Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Establishment

---

Van Orden v. Perry, 545 U.S. 677 (2005)

Thomas Van Orden was a lawyer in Austin, Texas. When doing research at the state law library, Van Orden often walked across the state capitol grounds, which included a six-foot monument donated by the Fraternal Order of Eagles that was inscribed with the Ten Commandments. Van Orden brought a lawsuit against Texas governor Rick Perry and other state officials, claiming that the monument on state grounds violated the Establishment Clause of the First Amendment as incorporated by the Fourteenth Amendment. The federal district court found a constitutional violation and that judgment was sustained by the Court of Appeals for the Fifth Circuit. Texas appealed to the Supreme Court of the United States.

The Van Orden *case split the American religious community. Prominent conservative religious communities, conservative public interest groups, many states, and the Chester County Historic Preservation Society supported the continued placement of the Ten Commandments on state grounds. The brief for the Fraternal Order of Eagles stated,*

> *Our constitutional jurisprudence does not require us to erase the religious content from our historical monuments. Such a brooding hostility is not the law. The intentional exclusion of religion from the public square does not send a neutral message. Instead, such intentional exclusion sends a harmful message to the public that it is improper for us to publicly acknowledge any parts of our history and culture with religious content. A state should be free to acknowledge all of its history. The Establishment Clause was never intended to be used to censor our religious history and culture. The Fraternal Order of Eagles simply seeks to preserve our cultural and legal heritage for future generations to grow in their respect for the law and for each other.*

Prominent liberal religious communities, organizations of atheists and secular humanists, and liberal public interest grounds urged the Supreme Court to declare the monument unconstitutional. The Brief for the Hindu American Foundations asserted,

> *The maintenance of the Ten Commandments Monument on the grounds of the Texas State Capitol violates the Establishment Clause because the Monument is inherently religious, serves no historic purpose, and does not lose its religious character through juxtaposition with secular images. It depicts the Ten Commandments, a cornerstone of Judeo-Christian theology, in the traditional shape of the "Biblical Stones." Non-Judeo-Christians, including Amici, who do not adhere to the religious views that the Ten Commandments either state or symbolize, cannot fail to perceive the placement of such a monument on the grounds of the Texas Capitol as an endorsement of Judeo-Christian beliefs over their own. The maintenance of the Monument therefore has the primary effect of advancing the Judeo-Christian beliefs to which a majority of Texans subscribe.*

The Supreme Court by a 5–4 vote declared that the monument was constitutional. Chief Justice Rehnquist in his plurality opinion claimed that the monument was "passive" and had historical significance. The dissenters insisted that the monument endorsed Judeo-Christian religious beliefs. Who had the better of that argument? Compare Justice Thomas and Justice Breyer's concurring opinions. Justice Thomas insisted on a rigid rule, while Justice Breyer called for judicial judgment. Who had the better of that argument?

Van Orden v. Perry *was handed down on the same day that the Supreme Court decided* McCreary County v. ACLU of Kentucky *(2005). Four justices insisted both displays were unconstitutional. Four believed both were constitutional. Justice Breyer, who cast the decisive vote in both cases, was the only justice who distinguished between the two. On what basis does he distinguish the two displays? Is his distinction sound?*

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join.

. . .

Our cases, Janus like, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage:

Whatever may be the fate of the [*Lemon v. Kurtzman* (1971)] test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

. . . "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. . . . This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. Such a practice, we thought, was "deeply embedded in the history and tradition of this country."

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.

. . .

Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. . . .

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham* (1980). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose. . . . Neither *Stone* itself nor subsequent opinions have indicated that Stone's holding would extend to a legislative chamber or to capitol grounds.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in Stone, where the text confronted elementary school students every day. . . . Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

JUSTICE SCALIA, concurring.

. . . [T]here 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. . . .

JUSTICE THOMAS, concurring.

. . .

This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resis[t] incorporation" against the States. . . . If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.

[O]ur task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily [to] involve actual legal coercion." . . . "[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." And "government practices that have nothing to do with creating or maintaining . . . coercive state establishments" simply do not "implicate the possible liberty interest of being free from coercive state establishments."

There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.

[T]his Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion. For example, individuals frequenting a county courthouse have successfully challenged as an Establishment Clause violation a sign at the courthouse alerting the public that the building was closed for Good Friday and containing a 4-inch-high crucifix. . . .

[I]n a seeming attempt to balance out its willingness to consider almost any acknowledgment of religion an establishment, in other cases Members of this Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation. . . . Telling either nonbelievers or believers that the words "under God" have no meaning contradicts what they know to be true. . . .

. . . This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display. . . .

This analysis is not fully satisfying to either nonadherents or adherents. For the nonadherent, who may well be more sensitive than the hypothetical "reasonable observer," or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents

alike, or it provides no principled way to choose between those views. In sum, this Court's effort to assess religious meaning is fraught with futility.

. . .

Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application. While the Court correctly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.

JUSTICE BREYER, concurring in the judgment.

. . .

[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case. . . .

If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment. . . .

The case before us is a borderline case. . . . On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States. . .

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. . . .

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, 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. . . .

The physical setting of the monument, moreover, suggests little or nothing of the sacred. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. The setting does not readily lend itself to meditation or any other religious activity. . . .

. . . As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to

"engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." . . .

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. . . . This case also differs from McCreary County, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. . . .

For these reasons, I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily "advanc[ing]" or "inhibit[ing] religion," and not creating an "excessive government entanglement with religion"—might satisfy this Court's more formal Establishment Clause tests.

But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

. . .

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. . . . Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

. . .

In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property. The adornment of our public spaces with displays of religious symbols and messages undoubtedly provides comfort, even inspiration, to many individuals who subscribe to particular faiths. Unfortunately, the practice also runs the risk of "offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." . . .

. . .

The monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it upon objection be explained as a simple desire to preserve a historic relic. This Nation's resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God.

[The Fraternal Order of Eagles who donated the monument] were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "'code of conduct or standards by which to govern their actions.'" It is the Eagles' belief that disseminating the message conveyed by the Ten Commandments will help to persuade young men and women to observe civilized standards of behavior, and will lead to more productive lives. Significantly, although the Eagles' organization is nonsectarian, eligibility for membership is premised on a belief in the existence of a "Supreme Being."

The desire to combat juvenile delinquency by providing guidance to youths is both admirable and unquestionably secular. But achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor. By spreading the word of God and converting heathens to

Christianity, missionaries expect to enlighten their converts, enhance their satisfaction with life, and improve their behavior. Similarly, by disseminating the "law of God"—directing fidelity to God and proscribing murder, theft, and adultery—the Eagles hope that this divine guidance will help wayward youths conform their behavior and improve their lives. In my judgment, the significant secular byproducts that are intended consequences of religious instruction—indeed, of the establishment of most religions—are not the type of "secular" purposes that justify government promulgation of sacred religious messages.

. . .

[T]he Decalogue is a venerable religious text. . . .

The profoundly sacred message embodied by the text inscribed on the Texas monument is emphasized by the especially large letters that identify its author: "I AM the LORD thy God." It commands present worship of Him and no other deity. It directs us to be guided by His teaching in the current and future conduct of all of our affairs. It instructs us to follow a code of divine law, some of which has informed and been integrated into our secular legal code ("Thou shalt not kill"), but much of which has not ("Thou shalt not make to thyself any graven images . . . . Thou shalt not covet").

Moreover, despite the Eagles' best efforts to choose a benign nondenominational text, the Ten Commandments display projects not just a religious, but an inherently sectarian, message. There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance. In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate.

. . . Even if, however, the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism. . . .

. . .

Critical examination of the Decalogue's prominent display at the seat of Texas government, rather than generic citation to the role of religion in American life, unmistakably reveals on which side of the "slippery slope" this display must fall. God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose—to encourage Texans to abide by the divine code of a "Judeo-Christian" God. If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow.

. . . The speeches and rhetoric characteristic of the founding era, however, do not answer the question before us. . . . [W]hen public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity. The permanent placement of a textual religious display on state property is different in kind; it amalgamates otherwise discordant individual views into a collective statement of government approval. . . .

Ardent separationists aside, there is another critical nuance lost in the plurality's portrayal of history. Simply put, many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a narrower proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.

The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their various constitutions. Many of those provisions, however, restricted "equal protection" and "free exercise" to Christians, and invocations of the divine were commonly understood to refer to Christ. . . .

Along these lines, for nearly a century after the founding, many accepted the idea that America was not just a religious Nation, but "a Christian nation." . . .

The original understanding of the type of "religion" that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred "monotheistic" religions Justice SCALIA has embraced in his *McCreary County v. American Civil Liberties Union of Kentucky* (2005) opinion. The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, Justice SCALIA is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause's original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. . . .

. . .

It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. . . .

To reason from the broad principles contained in the Constitution does not, as Justice SCALIA suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate. . . .

The principle that guides my analysis is neutrality. The basis for that principle is firmly rooted in our Nation's history and our Constitution's text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. Fortunately, we are not bound by the Framers' expectations—we are bound by the legal principles they enshrined in our Constitution. Story's vision that States should not discriminate between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, "polytheists[,] and believers in unconcerned deities," is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, prohibits Texas from displaying the Ten Commandments monument the plurality so casually affirms.

. . .

The judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to "have no other gods before me," it is difficult to conceive of any textual display that would run afoul of the Establishment Clause.

JUSTICE O'CONNOR, dissenting.

. . .

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

. . .

Ten Commandments constitute a religious statement [and] their message is inherently religious. . . .

In the present case, the religious purpose was evident on the part of the donating organization. When the Fraternal Order of Eagles, the group that gave the monument to the State of Texas, donated identical monuments to other jurisdictions, it was seeking to impart a religious message. . . . Thus, a pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones. In this case,

moreover, the text is presented to give particular prominence to the Commandments' first sectarian reference, "I am the Lord thy God." That proclamation is centered on the stone and written in slightly larger letters than the subsequent recitation. . . .

To drive the religious point home, and identify the message as religious to any viewer who failed to read the text, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ. Nothing on the monument, in fact, detracts from its religious nature. . . .

The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them, the frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers. While Moses holds the tablets of the Commandments showing some Hebrew text, no one looking at the lines of figures in marble relief is likely to see a religious purpose behind the assemblage or take away a religious message from it. Only one other depiction represents a religious leader, and the historical personages are mixed with symbols of moral and intellectual abstractions like Equity and Authority. . . . Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable.

. . .

Texas seeks to take advantage of the recognition that visual symbol and written text can manifest a secular purpose in secular company, when it argues that its monument (like Moses in the frieze) is not alone and ought to be viewed as only 1 among 17 placed on the 22 acres surrounding the State Capitol. Texas, indeed, says that the Capitol grounds are like a museum for a collection of exhibits, the kind of setting that several Members of the Court have said can render the exhibition of religious artifacts permissible, even though in other circumstances their display would be seen as meant to convey a religious message forbidden to the State. . .

. . .

But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass.

. . .

. . . Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it.

To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment, . . . this distinction should make no difference. The monument in this case sits on the grounds of the Texas State Capitol. There is something significant in the common term "statehouse" to refer to a state capitol building: it is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion.

. . .