"THOU SHALT NOT BEAR FALSE WITNESS": "SHAM" SECULAR PURPOSES IN TEN COMMANDMENTS DISPLAYS

BY SUSANNA DOKUPIL*

The Ten Commandments

1 And God spake all these words, saying,
2 I am the LORD thy God, which have brought thee out of the land of Egypt, out of the house of bondage.
3 Thou shalt have no other gods before me.
4 Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:
5 Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation

* J.D. Harvard Law School, 2000; M.A. Church-State Studies, Baylor University, 1996; B.A. University Scholar, *magna cum laude*, 1994.

of them that hate me;
6 And showing mercy unto thousands of them that love me, and keep my commandments.
7 Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.
8 Remember the sabbath day, to keep it holy.
9 Six days shalt thou labor, and do all thy work:
10 But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates:
11 for in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it.
12 Honor thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.
13 Thou shalt not kill.
14 Thou shalt not commit adultery.
15 Thou shalt not steal.
16 Thou shalt not bear false witness against thy neighbor.
17 Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbor's.[1]

Last fall, the nation watched as Chief Justice Roy Moore of the Alabama Supreme Court proudly erected a two-and-a-half-ton granite monument right in the center of the rotunda of the state's courthouse. The monument was engraved with the Ten Commandments and other references to God from documents and people important to American history.[2] Courts quickly found the display unconstitutional,[3] amidst much public outcry from Moore's supporters.[4] Moore was removed from the bench by the Alabama Court of the Judiciary for violating canons of judicial ethics.[5]

While the courts were absolutely right to find the monument

1. *Exodus* 20:1-17 (King James).
2. *See* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294-95 (M.D. Ala. 2002).
3. *Id.*; *see also* Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003).
4. *See Movers Haul Away Ten Commandments*, FoxNews.com, *at* http://www.rense.com/general40/movers.htm (last visited Nov. 15, 2004) ("'Get your hands off our God, God haters!' yelled the wildly gesturing, red-faced man who initiated the chanting.").
5. *See Moore v. Judicial Inquiry Comm'n*, 2004 WL 922668 (Ala. Apr. 30, 2004), *cert. denied* 125 S. Ct. 103 (2004) (upholding the removal decision).

unconstitutional under current Supreme Court precedent, the incident highlights the importance of religious symbols to many American citizens.[6] Around the country, courts have faced constitutional challenges to the display of religious symbols on government property.[7]

---

6. The Eleventh Circuit recently affirmed the district court's dismissal of a complaint challenging the removal of the Moore monument on the basis that it established a religion of nontheism. *See* McGinley v. Houston, 361 F.3d 1328, 1330 (11th Cir. 2004). This case demonstrates the lengths to which citizens will go to defend what they view as an attack on their faith and their way of life.

7. See, *e.g.*, ACLU v. Ashbrook, 375 F.3d 484 (6th Cir. 2004) (challenging a judge's posting of the Ten Commandments and the Bill of Rights on a courtroom wall); Mercier v. Fraternal Order of Eagles, 2005 Lexis 9 (7th Cir. 2005); ACLU v. City of Plattsmouth, 358 F.3d 1020, 1036 (3d Cir. 2004) (challenging a Ten Commandments marker in a public park); ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003) (granting preliminary injunction directing the removal of Ten Commandments displays from schools and courthouses), *reh'g denied* 361 F.3d 928 (6th Cir. 2004), *cert. granted* 125 S.Ct. 310 (2004); Newdow v. United States Congress, 292 F.3d 597, 600 (9th Cir. 2002) (challenging the constitutionality of the phrase "under God" in the pledge of allegiance), *amended by* Newdow v. United States Congress, 328 F.3d 466, 468 (9th Cir. 2003), *rev'd by* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2305 (2004); Freethought Soc'y v. Chester County, 334 F.3d 247 (3rd Cir. 2003) (challenging a Ten Commandments plaque on the county courthouse); ACLU v. Schundler, 168 F.3d 92, 94 (3d Cir. 1999) (challenging a holiday display); Suhre v. Haywood County, 131 F.3d 1083, 1084 (4th Cir. 1997) (challenging a Ten Commandments display in a county courtroom); Carpenter v. City & County of San Francisco, 93 F.3d 627, 628 (9th Cir. 1996) (challenging the display of a large cross on a mountain designated as public property); Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1385 (11th Cir. 1993) (challenging the state's denial of a petition to remove a display of a menorah during Chanukah); Gonzales v. N. Township, 4 F.3d 1412, 1414 (7th Cir. 1993) (challenging a crucifix in a public park); Kreisner v. City of San Diego, 1 F.3d 775, 776 (9th Cir. 1993) (challenging a Christmas display on public property); Ellis v. City of La Mesa, 990 F.2d 1518, 1520 (9th Cir. 1993) (consolidating challenges to two Latin crosses on public property and a cross in a town emblem); Doe v. Small, 964 F.2d 611, 612 (7th Cir. 1992) (challenging an outdoor display of sixteen paintings of Christ in a public park during the Christmas season); Hewitt v. Joyner, 940 F.2d 1561, 1563 (9th Cir. 1991) (challenging a biblical statuary display in a municipal park); ACLU v. Wilkinson, 895 F.2d 1098, 1099 (6th Cir. 1990) (challenging a holiday manger scene on the grounds of the capitol); Smith v. County of Albermarle, 895 F.2d 953, 954 (4th Cir. 1990) (challenging a creche on the grounds of a county office building); Kaplan v. City of Burlington, 891 F.2d 1024, 1025 (2d Cir. 1989) (challenging a menorah in City Hall Park); ACLU v. City of St. Charles, 794 F.2d 265, 267 (7th Cir. 1986) (protesting a lighted cross on a fire station at Christmas); ACLU v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1101 (11th Cir. 1983) (challenging a Latin cross in a state park); ACLU v. Hamilton County, 202 F. Supp. 2d 757, 761 (E.D. Tenn. 2002) (challenging the Ten Commandments in three Tennessee courthouses); Kimbley v. Lawrence County, 119 F. Supp. 2d 856, 858 (S.D. Ind. 2000) (granting an injunction against the display of the Ten Commandments on the courthouse lawn); Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667, 669-71 (E.D. Ky. 2000) (challenging a Ten Commandments display at a local school); ACLU v. Pulaski County, 96 F. Supp. 2d 691, 695 (E.D. Ky. 2000) (challenging a Ten Commandments display at the county courthouse); Harvey v. Cobb, 811 F. Supp. 669, 670 (N.D. Ga. 1993) (challenging a Ten Commandments display in the county courthouse building); Murphy v. Bilbray, 782 F. Supp. 1420, 1422 (S.D. Cal. 1991) (challenging the display of two Latin crosses in a public park on printed materials associated with the city); Mendelson v. City of St. Cloud, 719 F. Supp. 1065 (M.D. Fla. 1989) (protesting the display of a Latin cross on a city water tower); Jewish War Veterans v. United States, 695

Under the United States Constitution, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[8] Thomas Jefferson once used the metaphor of a "wall of separation between church and State" to describe the First Amendment.[9] Justice Hugo Black, a strong supporter of a strict separation of church and State, accorded that resonant metaphor an almost liturgical quality and added a chorus: "The wall must be kept high and impregnable."[10] Although scholars and judges have questioned whether this metaphor accurately portrays the legal effect of the Establishment Clause,[11] polls show that Americans generally agree with this portrayal of the church-state relationship.[12]

Yet, the experience in Alabama demonstrates that Americans may perceive the Establishment Clause's parameters slightly differently in practice. A recent poll by the Public Broadcasting System found that 40% of Americans surveyed believe the nation is "guided . . . by Judeo-Christian beliefs inspired by God," and 68% believe it "should be permissible to install a monument to the 10 Commandments" in a courthouse.[13] Notwithstanding Supreme Court rulings suggesting that

---

F. Supp. 3, 4 (D.D.C. 1988) (challenging a sixty-five-foot Latin cross displayed on a United States naval base in Hawaii); Freedom from Religion Found., Inc. v. Zielke, 663 F. Supp. 606, 607 (W.D. Wis. 1987) (challenging a Ten Commandments monument in a city park); ACLU v. Miss. State Gen. Servs. Admin., 652 F. Supp. 380, 381 (S.D. Miss. 1987) (challenging a lighted cross on state-owned property at Christmas); ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984) (challenging three crosses and a Star of David in a public park); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 340 (Or. 1976) (challenging the erection of a Latin cross in a municipal park).

8. U.S. CONST. amend. I.

9. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 282 (Andrew Lipscomb ed. 1905).

10. Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Black, J., dissenting); *see also* Bd. of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting); Illinois *ex. rel* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (Black, J.); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (Black, J.).

11. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 98, 113 (1985) (Rehnquist, J., dissenting); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 774 (7th Cir. 2000) (Coffey, J., dissenting).

12. *See* The Williamsburg Charter Foundation, *The Williamsburg Charter Survey on Religion and Public Life* 1 (1988) *cited in* STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING 2 (1993), (noting that the survey responses revealed that 51% of the general population, 77% of government leaders, 92% of academics, and 79% of media leaders agreed with the "wall of separation" metaphor). A more recent survey, *Religion and Public Life* (2000), found that 40% of Americans were "quite interested" in maintaining strict separation between church and state; 27.7% were "fairly interested"; and 28.9% were "not interested." American Religion Data Archive, *at* http://www.thearda.com/FR_Index.html?/archive/Description/RELPUB.html (last visited Nov. 15, 2004).

13. *Flashpoints USA*, PBS.org (Dec. 19-21, 2003), *at* http://www.pbs.org/flashpointsusa/20040127/tvpoll_results.html (last visited Nov. 15, 2004).

religious symbols standing alone on government property are unconstitutional,[14] a number of organizations, the most well-known of which are the Family Research Council and Focus on the Family, have mobilized support for defending Ten Commandments displays on government property.[15] Lawmakers in Kentucky and Indiana have made a concerted effort to post the Ten Commandments in schools.[16] Indeed, Justice Roy Moore built his career on posting the Ten Commandments in courthouses[17]—a career that even contemplated a third-party run for the presidency.[18]

That posting the Ten Commandments has become a popular rallying cry with certain conservative segments of the population indicates that religious symbol displays will continue to spawn litigation. But, the body of applicable precedent is murky at best. The fact-intensive inquiry required by the endorsement test, which typically governs First Amendment analysis of religious symbol cases,[19] yields little predictability. Requiring the display to have a

---

14. *See* County of Allegheny v. ACLU, 492 U.S. 573, 574 (1987); Stone v. Graham, 449 U.S. 39 (1980).

15. *See, e.g.*, Tarik Abdel-Monem, *Note: Posting the Ten Commandments as a Historical Document in Public Schools*, 87 IOWA L. REV. 1023, 1043-46 (2002); *Left Field*, The Texas Observer (Nov. 12, 1999), *at* http://www.texasobserver.org/showArticle.asp?ArticleID=213 (last visited Nov. 15, 2004) (describing the Family Research Council's movement to "Hang Ten"); *Dobson Urges Support of 'Ten Commandments Justice,'* Family.org, (Aug. 25, 2003), *at* http://www.family.org/welcome/press/a0027474.cfm (last visited Nov. 15, 2004) (asking listeners of Dr. James Dobson's popular Christian radio show to travel to Montgomery, Alabama to support Justice Roy Moore); *About the Foundation*, Foundation for Moral Law, Inc., *at* http://www.morallaw.org/about.htm (last visited Nov. 15, 2004) (noting that the foundation's three-fold purpose is to (1) defend the "right to acknowledge Almighty God" (including the defense of Roy Moore); (2) "[e]ducate the public about the U.S. Constitution and the Godly foundation of the United States of America; and (3) "reestablish society with good morals and values as set forth in the Holy Bible); *'10 Commandments Revolution' Launched: Man Wants to See ACLU 'Go Crazy' as Signs Crop up Nationwide*, WorldNetDaily.com, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34810 (last visited Nov. 15, 2004) (describing a 33-year-old "average guy who's fed up and wants to do something" launching a campaign to distribute Ten Commandments signs across the country).

16. Lonnie Harp, *Commandments are a Hot Topic in Many States*, THE COURIER JOURNAL (Feb. 20, 2000) *at* http://www.courier-journal.com/localnews/2000/0002/20/000220comm.html (last visited Nov. 15, 2004).

17. *Reclaiming America: Defending the 10 Commandments*, The Center for Reclaiming America, *at* http://www.reclaimamerica.org/PAGES/10Commandments/MooreTime.asp (last visited Nov. 15, 2004).

18. *Roy Moore for President?: 'Ten Commandments Judge' Won't Rule Out Challenge to Bush*, WorldNetDaily.com, (Feb. 2, 2004) *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36899 (last visited Nov. 15, 2004) (reporting that Moore has also considered running for governor of Alabama).

19. *See* discussion *infra* Part II.

secular purpose clouds the issue further.

Only one presentation of the Ten Commandments on government property has the Supreme Court's explicit blessing: the one in its courtroom. That frieze on the north and south walls features civilization leaders, including Moses, Hammurabi, Solomon, Confucius, and Octavian.[20] As Justice Stevens has noted, the carving "signals respect not for great proselytizers, but for great lawgivers."[21]

Depictions of the Ten Commandments elsewhere have fared less well.[22] More often than not, courts find them unconstitutional, in part because they believe the government entity in question intended to advance religion. Accurately discerning intent, however, is far from an exact science.[23] In fact, courts often derive evidence of purpose from the overall effect of the display.[24] Given the problems inherent in convincing a hostile court that a display featuring a religious symbol has a secular purpose,[25] and the fact that secular purpose analysis rarely changes the ultimate conclusion,[26] streamlining the analysis by focusing solely on the observer's perception of the overall effect[27] would improve both the court's clarity of reasoning and its credibility with the average American without eroding the Establishment Clause's protection.

I. REMEMBER THY HISTORY, HOLY OR NOT

In erecting Ten Commandments displays, the articulated purpose most often alludes either to the document's role in the evolution of law or to the need for a universal moral code.[28] The Ten

20. *Courtroom Friezes, North and South Walls,* Supreme Court of the United States, *at* http://www.supremecourtus.gov/about/north&southwalls.pdf (last visited Nov. 15, 2004).

21. County of Allegheny v. ACLU, 492 U.S. 573, 652-53 (Stevens, J., concurring in part and dissenting in part); *see also* City of Elkhart v. Books, 532 U.S. 1058, 1062 (2001) (Rehnquist, C.J., dissenting from denial of certiorari).

22. *See, e.g.*, ACLU v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004) (finding display of Ten Commandments unconstitutional); Baker v. Adams County/Ohio Valley Sch. Bd., Nos. 02-3776, 02-3777 2004 U.S. App. LEXIS 481 (6th Cir. Jan. 12, 2004) (unpublished); ACLU v. McCreary, 354 F.3d 438, 440 (6th Cir. 2003); Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003); Adland v. Russ, 307 F.3d 471, 474 (6th Cir. 2002); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 768 (7th Cir. 2001); Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000); Mercier v. City of La Crosse, 276 F.Supp. 2d 961, 980 (W.D. Wis. 2003).

23. *See* discussion *infra* Part III.B.2.

24. *See* discussion *infra* Part II, III, IV.

25. *See* discussion *infra* Part III, IV.

26. *See* discussion *infra* Part II, III, IV.

27. This analysis would employ the endorsement test. *See* discussion *infra* Part II.

28. *E.g.*, Adland v. Russ, 307 F.3d 471, 475 (6th Cir. 2002) (noting that the Fraternal Order of the Eagles donated the monument with the purpose of teaching morality to the

Commandments laid the foundation for the English common law and the Napoleonic Code, which, in turn, laid the foundation for American jurisprudence.[29] Indeed, the laws of King Alfred, founder of the English common law, began with the Ten Commandments.[30] Even former presidents have readily acknowledged the importance of the Decalogue to the law.[31]

More generally, elements of Judeo-Christian tradition pervade many aspects of our society, and have since the time of the country's founding with the blessing of the founding fathers.[32] The currency bears the slogan "In God We Trust." Thanksgiving, a national holiday, began when George Washington proclaimed a day of prayer "to be observed by acknowledging with grateful hearts the many and signal favors of almighty God."[33] Thomas Jefferson arranged for annual cash support for a Roman Catholic priest to provide services to the Indian tribes.[34] Congress pays a salary to a legislative chaplain.[35]

---

younger generation); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001) (noting that the monument reminds society of the core values and history of our legal tradition); Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) (noting that the monument dedication included speeches about the importance of the unchanging moral values embodied in the Ten Commandments).

29. *See* Books v. City of Elkhart, 235 F.3d 292, 312-13 (7th Cir. 2000) (Manion, J., dissenting) (internal citations omitted).

30. Harold J. Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach*, 21 U. CAL. DAVIS L. REV. 549, 561 (1988) (noting that the laws of King Alfred begin with the Ten Commandments); *see also* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW, at 1 (1958) (noting that in the history of American institutions no other book—except Blackstone's *Commentaries on the Laws of England*—has played as great a role as the Bible).

31. *E.g.*, JOHN ADAMS, *On Government*, *in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 9 (Charles C. Little & James Brown eds. 1958) ("If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."); *President's Address Before the Attorney General's Conference on Law Enforcement Problems* (Feb. 15, 1950), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY TRUMAN 157 (1965) ("The fundamental basis of this Nation's laws was given to Moses on the Mount.").

32. *See* Lynch v. Donnelly, 465 U.S. 668, 674 (1984) ("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."). The Supreme Court discusses this position extensively in *Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983) (holding that Nebraska's employment of an official Legislative Chaplain did not violate the Establishment Clause). Examining whether the *Marsh* 'exception' to the *Lemon* rule should be confined to specific practices that have continued since the founding or should be extended to other religious displays is beyond the scope of this article. This article takes *Allegheny*'s adoption of the endorsement test for religious display cases as the point of departure and focuses on the rule of secular purpose in that analysis in cases after that 1987 decision.

33. Wallace v. Jaffree, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 779 (7th Cir. 2001) (Coffey, J., dissenting) (quoting from Washington's speech at length).

34. *Wallace*, 472 U.S. at 103.

35. *Marsh*, 463 U.S. at 788-89.

The Supreme Court opens its sessions with "God save the United States and this Honorable Court."[36] Since 1954, the Pledge of Allegiance has included the words "under God."[37]

The Ten Commandments are similarly a part of American society. Many contemporary laws have parallels in the Ten Commandments, including prohibitions against murder, blasphemy, adultery, theft, lying, and even Sunday closings.[38] Judicial opinions from a half-century ago regularly mention the Ten Commandments as part of a universally recognized code of conduct. This example from 1950 is illustrative:

> In American life the family is the foundation on which democratic institutions are reared. The church and the school are but auxiliaries to the family. The school, private, public and college is the offspring of the church. Different species of democracy have existed for more than 2,000 years, but democracy as we know it has never existed among the unchurched. A people unschooled about the sovereignty of God, the ten commandments and the ethics of Jesus, could never have evolved the Bill of Rights, the Declaration of Independence and the Constitution. There is not one solitary fundamental principle of our democratic policy that did not stem directly from the basis moral concepts as embodied in the Decalog [sic] and the ethics of Jesus.[39]

A criminal case from Colorado in 1945 concludes: "One of the ten commandments is, 'Thou shalt not kill.' This is incorporated into our statute. Defendant violated the laws of both God and man . . . ."[40] A New York bigamy case, also from 1945, explains that "[t]he natural law was codified in the Ten Commandments. By the natural law, the

---

36. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952).

37. Newdow v. United States Congress, 292 F.3d 597, 600 (9th Cir. 2002) (challenging the constitutionality of the phrase "under God"), *amended by* Newdow v. United States Congress, 328 F.3d 466 (9th Cir. 2003), *rev'd by* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2305, 2312 (2004).

38. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibition of murder, theft, and adultery reinforce commands of the Decalogue."); Bertera's Hopewell Foodland, Inc.v. Masters, 236 A.2d 197, 200-01 (Pa. 1967) (noting that Sunday closing laws derive from the Ten Commandments); State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 768 (N.D. 1966) ("[M]urder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation . . . . The same could be said of theft, fraud, etc. because those offenses were also proscribed in the Decalogue.") (internal citations omitted); Anderson v. Maddox, 65 So. 2d 299, 301-02 (Fla. 1953) ("'Thou shalt not steal' and 'thou shalt not bear false witness' are just as new as they were when Moses brought them down from the Mountain.")(Terrell, J., concurring).

39. State ex rel. Tampa, Florida, Co. of Jehovah's Witnesses v. City of Tampa, 48 So. 2d 78, 79 (Fla. 1950) (overturning denial of a permit to construct a church).

40. Silliman v. People, 162 P.2d 793, 800 (Colo. 1945).

unity of the matrimonial bond and its indissolubility and permanency are essential properties of conjugal society."[41]

In describing a fiduciary's duty of loyalty to his principal, a Texas court noted: "It has long been known and recognized by mankind throughout all the ages. It is written in the Ten Commandments, on the Twelve Tables, in the laws of every nation, and in the heart of every man."[42] A Wyoming court referenced an excerpt from an editorial describing a 1946 embezzlement case which observed that "[t]he Ten Commandments will not budge, And stealing will continue stealing."[43] Finally, in California, a school principal testified as to a criminal defendant's sanity in 1949. He claimed that the defendant knew right from wrong because "[w]e teach the Ten Commandments, the moral law[,] and we definitely taught him the Commandment, 'Thou shalt not kill.' He knew that killing was wrong. I am sure of it."[44]

Against this background of regular acknowledgment of the Ten Commandments' role in good citizenship, Minnesota juvenile court judge E.J. Ruegemer partnered with the Fraternal Order of Eagles in the 1940s to provide a "nonsectarian" version of the Ten Commandments to instill morality in youth across the country.[45] This partnership seems natural and reasonable once one realizes that "nonsectarian" in this context meant that the text distilled the essence of the Protestant, Catholic, and Jewish versions into a form that represented all three groups.[46] In that day, Protestant, Catholic, and Jewish constituted nearly everyone. Even as late as 1972, according to the National Opinion Research Center, those three groups combined accounted for 93% of the United States' population.[47] In 2002, those three groups combined still accounted for nearly 80% of the U.S. population.[48] Although no government entity should discriminate against minority religions, the fact that a three-faith model held sway around the time the Eagles' monuments were erected should

41. Sodero v. Sodero, 56 N.Y.S.2d 823, 827 (1945).

42. Rio Securities Co. v. Wassel, 64 F. Supp. 881, 884 (S.D. Tex. 1946).

43. State v. Hambrick, 196 P.2d 661, 665 (Wyo. 1946).

44. People v. Thompson, 211 P.2d 1, 5 (Cal. Dist. Ct. App. 1949).

45. Books v. City of Elkhart, 235 F.3d 292, 294 (7th Cir. 2000).

46. *Id.*

47. Cathleen Falsani, *Protestants Soon to be Minority in US, Study Finds,* CHICAGO SUN TIMES, July 21, 2004, *available at* http://www.suntimes.com/output/religion/cst-nws-prots21.html (last visited Nov. 15, 2004). Protestants comprised 62.5%, Catholics 27.4% and Jews 3.0% in 1972. *Id.*

48. *Id.* Protestants comprised 52.4%, Catholics 25.5%, and Jews 1.5%.

illuminate their purpose.[49] Note too, that the Quran parallels the Ten Commandments,[50] although Muslims were not considered part of the three-faith "nonsectarian" group back then.

In that era, a proffered intent to provide a universal code of morality through the Ten Commandments without proselytizing for any particular religion was a sincere secular purpose. Recall, too, that the Supreme Court did not even incorporate the Establishment Clause against the States until 1947[51] and would not develop a body of precedent suggesting that displaying the Ten Commandments on government property might be unconstitutional for several more decades. Even today, a legislator who ascribes to the values the Ten Commandments promote may honestly believe that erecting a monument printed with their text properly honors a moral consensus, the nation's history, or the foundation of its laws independently of the religious content. But, especially in analyzing older monuments from the three-faith-consensus era, courts should not automatically equate that era's intent to display the Ten Commandments with an unconstitutional intent to promote a particular religion.[52]

The automatic equation of intent to display with intent to promote religion is precisely illustrated in *Books v. City of Elkhart*.[53] Plaintiffs challenged a Ten Commandments monument in the city of Elkhart, Indiana, donated in 1958 by the Fraternal Order of Eagles, on Establishment Clause grounds after the city denied a request in 1998 to remove it.[54] In refusing to take down the monument, the city noted that the Ten Commandments "have had a significant legal impact on the development of the fundamental legal principles of Western Civilization," and the monument "is a historical and cultural

49. The three-faith model is obsolete today, but it was prominent in the 1950s. United States Information Agency, *Portrait of the United States of America*, *at* http://usinfo.state.gov/usa/infousa/facts/factover/ch8.htm. (last visited Nov. 15, 2004).

50. Larry Copeland, *Church-and-State Standoffs Spread over USA*, USA TODAY, Sept. 20, 2003, *available at* http://www.usatoday.com/news/nation/2003-09-29-religious-usat_x.htm (last visited Mar. 15, 2004) (quoting Mugtedar Khan, a Muslim scholar, as asserting this fact); *see also* A. Arshed, *Islam Supports Bible's Ten Commandments*, ISLAM 101, *at* http://www.islam101.com/religions/TenCommandments/tcQuran.htm (Aug. 26, 2003).

51. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause to the states); *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause to the states).

52. Recognizing an honest intention to proffer a secular purpose does not render a display constitutional. The court will still have to analyze the appearance of the Ten Commandments in context, and that context may unconstitutionally advance religion regardless of intent. *See* discussion *infra* Part II.

53. 235 F.3d 292 (7th Cir. 2000).

54. *Id.* at 296-97.

monument that reflects one of the earliest codes of human conduct."[55] The Seventh Circuit, however, found that the city had a religious purpose, evidenced by the Ten Commandments' essentially religious character which the city had not diminished.[56] The court found it significant that the code of conduct concerned man's relationship with God and that religious leaders spoke at the initial dedication, and it concluded that the real purpose was to encourage adoption of religious precepts, which is unconstitutional.[57] Thus, the Seventh Circuit viewed the older monument through a modern lens and substituted its opinion of the city's purpose for the city's stated purpose.

Books illustrates the particular problem presented by a Ten Commandments display—unlike a Latin cross or crèche, the Decalogue is both secular and religious. As the dissent in *Books* meticulously explained, the majority cannot both recognize that the Ten Commandments "played a role in the secular development of our society" and excoriate the city for lacking a secular purpose.[58]

Intent is only one constitutional hurdle a Ten Commandments display must clear under current law. Removing it from the analysis would alleviate a significant barrier to fairness in ascertaining the constitutionality of a Ten Commandments display while leaving intact the tests that already pull more of the weight.

II. HONOR SUPREME COURT PRECEDENT, THAT THY DISPLAY'S DAYS MAY BE LONG UPON GOVERNMENT PROPERTY

Two key Supreme Court cases primarily govern the lower courts' analyses: *Lynch v. Donnelly*[59] and *County of Allegheny v. ACLU*.[60] In *Lynch*, the city of Pawtucket, Rhode Island had presented an annual Christmas display for forty years.[61] This display included a crèche along with a mélange of secular symbols, including reindeer pulling Santa's sleigh, a Christmas tree, and a "Seasons Greetings" banner.[62]

55. *Id.* at 297 (quoting the Common Council of the City of Elkhart).
56. *Id.* at 302-03.
57. *Id.* at 303-04.
58. *Id.* at 313.
59. 465 U.S. 668 (1984).
60. 492 U.S. 573 (1989).
61. 465 U.S. at 671.
62. *Id.* The display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing . . . a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche . . . . The crèche, which has been included in

The Court found this display constitutional in a 5-4 opinion under the three-prong test enunciated in *Lemon v. Kurtzman*:[63] (1) it had the legitimate secular purpose of celebrating Christmas and depicting the holiday's origins;[64] (2) it did not have the primary effect of advancing religion because, *inter alia*, any benefit to religion was indirect;[65] and (3) the display did not foster entanglement between religion and the state.[66] Significant to the Court's analysis was the presence of the secular symbols alongside the religious ones—a fact that gave rise to the so-called "plastic reindeer rule."[67]

In retrospect, more important than the majority opinion in *Lynch* is Justice Sandra Day O'Connor's concurrence.[68] There, she articulated the endorsement test for religious display cases:

> The . . . more direct infringement [than excessive entanglement between government and religion] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[69]

The endorsement test encompasses the secular purpose and primary effect prongs of the *Lemon* test.[70] Thus, it looks both to the intent of the speaker and to the objective meaning of the statement.[71] The purpose prong under the endorsement test amounts to intent: "whether the government intends to convey a message of endorsement or disapproval of religion."[72] And the effect prong requires "that a government practice not have the effect of communicating a message

---

the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'."

63. 403 U.S. 602 (1971). The *Lemon* test requires that "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (internal citations omitted).

64. *Lynch*, 465 U.S. at 681.

65. *Id.* at 683.

66. *Id.* at 683-84.

67. *E.g.*, Kevin J. Hasson, *God and Man at the Supreme Court: Rethinking Religion in Public Life*, Address at the Russell Kirk Memorial Lectures, The Heritage Foundation (Oct. 14, 1997), *available at* http://www.heritage.org/Research/Religion/HL599.cfm, at 4 (last visited Feb. 26, 2004).

68. 465 U.S. at 687-94 (O'Connor, J., concurring).

69. *Id.* at 688.

70. *Id.* at 690.

71. *See id.*

72. *Id.* at 691.

of government endorsement or disapproval of religion."[73] Critical to the endorsement test's application are the unique circumstances of each case.[74] In *Allegheny v. ACLU*, five years after *Lynch*, the Court examined another religious display in Pittsburgh, Pennsylvania.[75] There, the county had allowed a Catholic group, the Holy Name Society, to erect a crèche on the grand staircase of the Allegheny County Courthouse to celebrate the holiday season.[76] It also had a Chanukah menorah, a Christmas tree, and a sign saluting liberty outside the City-County Building.[77] Most importantly for this discussion, the *Allegheny* majority adopted Justice O'Connor's endorsement test as the standard by which future religious display cases should be judged.[78]

Applying that test, the Court held, in a 5-4 decision, that the crèche, standing alone in a prominent place on government property, violated the Establishment Clause.[79] Judging the crèche in its context, nothing detracted from its religious message.[80] Plus, its physical setting at the top of the grand staircase conveyed that the county endorsed the religious message of the crèche.[81] Finally, the sign indicating that a private group sponsored the display did not serve as a disclaimer—in context, it merely suggested that the government endorsed the private group's message.[82]

The display outside the City-County Building, however, was constitutionally acceptable.[83] Even though the menorah had both secular and religious connotations, its setting next to the Christmas tree and the Salute to Liberty sign created an "overall holiday setting"[84] that celebrated both Christmas as a secular holiday and

---

73. *Id.* at 692.

74. *Id.* at 694.

75. 492 U.S. 573 (1989).

76. *Id* at 578-79. "The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims 'Gloria in Excelsis Deo!'" *Id.* at 580. The crèche was surrounded by poinsettia plants and two evergreen trees. *Id.*

77. *Id.* at 578. The sign read: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 582.

78. *Id.* at 595, 597.

79. *Id.* at 598, 601-02.

80. *Id.* at 598.

81. *Id.* at 599-600.

82. *Id.* at 600.

83. *Id.* at 614-16.

84. *Id.* at 614.

Chanukah as an "alternative tradition."[85] The combined effect of the three objects, in the Court's view, was secular, even though the menorah had religious connotations. Thus, the state may display either a purely religious symbol or a symbol with mixed secular and religious connotations so long as the totality of the display does not convey a message that the government endorses religion.

Interestingly, despite Justice O'Connor's emphasis on secular purpose in her *Lynch* concurrence, the majority in *Allegheny* practically ignored the purpose behind the displays. It did mention that government has a legitimate secular purpose in acknowledging religion to "solemniz[e] public occasions, express[] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society."[86] Unquestionably, the *Allegheny* Court believed in the theory that secular purpose analysis forms an essential part of the endorsement test. Yet the majority did not specifically discuss the county's intent behind either the crèche or the "overall holiday setting." Presumably, it inferred a legitimate intent from the context—as the Court stated in *Lynch*, Pawtucket had a secular purpose in displaying the crèche "to depict the origins of that Holiday."[87]

Significantly, neither *Lynch* nor *Allegheny* suggests that direct evidence of secular purpose was available to the Court. The Court, then, implicitly blessed the principle of inferring purpose from context as part of a larger endorsement inquiry. Secular purpose had more independent functionality in Justice O'Connor's concurrence in *Lynch* than it did in the *Allegheny* majority opinion. One could argue that the emphasis in *Lynch* was designed to tie the new endorsement test more closely to two of the prongs of the familiar tripartite *Lemon* test. In any event, once the Court recognized a legitimate secular purpose in "solemnizing public occasions," "depicting the origins of a holiday," and "encouraging recognition of what is worthy of appreciation," it broadened the definition of secular purpose to the point where nearly any display should meet it. Despite these broadly defined parameters, many displays still fail secular purpose once a court derives its understanding of the purpose from the effect.

The fact that the Court let the "effect of advancing religion" component of the endorsement test do the lion's share of the work in

85. *Id.* at 618.
86. *Id.* at 625 (citing *Lynch*, 465 U.S. at 693 (internal quotation marks omitted)).
87. *Lynch*, 465 U.S. at 681.

Allegheny calls into question the practical necessity of focusing sharply on the purpose prong. Indeed, the Court explains that "[t]he effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'"[88] If the reasonable observer can infer the government's purpose from the overall context of the display, then the effect and the purpose become one. To the extent that the "real" purpose of a display may conflict with the apparent one, this language from *Lynch* and *Allegheny* suggests that the perception of the reasonable observer should dominate the analysis.

Justice O'Connor further clarified her view of the reasonable observer in her concurrence in *Capitol Square Review and Advisory Board v. Pinette*.[89] She explained that

> the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears . . . . An informed member of the community will know how the public space in question has been used in the past—and it is that fact, not that the space may meet the legal definition of a public forum, which is relevant to the endorsement inquiry.[90]

Again, her description supports collapsing purpose and effect. To the extent that the state's purpose in creating a display is relevant, it is only relevant to the extent that it impacts the perception of the reasonable observer.

Yet, as the lower courts have interpreted *Lynch* and *Allegheny*, they have applied the endorsement test more as a "two-out-of-three" *Lemon* test.[91] A superior approach would be to follow the actions of the *Allegheny* Court—though not its rhetoric—and look simply to the effect.

III. THOU SHALT NOT PROFFER SHAM PURPOSES

A. From Whence Cometh Secular Purpose?

Despite the plastic-reindeer-rule jokes,[92] the endorsement test

88. *Allegheny*, 492 U.S. at 595 (citing *Lynch*, 465 U.S. at 692).

89. 515 U.S. 753 (1995) (holding that a display of a cross by the Ku Klux Klan in a public forum did not violate the Establishment Clause).

90. *Id.* at 780-81.

91. *See* discussion *infra* Part IV.

92. *See, e.g.*, Am. Jewish Cong. v. Chicago, 827 F.2d 120, 130 (7th Cir. 1987)

predominates in judging religious display cases.[93] Because that test purports to encompass the first two prongs of the *Lemon* test,[94] secular purpose *vis-à-vis* endorsement tends to function identically to the initial *Lemon* inquiry.[95]

Under the traditional *Lemon* analysis, the absence of secular purpose renders a government action unconstitutional regardless of its primary effect.[96] As Michael McConnell has noted, "[t]he Establishment Clause would seem to be the sole doctrinal field in which intent, divorced from results, can lead to a finding of unconstitutionality."[97] Yet in practice, purpose alone rarely invalidates a religious symbol display—the courts typically find the

---

(Easterbrook, J., dissenting) (arguing that "[I]t would be appalling . . . [to have] witnesses testifying that they were offended — but would have been less so were the crèche five feet closer to the jumbo candy cane"); ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting) (referring to the endorsement test as the "St. Nicholas too" test).

93. *See, e.g.*, Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000); Murray v. City of Austin, 947 F.2d 147, 153-58 (5th Cir. 1991); Foremaster v. City of St. George, 882 F.2d 1485, 1491 (10th Cir. 1989).

94. *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). Although some scholars have suggested that secular purpose is not a part of the endorsement test, *cf.* Paul Jefferson, Note, *Strengthening Motivational Analysis Under the Establishment Clause: Proposing a Burden-Shifting Standard,* 35 IND. L. REV. 621, 629 n.64 (2002), the *Santa Fe* Court's opinion indicates that it is. It articulated the endorsement test: "[i]n cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools.'" Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000). Then, in the next paragraph, the Court examines secular purpose, concluding that the school district's proffered purpose was a sham. *Id.* Significantly, the Court held that the prayer-at-football-games policy both lacked a secular purpose and would convey a message of state sponsorship of the prayer to reasonable observers. *Id.* at 308-10.

95. This article confines itself to secular purpose as it relates to the endorsement test. The general issues surrounding secular purpose analysis have been recently debated more broadly elsewhere. *See, e.g.*, Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1 (2002); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002); Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L. J. 1 (1991); Hal Culbertson, Note, *Religion in the Political Process: A Critique of* Lemon*'s Purpose Test*, 1990 U. ILL. L. REV. 915 (1991); Jefferson, *supra* note 94. Justice Scalia's concurrence in *Lamb's Chapel,* although talking about the *Lemon* test generally, sums up the present problem with secular purpose in the religious display context: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

96. Jefferson, *supra* note 94, at 623; *see also Santa Fe*, 530 U.S. at 314 ("Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose.").

97. Michael W. McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1, 48.

effect is also unconstitutional.[98]

In attempting to resolve a secular purpose question, a court may observe the language of the statute or act itself. Ostensibly, courts may also look to legislative history, including committee reports, debates, and hearings.[99] But these data points cannot yield a single, accurate measure of purpose. As Justice Scalia eloquently put it:

> For while it is possible to discern the objective "purpose" of a statute (*i. e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task . . . . To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.
>
> Putting that problem aside, however, where ought we to look for the individual legislator's purpose? . . . Quite obviously, "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968) . . . . Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications — for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?
>
> Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the

98. *But see* ACLU v. Rutherford County, 209 F. Supp. 2d 799, 809-12 (M.D. Tenn. 2002) (finding that a "Foundations of American Law and Government" display in the Rutherford County courthouse lacked a secular purpose, but the effect did not convey a message of government support for religion).

99. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137-47 (1975). In *Edwards v. Aguillard*, Justice Powell's concurrence uses this type of analysis to look behind the statutory language and discern the legislation's lack of secular purpose. *See* 482 U.S. 578, 597-99 (Powell, J., concurring); *see also* Culbertson, *supra* note 94, at 922-23 (explaining that one usually looks to legislative history when the statute is ambiguous, but that in motivational analysis the legislative process itself is suspect).

> intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?[100]

Proponents of secular purpose analysis believe this requirement protects the values embodied in the Establishment Clause.[101] As Andrew Koppelman has noted, "[t]he secular purpose requirement follows directly from a principle at the core of Establishment Clause: that government may not declare religious truth."[102] But for those who advocate a more limited reading of the Establishment Clause, the secular purpose requirement wreaks havoc on otherwise legitimate government intent.[103] Certainly the government should not establish religious orthodoxy, but the presence of a secular purpose, religious purpose, or no purpose behind a religious symbol display is so much less important than the effect that a purpose-based analysis causes more problems than it solves.

In fact, the problems inherent in discerning the actual purpose behind any given government action may erode the very protection proponents champion by yielding a malleable, and thus unpredictable, rule.[104] The very flexibility of the secular purpose rule allows judges to make personal judgments under the guise of precedent, a risky posture either for the religious adherent or for the committed atheist.

As early as 1810, the Court expressed concern over judging the motives behind the law rather than the law itself.[105] Some scholars have called for abandoning secular purpose because it tends to prevent religious persons from presenting their views in the legislative process, defies ascertainment, and lacks a standard for

---

100. *Edwards*, 482 U.S. at 636-38 (Scalia, J., dissenting); *see also* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (observing, in the context of allegedly racially motivated closing of swimming pools in Mississippi, that the court could not "determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators").

101. *See, e.g.*, Jefferson, *supra* note 94, at 622-23; *see generally* Koppelman, *supra* note 95.

102. Koppelman, *supra* note 94, at 89.

103. *Cf.* Books v. City of Elkhart, 235 F.3d 292, 313 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part).

104. Justice Scalia articulates the ambiguous rule in his dissent in *Edwards*:

> We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility toward religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional."

482 U.S. at 636 (Scalia, J., dissenting).

105. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810).

parsing a secular purpose from a religious one.[106] Others advocate relying on a pure effects test.[107] This latter position seems particularly appropriate in the endorsement context because the great weight of the analysis focuses on the effect of the display on the reasonable observer, as Part V will demonstrate.

B. Whither Goeth Secular Purpose?

Finding secular purpose typically presents a low bar.[108] A religious purpose combined with a secular purpose may satisfy the criteria.[109] In theory, any sincere secular purpose should satisfy *Lemon*, but in practice courts will find a government action unconstitutional where the religious purpose predominates.[110] If a secular purpose predominates, the odds of a court finding it constitutional will improve.[111] Generally, courts should defer to the government's stated purpose,[112] even if the policy in question is arguably religious.[113] But

---

106. *See* McConnell, *supra* note 97, at 49; Culbertson, *supra* note 95, at 950.

107. *See, e.g.*, Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 331 (1986). *But see* John Hart Ely, *Legislative and Administrative Motive in Constitutional Law*, 79 YALE L. J. 1205, 1316 (1970).

108. *See, e.g.*, Idleman, *supra* note 95, at 11& nn.46-47 (citing *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) and *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2nd Cir. 2002)).

109. *See, e.g.*, Lynch v. Donnally, 465 U.S. 668, 681 n.6 (1984) ("We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), requires. Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated."); Bowen v. Kendrick, 487 U.S. 589, 602 (1988) ("[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose . . . ."); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (noting that "a statute must be invalidated if it is entirely motivated by a purpose to advance religion," but finding that "a statute that is motivated in part by a religious purpose may satisfy [the secular purpose requirement of *Lemon*]"); *see also* Harris v. McRae, 448 U.S. 297, 319 (1980) ("[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" (citing *McGowan v. Maryland*, 366 U.S. 420, 422 (1961))).

110. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe 530 U.S. 290 (2000); Edwards v. Aguillard, 482 U.S. 578, 593 (1987); *Wallace*, 472 U.S. at 56.

111. *Cf. Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.").

112. *See Edwards*, 482 U.S. at 586 (noting that "the Court is normally deferential to a State's articulation of secular purpose," yet finding a sham secular purpose behind a statute requiring the teaching of creation science); Mueller v. Allen, 463 U.S. 388, 394-95 (1982) ("[G]overnmental assistance programs have consistently survived [the secular purpose] inquiry . . . . This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."); *Lemon*, 403 U.S. at 613 ("[N]othing . . . undermines the stated legislative intent; it must therefore be accorded

if the court finds an avowed secular purpose insincere, it may still declare the religious display unconstitutional.[114] This power to declare the stated purpose a sham in effect overrides the theoretical low bar. When the state actor's intent combines a religious and secular purpose and when which predominates is a close question, finding a secular purpose or lack thereof often lies in the eye of the beholder. The state action is thus subject to the mercy of the court rather than to a set of predictable rules.

1. Stone v. Graham

One of the key precedents for religious displays, *Stone v. Graham*, found such a sham purpose. There, the Kentucky legislature mandated the display of the Ten Commandments in public school classrooms.[115] "[T]he legislature required the following notation in small print at the bottom of each display of the Ten Commandments: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'"[116] But, the Court found that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[117] Although the Court recognized that the Ten Commandments (as well as other parts of the Bible) could properly and constitutionally be integrated into school curricula, it decided that the required posting "serve[d] no such educational function."[118] Rather, the Court said, "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[119]

Thus, in *Stone*, the Court set the stage for subsequent cases by declaring a stated purpose unconstitutional. Then-Justice Rehnquist, in dissent, decried the Court's refusal to grant the legislature's avowed purpose more deference.[120] The dissent argued that even

---

appropriate deference.").

113. *See Santa Fe*, 530 U.S. at 308 ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguish a sham purpose from a sincere one.'") (citing *Wallace*, 472 U.S. at 75).

114. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980).

115. *Id.* at 39.

116. *Id.* at 41.

117. *Id.*

118. *Id.* at 42.

119. *Id.*

120. *See id* at 43-44. Justice Rehnquist compared the Ten Commandments posting to

though the Ten Commandments are a sacred text, the fact remained that they had, as Kentucky submitted, impacted many subsequent legal codes.[121] The unique mixture of the sacred and secular in the Ten Commandments provides near-equal fodder for both the majority's and the dissent's positions, illustrating again the difficulties of discerning intent even in light of a stated secular purpose.

Significantly for this discussion, the *Stone* case examined effect in analyzing purpose. Although the Court intended the aforementioned reference incidentally, it suggests that the posting of the Ten Commandments would have failed the second prong of the *Lemon* analysis had the Court reached it.[122] The fact that the Ten Commandments stood alone, unflanked by other legal codes, indicates a high likelihood that the Court would have found that the primary effect, as it noted in dicta, was to advance religion through encouraging the veneration of a sacred text.

Whenever the state displays the Ten Commandments in any context, the secular purpose debate tends to follow the model exhibited in *Stone*. Because the nature of the government action has an inherently religious component, even if not wholly religious, parsing the religious purpose from the secular one or determining which controls poses obvious difficulties.[123] *Lynch* and *Allegheny*, however, teach that an inherently religious component need not in and of itself render an entire display unconstitutional. Moreover, in the case of older displays, purpose analysis often presents a timing problem. Should the court consider the original purpose or the contemporary one? Some courts have focused exclusively on the present-day purpose,[124] but others have looked to the original.[125]

---

the Sunday closing laws, which the Court upheld as secularly motivated despite the fact that they had the effect of advancing some individual religious beliefs. *Id* (citing *McGowan v. Maryland*, 366 U.S. 420, 445 (1961)). Indeed, the purpose behind the Sunday closing laws was "to provide a uniform day of rest for all citizens" on a day that conveniently coincided with Christian religious observances. *Id.*

121. *Id.* at 45.

122. Other courts have taken this suggestion very seriously. *See, e.g.*, Adland v. Russ, 307 F.3d 471, 481 (6th Cir. 2002); Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001), *cert. denied* 534 U.S. 1162 (2002) ("Beyond assessing the purpose expressly articulated by the state, we ensure that the stated secular purpose is legitimate by also examining the context and the content of the display.").

123. *See generally* Idleman, *supra* note 95, at 13-14 (noting that a finding of sham purpose tends to occur only in cases involving inherently religious acts like state-sponsored prayer or religious displays).

124. *See, e.g.*, Freethought Society v. Chester County, 334 F.3d 247 (3rd Cir. 2003) (upholding the constitutionality of an 82-year-old plaque because the county's purpose for retaining it was sufficiently secular); *see also* Idleman, *supra* note 95, at 14-15 (favoring

As a result, courts may use secular purpose (or lack of it) as a vehicle for implementing their own judgment as reasonable observers. Although courts frequently use secular purpose to declare Ten Commandments displays unconstitutional, in almost every case the effect prong alone would yield the same result.[126] As the next sections explain, recent Ten Commandments decisions appear to ratchet up the requirement for a secular purpose beyond what *Lemon*, *Lynch*, or *Allegheny* envisioned.[127] Avoiding the inquiry into purpose altogether enables legislators to focus on creating a display that a reasonable observer will perceive as an appropriate tribute to the nation's legal tradition rather than an attempt to proselytize. If legislators do not use the Ten Commandments in a display that passes the effects test, then the display of the Decalogue should be found unconstitutional. But forcing legislators to pronounce the magical mystery words that convince a court that the secular purpose outweighs the religious one merely obscures the real issue—the reasonable observer's perception—without offering much additional protection for Establishment Clause values.

2. Parsing the Sham Purpose from the Sincere One

Courts have almost universally accorded great weight to the *Stone* case in ascertaining the purpose behind a religious display. Despite the stated rule that courts defer to a proffered purpose, any display of an overtly religious symbol, such as the Ten Commandments or a Latin cross, seems to trigger suspicion that the purpose is not secular. As *Stone* indicated, the Ten Commandments are a "sacred text" and "no legislative recitation of a supposed secular purpose can blind us to that fact."[128] To the extent such suspicion exists, Chief Justice Rehnquist (who dissented in *Stone*) calls it into question in his recent dissent from the denial of certiorari in *City of Elkhart v. Books*,[129] a case in which the Seventh Circuit declared a Ten Commandments

---

this treatment of purpose).

125. *See, e.g.*, King v. Richmond County, 331 F.3d 1271 (11th Cir. 2003) (finding a court clerk's seal containing an outline of the Ten Commandments constitutional where the original purpose was probably to use a well-known symbol of the law).

126. *But see* ACLU v. Rutherford, 209 F. Supp. 2d 799 (M.D. Tenn. 2002) (finding a Ten Commandments display lacked secular purpose but did not have the effect of endorsing religion).

127. *Cf.* McGowan v. Maryland, 366 U.S. 420 (1961) (finding a secular purpose in laws prohibiting certain business practices on Sunday, even though such laws directly correspond with the commandment to observe the Sabbath).

128. Stone v. Graham, 449 U.S. 39, 41 (1980).

129. 532 U.S. 1058 (2001).

monument unconstitutional. Rehnquist explains that "[e]ven assuming that . . . the monument's appearance and history indicate that it has some religious meaning, the city is not bound to display symbols that are wholly secular, or to convey solely secular messages. In determining whether a secular purpose exists, we have simply required that the displays not be 'motivated wholly by religious considerations.'"[130] Similarly, Chief Justice Burger's opinion in *Lynch* admonishes against "[f]ocus[ing] exclusively on the religious component of any activity," as it "would inevitably lead to its invalidation under the Establishment Clause."[131]

Yet, separating the 'sham' purposes (unconstitutional) from the 'not wholly religious' ones (constitutional) often proves difficult. *Indiana Civil Liberties Union v. O'Bannon* offers an excellent illustration.[132] In *O'Bannon*, the Seventh Circuit considered the constitutionality of a Ten Commandments plaque in downtown Indianapolis.[133] In 1958, the Fraternal Order of Eagles had donated a plaque erected on the Indiana Statehouse grounds, and it remained until a vandal destroyed it in 1991.[134] Plaintiffs challenged a planned 7'x4', six-ton replacement monument inscribed not only with the Ten Commandments but also with the Bill of Rights from the United States Constitution and the Preamble to the 1851 Indiana Constitution.[135] Significantly for this discussion, the majority and dissent differed sharply on the purpose analysis.

The majority noted that "the state bears the burden of demonstrating that it has taken steps to obviate [the Ten Commandments'] religious purpose."[136] After acknowledging that it would defer to a non-sham purpose, the *O'Bannon* court promised to "ensure that the stated secular purpose is legitimate by also examining the context and the content of the display."[137] Here, as in *Lynch* and *Stone*, the court uses an effect analysis to ascertain purpose.

Ignoring the purpose of the 1958 display (because the replacement would be substantially different), the court focused on Governor O'Bannon's statement in announcing the monument, explaining that

130. *Id.* at 1062 (quoting Lynch v. Donnelly, 465 U.S. 668, 680 (1984)).
131. *Lynch*, 465 U.S. at 680.
132. 259 F.3d 766 (7th Cir. 2001).
133. *Id.* at 768.
134. *Id.*
135. *Id.* at 768-69.
136. *Id.* at 771 (internal quotation marks omitted).
137. *Id.* (citing Books v. City of Elkhart, 235 F.3d 292, 302-04 (7th Cir. 2000)).

the monument would "'be an integral part of the Statehouse setting, which honors the history of our state and our nation.'"[138] The Seventh Circuit rejected the purpose of reminding citizens of "'some of our nation's core values'" as nonsecular because the Ten Commandments contain religious values as well as secular ones—the values are only "core" to religious adherents.[139] Moreover, the court believed that the placement of the other texts on either side—a viewer would see only the Ten Commandments approaching head-on—undermined the State's "core values" argument.[140]

Judge Coffey, in dissent, argued the "not wholly religious" position: "[s]imply because some religious meaning is conveyed by a monument does not destroy a state's valid secular purposes for its display."[141] Finding no difference between Indiana's proposed monument combining religious and secular symbols of the nation's history and the frieze in the Supreme Court, he refused to believe that the four commandments referencing God should "so overshadow the remainder of the monument" that "the monument has no secular purpose whatsoever."[142] Plus, he found no reason to conclude Governor O'Bannon had not articulated a sincere secular purpose deserving of deference.[143]

The majority and dissent in *O'Bannon* highlight the vital role of the court's judgment in discerning secular purpose.[144] They also illustrate the unimportance of secular purpose in practice. The majority honed in, *inter alia*, on the monument's design in finding impermissible purpose, then used the same logic to conclude the effect was unconstitutional.[145] The dissent noted that the display in its entirety linked the Ten Commandments with the secular documents to convey a secular message,[146] then applied that same conclusion in finding that the design and placement of the monument did not have the effect of endorsing religion.[147] On both sides, ignoring the State's intent would not have changed the conclusion.

---

138. *Id.* at 771.
139. *Id.*
140. *Id.* at 771-73.
141. *Id.* at 775 (internal citations omitted).
142. *Id.* at 775-76.
143. *Id.* at 777-76.
144. *Books v. City of Elkhart*, 235 F.3d 292, 308 (7th Cir. 2000), also illustrates this principle.
145. *See O'Bannon*, 259 F.3d. at 771-73.
146. *See id.* at 776.
147. *See id.* at 778-79.

In *O'Bannon*, the Seventh Circuit had the luxury of an explicitly stated intent to evaluate, yet it still derived evidence of purpose from effect to find the proposed display unconstitutional. On the opposite end of the spectrum, the Eleventh Circuit had no evidence of purpose for the symbol in *King v. Richmond County*,[148] yet it upheld its constitutionality. In *King*, the Eleventh Circuit considered the constitutionality of a court clerk's 130-year-old official seal bearing a sword and two rectangular tablets with rounded tops inscribed with the Roman numerals I-X.[149] The seal appears nowhere but on authenticated legal documents.[150] Although no evidence of the original purpose remained, the District Court surmised that the symbol of a "widely recognized legal code" would "notify the reader that the stamped documents [were] court documents."[151] The *King* court held that the proposed plausible secular purpose would stand absent any evidence to rebut it.[152] Because the Ten Commandments had more secular than religious dimensions as a legal code (*contra* the 7th Circuit's holding in *O'Bannon*); the Ten Commandments symbol appeared with a sword, presumably to indicate the force of law; and the small seal had limited use and discrete placement, the court found its primary effect constitutional.[153]

Juxtaposing *King* and the two *O'Bannon* opinions reveals the tension inherent in the analysis. Even ignoring the problems with discerning which elements of legislative history or history of the display most accurately represent the state's purpose, or even when the members of the tribunal actually agree on the articulation of the purpose, one judge's legitimate secular purpose is another's sham.

Eliminating purpose analysis resolves this problem. Federal cases decided after *Allegheny*'s adoption of the endorsement rule suggest that purpose typically aligns with effect. Under current law, the state must show both a secular purpose and an effect that does not endorse religion. But, regardless of purpose, if the effect endorses religion, the display is still unconstitutional. As the following discussion of representative cases indicates, courts frequently use their perception of the display's history and context to color their purpose analysis.

148. 331 F.3d 1271, 1286 (11th Cir. 2003).

149. *Id.* at 1273-74.

150. *Id.* at 1274.

151. *Id.* at 1275 (internal quotation marks omitted).

152. *See id.* at 1277. The court carefully emphasized that "this analysis applies only when there is no evidence of governmental intent for adopting a practice." *Id.* at 1278.

153. *See id.* at 1283-86.

Subsuming that analysis entirely under the question whether the display's effect endorses religion in the mind of a reasonable observer might not change most results, but it might decrease machinations on the part of state actors to create constitutional displays while increasing the perception that courts apply the law fairly.

IV. THOU SHALT NOT CIRCUMVENT THE COURT

Recent challenges to Ten Commandments displays fall into two main categories: older displays, particularly the Fraternal Order of the Eagles monuments from the 1950s and 1960s, and new displays, in some cases with modifications attempting to make them constitutional. These latter types of cases best illustrate the overemphasis on secular purpose analysis because the mere fact that the state changes some aspect of the display to make it constitutional tends to raise judicial eyebrows.

A. Older Displays and Legal Necromancy

The older displays, those that predate 1970,[154] tend to fare better in the courts than their newer counterparts. *Freethought Society of Greater Philadelphia v. Chester County* upheld an antique plaque on the courthouse façade.[155] *Suhre v. Haywood County*[156] similarly found constitutional a Ten Commandments plaque integrated with a larger display dedicated to the theme of Justice.[157] *Van Orden v. Perry* also found that a Ten Commandments monument constitutionally comprised part of an integrated display.[158] Others, including *Books v. City of Elkhart*[159] and *ACLU v. City of Plattsmouth*,[160] have struck these longstanding displays, in part due to the lack of secular purpose, and in part because they stood, as the crèche in *Allegheny*, unflanked by other secular symbols contributing to the overall message. *Freedom from Religion Foundation v. State*,[161] by contrast, found a remarkably similar display constitutional.

---

154. *Lemon v. Kurtzman*, which created the tripartite test of which secular purpose and primary effect requirements constitute the first two prongs, was decided in 1973. The use of purpose and primary effect to analyze Establishment Clause violations first appeared in Abington v. Schempp, 374 U.S. 203, 222 (1963).

155. 334 F.3d 247 (3d. Cir. 2003).

156. 55 F. Supp. 2d 384 (W.D.N.C. 1999).

157. *Id.* at 399.

158. 351 F.3d 173, 182 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004).

159. 235 F.3d 292, 308 (7th Cir. 2000).

160. 358 F.3d 1020, 1038, 1040 (8th Cir. 2004).

161. 898 P.2d. 1013, 1026-27 (Colo. 1995).

Suhre considered two Ten Commandments plaques in a courthouse flanking a large statute of Lady Justice.[162] At the 1932 dedication of the courthouse, the keynote address referred to the structure as the "Temple of Justice," and explained the law's debt to ancient Greek and Roman civilization, as well as to the Decalogue.[163] Looking also to the effect of the display to derive its purpose, the court determined that the other traditional symbols of justice (scales, sword) and the national and state flags presented an overall message that did not endorse religion.[164] This combined display comported with those blessed by the Supreme Court in *Lynch* and *Allegheny*.[165] The presence of the Ten Commandments as one element in a display with an overall secular message passed muster.

The Third Circuit's approach in *Freethought Society* employed a version of the model this article advocates—collapsing purpose and effect inquiry. In an earlier case, *Tenafly Eruv Association, Inc. v. Borough of Tenafly*,[166] which involved the application of a ban on placing signs on public property to the Orthodox Jewish demarcation of *eruv*,[167] the Third Circuit described Justice O'Connor's endorsement test as "dispens[ing] with the 'entanglement' prong of the *Lemon* test and collaps[ing] its 'purpose' and 'effects' prong into a single inquiry . . . ."[168] The Third Circuit adopted this one-step endorsement test for religious symbol cases in *Freethought Society*.[169]

Freethought Society found constitutional a bronze plaque on the Chester County Courthouse façade displaying the Ten Commandments.[170] The plaque, donated in 1920 by the Religious Education Council, was dedicated in a ceremony that stressed both

---

162. 55 F. Supp. 2d at 386.

163. *See id.* at 387, 394.

164. *See id.* at 397-99.

165. *See* discussion *supra*, Part II.

166. 309 F.3d 144 (3d Cir. 2002).

167. An *eruv*, constructed of thin black strips hung along utility poles, delineates the boundaries within which certain pushing and carrying activities are allowed on the Sabbath. *Id.* at 152.

168. *Id.* at 174. *See also* Harvey v. Cobb County, 811 F. Supp. 669, 676 (N.D. Ga. 1993) (focusing on the second prong of *Lemon*). *Harvey* is infamous for the following quotation: "[T]he Ten Commandments are not in peril. They may be displayed on lawns and in corporate boardrooms. Where this precious gift cannot, and should not, be displayed as a religious text is on government property. For any erosion of the Bill of Rights—restraints voluntarily imposed by the majority to protect the rights of the minority—will inevitably produce prejudice and persecution." *Id.* at 671.

169. 334 F.3d 247, 258 (3d. Cir. 2003). The *Freethought Society* case is also significant for rejecting an argument that historic monuments and artifacts should have a presumption of constitutionality. *Id.* at 260 n.10.

170. *Id.* at 268.

the religious and secular significance of the Ten Commandments.[171] In 2001, a representative of the Freethought Society requested the removal of the plaque, and the County Commissioners refused.[172] Although the court found it unnecessary to consider the County's purpose under the endorsement approach, it did so anyway, concluding that the County had a sufficiently secular purpose for leaving the plaque in place—simply to preserve a longstanding plaque.[173] The court further found that the plaque did not endorse religion given its age and history and placement near an unused entrance—the plaque simply remained as a part of history.[174]

In *Books* and *Plattsmouth*, however, courts concluded that retaining the longstanding Ten Commandments monuments had no secular purpose—even to preserve cultural history.[175] In both cases, the court examined Fraternal-Order-of-Eagles-donated monuments, circa 1960, standing alone on government property. *Books* emphasized the religious nature of the Ten Commandments: "As a starting point, we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document."[176] The *Plattsmouth* court agreed.[177] This analysis also comports with the Supreme Court's decision in *Stone*.[178] Concluding that these stone monuments standing alone[179] in a park (*Plattsmouth*) or in front of a courthouse (*Books*) bearing religious symbols in addition to the religious text of the Ten Commandments convey a message of

171. *Id.* at 251. Keynote speaker Judge Frank E. Hause delivered an address entitled "The Relation of the Ten Commandments to Jurisprudence," in which he both admonished listeners to obey the commandments as well as highlighted the importance of the document as a foundation for "every statute on our books" (internal quotation marks omitted). *Id.*

172. *Id.* at 255.

173. *See id.* at 261, 265, 267. One County Commissioner had testified that the plaque symbolized the "two wing theory of our polity," "faith and reason." Another testified that the Ten Commandments was "the story of people . . . coming out of the wilderness . . . to find civilization through the law" (internal quotation marks omitted). *Id.* at 255.

174. *Id.* at 266-67.

175. *See also* Freedom from Religion Found. v. State, 872 P.2d 1256, 1264 (Colo. Ct. App. 1993), *rev'd sub nom.* State v. Freedom from Religion Found., 898 P.2d 1013, 1025 (Colo. 1995).

176. 235 F.3d at 302.

177. *See* ACLU v. City of Plattsmouth, 358 F.3d 1020, 1036 (8th Cir. 2004).

178. *See* Stone v. Graham, 449 U.S. 39, 41 (1980).

179. In both cases, the dissenting justices argue that other memorials and markers near the Ten Commandments monument in question dilute the religious message. *See Books*, 235 F.3d at 316-18 (Manion, J. dissenting); *Plattsmouth*, 358 F.3d at 1046 (Bowman, J. dissenting).

endorsement seems within the realm of reason given the Supreme Court's opinion in *Allegheny*.[180]

Neither case clearly delineated at what point the 'purpose' prong ends and the 'effect' prong begins. Both, at least in part, inferred the purpose from the effect. In *Books,* the Seventh Circuit explains that even though "the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order,"[181] the "history" and "placement of this particular monument serves to emphasize a religious purpose in its display."[182]

Focusing on the intent behind the initial adoption of the monument, which was solemnized by a Protestant minister, a Catholic priest, and a Jewish rabbi, the court inferred that the initial purpose of erecting the monument "was not only to provide youths with a common code of conduct to guide their participation in the civil community but also to urge the people of Elkhart to embrace [this] specific religious code . . . ."[183] Unlike in *Freethought Society,* where the Third Circuit focused on the county's 2001 intent to leave the plaque intact,[184] *Books* examined both the city's intent to erect the monument in 1958, then its ultimately unpersuasive "avowed secular purpose of recognizing the historical and cultural significance of the Ten Commandments, issued on the eve of litigation."[185] Yet, it hardly seems fair to discount the sincerity of the city's purpose just because it was prompted by litigation[186]—the monument had stood unchallenged from 1958 (pre-secular-purpose requirement) to 1998,[187] offering the city no reason to articulate a secular purpose before then.[188] Moreover, the city need not have an exclusively secular purpose, merely *a* secular purpose. Even the 1958 purpose of encouraging the youth not to lie, cheat, or steal comports with the city's secular goals.[189]

---

180. *See* discussion *supra* Part II.

181. 235 F.3d at 302.

182. *Id.* at 303.

183. *Id.*

184. 334 F.3d at 262.

185. *See* 235 F.3d at 303-04.

186. *See id.* at 313-14 (Manion, J., dissenting) ("But there is no evidence that the Common Council's resolution was a sham, and absent some evidence that the Common Council's stated reasons for its decision not to remove the monument are insincere, we should defer to those asserted justifications.").

187. *See id.* at 297.

188. *See id.* at 314 (Manion, J., dissenting).

189. *Cf. id.* ("Providing youth with a common code of conduct is a valid secular

In *Plattsmouth*, the city administrator suggested that "'it is safe to assume' [absent any evidence about the monument's origin] the purpose of installing the monument was to show gratitude to the Eagles for their civic contributions."[190] The Eighth Circuit, however, found this purpose a sham because the Eagles gave the monument to the city, and the Eagles' contributions are not mentioned on the monument.[191] Although the *Plattsmouth* court acknowledged that, theoretically, the Ten Commandments could serve a secular purpose, it thought that, despite the city's suggestion to the contrary, the city adopted the Eagles' goals—goals that were not secular, in the court's opinion.[192] It further dismissed the city's purpose in retaining the monument[193]—the cost of removal—as sham because the city had reinstalled it when someone toppled it over.[194] Similarly to *Books*, the court tacitly bolstered its purpose analysis with its understanding of the effect. Forming an opinion about the religious nature of the Eagles' message from the text and appearance of the monument itself predicated the court's decision to call the city's proffered purpose a sham.[195] By *Plattsmouth*'s logic, "it is difficult to imagine any Ten Commandments display that could pass muster. In fact the Court makes it clear that it would find an Establishment Clause violation no matter where the city displayed this gift."[196]

Although in *King*, the court deferred to a purpose guess, in a situation with equal lack of evidence the *Plattsmouth* court uses that guess to call the purpose a sham. Had the *Plattsmouth* panel heard the *King* case, it might well have inferred a religious purpose there, too. As the dissent correctly notes, *Lynch* cautions against focusing exclusively on the religious component of a display.[197] The content of

---

purpose").

190. ACLU v. City of Plattsmouth, 358 F.3d 1020, 1037 (8th Cir. 2004).

191. *Id. But see* Van Orden v. Perry, 351 F.3d 173, 178-79 (5th Cir. 2003) (affirming that the State of Texas accepted the Eagles' monument "to recognize and commend a private organization for its efforts to reduce juvenile delinquency."), *cert. granted*, 125 S. Ct. 346 (2004).

192. *Plattsmouth.*, 358 F.3d at 1037.

193. *Cf.* Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d at 261-62 (adopting the county's intent to retain the plaque in the face of a request for removal rather than its intent to mount it on the courthouse).

194. *Plattsmouth*, 358 F.3d at 1039.

195. *Cf. id.* at 1046 (Bowman, J., dissenting) ("[T]he content and context of the monument are more usefully considered under the 'endorsement' inquiry . . . and should not be the *sole* basis for ascribing a religious purpose to a governmental entity where the record is largely devoid of such evidence.").

196. *Id.* at 1047 (Bowman, J., dissenting).

197. *Id.* at 1045 (Bowman, J., dissenting); *see also* discussion *supra* notes 64-74 and accompanying text.

the monument—a nondenominational rendering of the Ten Commandments surrounded by various religious and national symbols—links it, in the dissent's view, to our nation's history.[198] Further, the dissent believes the city's acceptance of the monument should not automatically mean that the city adopts the Eagles' purposes.

In a comparable situation, *State v. Freedom from Religion Foundation*,[199] the Colorado Supreme Court found a secular purpose.[200] This court found that the same basic Fraternal Order of Eagles monument at issue in *Books* and *Plattsmouth* was secular because the National Youth Guidance Program had a secular purpose—to give young people a code of behavior.[201] There, as in *Plattsmouth*, the standard Fraternal Order of Eagles Ten Commandments monument stood in a nonprominent position in a park.[202] In *Freedom from Religion*, as in *Plattsmouth*, the court ascribed the Eagles' intent in donating the monument to the State in accepting it. But here, because the Eagles' intent was deemed secular, the State's intent was also secular.[203] The court's conclusion that the monument formed part of a larger collection of memorials on the state capitol grounds may well have influenced its finding of a secular purpose.

Finally, *Van Orden v. Perry* considered yet another example of a challenged Fraternal Order of Eagles Ten Commandments monument on the Texas State Capitol grounds.[204] As in *Freedom from Religion*, *Van Orden* concluded that the display had a secular purpose and, in the context of other memorials on the State Capitol grounds, it did not convey a message of endorsement.[205] As in *Plattsmouth*, the court had no contemporaneous evidence of the purpose of the monument's erection in 1961. The Texas Senate's resolution adopting the monument stated that the Fraternal Order of Eagles deserved commendation "for its efforts and contributions in combating juvenile

198. *Plattsmouth*, 358 F.3d at 1046 (Bowman, J., dissenting).

199. 898 P.2d. 1013 (Colo. 1995).

200. *Id.* at 1023-24. *See also* Christian v. City of Grand Junction, No. 01-CV-685, 2001 WL 34047958, at *5 (D. Colo. Jun. 27, 2001) (finding a secular purpose in displaying a Fraternal Order of Eagles monument because it had a disclaimer emphasizing the Ten Commandments' role in the development of a rule of law and explaining that the message was not intended to be religious).

201. *Freedom from Religion Found.*, 898 P.2d at 1024 & n.16.

202. *Id.* at 1024.

203. *Id.*

204. 351 F.3d 173, 176 (5th Cir. 2003).

205. *Id.* at 180-81.

delinquency," and the court adopted that rationale as the purpose behind the display.[206] The Fifth Circuit found no sham purpose because—again deriving purpose from effect—the other monuments to various groups on the State Capitol grounds lent credence to the State's claim.[207]

Comparing and contrasting *Books*, *Plattsmouth*, *Freedom from Religion*, and *Van Orden* presents the problems with secular purpose analysis in stark relief. Each of these cases considered basically the same monument given to the city for basically the same purposes as part of the same national program. Yet, the circuits cannot agree even on whether the Eagles' purpose in donating a given monument was secular, much less the state actor's purpose in accepting it. In the absence of a purpose analysis, the factors that guided that inquiry in these cases would likely produce the same outcome under the effects prong. The monuments standing alone would likely convey a message of endorsement to the reasonable observer, and the monuments standing as a part of a larger group likely would not. As such, one might question the utility of engaging in legal necromancy—contacting the spirits of long-forgotten ceremonial resolutions.

B. "If at first you don't succeed. . . .": Modified Displays

Courts generally take a dim view of modern efforts to display the Ten Commandments in prominent places. Displays erected in the last five years have the benefit of a body of precedent from which to construct their display that donees of Eagles monuments in the 1950s and 1960s did not, so courts may grant the benefit of the doubt more reluctantly to a state's avowed secular purpose.

For example, in *Adland v. Russ*,[208] the Commonwealth of Kentucky planned to move a Fraternal Order of Eagles monument similar to the ones discussed above from its place on the State Capitol grounds to a more visible location near Kentucky's floral clock as part of a "historical and cultural display" including markers in memory of famous Kentuckians, a Civil War battle, and Vietnam prisoners of war.[209] The Resolution adopting the proposed plan contained a preamble quoting former presidents and other famous Americans

206. Van Orden v. Perry, No. A-01-CA-833-H, 2002 LEXIS 26709, at *14 (W.D. Tex. Oct. 2, 2002), *aff'd*, 351 F.3d 173 (5th Cir. 2003); *see also Van Orden*, 351 F.3d at 178-79.

207. *See Van Orden*, 351 F.3d at 179.

208. 307 F.3d 471 (6th Cir. 2002).

209. *Id.* at 475, 477.

"professing their faith in God, the Bible, or Christianity."[210] Although recognizing that the Constitution does not require a wholly secular purpose, nevertheless, the Sixth Circuit concluded that an intent to "remind Kentuckians of the Biblical foundations of the laws of the Commonwealth" was insufficient.[211] Looking also to the context of the display—again essentially deriving purpose from effect—the fact that the display would recognize only the Ten Commandments as a foundational document suggests that the Commonwealth intended to advance "a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences."[212] The quotes from the Resolution, which the Commonwealth intended to post on the monument, arguably would "commemorat[e] how the Bible and Ten Commandments influenced a nation," but the court discounted this suggestion because it appeared only in the reply brief.[213] The court also found significant that the inclusion of other markers in the proposed display emerged only in response to litigation.[214] For these reasons, and because the Ten Commandments would dominate the proposed display, the court concluded that Kentucky did not have a secular purpose.[215]

After *Adland*, it is difficult to imagine a purpose for displaying the Ten Commandments as a foundational document that a court would find constitutional (aside, of course, from the frieze in the Supreme Court). Even had Kentucky advanced its articulated secular purpose earlier in the litigation, one questions whether it would have made much difference. Regardless of whether *Adland* correctly held that the proposed historical and cultural display would have had the impermissible effect of advancing religion because the Ten Commandments would dominate it,[216] the opinion essentially forecloses any intent to portray the Decalogue and Christianity as a part of our nation's history. Somewhat in tension with *Lynch*, *Adland*, like its counterparts *Books*, *Plattsmouth*, and *O'Bannon*, appears to require not just some secular purpose, but a particular type of secular purpose—one that does nothing to highlight the role of religion in

210. *Id.* at 476 (citing Andrew Jackson as stating "[t]he Bible is true" and Woodrow Wilson as stating "[t]he Bible is the word of life").

211. *Id.* at 475. In fact, this purpose is remarkably similar to the one rejected in *Stone*. *Id.* at 484.

212. *Id.* at 481-82.

213. *Id.* at 482.

214. *Id.* at 481.

215. *Id.* at 482-83.

216. *See id.* at 486-87.

American history. Comparing these cases with *Van Orden, Freedom From Religion,* and *Suhre*, no predictable rule emerges from which a legislature may find safe harbor from the shoals of sham purpose.

Where a Ten Commandments display has failed a court's Establishment Clause test once, subsequent attempts to erect modified versions of that display usually fare poorly. But, the outcome of the previous case (or cases) should not be dispositive. As the Third Circuit has stated, "The mere fact that [the] first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular purpose, or that it was intended to convey a message of endorsement or disapproval of religion."[217]

In response to the labyrinthine rulings concerning Ten Commandments displays, some legislators have responded with creative maneuvers. In *Mercier v. City of La Crosse*,[218] a court had declared a Fraternal Order of Eagles monument in a city park unconstitutional for reasons similar to those discussed in *Books* and *O'Bannon*. The city sold the land around the monument to the Fraternal Order of Eagles, who installed a fence around the parcel and posted disclaimers stating that the land was privately owned and the city did not endorse the message. Still, the district court found that only removal of the monument would eliminate the Establishment Clause violation.[219] On appeal, the Seventh Circuit confined its opinion to the constitutionality of this land sale, regardless of the constitutionality of the monument's previous presence in the park.[220] The district court had found the sale of land unconstitutional because the sale gave preference to one religious message.[221] Such analysis illustrates the irrelevance of secular purpose from another angle—regardless of the city's purpose in selling the land to the Eagles, if the effect is to single out religion for a benefit, the sale is

217. ACLU v. Schundler, 168 F.3d 92, 105 (3d Cir. 1999) (finding that a city's holiday display, modified with additional symbols of cultural and ethnic diversity, in response to previous litigation, did not violate the Establishment Clause).

218. 305 F. Supp. 2d 999 (W.D. Wis. 2004).

219. Mercier v. City of La Crosse, 276 F. Supp. 2d 961 (W.D. Wis. 2003), *aff'd* 305 F. Supp. 2d 999 (W.D. Wis. 2004).

220. Mercier v. Fraternal Order of the Eagles, 2005 U.S. App. LEXIS 9, at *15-16 (7th Cir. Jan. 3, 2005).

221. *Id.* at 1010-11 (citing, *inter alia*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' towards religion, favoring neither one religion over the others nor religious adherents collectively over nonadherents."); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989) ("Government may not 'place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general.'")).

impermissible.[222] The Seventh Circuit, however, found that the sale did not endorse religion.[223] It found significant the location of the monument—a non-prominent corner of the park near the Eagles' own headquarters—and the Eagles' care of the monument since its erection at no cost to the State.[224] The purpose behind the sale—to divest the city of ownership and avoid litigation—was secular, and the effect of the sale—to give the monument back to the donor—did not endorse religion.[225] Although selling real property on which a contested religious display sits might not always be constitutional due to the unique circumstances of each case, it may offer state officials a creative way of maintaining a historic display without violating the Establishment Clause.

After the *O'Bannon* decision, an Indiana state representative arranged for the monument declared unconstitutional in *O'Bannon* to reside on the grounds of the Lawrence County Courthouse near a walkway where it would be visible to pedestrians and vehicular traffic, and flanked by no other monuments.[226] A commissioner testified that the Ten Commandments influenced the Bill of Rights and the State constitution, but he also noted that posting the Ten Commandments would promote the values inherent in the first four, governing the man-God relationship.[227] After acknowledging that the County had both secular and religious purposes for displaying the monument, the district court found that the fact that the Ten Commandments were not visually linked or otherwise integrated with the texts on the other three sides of the monument (a debatable conclusion) tilted the scales against a finding of secular purpose.[228] For similar reasons, the monument also failed the effect prong.[229] Again, the purpose analysis rested heavily on effect, despite the importance of the commissioners' testimony.

---

222. *Cf.* Kiryas Joel, 512 U.S. 687; Texas Monthly, 489 U.S. 1.

223. *Mercier*, 2005 U.S. App. LEXIS 9, at *28.

224. *Id.* at *29-31.

225. *Id.* at *34-36.

226. Kimbley v. Lawrence County, 119 F. Supp. 2d 856, 858-59, 862-63 (S.D. Ind. 2000).

227. *Id.* at 863. ("Commandment: Thou shalt have no other gods before me. Value: You should only worship one God. Commandment: Thou shalt not make unto Thee any graven image. Value: 'I know I can't worship this stone.' Commandment: Thou shalt not take the name of the Lord, thy God, in vain. Value: 'You shouldn't use God's name in vain.' Commandment: Remember the Sabbath Day, to keep it holy. Value: 'Everyone needs a day of rest,' specifically, the Sabbath.").

228. *Id.* at 867-68.

229. *Id.* at 872-73.

The best examples of legislative attempts to create Ten Commandments displays that triumph over constitutional challenges come from so-called Foundations of Law displays in Kentucky and Tennessee. A rash of cases over the past four years concerned efforts to post the Ten Commandments in courthouses and schools. In many instances, the state actor included the Ten Commandments in a group of similarly-framed excerpts from documents important to the country's founding—either in the first instance or in response to litigation—in an attempt to create a constitutional display consistent with *Lynch* and *Allegheny*.[230] Nearly all have been declared unconstitutional,[231] at least in part due to a lack of a valid secular purpose.[232] Given the similar facts and legal analysis in most of these

230. *See, e.g.*, ACLU v. Ashbrook, 375 F.2d 484 (6th Cir. 2004) (finding unconstitutional a judge's courtroom display of the Ten Commandments and the Bill of Rights); Baker v. Adams County/Ohio Valley Sch. Bd., 2004 U.S. App. LEXIS 481, at *6 (6th Cir. Jan. 12, 2004) (adding the Preamble to the United States Constitution, the Declaration of Independence, the Magna Carta, and the Justinian Code did not "remove . . . [the] unconstitutional taint"); ACLU v. McCreary, 354 F.3d 438 (6th Cir. 2003) (combining three cases in which officials added various historical documents important to the Founding but did not make the display constitutional); ACLU v. Mercer County, 240 F. Supp. 2d 623 (E.D. Ky. 2003) (adding the Mayflower Compact, the Declaration of Independence, the Magna Carta, the Star Spangled Banner, the National Motto, the Preamble to the Kentucky Constitution, the Bill of Rights, and Lady Justice); ACLU v. Rutherford County, 209 F. Supp. 2d 799 (M.D. Tenn. 2002) (adding the Preamble to the Tennessee Constitution, the National Motto, the National Anthem, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, and the Magna Carta); Doe v. Harlan Cty. Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (adding an excerpt from the Declaration of Independence, the Preamble to the Constitution of Kentucky, the national motto of "In God We Trust," a page from the Congressional Record and proclamation by Ronald Reagan declaring 1983 the Year of the Bible, an excerpt from an address by President Lincoln praising the Bible, the Mayflower Compact, and the Kentucky statute authorizing the posting of the Ten Commandments); *see also* Turner v. Habersham County, 290 F. Supp. 2d 1362 (N.D. Ga. 2003) (featuring the Declaration of Independence, the Bill of Rights, the Magna Carta, the National Anthem, and Lady Justice). *Cf.* ACLU v. Hamilton County, 202 F. Supp. 2d 757 (E.D. Tenn. 2002) (finding unconstitutional the hanging of copies of the Ten Commandments in the King James Version, in two of three instances hanging alone on the wall, in the county courthouse, city courts building, and juvenile courts); ACLU v. Ashbrook, 211 F. Supp. 2d 873 (N.D. Ohio 2002) (finding unconstitutional a judge's hanging of the Ten Commandments, unflanked by other documents, in his courtroom).

231. *But see* Mercer County, 240 F. Supp. 2d at 625 (E.D. Ky. 2003) (finding a Foundations of Law display in the Mercer County Courthouse constitutional because the display had a legitimate secular purpose of "acknowledging the historical influence of the Ten Commandments," "the record is devoid of any evidence indicating a religious purpose by the government," and the display did not have the effect of endorsing religion); *see also* ACLU v. Mercer County, 219 F. Supp. 2d 777 (E.D. Ky. 2002) (denying a preliminary injunction against the same display because plaintiffs were unlikely to prevail on the Establishment Clause claim: including the Ten Commandments as part of an educational display of founding documents has a secular purpose, no evidence suggested the purpose was a sham (as distinct from *McCreary*, which had a history of unconstitutional displays), and the effect did not advance religion).

232. *But see* ACLU v. Grayson City, 2002 WL 1558688 at *2 (W.D. Ky. May 13,

cases, the ensuing discussion will focus primarily on the keynote case, *ACLU v. McCreary*,[233] and two cases that diverge from its analysis.

McCreary considered displays of framed copies of the Ten Commandments in McCreary and Pulaski County courthouses and the schools of Harlan County.[234] After a complaint was filed, the defendants changed the displays to include other documents "in an attempt to bring the displays within the parameters of the First Amendment and to insulate themselves from suit."[235] The additional documents included:

> (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.[236]

Although some of the documents were displayed in their entirety, others excerpted only the reference to God or the Bible.[237] The district court granted a preliminary injunction against the displays, finding that "the amended displays . . . lacked a secular purpose and had the effect of endorsing religion."[238] Defendants then further amended the display to include "the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments,[239] Lady Justice, and a one-

---

2002) (deferring to the stated purpose of "educat[ing] the counties about the foundation of our American law and government" in the absence of evidence to the contrary or a history of other displays consisting only of the Ten Commandments, yet finding the effect of the display unconstitutional in light of *McCreary*). In a most unusual move, *ACLU v. Rutherford* held that a Foundations of Law display had an unconstitutional religious purpose, but the effect of the display did not endorse religion. 209 F. Supp. 2d 799 (M.D. Tenn. 2002).

233. 354 F.3d 438, (6th Cir. 2003), *as corrected at* 2003 U.S. App. LEXIS 25606 (6th Cir. Jan. 5, 2004), *reh'g denied* 361 F.3d 928 (6th Cir. Mar. 23, 2004).

234. *Id.* at 440.

235. *Id.* at 442 (internal citation omitted).

236. *Id.* (internal citation omitted).

237. *Id.*

238. *Id.* (internal citation omitted).

239. The display used the King James Version. *Id.* at 443 n.2.

page prefatory document entitled 'The Foundations of American Law and Government Display.'"[240] The district court again granted a preliminary injunction against the displays.[241]

On appeal, the Sixth Circuit examined the defendants' articulated purposes for the displays:

> (1) to erect a display containing the Ten Commandments that is constitutional;
>
> (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government;
>
> (3) [to include the Ten Commandments] as part of the display for their significance in providing "the moral background of the Declaration of Independence and the foundation of our legal tradition;"
>
> (4) to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and
>
> (5) [as stated by the Harlan County School Board] to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law.[242]

The Sixth Circuit found that although the District Court may have erred in determining that the first three reasons were "facially unconstitutional," because it is, in fact, possible to accomplish these goals constitutionally, the content of the displays and the impact of the defendants' past attempts to erect similar displays revealed a

---

240. *Id.* at 443. The prefatory statement reads:

> 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, which declared that, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Id. at 443. The school board's display differed slightly in that it used the version of the Ten Commandments appearing in the Joint Resolution authorizing President Reagan to declare 1983 the Year of the Bible, included a copy of the Kentucky statute authorizing the displays, had a prefatory statement that emphasized the documents' importance to education and moral character of the students, and omitted Lady Justice. *See id.* The school board's display would also allow the posting of other documents with the permission of the county board of education. *Id.*

241. *Id.* at 444.

242. *Id.* at 446-47.

predominately religious purpose.[243]

The court held that all three displays lacked "a demonstrated analytical or historical connection" with the other documents, despite the explanatory statement included with each.[244] Although defendants proffered evidence that the Ten Commandments were codified in the laws of the American Colonies and present-day legal codes, the Sixth Circuit found that this display does not convey that fact, nor are the Ten Commandments the sole source of these rules.[245] Despite acknowledging religion's general influence on our nation's founding (in addition to that of European philosophers), the court did not believe that the Ten Commandments inspired the Declaration of Independence.[246] The lack of "relevant and credible evidence" to support these historic assertions led the Sixth Circuit ultimately to conclude that the defendants had a religious purpose.[247]

The Sixth Circuit believed that the content of the displays further supported its view because the defendants failed to "exercise special care to present the Ten Commandments objectively."[248] Finally, relying on *Santa Fe Independent School District v. Doe*,[249] the defendants' prior conduct weighed heavily in the analysis. Most importantly, the Sixth Circuit admitted that if the state's policy was "otherwise constitutional," "past unconstitutional conduct [would] not preclude a finding of unconstitutionality."[250] Had the displays passed the effects test, the court might have ignored the defendants' prior constitutional violations. It is difficult to envision a clearer statement that purpose analysis is entirely subordinate to effect.

In *ACLU v. Mercer*,[251] which predates *McCreary*, the court reached the opposite conclusion about a strikingly similar display. There, the defendants' proffered the secular purpose that "all of the documents, including the Ten Commandments, have played a role in the

243. *Id.* at 447-49.
244. *Id.* at 451.
245. *Id.* at 451-52.
246. *Id.* at 452-53.
247. *Id.* at 453-54.
248. *Id.* at 455.
249. 530 U.S. 290 at 315 (using a school district's repeated attempts to create a constitutional policy of student-led prayer at football games as evidence of its religious purpose—to endorse school prayer).
250. McCreary, 354 F.3d at 456-57. (citing Granzeier v. Middleton, 173 F.3d 568, 571 (finding no sham purpose in changing a "Good Friday" holiday to "Spring Holiday" because the holiday, like Christmas and Thanksgiving, was constitutional due to its secular effects of high absenteeism and low activity in business offices)).
251. 219 F. Supp. 2d 777 (E.D. Ky. 2002).

formation of our system of law and government."[252] Recalling that *Lemon* requires only *a* secular purpose, the court noted: "The Court is obviously not required to determine whether the secular purpose is morally or politically correct—because the government acts neutrally so long as the purpose is one other than advancing religion."[253] *Mercer* thus stands in tension with *McCreary* in that *McCreary* implicitly judged not only whether the secular purpose was morally or politically correct, but also factually correct. The *McCreary* court's skepticism, perhaps fueled by the defendants' history, sets a higher bar than *Lynch* or *Allegheny*. A general theme of holiday celebration formed the only link between the Santa Claus, plastic reindeer, and crèche in *Lynch* and the Christmas tree, menorah, and Salute to Liberty in *Allegheny*. Yet a general theme of historical documents influencing American legal history fell short in *McCreary*. *Mercer*'s approach—obviously conditioned on the constitutionality of the effect—seems more appropriate, given that the historical influence of the Ten Commandments is a debatable point. A court's belief that a display has its facts wrong should not render it unconstitutional.

ACLU v. Rutherford arrived at the rare conclusion that secular purpose was lacking, yet the effect did not endorse religion.[254] Scrutinizing another "Foundations of American Law and Government" display, the court deduced from the history of the litigation, including changes in the resolutions articulating the purpose and content of the display in response to litigation, that the county had a religious purpose.[255] *Rutherford* offers the purest form of purpose analysis, looking only to the legislative history rather than the effect. The court suggested "a more thoughtfully-constructed display might include, along with the Ten Commandments, quotes from historic lawgivers such as Confucius, Muhammed, King John, Louis IX, or John Marshall, or documents important to the historical development of the law or the governance of mankind . . . ."[256] Although typically courts require both a secular purpose and an effect that does not endorse religion to uphold a display, this court's refusal to find the display at hand unconstitutional further exhibits the subordination of secular purpose to effects analysis.

Rutherford excepted, challenges to the Foundations of Law and

252. *Id.* at 783.
253. *Id.* at 784-85.
254. 209 F. Supp. 2d 799 (M.D. Tenn. 2002).
255. *Id.* at 806.
256. *Id.* at 812.

American Government displays further indicate that a court's understanding of the effect of a Ten Commandments display will influence, yea, transcend its purpose analysis. Although a secular purpose inquiry may inflame the passions of courts and litigants, it ultimately does little to change the analysis.

V. THOU SHALT HANG EIGHTEEN, NOT TEN

Removing secular purpose analysis from the endorsement equation would alleviate the confusion resulting from conflicting court opinions while remaining consistent with the principles articulated in Supreme Court precedent. Even in the most extreme example, *Glassroth v. Moore*, in which the proffered purpose for a two-and-a-half-ton granite monument was nothing but religious—to remind Alabama citizens of "the sovereignty of the Judeo-Christian God over both the state and the church"[257]—the court would probably still have found the display unconstitutional under the effect rubric. Judge Moore rejected offers to post other historically significant speeches in the same space because "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments."[258] Although the monument itself contained references to other documents important to American history, all indicated the importance of God to the law.[259] Under *Lynch* and *Allegheny*, no court would likely uphold such a display standing alone in the courthouse rotunda, even disregarding Moore's religious purpose entirely.

But the *Moore* case illustrates the importance of these displays to a significant segment of the American people. *Moore* merely fueled the tendency of mainstream Americans to believe that the courts oppose religion in public life. Whether or not this assessment is correct, replacing purpose analysis with one that concentrates on effect might diffuse animosity toward courts predicated on this belief.

In the meantime, those who wish to "Hang Ten" in the courthouse, school, or municipal building should consider hanging Eighteen. The infamous frieze in the Supreme Court portrays eighteen famous lawgivers, including Moses holding the Ten Commandments. The Supreme Court, and many lower courts, have blessed this frieze as an appropriate and constitutional way to display the Ten

257. Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003).
258. *Id.*
259. *See* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1295 (M.D. Ala. 2002).

Commandments' impact on the law. A Hang Eighteen campaign featuring copies of this frieze would remind the public of the importance of our legal and moral foundations in a virtually unassailable manner.