep bitter religious controversy out of public life"); see also Mitchell, 530 U.S. at 837 (Souter, J., dissent-
The Court has articulated a number of tests meant to exemplify the neutrality principle, including the Lemon test and the endorsement test.151 Followers of the accommodation approach, on the other hand, emphasize the importance of religion in society and argue that government policies of accommodation, acknowledgment, and support for religion are consistent with the Establishment Clause.152 They contend that the neutrality principle is


152. See County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part) (“Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society.”); see also Tex. Monthly, Inc., 489 U.S. at 38-39 (Scalia, J., dissenting) (adhering to the accommodation principle); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” (citation omitted) (quotation marks omitted)); see generally Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 14 (defending the accommodation approach).
unjustifiably hostile toward religion, as it “require[s] government . . . to acknowledge only the secular, to the exclusion and so to the detriment of the religious.” 153 According to those who adhere to the accommodation principle, the Establishment Clause is violated only when government establishes a national religion or religious institution, 154 coerces religious participation, 155 or as a general matter, favors one religion over another. 156 Supporters of this approach believe that government need not remain neutral between religion and nonreligion 157 and that, at least with respect to public acknowledgment of a single Creator, government may favor monotheistic religions over all others. 158

B. Identifying the Principles’ Supporters (as of Last Term), the Justifications Given for Their Use, and Their Outcome Determinative Effect

Having reviewed the predominant principles, this sub-Part now uses the opinions in Van Orden and McCready to reveal the principles’ supporters (as of last term), the justifications given for their use, and their outcome determinative effect. It first considers Van Orden.

1. Van Orden

The Justices comprising the Plurality in Van Orden – Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas – clearly subscribe (or, in the case of Chief Justice Rehnquist, subscribed) to the accommodation principle. Indeed, in their opinion, they embraced the following language

153. County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part). However, advocates of the neutrality principle insist that “[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.” Id. at 610. See generally Mark Tushnet, The Emerging Principle of Accommodation of Religion, 76 GEO. L.J. 1691 (1988) (criticizing the accommodation approach).

154. See, e.g., Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting).

155. See, e.g., Lee, 505 U.S. at 642 (Scalia, J., dissenting) (“[T]he Establishment Clause guarantees that government may not coerce anyone to support or participate in religion or its exercise.” (quotation marks omitted)). But, followers of the accommodation principle have disagreed over the form that the coercion must take. Compare id. at 592 (majority opinion) (invalidating a school’s practice of having a member of the clergy say a prayer during graduation ceremonies because of “subtle coercive pressure” inherent in the practice), with id. at 642 (Scalia, J., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . . .”).

156. See, e.g., Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting).

157. See, e.g., id.

158. See McCready County v. ACLU, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting) (“[T]he principle that government cannot favor one religion over another . . . applies in a . . . limited sense to public acknowledgment of the Creator.” (citations omitted)).
from Zorach v. Clauson, a case from 1952 in which the Court upheld a public school’s practice of releasing students during the school day for religious instruction conducted outside the school: “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” As if to eliminate any lingering doubt as to their favored approach, the Justices of the Plurality explicitly stated, in their opinion, that they do not subscribe to the view that the Establishment Clause “bars any and all governmental preference for religion over irreligion.” These Justices justified their adherence to the accommodation principle by citing examples of the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789,” including the language of the Thanksgiving Day Proclamation issued by George Washington in 1789 in which he recommended that the citizenry give thanks to God and the longstanding practice of opening legislative sessions with a prayer.

In view of the above, it logically follows, and should have come as no surprise, that these advocates of the accommodation principle voted in favor of the constitutionality of the Ten Commandments monument at issue in Van Orden and that they justified their votes by relying heavily on the Ten Commandments’ secular and religious significance to “our Nation’s history.” Indeed, it would have been surprising had these Justices not voted in the monument’s favor. After all, in erecting the monument, Texas did not establish an official religion, coerce religious participation as these Justices define coercion, or, in these Justices’ view, impermissibly favor one religion over another.

159. 343 U.S. 306 (1952).
161. Id. at 2860 n.3.
162. Id. at 2861 (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984)).
163. Id.
164. Id. at 2862.
165. Id. at 2861, 2864.
166. Chief Justice Rehnquist defined, and Justices Scalia and Thomas define, coercion as including only “acts backed by threat of penalty.” Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); see id. at 640 (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”) (emphasis in original)); see also Cutter v. Wilkinson, 125 S. Ct. 2113, 2126-27 (2005) (Thomas, J., concurring) (same). And, Texas certainly did not threaten to punish those who refused to declare their allegiance to the teachings of the Decalogue (or, for that matter, to religion generally). In Lee, Justice Kennedy identified the existence of, and voted to invalidate a public school’s practice of including prayers in graduation ceremonies.
Two members of the Plurality – Justices Scalia and Thomas – wrote separately to emphasize, *inter alia*, that religion should not only be accommodated but also revered, and that the Establishment Clause prohibits government action honoring religion only when government acts in a coercive manner, with coercion encompassing only those government acts backed by force of law and threat of penalty. The monument clearly was not coercive, at least as these two Justices define the term, and thus, their conclusion that its presence does not contravene the Establishment Clause should never have been in doubt. Given the version of the accommodation principle that these two Justices favor, with its narrow definition of coercion, there are few religious practices they would not uphold, and the erection of this monument certainly is not one of them.

The four dissenting Justices – Justices Stevens, O’Connor, Ginsburg, and Souter – adhere to the principle of neutrality. Justice Stevens, in his dissent, which was joined by Justice Ginsburg, identified neutrality as “[t]he principle that guides [his] analysis.” Similarly, Justice Souter, in a dissent joined by Justices Stevens and Ginsburg and mentioned approvingly by Jus-

167. To be sure, an argument can be made that government-sponsored erection of the Decalogue conveys the message that the state favors monotheistic religions over all others. However, these Justices do not necessarily view government acknowledgment of a specific religious symbol or text as an establishment, even if the symbol or text is revered by only some religions. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting) (asserting that acknowledgment of a single Creator through the erection of a religious symbol is consistent with the ban on establishment); County of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (arguing that the placement of a crèche in a county courthouse was constitutional).

168. *See* Van Orden, 125 S. Ct. at 2864 (Scalia, J., concurring).

169. *See id.; id.* at 2865 (Thomas, J., concurring); *see also supra* note 155 (comparing Justice Kennedy’s definition of coercion with that of Chief Justice Rehnquist and Justices Scalia and Thomas).

170. *See, e.g.,* Van Orden, 125 S. Ct. at 2865 (Thomas, J., concurring) (“In no sense does Texas compel petitioner . . . to do anything. . . . The mere presence of the monument along [petitioner’s] path involves no coercion and thus does not violate the Establishment Clause.”).

171. *Id.* at 2890 (Stevens, J., dissenting); *see also id.* at 2875 (“[T]he Establishment Clause demands religious neutrality . . . .”); *id.* at 2877 (“This Nation’s resolute commitment to neutrality with respect to religion is flatly inconsistent with the [plurality opinion].”).
tice O’Connor, stated that “the Establishment Clause requires neutrality as a general rule.”172 These Justices defend their adherence to the neutrality approach by arguing that: despite the accommodation supporters’ insistence to the contrary, the historical record does not definitively support either accommodation or neutrality;173 the Establishment Clause, like much of the Constitution, contains indeterminate language meant to reflect general ideals rather than the Founders’ specific views;174 the ideals underlying the Establishment Clause include the central tenet that “government must remain neutral between valid systems of belief”175 in order to avoid social divisiveness and ensure individual freedom of conscience;176 and, in light of “the diversity of religious and secular beliefs held . . . by all Americans,”177 government’s ability to influence the marketplace of ideas,178 and the conflict that inevitably results when government involves itself in matters of religion,179 neutrality is more faithful to the purposes underlying the Establishment Clause than accommodation.

The dissenters’ embrace of the neutrality principle and view that the monument conveys an unmistakably religious message explains – and all but required – their votes against its constitutionality. After all, as Justice Souter stated, “[a] governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that [it will not reasonably be interpreted as endorsing a religious message].”180 And, as the dissenters found, this monument, which was placed at the seat of Texas government, and which contains obviously religious text and symbols (emphasized and enhanced), represents an unambiguous endorsement of the divine code of the Judeo-Christian God and, thus, impermissibly communicates a government preference of certain faiths over others and of religion over

172. Id. at 2892 (Souter, J., dissenting); see id. at 2891 (O’Connor, J., dissenting).
173. See id. at 2882-88 (Stevens, J., dissenting); see also McCreary County v. ACLU, 125 S. Ct. 2722, 2743-44 (2005) (“[T]he [accommodationists’] argument . . . is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed.”).
174. Van Orden, 125 S. Ct. at 2888 (Stevens, J., dissenting); see also McCreary, 125 S. Ct. at 2744 (The Founders deliberately “[f]or the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure . . . .”).
175. Van Orden, 125 S. Ct. at 2890 (Stevens, J., dissenting).
176. See id. at 2875; McCreary, 125 S. Ct. at 2742.
177. Van Orden, 125 S. Ct. at 2881 (Stevens, J., dissenting).
178. See McCreary, 125 S. Ct. at 2747 (O’Connor, J., concurring) (“In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs.”).
179. See id. (“Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs.”).
180. Van Orden, 125 S. Ct. at 2892 (Souter, J., dissenting).
irreligion. Specifically, the monument communicates a preference for Judaism and Christianity (monotheistic faiths) over, for example, Hinduism (a polytheistic faith) and Buddhism (a nontheistic faith).  

Justice Breyer, the swing vote in Van Orden, also subscribes to the neutrality principle, albeit a distinctive variant thereof. In his concurrence, he embraced the view that "government must neither engage in nor compel religious practices, that it must effect no favoritism among sects or between religion and nonreligion, and that it must work deterrence of no religious belief." However, his conception of neutrality is affected by his sensitivity to the fine line that exists between neutrality towards religion and passive (or even active) hostility towards the same, as well as his desire to avoid social conflict and protect individual conscience in the religious sphere. Consequently, at least when it comes to difficult, "borderline" cases – he labeled Van Orden such a case – he is loath to embrace any single test "designed to measure 'neutrality'" and prefers instead to rely on "the exercise of legal judgment." This legal judgment, according to Justice Breyer, must focus on the unique circumstances of each case and on whether the religious action at issue impedes the realization of the Establishment Clause's underlying goals, paying particular attention to whether the action is divisive. It was this

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181. See id. at 2880-81 (Stevens, J., dissenting).

182. See id. (The monument "run[s] afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, . . . [and communicating] a preference for religion over irreligion."); id. at 2893 (Souter, J., dissenting) ("It would . . . be difficult to miss the point that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it, with both code and conception of God being rightly understood as the inheritances specifically of Jews and Christians.").

183. Id. at 2868 (Breyer, J., concurring in the judgment) (citations omitted) (quotation marks omitted).

184. See id. at 2868-69 ("[T]utored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.") (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

185. Id. at 2868 (asserting that blind adherence to the neutrality principle could lead to "the kind of social conflict the Establishment Clause seeks to avoid"); see Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) (noting that the establishment ban was meant to protect this Nation from "the religious strife that had long plagued the nations of Europe").

186. Van Orden, 125 S. Ct. at 2868-69 (Breyer, J., concurring in the judgment).

187. Id. at 2869; see also Stephen Breyer, Active Liberty 122 (2005) ("[T]he need to avoid a 'divisiveness based upon religion that promotes social conflict' . . . helped me determine whether the Establishment Clause forbade [the] public displays of the tablets of the Ten Commandments [at issue in Van Orden and McCreary] . . . [G]iven the religious beliefs of most Americans, an absolutist approach that would
conception of neutrality that led Justice Breyer to vote in favor of the constitutionality of the Texas monument: "The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State intended the . . . nonreligious aspects of the [Ten Commandments’] message to predominate. And the monument’s 40-year history on the Texas state grounds indicates that that has been its effect and, thus, that it "is unlikely to prove divisive." In fact, as mentioned supra, Justice Breyer found it significant that a holding against the monument "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . [and] thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

Given Justice Breyer’s conception of neutrality, his vote in this case – assuming, for the moment, that the case does in fact constitute a "borderline" case and that the monument is not divisive and does not infringe on individual conscience – can be explained and his position in future "borderline" cases can be predicted: If the challenge is to a practice or display touching on religion that does not have an obviously religious purpose and has had a long and relatively controversy-free history (like the monument in Van Orden), he likely will vote in favor of the practice or display, as it probably will not have been viewed as a government endorsement and, thus, in all likelihood, will not prove divisive or endanger individual conscience. If, however, the challenge is to a newly instituted practice or a recently erected display touching upon religion, he likely will vote against the practice or display, as it probably will have sparked significant controversy.

 purge all religious references from the public sphere could well promote the very kind of social conflict that the Establishment Clause seeks to avoid. . . . [T]he Establishment Clause cannot automatically forbid every public display of the Ten Commandments, despite the religious nature of its text. Rather one must examine the context of the particular display to see whether, in that context, the tablets convey the kind of government-endorsed religious message that the Establishment Clause forbids." (emphasis in original)).

188. See supra note 84; see also supra Part I.A.
189. See supra notes 41-43 and accompanying text; see also supra Part I.A.
190. Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment).
191. Id. at 2871.
192. Id.
193. In Part IV.B, infra, this Article will consider whether Van Orden fairly can be characterized as a "borderline" case and whether Justice Breyer’s adherence to the foundational tenets of the neutrality principle should have led him to reach a different result in Van Orden, a result more in line with that reached by the dissenters.
194. See supra note 88.
Turning now to *McCreary*, the five Justices in the majority are the dissenters from *Van Orden* – Justices Stevens, O’Connor, Ginsburg, and Souter – plus Justice Breyer. Just as they did in *Van Orden*, these Justices adhered to the neutrality principle, stating that “[t]he touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”\(^\text{195}\) And, once again, they justified their application of the neutrality principle by pointing out that it is consistent with the leading aims of the Establishment Clause because it “protect[s] the integrity of individual conscience in religious matters [and] guard[s] against the civic divisiveness that follows when the Government weighs in on one side of religious debate.”\(^\text{196}\)

As soon as these Justices found that the courthouse displays had “the ostensible and predominant purpose of advancing religion,”\(^\text{197}\) their allegiance to the neutrality approach demanded that they vote to strike them down.\(^\text{198}\) This is because when the government acts to advance religion, it identifies nonbelievers as outsiders, encroaches upon religious liberty, and fosters divisiveness.\(^\text{199}\)

The four Justices who subscribed to the accommodation principle in *Van Orden* – Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas – dissented in *McCreary*. As one would expect, the dissenters labeled as “false”

\(^{195}\) McCreary County v. ACLU, 125 S. Ct. 2722, 2733 (2005); see also id. at 2742 (“The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947) . . . .”); id. at 2746 (O’Connor, J., concurring) (“Government may not coerce a person into worshiping against her will, nor prohibit her from worshiping according to it. It may not prefer one religion over another or promote religion over nonbelief. It may not entangle itself with religion. And government may not, by endorsing religion or a religious practice, make adherence to religion relevant to a person’s standing in the political community.” (citations omitted) (quotation marks omitted)).

\(^{196}\) Id. at 2742 (citation omitted). The majority also discussed the additional justifications mentioned *supra* in Part II.B.1.

\(^{197}\) *McCreary*, 125 S. Ct. at 2733.

\(^{198}\) Justice Breyer voted in favor of the constitutionality of the monument at issue in *Van Orden* because he felt that the circumstances of that case (the monument’s donation by a group more concerned with the Commandments’ role in shaping civic morality than its religious aspects, as well as the monument’s physical setting) suggested that the state’s purpose in erecting the monument was to emphasize the nonreligious aspects of the Commandments’ message and that the monument’s history indicated that the nonreligious aspects of the Commandments’ message had in fact predominated. *See Van Orden*, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment). Once it was clear that the counties in *McCreary* erected the displays with the purpose to advance religion, it was easy (for Justice Breyer) to distinguish this case from *Van Orden*.

\(^{199}\) (190) *See McCreary*, 125 S. Ct. at 2746-47 (O’Connor, J., concurring).
the majority's "assertion that the government cannot [act with the intent to]
favor religious practice." To justify their position, the dissenters pointed to
historical and contemporary examples of the Nation's leaders invoking reli-
gion. And, the dissenters argued that acknowledgment of religion is consist-
ent with the expectations of the vast majority of the Nation's citizens. As
was the case in Van Orden, these Justices' adherence to the accommodation
principle all but ensured their votes in favor of the courthouse displays: In
posting the Ten Commandments, the counties did not contravene the Estab-
ishment Clause because they did not establish an official religion or, in these
Justices' view, coerce religious participation or impossibly favor one reli-
gion over another.

C. The Impact of the Appointment of Chief Justice Roberts and Justice
Alito on the Court's Establishment Clause Jurisprudence

By now, the following should be clear: Last term, the neutrality prin-
iple was favored by a majority of the Justices, with five Justices adhering to it
(Justices Stevens, O'Connor, Ginsburg, Souter, and Breyer) and four to the
accommodation approach (Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas). And, the principle used by a majority of the Justices
usually determines the outcome in a given case because followers of one
principle commonly resolve Establishment Clause issues similarly and differ-
ently from supporters of the other approach. Indeed, Justices who adhere to
the neutrality principle tend to vote alike and against government action in the
religious sphere, while those who support the accommodation approach tend
to vote alike and in favor of government action in the religious sphere.

The appointment of Chief Justice Roberts and Justice Alito to fill the
vacancies left by Chief Justice Rehnquist and Justice O'Connor likely will
alter the Court's Establishment Clause jurisprudence and produce decisions
that conform to the teachings of the accommodation approach. Last term, the
neutrality approach enjoyed majority support by the slimmest of margins, and
one of the supporters of that approach, Justice O'Connor, has since left the
Court. Crucially, the vacancies left by both of the departing Justices have
been filled by individuals who, in the past, have espoused views with respect
to the Establishment Clause more in line with those of Chief Justice

200. Id. at 2748 (Scalia, J., dissenting); see also id. at 2758 ("[E]ven an exclusive
purpose to foster or assist religious practice is not necessarily invalidating." (emphasis
in original)).

201. See id. at 2748-50.

202. See id. at 2750 (maintaining that "the current sense of our society [is] re-
lected in [a recent] Act of Congress adopted unanimously by the Senate and with
only 5 nays in the House of Representatives, criticizing a Court of Appeals opinion
that had held 'under God' in the Pledge of Allegiance unconstitutional" (emphasis in
original) (citation omitted)).

203. See supra notes 166-67 and accompanying text.
Rehnquist than with those of Justice O'Connor. For example, in 1989 and 1991, while Deputy Solicitor General, Chief Justice Roberts co-authored two Supreme Court briefs in which he urged the Court to replace the Lemon test with an Establishment Clause test allowing for far more government support for religion. In one of those briefs, he took the position that "civic acknowledgments of religion in public life do not offend the Establishment Clause, as long as they neither threaten the establishment of an official religion nor coerce participation in religious activities." What is more, he asserted in that brief that "accommodation by the government of the religious beliefs of its citizens 'follows the best of our traditions.'" Turning to Justice Alito, in 1996, while a judge on the United States Court of Appeals for the Third Circuit, he voted to uphold a public school policy that allowed for student-initiated, student-led prayer at high school graduation ceremonies, and he joined an opinion that questioned whether "the Establishment Clause precludes the government from conveying a message that it endorses or encourages religion in a generic sense, or especially acknowledges or accommodates the broad Judeo-Christian heritage of our civil and social order." Moreover, in 1985, while an assistant to the Solicitor General, Justice Alito wrote that he became interested in constitutional law primarily because of his "disagreement with the Warren Court's decisions" with respect to, inter alia, the Establishment Clause. One of those decisions struck down a school policy of causing a prayer to be said at the beginning of each school day. Another invalidated school programs calling for voluntary Bible reading and

205. Brief for the United States as Amicus Curiae Supporting Petitioners at *12-13, Weisman, 505 U.S. at 577 (No. 90-1014) ("The proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation.").
206. Id. at *35 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
207. See ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1489, 1495-97 (3d Cir. 1996) (en banc) (Mansmann, J., dissenting) (arguing in favor of the constitutionality of "student-initiated, -directed and -composed prayer at high school graduation" (emphasis in original)). The policy at issue in Black Horse was very similar to the one the Court later struck down in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000). In addition, while a Third Circuit Judge, Justice Alito wrote the majority opinion in a case in which the court upheld a holiday display consisting of, inter alia, "a crèche, a menorah, and Christmas tree." ACLU of N.J. v. Schundler, 168 F.3d 92, 94-95 (3d Cir. 1999). Importantly, in that opinion, then-Judge Alito rejected the argument that the evolution of a display should be taken into account when deciding whether the display has a sectarian purpose. See id. at 105. This is contrary to the Court's subsequent holding in McCreary. McCreary County v. ACLU, 125 S. Ct. 2722, 2736-37 (2005).
208. See U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, WASH. POST, Jan. 9, 2006.
the use of the "Lord's Prayer" at the start of each school day. In light of the above, it is very likely that the Court is now comprised of five supporters of the accommodation approach – Chief Justice Roberts and Justices Kennedy, Scalia, Thomas, and Alito – and only four followers of the neutrality principle – Justices Stevens, Ginsburg, Souter, and Breyer. The embrace of the accommodation approach by a majority of the Justices could mean a significant increase in, among other things, government aid to parochial schools, religious activities in public schools, and the placement of religious symbols on government property.

Given the recent change in Court personnel and the very real potential for accommodation to displace neutrality as the majority approach, it is important, now more than ever, to determine which of these two principles is more faithful to the purposes underlying the Establishment Clause. In the next Part, this Article does precisely that, and more.

III. EVALUATING THE LEADING ESTABLISHMENT CLAUSE PRINCIPLES

This Part first demonstrates that, heretofore, the Court has failed to consistently apply either of the leading Establishment Clause principles. It then evaluates the two predominant principles; concludes (based on the results in, among other cases, Van Orden and McCreary) that neutrality is more faithful than accommodation to the purposes underlying the Establishment Clause; and argues for neutrality’s consistent and honest application.

A. Illustrating the Court’s Failure to Consistently Apply Any One Establishment Clause Principle

It has been said that "[w]hat distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that [Court] opinions be grounded in consistently applied principle." In the absence of consistently applied principle, there is at least the appearance, if not the danger and even the likelihood, that adjudication of legal challenges turns on the personal preferences of the Justices. Moreover, if the Court fails to abide by a single principle in addressing issues implicating a discrete area of the law, then there will be inconsistency in its

212. McCreary, 125 S. Ct. at 2751 (Scalia, J., dissenting).
decisions, and its jurisprudence will provide insufficient guidance to future Courts, lower courts, and policymakers alike.

Therefore, it is essential that the Court’s Establishment Clause jurisprudence be grounded in a consistently applied principle. Unfortunately, as this sub-Part demonstrates, to this point, that has not been the case.

Last term, neutrality was the favored Establishment Clause principle.\(^\text{214}\) And, it has enjoyed that status for more than fifty years.\(^\text{215}\) However, during that time, the Court, on occasion, has opted to avoid reaching the results that the neutrality principle would appear to have required.\(^\text{216}\) It did so most obviously in *Marsh v. Chambers*, where it upheld the Nebraska state legislature’s sixteen-year practice of paying the same chaplain of the Presbyterian faith to lead a prayer at the opening of each legislative session.\(^\text{217}\) The Court’s primary argument for upholding legislative prayer was historical: the men who drafted the Establishment Clause did not regard paid legislative chaplains or opening prayers as unconstitutional – in fact, they authorized such practices at the congressional level – and therefore, the practices cannot be so.\(^\text{218}\) But, in upholding legislative prayer, the Court failed to address whether the Nebraska practice was an endorsement of one religion over another or religion over irreligion, or even whether it contravened the basic purposes underlying the Establishment Clause.\(^\text{219}\) And, there can be no question that the Nebraska legislature’s longstanding practice of opening its sessions with a prayer by the same Presbyterian minister could be interpreted – by an objective and reasonable observer who is aware of the history and circumstances surrounding the

214. *See supra* Part II.B.

215. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (The Establishment Clause “requires the state to be a neutral in its relations with groups of religious believers and non-believers.”).

216. Indeed, in *McCreary*, the majority observed that “[i]n special instances [the Court has] found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.” 125 S. Ct. at 2733 n.10.

217. 463 U.S. 783 (1983). In addition to *Marsh*, there are other cases the results of which are often identified as violating the neutrality principle, including: *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (upholding the placement of a menorah next to a decorated evergreen tree and a sign referring to the display as a “Salute to Liberty” in front of the entrance to a government building); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding an exemption for religious organizations from an otherwise applicable prohibition against religious discrimination in employment); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (upholding a tax exemption equally available to a number of private, non-profit organizations, including religious ones); and *Zorach v. Clauson*, 343 U.S. 306 (1952) (permitting public schools to release students during the school day for religious instruction conducted outside of the school).

218. *See* *Marsh*, 463 U.S. at 786-91.

219. *See generally id.*
practice\textsuperscript{220} — as a manifestation of the state’s preference for one sect over all others and religion over irreligion. Moreover, the practice is antithetical to the basic purposes underlying the Establishment Clause in that it threatens the integrity of individual conscience as to religious matters\textsuperscript{221} and fosters divisiveness.\textsuperscript{222} Under the neutrality principle, the practice should have been struck down.

\textbf{B. Evaluating the Leading Principles: Neutrality versus Accommodation}

\textbf{1. The Argument for Accommodation}

As \textit{Marsh} demonstrates, and as the other cases cited in the prior sub-Part at least arguably demonstrate,\textsuperscript{223} the Court has seen fit to ignore the neutrality principle from time to time. Followers of the accommodation approach cite, \textit{inter alia}, the inconsistent application of the neutrality principle, as well as its alleged disconnect with the Framers’ understanding of the scope of the establishment ban, as justification for its abandonment.\textsuperscript{224} They insist that the accommodation approach — which, they claim, lends itself to consistent application because it captures the Framers’ intent and reflects the expectations of

\begin{quote}
\textsuperscript{220} See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring) (arguing that a challenged practice should be evaluated from the perspective of an objectively reasonable and informed observer); \textit{see also supra} note 123 and accompanying text.

\textsuperscript{221} Legislative prayer “intrudes on the right to conscience by forcing some legislators either to participate in a ‘prayer opportunity’ with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate.” \textit{Marsh}, 463 U.S. at 808 (Brennan, J., dissenting) (citation omitted). Whether the legislators have the option not to participate is irrelevant, as the practice places “indirect coercive pressure upon religious minorities to conform to the [majority view].” Engel v. Vitale, 370 U.S. 421, 431 (1962) (addressing the constitutionality of school prayer). Moreover, the Nebraska practice “associates one set of religious beliefs with the state” (that is, those associated with the Presbyterian faith) and, thus, “identifies nonadherents as outsiders[ and] encroaches upon the individual’s decision about whether and how to worship.” \textit{McCreary}, 125 S. Ct. at 2747 (O’Connor, J., concurring).

\textsuperscript{222} The majority in \textit{Marsh} acknowledged that Congress’s practice of opening its sessions with a prayer “was challenged in the 1850’s,” \textit{Marsh}, 463 U.S. at 788 n.10, and Justice Brennan, in his dissenting opinion, provided more contemporary examples of disputes concerning legislative prayer, \textit{see id.} at 800 n.10 (Brennan, J., dissenting); \textit{see also id.} at 808 (observing that legislative prayer “creat[es] the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens”).

\textsuperscript{223} \textit{See supra} note 217 and accompanying text.

\textsuperscript{224} \textit{See, e.g., McCreary}, 125 S. Ct. at 2750-52 (Scalia, J., dissenting).
\end{quote}
society – should replace neutrality as the favored principle. The remainder of this sub-Part addresses, and ultimately refutes, the argument that accommodation is true to the Framers' intent.

Those who adhere to the accommodation approach cite historical evidence, specifically, the Founders' writings and practices, to support their view that the Framers understood the scope of the establishment ban to be sufficiently narrow to allow significant government involvement in the religious sphere. They argue that this evidence provides justification for their position that government should be allowed to favor religion over nonreligion and, in some circumstances, certain religions, that is, monotheistic ones, over others. Those who prefer the neutrality principle maintain that the supporters of the accommodation approach present an incomplete picture of the historical record: "the . . . argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed." The adherents of the neutrality principle have the better argument. The historical record is contradictory such that the fair inference to be drawn from it is that there was no common understanding among the Framers as to the appropriate scope of the prohibition on establishment.

To be sure, there is evidence that some Founders believed that some endorsement of religion was consistent with the Establishment Clause. George Washington evidently thought it constitutional to add the words "so help me God" to the form of the Presidential Oath; open his inaugural address with the statement that "National morality can[not] prevail in exclusion of religious principle"; and issue a Thanksgiving Day Proclamation in which he recommended that the citizenry give thanks to God. In addition, John Adams, Thomas Jefferson, and James Madison deemed it appropriate to publicly invoke religion. Moreover, under John Marshall, the Supreme Court began its sessions with the prayer "God save the United States and this Honorable

225. See id.
227. McCreary, 125 S. Ct. at 2743; see also Van Orden v. Perry, 125 S. Ct. 2854, 2888 (2005) (Stevens, J., dissenting) ("[T]he widely divergent views espoused by the leaders of our founding era plainly reveal that the historical record of the . . . Establishment Clause is too indeterminate to serve as an interpretive North Star."); Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) ("[A]t best, . . . the Framers simply did not share a common understanding of the Establishment Clause.").
228. See McCreary, 125 S. Ct. at 2748-49 (Scalia, J., dissenting).
229. See id. at 2749-50. Adams at one point wrote to the Massachusetts Militia, "Our Constitution was made only for a moral and religious people." Id. at 2749. And, Jefferson and Madison both made reference to a single, Almighty Being in their inaugural addresses. Id. at 2749-50.
Court."230 And, the first Congress opened its sessions with a prayer by a chaplain paid by the state.231

Now, "if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it."232 But, the above evidence does not paint a complete picture of the Framers' understanding of the scope of the establishment ban. There also is historical evidence that supports the neutrality principle's basic teaching that government must refrain from taking sides in matters of religion, including in the debate between religion and irreligion. For example, an early draft of the Establishment Clause stated that "no religion shall be established by law" and, thus, apparently prohibited only the establishment of a single, national religion.233 This early draft was rejected and ultimately replaced with a provision containing the language eventually enshrined in the First Amendment, "Congress shall make no law respecting an establishment of religion."234 Therefore, the early draft, "which arguably ensured only that 'no religion' enjoyed an official preference over others," was discarded in favor of "a prohibition extending to laws establishing 'religion' in general."235 In addition, there is evidence that Jefferson and Madison, two of the Framers whose actions and writings are often cited by supporters of the accommodation approach, were uncomfortable with government invocations of religion.236 While president, Jefferson refused to issue Thanksgiving Day Proclamations because he viewed them as unconstitutional endorsements of religion.237 Madison, prior to becoming president, opposed a general tax imposed by Virginia the proceeds of which would have benefited religion "not simply because it forces people to donate 'three pence' to religion, but, more broadly, because 'it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.'"238 Moreover, during his first three years

230. Id. at 2748.
232. McCreary, 125 S. Ct. at 2743.
234. U.S. CONST. amend. I.
235. Lee, 505 U.S. at 613 (Souter, J., concurring).
236. The fact that Jefferson and Madison may have been inconsistent in their advocacy of a separation between government and religion does not advance the cause of those favoring the accommodation approach. See McCreary, 125 S. Ct. at 2744 n.25 ("[A] record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle.").
237. Van Orden v. Perry, 125 S. Ct. 2854, 2884 (2005) (Stevens, J., dissenting); see Lee, 505 U.S. at 623-24 & n.5 (Souter, J., concurring).
238. Lee, 505 U.S. at 622 (Souter, J., concurring) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), in 5 FOUNDERS' CONSTITUTION, at 83).
in office, Madison refused to issue Thanksgiving Day Proclamations (although he later did so on four separate occasions).\(^{239}\) And, following his retirement, in an essay in which he disparaged the practice of using public money to support congressional and military chaplains, Madison condemned the custom of calling for days of thanksgiving and prayer.\(^{240}\)

As the above demonstrates, the historical record definitively favors neither accommodation nor neutrality.\(^{241}\) Although some Framers likely would disagree with the basic tenets of the neutrality principle, it is far from clear that they all would. Indeed, it appears that many would not.

2. The Argument for Neutrality

When it comes to interpreting the Constitution, the Establishment Clause included, the Founders’ specific views and practices – which were formed and engaged in at a time when society was far less diverse than it is today\(^{242}\) – should not be controlling. Instead, constitutional interpretations

\(^{239}\) Id. at 624-25.

\(^{240}\) See id. In addition, after leaving office, Madison wrote in a letter addressing government involvement in religion that the tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.


\(^{241}\) See Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. REV. 346, 404-05 (2002). Notably, the historical record reveals that “many of the Framers understood the word ‘religion’ in the Establishment Clause to encompass only the various sects of Christianity.” Van Orden, 125 S. Ct. at 2885 (Stevens, J., dissenting). This view was in accordance with the language of many state constitutional provisions protecting religious freedom in existence at the time of the Founding, which “restricted ‘equal protection’ and ‘free exercise’ to Christians.” Id.; see Lee J. Strang, The Meaning of “Religion” in the First Amendment, 40 DUQ. L. REV. 181, 220-23 (2002). Moreover, a generation after the Founding, Justice Story wrote that the “real object” of the Establishment Clause “was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.” 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 594 (2d ed. 1851). To the extent that the historical record shows that the Establishment Clause was meant only to avoid government endorsement of a single sect of Christianity, it supports a reading of the Establishment Clause far narrower than that embraced by those favoring either accommodation or neutrality. Indeed, an examination of the historical record recently led a majority of the Justices to conclude that there is “no escape from interpretive consequences that would surprise [at least some of] the Framers.” McCready, 125 S. Ct. at 2745.

should be based on the Framers’ “broad purposes.” \(^{243}\) And, an understanding of the general concerns of the Founders with respect to religion reveals that the principle of neutrality is more in line with their views than that of accommodation. Members of the founding generation knew, some from personal experience, of the dangers of government involvement in the religious sphere. \(^{244}\) They recognized that “liberty and social stability demand a religious tolerance that respects the religious views of all citizens” and that government religious expression can send a message of intolerance and disrespect. \(^{245}\) Therefore, they drafted the religion clauses with the expectation that they would protect individual right to conscience as to religious matters and guard against the divisiveness that inevitably results when government appears to take, or in fact takes, sides in the religious debate. \(^{246}\) The neutrality principle serves these goals; the accommodation approach does not.

All of the Justices currently on the Court who, in Court opinions, have professed their adherence to the accommodation approach – Justices Kennedy, Scalia, and Thomas – would allow government to express a preference for religion over irreligion and publicly recognize the existence of a single Creator. They would permit a county to erect a display containing only the full text of the Ten Commandments – including its first sectarian reference, “I am the Lord thy God” – in a public building for the express purpose of venerating religion. \(^{247}\) They also would allow the county to place a holiday display

\(^{243}\) See Marsh v. Chambers, 463 U.S. 783, 816-17 (1983) (Brennan, J., dissenting) (“[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. . . . To be truly faithful to the Framers, our use of the history of their time must limit itself to broad purposes, not specific practices. [The Court’s] primary task must be to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century.” (citation omitted) (quotation marks omitted) (footnote omitted)).

\(^{244}\) See Engel v. Vitale, 370 U.S. 421, 427-29 (1962); see also Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947) (“A large portion of the early settlers of this country came here from Europe to escape [religious persecution]. . . . With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. . . . These practices of the old world were transplanted to and began to thrive in the soil of the new America.” (emphasis added)).

\(^{245}\) Zelman, 536 U.S. at 718, 723-25 (Breyer, J., dissenting).

\(^{246}\) See supra note 150. Even those Framers who understood the ban on establishment to mean only that government must not discriminate among the various Christian sects, see supra note 241, arguably adhered to the overarching belief “that government must remain neutral between valid systems of belief.” Van Orden, 125 S. Ct. at 2890 (Stevens, J., dissenting).

\(^{247}\) Cf. id. at 2863-64 (plurality opinion); McCreary County v. ACLU, 125 S. Ct. 2722, 2758 (2005) (Scalia, J., dissenting).
consisting only of a crèche in the same building to serve the same purpose.\textsuperscript{248} And, they would do this (1) without considering whether the displays would cause some viewers, nonbelievers and polytheists, for example, to perceive themselves as outsiders and, as a result, alter their behavior,\textsuperscript{249} and (2) without regard to the divisive effect that the displays almost certainly would have.\textsuperscript{250} Similarly, these Justices would vigorously defend the practice of legislative prayer,\textsuperscript{251} even though it intrudes on the right to conscience\textsuperscript{252} and has proven, and likely will continue to prove, divisive.\textsuperscript{253}

Moreover, at least two of these Justices – Justices Scalia and Thomas – would permit public primary and secondary schools to hold a moment of silence each day for voluntary prayer in order to promote religion.\textsuperscript{254} In addition, they would allow such schools to invite members of the clergy to give invocations and benedictions at their graduation ceremonies.\textsuperscript{255} These Justices also would uphold a school policy providing for student-initiated, student-led prayer at school events.\textsuperscript{256} And, they would permit these practices irrespective of their effect on the right to conscience or social accord.

A principle, or variation thereof, that allows any of these practices or displays is not faithful to the purposes of the Establishment Clause and, therefore, should not be employed.\textsuperscript{257} The principle embraced by the Court should strive to ensure religious liberty and tolerance and avoid social discord to the greatest extent possible. The neutrality principle, which, at bottom, mandates


\textsuperscript{249} See McCleary, 125 S. Ct. at 2747 (O'Connor, J., concurring) (observing that "government has ... special status" in the marketplace of ideas and that when government "identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship").

\textsuperscript{250} See id. ("Allowing government to be a potential mouthpiece for competing religious ideas risks [social] division . . . ").


\textsuperscript{252} See supra note 221.

\textsuperscript{253} See supra note 222.


\textsuperscript{255} See Lee, 505 U.S. at 631-32 (Scalia, J., dissenting).


\textsuperscript{257} See County of Allegheny v. ACLU, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic . . . community." (citation omitted)).
that government not exhibit a preference for one religion over another, religion over irreligion, or irreligion over religion, satisfies these requirements. If consistently and honestly applied (as it should be), it would lead to the invalidation of all of the above practices and displays, as well as the reversal of the decision in, for example, *Marsh.*

Indeed, as applied, it has led to the invalidation of most of the above practices and displays.

Of course, consistent and honest application of the neutrality principle does not mean that all that in any way partakes of the religious must be removed from the public sphere. It requires only the elimination of those practices and displays that communicate to a reasonable and informed observer government endorsement of religion or irreligion. Thus, consistent and honest application of the neutrality principle would allow, *inter alia,* schools to offer courses in comparative religion; public depictions of Moses holding the Ten Commandments, so long as Moses is depicted with other lawgivers or in a similar context indicating that the purpose underlying the depiction is not to advance religion; government to provide non-sectarian instructional materials to parochial and non-parochial schools, as long as the materials are used only for secular instruction; government programs providing comparable aid to students attending parochial and non-parochial schools; museums to display religious art; laws regulating conduct that today are intended only to serve secular purposes but that may have derived from religious motivations or "coincide or harmonize with the tenets of some or all religions"; statutes authorizing repayment to parents of their children's transportation expenses to parochial and non-parochial schools; tax exemptions generally available to a wide class of religious and nonreligious beneficiaries if they meet certain secular criteria; and the public celebration of, among other holidays,

258. See generally supra Part III.A. Consistent and honest application of the neutrality principle also would lead to the reversal of the decision in *Van Orden.* See infra Part IV.B.

259. See supra note 123.


Thanksgiving, "for despite its religious antecedents, [its celebration today] is unquestionably secular and patriotic."\(^\text{265}\)

IV. ADDRESSING DISAGreements AMONG FOLLOWERS OF THE SAME PRINCIPLE AND PROPOSING A NEW APPROACH FOR HANDLING ESTABLishment CLAUSE CHALLENGES IN THE FUTURE

In the prior Part, this Article argued for the consistent and honest application of the neutrality principle. This Part begins by demonstrating — through a comparison of the dissenting opinions and Justice Breyer’s concurring opinion in *Van Orden* — that advocates of the same principle — in *Van Orden*, the neutrality principle — sometimes resolve Establishment Clause challenges differently. But, it then shows (using the aforementioned opinions) that faithful adherence to the tenets of the neutrality principle and the purposes underlying the Establishment Clause should limit such occurrences with respect to followers of that principle. This Part concludes by proposing a new approach for addressing Establishment Clause challenges that is consistent with the neutrality principle.

**A. Advocates of the Same Principle Sometimes Disagree Over the Resolution of Establishment Clause Challenges**

On occasion, advocates of the same basic principle resolve issues implicating the Establishment Clause differently. This most recently occurred in connection with the *Van Orden* case. In *Van Orden*, five Justices — Justices Stevens, O’Connor, Ginsburg, Souter, and Breyer — employed the neutrality approach. However, four of them, Justices Stevens, O’Connor, Ginsburg, and Souter (the “dissenters”), found the Ten Commandments monument at issue unconstitutional, while one of them, Justice Breyer, found it constitutional.\(^\text{266}\)

On the one hand, the dissenters viewed the monument as an unambiguous endorsement of monotheistic religions over all others and of religion over irreligion.\(^\text{267}\) Consequently, they voted for its removal, concluding that its continued existence likely would threaten individual conscience as to reli-


\(^\text{266. Supporters of the accommodation approach are as likely to resolve issues implicating the Establishment Clause differently as advocates of the neutrality principle. For instance, in Lee v. Weisman, Justice Kennedy found a school’s practice of inviting members of the clergy to give invocations and benedictions at its graduation ceremonies coercive and, therefore, a violation of the Establishment Clause. 505 U.S. 577, 587 (1992). However, Chief Justice Rehnquist and Justices Scalia, Thomas, and White disagreed with Justice Kennedy’s finding of coercion; they would have upheld the challenged practice. See id. at 642 (Scalia, J., dissenting).}\)

\(^\text{267. See Van Orden v. Perry, 125 S. Ct. 2854, 2880-82 (2005) (Stevens, J., dissenting); id. at 2893 & n.2 (Souter, J., dissenting); id. at 2891 (O’Connor, J., dissenting); see also supra Part I.A.}\)
gious matters and lead to social discord. Justice Breyer, on the other hand, asserted that the circumstances of this "borderline" case clearly demonstrated that the state intended the nonreligious aspects of the Commandments' message to predominate and that the monument's history demonstrated that the public understood that to have been the state's intent. Thus, Justice Breyer decided that the monument did not communicate a preference for religion and was not a viable threat to religious liberty or social accord.

B. Faithful Adherence to the Neutrality Principle and the Purposes Underlying the Establishment Clause Should Circumscribe Disagreements among Followers of that Principle

Consistent and honest application of the neutrality principle, with a sensitivity to the purposes underlying the Establishment Clause, should circumscribe the instances where its followers resolve Establishment Clause challenges differently. Indeed, such application of the neutrality principle in Van Orden should have led its five followers – the dissenters and Justice Breyer – to find the monument there in question unconstitutional. To be sure, as Justice Breyer observed, the monument was donated by a group that was concerned primarily with the Commandments' role in shaping civic morality (and not with its religious aspects); was but one of seventeen monuments on the grounds of the Texas state capitol dedicated to the elements that compose Texan identity; and had stood on the capitol grounds for approximately forty years before facing legal challenge. But, even assuming that Texas did not intend the Commandments' religious message to predominate and that the petitioner in Van Orden initiated the first legal challenge to the monument's placement, the neutrality principle still required the monument's removal, as its placement contravenes the principle's tenets, as well as the purposes underlying the Establishment Clause.

The Ten Commandments is, and is commonly understood to be, "a sacred text in the Jewish and Christian faiths." Yet, the population of Texas,

268. See id.
269. See Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment); see also supra Part I.A.
270. See id.
271. Of course, even "consistent and honest" application of the neutrality principle cannot altogether eliminate disagreements among its followers. For example, the principle's adherents may disagree over whether a reasonable and informed observer would view a holiday display consisting of a menorah, a decorated evergreen tree, and a sign referring to the display as a "Salute to Liberty" as an establishment. See County of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989).
272. Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment).
273. Id.
274. Id. at 2870-71.
much like that of the Nation, is religiously diverse.\textsuperscript{276} Undoubtedly, there are many Texans who do not believe in the God whose Commandments adorn their seat of government. And, the placement of this monument, which contains the text of the Commandments (including the sectarian statement, "I AM the LORD thy God"	extsuperscript{277}) without anything to emphasize the Commandments’ nonreligious aspects, at the seat of Texas government, inescapably communicates the message that Texas favors the divine code of the Judeo-Christian God.\textsuperscript{278} The monument, therefore, tells the reasonable observer that Texas prefers, at the very least, monotheistic religions over all others and religion over irreligion. In conveying this message, Texas identifies, among other people, nonbelievers and polytheists as outsiders in the political community and, in so doing, threatens their right to conscience. This, neutrality does not permit.

Moreover, although the monument was not challenged legally prior to \textit{Van Orden}, "the deluge of cases [addressing the constitutionality of such displays now] flooding lower courts,"\textsuperscript{279} as well as the attention the litigation surrounding the monument has drawn, suggest that its future will be less controversy-free than its past. What is more, although the monument never before was challenged legally, that does not mean that it has not been divisive. This monument, which is located at the seat of Texas government and inscribed with a sacred text of only some religions, very well may have provoked protests or other forms of social discord that did not culminate in litigation.\textsuperscript{280}


\textsuperscript{277} This monument is distinguishable from other public depictions of the Ten Commandments that do not contain its more religious aspects (for example, depictions that include the tablets without further inscription and depictions that include only the Commandments’ more secular pronouncements).

\textsuperscript{278} The placement of sixteen other monuments “with no common appearance, history, or esthetic role” over twenty-two acres does nothing to alter this message. See \textit{Van Orden}, 125 S. Ct. at 2895 (Souter, J., dissenting); see generally Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 801-02 (1995) (Stevens, J., dissenting) (“The very fact that a [display] is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the [display] stands in front of the seat of the government itself. The ‘reasonable observer’ of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign – which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory – has sponsored and facilitated its message.”); \textit{id.} at 785 (Souter, J., concurring in part and concurring in the judgment) (same); County of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989) (same).

\textsuperscript{279} \textit{Van Orden}, 125 S. Ct. at 2882 n.19 (Stevens, J., dissenting); see also McCreary County v. ACLU, 125 S. Ct. 2722, 2760 n.11 (2005) (Scalia, J., dissenting) (listing several of “[t]he significant number of cases involving Ten Commandments displays in the last two years”).

\textsuperscript{280} See generally Lynch v. Donnelly, 465 U.S. 668, 703 (1984) (Brennan, J., dissenting) (“The fact that calm had prevailed prior to this suit does not immediately
Justice Breyer's approach to "borderline" cases—determine, on a case-by-case basis, whether the challenged practice or display contravenes the purposes of the Establishment Clause\textsuperscript{281}—may prove to be a good one.\textsuperscript{282} But, *Van Orden* was not such a case. The monument there in question conveys a message of support for religion and is antithetical to the purposes of the Establishment Clause. All those who adhere to the neutrality principle, Justice Breyer included,\textsuperscript{283} should have voted against its constitutionality.

### C. A New Approach for Addressing Establishment Clause Challenges in Keeping with the Neutrality Principle

At the outset, this Article observed that Establishment Clause challenges frequently involve a number of "values, each constitutionally respectable," competing with one another.\textsuperscript{284} Thus, there inevitably will be circumstances where strict adherence to the concept of neutrality could lead to unacceptable consequences, such as the invalidation of seemingly non-threatening historical traditions (for example, the inclusion of the words "so help me God" in the form of the Presidential Oath) and practices respecting, among other rights, that to free speech (for instance, allowing all groups, including religious groups, equal access to public school facilities).\textsuperscript{285} To be sure, this Article has argued for, and continues to advocate for, consistent and honest application of the neutrality principle. But, in true borderline cases, that is, in cases where "constitutionally respectable" values compete without any one clearly outclassing the others,\textsuperscript{286} strict adherence to the neutrality approach is not always a viable option. In such cases, there sometimes will need to be trade-offs. This sub-Part offers a new method of analysis for all Establishment Clause challenges that will allow these trade-offs while still honoring the tenets of the neutrality principle and the purposes underlying the Establishment Clause.

\textsuperscript{281} See *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment); see also supra Part I.A.

\textsuperscript{282} In fact, the approach to Establishment Clause challenges that this Article proposes *infra* in Part IV.C is based, in part, on Justice Breyer's method of analyzing "borderline" cases.

\textsuperscript{283} Although Justice Breyer employs a distinctive variation of the neutrality principle, he unquestionably adheres to the basic tenets of that approach. See supra Part II.B.1-2.

\textsuperscript{284} See supra INTRODUCTION.

\textsuperscript{285} See supra INTRODUCTION.

\textsuperscript{286} See supra INTRODUCTION (identifying the values associated with, *inter alia*, the Establishment and Free Exercise Clauses as ones that, from time to time, compete).
A court reviewing an Establishment Clause challenge to a practice or display should begin by asking whether the practice or display conveys a message to the reasonable observer – who is not necessarily aware of all relevant circumstances surrounding the practice or display – of preference for one religion over another, religion over irreligion, or irreligion over religion. A practice or display conveys such a message if it has a sectarian purpose (government intends to communicate a message of endorsement or disapproval of religion) or effect (it is likely to communicate to the reasonable observer a message of endorsement or disapproval of religion because, for example, it creates an excessive entanglement between government and religion). If the practice or display does not convey a message of endorsement or disapproval, then there is no Establishment Clause violation and the inquiry is at an end. However, if the practice or display does convey such a message, then the court should determine whether it violates one or both of the predominant purposes underlying the Establishment Clause. That is, the court should look at all of the relevant history and circumstances surrounding the practice or display and ask whether it is likely to threaten individual conscience as to religious matters or prove divisive. If the answer to either question is yes, then the practice should be invalidated or the display struck down. If the answer to both questions is no, then the practice should be allowed to continue or the display to stand. Of course, it will be rare that a practice or display conveys a message of endorsement or disapproval to the reasonable observer.

287. This standard looks at a challenged practice or display from the viewpoint of an objectively reasonable – but not necessarily fully informed – individual. "[T]he applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring) (quotation marks omitted) (alteration in original); cf. id. at 800 n.5 (Stevens, J., dissenting) ("I would extend protection to the universe of reasonable persons and ask whether [any reasonable] viewers of the religious display would be likely to perceive a government endorsement.").

If, however, a government practice on its face creates a denominational preference (that is, singles out specific religious sects for special benefits or burdens), a court need not inquire as to whether the practice conveys a message of preference to the reasonable observer. Such a practice violates the Establishment Clause unless the government can demonstrate that it is necessary to achieve a compelling interest. See, e.g., Larson v. Valente, 456 U.S. 228 (1982) (viewing a state law regulating the solicitation of donations by charitable organizations as creating a denominational preference, and striking down the law because it was not necessary to achieve a compelling interest).

288. See Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) ("The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact.").
but does not contravene one or both of the primary purposes of the Establishment Clause. 289

Under this method, of all of the practices and displays identified above in Part III.B.2, only those singled out as inconsistent with the neutrality approach, such as legislative prayer, school prayer, and the erection of a Ten Commandments display for the sole purpose of venerating religion, would be invalidated. 290 Moreover, such time-honored, historical practices as placing

289. For instance, it is difficult to imagine a situation where the government institutes a practice or erects a display in order to promote religion and the practice or display is not likely to prove divisive. One can, however, imagine a situation where, for non-religious reasons, the government institutes a practice or erects a display that at least arguably communicates a message of endorsement or disapproval to the reasonable observer but does not contravene the purposes underlying the Establishment Clause.

290. If the Court had employed this approach in Van Orden, it would have struck down the Ten Commandments monument there in question, as the monument conveyed a message of endorsement to the reasonable observer and contravened the purposes underlying the Establishment Clause. See supra Part IV.B. However, application of this method would continue to permit the release of public school students during the school day for religious instruction conducted outside the school. See Zorach v. Clauson, 343 U.S. 306 (1952). Even assuming that the reasonable observer would view this practice as an endorsement (an assumption that is not entirely unreasonable), merely providing for the release of students (as opposed to providing a forum within the school for religious study) does not threaten individual conscience and, thus far, has not proven particularly divisive (and, therefore, is unlikely to prove divisive in the future). In addition, application of this new approach would lead to the validation of statutes calling for a moment of silence prior to the start of each public school day, so long as the statutes were not enacted to advance religion. Cf. Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a statute authorizing a moment of silence for meditation and voluntary prayer because the statute's purpose was to advance religion). Such statutes could not reasonably be viewed as an endorsement. See id. at 72 (O'Connor, J., concurring) ("A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence . . . need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her [religious] beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. . . . By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period."). Application of this approach also would allow a holiday display on government property consisting of a Menorah, a Christmas tree, and a sign explaining that the display is meant to convey a secular message, so long as the display truly is meant to convey a secular message and the reasonable observer would understand the display's message to be a secular one. Cf. County of Allegheny v. ACLU, 492 U.S. 573 (1989). And, application of this new approach would permit government to exempt religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion, if, but only if, the exemption was created as a means to lift a readily identifiable burden on the free exercise of religion (rather than as a means to advance religion) and the reasonable observer would understand that to have been the exemption's
the phrase "in God we trust" on currency, including the words "so help me God" in the form of the Presidential Oath, and opening Court sessions with the statement "God save the United States and this Honorable Court" would be upheld.291

CONCLUSION

This Article evaluated the predominant Establishment Clause principles – neutrality and accommodation – and argued for the consistent and honest application of the neutrality principle. In addition, the Article pointed out that the debate between neutrality and accommodation is particularly relevant now given the uncertainty that surrounds the Court’s Establishment Clause jurisprudence in the wake of the death of Chief Justice Rehnquist and the retirement of Justice O’Connor.292 The Article also proposed a new approach for addressing all Establishment Clause challenges that is in keeping with both the neutrality principle and the purposes underlying the Establishment Clause. The Article now concludes by using this new approach to resolve the hypothetical posed at the outset.293


291. Even if the reasonable observer would view these practices as an endorsement, they do not contravene the purposes of the Establishment Clause – they have been an accepted and non-proselytizing part of public life for so long that they cannot reasonably be viewed as a threat to individual conscience and are unlikely to prove divisive – and, therefore, should be allowed to continue. Indeed, their invalidation would be far more divisive than their continued existence. See Van Orden v. Perry, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring in the judgment). However, the adoption of the approach that this Article has proposed likely would lead to the invalidation of the public school practice of having students recite the national Pledge (which contains the words, "under God") at the beginning of each school day. The "under God" language of the Pledge (which has been part of the Pledge only since 1954, see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 7 (2004)) reasonably can be viewed as an endorsement. And, even if students are allowed not to say the words "under God," the practice arguably affects individual conscience as to religious matters, see Lee v. Weisman, 505 U.S. 577, 588 (1992) (including prayers in public school graduation ceremonies is unconstitutional because the practice is subtly coercive), and has proven, and in all likelihood will continue to prove, divisive, see Elk Grove Unified Sch. Dist., 542 U.S. at 1 (addressing a challenge to a school district’s policy of requiring teacher-led recitation of the national Pledge). See generally Van Orden, 125 S. Ct. at 2863-64 (plurality opinion) ("[W]e have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”) (citation omitted) (quotation marks omitted)).

292. See supra Part II.C.

293. See supra INTRODUCTION. Given that the Court is now almost certainly comprised of five supporters of the accommodation approach, see supra Part II.C, there is little doubt that it would uphold the display described in the introductory hypothetical, see Part II.A.
Ordinarily, a government display consisting of only the text of the Ten Commandments, its more sectarian references included, unquestionably would communicate to the reasonable observer a preference for, *inter alia*, religion over irreligion (and, therefore, would have to be struck down, unless it was shown not to violate either of the primary purposes of the Establishment Clause). However, the situation posed in the hypothetical is complicated by the fact that, in addition to the text of the Commandments, the county also posted an unambiguous statement explaining that the display was meant to illustrate the historic relationship between the Commandments' standards of social conduct and the law. And, although the Ten Commandments is a religious document, "[i]n certain contexts, a display of [its text] can convey not simply a religious message but also a . . . historical message (about the historic relation between [its standards of social conduct] and the law)." The hypothetical presented such a context. Given the explanatory statement and the display’s posting in a courthouse, as well as the fact that there was nothing in the hypothetical indicating that the county had an ulterior motive in posting the display to advance religion, the reasonable observer would not perceive the display as an endorsement. Because the display does not violate the tenets of the neutrality principle, that is, it does not communicate to the reasonable observer that the state prefers one religion over another or religion over irreligion, there is no need to move on to the second stage of inquiry and ask whether it contravenes the purposes underlying the Establishment Clause. Of course, had the county not posted the explanatory statement, or had there been some indication that its true motive in erecting the display was the advancement of religion, the approach that this Article has offered would call for the display’s removal. This is because, in that case, the display would communicate to the reasonable observer a preference for religion, threaten individual conscience as to religious matters, and almost certainly, result in social discord.

294. *Van Orden*, 125 S. Ct. at 2869-70 (Breyer, J., concurring in the judgment).

295. *Cf. McCreary County v. ACLU*, 125 S. Ct. 2722, 2738-41 (2005) (concluding that the purpose behind each of the displays in question was the advancement of religion).

296. Here, the Buddhist organization’s objection to the display was not objectively reasonable. *See supra* note 287.

297. *See supra* Part IV.C; *see also Van Orden*, 125 S. Ct. at 2892 (Souter, J., dissenting) (“A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.”) (emphasis added)).