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Judging the Decalogue:
The Ten Commandments and the Establishment Clause

By

Ross Stephen Astoria

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of the

University of California, Berkeley

Committee in Charge:

Professor David Lieberman, Co-Chair

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Professor Hans Sluga

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Abstract

Judging the Decalogue: The Ten Commandments
And the Establishment Clause

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Doctor of Philosophy in Jurisprudence and Social Policy

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Professor David Lieberman, Co-Chair
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Beginning in 1999 the Federal Courts experienced a great influx of litigation over the constitutionality of a government's display of the Ten Commandments. This dissertation examines the causes and consequences of this litigation.

In the first part of the dissertation I examine changes in Establishment Clause doctrine which first make a government's display of religious symbols a possible subject of litigation and, later, make the Decalogue an attractive symbol for conservatives to defend before the federal judiciary.

In the second part of the dissertation I examine two counties from Tennessee who elected to post the Ten Commandments and were subsequently sued by the ACLU. I conclude that participants to either side of the conflict situate their political and legal activity in mythic conceptions of American Republicanism. Both posting the Ten Commandments and the resistance to such posting are attempts to preserve or return to these mythic conceptions.

The last part of the dissertation is normative jurisprudence. Using the results from parts one and two I offer suggestion as to how the Supreme Court might alter its doctrine so as to align it with the value of equal citizenship. In this regard, Establishment Clause jurisprudence emphasizes the distinction between religious purposes and secular purposes. This distinction ought to be muted. Instead, the Supreme Court should promulgate doctrine designed to protect equal citizenship.

Chapter One: Popularity of the Ten Commandments

I. Popularity of the Ten Commandments

Before 1990, the constitutionality of a state's display of the Decalogue had been litigated only twice, in 1973 and in 1980.¹ Cobb County, Georgia then defended its Decalogue display in 1993 and Colorado its in 1995.² Within the next five years the federal courts began to digest a prodigious amount of litigation over the government's display of the Decalogue and a great preponderance this litigation refused to be resolved at the district court.³ Mr. Sekulow, who was involved in much of this litigation, estimates there to have been no fewer than thirty such cases.⁴ The Supreme Court granted *certiorari* for two of them, *McCreary County* and *Van Orden*, raising expectations that it might clearly resolve the constitutional issue one way or the other.⁵ It did not, instead leaving municipalities, their lawyers, and the lower courts in confusion over how to

¹ *Anderson v. Salt Lake City*, 475 F. 2d 29 (10th Cir. 1973) reversing *Anderson v. Salt Lake City Corp.*, 348 F.Supp. 1170 (D.C. Utah 1972) and holding that Salt Lake's display of a Fraternal Order of Eagles Monument was constitutional. *Stone v. Graham*, 449 U.S. 39 (1980).

² See *Harvey v. Cobb County*, 811 F.Supp. 669 (N.D.Ga. 1993); *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995) reversing *Freedom From Religion Foundation, Inc. v. State*, 872 P.2d 1256 (Colo.App. 1993).

³ See e.g., *Suhre v. Haywood County*, 131 F.3d 1083 (C.A.4 1997) reversing and remanding *Suhre v. Board of Com'rs*, 894 F.Supp. 927 (W.D.NC. 1995); *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (C.A.7 2000) reversing *Books v. City of Elkhart*, 79 F.Supp.2d 279 (N.D.Ind. 1999); *Adland v. Russ*, 307 F.3d 471 (C.A.6 2002) affirming *Adland v. Russ*, 107 F.Supp.2d 782 (E.D.Ky. 2000); *Indiana Civil Liberties Union Inc. v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001) affirming *Indiana Civil Liberties Union Inc. v. O'Bannon*, 110 F.Supp.2d 842 (S.D.Ind. 2000); *Kimbly v. Lawrence County, Ind.*, 199 F.Supp.2d 856 (S.D.Ind. 2000); *Summun v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002) affirming in part and reversing and remanding in part *Summun v. City of Ogden*, 152 F.Supp.2d 1286 (D.Utah 2001); *ACLU Nebraska Foundation v. City of Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. en banc 2005) reversing *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 186 F.Supp.2d 1024 (D.Neb. 2002); *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003) reversing *Freethought Soc. of Greater Philadelphia v. Chester County*, 191 F.Supp.2d 589 (E.D.Pa 2002); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002); *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D.Tenn. 2002); *ACLU of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004) affirming *ACLU of Ohio Foundation, Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002); *ACLU of Kentucky v. Mercer Co.*, 432 F.3d 624 (6th Cir. 2005) affirming *ACLU of Kentucky v. Mercer Co.*, 240 F.Supp.2d 623 (E.D.Ky. 2003); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) reversing *Mercier v. City of La Crosse*, 305 F.Supp.2d 999 (W.D.Wisc. 2004); *Turner v. Habersham Co.*, 290 F.Supp.2d 1362 (N.D.Ga. 2003); *Mordovich v. Allegheny Co.*, 385 F.3d 397 (3d Cir. 2004); *Chambers v. City of Frederick*, 373 F.Supp.2d 567 (D.Md. 2005); *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) affirming *Card v. City of Everett*, 386 F.Supp.2d 1171 (W.D.Wash. 2005); *Twombly v. City of Fargo*, 388 F.Supp.2d 983 (D.N.D. 2005); *ACLU of Ohio v. Board of Com'rs of Lucas County*, 444 F.Supp.2d 805 (N.D. Ohio 2006); *ACLU of Ky. v. Garrard Co.*, 517 F.Supp.2d 925 (E.D.Ky. 2007); *ACLU of Ky. v. Rowan Co.*, 513 F.Supp.2d 889 (E.D.Ky. 2007); *ACLU of Ky. v. Grayson Col*, 591 F.3d 837 (6th Cir. 2010).

⁴ JAY SEKULOW, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* 321 (Rowman & Littlefield Publishers, Inc. 2006).

⁵ *Van Orden v. Perry*, 125 S.Ct. 2854 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005).

resolve these disputes. One district court in Oklahoma, in wandering through the legal confusion that ensued from these two cases, crafted its opinion along the conceit of a descent into Dante's Inferno.⁶ The course of litigation over the Decalogue, then, seems to be something like this: before the mid-nineties, with the notable exception of *Stone v. Graham*, there was no litigation over the posting of the Decalogue. The litigation over this symbol increased in the years just prior to the turn of the millennium and has continued in a steady and perplexed stream since.

The trajectory of litigation over the crèche provides an interesting contrast. As with the Decalogue, there was very little litigation over the crèche before 1984, the year of the Court's landmark ruling of *Lynch v. Donnelly*. There is one instance of litigation over the crèche in a federal park (1970-73), two instances from the New York State courts (1958 and 1963), and one case from Denver (1981).⁷ After *Lynch* and before *Allegheny County* (1989), the state courts and the federal courts rendered decisions upon the constitutionality of a no fewer than six state owned displays of the crèche.⁸ After *Allegheny*, both federal and state courts continued to preside over crèche-based litigation at a steady pace, although the procedural posture of these cases is generally different. Whereas the cases in the interim between *Lynch* and *Allegheny* were largely about a municipality's display of crèche that it owned, these later cases, including *Allegheny* itself, are frequently about whether a municipality may allow private organizations to erect such displays on city property or whether the Establishment Clause prohibits them from doing so.⁹ Hence, one frequently finds cases where a municipality is being sued for refusing to allow a private organization to display their favored Christmas symbols on city property, often because the municipality believed that allowing such a display would

⁶ *Green v. Bd. of County Comm'rs of the County of Haskell*, 450 F. Supp. 2d 1273 (E.D. Okla. 2006) reversed by *Green v. Haskell Co. Board of Com'rs*, 568 F.3d 784 (10th Cir. 2009).

⁷ *Allen v. Morton*, 495 F.2d 65 (U.S.App.D.C. 1973) upholding *Allen v. Morton*, 333 F.Supp. 1088 (D.C.D.C. 1971); *Baer v. Board of Education*, 181 N.Y.S.2d 230 (1958) and *Lawrence v. Board of Education*, 243 N.Y.S.2d 87 (1963); *Citizens Concerned for the Separation of Church and State v. City and County of Denver*, 508 F.Supp. 823 (1981) upholding *Citizens Concerned for the Separation of Church and State v. Denver*, 481 F.Supp. 522 (D.C. Colo. 1979).

⁸ *American Civil Liberties Union V. City of Birmingham*, 791 F.2d 1561 (C.A.6.Mich 1986) upholding *American Civil Liberties Union v. City of Birmingham*, 588 F.Supp. 1337 (E.D.Mich.S.Div. 1984.); *Burell v. City of Nasha*, 599 F.Supp. 792 (D.N.H. 1984); *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (C.A. 7, Ill. 1987); *Mather v. Village of Mundelein*, 864 F.2d 1291 (C.A.7 1989) reversing *Mather v. Village of Munelein*, 699 F.Supp. 1300 (N.D. Ill. E. Div. 1988); *Smith v. Lindstrom*, 699 F.Supp 549 (W.D. Va. 1988); *American Civil Liberties Union of Kentucky v. Wilkinson*, 701 F.Supp. 1296 (E.D.Ky. 1988).

⁹ See e.g., *King v. Village of Waunakee*, 517 N.W.2d 671 (Wis. 1994); *Kreisner v. City of San Diego, Cal.*, 1 F.3d 775 (C.A.9 1993.) affirming *Kreisner v. City of San Diego*, 788 F.Supp. 445 (S.D.Cal. 1991) (municipality's practice of allowing nativity scene pursuant to open access policy that distributed permits on a first come, first served basis did not violate Establishment Clause or the California Constitution.); *American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (C.A.3 1997) (display of crèche and menorah on city hall plaza violated establishment clause). *Elewski v. City of Syracuse*, 123 F.3d 51 (C.A.2 1997) (holding that the city's display did not violate the Establishment Clause because "a reasonable observer would not perceive the crèche as a message of endorsement of Christianity.")

be a violation of the Establishment Clause.¹⁰ By the turn of the millennium, then, at the same time that litigation over the crèche seems to have leveled off or even diminish, it became increasingly popular to litigate over the constitutionality of a state's display of the Decalogue. A new fade in litigation, it seems, had come into being.

Nor was the popularity of the Decalogue limited to the courts of law and the legal activists who try to manipulate those courts. The litigation seems to be the tip of the proverbial iceberg, and while this dissertation limits itself to the legal phenomena, it is worth noting that the fashionableness of the Decalogue was not limited to the courtroom, nor to any particular geographic region.

During the mid-1990s, a Fraternal Order of Eagles Monument located at the Redondo Beach Civic Center began to garner attention. Although it had sat been there is 1962 apparently without causing any alarm, a local resident informed the city council that they needed to remove it or face a law suit. The monument was soon thereafter placed in protective storage while construction was performed upon the Civic Center, but some 300 concerned citizens petitioned the government for its return. The city council was eager to please and re-erected the monument on the grounds of the city hall.¹¹

Again in southern California, a prominent business man in Downey, Ed Diloreto, bought advertising space on the fence of the baseball diamond of one of the local schools. He intended to display there the Ten Commandments under the title "Principles to Live By," but the school district decided to end the practice of selling advertising space. Incensed and believing that the school district had ended the advertising program so as to avoid having to post the religious precepts, DiLoreto sued the district. Deciding that the speech forum here in question was non-public, both the district and appellate courts concluded that the school district's activities had been constitutional, even if it had closed the forum as a means to avoid the public controversy attendant, or possibly attendant, upon the posting of the Ten Commandments in the ballpark.¹² They seemed to have gotten the controversy anyhow.

In Niagara County, New York, David Warsocki, a 68 year old retired auto mechanic and occasional substitute teacher, was moved by the Columbine shootings. He began to lobby local County legislatures, city councils, and school boards, proposing that they permit or require the posting of the Ten Commandments because he wanted "to have

¹⁰ See e.g., *Creatore v. Town of Trumbull*, 68 F.3d 59 (C.A.2 1995) (after municipality's refusal, plaintiff sought to place a crèche upon the town green); *Knights of Columbus, Council No. 94 v. Town of Lexington*, 272 F.3d 25 (C.A.1 2001) affirming *Knights of Columbus, Council No. 94 v. Town of Lexington*, 124 F.Supp.2d 119 (D.Mass. 2000); *Jocahm v. Tuscola County*, 239 F.Supp.2d 714 (E.D.Mich.N.Div. 2003); *Osediacz v. City of Cranston ex rel. Rossi*, 344 F.Supp.2d 799 (D.R.I 2004); *Snowden v. Town of Bay Harbor Islands, Florida*, 358 F.Supp.2d 1178 (S.D.Fla. 2004).

¹¹ STEPHANIE WALTON, *Ask Us - Q: Ten Commandments*, Daily Breeze April 23, 1997.

¹² *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999); THEO DOUGLAS, *Man Still Pushing for Sign*, Press-Telegram May 21, 1997; CHRIS CHRISTENSEN, *Downey Man Pushes Morals*, Press-Telegram August 23, 1997.

the kids grow up with some values.”¹³ Although he took some inspiration from the Family Research Council and other states (see below) which had at that time passed legislation promoting the posting of the Ten Commandments, he worked entirely alone. For the price of 40 dollars in postage and 200 hours of time, seventeen county level legislative bodies, including three cities, voted in favor of Mr. Warsocki’s proposal. In the Niagara County Legislature, for instance, the proposal passed by a vote of 17-1. The sponsor of the bill, Majority Leader Shirley G. Urtel, a Republican from Cambria, explicitly linked the effort to post the Commandments with the Columbine shooting, saying that “If the two who caused so much sorrow had read and believed in the commandments, would they have done what they did?”¹⁴ Some of those who voted for the proposal were clearly apprehensive about casting their vote as they did, being proponents of “church-state separation,” but fearing that a vote against it would appear to their constituents as if they were “voting against God.”

Other individuals attempted to incorporate new cities whose laws would be only the Ten Commandments and Jesus’ teachings. In Brooksville, Alabama, James Henderson led a referendum drive to incorporate the small town. “Brooksville,” he’s quoted as saying, “will be a Christian democracy, based upon the principles of the Ten Commandments and the Golden Rule.” Some of those supporting the attempt worried that their tiny hamlet might be swallowed up by nearby Decatur, Alabama, and that a beer store might be built at the corner of one of the town’s two intersections. The opposition to incorporation pointed out that the proposed town charter did not provide for taxing and spending in support of police and various utilities, including sewage. The probate judge in charge of the issue sidestepped any discussion of the Decalogue or the teachings of Jesus, instead ruling that the proposal did not meet other basic requirements of state law. The proposed incorporation would have illegally appropriated land from a neighboring city. Further, every citizen would have been a voting member of the city council, but state law required both a representative democracy and prescribed the size of the city council.¹⁵

Sheriffs and prison wardens began to use the Ten Commandments as a code of conduct for their jails and prisons. In Arkansas, Sheriff Andy Lee posted the Ten Commandments as the rules for his jail. One inmate in the brink on a probation violation, Jamey Ashford, sued. The state circuit judge agreed that Sheriff Lee had violated the constitution. If Ashford had actually violated one of the commandments and then been punished for it, then, said the judge, he would have awarded Ashford more than *de minimus* damages. As it was, the judge felt a single dollar was fair and sufficient compensation for Mr. Ashford’s harms.

¹³ THOMAS J. PROHASKA, *Bible Battle: Why Hang the Ten Commandments in Schools and other Public Buildings? A Lockport Man Who’s Pushing the Idea Says Kids Today Need a Dose of Moral Fiber*, The Buffalo News May 27, 2000.

¹⁴ Id.

¹⁵ CHRISTOPHER BELL, *Brooksville Group Asks for Vote*, The Huntsville Times February 24, 1999; COLEMAN, *Of God, the State and the Law*, Mobile Register April 18, 1999; THE ASSOCIATED PRESS, *Evangelist Loses Incorporation Bid in Ala., - Judge Doesn’t Explore Plan to Use Bible as Law*, The Commercial Appeal April 14, 1999.

Sheriff Lee then posted a new set of rules, apparently based upon the Ten Commandments, but including other important prohibitions as well. The commandment prohibiting stealing, for instance, also insists that inmates “shalt not plan nor participate in any escape.” Further, inmates must “honor thy father and mother when they come to visit you in jail, by treating them in a manner that is outwardly respectful; obey the lawful orders of the jail staff; and keep yourself and your living area clean.”¹⁶

The Decalogue was not only an instrument for maintaining law and order, it inspired a great deal of civil disobedience. Many county officials, with legal sanction, posted the Decalogue in or around the buildings where they worked. For instance, Howard Williams, a city council member in Columbus, Mississippi, hung, upon his own volition, a copy of the Decalogue inside the city hall courtroom.¹⁷ When it was suggested to him that some of the city’s citizens might object to the posting, he replied: “I say heck with them. I’m going to pray when and where I want to pray, and I’m going to hang the Ten Commandments where and when I want to hang them.”¹⁸

Also at the municipal level, various groups championed non-legislative, semi-constitutional means of introducing the Ten Commandments into the schools. In Chicago, for instance, Jerry Rose, president of the Total Living Network, sponsored a “distribution rally” across the street from Von Humboldt Elementary School. In the spirit of ecumenical cooperation, the rally was attended by Jewish, Catholic, and Protestant leaders. They aimed to bestow some hundred thousand book covers, purchased for \$30,000 and emblazoned with the Ten Commandments. Rose said of the covers that they are to be “a daily reminder to students of how to treat themselves and other people,” and that “we’re not trying to evangelize. We’re not trying to proselytize. We’re just giving kids a reminder.”¹⁹ The rally had originally been planned to take place on school property until the Public Schools Chief, who was sympathetic but concerned about constitutionality, requested Rose to move it off of school property.²⁰

State legislatures also busied themselves with promoting the Ten Commandments and much of this activity was responsive to the Columbine massacres. In Colorado, the state in which the shootings occurred, a BILL FOR AN ACT “Concerning Measures to Prevent the Exclusion of America’s Moral Heritage in the Teachings in Public Schools” would have required public schools to display the Ten Commandments in both classrooms and the hallway of the main entrance.²¹ The text of the Bill illustrates recurrent themes:

¹⁶ ASSOCIATED PRESS, *Inmate Wins Suit, but Jail Can Post Bible-based Rules*, The Dallas Morning Star July 17, 1998.

¹⁷ GEORGE MCEVOY, *Congress' Simpletons Answer Shootings Simply: 'Hang Ten'*, The Palm Beach Post November 15, 1999.

¹⁸ *Id.*

¹⁹ ROSALIND ROSSI, *Thous shalt not trespass, Vallas says*, Chicago Sun-Times August 15, 2000.

²⁰ *Id.*

²¹ See SB 00-114, at

http://www.leg.state.co.us/2000/inetcbill.nsf/fsbillcont/859BF76DAAD80AF00725685D0058D206?Open&file=114_01.pdf (last visited July 9, 2008). The text of the Bill is illustrative:

I. THOU SHALT HAVE NO OTHER GODS BEFORE ME.

EACH SCHOOL DISTRICT SHALL POST IN EVERY PUBLIC SCHOOL CLASSROOM AND IN THE MAIN ENTRYWAY IN EVERY PUBLIC SCHOOL A DURABLE AND PERMANENT COPY OF THE TEN COMMANDMENTS AS SPECIFIED IN PARAGRAPH (b) OF THIS SUBSECTION (4).

(b) THE COPY OF THE TEN COMMANDMENTS REQUIRED BY PARAGRAPH (a) OF THIS SUBSECTION (4) SHALL READ EXACTLY AS FOLLOWS:

A CODE OF CONDUCT

INFLUENTIAL AMONG THE NATIONS FOR 3000 YEARS THE TEN COMMANDMENTS, SAID TO HAVE BEEN RECEIVED BY MOSES ABOUT 1200 BC, CONTRIBUTED IMPORTANTLY TO THE AMERICAN FOUNDING AND REMAIN A TREASURE OF WORLD CIVILIZATION. THIS WIDELY ACCEPTED CODE OF CONDUCT IS RECORDED AT EXODUS 20 IN THE SCRIPTURES OF JUDAISM AND CHRISTIANITY, AND ENDORSED AT SURAH 7:154 IN THE MUSLIM KORAN. THE TEXT USED HERE IS A COMPROMISE VERSION DEVELOPED BY INTERFAITH SCHOLARS FOR THE MONUMENT LOCATED ON THE STATE CAPITOL GROUNDS. IT IS DISPLAYED IN COLORADO SCHOOLS FOR HISTORICAL, NOT RELIGIOUS, PURPOSES ONLY.

There is then a redacted version of the Decalogue. The bill also required a moment of silence that teachers were to introduce as follows: “The class will now observe a moment of silence for reflection on our heritage as a free people in one nation under God.”²² The bill was shelved in committee after a heated debate that attracted a great deal of public attention.²³

II. THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.

III. REMEMBER THE SABBATH DAY TO KEEP IT HOLY.

IV. HONOR THY FATHER AND THY MOTHER THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.

V. THOU SHALT NOT KILL.

VI. THOU SHALT NOT COMMIT ADULTERY.

VII. THOU SHALT NOT STEAL.

VIII. THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR.

IX. THOU SHALT NOT COVET THY NEIGHBOR’S HOUSE.

X. THOU SHALT NOT COVET THY NEIGHBOR’S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR’S.

²² Id.

²³ JOHN SANKO, *Bill Spurs Emotion Hearing: Plan Would Force Schools to Post Ten Commandments*, Rocky Mountain News January 28, 2000.

The Georgia Assembly similarly took a direct approach, considering in 2000 a bill that would have required local school systems to display the Ten Commandment in every classroom within the school district.²⁴

But not all state legislative bodies were so brazen. Kentucky, a hot-spot for Ten Commandments litigation, took a more subtle approach. Its house of representatives considered a bill that would have allowed private citizens to submit a petition for referendum to the County Clerk. If the referendum were successful by a majority vote the county would then be required to post the Ten Commandments and the include lessons in the social studies curriculum “regarding the historical impact of the Ten Commandments, as it relates to the comparative religion and moral, ethical, legal, and societal rules reflected by and related to the Ten Commandments’ role in the historical development of the United States and the Commonwealth of Kentucky.”²⁵

The Federal Congress also found the promotion of the Ten Commandments to be politically expedient. During the 105th Congress, Representative Alderholt, who represented Judge Moore’s district, introduced a resolution “expressing the sense of Congress” in support of Judge Moore’s display of the Decalogue.²⁶ On March 5, 1997 the resolution won the support of the House, 295-125.

Further, in considering the Consequences of Juvenile Offenders Act of 1999, Mr. Alderholt proposed an amendment, at that time entitled “Rights to Religious Liberty”, which would have empowered states to display the Ten Commandments on state property. It garnered 248 supportive votes against 180 negatives and was inserted into the bill. While this bill never became law, languishing in conference committee, the amendment lives on independently as bills of several names, including the Ten

²⁴ See HB1207, at http://www.legis.ga.gov/legis/1999_00/leg/fulltext/lc271025.htm. (last visited July 9, 2008).

²⁵ See HB 111, at <http://www.lrc.ky.gov/recarch/00rs/HB111.htm> (last visited July 9, 2008).

²⁶ This text reads:

Whereas Judge Roy S. Moore, a lifelong resident of Etowah County, Alabama, graduate of the United States Military Academy with distinguished service to his country in Vietnam, and graduate of the University of Alabama School of Law, has served his country and his community with uncommon distinction;

Whereas another circuit judge in Alabama, has ordered Judge Moore to remove a copy of the Ten Commandments posted in his courtroom and the Alabama Supreme Court has granted a stay to review the matter;

Whereas the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization; and

Whereas the Ten Commandments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that--

- (1) the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society; and
- (2) the public display, including display in government offices and courthouses, of the Ten Commandments should be permitted.

Commandments Defense Act, the Religious Liberties Restoration Act, and the Safeguarding Our Religious Liberties Act.²⁷ Representative Aderholt and others periodically reintroduce this piece of legislation, which gets referred to the Subcommittee on the Constitution, where it stays.²⁸ Amongst other things, Representative Aderholt said this in favor of the bill: “The founders wisely realized that in a free society it is imperative that individuals practice forbearance, respect and temperance. These are the very values taught by all the world's major religions and the Ten Commandments and our Constitution underscore these values.”

More recently, the House has considered: bills that would remove the fee shifting provisions from §1983 in cases involving the display of religious symbols;²⁹ bills that would remove display cases from the jurisdiction of the Federal Courts;³⁰ bills that would

²⁷ Senate 1558 (108th Congress, 1st Session) August 1, 2003 and House Resolution 3190 (108th Congress, 1st Session) September 25, 2003 (this bill would also have “protected” the “under God” clause of the Pledge and the “In God We Trust” motto).

²⁸ The content of the “Rights to Religious Liberty” and of the “Ten Commandments Defense Act” seem to be identical:

A Bill

To defend the Ten Commandments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Ten Commandments Defense Act of 2002’.

SEC. 2. FINDINGS.

The Congress finds the following:

- (1) The Declaration of Independence declares that governments are instituted to secure certain unalienable rights, including life, liberty, and the pursuit of happiness, with which all human beings are endowed by their Creator and to which they are entitled by the laws of nature and of nature's God.
- (2) The organic laws of the United States Code and the constitutions of every State, using various expressions, recognize God as the source of the blessings of liberty.

...

SEC. 3. RELIGIOUS LIBERTY RIGHTS DECLARED.

(a) DISPLAY OF TEN COMMANDMENTS- The power to display the Ten Commandments on or within property owned or administered by the several States or political subdivisions thereof is hereby declared to be among the powers reserved to the States respectively.

(b) EXPRESSION OF RELIGIOUS FAITH- The expression of religious faith by individual persons on or within property owned or administered by the several States or political subdivisions thereof is hereby--

- (1) declared to be among the rights secured against laws respecting an establishment of religion or prohibiting the free exercise of religion made or enforced by the United States Government or by any department or executive or judicial officer thereof; and

- (2) declared to be among the liberties of which no State shall deprive any person without due process of law made in pursuance of powers reserved to the States respectively.

(c) EXERCISE OF JUDICIAL POWER- The courts constituted, ordained, and established by the Congress shall exercise the judicial power in a manner consistent with the foregoing declarations.

See HR 3895 IH (107th, 2d session) March 7, 2003. For the Amendment, see Congressional Record of June 16, 1999, p. 4457-58.

²⁹ House Resolution 2679 (109th Congress, 2d Session) May 25, 2005, passed 244-173 and reported to the Senate on September 14, 2006 where it was sent to the Committee on the Judiciary.

³⁰ House Resolution 4922 (107th Congress, 2d Session) June 12, 2002.

require the posting of the Ten Commandments in the House and Senate Chambers;³¹ bills that would require the posting of the Ten Commandments in the Capitol;³² bills that would establish the first weekend in May as “Ten Commandment Weekend;”³³ resolutions honoring the Ten Commandments Committee³⁴ and expressing the sense of Congress that the Supreme Court’s decision in *McCreary* was mistaken;³⁵ and constitutional amendments which would “protect” the Pledge of Allegiance, the display of the Ten Commandments and voluntary school prayer.³⁶

Finally, the Decalogue also made a grand entrance into the world of pop culture. For instance, ABC’s 2000 Easter broadcast of DeMille’s “The Ten Commandments” garnered 25 percent more viewers than the same broadcast two years previous.³⁷ Again, Laura Schlessinger’s book, written with Rabbi Stewart Vogel, “The Ten Commandments: The Significance of God’s Laws in Everyday Life” moved quickly to the top tier of the national best seller list. It considers each of the commandments, deriving from each a set of conclusion pertinent to modern living. The Sabbath, for instance, is good because it is a day of “re-creation” during which we can “break ourselves free from the chains that enslave us to our work.” Hence, “a good rule for the Sabbath is to avoid discussion of people’s jobs.”³⁸ Unfair business practices – including personal attacks on owners, employees and stockholders of a company – is condemned under the sixth commandment, thou shalt not murder. “We would argue that nonfactual negative advertising – criticism of a competitor based on negative imagery or innuendo – can be considered a form of murder.” Also prohibited under the prohibition of murder are suicide, abortion, euthanasia, complicity while a third party murders, and – less obviously – gossip and embarrassing people (forms of social murder).³⁹

It is not just litigation over the Decalogue that became fashionable in the late 1990s. The Decalogue itself was the fashion and it echoed through politics, law, and culture. This dissertation focuses on the litigation over the Decalogue and presents a case study of two counties in Tennessee who experienced (or perhaps instigated) such

³¹ House Concurrent Resolution 50 (108th Congress, 1st Session) February 13, 2003.

³² House Concurrent Resolution 310 (108th Congress, 1st Session) October 21, 2003.

³³ Senate Resolution 483 (110th Congress, 2d Session) March 13, 2008.

³⁴ House Resolution 598 (110th Congress, 1st Session) August 1, 2007.

³⁵ House Concurrent Resolution 194 (109th Congress, 1st Session) June 28, 2005.

³⁶ House Joint Resolution 46 (108th Congress, 1st Session) April 9th, 2003. Evidently influenced by the rhetoric of Judge Moore, this proposed amendment reads: “To secure the people’s right to acknowledge God according to the dictates of conscience:

“The people retain the right to pray and to recognize their religious beliefs, heritage, and traditions on public property, including schools.

The United States and the States shall not establish any official religion nor require any person to join in prayer or religious activity.”

³⁷ ASSOCIATED PRESS, *Moses Plays Part in ABCs Golden Week in TV Ratings*, The Commercial Appeal April 20, 2000.

³⁸ DR. LAURA SCHLESSINGER & RABBI STEWART VOGEL, *The Ten Commandments: The Significance of God’s Laws in Everyday Life* 108-109 (Cliff Street Books 1998).

³⁹ *Id.* at 173-206.

litigation. Hence, although the conclusions I reach in the subsequent chapters can not pretend to generality, such generally no doubt exists.

II. Goal of the Dissertation

One goal of this dissertation is to offer an explanation for the popularity of litigation over a state's display of the Decalogue. The explanation I offer is not meant to be all encompassing; rather, it focuses upon the role of the Supreme Court in generating and structuring this litigation. There are two questions that I ask and answer about the Supreme Court's influence. The first question is about timing: what changes in the Court's doctrine instigated litigation over the Decalogue? The second question is about content: why did the Decalogue, rather than some other symbol from Christianity's rich tradition, become such a popular object of litigation?

Timing Question

I tackle the first question in the first part of this dissertation by offering a periodization of the Court's Establishment Clause jurisprudence since 1947. Simplified, the thesis here is that before 1984, the year of *Lynch*, the Court had not developed a constitutional jurisprudence that suggested a state's displays of a religious symbol could be a matter of constitutional importance. The display of a religious symbol is a communicative act and before the formulation of the Endorsement Test, the available constitutional vocabulary made it difficult to conceive of monumental communicative acts as possible violations of the Establishment Clause. The Endorsement Test changed that: it explicitly acknowledges that such displays are one means by which a state communicates and introduces a doctrinal vocabulary that attempts to be responsive to this type of communicative act. The Endorsement Test singles out one way amongst many that the state might express itself and prohibits such expressions. To use nomenclature from the philosophy of language, endorsing is a type of illocution and the Endorsement Test prohibits such illocutions.

After *Lynch* the lower federal courts spent the remainder of the decade working out this doctrine with respect to those religious symbols that typically appearing during the Christmas season: the crèche, the Christmas Tree, and, increasingly, the Menorah. The crowning achievement of this work is *Allegheny County*, in which the Court found the display of a crèche to be unconstitutional but the display of a Christmas Tree with a Menorah (or, perhaps a Menorah along side a Christmas Tree) to be constitutional. Hence, by beginning of the 1990s, the Court had worked about a constitutional jurisprudence which, if not entirely clear, gave sufficient direction to municipalities concerning what was and what was not constitutional when it came to displaying the symbols of the Christmas season.

In this part of the dissertation, I also point out that the Endorsement Test, along with the *Lemon* test, establishes a doctrinal structure in which postings of the Decalogue can be easily, or more easily, defended than the posting of other symbols. Stated briefly,

for the display of a symbol to be constitutional under either of these tests, it can have neither a religious purpose nor a religious effect. Part of what determines whether effects and purposes are secular or not is the character of the symbol being displayed. When compared with other common symbols from the Christian tradition, the character of the Decalogue can be more easily separated from the Christian metaphysics of salvation and eschatological hope and situated in the mundane and secular world of cultural development. As a salient example of such a strategy, I give special attention to an argument proffered by Mr. Sekulow of the ACLJ. This argument responds to the Endorsement Test and legitimizes a state's display of the Decalogue by arguing that the Decalogue functioned as a heuristic for the reorganization of the positive law in the aftermath of the Protestant revolt. When the state displays it, it memorializes and educates the populace about this important historical and secular usage. Some of the attractiveness of the Decalogue, then, is that without overly degrading its symbolic potency cause lawyers interested in posting can present the Decalogue as "secular" in ways that are not possible for other Christian symbols.

Content Question

This relationship between the Endorsement Test and the defensibility of the Decalogue gives some hint as to the popularity of Decalogue litigation. The Decalogue is capable of assuming symbolic meanings that fit it for some timely political usage, but it does not tell us what that political usage is. It is the goal of the second part of this dissertation to present a case study detailing these usages, from either side of the dispute. The short answer is that the attempt to post the Decalogue, and the ensuing resistance to such an attempt, takes place within competing mythic conceptions of American Republicanism. Each side's political activity is an attempt to restore or preserve its own vision of the mythic Republic against a dangerous and immanent threat. My analysis of the case study details the content of these competing mythic conceptions of American Republicanism and shows how the posting of the Decalogue is for one side the great remedy to America's ills while for the other the attempt to post is itself a threat to the values that underpin the possibility of democracy. My analysis, then, is an ideological analysis and is situated between two levels of generality. On the one hand, my analysis of these conflicts is not a narrative of historical contingency in which is related a series of discrete and concrete events that, when tied together, happen to result in the popularity of Decalogue litigation. Nor is my analysis one that mobilizes generalized social facts (such as "urbanization") to explain another generalized social fact (such as "fundamentalism"). My analysis, however, does make use of both of historical contingency and sociological categories, and so are in need of review here.

The fame of Roy Moore is one salient piece of historical contingency which indubitably increased both the popularity of the Decalogue and litigation over the state's posting of it. In 1992 the governor of Alabama appointed Roy Moore to the bench in Etowah County. Once installed, Judge Moore instituted the practice (or continued the long standing practice, depending upon which side of the issue one stands) of inviting

local clergy to deliver a prayer before venired jury members. His newly inherited courtroom was also in need of some interior decorating and so, along with an assortment of other items, Judge Moore hung a wood burning of the Decalogue.⁴⁰ A few other district court judges in Alabama also caused prayers to be said before venired jurors and it is this practice that initially caught the attention of the Alabama ACLU. That Judge Moore had tablets of the Decalogue seems to have only been noticed later but was nonetheless included in the ensuing legal complaint.

In the suit, the Alabama Freethought Association, with the ACLU as their legal counsel, charged that both the prayers and the posting of the Decalogue violated the Establishment Clause of the Federal Constitution.⁴¹ The federal judge dismissed the case for reasons of justiciability, but the litigation seeped over into the state court system, and this set of cases, because of their highly convoluted procedural posture, took years to resolve. The Alabama Supreme Court in 1998 also dismissed this set of cases, again for reasons of justiciability.⁴² Over these four years of the litigation, Judge Moore's obstinacy in retaining the Decalogue upon his wall garnered him a great deal of media coverage, which he handled with aplomb. And not only did he resist the onslaught of the ACLU but seemed to triumph, no court ordering to take them down. His ensuing fame and notoriety were sufficient to guarantee the success of his 2000 bid for Chief Justice of the Alabama Supreme Court.

Upon assuming the office, Chief Justice Moore had a 5,000 pound Ten Commandments monument – which detractors dubbed “Roy’s Rock” – installed in the rotunda of the court building in Montgomery. A redacted version of the two tablets of the Decalogue sit atop this monument and various quotes of Americana grace each of the monument’s four sides. The federal court with authority over the ensuing lawsuit found the display violative of the Establishment Clause and when Chief Justice Moore refused to remove it, the Alabama state ethics committee remove him, deeming his disobedience of a federal court to manifest a disregard for the rule of law incommensurate with the duties of his office.

Mr. Moore is a charismatic and polarizing figure. He inspires religio-political conservatives while alarming both liberals and moderates (the business wing of Republican part turned on him during his 2006 gubernatorial bid). Without his

⁴⁰ Mr. Moore describes his interior decorating thusly: “One day as I was standing in the dining room of my home, the Ten Commandments plaque I had made twelve years before caught my eye. Through the years, I had displayed that plaque in my home and in my office. I was proud of the only wood burning I had ever done. It was not elaborate, but it represented the moral foundation of the law I was sworn to uphold.

“My first thought was that the plaque would be perfect behind my chair to reflect my belief in the Supreme Lawgiver of the universe. The plaque seemed to be the answer to my quest for something fitting on the wall behind my bench. But surely attorneys would object to such a “religious” display. If I was sued and forced to remove such a display, I knew there would be both political and spiritual consequences. On the other hand, I reasoned, what a hypocrite I would be if I failed to acknowledge the God who was responsible for my new job. The choice was not difficult: I would display God’s law.” ROY MOORE & JOHN PERRY, *So Help Me God: The Ten Commandments, Judicial Tyranny, and the Battle for Religious Freedom* (Broadman & Holman Publishers 2005).

⁴¹ *Alabama Freethought Association v. Moore*, 893 F.Supp. 1522 (N.D. Ala. 1995).

⁴² *Ex parte State ex rel. James*, 711 So. 2d 952 (Ala. 1998).

accidental fame, it is unlikely that the Decalogue would have attracted as much attention as it did: not only did he inspire some to attempt to post the Decalogue but he also caused others to view other Decalogue monuments with new eyes. Some of these monuments had sat for many decades in city parks or on the lawn near the county courthouse, apparently causing little or no political anxiety. Mr. Moore succeeded in infusing the Ten Commandments with a meaning that many now found alarming. No longer did long standing Decalogue monuments appear to be benign relics of a simpler time. They now appeared as symbols of intolerance and their removal suddenly seemed to many to be an important political and legal project. While the rise of Mr. Moore coincides with the rise in litigation over the display of the Decalogue, Mr. Moore's charisma alone can not explain this popularity.

Mr. Moore's rhetoric symbolizes the Decalogue in a particular way and then situates that symbolization in a mythic understanding of the American Republic. That understanding of the American Republic resonates with important and salient features of conservative American ideology. Without this resonance, Mr. Moore would not have attracted the following that he did. He tapped into, and continues to tap into, a conservative ideology of discontent with and resentment of the perceived dominion of a secular, liberal elite.⁴³ Mr. Moore's influence, then, is incidental to the ideological elements which form the plinth of his popularity.

Another approach to explaining this litigation would rely upon general sociological facts. The posting of the Decalogue would then be a species of such a general fact (i.e., an expression of mechanical solidarity) that was brought about by species of general fact (i.e., morally outrageous and criminal behavior). Such general categories are indispensable to the analysis of this litigation, but in approach the phenomena in such a high level of generality, they lose the ability to explain why the political motivations of those who participate in these legal disputes. Three prominent sociological approaches are worth mentioning here: a Durkheimian approach, a Weberian approach, and the "culture war" approach.

Durkheim

Initially, the attempt to post the Decalogue appears as an archetypal Durkheimian moment. Here we see the social body returning to the repressive, criminal law with the salutary social effect of reconstituting the social solidarity of the community through the re-affirmation of the conscience collectif. The Decalogue is a part of the ancient law, promulgated by God and backed by his threat of punishment should it be violated. There is a describable up-tick of Ten Commandments political activity after both the Columbine shootings and the 9/11 Terror Attacks, suggesting that this activity is the product of moral outrage. Legislation aimed at promoting the Decalogue is often associated with or incorporated into larger crime bills. These bills are often explicitly responsive to these two events, suggesting that the promotion of the Decalogue is aimed at punishing

⁴³ Mr. Moore, for instance, ran for governor in 2006 and 2010 and was one of the speakers at the Tea Party Convention in Nashville.

criminal and social deviance. All of the haranguing surrounding the attempt to post the Decalogue no doubt draws together like-minded individuals in a discursive re-affirmation of the moral order, of which the Decalogue is an important part.

Yet, this theory is insufficient to explain both attempts to post the Decalogue and the resistance to such attempts. In this respect we can see a particular instance of one of the chief criticisms of the Durkheimian theory of crime, punishment, and society. On the Durkheimian theory, punishment is expressive of the community's moral outrage, which is to work directly and violently upon the criminal. It is the activity of punishment that brings the community together in a re-affirmation of the community's moral sentiments and beliefs. Such a theory, it is rightly complained, can not account for the power of the state as an intermediary between the community's sentiments of moral outrage and the eventual punishment of the criminal. Nor can it account for the community's moral pluralism, since within in a pluralistic community there is no one conscience collectif to reaffirm, if the activity of punishing does re-affirm the moral order, it can not be the community's moral order, but only that of one of its sub-divisions.

First, the power of the state intervenes between the community's sentiment of moral outrage and the actual expression of that moral outrage. There are so many institutions and procedures – techniques of rationalization – between the community and the punishment of the criminal that one can not explain this punishment by reference to the moral outrage engendered by the criminal offense alone. Indeed, with respect to Decalogue litigation, the moment of punishment, when the community is to gather together to commend one another and thereby reaffirm the moral order, is entirely absent. No where in the case study, or anywhere else that I know of, is anyone punished. Or rather, there is punishment, but that punishment has taken on a form so inflected by its social and political circumstances that to understand that punishment we need to understand these social and political circumstances. As we shall see, the ACLU is a continual object of verbal assault (punishment) and such assault draw cheers and praise. It is highly plausible to understand such moments as reaffirmations of the moral order against the threat of immoral deviance, but note the Durkheimian theory alone can not explain why the ACLU is the object of assault, why those assaults are verbal, or what the ACLU has got to do with the posting of the Decalogue. Particular institutions and ideology intervene in the expression of moral outrage and give that expression an institutionally appropriate form.

While some of the activity surrounding the attempt to post the Decalogue may be understood as a type of punishment, the actual posting of can not. If advocates of posting want to return to the "repressive law" they want to do so by posting that "repressive law", not enforcing it. Advocates of posting do not what to codify the Decalogue, although they are fond of point out the various commands of the second pentad (thou shall not murder) are already codified. Nor do they seek to punish individuals for violations thereof. While the ACLU is subject to verbal assaults, there are no such assaults, or even chastisement, inflicted upon Sabbath breakers. Indeed, as we shall see, advocates of posting are universally unconcerned with the first pentad of the Decalogue. If advocates of posting do not seek to enforce the prohibitions of the Decalogue, what then do they

mean to achieve by posting it? The Durkheimian categories of social solidarity and conscience collectif can not by themselves answer this question.

If the power of the state channels and inflects the community's outrage into certain forms, it is nonetheless correct that it has not defused this outrage entirely. The attempt to post the Decalogue is still an expression of moral outrage, and this expression thereof still has the indirect Durkheimian effect of reconstituting the conscience collectif of the (relevant) community. But the question then is what is the relevant community? And we here run into the question of moral pluralism.

On the Durkheimian paradigm, the activity of punishment reaffirms the moral order of the entire political community. In the case study, the attempt to post the Decalogue can not be understood as a re-affirmation of the entirety of the political community, whether one consider that political community to be the nation, the state, or the county. The attempt to post generates two distinct moral communities and polarizes them.

On the one hand, advocates for posting present an ideal for the whole nation and the posting as salutary towards that ideal. From the sociological point of view, however, the presentation of this ideal does not re-affirm a national conscience collectif, but a that of a particular sub-group of the national community. Hence, while advocates present the posting as an attempt to reform national politics, the narrative they tell about that national politics reconfirms their identity as marginalized members of the national political community. They are, to use Christians Smith's apt phrase, beleaguered sojourners in their own land. The resistance generated by their attempt to post the Ten Commandments, as well as their ultimate removal of those commandments from the place of their posting, confirm their beleaguered and marginal status. This sub-group identity, the conscience collectif, is re-affirmed by the attempt to post.

Resistance to posting generates and affirms the conscience collectif of an entirely different sub-group within the American polity. While opponents of posting overtly attempt to protect minority member of the political community, in doing so they also project an ideal for the entire nation, an ideal that is, in their own words, one of toleration and inclusiveness. Rather than conceiving themselves as sojourners in their own land, this sub-group thinks of its self as the carriers of toleration and religious liberty, and the attempt to post the Decalogue is an attack on these two values. There can be, therefore, no common ground between the two groups.

In sum, the Durkheimian theory is correct insofar as it would conceive of the attempt to post as generated by moral outrage. However, the state, and its ideological supports, has inflected the expression of this moral outrage into non-violent and institutionally appropriate forms. In which case, what is needed is an understanding of those forms, not merely that they were brought about by moral outrage. The Durkheimian theory also fails insofar as it posits that the activity of punishment refreshes social solidarity, draws the community together, re-affirms the conscience collectif, and renews group identity. All of these things happen in the case study, but upon two different communities, who are polarized by the attempt to post the Decalogue rather than brought together.

Weber

A Weberian approach, with its focus on institutions and ideological sub-groups, also initially seems well equipped to explain the litigation over the posting of the Decalogue, and Professor Gordon has made an explicit attempt to do this.⁴⁴ Following Martin Resiebrodt's magisterial study,⁴⁵ Professor Gordon argues that the movement to post the Decalogue in the aftermath of the Columbine shootings was a part of a "rationalistic fundamentalist" movement. Such movements have four characteristics. First, they imagine a societal fall from a mythic and enchanted past; second, they are a "mobilized traditionalism" seeking to recapture this mythic past through a social or political program; third, they adhere to a Manichean dualism; and fourth, they involve a "compulsive legalism." According to Reisebrodt, such movements are the product of the confrontation between urban industrialization, with its impersonal bureaucratic and market relationships, and traditional patriarchy, with its personal economic relationships. In this confrontation, the traditionalists suffer a loss of prestige and political influence, which they attempt to reclaim by entering into politics. Hence, we would expect fundamentalism to initially take hold in those areas of the country just beginning to urbanize, which, according to Reisebrodt, we do. In American, for instance, one observes fundamentalism initially taking hold in the North, Midwest, and Southern California between 1910 and 1928, in particular in Boston, Chicago, Saint Louis, Baltimore, Los Angeles, and Minneapolis.

The "carriers of fundamentalism" then, will have a particular geographic distribution, being located in areas of intense urbanization. Professor Gordon attempts to gauge this distribution by examining Congressional delegate support for Representative Alderholt's Ten Commandments Defense Act. He first classifies each state into one of three groups: those with supportive delegations, those with neutral delegations, and those with opposing delegations. This reveals that Representative Alderholdt's proposal garnered support from the South, the Midwest, and the Southwest. Examining the demographics for these areas, Professor Gordon concludes that these are all areas that have in the past few decades experienced a great deal of urbanization.

The outlines of this theory hold fairly tightly for the two Tennessee subject counties. The attempt to post the Decalogue corresponds, as we shall see in Chapter - , with Reisebrodt's ideological definition of fundamentalism: advocates of posting conceive of a fall from the enchanted past and posting the Decalogue, conceivably a type of compulsive legalism, is an attempt to return to that past. Furthermore, both subject counties have experienced an increase in population in the past few years (Rutherford more so than Hamilton), which might be taken as a rough proxy of urbanization (although it could also be a proxy for suburbanization, which may or may not generate

⁴⁴ DANIEL GORDON, *Dead Student, an American Story and Answer: A Sociological Analysis of Fundamentalism Explaining the Legalization for Religious Textualism*, 40 Washburn Law Journal 13 (2000).

⁴⁵ MARTIN RIESEBRODT, *Pious Passion, The Emergence of Modern Fundamentalism in the United States and Iran* (University of California Press 1990).

fundamentalism by endangering the prestige of the society's traditional elements). Therefore, while this theory seems initially plausible, it can only explain large social trends, not any particular instance of the attempt to post the Decalogue and the litigation that ensued thereafter.

First, Reisebrodt and Gordon proceed with a generally Weberian analysis, one that focuses on institutions and classes of people grouped by ideological affiliation. Much as the Durkheimian explanation is subject to a Weberian critique (where's the state?), so to is this Weberian analysis subject to a Durkheimian critique. The temporal and rhetorical proximity of the attempt to post the Decalogue to both the Columbine Shootings and the 9-11 Terror Attacks (in both cases advocates of posting specifically identify their attempt as responsive to these moral calamity), along with the association of those attempts with criminality and the criminal law, suggests that the attempt to post has much more to do moral outrage than an institutional and ideological analysis can handle. A Durkheimian inspired analysis, where criminalization and punishment are a technique for separating the normal from the abnormal and reconstituting the conscious collectif through a return to an ancient, god-given law might do more to explain this movement's "compulsive legalism" than does urbanization. Indeed, while the discourse of advocates of posting displays elements of fundamentalist ideology, there is also present in this discourse elements of punishment, such as verbal assaults on the ACLU, that separate the good from the bad and reinforce the social solidarity. That is, these conflicts are not merely an attempt of one group to retain its prestige, as the Reisebrodt-Gordon thesis would have it. They are also the very means by which this group constructs and reconstitutes its social solidarity through the affirmation of the mythic narrative – paralleling that of "fundamentalism" – which gives identity to the group.

Second, the unit of urbanization in Professor Gordon's study, the state, is simply too large to accurately identify regions of urbanization, albeit, as we will see, political geography plays an important part in the mythic narratives. The political geographies, in this case the state of Tennessee and two counties of that state, have their own histories and their own cast of characters which infuse the mythic narratives with local idiosyncrasies. For instance, Hamilton County is within an hour drive of Dayton, site of the Scopes trial, present location to Bryant College, and home to one of the activist heavily involved in the attempt to post the Decalogue in the courthouse, both in Hamilton County and throughout the state. Further, a certain secessionist ideology native to southern states makes frequent appearances in the discourse of those attempting to post the Decalogue. Once again these conflicts not only enact ideologies, but build them, and the local political detail is built into these myths, detail which can not be identified through general sociological categories such as urbanization.

Third, explanations that rely upon general sociological facts give a causal explanation for the phenomena they purport to explain. When correct, they allow one to predict when and where we will find "fundamentalism" and what changes in society will impel "fundamentalist" onto the political stage. Such an explanation, however, does not make the legislative attempt to post the Decalogue intelligible, in the sense that by such a

sociological explanation we now know what individual people, or groups of such people, were intentionally attempting to achieve in posting the Decalogue.

The Reisebrodt-Gordon theory, for instance, makes little reference to intentionality, and to the degree that it does, the content of those intentions are too thin to do any work in making the attempt to post the Decalogue intelligible. Were the attempt to post the Decalogue an instance of “rationalistic fundamentalism”, then advocates of posting would be intending, by doing so, to reclaim their lost prestige. Supposing this to be so, this intention leaves the following questions unanswered: why is posting the Decalogue a means of regaining lost prestige? Since the effort is only to post the Decalogue and not, say, follow it meticulously, why is the attempt to post a species of “compulsive legalism”? Why insist upon posting the Decalogue rather than some other element of religious law, such as the beatitudes? Why must it be posted in schools, courthouse, and legislative lawns, rather than, where liberal insist, in churches and homes?

In sum, while Gordon’s Weberian approach provides useful guideposts – especially in its ideological definition of fundamentalism – it can not answer these questions about intentions, motives, and policy goals. Nor can it account for the Durkheimian aspects of the attempt to post the Decalogue. The focus on criminality, on punishment, and its proximity to two moral calamities can not be explained by a Weberian approach.

Culture Wars

Finally, the sociological literature concerned with the “culture wars” – a term whose appropriateness is much disputed – also seems to offer a general sociological explanation of these conflicts. I leave a full description of this sociological theory to Chapter 8 and here only take note of its most prominent points.

While there is dispute over the details, it is generally agreed that the “culture war” is a competition between two groups who adhere to differing conceptions of the sources of moral authority. It is also generally agreed that this is not a competition between particular moral maxims, on the one hand, or creedal elements of religious dogma, on the other. The conservatives (or “orthodox”), it is said, are moved by an absolutist, other-worldly conception of moral authority: morality is what God says it is; its content is indifferent to the will or desires of particular individuals. It is typically supposed that conservatives look to “religion” for moral guidance. The liberals (or “progressives”), it is said in contrast, locate the source of morality in the needs and desires of individuals. Since there are universal aspects of human nature (e.g., we all feel pain and do not like it) there are some universal moral rules (e.g., don’t hurt others), but much of morality is idiomatic to groups and individuals. It is typically supposed that liberals look to secular sources, such as science, for moral guidance, for these can tell us, e.g., about the psychological nature of humanity and therefore what is harmful, what beneficial, and what indifferent.

As with the Durkheimian and Weberian explanations, much of this general social theory seems to manifest in the attempt to post the Decalogue. Advocates of posting appear to look to the absolute word for moral guidance (the Decalogue) while opponents seem to be opposing that absolute word and looking towards this-worldly sources of morality (i.e., what sort of life makes people happy, whether that is a religious life or not). These appearances, however, are misleading. In chapters 6 and 7 I specify the ideological differences between these two groups and show that these specifics can not be understood as mere instantiations of this general theory. First, the theory is correct insofar as it refuses to identify the conflict as a religious one: within the case study there is hardly a peep about the veracity of those religious dogmas that divided earlier Christian communities, such as the appropriateness of infant baptism and the doctrine of predestination. However, in characterizing the difference between the two sides as one about the sources of moral authority, this theory of the “culture war” has overcompensated. Conceptions of religion, but not creedal dogma, still form a part of the differences between these two competing groups.

Advocates of posting, I argue, conceptualize religion as necessary for the maintenance of a structured and ordered community. In contrast, opponents of posting conceptualize religion as a part of the care of the soul. Once this is recognized, it can be seen why the second generalization about conservative and liberals – that conservatives look to religion and liberals look to secular sources of morality – is mistaken. When conceptualized as necessary for the maintenance of harmonious and organized social units, “religion” becomes for advocates of posting a mix of both secular and religious elements. Hence, advocates of posting are more likely to cite the Founding Fathers than they are to cite the Bible. These Founding Fathers are, note are not only distinctly secular but also distinctly American and America is one of the particular communities of concern for advocates of posting. These archetypal but this-worldly members of the political community are for advocates of posting a greater source of moral authority for than are more other-worldly sources, such as Scripture.

Just the reverse is true for opponents of posting. Since religion is about the care of the soul, they are more likely to cite the New Testament, which can provide such care, than the Founding Fathers, who can not. Far from deriving their resistance to the posting of the Decalogue from naturalistic, this-worldly facts about human nature, opponents look to one of the paradigmatic sources of religious authority, Scripture.

In this instance, then, the theory of the cultural war seems to get it just backwards: where advocates of posting should be appealing to other-worldly sources of authority, they appeal to the Founding Fathers and where opponents of posting should be looking to psychology or some other naturalistic science, they appeal to the New Testament.

The Case Study

The case study of litigation in Tennessee attempts a mid-path between the historical contingency of Moore’s celebrity and sociological generality. It also incorporates the felicitous elements of each of these three sociological theories.

In outline, the attempt to post the Decalogue is an expression of moral outrage, but one inflected into a form appropriate to the institutional and ideological setting of its expression. The Supreme Court is the central character of this institutional and ideological setting. Advocates of posting think of their political action as an attempt to reform the Supreme Court – the agent of America’s moral decline – and they infuse the Decalogue with symbolic meanings which, from their point of view, fit it for this purpose; namely, they think of the Decalogue as the transcendent moral law, prohibitory, simply, and universal.

In contrast, opponents of posting tend to see the Court as the last bastion for the protection of individual rights against the occasional irrationality of majoritarian politics. Whether they are “secular” or “religious”, opponents of posting conceive of the Decalogue as a creedal element of faith which is complicated (that is, not simple) and intelligible only in the historical and social context of its composition (that is, not universal). They agree with advocates of posting that the Decalogue is prohibitory, but find this troublesome rather than salutary. Such prohibitions, when articulated by the state, associate violation thereof with both criminality and an inferiority citizenship for those who do not adhere to those prohibitions. Since the Decalogue is a creedal element of faith, rather than the transcendent moral law, the attempt to post it is an attempt at religious domination. It is thus one of majoritarian politics occasional irrationalities in need of judicial remedy.

The Court, rather than “religion” or some element therefore, is the central institution structuring these legal dramas. Conceiving of the Court as a mere adjudicator over some pre-existing social conflict (i.e., the “culture wars”) is misleading. While the judiciary does adjudicate these disputes and does resolve the constitutionality of any particular display, the real object of contestation is the Court itself. Determinations over the constitutionality of posting the Decalogue are really determination of the symbolic possession of the Court. Is the Court aligned with America’s “Judeo-Christian” heritage and the Transcendent Moral Law, as advocates would have it? Or is it a protector of individual religious liberty, as opponents would have it? The Court, and its doctrine, is the central institution structuring the mythic narratives in which the attempt to post, and the resistance to such attempt, takes places. Each side contests for its possession and the Decalogue is the symbol by which this is to be achieved.

The case study, then, unearths and articulates the mythic narratives that structure the legal/political conflict over the posting of the Decalogue. It also shows that this political action is situated within mythic conceptions of American Republicanism composed of ideological elements sufficiently nuanced to resist categorization as either religious or secular, or this-worldly or other-worldly. In the last part of the dissertation I confront the religious/secular distinction and argue that it must be either jettisoned or, if retained, highly modified if it is going to do any useful work as either a theoretical concept or an element of constitutional doctrine.

In this regard, one strain of political philosophy deeply in need of retooling is that concerned with the duty of civility and the Rawlsian doctrine of public reason. The duty of civility, it is typically argued, is an obligation of democratic citizenship that, inter alia,

can only be satisfied by offering “public reasons” when engaging in certain types of political activity. What type of political activity obliges political actors to offer public reasons and what, exactly, makes a reason public are highly disputed. It is less contentious, however, that religious reasons are paradigmatic examples of non-public reasons. To offer “religious” reasons for political action is therefore a violation of the duty of civility. I do not think that the epistemic designation of “religious” can bear the weight that theorists in this area desire it to. By mobilizing the details of the case study, I show why this is so and join a growing minority who think the distinction between religious reasons and secular reasons is theoretically infelicitous. Not only does it fail to identify anything that is a worrisome per se to democratic politics, but by designating one particular type of reasons for political action as illicit, it threatens to create communities of resentment of those who have and would act upon such reasons. This is a result, it seems to me, to be avoided if at all possible.

Indeed, this is much more than a problem with the abstract, philosophical literature. Most theorists think that the duty of civility and the doctrine of public reason ought to be obligations of political morality alone and it is therefore universally acknowledged that such obligations should be neither constitutional or legal requirements. But this is exactly what the purpose prong of the Endorsement Test does: it operationalizes the Rawlsian doctrine of public reason by penalizing legislators who would give religious reasons for political action. The purpose prong incentivizes silence – or worse, dissembling – by making the outcome of the constitutional question dependent upon what individual legislators say in the course of legislative debate or even outside of that debate.

The final chapter, then, offers suggestions to avoid this unseemly consequence of the Endorsement Test. Yet, unlike many, I do not think this test ought to be jettisoned altogether because, once properly modified, “endorsement” is a concept that can usefully be put to work on behalf of what is really at stake, or potentially a stake, in these disputes; namely equality of political status, what we might also call or equal citizenship. The posting of a symbol (religious or otherwise), I argue, is not merely “passive”, as their advocates often assert – somewhat disingenuously, given how vehemently they defend them. Rather, the state’s posting of symbols is a communicative performance that arranges expectations about how the state will treat certain individuals. Equal citizenship is disabled to the extent that a monument’s communicative performance defeats the expectation of equal treatment. The state’s posting of a “religious” symbol might very well arrange expectations so as to disable the citizenship of some by asserting their incompetence to enter and participate in the public sphere.

Whether or not any particular symbol produces such a stigmatic impact can not be determined by asking whether or not a symbol has a religious purpose or effect. Instead, I think jurist should ask three questions, each of which is only incidentally related, if at all, to the distinction between religious purposes and secular purposes. First, jurist should ask about the social meaning of the place in which the symbol is displayed. Is it a place of social and political equality? Instead of asking about purpose, jurist should ask what cultural script the display enacts, and then whether that script is one of equality or

separation and inferiority. Instead of asking about the effect of a display, jurist should ask about the significance of the symbol from within the tradition of which it is a part. These three inquiries place the jurist in a position to analyze whether or not the display disables or degrades the citizenship of individuals because of their religious affiliations.

Plan of the Dissertation

The first part of the dissertation examines doctrinal changes that made the state's display of a religious symbol a possible subject of litigation and then made the Decalogue an attractive symbol to defend. The second part of the dissertation begins with a discussion of the sociological theory of "culture war", presents the two competing mythic conceptualizations of American Republicanism, and suggests modifications to the general theory of culture war. The third part of the dissertation – the normative section – argues that the religious/secular distinction ought to be excised from the theoretical literature and replaced with different epistemological and aretaic demands. In the concluding chapter, I argue that the Endorsement Test, properly re-tooled, can operate as a protector of equal citizenship and suggest the doctrinal re-tooling that might serve this end.

**Part One:
Doctrinal Analysis**

**Chapter Two:
Institutional Separation**

I. Part Introduction: Doctrinal Change and the Establishment Clause

The following suite of three chapters has two goals. The first is to offer a periodization of Establishment Clause jurisprudence. The second goal is to show that we are presently living in a jurisprudential period in which the Court's doctrinal vocabulary erects a deliberative forum in which the Decalogue, vis-à-vis other symbols of Christianity, is a relatively attractive symbol to defend.

There are three eras to the periodization. I identify different periods primarily by the normative grounds that animate the Court's jurisprudence. Differences in doctrinal vocabulary are also an important indicator that Court has entered a new era of jurisprudence, especially to the degree that doctrinal vocabulary signifies differences in the normative grounding of the Court's jurisprudence. The trajectory of the Court's jurisprudence is one that begins with a concern to preserve the autonomy of the institutions of church and state against each other's influence and moves towards a concern for preserving the equal political status of the individual "non-conformist".

The first period, from the Establishment Clause's incorporation in *Everson* (1947) until the early 1960s, is the separation era. During this time, the Court's rhetoric show that it took the metaphor of a wall of separation between church and state seriously. It tried to make this metaphor literal through its doctrine and holdings. I call this the Separation Era of the Court's Establishment Clause jurisprudence. It took the preservation of the institutional autonomy of religious organizations and the institutions of the state as the chief normative concern of the Establishment Clause and the prevention of state "aid" to religion was the chief, but not the only, means by which the Court attempted to preserve the autonomous spheres of these two types of institutions.

The second era of this periodization, which I call the "advancement" era, begins in the early 1960s and last until 1984, the year of *Lynch*. It is characterized both by the development of new doctrinal vocabulary and a greater concern for the equal political status of the non-conformist. This change in the focus of the normative grounding of the Court's jurisprudence is most explicit in *Torasco* (1961), in which the Supreme Court found an oath of office that included an affirmation of the existence of God to be violative of the Establishment Clause. It also manifests in cases like *Engel* (1962, school Bible reading), *Schemmp* (1963, school prayer), and *Epperson* (1968, Evolution), where the question is not so much about the separation of institutions (none of these three cases involve an institutional church) but the way that an individual's religious affiliations impact their use of a "secular" institution, in this case the school.

This shift in the Court's jurisprudential concerns is also manifest in the presentation of new doctrine, in this case the *Schemmp* test. This test, which requires

courts to ask about the “purpose” and “effect” of a state practice and determine whether either of these was “religious”, eventually became the first two prongs of the *Lemon* test (1971), which in turn morphed into the Endorsement Test (1983). This new doctrinal vocabulary, which abandons some of the rhetoric of institutional separation and instead focuses on the “advancement” of religion, allows courts to begin to conceptualize the harm that some religion-state relationships (rather than church-state relationships) can have upon the political standing of “non-conforming” individuals. Although this normative concern with the equal political status of individuals remains suppressed, *Schempp* marks the transition from the period of separation to the period of advancement.

This new doctrinal vocabulary, however, is not sufficient for analyzing at least one kind of now commonly occurring litigation, that over the constitutionality of a state’s display of a religious symbol. It is only during the advancement era that courts began to consider such cases. The difficulty here is that such displays are communicative acts and the communicative act, as I show Chapter 3, is a highly complicated phenomenon. None of the doctrine that the Supreme Court had hitherto developed provided courts with an adequate conceptual tool for analyzing this phenomenon and formulating coherent judgments about it. The concept of “advancement” is a poor vehicle for attempting to understand how a state’s communicative acts, via its monumental displays, arranges expectation about who is and who is not competent to enter and participate in political and public life. The display cases of 1970s (analyzed in Chapter 3) manifest this infelicity. Justice O’Connor’s introduction of the Endorsement Test (1984), so the argument goes, is an attempt to resolve this tension while ground Establishment Clause jurisprudence in a concern for the equal status of citizens within the political community.

Nineteen eighty-four also marks the beginning of the third era of Establishment Clause jurisprudence. The endorsement era of Establishment Clause jurisprudence, which we may or may not still be living in, is marked by two distinguishing features. First, unlike previous Establishment Clause doctrine, it explicitly takes equal political status as its normative ground. Second, it explicitly takes the state’s display of a religious symbol as a communicative act that can endanger a citizen’s standing within the political community. It thus attempts to respond to the phenomena over which it purports to regulate – a state’s monumental communicative acts – and foregrounds equal political status over other normative concerns.

The Endorsement Test does this by inquiring into the content of the message the speaker intended to send by its monumental display and the message the audience received from the state’s communicative act. This, in turn, requires judges and others who would employ the test to engage in a novel set of judicial enquiries. It is no longer sufficient to determine whether or not the state “aided” or “advanced” of religion. Judges must, to use a phrase from the philosophy of language, determine the illocutionary force of the state’s communicative act; that is, judges must determine what the state is doing when it communicates through a monumental display, and determining this requires judges to form a whole new set of ancillary judgments about the significance of such displays. In particular, the constitutionality of a display can not be determined merely by

classifying a display as either religious or secular. Instead, judges must determine the propositional content of the displayed symbol and determine how that propositional content interacts with the place of display to deliver 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 community.”⁴⁶

The Endorsement Test, like all constitutional doctrine, also requires defendants and plaintiffs to argue in a mode that is responsive to that doctrine. It erects a deliberative forum in which sometime of reasons will count as persuasive and other will not. In presenting such arguments, the opposing parties must therefore offer competing symbolizations of the both the contested symbol and the place of their display. The deliberative forum erected by the Endorsement Test makes the state’s presentation of the Decalogue, vis-à-vis the other symbols of Christianity, a relatively defensible act. To prove this claim, I turn in the last section of this part of the dissertation to one prominent argument for the constitutionality of state displays of the Decalogue. This argument is proffered by Mr. Jay Sekulow, who, through his organization the ACLJ, has become one of the preeminent litigators in this area. His argument for the constitutionality of Decalogue displays symbolizes (or re-symbolizes) the Decalogue with “secular” social and political meanings which, if recognized by a court, would free it from suspicion under the Endorsement Test. Religious belief and practice is not *sui generis*, but always absorbs, even while it shapes, the characteristics and content of the greater legal and social culture in which it exists. In Mr. Sekulow’s argument, we have a prominent example of this interaction.

II. The Separation Era

In this chapter, I argue that between 1947 and 1963, the year of *Schempp*, the Court was concerned with maintaining the separation of the institutions of church and state. For the reader familiar with the body of constitutional law, this claim will not appear entirely novel. However, it is important to articulate it here in some detail so as to reveal the stark differences between it and the Court’s later jurisprudence.

A. *Everson*

Early interpretations of the Establishment Clause, between 1947 and the early 60s, were dominated by Jefferson’s metaphor of a wall of separation between church and state.⁴⁷ This metaphor encouraged the justices to think of the Establishment Clause as

⁴⁶ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁴⁷ This metaphor finds its proximal inclusion in Religious Clause jurisprudence via Jefferson’s Letter to the Danbury Baptist association. There has therefore developed a body of literature disputing the appropriateness of so using this letter. Hamburger finds the letter’s use inappropriate because it is “manifestly” meant to strike at his Federalist opposition in Connecticut, not provide an interpretation of the First Amendment. PHILIP HAMBURGER, *Separation of Church and State* 155-65 (Harvard University Press 2002). But Levy disagrees, finding the letter authoritative because “on the occasion of writing this letter he was so concerned with the necessity of expressing himself with deliberation and precision that he went out

being concerned with the preservation of institutional autonomy: in exchange for sovereignty over its own affairs each type of institutions was to be constitutionally proscribed from interfering in the affairs of the other. During this period, the Court attempted to make the metaphor of separation literal by prohibiting the state from rendering “aid” to religious institutions.

Everson v. Board of Education is the seminal case for this approach to the Establishment Clause.⁴⁸ The question in this case was the constitutionality of a New Jersey statute authorizing local governments to form contracts for the transportation of children to and from school. The Board of Education of Ewing “authorized reimbursement to parents of money spent by them for the bus transportation of their children on regular busses operated by the public transportation system” except when the school was operated for profit.⁴⁹ Parents who sent their children to Catholic parochial schools were eligible to receive this state subsidy, and the statute was challenged as a violation of the Establishment Clause of the First Amendment.⁵⁰

In his majority opinion, Justice Black articulates an interpretation of the Establishment Clause that forbids the state from rendering aid to religion with the proviso, grounded in the Free Exercise Clause, that the withholding of such aid can not manifest hostility towards religion. Thus, at one and the same time, the Religion Clauses prohibit states from contributing “tax-raised funds to the support of an institution which teaches the tenants and faith of any church” while also prohibiting states from excluding individuals “because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”⁵¹

The majority and the dissent agree that the tax rebate program does indeed aid religion (“it is undoubtedly true that children are helped to get to schools”⁵²) but the majority thinks that this aid is of the same character as that provided by other generally available governmental services, and thus falls under the free exercise proviso. The character of aid here in question, they think, is analogous to that provided by police who, in the normal course of their duties, protect children against the hazards of vehicular traffic, even while those children are traveling to “sectarian” schools. The bus subsidy, they say, is also analogous to that provided by the local fire department which responds to fires at parochial schools as well as other buildings, to the maintenance of public

of his way to get the approval of the attorney-general of the United States.” *The Establishment Clause*, p. 182-83. However, Jefferson was not the first to employ the phrase: Roger Williams found it a useful metaphor for understanding the appropriate relationship between church and state. *Id.* at 183.

⁴⁸ *Everson v. Board of Education of Ewing TP.*, 330 U.S. 1 (1947).

⁴⁹ *Id.* at 3, FN 1.

⁵⁰ That the Catholic schools were recipients of this benefit is not at all incidental to the inception of that case. The plaintiff in the case, Arch R. Everson, was a member of the Junior Order of United American Mechanics, founded in 1845 in resentment against Catholic economic competition. During the later 19th century it associated with the American Protect Association and later, in the 1920, cooperated with the Klan. In New Jersey it lobbied against the practice of school busing, at that time primarily to Catholic schools, and eventually filed an amicus brief in *Everson* itself. It is not difficult, therefore, to understand this suit as instigated by anti-Catholic sentiment. For more details, see HAMBURGER, 454 et seq.

⁵¹ *Everson v. Board of Education of Ewing TP.*, 16.

⁵² *Id.* at 17.

highways and sidewalks along which Catholics travel to reach the parochial school, and to the sewage disposal provided by the public water works which carries water to and from parochial schools the same as public schools.⁵³ Denying services such as these to religious institutions would be, thinks the majority, unconstitutionally hostile. The rebate program, then, “does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”⁵⁴

The dissenters followed Justice Black in insisting that the state be prohibited from aiding religious institutions, but objected to the application of that principle on two grounds: they thought the majority misunderstood the nature of the institutions receiving aid and also gave too much weight to the free exercise proviso.

First, as articulated by Justice Jackson, the aid is not merely going to “accredited schools,” as the majority characterizes the parochial schools. Rather, that the aid is directed specifically towards Catholic schools and therefore singles out one type of religious organization in preference to others, and for Justice Jackson this is a dispositive fact. The school district has singled out a particular church, whose education system is pervasively religious, for monetary benefit, a scheme that “is understandable only in light of a purpose to aid the schools.” Further, it makes no difference that the aid is made directly to the student and only incidentally to the institution because the “prohibition against the establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”⁵⁵

For the other dissenters, however, even a “non-preferential” disbursement of tax-raised money would not save the program’s constitutionality: “The Amendment’s purpose,” writes Justice Frankfurter, “was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. . . . It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”⁵⁶ Thus, for those Justices joining this opinion, the fact that the aid might have been specifically directed to a particular denomination is immaterial, as is the fact that its educational system is “pervasively sectarian.” By their lights, no aid, no matter how miniscule or how generally available, can go to any religious institution, even when that institution provides other distinct, secular functions. The dissent would, then, greatly diminish, perhaps remove altogether, the force of no hostility proviso: the “complete and permanent separation” of church and state prohibits any state accommodations of the “spheres of religious activity.”⁵⁷

⁵³ Id. at 17-18.

⁵⁴ Id. at 18.

⁵⁵ Id. at 24.

⁵⁶ Id. at 31-32.

⁵⁷ Id.

Despite the appearance of an unbridgeable difference between the majority and the dissent, there was consensus that the Constitution requires the separation of the institutions of church and state and that one of the primary channels of connection between these two institutions is state appropriated fiscal aid. This doctrine requires a “separation analysis” to determine if a challenged state practice or statute violates the Establishment Clause.

B. Separation Analysis

Under a doctrine that prohibits aid to religious institutions from tax-raised funds, a judge must make three ancillary judgments about any given program: first, whether the state has aided an institution; second, whether the institution or institutions aided are religious in nature; third, whether that aid is general, in which case it provides only an incidental benefit to the religious institution and is constitutional under the demands of the Free Exercise proviso, or preferential, in which case it provides a direct benefit to the religious institution and is unconstitutional. I consider each of these three questions in order.

First, the judge must determine whether the state has provided aid to an institution. When the aid under scrutiny is financial, this question is usually quickly determined: tax raised monies have reached the coffers of a non-governmental institutions and such, in most circumstances, is aid. However, the question is more complex when the aid is non-fiscal. In *McCollum v. Board of Education* (1948) the Court considered the constitutionality of an Illinois “release time” program, which “released” children from their normal pedagogical duties for the purpose of being instructed upon the tenants of a religious tradition of their choice.⁵⁸ In *McCollum* these classes were led by members of an ecumenical group (The Champaign Council on Religious Education, composed of Catholics, Protestants, and Jews) who were given access to school rooms once a week. Those children who did not wish to attend any such instructional session continued with their normal studies.⁵⁹

The Court examined the constitutionality of this practice under its *Everson* precedent. In applying the prohibition on “aid”, the Court found that “here not only are the state’s tax supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery. This is not separation of Church and State.”⁶⁰ Although the vote

⁵⁸ *McCollum v. Board of Education of School Dist. No. 71*, 333 U.S. 203 (1948).

⁵⁹ *Id.* at 207.

⁶⁰ *Id.* at 212. The majority’s opinion was not much verbose than the quotation here, and this brevity has been much noted. Of it, Professor Howe writes: “Mr. Justice Black spoke for the Court’s majority with such an oversimplifying abruptness that the case told us very little except that the constitutional rule of separation which had been outlined in the *Everson* case was violated by the release-time program at issue.” MARK DEWOLFE HOWE, *The Garden and the Wilderness* 140 (The University of Chicago Press 1965). In reaching this conclusion, however, the Court quickly dispatched with the contention that the plaintiff’s lacked standing – merely saying this is “a ground which is . . . without merit” and citing only *Coleman v.*

count in this case was not close (8-1), the one dissent is qualitatively different than the dissents in *Everson*. Whereas the *Everson* dissenters disagreed about the majority's application of the "aid" principle, Justice Reed's dissent in *McCollum* breaks allegiance with that principle.

He argues that the majority's understanding of the *Everson* prohibition on aid is overly expansive. He fails to see how a religious institution is aided by the state's release time program: "there is no extra cost to the state but as a theoretical accounting problem it may be correct to charge to the classes their comparable proportion of the state expense for buildings, operation and teachers. In connection with the classes, the teachers need only keep a record of the pupils who attend. Increased custodial requirements are likewise nominal. It is customary to use school buildings for community activities when not needed for school purposes."⁶¹ So what aspect of the release time program, he asks, violates the Establishment Clause? The majority opinion, he says, does not tell us: "Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; of the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors?"⁶²

Justice Reed worries that the constitutional prohibition on aid is based upon a metaphor – "wall of separation" – and warns that "a rule of law should not be drawn from a figure of speech."⁶³ In *Everson*, that figure of speech made state fiscal aid to religion unconstitutional. In *McCollum*, Justice Reed right notes, the meaning of aid is stretched to include non-fiscal aid. He would, therefore, restrict the constitutional prohibition on aid: "I agree that they cannot 'aid' all or any religions or prefer one 'over another.' But 'aid' must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions."⁶⁴

Justice Reed's concern over whether there has been aid to an institution dovetails with the second judgment that a judge must make in applying the "no aid" principle, which is whether the aided institution is religious in nature. In *McCollum* Justice Reed would constrict the prohibition of aid to "the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be

Miller, 307 U.S. 433 (1939). It also quickly waived aside the contention that "the First Amendment was intended to forbid only government preference of one religion over another" and that it ought to overrule the "holding in *Everson* that the Fourteenth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States." Responding to both with only: "After giving full contention to the arguments presented we are unable to accept either of these contentions."

McCollum v. Board of Education of School Dist. No. 71, 211.

⁶¹ *McCollum v. Board of Education of School Dist. No. 71*, 329, FN2.

⁶² *Id.* at 240.

⁶³ *Id.* at 247.

⁶⁴ *Id.* at 248.

performing ecclesiastical functions.”⁶⁵ Hence, Justice Reed would proclaim the challenged practice constitutional if, upon inspection, there is in fact no aid, or there is no institution aided, or the institution aided is not religious in nature.

Similarly, in *McGowan* (1961), the Court believed that the critical question was not about the origin of Sunday blue laws (“there is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces”) but whether “present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.”⁶⁶ The Court answers this question in the negative: whatever the original religious purpose of the Sunday Closing Laws, there is now agreement, says that Court, that “the statutes’ present purpose and effect is not to aid religion but to set aside a day of rest and recreation.”⁶⁷ These laws, then, are not of a religious character and therefore their continued enforcement is constitutional. Under a separation analysis, the second judgment in application allows a justice to dismiss the plaintiff’s constitutional claim if there is no religious institution that is aided by the state.

Under a separation analysis, there is a third moment of judicial application: even if the aid is determined to benefit a religious institution, the justices must still confront the question of whether that aid is incidentally received as a part of a generally available public welfare program or specifically benefits religious institutions. Hence, during the late 60s and 70s, the Supreme Court engaged in a detailed, even absurd, parsing of the various types of aid that religious schools might receive from the state, determining which of those aids were general and which specific. For instance, in *Board of Education v. Allen*, the Supreme Court examined a New York statute requiring school districts to loan textbooks to students attending private schools within their district. Conceding that such aid might “make it more likely that some children choose to attend a sectarian school,” the Court nonetheless upheld the statute, reasoning that “The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not schools.”⁶⁸

In contrast, when the aid to schools has been financial the Court has quickly found the enabling statutes violative of the Establishment Clause. In *Nyquist* (1973), for instance, the court struck down a New York statute that: (1) provided to private schools, including “parochial” schools, monies for the maintenance and repair of school property, (2) reimbursed parents of children attending such schools with grants of up to \$100 per child, and (3) allowed other parents to subtract a portion of tuition cost to such schools from their adjusted gross income when filing their state taxes. The direct financial aid to

⁶⁵ While Justice Reed clearly means for this principle to be restrictive, the last disjunctive (“some religious group of organization . . .”) seems at counter purposes to this goal, for the Champaign Council on Religious Education seem to be an “organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions.”

⁶⁶ *McGowan v. State of Maryland*, 366 U.S. 420, 431 (1961).

⁶⁷ *Id.* at 449.

⁶⁸ *Board of Ed. Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 244 (1968).

schools for maintenance and repairs aids, subsidizes, and advances, says the Court, “the religious mission of the sectarian schools.”⁶⁹ It is not a generally available benefit. The tuition grants, while not disbursed directly to a religious institution, nonetheless contained no restrictions on their use, unlike the secular textbooks in *Allen*, and therefore also “provide desired financial support for nonpublic, sectarian institutions.”⁷⁰ Likewise, the Court found that the provision of tax breaks lacked restrictions on their use and therefore found them to be violative of the Establishment Clause.⁷¹

In sum, a structural analysis insist upon maintaining a wall of separation between church and state, which the Supreme Court, during the first fifteen years of its interpretation of the Establishment Clause, attempted to enforce by prohibiting the state from rendering aid to religious institutions. The determination of unconstitutionality, therefore, involves three moments: whether the state has rendered aid, whether that aid benefits an institution religious in nature, and, following the no hostility proviso, whether that aid was a generally available welfare benefit.

III. Separation Analysis and the Equal Status of the Individual

The normative foundation of a separation analysis is the preservation of the autonomy of the institutions of church and state. Since interactions between them tend towards mutual corruption, it is claimed, such autonomy is best achieved by cordoning them from each other. The following language from Justice Black is indicative of such an attitude: “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.”⁷²

This focus on the separation of institutions draws the Court’s attention away from other possible normative foundation of an Establishment Clause jurisprudence, such as political equality and the manner in which religion-state relations impact the value of an individual’s standing within the political community. Indeed, throughout these early cases, the individual appears only as a spectral child, an abstract denizen of a pedagogical institution, possessing only the thinnest of religious beliefs and psychological qualities. Under a separation analysis the individual is conceived of chiefly as a conduit through which state funds or other aid might pass on their way to a religious institution.⁷³ Nonetheless, this spectral presence seems to explain the outcome of a number of cases during the separation era.

⁶⁹ *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80 (1973).

⁷⁰ *Id.* at 783. In this case, “there has been no endeavor ‘to guarantee the separation between secular and religious education functions and to ensure that State financial aid supports only the former’” quoting from *Lemon v. Kurtzman*.)

⁷¹ *Id.* at 790-91.

⁷² *McCollum v. Board of Education of School Dist. No. 71*, 212.

⁷³ See, *Everson* and *Allen*, *supra*.

For instance, the different outcomes in *McCollum* (1948) and *Zorach* (1952) can be explained by a concern over the differential impact those two release time programs have on an equality of political status.⁷⁴ Both were constitutional challenges to release time programs, the seeming only difference between the two was the religious instruction in *McCollum* took place on campus while that in *Zorach* took place off campus. If one attempts to analyze these cases from the point of view of separation of institutions, one will be hard pressed to differentiate these two cases. In both cases the amount of state participation is *de minimus*: in *McCollum* teachers spent some time organizing the students for their release, tabulating attendance and marking truancies upon state owned attendance cards, which they did not do in *Zorach*, although the *Zorach* majority notes this, it is not the pith of their argument.⁷⁵ Similarly, if one attempts to analyze these cases from the point of view of protecting children from religious indoctrination, the location of the instruction is a matter of indifference. It is likely that each program was equally effective at indoctrinating religious dogma, so that it is not that case that one program has more religious effects than the other.

From the point of view of the individual's political and social equality, however, the location of instruction is important. The location of the instruction provides important lessons about the meaning of religious difference and the attitude that one ought to have about those religious differences. In *McCollum*, the religious instruction took place within the walls of the school. When the instruction takes place there, the symbolic message of that instruction is that political and social authorities recognize that citizens have different religious affiliations and think it important, necessary or expedient to segregate the population in accordance with those religious differences. In *McCollum*, then, differences in religious affiliation are treated as legitimate reasons for balkanizing the citizenry.

In contrast, when the instruction takes place off of campus, the symbolic lesson is different. In *Zorach*, the religious instruction does not occur within, literally or metaphorically, public space or institution. When the school, symbolic of this public space, releases the children from their pedagogical duties for the purpose of receiving religious instruction, the lesson is that we are a diverse citizenry whose religious beliefs are important to us. Because these beliefs are so important, political authority release the citizenry from their public lives in the school to attend the religious instruction of their choice. Here the balkanization and recognition of difference occurs in the private realm. The state recognizes differences but does not facilitate the creation or recreation of those differences. Whatever differentiation that occurs between citizens is due to private, individual choices, and the symbolic lesson of *Zorach* is that, while we are different in our private lives and the state allows these differences in the private realm, when citizens returned to the public realm of the school, those differences ought not to divide us from one another.

The degree of separation (or non-separation) between the institutions of church and state in *McCollum* and *Zorach* is roughly equal, and the degree of religious

⁷⁴ *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁷⁵ *Id.*

indoctrination that we might expect from each program is also roughly equal. The difference between the two cases is the location of the religious instruction, which location imparts important lessons about the meaning of citizenship, the meaning of the difference between public and private, and the political and social equality of the individuals, in this case, children who make use of that institution. While the vocabulary of these two cases sounds in the rhetoric of separation, this rhetoric is not sufficient to explain the differing outcomes. This difference is, however, attributable to the sentiment that the state ought not to manage or oversee the religious balkanization of its citizens in one of the paradigmatic instances of the public realm, the schools (*McCullum*); it can recognize those differences and make accommodations for them so long as those accommodations have no impact upon the individual's equal status within the political community (*Zorach*).

Again, in *Torcaso v. Watkins* the Court seems moved by questions of political equality, even though its rhetoric repeats the tropes common to a separation analysis. In this case, the Court considered a Maryland constitutional requirement that officeholders affirm the existence of God in their oath of office. Although the oath was ecumenical when first included in the Maryland Constitution (it required the affirmation of God's existence, rather than, like most of the original state constitutions, an affirmation of Protestantism), the Supreme Court held the requirement to be violative of the Establishment Clause. The Maryland Supreme Court upheld the oath requirement, reasoning that such an oath does not compel the petitioner "to believe or disbelieve, under threat of punishment of compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."⁷⁶ Plainly, however, the harm here is not to the integrity of Mr. Torcaso's religious beliefs, which remain intact and whole, but to his political equality: the Maryland oath disables him from holding offices of political power and thereby diminishes the value of his citizenship. Nonetheless, the Supreme Court insists that this case has something to do with religious liberty, rather than political equality: "This Maryland religion test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."⁷⁷ Here, then, the Court, repeating the rhetoric it developed in its earlier case law, recognizes, and seems to be motivated by the threat to political equality, without actually incorporating such reasoning into their opinion. The individual and his equal standing in the political community again seems to provide the normative motivation for this case, although not, again, explicitly.

Finally, in *Engel* the Court found the practice of school prayer to be violative of the Establishment Clause, even when school policy allowed students to excuse themselves from the practice.⁷⁸ Under the direction of the State Board of Regents, teachers in New York, at the beginning of the school day, were required to lead their

⁷⁶ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

⁷⁷ *Id.* at 496 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191-192 (1952) for the proposition that whether or not an abstract right to public employment exists, Congress could not pass a law providing that no federal employee shall attend Mass or take any active part in missionary work.)

⁷⁸ *Engel v. Vital*, 370 U.S. 421 (1962).

classes in the recitation of the following: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”⁷⁹ Parents of pupils challenged the practice as a violation of the Establishment Clause. Justice Black, joined by four justices, wrote the opinion for the Court, while Justices Frankfurter and White abstained, Justice Douglas concurred, and Justice Stewart dissented.

The Court grounded its holding upon the salutary effects of institutional separation when, to all appearances, the salient matter of concern is the integrity of a child’s religious beliefs, on the one hand, and her social and political equality on the other. Justice Black basis the majority conclusion on the premise that “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of American people to recite as a part of a religious program carried on by government.”⁸⁰ This constitutional prohibition is not intended to protect the individual from coercion, for “the Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”⁸¹

The Court does admit that when the state brings its financial resources to bear upon the question of religion, there might be, by the nature of the connection, some coercion. However, the purpose of the Establishment Clause goes much further than the protection of the individual against coercion: “the history of government established religion . . . showed that whenever government had allied itself with one particular form of religion the inevitable result had been that it incurred the hatred, disrespect and even contempt of those who held contrary beliefs. The same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.”⁸² Further, “another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecution go hand in hand.”⁸³ Forgoing any consideration, then, of the harm that might be inflicted upon the nonobserving children forced to either recite the prayer or conspicuously exempt themselves, the Court opts to found its conclusion in *Engel* upon the imagined long term horrors we can expect from a combination of church and state. The practice in question here – perhaps only a tiny establishment of religion – is nonetheless “the first experiment with out liberties” about which we ought to be alarmed because of its potentially disastrous long term consequences, not because the practice

⁷⁹ Id. at 422.

⁸⁰ Id. at 425.

⁸¹ Id. at 430.

⁸² Id. at 431.

⁸³ Id. at 432.

threatens either the integrity of the student's religious beliefs or their standing within the political community.⁸⁴

Justice Douglas, in his concurrence, is even more explicit about resting his decision upon the institutional features of the program, even arguing explicitly that the practice of prayer recital involves no elements of coercion. "The point for decision," he begins, "is whether the Government can constitutionally finance a religious exercise."⁸⁵ The question of finance is the critical question because "there is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day" with a prayer.⁸⁶ No student is compelled to take part. Non-conforming students may, if they wish, stand in place while those about them pray, and the teacher is forbidden by statute to comment upon their participation or non-participation. Further, students can be exempted from the practice and parents can implement that exemption simply by sending a letter to the school authorities.⁸⁷ Thus, "as I read this regulation, a child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official."⁸⁸

Nonetheless, the state has still exceeded its authority by financing a religious exercise:

In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayer in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.⁸⁹

Thus, for Justice Douglas, the financial connection between the two institutions, although minuscule, is enough to conclude that the program is violative of the Establishment

⁸⁴ Id. at 436 quoting from Madison's Remonstrance. A liberal like J. S. Mill, however, would find it curious that such a program could be called a "first experiment" with our liberties, as state-compelled prayer is fundamentally at odds with neo-Kantian autonomy, and thus abhorred by liberals. If compelled prayer can be classified as "first experiment," it is only through the lenses of a structural analysis, from which point of view the state appears to have done little to nothing to "aid" religion.

⁸⁵ Id. at 437.

⁸⁶ Id. at 438.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id. at 441, 442. He then opinions that every act of praying in situations like these might be intrinsically coercive as "every such audience is in a sense a 'captive' audience." It is not clear why this observation does not change or perhaps even vitiate his earlier analysis of coercion.

Clause, seemingly irrespective of what future disasters might come about from a church-state combination.

The *Engel* Court retained a strict distinction between the business of the Establishment Clause (institutional separation) and that of the Free Exercise Clause (coercion). From within this dichotomy, teacher led school prayers, so long as they permit exemptions, can be constitutionally proscribed only for the awkward reason that during the recitation of the prayer the state pays teachers a few pennies of salary. If, however, one finds the practice to be morally disturbing, it is not on account of these few pennies; were the program to be free (say, because the teachers' salaries were subsidized by a private entity for the few moments during which the students were reciting the prayer) one's evaluation of the practice would not alter. The locus of moral concern is not the breach in the wall of separation between church and state, as every opinion in the case seems to contend; rather, the locus of moral concern is simply that the practice itself (not its cost to the state) places nonobserving students in a profoundly cruel position. They must either pray, feign praying, or conspicuously mark themselves as different by not praying. The danger here, which the Court seems to recognize only on an unconscious level, is to the individual and not to the integrity of institutions. As with *Zorach*, the activity of school prayer, with its exemption provision, imparts important lessons about the interaction between religious belief and social and political equality. Once again, although the Court's opinion employs the rhetoric of institutional separation, the religious and political integrity of individual student seems to be subject of salient moral concern.

IV. The *Schempp* Test and the Advancement Era

During the early period after the incorporation of the Establishment Clause against the states, the Supreme Court insisted upon an interpretation of that Clause that attempted to literalize Jefferson's metaphor of a wall of separation between church and state. It hence proscribed the state from "aiding" religious institutions, so long as the refusal of that aid did not manifest an unconstitutional hostility. The normative foundation of such a form of adjudication is the concern for the integrity and autonomy of the institutions of religion, on the one hand, and the institutions of the state on the other. In addition to protecting the autonomy of institutions, this jurisprudence was concerned with the (speculative) long-term horrors of a church-state combination.

Within this normative vocabulary and mode of reasoning the individual, and the impact that state conducted practices might have upon her, plays little or no role. Nonetheless, as *Zorach* (in contrast with *McCullum*), *Torasco*, and *Engle* show, the integrity of the individual's religious beliefs and the equality of political standing seem to supply the actual impetus for many of the Court's decision during this era. The subsequent trajectory of Establishment Clause jurisprudence is one in which the individual emerges as the locus of moral concern.

A. *Schempp*

Both liberals and conservatives have strong views about school-directed Bible reading (along with school directed prayer). Liberals perceive in this practice, even when accompanied by the right of exemption, the taint of compulsion and see the state as exercising an insidious influence over the contents of their children's religious beliefs. Conservatives, on the other hand, see in these two cases the very origin of America's present state of perceived moral depravity. These two practices, many conservatives think, are (were) the keystone of America's moral integrity, and their extirpation by a "liberal, activist judiciary" made it difficult, even impossible, to inculcate children with proper moral discipline, lack of which had resulted in various societal ills.⁹⁰

Those who assume that the excusal provision removes any taint of unconstitutionality from the practice of school-directed Bible reading (or prayer), incorrectly believe that plaintiffs are objecting per se to the Bible and its reading. Since, it is inferred, the excusal provision allows non-conformists to avoid being exposed to the Bible, they are not forced to do anything they do not wish to do. Judicial determinations against the practice appear as nothing but animosity directed against Christianity.

This, I think, misconceives the issue. It directs attention towards the central item of the religious tradition – the Bible – while ignoring entirely the context in which that book is being used, by whom, and for what purposes. Litigation over school Bible reading (and school prayer) is less about religion than it is about political equality. The allowance of excusals from the practice, however much it allows the student to "avoid" reading the Bible, places the dissenting student into a situation where he must either engage in the religious practice in violation of his conscience, pretend to engage in the practice, which is to dissimulate (itself a sin in many faith traditions), or exercise his right of excusal which, to the degree that such students must relocate themselves, conspicuously mark them as different. It is this conspicuous marking that threatens the equal standing of the individual.

A separation analysis can indeed produce those results desired by liberals, but only upon grounds that seem, as I contend below, bizarrely misguided.

B. *Schempp* and the Individual

In *Schempp*, two companion cases, the Court accepted for resolution a dispute over the constitutionality of school-directed Bible reading.⁹¹ In this case, the issue of moral saliency is the same as in *Engel*: children and their parents are forced to choose between reading the Bible and conspicuously exempting themselves from the ritual. Unlike *Engel*, however, the Court seems to recognize this, with two important results. First, Justices, for the first time in Establishment Clause jurisprudence, looked away from a separation analysis and began to pay close attention to the impact that the practice had, or

⁹⁰ For further details, see chapters 6 and 7.

⁹¹ *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963).

could have, on the individuals involved. This is apparent from the majority opinion, penned by Justice Clark, but is most conspicuous in Justice Brennan's concurrence.

Second, this new focus required the articulation of new doctrine. Doctrine founded in a vocabulary that makes "aid" and the nature of institutions the touchstone of constitutionality can not felicitously resolve disputes over the way that religion-state relations impact the interaction between individuals and the institutions that they use frequent. Hence, in *Schempp* we witness an important change in doctrine. Instead of "aid", courts are now to focus on the "purpose" and "effect" of the state activity, attempting to discern if either of those is the "advancement" or "inhibition" of "religion."

This test is of critical importance to the development of Establishment Clause doctrine that I am telling here. First, as we shall see in the next chapter, during the 1970s courts employed this standard in their attempts to adjudicate "display cases." Second, this standard, as those familiar with Establishment Clause doctrine will recognize, becomes the first two prongs of the *Lemon* test, and it is these two prongs that Justice O'Connor's Endorsement Test are meant to clarify.

i. Majority Opinion

The majority opinion relies upon certain types of evidence hitherto absent from Establishment Clause reasoning and dicta. First, the Court included in its opinion the testimony of one of the fathers in the case, Edward Schempp, who said of exempting his children from the morning Bible reading that "after careful consideration he had decided that he should not have Roger or Donna excused from attending these morning ceremonies." He feared that:

his children would be 'labeled as 'odd balls' before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable 'to lump all particular religious difference(s) or religious objections (together) as 'atheism' and that today the word 'atheism' is often connected with 'atheistic communism', and has 'very bad' connotations, such as 'un-American' or 'anti-Red', with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct.⁹²

⁹² Id. at 208 FN3 (referencing the lower court, 201 F.Supp. at 818.)

Second, the Supreme Court took notice of expert testimony at trial that focused upon the differences between the Hebrew Scriptures and the Christian Scriptures. Dr. Gazel, for instance,

cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.⁹³

Finally, the Court takes judicial notice of the country's great diversity: "Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups."⁹⁴

This evidence draws attention to individual students who must cope with the school-directed Bible reading. The father's testimony, for instance, is not at all concerned about the appropriation of tax-raised money for the support of a religious exercise. Instead, he is concerned with the impacts that the exercise will have upon his children's social standing. To have his children excused from the reading is to mark them as different and other, and to associate them unfairly with godless Communism, which jeopardizes their standing within the political community. The testimony regarding differences in Scripture is not designed to show that the Bible is indeed a holy text, but rather that there are features of that Scripture that denigrate, or are likely to be perceived as denigrating, members of minority faiths, particularly Jews. The evidence concerning the diversity of religious belief is calculated to counter the claim that, in this case, the legal system is kowtowing to the desires of a few (and perhaps vicious) eggshell plaintiffs. Taking judicial notice of the nation's pluralism shows that we are a nation of minorities and the holding protects more than a small minority of "godless communists."

A separation analysis can do without these evidences. It need not be concerned with the motivations, thoughts, feelings, or mental states of the children and parents involved. Nor need it be concerned with the differences between Holy Scriptures (only that they are indeed holy) or the reactions that those differences might solicit from individual's of differing faith traditions. Nor need it be concerned with the nation's diversity. A separation analysis only concerns itself with the interaction between the institutions of church and state so as to preserve the autonomy of each. A strict insistence upon institutional separation, such as that accepted by Justice Douglas in *Engel*, would

⁹³ Id. at 209.

⁹⁴ Id. at 214.

strike down the practice of school-directed Bible reading simply because it cost the state a few pennies to have a school employee read the Bible excerpt over the loud speaker.

Given the dissonance between the doctrine, focused upon institutions, and the Court's recognition that school-direct Bible reading implicates the equality of individuals, it is not surprising that the Court articulates new doctrine: "The test may be stated as follows: what is the purpose or the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁹⁵

Despite the opinion's early emphasis upon individual equality and the articulation of new doctrine, Justice Clark proceeds with a standard separation analysis, seemingly neglecting to show how the practice of school-directed Bible reading has either the purpose or effect of advancing religion. Instead, as in *Engel*, the opinion focuses on the nature of the practice – it is religious – and the future civil strife that might possibly result from a church-state combination such as school-direct Bible reading:

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'⁹⁶

Justice Clark begins with the assertion that plaintiff's rights are infringed by the practice of Bible reading and that the constitutionality of that practice is not saved by the availability of exemption. Rather, however, than telling us what right is violated by this practice, the Court relies upon the position that the Establishment Clause prohibits more than the coercion to religious practice: the Establishment Clause requires the separation of the institutions of church and state. Hence, instead of grounding its new doctrine in an attempt to preserve the equality of individuals in a religious diverse polity, where it initially seemed to be going, the Court returns to a separation analysis and can, therefore, imagine only one harm to be guarded against – the long term horrors of a church-state combination. In this opinion, therefore, the harm to the individual remains spectral rather

⁹⁵ Id. at 222. The two components here, purpose and effect, are, of course, the first two prongs of the Lemon test.

⁹⁶ Id. at 224-25.

than concrete, and, more peculiarly, the Court says nothing about how, by the reading of the Bible in school classrooms, religion is advanced, either in effect or in purpose.

ii. Justice Douglas

Justice Douglas' concurrence perhaps gives some notion of how school Bible reading "advances" religion. There are a variety of ways that a state and church might combine, he says, but, from the point of view of the Establishment Clause, they all have the same vice – "that the state is lending its assistance to a church's efforts to gain and keep adherents."⁹⁷ If the unconstitutionality of reading the Bible in the classroom is located in its propensity to increase a church's tithable congregation, then one would expect Justice Douglas to focus his opinion on social statistics that support the contention that children who read the Bible in the classroom go to church more frequently, or that he would at least speculate in this direction. Instead, he opines on the manner by which such readings render fiscal aid to religion and how that fiscal aid might violate the sensibility of others. The Establishment Clause

forbids the State to employ its facilities or funds in a way that gives any church, or all churches greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.⁹⁸

Justice Douglas' opinion is a conglomeration of separation concerns and concerns over the religious sensibilities of individuals. On the one hand, Justice Douglas thinks that the state may not use its resources to give religious institutions greater strength in society than they would have were they to rely upon their members alone and that even a tiny amount of state money increases this strength. These are separation concerns. On the other, he is also concerned that the practice, in relying upon tax-raised funds, forces some citizens to support a religious practice violative of their sensibilities. The Justice's concern for the sensibilities of the non-conformist, however, remains vague. Focusing on these "sensibilities" draws one's attention to the individual who has those sensibilities, but Justice Douglas does not elaborate upon the exact nature of those sensibilities nor whether their presence is sufficient to show that there has been a violation of the Establishment Clause. Hence, while Justice Douglas makes some attempt to understand how school-direct Bible reading "advances" religion and the impact that the practice has

⁹⁷ Id. at 228.

⁹⁸ Id. at 229.

upon the sensibilities of some individuals, he ultimately skirts the issue and falls back upon separation concerns.

iii. Justice Brennan

Justice Brennan's concurrence most clearly moves away from a separation analysis and focuses upon the way that school-direct Bible reading impacts the political standing of non-observing individuals. Some of this concern manifests in the alternative doctrine he would promulgate, if he were in the majority: "the Establishment Clause . . . prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief."⁹⁹ The locus of "worship" and "belief" is the individual, and so Justice Brennan's standard directs the Court's attention to an analysis of the way a state practice impacts the autonomy of an individual's religious beliefs and practice.

First, by way of a long historical discussion of the reading of the Bible in public schools, Justice Brennan arrives at the conclusion that the practice is indeed religious.¹⁰⁰ He also concludes that the practice can not pretend to be secular or non-preferential, as the defense contends, and is not, therefore, by these arguments made constitutional.¹⁰¹ Nor does the excusal provision shield school-direct Bible reading from either the Establishment Clause or the Free Exercise Clause. As for the Establishment Clause: "The short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day."¹⁰² Here, then, Justice Brennan seems to rest his judgment upon the way that the practice violates the autonomy of the institutions of church and state: school-direct Bible reading is a religious practice and takes places in a school, an instrumentality of the state. The separation of church and state prohibits such a combination, and Justice Brennan therefore echoes Justice Douglas opinion.

However, in considering the plaintiff's Free Exercise claim, Justice Brennan's considers the dilemma that the exemption provision forces upon a student. "We have

⁹⁹ Id. at 234.

¹⁰⁰ Id. at 277-78. "The whole panorama of history permits no other conclusion than that daily prayers and bible readings in the public school have always been designed to be, and have been regarded as, essentially religious exercises."

¹⁰¹ Id. at 278-81. "While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.") *School District of Abington Township, Pennsylvania v. Schempp*, at 281-87. "One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place, that is, to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.")

¹⁰² *School District of Abington Township, Pennsylvania v. Schempp*, 288.

held,” he writes, referencing *Barnette* and *Torcaso*, “that a State may require neither public school students nor candidates for an office to public trust to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.”¹⁰³ Since exercise of the excusal provision is necessarily public, the exercise of it is a profession of disbelief and

by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.¹⁰⁴

Justice Brennan notices that non-observing children must choose between engaging in a religious practice that violates the scruples of their conscience or risk the (political) stigma associated with being an atheist and a non-conformist. The exercise of the constitutional right to exemption jeopardizes the social and political equality of those who exercise it. In support of this contention, Justice Brennan quotes from two state cases, both adjudicating the constitutionality of school-directed Bible reading. The first is from an 1890 Wisconsin Supreme Court case:

‘the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.’¹⁰⁵

The second is from a 1915 opinion from the Supreme Court of Louisiana:

‘Under such circumstances, the children would be excused from the opening exercises because of their religious beliefs. And

¹⁰³ Id. at 288-89.

¹⁰⁴ Id. at 289-90.

¹⁰⁵ Id. at 292 (quoting *State ex rel. Weiss v. District Board of School District No. 8*, 44 N.W. 967, 975 (1890).)

excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs to the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act (*sic*), under a Constitution which seeks to establish equality and freedom in religious matters.’¹⁰⁶

Justice Brennan therefore recognizes that the problem of moral saliency with school prayer is the following dilemma. The non-conformist student must either participate in the religious practice, which is to him an offense to conscience and is likely a threat to the integrity of his beliefs, or conspicuously exempt himself from the practice, which marks him as different and damages his “caste.” The few pennies that are appropriated by the state for support of this practice are of moral concern only insofar as this dilemma is already morally troublesome.

V. Conclusion/Observations

Schempp is a moment of doctrinal change. Besides the presentation of new doctrinal vocabulary – “purpose,” “effect,” “advance,” “inhibit” – the Court also shifted away from a concern over the separation of the institutions of church and state and towards an increased acknowledgment of the influence that religious practices can have upon the individuals who frequent secular institutions like the school. The impacts that state directed practices can have upon the individual, either upon her religious beliefs or her social and political standing within the community, begin to be the locus of moral and constitutional concern. Elements of a separation analysis are still present – Justice Brennan, for instance, finds the separation of institutions dispositive for the Establishment Clause claim in *Schempp* – and they seem to be doing a fair amount of the normative work. However, in those legal opinions in which concern over the separation of the institutions of church and state do play a normative role, those concerns seem to be misplaced insofar as they are insufficiently robust to determine the outcome: if one believes school-directed Bible reading or school-direct prayer to be unconstitutional, it is not because such practices are funded from the state coffer. If they are morally or constitutionally objectionable, they would continue to be so even if the practice cost the state no money.

Further, the *Schempp* Court recognized that the practice poses a threat to the individual’s social and political standing, rather than to the integrity of his or her religious beliefs, and that this threat to equality is not posed by an abnegation of legal rights. The practice does not extinguish the legal rights of any non-conformist child. The

¹⁰⁶ *School District of Abington Township, Pennsylvania v. Schempp*, 292 (quoting *Herold v. Parish Board of School Directors*, 136 La. 1034 (1915)).

threat posed by the exemption procedure is to the social and political equality of the “nonconforming” individual. The exercise of the exemption right marks the student as different and as an outside to the normal political and social community.

This trend in Establishment Clause jurisprudence – a trend towards doctrine that recognizes that state directed religious practices function to establish the social and political worth of individual citizens – continues during the 1970s, when courts begin to use the *Schempp* test to determine the constitutionality of “display cases.” We now turn to those cases.

Chapter Three: The Advancement Era: Early Display Cases

I. Introduction

In the first chapter, I argued that early Establishment Clause jurisprudence was dominated by the metaphor of a wall of separation between church and state and that the Court produced doctrine responsive to this metaphor. With little dissent, the justices concurred that the Establishment Clause forbade the state from “aiding” religious institutions. This developed into a doctrine focused upon the type of aid involved, whether financial or not, the amount of that aid, the immediacy of that aid, and the nature of the institution it aided. I called this a separation analysis and its chief normative concern is to preserve the autonomy of religious institutions and political institutions against the corrupting influence that each has upon the other. It is particularly concerned with the imagined long-term horrors of a church-state combination. Minor breaches in the wall between church and state such as, from the Court’s point of view, school Bible reading, are declared unconstitutional because the long-term accretion of such minor violations threaten both the civil peace and the vivacity of religious institutions.

Within this jurisprudence, the individual makes little or no appearance, spectrally lurking in the background. Nonetheless, concern over this individual’s political equality best explains the outcome of many of these early cases. The locus of harm, or potential harm, involved in many religion-state relations is the individual child, who must either engage in the practice or conspicuously excuse himself. Engaging in the practice is both a violation of the non-observing child’s conscience and also likely to have influence over the child’s religious beliefs, having some conversion effect upon her. Excusing themselves from the practice marks children as different and endangers their “caste” and equal standing amongst their peers. The hazard posed to the child’s equality is magnified by the location of this social differentiation: the school is one of the archetypal forums of equality and any threats to it here are likely to disseminate into larger society.

This incongruity between the court’s jurisprudential vocabulary, on the one hand, and the actual moral harm, on the other, forced the Court to change its doctrine. The *Schempp* test requires courts to examine the “purpose” and “effect” of a state activity in an effort to determine if either of these is the “advancement” of religion. This more spacious language allows courts to enlarge their ambit of concern beyond that of the separation of institutions. While it permits courts to consider the relationship between institutions, and whether or not any particular state practice breaches the wall of separation between them, they are no longer limited to such an inquiry.

One result of this doctrinal change was to make a state’s display of religious symbols a possible object of constitutional litigation. Before *Schempp*, there seem to have been only three challenges to a state’s display of a religious symbol, two disputes over the display of a privately funded crèche upon school grounds and one case over a

city's ownership of a statue of a Catholic nun whose philanthropy had been locally famous.¹⁰⁷ It was not until the 1970s that state and federal courts began to take up this issue in earnest. These cases are of interest here because they illustrate the difficulties that a court faces in applying the *Schempp* test to a state's monumental display of a religious symbol. Such displays are communicative acts and while the *Schempp* test supplies plaintiffs with the material they need for making strong constitutional arguments against such displays, it does not provide the conceptual machinery that would allow a court to perform a concise analysis of the phenomena being litigated.

These cases are rarely referenced either in the scholarly literature or contemporary court opinions. *Lynch* erected a conceptual boundary between them and the litigation that came after it, rendering the judgments in these earlier cases difficult to integrate into contemporary litigation, even when the result is conducive to the partisan's aim. The feeling is that no matter how congenial the court's result, the method by which it was reached is no longer valid. We explore these cases here, however, for two reasons: first, to illustrate the difficulties that these communicative acts pose to an application of the *Schempp* test, as a preamble to understanding how the Endorsement Test attempts to cope with those tensions; second, to unearth a little discussed period of Religion Clause jurisprudence.

The axiom of this and subsequent chapter is that a state's monumental displays are communicative acts, and can be analyzed as such. To facilitate that analysis, I first introduce the nomenclature from the philosophy of language (Section II). I then move on to the cases themselves. (Section III).

II. Philosophy of Language: Locutions, Illocutions, Perlocutions

Contemporary philosophers of language distinguish between two areas of inquiry into language: semantics and pragmatics. The exact difference between these two types of inquiry is contested, and whatever barrier there is between them is not impermeable. Nonetheless, there is wide agreement that the field of semantics takes as its subject the meaning of sentences, while the study of pragmatics takes as its subject the use of those sentences. Hence, semantics begins with the "principle of compositionality": the principle that the meaning of a sentence is determined by the meaning of the words that

¹⁰⁷ *Baer v. Board of Education, supra*. (Denying standing to all but one of the plaintiffs and finding the display constitutional because "the erection and display of the Creche involved the use of no public funds nor the time of any school personnel," and "It would be difficult to say that as a practical matter any greater influence exists by virtue of the fact that the symbol is permitted on public as well as private property." *Baer v. Board of Education*, 1020. *Lawrence v. Board of Education, supra* (finding the display of the crèche constitutional because "there is no proof that plaintiffs or their children were compelled to look upon the crèche and there is no statement or averment that any of the plaintiffs or any of their children, even voluntarily, viewed the same" and "the present case constitutes, at most, merely a passive accommodation of religion." Referencing *Baer, supra*. *State ex. rel Singelmann v. Morrison*, 57 So.2d 238 (La.App. 1952) (finding it constitutional for the city of New Orleans to have accepted and displayed a statue of Mother Cabrini, a Catholic nun who had been a great benefactress to the local community.)

compose it along with the syntactic rules that yoke them into a unity.¹⁰⁸ According to one prominent school of thought, the compositionality of a sentence embodies an expression of truth conditions, i.e., what would have to be the case for a sentence to be true. Thus, it is said that a sentence has “truth-referential properties” and that these are its meaning. On this view of meaning, when a person says, “Coffee keeps me awake,” the meaning of that sentence is the conditions under which it would be true, namely, that coffee keeps the speaker awake.

However, there are many ways in which the compositional meaning of a sentence provides no insight into the use of that sentence. Hence, our same speaker as above might again say, “Coffee keeps me awake,” but be using this expression in a number of different ways, some of which are indifferent to the truth conditions of the expression. For instance, if the speaker desires to remain awake and has good reason to believe that his audience believes that he desires to remain awake, then this sentence might be used to accept an offer of coffee. Similarly, if the speaker desires not to remain awake, and has good reason to believe his audience believes this, then in uttering this sentence he is declining an offer of coffee.

The exploration between the difference in meaning and use is the domain of the study of linguist pragmatics, and philosophers of language have developed a number of concepts which allow them to analyze these usages. For present purposes, we need the following three concepts: the locution, the illocution, and the perlocution. J.L. Austin first introduced this nomenclature as a means of analyzing the different ways in which, in uttering a sentence, we are doing something.¹⁰⁹

First, in saying something we are performing a “locutionary act,” which is “roughly equivalent to uttering a certain sentence with a certain sense and reference, which again is roughly equivalent to ‘meaning’ in the traditional sense.” That is, in uttering a locution, the speaker expresses some meaning and this meaning is the propositional content of the communicative act.¹¹⁰

Second, in performing a locutionary act we are, by that very performance, also performing an illocutionary act. An illocutionary act is what one does *in* saying something.¹¹¹ Rather than having a meaning, illocutionary acts are said to have a “force” and this difference is force is the distinguishing feature of illocutionary acts. Classic examples of illocutionary acts are: asking, answering, informing, assuring, warning, announcing, identifying and describing. For Austin, the illocutionary force is always conventional, and an illocutionary act is successful when this conventional force is recognized by the audience. Philosophers of language since Austin, however, have disputed the contention that the illocutionary force of a speech act is always conventional.

¹⁰⁸ See, for instance, MICHAEL DEVITT & RICHARD HANLEY, *The Blackwell Guide to the Philosophy of Language* 42-43 (Steven Cahn ed., Blackwell Publishing 2006).

¹⁰⁹ J. L. AUSTIN, *How To Do Things With Words* 5 (J.O. Urmson & Marina Sbisa eds., Harvard University Press. 1962).

¹¹⁰ Id. at 109. See also, JOHN R. SEARLE, *Speech Acts: An Essay in the Philosophy of Language* Chapter 2 (Cambridge University Press 1969).

¹¹¹ Austin explains that “illocution” is “locution” with the prefix “in-” plus euphonic changes. Hence, the illocutionary is what we do *in* saying something.

They argue that every illocution has associated with it some attitude on the part of the speaker and that it is this attitude which confers upon the locution its illocutionary force. Hence, when one is *stating* a proposition p, one is expressing the attitude “belief in p”; a request expresses the attitude “desire for audience to do something”; a promise expresses the attitude “firm intention to do something”; and an apology expresses the attitude “regret for having done something.”¹¹² For one of these illocutions to be successful, then, what is needed is that its audience recognize the attitude expressed in it, and the recognition of the intent to express this attitude, it is claimed, need make no essential use of convention.

There are two things to note about the illocutionary intent. First, it is now a *sine qua non* of the philosophy of language that the illocution involves an interestingly constituted intention; namely, a communicative act requires on the part of the speaker S an intention to produce in S’s audience A an illocutionary effect by means of A’s recognition of S’s intention to produce this illocutionary effect. As Searle describes this intention: “In speaking I attempt to communicate certain things to my hearer by getting him to recognize my intention to communicate just those things. I achieve the intended effect on the hearer by getting him to recognize my intention to achieve that effect.”¹¹³ This intention is essential reflexive, as its own intentionality is a part of its content, and there has thus developed a convention of calling this intention the R-intention, although, to emphasize its role in communication rather than its structure, I will here call it the illocutionary intention. The second thing to note is that the force of the illocution is determined by the “attitude” expressed in the illocution. That attitude, in turn, is determined by the propositional content of the locution and by the perlocutionary intention (to which we now turn) embedded in the illocution.¹¹⁴

Finally, by uttering a locution, we will be producing perlocutionary effects.¹¹⁵ As Austin articulates it, “saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention, or purpose of producing them . . . We shall call the performance of an act of this kind the performance of a perlocutionary act.”¹¹⁶ That is, the perlocutionary effects are those effects that the illocution produces upon the audience. The perlocutionary intention is that intention, embedded within the illocution, that aims at producing just this effect. A single locution might contain several perlocutionary intentions.

Take again our example from above: the speaker utters the phrase, “Coffee keeps me awake.” The propositional content of this sentence is that when the speaker drinks coffee, the coffee keeps him awake. However, in uttering this sentence, the speaker is

¹¹² See, KENT BACH & ROBERT M. HARNISH, *Linguistic Communication and Speech Acts* (MIT Press 1979). See also, DEVITT & HANLEY, Chapter 8.

¹¹³ SEARLE, 43.

¹¹⁴ BACH & HARNISH, Chapter 4.

¹¹⁵ Again, the apparent etymology of “perlocution” is instructive. Perlocution = per + locution, where ‘per’ is Latin for “through” or “by”. Hence, the “per” indicates that the perlocution is concerned with those things brought about by the utterance of the locution, i.e., with its effects.

¹¹⁶ AUSTIN, 101.

not merely informing the waiter of the insomniac influence that coffee has upon him; rather, he is using the utterance to accept or refuse an offer of coffee. The illocutionary force of the utterance is an acceptance, and the waiter recognizes this when he understands that the speaker intended for him to so understand it. At this point, communication has successfully taken place, but the speaker's perlocutionary intention is not satisfied until the waiter fills the speaker's cup with coffee.

The display of a symbol is an effective way for the government itself, rather than merely one of its officials, to communicate. The speech of an individual is fleeting and momentary and, even though that person is an official, it will always be ambiguous whether that individual is speaking for himself or for the state. As we shall see, however, the state itself can unambiguously arrange a symbol so as to make its display its communicative act. That communicative act, in turn, has a propositional content, an illocutionary force, and perlocution effects, all of which are influenced by its context, which can determine the propositional content as well as alter the illocutionary force and perlocutionary effects of the communicative act.

III. The Cases

These cases were contended in both state and federal court. In total, there are seven cases: two considered the constitutionality of posting the Decalogue, three considered the constitutionality of displaying the cross, and two considered the constitutionality of a seasonal display of the crèche. With one exception, each of these cases was resolved under the federal constitution and the adjudicating court employed either the *Schempp* test or, after 1971, the *Lemon* test.

In *Paul v. Dade County*, 202 So.2d 833 (Fla. App. 1967) the court found it constitutional for the county to permit the local Business Counsel to hang a cross of lights upon the courthouse during the Christmas season, when the county had contributed no tax-raised funds to endeavor. In *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla. 1972) the Oklahoma Supreme Court found that a Latin cross, paid for by the city and located on the fair grounds, did not violate the Oklahoma constitution. In *Anderson v. Salt Lake City*, 475 F. 2d 29 (10th Cir. 1973), the Tenth Circuit over turned the trial court and concluded that a Decalogue monument donated by the Fraternal Order of Eagles (FOE) and located on courthouse grounds did not violate the federal constitution. In *Allen v. Morton*, 495 F.2d 65 (U.S.App.D.C. 1973), the appellate court, after a circuitous series of appeals, found that a Christmas crèche located upon federal park lands adjacent to the White House violated the entanglement prong of the *Lemon* test. In *Citizens Concerned for the Separation of Church and State v. Denver*, 481 F.Supp. 522 (D.C. Colo. 1979), the court concluded that the city of Denver violated the Establishment Clause when it displayed a crèche outside the city and county building in Denver. This judgment was vacated for lack of standing and a subsequent court, considering the same display in 1981, found it to be constitutional.¹¹⁷ In *Ring v. Grand Forks*, 483 F.Supp. 272 (D.C.N.D. 1980), the court

¹¹⁷ *Citizens Concerned for the Separation of Church and State v. City and County of Denver*, *supra*.

found unconstitutional a 1927 North Dakota statute requiring the posting of the Decalogue in every classroom. Finally, in *Lowe v. City of Eugene*, a convoluted case stretched out over seven years, the Oregon Supreme Court first found the city's display of a cross to be constitutional.¹¹⁸ On petition for rehearing, however, it reached the opposite conclusion¹¹⁹ and on a second petition for re-hearing, affirmed this reconsidered position.¹²⁰ Then, the cross un-removed, a plebiscite declared the cross to be part of a war memorial and the defendants filed an original suit, asking the courts to overturn its previous ruling on the grounds that a change of facts made the cross constitutional. The Oregon Supreme Court ultimately acquiesced.¹²¹ Of course, *Stone v. Graham* (1980), was also decided during the era here under consideration, but I reserve discussion of it for the next chapter, where I use it as a foil to the Endorsement Test's approach to that symbol.

These cases illustrate the several ways that symbolic displays, because communicative acts, resist felicitous analysis under the *Schempp* test. They place stress upon the following: (1) the significance of the ownership of property and its transfer; (2) the judicial attempt to discern the character of the symbol, viz. whether it is secular or religious; (3) the purpose prong of the *Schempp* test; and, (4) the effects prong of the *Schempp* test.

A) Property

Under a separation analysis, property and funds, and their transfer from the state to a religious organization, take the central role in the adjudicative process. When the *Schempp* test encounters communicative acts, the constitutional significance of the ownership and transference of property becomes difficult to identify. It is possible to arrange the physical and legal relationship between the symbol and the government in such a way that the relationship avoids separational unconstitutionality while nonetheless associating the symbol with the government in such a manner that the symbol can be reasonably understood as the government's communicative act. Hence, a state's monumental speech acts may evade a determination of unconstitutionality under a separation analysis while the state is nonetheless doing something that might be of concern to the Establishment Clause.

In *Paul v. Dade County*, for instance, the Miami Chamber of Commerce had originally hung a cross of lights upon the side of the courthouse in 1955. In subsequently

¹¹⁸ *Lowe v. City of Eugene*, 451 P.2d 117 (Or. 1969).

¹¹⁹ *Lowe v. City of Eugene*, 459 P.2d 222 (Or. 1969).

¹²⁰ *Lowe v. City of Eugene*, 463 P.2d 360 (Or. 1969).

¹²¹ *Eugene Sand & Gravel, Inc. v. City of Eugene*, 552 P.2d 596 (Or. App. 1976). To my knowledge, this analysis is comprehensive except for three cases. These three cases are not treated here because they all took place in the pre-*Schempp* area, were state case, and had little impact upon the present family of cases, which cases, in contrast, make constant reference to each other. It is notable that post-*Lynch* era, court will make little use of these case, they having been effectively swept aside by the Endorsement Test. The reader familiar with the matter will recognize that I have left *Stone v. Graham* aside, but I have done so intentionally, for it is to receive some extensive treatment is a future chapter.

years, including the year in dispute (1966), no public monies had paid for the erection, maintenance, or removal of the cross.¹²² “Notwithstanding this, the appellant argues that even if public funds were not used in the erection, maintenance and removal of the lighted cross, his constitutional rights have been violated by the erection of a religious symbol on the side of a public building, the Dade County Courthouse, which his taxes help to support.”¹²³ Evoking the *Schempp* test, the court briskly concluded that the presence of the cross does not “promote the participation by anyone in the affairs of any religious organization or sect.”¹²⁴ Here, then, the cross is clearly associated with the government, which has permitted its presence upon one of its judicial buildings, but there is no transference of property between the government and a religious institution.

Even when the government unambiguously spends money to maintain the symbol, however, it is not clear that there is a violation under a separation analysis, since the symbol itself is not a religious institution. For instance, in *Meyer v. Oklahoma City* the Oklahoma Supreme Court found the city’s possession of a permanent cross on its fair grounds to be constitutional under the Oklahoma Constitution. The provisions of the constitution related to religion were, according to the court, “designed to prevent sectarian bodies from making raids upon the public treasury or from subjecting public property to unauthorized sectarian uses.”¹²⁵ After examining its previous decision on this issue the court concluded that “it is clear that whenever public money or property became operative in an effective way to be appropriated, applied, donated, or used for the benefit or support of any sect, church, denomination, system of religion or sectarian institution as such, the proscribed practices have been enjoined.”¹²⁶ However, the cross here in question “cannot conceivably be said to operate for the use, benefit or support of any of the institutions or systems named in Art. 2 Sect 5” of the Oklahoma constitution.¹²⁷ State money was indeed being used to maintain the cross, but the cross itself is not an institution and, under a separation analysis, there is no constitutional violation.

Hence, it is possible to arrange the relationship between the government and the symbol so as to evade unconstitutionality under a separation analysis without dispelling the perception that the symbol is, in fact, the government’s communicative act. Asking whether or not property has been transferred can no longer determine the question of

¹²² *Paul v. Dade County*, 202 So.2d 833,835 (Fla. App. 1967). “There was sufficient evidence in the record to justify the finding of the chancellor that the money for the erection, maintenance and removal of the lights for the Latin cross had been donated by private persons for the year 1966 and that there would be no public funds used in connection therewith.”

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Meyer v. Oklahoma City*, 496 P.2d 789, 791 (Okl. 1972). The applicable portion of the Oklahoma constitution reads: “No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.” *Meyer v. Oklahoma City*, at 790. The Oklahoma Constitution, therefore, is unlike the Federal Constitution or the *Schempp* test unambiguously concerned with a structural and fiscal separation of church and state, understood as institutions.

¹²⁶ *Meyer v. Oklahoma City*, 792.

¹²⁷ *Id.*

constitutionality. During this period courts were still concerned with property and ownership, but that inquiry was not about the ownership itself but the significance of that ownership. The main concern is not about who possess the legal rights over a physical object or piece of property, but rather whether legal possession also signifies that the government possess the communicative act. The inquiry is whether the ownership of the symbol also signifies ownership over the communicative act.

This was just the issue in *Lowe v. City of Eugene*. During the 1920s private citizens had erected a wooden cross upon Skinner Butte, a city park and a prominent hill visible from many popular locations in Eugene. After thirty years, Eugene Sand & Gravel, Inc., along with Hamilton Electric and J.F. Oldham & Sons, Inc., built in its place a 51-foot concrete replacement. In addition to being permanent, it was inset with neon tubing, to make it easy to illuminate during Christmas and Easter. The city had taken no official part in the erection of the earlier wooden crosses. The Chamber of Commerce and other private entities had cared for them. Eugene Sand & Gravel continued this informal tradition and erected their concrete version without governmental permission. Only later did they apply for building and electrical permits. In a contentious city council meeting, the council was persuaded to issue the desired *post hoc* permits, voting 7-1 in their favor.¹²⁸

Hence, the cross was highly visible, owned by private individuals, officially permitted by the city, and located upon a tiny patch of city property. In the second re-hearing of the case, the Oregon Supreme Court affirmed its previous conclusion and found this arrangement to be unconstitutional. The location of the cross, says the court, is decisive: “If the hilltop in question were private property, the petitioners and their supporters would be constitutionally entitled to erect their cross under the free-exercise clause of the First Amendment. However, the land is public, and its custodian is a governmental subdivision. This is the decisive factor.”¹²⁹ It is not, however, the mere ownership of the property but the significance of that property that makes the presence of the cross unconstitutional.

Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city’s endorsement.¹³⁰

¹²⁸ *Lowe v. City of Eugene*, 118-19.

¹²⁹ *Lowe v. City of Eugene*, 363.

¹³⁰ *Id.* This seems to be the first instance in which the term “endorsement” appears within Establishment Clause jurisprudence, at least in the normatively decisive role it plays here.

The court is concerned with ownership of property insofar as that ownership indicates that the owner claims possession of the communicative act that takes place upon or through that property. It is the possession of the message and not the possession of the land or the physical material composing the cross that makes this relationship unconstitutional.

In contrast, the Oregon Supreme Court later changed its mind over the matter in an original suit. Before anyone could remove the cross, a plebiscite empowered the city to accept it as a donation from the gravel company, dedicated the structure as a “monument and memorial to war veterans,” authorized the local American Legion Post to maintain the cross, and allocated the responsibility of turning on the cross’ lighting to the city’s recreation department.¹³¹ Now, the city owned the cross, rather than a private individual, permitted the cross, and owned the land upon which the cross was located. Further, although the city was not responsible for maintaining the cross, it was in charged with deciding when it should be illuminated.

This new relationship between the cross and the city seems to be at least as close as the relationship previously found unconstitutional. Nonetheless, the second Lowe Court found that the purpose of the city’s ownership was not religious. Taking the plebiscite at face value, the court concluded that the cross was a war memorial, and therefore had a secular purpose sufficient to render its presence constitutional, irrespective of whether the cross was the city’s communicative act or not.

Both the early Lowe court and the late Lowe court agreed that possession of the cross, or the land upon which it is located, is not sufficient to determine the question of constitutionality. Rather, the ownership of the land or the symbol is indicative of ownership of the communicative act, and it is this communicative act, both courts again agree, that is either constitutional or unconstitutional. Where they disagree, however, is on how to analyze this communicative act, a general disagreement found amongst all the courts of this era.

Some courts, following the *Schempp* test, might consider the character of the symbol, its purpose in being erected, and the effects of its presence. They do not,

¹³¹ *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976). The four sections of the amendment read: “Section 1. That the City of Eugene be and is hereby empowered, and by this Act does, accept a deed of gift of the concrete structure in the form of a cross now located on the south slope of Skinner’s Butte Park. Section 2. That the concrete cross structure shall remain at said location in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be know as the ‘Veterans War Memorial Cross.’ Section 3. That the American Legion, Eugene Post No. 3 be and is hereby authorized at its own expense to prepare and affix to said structure a suitable and fitting plaque and other ornamentations consistent with the intendments of this act. Section 4. That the control and lighting of said structure is hereby designated as a responsibility of the Park and Recreation Department of the City of Eugene and is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited to, Memorial Day, Independence Day, Thanksgiving, and the Christmas Season, and Veterans Day.”

however, do a good job of segregating these inquires from one another and then reintegrating them to form a coherent constitutional judgment.

B) Character of the Symbol, Locution

The courts during this era typically supposed that a symbol's religiousness, or lack thereof, plays an important role in determine whether its display has either a religious purpose or religious effect. The communicative nature of monumental displays therefore invites a judicial inquiry into the "character", "nature", or "meaning" of the contested symbol; that is, courts are to inquire into the propositional content of the locution. Like words, the propositional content of symbols is complicated, alters over time, is altered by context, and is partially constituted by its audience. Attempting to classify monumental communicative acts as either secular or religious leads to analytic confusion. This binary determination, and the terms that compose it, are insufficiently nuanced to serve as an analytic tool for communicative acts.

For instance, in *Paul v. Dade County*, the court wrote that the meaning of symbols can shift over time: "[f]or example, the dove, the star, the fish, and three intertwined (sic) rings have all had, or presently may have, some religious symbolism attached thereto. On the other hand, some have also acquired certain secular meanings."¹³² The court, however, does not opine upon whether the "meaning" of the cross had so shifted or, if it had, what impact that shift would have had upon the determination of the case.

Not only might a symbol that was once "religious" become "secular" over time, but some courts find that, at any one moment, a single symbol might be both religious and secular. In *Anderson v. Salt Lake City* the City and County of Salt Lake had informally permitted the Fraternal Order of Eagles to erect one of their Ten Commandment monoliths upon the grounds of the city-county courthouse. The city provided lighting for the monument and installed a bench for comfortable viewing, but these expenses were, to the trial court, a matter of indifference. "The message on the stone," it wrote "is clearly religious in character," making its display unconstitutional.¹³³

The appellate court disagreed. In determining whether the Decalogue is secular or religious it wrote that "[t]he exact origin of the Ten Commandments is uncertain, but testimony in the record aids the supposition that a larger portion of our population believes they are Bible based. Even so, an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character – it also has substantial secular attributes. Indeed, one of the plaintiffs in our case, a lawyer, admitted while testifying that ' . . . the Ten Commandments is an affirmation of at least a precedent legal code.'¹³⁴ Further, in determining the character of the Decalogue, the court also took into account the purpose of that monument. "Although one of the declared purposes of the monolith was to inspire respect for the law of God, yet at the same time secular purposes were also emphasized. It is noteworthy that the Order of the Eagles is not a religious

¹³² *Paul v. Dade County*, 835.

¹³³ *Anderson v. Salt Lake City Corp.*, 1179.

¹³⁴ *Anderson v. Salt Lake City*, 33.

organization – it is a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based, but this creed does not include any element of coercion concerning these beliefs, unless one considers it coercive to look upon the Ten Commandments.”¹³⁵ Hence, concluded the court, “the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions.”¹³⁶

There are a couple of things to note about this opinion. First, the court believes the monument to be both secular and religious, but says nothing about the particular relationship of those two qualities within the monument itself. Second, and more importantly, the court determines the character of the monument with reference to two things. First, it looks to people’s perceptions of the symbol, finding that, despite a lack of scholarly consensus over the origin of the Decalogue, it is likely that “a larger portion of our population believes they are Bible based.” Hence, the court determines part of the symbol’s character, the religious part, from an informal survey of people’s perceptions of the Decalogue. In contrast, the court determines the secular character of the Decalogue through reference to the purpose of the organization that donated the monument. Hence, that the monument was donated by the FOE, which is not a religious organization, as a part of its advocacy for taking “ecclesiastical law as the temporal foundation on which all law is based” gives the Decalogue a partial secular character.¹³⁷

One difficulty here is that although symbols have proposition content, that content can not be read off of the symbol as a thing-in-itself. Just as with other types of communicative acts, our shared understanding and the intentionality of both the speaker and the audience contribute to the construction of the propositional content of the communicative act, which can not then be determined without reference to these two things. The intent (or, in the doctrinal vocabulary, “purpose”) and the perception (or “effect”) of the communicative act each contribute to the content of the locution.

Neither does that propositional content present itself in a binary fashion as being either secular or religious. The *Schempp* test’s invitation to determine the character of the symbol does not recognize that a symbol has a complex propositional content. As we shall see, courts can and articulate the propositional content of symbolic displays but only by evading the invitation to classify them as either religious or secular.

C) Purpose

The *Schempp* test requires that courts discern the defendant’s purpose, and if that purpose is the advancement of religion, then the challenged activity is to be judged unconstitutional. The *Schempp* test, however, offers no guidance as to what is to count as evidence of purpose. In some cases, courts believe that the religious character of the symbol, perhaps in conjunction with the text of the legislation requiring its display, is

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Although I reject the normative and epistemological value of the religious/secular distinction (see Chapter 9), it is far from plain as to why the court concludes that the FOE’s purpose is secular.

sufficient to determine this purpose. For instance, in *Ring v. Grand Forks*, the plaintiff challenged a North Dakota statute, first enacted in 1927 and amended in 1961, requiring public schools to post in every classroom “a placard containing the ten commandments of the Christian religion.”¹³⁸ In a short opinion, the district court concluded that the statute is violative of both the purpose and effect prongs of the *Lemon* test. The court reasoned that, on its face, the purpose of the statute is religious: the “purpose is to display the Ten Commandments of the Christian religion in a conspicuous place in all classrooms. There is nothing more. There is not even a pretense of a secular purpose in the statute or in the defendants’ compliance with the statute.”¹³⁹ Any attempt to segregate the “secular” commandments from the “divine” commandments is, at least in this instance, impossible because the statute in question requires that the school post all Ten Commandments of the Christian religion.¹⁴⁰ Here, a cursory understanding of the symbol’s religious character produces a sufficiently clear impression as to its purpose, and courts have no difficulty in discerning it.

Note that this court makes just the opposite inference as the *Anderson* court. In *Anderson*, the court inferred that the Decalogue monument had a secular character because its donor had had a secular purpose. In contrast, in *Ring* the court infers that the state had a religious purpose in requiring the posting of the Decalogue because the Decalogue has a religious character.

To further compound the epistemic difficulty, the commencement or threat of litigation incentivizes the defendant to present non-religious purposes for the presence of the religious symbol. Sometimes, these are clearly *post hoc* rationalization conjured by the defendant’s legal counsel in an attempt to preserve the constitutionality of the symbol. For instance, in *Ring v. Grand Forks* the defendant asserted that, in posting the Decalogue, the state had the purpose of “[instilling] in students the basic mores of civilization and the principles of the common law.”¹⁴¹ The court quickly set this contention aside: “if the secular purpose of the document is as defendants contend, they are in effect suggesting that the basic mores of Civilization are embodied only in the Christian religion. The court does not believe that to be a serious contention.”¹⁴² Although the *Ring* court did not accept the defendant’s slight of hand, other defendants have found more willing jurists. The second *Lowe* court, discussed above, for instance, took the results of the plebiscite at face value, and assumed that the cross was a war memorial and therefore presumed it to have both a secular purpose and content.

¹³⁸ *Ring v. Grand Forks Public Schools District Number 1*, 483 F.Supp. 272, 273 (D.C.N.D. 1980). The entirety of pertinent statutory language reads: “The school board of every school district, and the president of every institution of higher education in the state which is supported by appropriations or by tax levies, shall cause a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction. The superintendent of public instruction may cause such placards to be printed and may charge an amount therefore that will cover the cost of printing and distribution.”

¹³⁹ *Id.* at 274.

¹⁴⁰ *Id.*

¹⁴¹ *Ring v. Grand Forks*, 483 F.Supp. 272, 274 (D.C.N.D. 1980).

¹⁴² *Id.*

Frequently, there is no official legislative record authorizing the presence of the symbol. This is often true when the government accepts a religious monument as a donation, as is the case for many Decalogue monuments donated by the FOE. In these cases courts must either abandon their inquiry or turn to extra-legislative evidence to determine the purpose of the display. In *Anderson*, the court determined the character and purpose of the Decalogue monument through a consideration of the FOE's mission statement, which, thought the court, showed it to be a secular organization. Because this organization has a secular purpose, the purpose of the presence of the Decalogue must also be secular. Here, the court sees the state as merely responding, in a passive way, to the offer of third party and hence the purposes of this third party can be attributed to the government.

Likewise, courts sometimes believe that the presence of religious symbols is the result of community pressure. The purpose of those citizens advocating for the display of the symbol can be attributed to the state, and courts will therefore examine the testimony of those who publicly supported the presence of the symbol. At one stage of the *Lowe* litigation, for instance, some of the justices, noted that the city had issued permits for the cross in response to community advocacy. The display of the cross, say these justices, is

at least concurrently a religious activity, even if one were to accept the somewhat labored argument of the proponents of the cross that the true motive for the display has been secular, i.e., the commercial exploitation of religious holidays. Indeed, the procross faction in the litigation has been embarrassed by its friends. Several witnesses innocently jeopardized the defense by references at the city council hearing to their reasons for wanting to keep the cross on display as a silent witness to their faith.¹⁴³

Insofar as courts understand legislative bodies as responding to popular community sentiment, they might attribute this sentiment to the legislative body as a means of determining the symbol's purpose.

Sometimes courts examine the letters which members of the legislative body received from supporters of the displayed symbols. In *Citizens Concerned for the Separation of Church and State v. Denver* the judge found that "the convincing and uncontroverted evidence presented to this court was that the City's placement of the Nativity Scene on the front steps of the City and County Building (the very building to which the citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith. On this issue there could be no more persuasive evidence than the letters and petitions sent to the Mayor of Denver."¹⁴⁴ This epistolary evidence indicates that the crèche is indeed perceived to be a religious

¹⁴³ *Lowe v. City of Eugene*, 124.

¹⁴⁴ *Citizens Concerned for the Separation of Church and State v. Denver*, 529.

symbol,¹⁴⁵ and because the City was aware of this sentiment when it approved the display, it is “somewhat difficult to accept the view that the city officials’ intent is only to further commercial interests in downtown Denver.”¹⁴⁶ Again, then, courts identify the purpose of the display with community sentiment, and means for identifying this sentiment is to examine the correspondence received by individual representatives.

The epistemic problem of identifying purpose is complicated by the defendant’s attempts to change or (re)construct the purpose. *Lowe v. City of Eugene* exemplifies this difficulty. In the first round of litigation, the Oregon Supreme Court found the city’s association with the cross to be unconstitutional: because the city was reacting to public pressure, the city had a religious purpose, and because the city owned the land on which the cross was situated, the message conveyed by the cross was attributable to the city. The second Oregon Supreme Court to reconsider this issue, after the plebiscite, determined the purpose of the cross from the text of the ballot proposition that authorized the city to accept the donated cross as war memorial. The physical location of the cross stayed the same, the city’s authority to use the cross was not diminished, and yet taking the plebiscite at face value led to the conclusion that the cross has a secular purpose. In both cases, the court determined the purpose of the cross through an inquiry into the content of community sentiment. The two courts only disagreed as to what evidence best indicated community sentiment.

Additionally, some courts recognized that symbols had both a secular and a religious content and purpose, and had to figure out how to untangle these two aspects of the symbol. Such is the case when defendants assert that the purpose of the crèche’s display is the attraction of consumers to the shopping district, followed by the good-willed loosening of their wallets. Some courts accept such reasoning, but many think that the asserted secular purpose is dependent upon the crèche’s religious character. In *Allen v. Morton*, the appellate court found the display of a crèche upon the White House lawn violated the entanglement prong of the *Lemon* test. One concurring judge, responding to the argument that because the crèche was meant to attract shoppers, it had a sufficient secular effect, argued that “what seems equally, if not more likely is that the commercial establishments that display the Nativity scene, a clearly religious symbol, do so in order to invoke its emotion message, as a motivation for purchase of contemporary equivalents of frankincense and myrrh.”¹⁴⁷ We see in this passage the conflation of effect (purchase frankincense and myrrh) and purpose (of invoking the crèche’s “emotional message”). We also see that courts must sometime identify the literal and non-literal aspects of communicative acts and identify one of them as prior to the other. This requires segregating the various purposes that a speaker might have and determining which of

¹⁴⁵ Id. For instance, one wrote that “it seems to me that if are a Christian nation that we should do something to demonstrate the fact.” Another expresses the opinion that “This country was founded on Christianity so why allow some non-Christian to dictate to the majority, and allow the infiltration of such ideas to occur in our country.” There was also a call for Madalyn Murray O’Hare, founder of the American Atheists, and chief plaintiff in *Murray v. Curlett*, consolidated with *Schempp*, to depart for another country.

¹⁴⁶ Id.

¹⁴⁷ *Allen v. Morton*, 89.

those purposes is direct and which indirect, which literal and which non-literal. In this case, the secular purpose/effect of attracting shoppers is the non-literal purpose/effect dependent upon the literal purpose/effect of invoking the religious feelings associated with the crèche and Christmas.

In sum, a determination of the purpose of a government's display of a religious symbol poses the following epistemic problems for courts. First, the court must determine what counts as evidence of purpose. Sometimes the "character" of the symbol and the text of the legislation enabling the symbol's display (if any) are sufficient to determine this purpose. When they are not, the court must look to other evidence. Since the legislative body can be understood as responding to community sentiment, courts will attempt to determine purpose by looking at letters and other public statements made by supportive community members. Further, even when a court is confident that it has determined the purpose of a display, that purpose can alter over time, and when it does so, a court must form a judgment about the authenticity of that change. Finally, if a symbol is believed to have both a secular and a religious purpose, courts must segregate these from one another and determine an order of dependency, viz., which of these is the literal and which the non-literal communicative act.

D) Effects and Perlocutionary Effects

The *Schempp* test requires courts to determine the effects of the challenged state activity, and to determine whether any of those effects are an advancement (or inhibition) of religion. Because communicative acts, including the symbolic displays, have only perlocutionary effects (the "only" is partitive not diminutive in force), gauging these perlocutionary effects is an epistemological challenge. First, perlocutionary effects are "intangible" and not susceptible to ordinary scientific techniques of detection and measurement (e.g., statistics). Being intangible in this way, courts are prone to ignore or dismiss them altogether, frequently conceiving of the religious symbol as a "passive monument" requiring nothing of those who might encounter them. This is particularly the case when a court is seeking to determine whether or not the challenge display involves any element of coercion. The court in *Anderson v. Salt Lake City* concluded that "it does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation of law, reflect the religious nature of an ancient era."¹⁴⁸ The rhetorical technique is to ignore perlocutionary effects altogether, focus on coercion and compulsion, and assert the passivity of the monument.

Second, if a court does conceptualize the symbol as a communicative act having perlocutionary effects, it must then identify a possible range of perlocutionary effects, determine whether the display actually produces these effects, given the context of the display, and decide whether these effects are an advancement of religion. Throughout these earlier cases, there are only a few perlocutionary effects that courts took into account when adjudicating these cases: the attraction of shoppers to the commercial

¹⁴⁸ *Anderson v. Salt Lake City*, 34.

district and the subsequent loosening of their wallet, as with the display of the crèche and cross during the Christmas season;¹⁴⁹ the indoctrination of the mores necessary for civilization, as with the display of the Decalogue in the classroom, where it is thought to be a tool of moral pedagogy;¹⁵⁰ the advocating of Divine Law as the foundation for temporal law, as with the display of FOE Decalogue monuments;¹⁵¹ the memorialization of the causalities of war, as with the display of the cross.¹⁵² If the court believed that any of these were the intended perlocutionary effects of the religious display, it was also inclined to conclude that the display was constitutional, although some courts did think such perlocutionary effects were mere as *post hoc* rationalizations and dismissed them as such.¹⁵³

On the other hand, there are two perlocutionary effects that, if recognized by the court, led to the conclusion that the display was unconstitutional. First, some courts thought that the display might, using the contemporary vocabulary to paraphrase, “alienate” some citizens by making them feel like outsiders. For instance, in the second round of *Lowe v. City of Eugene* (won by the plaintiffs) the court wrote that

the employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city’s endorsement.¹⁵⁴

Note that while the court’s concern for the political “stigma” generated by symbolic displays resonates well with a concern for equality, it does not at all resonate with concern for the advancement of religion. Supposing that such displays do indeed create political outsiders, it is not clear that this is also an advancement or inhibition of religion. Some courts link these two concerns by reasoning that the “stigma” associated with being a religious/political outsider inhibits the religious beliefs of those outsiders. This inhibition, then, is a non-literal perlocutionary effect. It is also the second type of perlocutionary effect that some courts find to be indicative of a display’s unconstitutionality. For example, in *Citizens Concerned for the Separation of Church and State*, the court wrote that

¹⁴⁹ *Allen v. Morton*; *Citizens Concerned for the Separation of Church and State v. Denver*; *Paul v. Dade County*.

¹⁵⁰ *Ring v. Grand Forks Public Schools District Number 1*; *Anderson v. Salt Lake City*.

¹⁵¹ *Anderson v. Salt Lake City*.

¹⁵² *City of Eugene*. One contemporary defense of the crèche, in particular, is absent from these cases: that it is an acknowledgement of a cultural phenomena and therefore itself neutral

¹⁵³ see e.g., *Ring v. Grand Forks Public Schools District Number 1*.

¹⁵⁴ *Lowe v. City of Eugene*, 363.

the convincing expressions by various witnesses of their feelings of ‘discomfort’, ‘anger’, ‘fear’ and ‘being left out’ upon viewing the scene, coupled with the expert testimony of the psychologist as to the effects upon minorities of symbolic governmental alignment with the majority, strongly suggest that the Nativity Scene may well have the effect of inhibiting religious beliefs (non-beliefs) of viewers.¹⁵⁵

Citizens are likely to distance themselves from their own religious beliefs to the degree that the state symbolically aligns itself with against those beliefs, and this is an inhibition of religion.

The identification of possible perlocutionary effects, however, does not determine whether any particular display is likely to actually bring about those effects. Here, courts sometimes thought that the context of the display diminished the likelihood that viewers would experience the perlocutionary effect. For instance, in *Allen v. Morton*, a case concerning the presence of the crèche on federal park land adjacent to the White House, one dissenting judge thought that the secular context of the display did not vitiate the religiousness of the crèche. Plaques placed around the Pageant, which explain that the display had a secular purpose, “are . . . plainly insufficient to show diminution of religious impact.”¹⁵⁶ This is because the statement announcing the secularity of the Pageant was buried in the eight paragraph of a lengthy text, and it was thus unlikely that anyone would read this disclaimer. The plaque therefore did not situate the religious content of the crèche within the pageant’s supposedly secular theme of world peace. Again, in *Meyers v. Oklahoma City*, the court found the presence of a cross to be constitutional, writing that “the alleged commercial setting in which the cross now stands and the commercial atmosphere that obscures whatever suggestions may emanated from its silent form, stultify its symbolism and vitiate any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution as such.”¹⁵⁷ The commercial setting of the cross blocks or absorbs any religious perlocutionary effect that “may emanate[] form its silent form.”

Finally, some courts thought that the purpose of a display had some impact upon the possible perlocutionary effects that might be understood by the display’s audience. Hence, in the second round of *Lowe v. Eugene*, the court refused to consider the effect prong of the *Lemon* test after determining that the cross, after the plebiscite, had a secular purpose. It wrote only that “the display of this cross in a city park as a war memorial under these circumstances does not have a ‘primary effect’ which either ‘advances’ or ‘inhibits’ religion.”¹⁵⁸ Without a religious purpose, it seems, a display can not have a religious effect.

¹⁵⁵ *Citizens Concerned for the Separation of Church and State v. Denver*.

¹⁵⁶ *Allen v. Morton*, 265.

¹⁵⁷ *Meyer v. Oklahoma City*, 792-93.

¹⁵⁸ *Eugene Sand & Gravel, Inc. v. City of Eugene*, 347.

In sum, symbolic displays are communicative acts and have perlocutionary effects. The *Schempp* test invites courts to identify possible perlocutionary effects and to determine whether those effects are an advancement or inhibition religion. When courts look for coercion, they tend to ignore perlocutionary effects entirely and conclude that the display is constitutional. The relationship between literal and non-literal perlocutionary effects is a crux for courts. They must unpack the relationship between the secular effects of a display (attract shoppers) and religious effects of that same display (feeling the Christmas spirit) and determine which of these is primary. Likewise, courts need to separate the political effects of a display (“alienation”) and relate those to a religious or secular effect (inhibition of belief). In determining the likelihood and content of these possible perlocutionary effects, courts also looked to the context of the display. As the medium through which the display’s effects travel on their way to the audience, context might either vitiate or absorb those effects, counseling a conclusion that the display is constitutional.

IV. Conclusion: Entanglement of Character, Purpose, and Effect

The Court’s early Establishment Clause jurisprudence aimed at the institutional separation of church and state, grounded in the belief that such separation preserved the autonomy and integrity of each against the influence of the other and prevented against the future harms associated with church-state combinations. The *Schempp* test moved away from this concern and provided courts with a more flexible set of concepts that allowed courts to consider the impacts that the practice might have upon the individual, either the individual’s religious beliefs or social and political standing. It’s more open ended vocabulary of “advancement”, “inhibition”, “purpose”, and “effect” also opened the door to challenges to a state’s display of religious symbols.

The vocabulary of the *Schempp* test, however, did not provide the conceptual material to felicitously resolve these disputes. First, it is possible to arrange the relationship between the government and the symbol so as to avoid unconstitutionality on separationist grounds. The symbol can be closely associated with the government without the government also financing the symbol. Nor is the symbol itself an “institution.” This feature of symbolic displays confuses the significance of a court’s inquiry into property and its transfer between the state and the religious “institution.” Under a separation analysis, this inquiry was the crux of the argument over constitutionality. However, when the litigation is over a state’s display of a monumental symbol, the inquiry into property is a method for determining the possessor of the monumental communicative act. Even if a court concludes that a monument is indeed the government’s communicative act, it must still determine what is said by that communicative act.

Second, the *Schempp* test requires the identification of the defendant’s purpose and this presents courts with a rather difficult epistemic problem. Some courts find the nature of the symbol, along with the content of the enabling legislation, to be *res ipsa loquitor* of a religious purpose. Others identify the government’s purpose with the

purpose of those who donated the symbol. Still other courts look to community sentiment, in the forms of letters and public testimony, to determine the purpose of the presence of the symbol.

Third, symbolic displays have only perlocutionary effects, and courts must make some determination of what those effects might be, segregate the supposedly secular ones from the supposedly religious one, and then formulate a judgment upon whether a display is likely to produce those effects. The success of these possible perlocutionary effects, furthermore, is impacted, in some way, by both the purpose and the context of the display, and courts must account, as best they can, for these influences.

As a result of these three difficulties posed by the confrontation of symbolic displays with the *Schempp* test, courts quickly entangle their analyses of the character, purpose, and effect of the communicative act. In this respect, courts frequently determine the nature of the symbol through reference to its purpose (as with *Anderson*), but they also do the opposite and determine the symbol's purpose through reference to its character (as with *Grand Rapids*). They also determine the character of the symbol through reference to how it is commonly perceived (as with *Denver*) and then go on to analyze its possible perlocutionary effect by reference to both its character and its purpose. Our earlier review of the philosophy of language indicates that this analytic entanglement is not merely sloppy thinking or judicial disingenuousness; rather, it reflects the inherent complexity of the communicative act.

The conclusion of this chapter, then, is that the *Schempp* Test allows courts to understand symbolic displays as communicative acts, but it does not supply justices with the vocabulary and conceptual tools necessary to adequately conceptualize the communicative act. These cases also signal a further shift in the normative foundation of the Establishment Clause jurisprudence, from one concerned with preserving the autonomy of institutions against the influence that each might have on the other to one concerned with maintaining the political equality of the individuals who use, or might use, those institutions. Justice O'Connor's Endorsement Test, the subject of the next chapter, attempts to complete this shift.

Chapter Four: The Endorsement Test and the Ten Commandments

I. Introduction

I begin this chapter with a brief discussion of the Endorsement Test. Because the Endorsement Test explicitly takes the government's display of religious symbols to be a communicative act, courts must take into account the propositional content of the symbol, the mental states (intentions) of the speaker, and the context of the locution. These inquiries, I argue, force courts to formulate theological, psychological, and aesthetic judgments, respectively. Additionally, as a preparatory for the formation of an aesthetic judgment, the court often must produce an iconographic description of the display's context. I illustrate these claims by presenting various judicial opinions that manifest such reasoning, including the two judicial opinions from the subject counties of Rutherford and Hamilton.

In the last section of this chapter, I examine one prominent argument for the constitutionality of governmental displays of the Decalogue. By contrasting this argument with the holding in *Stone* I detail how this argument is tailored to meet the doctrinal requirements of the Endorsement Test. In so tailoring the argument, I argue, one is required to vest the Decalogue with one type of symbolic meaning while ignoring other possible meanings. In contrast, other salient symbols from Christianity, such as the cross, cannot be so tailored.

II. The Endorsement Test

In *Lynch v. Donnelly* the Supreme Court granted *certiorari* for a case concerning the constitutionality of the City of Pawtucket's display of a crèche during its annual Christmas celebration.¹⁵⁹ In a thoughtful and candid opinion, the district court found the display unconstitutional. Rejecting the City's claim that the crèche had become a secular symbol,¹⁶⁰ the district court concluded that the City had by its erection and maintenance of the crèche violated both the purpose and effect prongs of the *Lemon* test. The district court also concluded that the City had violated the divisiveness aspect of the entanglement prong of that test, but did not take this to be independent grounds for unconstitutionality.

The First Circuit affirmed, relying upon the (seeming) requirement of *Larson*, decided in the interim, that governmental activities that expressly favor one sect are to be

¹⁵⁹ *Lynch v. Donnelly*.

¹⁶⁰ *Donnelly v. Lynch*, 525 F.Supp. 1150, 1167 (D. R.I. 1981). In discussing the propositional content of the crèche, the district court writes that unlike stars, bells, Santa Claus, and the Christmas tree, "the crèche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ. That collection of figures does not have an everyday meaning that must be transcended to reach religious meaning. For anyone with the most rudimentary knowledge of the religious beliefs and history of Western civilization, the religious message of the crèche is immediately and unenigmatically conveyed."

strictly scrutinized. Reasoning from the premise that the crèche expressly favored Christianity, the appellate court applied strict scrutiny and easily concluded that the display of the crèche was unconstitutional. It declined, however, to follow the district court in its entanglement prong analysis.¹⁶¹

The Supreme Court reversed, with four justices, led by Justice Brennan, dissenting. Justice O'Connor, with her introduction of the Endorsement Test, provided the swing vote. The plurality opinion found that the district court had "plainly erred" in its analysis of each of the three *Lemon* test factors. First, the plurality found that the district court had incorrectly rejected the City's claim that its purpose in displaying the crèche was the same as its purpose in erecting the entirety of the display; namely, to attract shoppers and create a festive atmosphere. The district court had therefore focused solely on the crèche without taking cognizance of its context. In the view of the plurality, the district court had blindly ignored that "the display is sponsored by the City to celebrate the Holiday and to depict the origins of the Holiday" and that this made the display an acknowledgement of a secular cultural phenomenon.¹⁶² As for the religious effects of the crèche, the plurality found these to be less potent than those found constitutional in its cases concerned with state aid to religious schools (citing *Allen*), legislative prayer (citing *Marsh*), and Sunday Closing Laws (citing *McGowan*).¹⁶³ Finally, the plurality derided the district court's entanglement prong analysis, asserting that it had erred in taking the civil friction generated by the lawsuit itself to be an indicia

¹⁶¹ *Donnelly v. Lynch*, 691 F.2d 1029, 1035 (1st Cir. 1982). ("Larson makes clear that because the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions it must be evaluated under the test of strict scrutiny. * * * it follows inexorably that defendants established no compelling governmental interest in erection of the nativity scene. If one is unable to demonstrate *any* legitimate purpose or interest, it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown. We conclude therefore that the first prong of strict scrutiny test is not met, and of course find it unnecessary to address the second prong. The judgment of the district court must be affirmed.")

¹⁶² The district court had, in fact, employed a highly contextually sensitive analysis. For instance, in the face of the City's admission that the secular aspects of Christmas could be celebrated without the crèche – glittering festoonery and Santa with his various attendants would be enough – the district court then asked, as the plurality does not, why the crèche was included at all. The crèche's holy character is not vitiated by its inclusion in the display, a conclusion demanded by both candor and respect for the integrity of the symbol; nor did the City attempt to disclaim association with the crèche by, say, the posting of no-endorsement signs. Hence, the City's after-the-fact attempts to give to the crèche a secular purpose are mere post hoc legerdemain. It was included for religious reasons, not festive ones. *Donnelly v. Lynch*, 1163-66, 1171.

¹⁶³ The District Court did not ignore these cases, but relied upon the proposition that for any religious effect to be constitutional it must be "remote and incidental." (*Nyquist*). The district court noted that by including the crèche the city "has singled out their religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable." *Id.* at 1178. The District Court also wrote that the city's association with the crèche is no small thing. To deny that such associations can influence belief "suggests that governmental actions cannot shape public values and perceptions unless the government announces overtly its intention to make a value judgment. The very fact that it employs a religious symbol represents an active and deliberate incursion by government into the sphere of religion." *Donnelly v. Lynch*, 1175.

of the crèche's political divisiveness. The contention generated by the lawsuit, says the plurality, can not itself compel an outcome favorable to the plaintiff.¹⁶⁴

Justice O'Connor joined this opinion, but wrote "separately to suggest a clarification of our Establishment Clause doctrine."¹⁶⁵ She takes the equal political standing of the individual as the normative ground of her "clarification": "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."¹⁶⁶ Governments can violate this prohibition in two ways. The first is through "excessive entanglement with religious institutions."¹⁶⁷ The second "and more direct infringement is government endorsement or disapproval of religion."¹⁶⁸

Hence, "the central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the City's display actually conveyed."¹⁶⁹ She also aligned these two inquiries with the first two prongs of the *Lemon* test: "The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the City's action."¹⁷⁰

As an initial matter, this standard takes the state's display of a symbol as a potential communicative act. The symbol has a "message" which the state can communicate to an audience and which that audience can understand. Further, the doctrine segregates the communicative act into two parts, the intentionality of the speaker ("what Pawtucket intended to communicate") and the message received by the audience ("what message the City's display actually conveyed."). Thus, the test conforms to one commonsensical image of the communicative act. This image takes speaking and other modes of communication as a type of transportation. The speaker has in his head some semantic content which he packs into the vessel of language (or some other form of symbolic representation) and then transports it to the audience. Upon receipt of the vessel, the audience unpacks that semantic content and gets the message. One might wish to imagine railroad cars being filled, hauled cross country, and then unpacked at their destination.

To the extent that this model of communication ignores the reflexive nature of the communicative act, the Endorsement Test reproduces many of the conceptual difficulties identified in the previous chapter. The language of "endorsement" and Justice O'Connor's

¹⁶⁴ The district court plainly did not take the contentiousness generated by the lawsuit as sufficient to render the crèche unconstitutional; rather, the judge inquires into the meaning of the public outrage generated by the lawsuit. The public outcry ("the atmosphere has been a horrifying one of anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol") indicates that the previous forty years of silence about the maintenance of the crèche had been the product of fear rather than political cohesiveness.

¹⁶⁵ *Lynch v. Donnelly*, 465 U.S. 668, 687 (1983).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 687-88.

¹⁶⁸ *Id.* at 688.

¹⁶⁹ *Id.* at 690.

¹⁷⁰ *Id.*

emphasis on intention and the message actually conveyed, does, however, attempt to take symbolic displays for what they are, communicative acts. The Endorsement Test, then, requires courts to formulate a new series of judgments about monumental displays. In particular, judges must examine: (1) the propositional content of the displayed symbol; (2) the mental states (intentions) of the defendants; (3) the theme of the context in which the symbol is displayed. These inquiries are, respectively, theological, psychological, and aesthetic.

III. Propositional Content, Theology

Courts must determine the propositional content of the displayed symbol if they are to understand how that content interacts both with the embedded perlocutionary intention(s) of the communicative act and with its context. It is no longer sufficient to classify a governmental activity as “religious” or “secular” or even to assign differing degrees of these to the governmental activity, as was the case under the *Schempp* test. Rather, courts must discern and precisely articulate the significance of the symbol from within the tradition of which it is a part, and this is a theological inquiry.

For instance, the city of St. Charles, just east of Chicago, had for many years festooned one of its public areas with the usual glitter of the Christmas season. It also hung lights from an aerial atop the fire department in such a way as to form a Latin cross. Two of the city’s residents, along with the ACLU, sued and won a preliminary injunction. The city’s appeal fell into the hands of Judge Posner.¹⁷¹ He first concluded that the placement of the cross conveyed a message of support for Christianity. Furthermore, he thought that this message was sectarian because the Latin Cross is particular to certain traditions of Christianity: some Protestants, as well as members of the Greek Orthodox Church, do not display the Latin Cross, or, perhaps, any cross at all.¹⁷²

In distinguishing between different types of crosses, Judge Posner has already wandered into theological territory, but he will wander further. The City argued, following *Lynch*, that the cross was like Pawtucket’s crèche, and its display recognized or acknowledged the sociological fact that Christmas is a national holiday. Since there is no difference between including a crèche and a cross in one’s Christmas display, the defendants contended, the inclusion of the cross in their Christmas display was constitutional.

Judge Posner disagreed: the symbolic meanings carried by the cross simply do not stand within the celebration of (a secularized) Christmas in the same way as a crèche. He begins his argument by echoing the court in *Paul v. Dade County*. Many symbols usually

¹⁷¹ *American Civil Liberties Union of Illinois v. City of St. Charles*, 622 F.Supp. 1542 (1985); *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

¹⁷² “It is, indeed, the principal symbol of Christianity as practiced in this country today. When prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.” *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

included in a Christmas display no longer bare their religious meaning and few now know their hidden meaning. The holly wreath, the evergreen tree, and the five pointed star have all lost their religious content, which at one point was quite potent.¹⁷³ The Latin cross, however, has not shed its Christian identity. The “St. Charles cross unmistakably signifies Christianity, as the reindeer and Santa Claus, and even the star and wreath, do not.”¹⁷⁴ Likewise, the crèche still stands as a vivid reminder of the birth of Jesus Christ, and it “brings Christianity back into Christmas.”¹⁷⁵ The cross and the crèche, therefore, are similar in that neither has lost its vivid Christian content. For Judge Posner, however, the difference between the two is not that one has been secularized and the other has not. Rather, the difference between the two symbols is in their propositional content and the way that that content comports, or does not comport, with the Christmas theological meaning of Christmas.

The crèche is a traditional Christmas symbol, depicting the birth of Jesus of Nazareth. However, the cross stands differently within the Christian tradition; within that tradition, it is not a Christmas symbol. It is associated with death and resurrection, and its inclusion in a Christmas display is discordant:

None of the books we have been able to find on the history of Christmas lists “cross” as an index entry. . . . The reason is easy to see. The cross was a device for inflicting a slow and painful death on traitors, pirates, and other serious miscreants. The device that the Romans used to execute Christ, it became the symbol of death, resurrection, and salvation, not of birth-of Easter not of Christmas. . . . It is “the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death.” . . . Of course without the birth of Jesus there would have been no resurrection and salvation; and hence the joy of Christmas to believing Christians is inseparable from the salvation of man, symbolized by the

¹⁷³ “Some symbols that are Christian - such as the holly wreath, which both symbolizes Christ’s hegemony (wreaths and garlands being a traditional symbol of kingship and prowess) and recalls the crown of thorns that was placed on His head before He was crucified, to mock His supposed Kingship, see Matthew 27:29 (“And when they had platted a crown of thorns, they put it upon his head, and a reed in his right hand: and they bowed the knee before him, and mocked him, saying, Hail, King of the Jews!”) - have lost their Christian connotations. They are regarded by most people, including most Christians, as purely decorative. Like the wreath, the Christmas tree has a buried religious connotation, through an association (unknown to most people) with the Tree of Life in the Garden of Eden. Another hidden linkage is the fact that evergreen trees are a traditional symbol of eternal life. The five-pointed star of Bethlehem, while unmistakably a part of the story of the birth of Jesus Christ, is the same star used in the American flag, and in many other secular settings; it, too, has lost its religious connotations for most people.” Id. at 721 (internal citations omitted).

¹⁷⁴ Id. at 272.

¹⁷⁵ Id.

cross. Christmas and the crucifixion are also linked indirectly by the legend that the cross on which Jesus was crucified was made out of the Tree of Life, from which the Christmas tree derives as we have seen. . . . But this is a linkage of which not one American in 10,000, we would guess, is aware.

When Christmas is considered in its secular signification, as a public holiday for Americans of whatever system of religious belief (or nonbelief), the introduction of the cross into the Christmas celebration strikes a discordant chord; for most Americans do not like to think about death in connection with birth. At any rate the cross is not in fact a common Christmas symbol, as far as any member of this panel is aware or the record shows. Its absence from Christmas celebrations may indeed be one of the reasons why Christmas is a national holiday celebrated by most Americans regardless of their religious affiliation. Whether or not you believe in the divinity of Jesus Christ, you cannot fail to be moved by the story of his birth in a manger as told in the New Testament and recalled by Christmas music, pageants, and displays, such as the Nativity tableau; in the words of Auld, . . . writing with great reverence, “Essentially, Christmas is the festival of childhood.” But the story of the death and resurrection of Christ, the story that the cross calls to mind, moves only Christians deeply. For others it is the symbol of a system of belief to which they do not subscribe.¹⁷⁶

Since the cross is not a traditional Christmas symbol and because the “evidence indicates that the cross occupies a highly prominent place in the display, that it is integrated with the other components of the display only in the sense that it is one more lighted structure,” Judge Posner concludes that the plaintiff would likely succeed on the merits in a full trial and sustains the grant of a preliminary injunction.

Judge Posner wrote his opinion in the shadow of *Lynch* and we can see one way that case altered the jurisprudential landscape. No longer is it sufficient for a judge to determine whether a symbol is “religious” or “secular.” This is only the beginning. The Endorsement Test requires of judges that they formulate a judgment about the meaning of the displayed symbol from within the tradition of which it is a part, and this is a theological inquiry. The reason that it might be constitutional to display a crèche during the Christmas season is that Christmas is a public holiday and the propositional content of

¹⁷⁶ Id. at 272-73.

the crèche thematically coheres with the celebration of that public holiday. The cross, on the other hand, has an entirely different propositional content that does not thematically cohere with the celebration of Christmas. All these claims are, I take it, theological.

Tennessee Counties

In the cases involving Rutherford and Hamilton counties, the judges briskly dispatched with the theological inquiry. Regarding Hamilton County, where the plaques had been posted unaccompanied by other magisterial documents, Chief Judge Edgar, in inquiring into the purpose of the display, wrote that

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. . . . Rather, the first part of the Commandments concerns the religious duties of believers; worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath.¹⁷⁷

For Chief Judge Edgar, then, the propositional content of the Decalogue, or the propositional content of its specific commands, is religious because the initial four or five commandments, depending upon how one enumerates them, are concerned with the duties of religious believers. They are intelligible only for those individuals already adhering to the faith traditions of which they are a part.

In *Rutherford*, Judge Echols made even swifter work of determining the propositional content of the Decalogue. Relying upon *Stone*, he found it unnecessary to formulate an independent judgment upon the matter: "the Supreme Court has stated that the Ten Commandments 'are undeniably a sacred text in the Jewish and Christian faiths' and that 'the preeminent purpose for posting the Ten Commandments . . . is plainly religious in nature.'"¹⁷⁸

In these three cases, the judges articulated a judgment about the theological content of the disputed religious symbol. The precision and depth of these theological judgments differ from court to court, varying with the complexity of the case. Judge Posner's case required the formulation of a rather sophisticated theological judgment about the propositional content of the cross. In *Rutherford*, Judge Echols was able to rely upon the pre-*Lynch* precedent of *Stone* and classify the Decalogue's "nature" in accordance with the dichotomous categories of "religious" and "secular." Chief Judge Edgar in *Hamilton* formulated a theological judgment whose complexity is somewhere

¹⁷⁷ *ACLU of Tenn. v. Hamilton County*, 763.

¹⁷⁸ *ACLU of Tenn. v. Rutherford County*, 806.

between the two. He divided the Decalogue into religious commandments and secular commandments (a frequent argumentative strategy) and concluded that on the whole it “concerns the religious duties of believers.” In each case, the Endorsement Test allocates to courts the responsibility of formulating a theological judgment about the “nature” of the disputed symbol.

While the propositional content of the displayed symbol supplies some clue as to whether its display is an endorsement of religion, it is not sufficient. Courts must still ask how the state, by its monumental display, intends to use that symbol, and this is a psychological inquiry.

IV. Mental States, Psychology

The intention prong of the Endorsement Test requires judges to determine the content of the message that the defendant intended to communicate. The test is ambiguous as to which intention (the illocutionary intention or the perlocutionary intention) the court is to identify. I shall assume that in applying the Endorsement Test courts are to identify the defendant’s perlocutionary intention. That is, they are to determine what the speaker intended its audience to do rather than what it intended it to understand by its communicative act.¹⁷⁹

Perlocutionary intentions, like all intentions, are not immediately sensible. There is no organ receptive to intentions and there is no one technique for reliably identifying another’s intentions (or in many cases even one’s own). The discernment of another’s intentions, especially in a communicative context, relies upon the observation of the interlocutor’s behavior, an understanding of the words spoken by the speaker, the tone of the speaker, and various contextual factors. In most situations, interlocutors make no conscious effort to discern each other’s intentions, instead relying upon habit and experience. It is only where communication has gone awry that one must explicitly identify the interlocutor’s intentions: for instance, when a word is not understood, or when the audience is unfamiliar with the speaker’s proclivity toward irony, or when someone sues a composite body for having unconstitutionally communicated a religious message. In these cases, the audience, or outside observers such as judges, must attempt to identify the speaker’s intention. As intentions are a type of mental state, this is a psychological inquiry.

The constitutional appropriateness of this inquiry was central to the *McCreary County* litigation. The district court had found the county’s Decalogue display to be unconstitutional, even though this display had been modified so as to be a part of a larger display of the “Foundations of Law.” The original posting of the Decalogue had manifested a religious intention and subsequent modifications of the display were mere fig leaves meant to conceal this original religious purpose. Liberty Counsel handled the appeal and made the propriety of a judicial inquiry into intention the fulcrum of its

¹⁷⁹ In the last chapter, I argue for the preservation of the Endorsement Test, properly retooled. Part of this retooling includes shifting the focus away from intentions altogether and, to the extent that intentions are still to be considered, from perlocutionary intentions to illocutionary intentions.

strategy, claiming that such intentions are unknowable, apparently as an epistemological matter. Therefore, if there is to be a purpose inquiry at all (which there should not) it should be limited to textually expressed legislative intent.¹⁸⁰

Justice Souter, writing for the Court, refused the invitation to expunge the purpose prong from the doctrinal toolbox. He reasoned that the judicial inquiry into the legislative purpose is meant to ensure government neutrality towards religion. State practices that manifests a religious purpose undermine religious toleration and respect and send a message to non-adherents that they are not welcomed members of the political community.¹⁸¹ Further, the examination of legislative purpose is a staple of contemporary judicial practice, occurring in a variety of settings: when interpreting statutes, when adjudicating Equal Protection claims and dormant Commerce Clause Claims, and in determining the appropriate level of scrutiny to employ in a Free Exercise Clause claim.¹⁸²

In most cases, there exist “readily discoverable fact(s)” from which these purposes can be determined, and the inquiry into purpose does not require the judicial branch to psychoanalyze the defendant’s “heart of hearts.”¹⁸³ There thus is “nothing hinting at an unpredictable or disingenuous exercise” in a court’s determination of purpose.¹⁸⁴ While it is possible that the “savvy” official might pass legislation without leaving behind “readily discernable fact” from which a court could infer that he had a religious purpose, such cases are of no concern to the Establishment Clause:

If someone in the government hides religious motive so well that the objective observer, acquainted with the text, legislative history, and implementation of the statute, cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of

¹⁸⁰ *McCreary County v. ACLU*, 859. “The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court’s conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.”)

¹⁸¹ *Id.* at 860. “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”) (referencing, respectively, *Epperson v. Arkansas*, 393 U.S. 97 (1968), *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).)

¹⁸² *McCreary County v. ACLU*, 860-61 (referencing, respectively, *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), *Washington v. Davis*, 426 U.S. 229 (1976), *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333 (1977), *Church of the Lukumi Babaul Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).)

¹⁸³ *McCreary County v. ACLU*, 862.

¹⁸⁴ *Id.*

nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.¹⁸⁵

Nonetheless, wrote Justice Souter, the judicial inquiry into legislative purpose should not be overly limited. The judiciary must discern real purposes from “sham” purposes, and this means that it can not limit its inquiry, as urged by Liberty Counsel, to merely the expressed, textual legislative purpose or to the “latest news about the last in a series of governmental actions.”¹⁸⁶ That is, while the courts are not to delve into the legislator’s “heart of hearts,” it must not merely accept at face value the declared legislative intent, nor suppose that intentionality takes place in an ahistorical vacuum; what the defendant has done before may be relevant to its most recent intentions.¹⁸⁷

In sum, the Court affirmed the legitimacy of the purposes prong, thereby requiring lower courts to evaluate “readily discoverable facts” that supply some clue as to the defendant’s intent. But the Court did not indicate which facts courts may take into account, nor the degree to which those facts may be used to make inferences about the defendant’s purpose or intent. Lower courts are left in much the same position as they were during the 1970s.

Tennessee Counties

In *Hamilton*, Chief Judge Edgar found that the enacting legislation evidenced a religious purpose. “The first ‘Whereas’ in the resolution directing posting of the Ten Commandments states: ‘WHEREAS, our nation recognizes that all laws governing man's actions toward his fellowman [sic] are derived by the Ten Commandments as given by God to Moses’ The Commission evidently believed that all laws come from the Ten Commandments, and that this is recognized by our nation.”¹⁸⁸ In addition to this textual evidence, Chief Judge Edgar looked to the epistolary evidence of the bill’s sponsor:

On October 9, 2002, after the posting resolution had passed, its prime sponsor, Bill Hullander, wrote a personal letter to some, but not all, local clergy in which he generally urged that they promote putting up copies of the Ten Commandments in churches and homes. In this letter, Mr. Hullander expressed his Christian motivation to have copies of “God's law posted all over our county.” The letterhead lists Mr. Hullander's personal address, but he signed the letter as “Chairman, Hamilton County

¹⁸⁵ Id. at 863 (internal quotation and citations removed).

¹⁸⁶ Id. at 864-66.

¹⁸⁷ Id.

¹⁸⁸ *ACLU of Tenn. v. Hamilton County*, 763.

Commission.” While Mr. Hullander's letter was written after the Commission approved the Ten Commandments resolution, it nevertheless clearly demonstrates that his motivation, as the resolution's primary sponsor, was a religious one.¹⁸⁹

Similarly, the debates in Rutherford County indicated to Judge Echols that the Commissioners there had a religious purpose when they voted to post the Decalogue.

Most of the discourse preceding the Commission's votes on the March and April resolutions consisted of extolling the virtues of the Ten Commandments and discussing the extent to which similar religious documents, symbols, and phrases are commonly referenced in the American legal system and government.

The focus of both the Commission's discussion and the public comment period was exclusively on the Ten Commandments. There was no meaningful debate regarding the historical or patriotic significance of the other documents that ultimately comprised the challenged display. In fact, the other documents were not discussed at all and were mentioned by name only when the first paragraph of the resolution was read aloud by the sponsor. Also, there was no discussion of why the other documents were chosen, how they related to each other or the whole, or the educational or historical purpose of the display.¹⁹⁰

Hence, in both *Hamilton* and *Rutherford*, the theological inquiry was straightforward and the psychological inquiry, which examined the text of the enacting legislation, letters sent by the Chair of Commission, and the content of the public debate, confirmed that the posting of the religious display did indeed have a religious purpose. These are the “readily discoverable facts” from which the defendant’s intentional mental states may be discerned. The purpose prong may not require courts to put the defendant on the couch, but they are nonetheless required to identify the defendant’s mental states and then show how these mental states interact with both the character and the context of the display.

¹⁸⁹ Id.

¹⁹⁰ *ACLU of Tenn. v. Rutherford County*, 807.

C. Context and Aesthetic Critique

According to the Endorsement Test, the constitutionality of a government's display of a religious symbol can be preserved if the context of the display vitiates, somehow, the religiousness of the display's message.¹⁹¹ If the symbol is a part of a thematically unified display, whose theme is "secular," the symbol's constitutionality might be preserved. Hence, judges must be both iconographer, describing the display and its location, and aesthetic critic, determining the thematic coherence and meaning of the display, given its context.

Because an unmediated experience of the posting is the best way to determine the thematic coherence of its context, judges have frequently paid official visits to the sites of contested displays. They then produce an iconography that becomes a part of the evidentiary record.

For instance, in both of Judge Moore's cases, first while a District Judge and later as Chief Justice of the Alabama Supreme Court, the presiding judge formed opinions about the constitutionality of the display by visiting the site where Moore had displayed the Ten Commandments. While a District Judge, Judge Moore hung a hand-made redwood plaque of the Ten Commandments upon the wall of his courtroom. The judge presiding over this case, Judge Price, originally enjoined Moore's practice of courtroom prayers but allowed the Ten Commandments plaque to remain. In response to this adverse holding, the plaintiffs moved for Judge Price to visit Judge Moore's courtroom so as to form a better impression of the effect of the Ten Commandments. This visit did indeed change his mind: "Based on the fact that the plaques are hanging in the courtroom on the wall alone for the obvious and stated purpose of promoting religion, the court finds that their presence as displayed, is a violation of the Establishment Clause of the United States Constitution and the Constitution of Alabama."¹⁹²

In Judge Moore's second case, involving the now famous Ten Commandment's monument he installed while Chief Justice of the Alabama Supreme Court, the presiding judge, at the behest of counselors for both parties, made an official fact-finding visit to the rotunda of the Alabama Supreme Court building to inspect the monument and its context. This visit produced the following impressions.

Additionally, at the request of the parties, the court visited the monument before beginning trial because all agreed that a personal on-site viewing of the monument was essential to capture fully not only the monument but its context as well. The court found the monument to be, indeed, much

¹⁹¹ As Justice O'Connor put it, somewhat misleadingly I think: "Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display - as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch v. Donnelly*, 692.

¹⁹² *Ex parte State ex rel. James*, 959.

more than the sum of its notable quotations, large measurements, and prominent location. The court was captivated by not just the solemn ambience of the rotunda (as is often true with judicial buildings), but by something much more sublime; there was the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred. Thus, it was not surprising to the court that, in describing the process of designing the monument, the Chief Justice emphasized that the secular quotations were placed on the sides of the monument, rather than on its top, because these statements were the words of mere men and could not be placed on the same plane as the Word of God. Nor was it surprising to the court that, as the evidence reflected, visitors and building employees consider the monument an appropriate, and even compelling, place for prayer. The court is impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse.¹⁹³

In *Green v. Haskell County*, Judge White visited the Haskell County government building, about which he made these humorous but frustrated observations:

The setting of the courthouse grounds is somewhat bucolic. Squirrels run across the grass, tall trees shade the lawn and neat sidewalks criss-cross it to converge at the front and side entrances. A small, rustic log cabin housing the Haskell County Historical Society is on the northeast side of the property. A picturesque gazebo, suitable for anything from political rallies to orchestral performances, stands on the northwest corner. Indeed, a number of public and private events take place on the courthouse lawn and at the gazebo.

The courthouse itself is not, from all appearances, an architectural marvel. To the court's untrained eye, its style could be described as "muscular brick and concrete with turquoise trim." A cheerful looking building it is not; however, no question has been raised regarding its functionality.

¹⁹³ *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1295 (M.D. Ala. 2002).

Spread willy-nilly over the front lawn of the courthouse is a mélange of marble* monuments of various styles, sentiments and construction. Private citizens paid for and erected most of the monuments. The largest monument sits smack dab in the center of the lawn. It lists and honors Haskell County citizens who died in World Wars I and II. In front of it are smaller monuments for KIAs in Vietnam and Korea. Behind the war memorial is a small rose garden with a birdbath. Nearby, straight and tall, stands a flagpole from which Old Glory proudly waves.

Not last, and certainly not least, the courthouse lawn holds two sturdy marble benches dedicated to and inscribed respectively by the Class of 1954 and the Class of 1955. The names of members of the graduating class are inscribed in (mostly) alphabetical order on the tops of the benches. The court is unsure why no other class demonstrated the wherewithal or initiative to erect a monument to themselves, or why the County perhaps approves of no other high school graduating class.

One of the sidewalks contains a section of “personal message bricks.” Each brick expresses a dedication to a loved one or sponsor such as “Earl & Effie Cantrell” or “Oklahoma Natural Gas Company.” The personal message bricks could be considered individual “monuments.” On the two northern corners of the lawn are two small (approximately 3' x 5') white billboard advertisements with red lettering. The sign on the northeast corner points the way to “First Assembly of God, Stigler.” The sign on the northwest corner points the way to “Bread of Life Ministry of Jesus.”

Of course, the courthouse lawn is also the site of the Ten Commandments Monument. But more on that anon.¹⁹⁴

* (Court’s footnote) Admittedly, the court is ignorant geologically and has no clear knowledge of whether the hard impermeable substances constituting the monuments are marble, granite, limestone or something else. They *look* marble; therefore, that is what the court will call them. Also, like “mélange,” it alliterates better.

¹⁹⁴ *Green v. Haskell County*, 1274-75.

From these ironic observations, evidently designed to highlight the absurdity of his task, Judge White formed these aesthetic conclusions about the thematic coherence of the display, also ironic:

Like the architecture of the courthouse itself, the lawn monuments have no apparent central theme to the amateur eye. One could argue that they all have some tenuous connection to the history of Haskell County. Of course, the flagpole and displayed American flag are also a “monument.” Such a monument has no real connection to Haskell County history, except for the fact that Haskell County, since its inception, has been part of the Union. Those Haskell County men honored by the war memorials certainly died for that Union.¹⁹⁵

Judge White, presenting his legal reasoning as a descent into Dante’s *Inferno*, thought that this particular monument and its context were more analogous to those surrounding the *Van Orden* monument than the *McCreary* display. He thus concluded that the display was constitutional, although it is apparent from the tone of his opinion that he believed his task as aesthetic critique to be more divination than deliberation.

Tennessee Counties

In *Rutherford*, Judge Echols was persuaded that the context of the display (“The Foundations of Liberty”) did secularize the message conveyed by the Decalogue.

In this case, however, the “Foundations” display contains eight documents, only one of which is religious in nature. The presence of the eight other documents, all with historical and patriotic significance to our nation and to the state of Tennessee, helps to place the Ten Commandments in the context of being a historic document of moral laws which served an important role in the development of our country's legal foundation. Thus, the display, taken as a whole, conveys a secular message of patriotism and justice to a reasonable observer. The location of the display at the courthouse where justice is administered under our legal system and local government is seated emphasizes the historical and foundational role of the Ten Commandments in secular, legal, and legislative matters. Given the overall historical and secular character of the display here, “the

¹⁹⁵ Id. at 1275.

inclusion of a single symbol of a particular historic religious event ... does not so 'taint' the ... exhibit as to render it violative of the Establishment Clause." [citing *Lynch*] Therefore, the Court determines that the display as a whole does not have the primary effect of advancing or endorsing religion.¹⁹⁶

In *Hamilton* where the county never posted additional documents alongside the Ten Commandments, Chief Judge Edgar reached the opposite conclusion.

Defendants contend that reasonable persons viewing these plaques would know that the Ten Commandments were not there for a religious purpose, but that they have played a role in the secular development of western law and culture. It may be true that the Ten Commandments have played such a secular role. However, the way that these plaques have been posted would not bring that to mind. Each plaque is posted separately and apart from any other wall adornments. They are clearly labeled as being the "Ten Commandments." They display the full (albeit edited) text of those Commandments, and if anyone doubts that they have religious significance, the Commandments are framed in the shape of what one would recognize as a stone tablet, and the plaques reference the Bible. The Hamilton County display has the effect, to a reasonable observer, of conveying a religious message.¹⁹⁷

In sum, the Endorsement Test requires of judges to produce an iconography of the display, perhaps even making an authorized trip to the site of the kerfuffle, and then to form an aesthetic judgment about the thematic coherence of the display. If judges can see in the display a united, secular theme, then the constitutionality of the presence of the religious symbol might be preserved. Under the Endorsement Test, then, the constitutionality of a display depends upon an aesthetic judgment.

¹⁹⁶ *ACLU of Tenn. v. Rutherford County*, 811-12. Nonetheless, Judge Echols proceeds: "The Court admits, however, that the documents chosen by the Commission to be displayed with the Ten Commandments are not the most impressive examples of our country's legal and governmental heritage. For example, a more thoughtfully-constructed display might include, along with the Ten Commandments, quotes from historic lawgivers such as Confucius, Muhammad, King John, Louis IX, or John Marshall, or documents important to the historical development of the law or the governance of mankind, such as the Code of Hammurabi, Justinian's *Corpus Juris Civilis*, the Napoleonic Code, or Hugo Grotius' *Concerning the Law of War and Peace*."

¹⁹⁷ *ACLU of Tenn. v. Hamilton County*, 765.

IV. The Attractiveness of the Ten Commandments

The Endorsement Test hangs the constitutionality of a display upon its illocutionary force, and this requires a judge to inquire into the propositional content of the symbol (theology), the mental states of those who supported the display (psychology), and the theme of the context in which the symbol is displayed (aesthetics). This has enabled an argumentative strategy that makes the display of the Decalogue, vis-à-vis the display of the cross and the display of the crèche, an attractive symbol to defend in a court of law. This argumentative strategy claims that whatever theological importance the Decalogue had and continues to have for Jews and Christians, it has played an important secular role in the development of Western secular culture, specifically in the development of Western law. Because they have played this role, their display may be an acknowledgement of history and tradition, rather than of endorsement of religion. That these displays are recognitional, the argument proceeds, is further evidenced by the thematic coherency of the context in which these displays are often found.

Jay Sekulow, of the American Center for Law and Justice, the chief legal advocate for this line of reasoning, has recently published a book in which he makes this argument. It is paradigmatic and Jay Sekulow's central position in this type of litigation insures its continued influence. The argument begins thusly:

The portion of the Hebrew Scriptures called the Ten Commandments, or the Decalogue, is an integral part of the legal heritage of Western civilization. The argument in favor of the constitutionality of the displays is straightforward. To require its removal from the walls of American courthouse and other public settings because it refers to the God of Israel as a source of fundamental legal obligations would be similar to requiring the removal of the Declaration of Independence because it refers to "Nature's God" and to "the Creator" and to "divine providence" as the source of the equality of all persons and of the universal rights of life, liberty, and the pursuit of happiness. Indeed, if one were to eliminate religious references from our legal history, one would reduce the time frame of that history to very recent generations.¹⁹⁸

The Founding Fathers, he then writes, "were entirely familiar with, and strongly influenced by, the great treatise of William Blackstone titled *Commentaries on the Laws of England* . . . in which he wrote that there are two main sources of law, namely, a law of nature which 'God has enabled human reason to discover,' and a divine law, 'whose doctrines are to found only in holy scripture.'" Further, "the first major book of English

¹⁹⁸ SEKULOW, 322.

history, King Alfred's ninth-century collection of rules of Anglo-Saxon law, starts with the full text of Exodus 20:1-17 of the Old Testament, containing the Ten Commandments."¹⁹⁹ The biblical commandments, he then asserts, "were also considered authoritative in English law throughout the Roman Catholic period of its history," as well as "throughout the Tudor-Stuart period. . . . Sir John Fortescue's fifteenth-century political and legal treatise, *In Praise of the Laws of England*, which was republished and annotated by John Selden two centuries later, invoked Mosaic law in order to inspire the 'Prince' to govern according to the rule of law."²⁰⁰ Mr. Sekulow further cites Sir Edward Coke and William Welwood before noting that the most direct influence of the Decalogue on American law originates with Protestantism:

Protestant legal scholars of the sixteenth century, starting with Martin Luther . . . faced with the task of synthesizing for Protestant princes the preexisting separate systems of canon law, Roman law, royal law, feudal law, and mercantile law, turned to the last six of the Commandments to identify "branches" or "fields" of law. They found the source of constitutional law expressed in the commandment to honor one's father and mother, which they interpreted as a command to respect higher authority; the source of criminal law in the commandment not to kill; the source of family law in the commandment not to commit adultery; the source of property law in the commandment not to steal; the source of contract law in the commandment not to bear false witness; and the source of the law of delict in the commandment not to covet, that is not to seek what belongs to another. These categories, which are still preserved in our legal science, cut across the diverse jurisdictions of the earlier period, each of which had been autonomous but, with the rise of Protestantism, came to be combined under the authority of the monarch.²⁰¹

The conclusion that Mr. Sekulow draws from these observations is that:

Not only the authors of the United States Constitution but also their successors who are authorized to interpret it have preserved the historical dimension of American law. The continuity of its development over generations and centuries, which is reflected in the doctrine of precedent as well as in legal scholarship, is symbolized in the display of

¹⁹⁹ Id.

²⁰⁰ Id. at 323.

²⁰¹ Id.

the Ten Commandments, which for centuries have been considered to be the historical source of universal legal obligations.²⁰²

Further,

The widespread and long-standing recognition by government and secular society of the Decalogue's foundational role is firmly embedded in American culture and, like other traditions and practices, are part of the fabric of our society. As Justice Arthur Goldberg put it in the 1960s: "[n]either government nor this Court can or should ignore the significance of the fact that many of our legal, political and personal values derive historically from religious teachings."²⁰³

Mr. Sekulow does not believe that the generality of this argument legitimates all state displays of the Decalogue, but only such displays that do indeed re-enact its foundational role. In conformity with the Endorsement Test, Mr. Sekulow accepts that the constitutionality of any particular display is dependent upon context and intention. He thus also employs, or at least acknowledges the validity of, case specific iconographic and aesthetic arguments. For instance, he apparently believes the differences between the displays in *McCreary County* and *Van Orden* were significant and that Justice Breyer's tergiversations between the two cases were reasonable. He writes that:

Context matters here. Justice Breyer found that the Texas display of the Fraternal Order of Eagles, a secular group, with sixteen other monuments scattered over the Texas state capitol grounds, provided "a context of history and moral ideas" as represented in the Ten Commandments. For Justice Breyer, the monument communicated "moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed." The moral message component in the context of other displays was decisive for Justice Breyer.

Justice Breyer distinguished the "40-year history" of the Fraternal Order of Eagles monument in Texas with the "short (and stormy) history of the McCreary County courthouse Commandments' displays, [which]

²⁰² Id.

²⁰³ Id.

demonstrates the substantial religious objectives of those who mounted them. . . .

Second, it was not the sacred aspect of the Ten Commandments display that became decisive. It was the context and history of the displays that served as a primary issue for Justice Breyer. During oral arguments, Justice Breyer commented that the Texas display was not divisive. The Texas monument has been in place for forty years without objection. On the other hand, the “stormy” history of the McCreary County, Kentucky, displays was decisive in the outcome of that case for Justice Breyer.²⁰⁴

Mr. Sekulow’s argument, then, represents technique of reasoning that responds to the Endorsement Test. It argues that the Ten Commandments, when placed in the right context for the right reason, do not have the illocutionary force of endorsing religion; rather, under the appropriate circumstances, they recognize a prominent part of Western history, now “part of the fabric of our society.” The historical argument is designed to show that Western legal and political discourse makes frequent and prominent mention of the Decalogue and that it was once used as a heuristic for the reorganization of the positive law during a time of intense social and political change. State displays of the Decalogue, when appropriately arranged, recognize this historical importance. Under those circumstances where the display plainly has some other purpose, Mr. Sekulow accepts the Endorsement Test’s condemnation of that display, agreeing with Justice Breyer that the intentions of the defendants and the theme of the display’s context both play an important part in determining any particular display’s constitutionality.

This argument defends the display of the Decalogue by quarantining its more intensely and obviously religious elements. The quarantining strategy first conceptually segregates the first four commandments from the last six. It then ignores the first four altogether while exiling the second six to history and legal tradition. By these moves, the Decalogue is disentangled from the Christian metaphysics of salvation and eschatological hope, and so disentangled can be presented as the “moral law” or the “natural law” composed of universally recognized obligations (i.e, do not murder).

This argument also conflates the Decalogue with the entirety of the Mosaic code which is then equated with either the “moral law” or the “natural law.” These equivocations allow Mr. Sekulow to mobilize some of the West’s most influential and venerable legal scholars as friendly witnesses. For instance, Mr. Sekulow calls Sir Edward Coke to the stand on behalf of the display of the Decalogue, where he is heard saying that “natural law, ‘which predated and underlay the laws of England,’ . . . ‘had its earliest written expression in Mosaic law.’”²⁰⁵ In sum, the quarantine strategy both

²⁰⁴ Id. at 327

²⁰⁵ Id. at 323.

segregates the “two tablets” of the Decalogue and by means of this segregation, equates the Decalogue with the pre-positive moral law.

The quarantine strategy also allows the Decalogue to be situated in the past as a species of legal text, made use of primarily by legal scholars, rather than theologians. For instance, the quarantine strategy does not take Martin Luther as a theologian rebelling against Rome but as a “protestant legal scholar” interested in reorganizing the positive law for the benefit of “Protestant princes,” a project that required the use of only the last six of the commandments. Indeed, the entire argument interprets the past as the advancement and perfection of the positive law, trending towards the law of the ideal American Republic, and the Decalogue as an indispensable element of that perfection. Hence, while the argument is deeply obsequious to tradition, it is utterly devoid of appeal to Biblical authority except to gesture at it as the “source” or “foundation”. Mr. Sekulow then does not make a single reference to the Bible, except to gesture at it as the “source” or “foundation.” He mentions that the Decalogue comes from the twentieth chapter of Exodus, but that is all.

The complex verbal composition of the Decalogue makes the quarantine strategy a possible response to the Endorsement Test. Without this verbal complexity the Decalogue could not be decomposed and then made a historical heuristic for the rationalization of positive law. In contrast, the cross and the crèche lack this verbal complexity, and the Endorsement Test does not make the quarantine strategy available to advocates of governmental displays of these symbols. There is no way for the advocate to segregate the “religious” portions of the cross and crèche from the secular portions. The propositional content of both of these symbols is a unity that is incomprehensible once removed from the Christian metaphysics of salvation and eschatological hope. Their intelligibility is essentially tied up in the Christian worldview.

As a result, advocates of governmental displays of the cross are often left in the awkward position of claiming that such crosses memorialize the war dead, as was the case in *Lowe v. City of Eugene*, where a plebiscite authorized the city to accept the cross as a donation for a war memorial. Even in those instances where such a usage is sincere rather than subterfuge the religious propositional content of the cross is not quarantined. When the cross is so displayed, the religious propositional content of the cross is not vitiated. The cross is a fitting symbol to memorialize the war dead only to the extent that the cross is a reminder of the Resurrection and the Afterlife, both of special concern to the Christian dead. If such crosses really do memorialize the war dead, then they effectuate some illocution other than endorsing (memorialization) without disentangling the cross from its Christian significance. That is, if crosses have the illocutionary force of memorialization it is only because the cross first speaks a religious message.

Likewise, the Endorsement Test does not make the quarantine strategy available to advocates of displaying the crèche. Here, advocates must argue that the crèche merely recognizes the socio-cultural fact that many citizens celebrate the birth of Jesus of Nazareth. However, the display of the crèche during the Christmas season is intelligible only because it represents the birth of Jesus of Nazareth, whom Christians call Christ. Even on the supposition that a government, by displaying the crèche, does intend only to

recognize this socio-cultural phenomena or to attract shoppers to the commercial district, the essentially religious nature of the crèche has not been vitiated. The religious portion of the crèche (which is all of it) has not been quarantined, but used from some other end than endorsing. Hence, in *St. Charles*, Judge Posner thought the display of the crèche during Christmas time different from a display of the cross during that same time because the theological content of the crèche comported with the cultural phenomena it purported to recognize, not because the crèche, because of the context of its display, had no theological content.

V. Conclusion

Mr. Sekulow's argument responds to the demands of the Endorsement Test and to reach the conclusion that a state's display of the Decalogue is constitutional, he must locate its symbolic saliency either in the past (heuristic for the organization of the positive law) or out of time (the transcendent moral law). In contrast, when the Court first consider the constitutionality of posting the Decalogue, it rejected these two symbolizations. In *Stone v. Graham* (1980) the Court found that a Kentucky statute requiring the display of the Decalogue on the wall of each public schoolroom in the state violated the purpose prong of the *Lemon* test. Delivering a per curiam opinion on petition for certiorari, it concluded that "the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths."²⁰⁶ It recognized the possibility of quarantining the "religious" aspects of the Decalogue, but refused to do so: "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murdering, adultery, stealing, false witness, and covetousness. . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day."²⁰⁷ In short, the Court resisted the temptation to secularize the Decalogue and instead characterized it as a creedal element of "the Jewish and Christian faiths" whose commands concern the "religious duties of believers."

When posted on the wall, the Decalogue is not merely pedagogical or an acknowledgement of their historical salience. It is, opinioned the Court, an invitation to worship: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce children to read, meditate upon, perhaps to venerate and obey, the Commandments. However, desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."²⁰⁸ Not only, then, is the Decalogue a creedal element of faith, but its display on the wall rather, its inclusion in a textbook, does not bracket that element of faith in such a way that suggests students are studying it from a sociological point of view. Rather, the manner of its display is an

²⁰⁶ *Stone v. Graham*, 41.

²⁰⁷ *Id.* at 42.

²⁰⁸ *Id.*

invitation to worship that also generates the paradigmatic feeling experienced by the worshiper, veneration. This is a fine emotion, the Court apologizes, but one must be experienced as a matter of private devotion.

The *Stone* Court and Mr. Sekulow approach the question of the constitutionality of a state's display of the Decalogue with the same categories of analysis: "purpose", "effect", "religious", "secular", and "advancement" or "endorsement". They also agree that veneration is the proper response to such a display, but disagree about significance of such an emotion. For the *Stone* Court, the Decalogue is a creedal element of faith. Any veneration produced by a state display of it, therefore, is indicative of the religious nature of that display. This type of veneration is experienced by believers in the course of their worship. It marks them as an authentic member of their religious community. The state, therefore, ought to have no part in producing such an experience.

Mr. Sekulow symbolizes the Decalogue as the moral law which is the source and foundation of the obligations of positive law. The moral law is abstracted from any particular religious affiliations and the ability to venerate the Decalogue is not dependent upon one being an authentic member of any particular religious community. Instead, Mr. Sekulow ranks the Decalogue with other documents central to the American experience, such as the Declaration of Independence. When one venerates the Decalogue, then, one is venerating both the pre-positive moral law (an abstract) and the American nation founded upon that moral law (a particular). Taken as an abstract, the Decalogue exists at every particular time. It existed in the past, when the Founding Fathers made a nation, and it exists in the present, when the nation has fallen away from its former glory. To venerate the Decalogue as the moral law, then, is to be inspired by this past and to desire to recreate present day America in the image of that past. The experience of this sort of veneration, then, does not mark one as a member of a religious community but as a member of the American polity. On Mr. Sekulow's symbolization, veneration of the Decalogue is a sign that one is an authentic American, not that one is an authentic Jew or an authentic Christian.

In sum, the Endorsement Test, with its required theological, psychological, and contextual inquiry, places into the hands of judges and lawyers the power and responsibility to not only determine the constitutionality of the display of religious symbols, but to determine the meaning and significance of those symbols. The Endorsement Test erects a deliberative forum in which certain claims will legitimated the state's display of the Decalogue. In this deliberative forum, if the state's display of the Decalogue is to be constitution, then it must be conceived as a secular legal instrument of historical importance, barren of any role within the Christian metaphysics of salvation and eschatological hope. The *Stone* Court resisted such a symbolization and instead conceptualized the Decalogue as a creedal element of faith comprehensive only to believers.

Furthermore, the contest over the symbolic meaning of the Decalogue is not a religious contest. It is a contest over the meaning of American Republicanism, the place of religious faith with that republic, and the meaning of citizenship in that republic. The

next part of the dissertation presents a case study and attempts to give some precision to the relationship between these three things.

Chapter Five: American Myth and the Ten Commandments

I. Introduction

The following chapters answer the questions of why advocating of posting the Decalogue engage in this political action and why opponents find such attempts disturbing enough to resist. The dissertation, then, moves away from an examination of constitutional doctrine and the professionals who regularly manipulate that doctrine in service of their policy goals. Instead, the following chapters examine the reasons and motives of ordinary folk who have engaged in this type of litigation.

I proceed with this enquiry by means of a case study of two Tennessee Counties that experienced such litigation shortly after the 9-11 Terror Attacks. The description of motives and reasons that I offer operates at a level of abstraction between that of historical contingency, on the one hand, and general and universal sociological facts, on the other. An explanation that proceeded by means of historical contingency would relate a series of events which, by means of happenstance and the confluence of various uncoordinated personal decisions, resulted in the popularity of posting the Decalogue. Such an explanation might relate the political career of Mr. Roy Moore. It would detail the events which led to his appointment to the bench in Etowah County, Alabama, his posting of a Ten Commandment plaque in his courtroom, and his subsequent rise to fame as he defended that posting against the onslaught of the ACLU. It might further detail how some were inspired by Mr. Moore, how others were horrified by Mr. Moore, and how these conflicting emotions eventuated in political and legal conflicts over the posting of the Decalogue. The explanation I offer is more general than this, but does not become so general as to rely solely upon sociological facts, such as urbanization or mechanical solidarity, as categories of analysis.

Such an explanation, as exemplified by Professor Gordon's study, discussed in the introduction, would identify the origin of the conflict as the natural or expected result of the arrangement of society, or changes to that arrangement. It might assert, as does Professor Gordon, that the conflict is the result of urbanization, which generates new types of economic relationship which in turn threaten the prestige of traditional patriarchy. This class then mobilizes in defense of its prestige, and the posting of the Decalogue is a part of that mobilization.

While the following analysis recognizes that certain individuals, such as Roy Moore, have had a proximal role in making litigation over the display of the Decalogue fashionable, it assumes that their popularity and influence was possible only because they were able to articulate reasons which resonated with generally held beliefs. The following analysis also acknowledges the salience of various general sociological concepts. In the context of the case study, the attempt to post the Decalogue occurs in close rhetorical and temporal proximity to the 9/11 Terror attacks. These attempts can therefore be understood as Durkheimian expressions of moral outrage that have the

incidental effect of generating social solidarity and the re-affirming the conscience collectif.

However, explanations that proceed by means of either historical contingency or general sociological fact seem to miss out on a thick description of the intentionality of the participants. On the one hand, historical contingency cannot explain why Mr. Moore became popular, only that he did and that his popularity had various consequences for the sort of litigation entertained by the Federal Courts. On the other hand, explanations that rely upon general sociological facts attribute to participants a motivation that is too vague to explain their particular motivations for engaging in this political activity, although they offer predictive value: urbanization threatens the prestige of traditional patriarchy; therefore, where there is urbanization we can expect to find traditional elements attempting to assert political and social authority against those forces which threaten their prestige. By such an explanation, however, we cannot know *why* posting the Decalogue, rather than, say, insisting that the Decalogue be scrupulously followed, can be understood as an attempt to protect threatened prestige. One needs a finer description of motives than this, a description which is unlikely to make reference to such general sociological facts. These facts do not, in most instances, provide the conscious motives for individuals, who do not usually say to themselves before engaging in political activity that, say, by that activity they mean to protect the prestige of their class against urbanization.

Generally, the following analysis proposes that both sides of this controversy situate their political action in mythic conceptions of American republicanism, and that the attempt to post or the resistance to such posting is an attempt to preserve or retain this mythic conception. Hence, the sociological literature of the culture war provides the correct level of generality between historical contingency and general sociological facts. This literature does not assume that these conflicts are merely the result of the idiomatic political action of individuals, but neither does it suppose that these conflicts can be explained solely through reference to general sociological facts. Rather, the literature of the culture war assumes that these “wars” take place in the context of American social and political life. The analysis of these conflicts must therefore make reference to particular individuals, particular events, and particular cultural scripts that have influenced American life and that are not shared by other societies. One of those particulars is American “Civil Religion.”

In what follows, I introduce the concept of civil religion and argue that this concept, at least as Robert Bellah originally conceived it, masks the sociological fact of “civil religion” pluralism. Even if America did at one time have a single civil religion, this is no longer the case: there is now a multiplicity of civil religions in America and these civil religions are, in many respects, in conflict, perhaps at “war” with one another. Indeed, although I generally think that the use of martial metaphors to describe this conflict is overheated, there is no doubt that the political and legal confrontations depicted in the following case study are very polemical. This literature, then, supplies the appropriate context for the case study. I therefore review two of the most influential works on this cultural conflict – David Hunter’s *Cultural Wars* and Robert Withnow’s

The Restructuring of American Religion. (Section II) I then defend the appropriateness of “myth”, rather than public philosophy, as a descriptor of these competing “civil religions”.

While the sociological literature of the culture war provides insights into the two competing myths, it is impossible to understand those two myths as mere instantiations of the general theory of culture war. Indeed, an analysis of the details of these two myths shows that this general sociological literature misreads these conflicts in very important ways. Briefly (and therefore also glossing over too much of the detail), it conceives of conservatives (or the “orthodox”) as adhering to other-worldly sources of morality and to be therefore motivated by “religion.” It conceives of liberals (or the “progressives”) as adhering to this-worldly sources of morality and to therefore have “secular” motives. In the case study, this is just the opposite: opponents of posting are more likely to cite sectarian texts, such as the New Testament, while advocates are more likely to find guidance in secular sources of political and moral authority, such as the Founding Fathers.

Correctly understanding how the standard theory of the culture war gets this distinction backwards has important implications for both Establishment Clause jurisprudence and democratic theory, and it is the goal of the last part of this dissertation to use the insights provided by the case study to argue for revisions to the Rawlsian conception of public reason (Chapter 9) and to Establishment Clause jurisprudence (Chapter 10).

II. Civil Religion

When Robert Bellah first identified American Civil Religion as an object of scholarly study, he found its content to be remarkably coherent, unified, and consistent. Much like Rousseau’s civil religion, its elements are simply and few: there is a God, so that “the will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong.”²⁰⁹ This God has an interest in American affairs and the nation thus has an “obligation, both collective and individual, to carry out God’s will on earth.”²¹⁰ In a later book, he traces the genealogy of this sense of special purpose and obligation back to the colonial sense of America’s newness, which the colonists perceived as “the blank screen of an alleged ‘state of nature.’ Upon that screen they projected fantasies, dreams, and nightmares long carried in the baggage of European tradition but seldom finding so vivid and concrete an objective correlation. Thus America came to be thought of as a paradise and a wilderness, with all of the rich associations of those terms in the Christian and biblical tradition.”²¹¹ Equating Europe with Egypt and the new world with Canaan was too obvious an analogy to pass over, and civil religion was largely populated with imagery and symbols from the Old Testament. According to Bellah, the Civil War

²⁰⁹ ROBERT BELLAH, *Civil Religion in America*, 96 *Daedalus*, 4 (1967).

²¹⁰ *Id.* at 5.

²¹¹ ROBERT BELLAH, *The Broken Covenant* 6 (The Seabury Press. 1975).

reforged American Civil Religion: particularly with Lincoln's Gettysburg Address and his subsequent assassination, themes and imagery from the New Testament – sacrifice, death, atonement, and rebirth – became central elements. The war dead, for instance, were taken as atonement for the American sin of slavery.

In his early article, Bellah conceived of America's civil religion as a force of good, harnessing Christian symbols to create an American destiny aimed progressively at liberty and equality. Other uses of this civil religion are outliers: "On the domestic scene, an American-Legion type of ideology that fuses God, country, and flag has been used to attack nonconformists and liberal ideas and groups of all kinds. . . . For all the overt religiosity of the radical right today, their relation to the civil religious consensus is tenuous, as when the John Birch Society attacks the central American symbol of Democracy itself."²¹² Not only outliers, these conservative uses of America's civil religion are also "deformations and demonic distortions."²¹³

In response, Amanda Porterfield notes that while the concept of civil religion is particularly helpful in understanding "the Custer memorial at the Little Bighorn, and commercials for the Nation Rifle Association," Bellah's early conception of civil religion minimizes, even ignores, these uses. "He would rather have us associate civil religion with the republican virtues of enlightenment, activist citizenship and with the commitments to social egalitarianism expressed in the Declaration of Independence and in our most eloquent presidential addresses."²¹⁴

Whether or not Bellah correctly perceived unity in an earlier version(s) of America's civil religion, scholars have since made it abundantly clear that fractious divisions have split America's civil religion into well-defined and largely impermeable camps. Liberals like Bellah denigrate the John Birch Society's conception of that American civil religion, but there is no doubt that this conservative conception is a more substantial and more pervasive inhabitant of American culture than Bellah initially allowed for. It is no mere outlier. Although liberals are not likely to soon be converted to the conservative version of civil religion, they are not necessarily as vulgar as Bellah conceived them to be in his early article. Later theorists, such as Hunter and Wuthnow, have offered interpretations of America's conservative civil religion that are both more sympathetic and more nuanced, and I now turn to some of that nuance.

III. Hunter and Wuthnow: Culture Wars

Within the literature, there is some disagreement over what terminology best describes the two sides to this cultural conflict. Hunter prefers "orthodox" and "progressive" over "conservative" and "liberal", and many influential theorists have taken

²¹² BELLAH, *Civil Religion in America*, 14.

²¹³ *Id.* at 12.

²¹⁴ AMANDA PORTERFIELD, *Forum: American Civil Religion Revisited*, 4 *Religion and American Culture*, 7 (1994).

up Hunter's terminology.²¹⁵ Others, including Wuthnow, are comfortable with the standard and popular labels of "conservative" and "liberal."

This disagreement over terminology, however, does not spill over to their substantive theories, which agree on most every point. First, it is agreed that the differences between conservatives and liberals can not be characterized by denominational differences, or even religious differences. This is not a conflict between Baptists and Presbyterians, or Protestants and Catholics, or even Christians and non-Christians. Rather, the second half of the 20th century is characterized by the waning of denominational loyalties and the emergence of para-church organizations. These non-profit institutes are either unconnected or only loosely connected with any denominational creed and instead operate on behalf of an extra-creedal "special agenda." These para-church (para-religious would be a better term) organizations draw donations and membership from various denominational and creedal affiliations. They and their leadership are elite "knowledge producers" adept at producing and circulating information within public culture. Concomitantly with their autonomy from creed and dogma, these para-church organizations advance moral agendas rather than creedal agendas. The goal of these organizations is not the conversion of souls but achievement of some policy goal.²¹⁶

The sociological literature accepts, therefore, that these political conflicts are grounded in moral difference. It also accepts with little exception that these two moral points of view are largely incompatible. While both sides frequently use the same moral-political vocabulary (e.g., liberty), they each designate by that vocabulary divergent and incompatible concepts. In many instances, then, this shared vocabulary exacerbates rather than mitigates the conflict between the two sides as they struggle for possession of a contested concept.

James Hunter elects to label the two camps as the "orthodox" and the "progressive" so as "to describe . . . a particular locus and source of moral truth, the fundamental (though perhaps subconscious) moral allegiances of the actors involved in the culture war as well as their cultural and political dispositions."²¹⁷ These are labels for the classification of moral differences, not religious differences, so that there are, for instance, Catholics, Jews, and some secularist whom might all be described as orthodox because they are each committed to "an external, definable, and transcendent authority."²¹⁸ This moral authority "defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are. It is an authority that is sufficient for all time."²¹⁹ This moral authority is beyond human

²¹⁵ See e.g., ANDREW MURPHY, *Prodigal Nation: Moral Decline and Divine Punishment from New England to 9/11* (Oxford University Press 2009).

²¹⁶ JAMES DAVISON HUNTER, *Culture Wars: The Struggle to Define America* Chapter 3 (Basic Books 1991); ROBERT WUTHNOW, *The Restructuring of American Religion: Society and Faith Since World War II* Chapters 5-6 (John R. Wilson ed., Princeton University Press 1988).

²¹⁷ HUNTER, 43.

²¹⁸ *Id.*

²¹⁹ *Id.* at 44.

experience and therefore immutable in the face of changing human will and desire. Further, this moral authority has propositional content. It is composed of rules and commands and therefore is “not just representational, but . . . has objective and concrete agency in human affairs. God, they would say, is real and makes Himself tangibly, directly, and even propositionally know in the everyday experience of individuals and communities.”²²⁰

In contrast, within the progressive camp “moral authority tends to be defined by the spirit of the age, a spirit of rationalism and subjectivism. . . . From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding.” One thing that progressives have in common is “the tendency to resymbolize historic faiths according to prevailing assumptions of contemporary life.”²²¹

Clustered around these differing visions of moral authority are a group of symbols and policies that translate these conflicting visions of moral authority in to public philosophies. The orthodox, for instance, treat history as ideology. The orthodox, says Hunter, link the nation’s birth to the Divine will so that “America is . . . the embodiment of Providential wisdom.”²²² The genius of the Founding Fathers is that, being aware of Biblical principles, they founded a government dedicated to, and capable of achieving, freedom and justice. For the orthodox, freedom is that freedom possessed by a polity when it has the power to govern itself and is free from despotism, what Charles Taylor calls civic freedom. For the orthodox justice “is generally defined in terms of Judeo-Christian standards of moral righteousness. . . . A just society, therefore, is a morally conscientious and lawful society. When its people abide by these standards it is also an ordered society.”²²³ Attached to the orthodox public philosophy is a commitment to a unique American destiny “to extend the boundaries of liberty and righteousness” that can only be achieved by staying the course, or “if change is necessary, it should only be undertaken to more perfectly fulfill the ideals established at the nation’s founding.”²²⁴

Progressives, in contrast, “rarely, if ever, attribute America’s origins to the actions of a Supreme Being.”²²⁵ America’s founding documents, therefore, “are not seen as reflecting absolutes either given by God or rooted in nature.”²²⁶ Rather, “law in a democratic society is one of the highest expressions of human rationality and must evolve as society evolves and matures.”²²⁷ Concomitantly, the progressives accept a “liberal” vision of freedom, one in which freedom is “defined in terms of the social and political rights of individuals,” rather than the power of the polity to govern itself.²²⁸ Progressives therefore focus on the “struggle of the founders to establish and preserve ‘pluralism and

²²⁰ Id. at 120-21.

²²¹ Id.

²²² HUNTER, 109.

²²³ Id. at 112.

²²⁴ Id.

²²⁵ Id. at 113.

²²⁶ Id.

²²⁷ Id. at 114.

²²⁸ Id.

diversity,” acceptance of which is required for the flourishing of liberal freedom.²²⁹ Justice is understood as equality and the end of social oppression, goals achieved through the acceptance of pluralism and diversity. Progressives also consciously attempt to resymbolize the tradition as an intentional rejection of the form and content of orthodoxy. This resymbolization includes a rejection of particularistic loyalties to the nation in favor of “eternal verities” based upon the universal nature of humanity. Moral authority therefore emerges from this-worldly considerations, and progressives look to science for moral guidance. Psychology, for instance, can tell us whether a practice harms or benefits people and therefore whether it is a good or a bad practice. Moral authority for the progressive also emerges from the realm of personal experience: “this concept implies a moral pragmatism centered around the individual’s perception of his or her own emotional needs or psychological dispositions. In this situation, reason linked with a keen awareness of subjective orientation provides the ultimate crucible for determining what is right and wrong, legitimate and illegitimate – and ultimately what is good and evil.”²³⁰

Wuthnow agrees that conservatives relate the founding of the nation to divine purpose. The government is legitimate because the Founding Fathers, who were influenced by Judeo-Christian values and therefore approached the world with Biblical principles, knew best how government should function. Conservatives emphasize the maintenance of religious values, which used to be taken seriously but no longer are. The advocacy of social change ought to be limited to returning to these values. Conservatives also think that America has some special destiny in the world, namely to use its “advantaged position to preach Christianity to all nation” and to hasten the second coming. Wuthnow also thinks that the conservatives confer a strong degree of divine authority on the existing mode of government: “Although no human government can ever fully conform to God’s ideal, government is nevertheless established by God as a means of maintaining social order. Thus ordained, it should not be questioned or openly challenged, except in those rare instances when it violates the Christian’s right to worship.”²³¹ As with Hunter, Wuthnow identifies the link between capitalism and conservative morality at the analogy between economic and spiritual freedom; one, it is said, can not exist without the other.²³²

Like Hunter’s progressives, Wuthnow’s liberals tend to shed particularistic loyalties. They make few references to the Founding Fathers and instead appeal to humanistic values that transcend American culture. Hence, they adhere to a policy agenda concerned with human flourishing in this world: nuclear disarmament, civil rights, international justice, and the environment are all of central concern. Were we to characterize these two groups under a Weberian category, says Wuthnow, then elite liberals would represent the “prophetic” tradition because they announce the likely doom

²²⁹ Id.

²³⁰ Id. at 125-26.

²³¹ WUTHNOW, 248.

²³² Id. at 248; HUNTER, 111.

of the future, while the policy goals of conservatives tend to be more in accord with a “priestly” orientation that strives to maintain traditional morals.

For Wuthnow, the disagreement between the two is also moral disagreement, although it is not a disagreement about the nature and source of moral authority. Instead, the disagreement over the veracity of those moral symbols expressing the unique identity of the nation and those associated with a broader humanity. Unlike Hunter, then, Wuthnow does not see the moral disagreement between the two sides as completely incommensurate. They agree over the importance of religious values to politics and the existence of transcendent values. They also both employ a biblically based moral vocabulary (although some in either camp fall back upon a secular vocabulary and values, such as “liberty”), and they draw upon the same pool of Biblical stories. These, however, I tend to show in the subsequent chapters are agreements only in the abstract. When mobilized into political action, these abstract agreements have very few irenic effects.

IV. Myths

On many points, elaborated in Chapter () Sec () below, the case study can not be understood as a mere instantiation of this standard theory of culture war. However, the standard theory of culture war is correct insofar as it recognizes that, for both sides of the debate, history is ideology. Each side projects and acts upon a mythic vision of the past, which it means to protect or restore. In this context, then, the vocabulary of “myth” is perspicuous for four reasons.

First, “myth” designates an essentially narrative phenomenon. The appellations “public philosophy”, “public theology”, “civil religion”, or “worldview” (all of which find currency in the literature concerned with the culture war) all suggest too much formal systematization of principle, rules, and dogma. These terms each suggest that individuals have and act upon a hierarchically organized set of principles. While the standard theory of the culture war accepts the possibility that a “civil religion” could and might include narrative elements, neither Hunter nor Wuthnow foregrounds these narrative elements. Articulating these narratives and attempting to understand them as the ideological context of political action reveals important insights.

Second, given the narrative context of political action, “myth” appropriately distinguishes these narratives from biographical narratives. It is possible that, in examining the public discourse of political actors, one would discover a set of individual political actors each engaging in politics for their own idiomatic, biographical reasons. For instance, an advocate of posting might desire that the Decalogue be posted because at some point in his life, reading the Decalogue turned his life around. Or, from the other side, one could image an opponent of posting doing so because, as a child, she was physically abused by her parents for supposedly violating the precepts of the Decalogue and because of this she can not stand the thought of it be posted anywhere, much less the courthouse or the school. Were such the case, then a report of the case study would list

the individual, biographically idiomatic narrative advanced by each participant. This turns out to not be the case.

The mythic narratives advanced by both advocates and opponents of posting are common and shared. They are the ideological context for an entire community of individuals, and not just one or two particular individuals. MacIntyre has emphasized the importance of biographical narrative in unifying individual personalities which then provides both the context and motivation for moral and political action. As I am conceiving it here, mythic narrative has an analogous function for groups, binding individuals together under a single identity and giving to them a shared destiny. As a general matter, one's own biography and idiomatic proclivities (say, for power or justice) play an important part in motivating individual political action, but, at least for the participants in the case study, these are not the most important motivation for their attempt to post or their opposition to such a posting. Within the subject politics, political action was not merely idiomatic whim.

Importantly, however, biographical elements and individuals proclivities do enter the discourse, but only in certain ways, ways that are (unintentionally) calculated to buttress the overarching mythic narrative. In particular, participants on both sides tend to advance into the public discourse only that part of themselves that they feel to be endangered by either the posting, were it to occur, or the absence of a posting. In this regard, opponents of posting advance into the public discussion biographical elements that profess their religious identities and authenticate their own citizenship. Advocates of posting, in contrast, advance familial relationships (e.g., mother) into the public discourse. In each case, these (differing) biographical elements mesh seamlessly into the mythic narrative.

The communal and shared nature of each of these two myths is evident from the remarkable degree of agreement over the plot of these myths, even amongst individuals who are otherwise strangers. While different "carriers" of a particular myth emphasize different aspects of that myth, they never advance narrative elements that are inconsistent with that myth, as told by someone else who is also a "carrier" of that myth. People are telling the same story with very little variation. Participants to each side have got their stories straight, although without any apparent coordination amongst them.

The one important exception to this generality occurs in the "conservative" camp. Here, one finds a cluster of extreme participants, mostly in Hamilton County, who understood the attempt to post the Decalogue as a continuation of the American Civil War. While this group also displays other unique features – they are, for instance, the only conservatives who cite the Bible as evidence of the correctness of their political action – they still participate in the same mythic conception of American Republicanism as do the more moderate conservatives. As I shall detail in the next chapter, they merely take certain themes come to the conservative camp (e.g., state and local autonomy) and drag them out to their most radical manifestation (secession).

Third, "myth" is the appropriate term to use for these narratives because doing so situates them within a genre of stories about the immortals and how those immortals relate to humans. It is worth noting at this point that, like the Greek myths, both of these

American myths accept the existence of a pantheon, or if not a pantheon, the existence of lesser deities who have an important influence upon the politics of mortals. This is plainly true for the liberal myth, which accepts, even cherishes, moral and religious pluralism, attendant with which is the acknowledgement of and esteem for others' gods. The conservative myth, as we shall see, aligns itself with the "Judeo-Christian" tradition and so understands itself as monotheistic. Its polytheism, then, is unconscious, located in its understanding of who and what counts as a moral authority. Since the conservative myth accords to the Founding Fathers a degree of moral authority that exceeds that of the scripture, its myth represents the apotheosis of the Founding Fathers.

The goal, then, of the next pair of chapters is to articulate two competing myths, a conservative or orthodox myth and a liberal or progressive myth, but first, the data and the method by which this data was obtained.

III. Data and Method

I chose to examine two subject counties from the state of Tennessee. Hamilton County encompasses the city of Chattanooga in the south-east corner of the state. Rutherford County is located 30 miles south and east of Nashville along I-24 . Using public records, I first identified all the plaintiffs involved in these two cases as well as the names of all of the County Commissioners sitting on the Commission at the time of the successful proposal to post the Decalogue. Again using public records I located the addresses of these individuals and sent to each a questionnaire about their involvement in the case and their attitudes towards the Decalogue. I was unable to find the contact information for some of these individuals. Of twenty plaintiffs (7 in Rutherford, 13 in Hamilton), I sent fifteen (15) questionnaires. Of thirty (30) commissioners (9 in Hamilton County and 21 in Rutherford County), I sent twenty-three (23) questionnaires. I received a total of six replies, four from plaintiffs and two from commissioners. Three of the plaintiff-responses were from Hamilton County. One was from Rutherford County. One commissioner response was anonymous. The other was from a Rutherford County commissioner who had voted against posting the Decalogue. I then contacted all non-anonymous responders and requested an interview. All agreed to meet with me and eventually did during June of 2008, when I paid a visit to Tennessee.

Since only one of the commissioners who had voted for posting the Decalogue responded to my questionnaire and this response was anonymous, I attempted to arrange more interviews with commissioners by calling eight of them (four from each county) who seemed from an examination of the public debates to be most highly involved in the issue. This additional effort did not result in additional useful contacts. Supporters of posting were plainly reluctant to speak with me. While this asymmetry in the data is clearly disappointing, it itself is an important piece of data which reveals something important about this litigation.

There seem to be three possible reasons for the asymmetry in response rate. First, in June the Counties were trying to pass a budget, so that the Commissioners would have had little free time. However, I made initial contacts several months before

commissioners began considering the budgets, so I do not think that this explains their reluctance. Second, I sent my epistles on UC Berkeley letterhead, judging that, in the balance of the university's prestige against the common perception that it is a liberal institution, prestige was more important, especially given that my institutional affiliation could not be concealed indefinitely. Gaining access to either side was conditioned upon display of the appropriate allegiance. One plaintiff, for instance, began a phone conversation with "I'd like to help you. Who's side are you on?" I was often able to negotiate these barriers once I had made oral contact with subjects on either side, but the initial, epistolary contact might have failed at this. Neither time constraints nor barriers to access, however, seem to me to be the chief explanation for the asymmetrical response rate. Immediately after being sued, attorneys for both sets of Commissions advised the Commissioners to say nothing about the case. Doing so might reveal something of their purpose which might, in turn, be used as evidence that they had violated the purpose prong of the *Lemon* test or the intent prong of the Endorsement Test. Silence from defendants, then, seems to have been the product of constitutional doctrine, and I take up this very important point in the third part of this dissertation.

I also gathered the public records from three legislative debates concerning bills or resolutions for the posting of the Decalogue. First, the initial debate in Rutherford, in which there is not only a lively exchange between the Commissioners but also a public comment period that disclosed fascinating attitudes. During this public comment period, a total of eleven individuals spoke at the podium. Three of them were for the posting of the Decalogue and eight of them against. These debates are available on the county's website.²³³ Second, I procured audio copies of the legislative debate in Hamilton County. The county clerk was able to identify, over the course of several commission meetings, all those discussions dealing with the posting of the Decalogue, and these tapes therefore include discussions concerned both with posting and with how the county ought to deal with the resulting litigation. Third, during the 1996 legislative session both the Tennessee Assembly and the Tennessee Senate debated a resolution "to encourage the observance of the Ten Commandments" that would have "encouraged every citizen of Tennessee to observe the Ten Commandments, teach them to their children, and display them in their homes, business, schools, and places of worship, and that ten days, starting the fifth day of May in the year of our LORD nineteen hundred and ninety-six, be set aside particularly to honor these Commandments."²³⁴ Judge Moore, then a county judge

²³³ <http://www.rutherfordcounty.org/commission/meetings/03-14-02/Agenda.htm> (7/21/09)

²³⁴ See SJR328, at

http://www.legislature.state.tn.us/Info/Leg_Archives/99GA/Bills/BillStatus/SJR0328.htm (last visited July 11, 2008). The content of the resolution's preamble is also illustrative:

WHEREAS, the foundation of any government is law and morality; and

WHEREAS, governments rely on the virtue of their citizens to preserve domestic tranquillity; and

WHEREAS, moral decline in society constitutes a threat to the welfare of any state; and

WHEREAS, the Founding Fathers of our Republic respected the place that the Ten Commandments occupy in the history of law and government; and

WHEREAS, we have seen a breakdown in our own culture due to a neglect of these

defending his posting of the Ten Commandments against the Alabama Freethought Association and the ACLU, attended a committee session in which the issue was debated and discussed. Although I first sought the records of these debates because of Mr. Moore's participation, they turned out to provide an important contrast with the county debates: the debates in the Tennessee Assembly occurred before both the Columbine massacres and the 9/11 Terror Attacks and yet, and this is the important contrast, the mythic narrative advanced in all three forums are entirely consistent. That is, while the 9/11 Terror Attacks provided the motive for posting in both the county, those attacks did not alter the content of the mythic narrative advanced by advocates of posting. Nor did it alter the narrative of those opposed to posting, although it did give liberal's one more salient example of religious intolerance.

I also arranged interviews with Hedy Weinberg, director of the Tennessee ACLU, Susan Kay, a law professor at Vanderbilt and one of the attorney's for the Hamilton County plaintiffs, Hubert Hamilton, the other attorney for the Hamilton County plaintiffs, and the attorneys at Barrett, Johnston, and Parsley, counsel for the Rutherford County plaintiffs. These interviews resulted in the acquisition of various leads and information, but I did not use them as a source for the articulation of the myths.

Finally, I arranged an interview with Mr. Roy Moore, former Chief Justice of the Alabama Supreme Court, and then head of the Foundation for Moral Law. I met with him and Mr. Ben Dupré, an attorney at the Foundation for Moral Law, for an entire day. Mr. Dupré graciously treated me to a tour of the Alabama Supreme Court building, where we, amongst other things, inspected the former location of the Ten Commandment's Monument, the stone floor scuffed and chipped because of an inattentive removal. I also lunched with Judge Moore, Mr. Dupré and other members of the Foundation for Moral Law.

These three sites share a political geography and a cast of characters. First, in all three of these forums, both the ACLU, and specifically Hedy Weinberg, and Judge Moore played a role. During the debate in the Tennessee Assembly, for instance, the house committee on State and Local Government solicited expert testimony. Both Judge Moore and Hedy Weinberg were present and spoke. The ACLU of Tennessee handled the litigation in both Rutherford and Hamilton County, and Judge Moore, then Chief of the Alabama Supreme Court, made an appearance at a rally in Hamilton County in defense of the Ten Commandments. Additionally, the two counties were primed to post the Ten Commandments by the activism of June Griffin, a resident of Rhea County (home to Dayton of the Scopes trial) who had for the previous several years visited each of Tennessee's 95 counties in an attempt to have them acknowledge their right to post the Ten Commandments.

Second, the physical proximity of the counties and the Tennessee Legislature would probably be a matter of indifference, except that it places them all within the same southern state. Indeed, throughout all three of these debates there is an antipathy towards federal authority. It is mostly subtle and subdued, but at other times it is secessionist and

basic standards; and

WHEREAS, a return to these standards would greatly benefit all people; now, therefore, . . .

comes close to advocating political violence. Some of this antipathy can only be explained by reference to the state's confederate heritage.

IV. Conclusion

In sum, the following two chapters articulate two competing mythic conceptions of American Republicanism and locate the salience of the Decalogue within each of those two mythic conceptions. These mythic conceptions have a level of generality that hovers between historical contingency and idiomatic biography (Mr. Moore), on the one side, and completely general social facts (urbanization) on the other. These two myths provide the ideological context in which the attempt to post, the resistance to such posting, and the ensuing litigation occurs. In short, the attempt to post the Decalogue and the litigation to remove the posting are both efforts to preserve or restore America to its mythic conception. The conservative myth, which I turn to first, is the Myth of the Covenant of American Republicanism. The liberal myth is the Myth of Separation.

Chapter Six: The Myth of the Covenant of American Republicanism

I. Introduction

The conservative myth of the covenant of American republicanism is a jeremiad.²³⁵ It is a story about America's former greatness, its decline from that greatness, and the attempt to return to that greatness. The following speech, delivered by Representative Peech, is paradigmatic. The resolution he is supporting "encouraged every citizen of Tennessee to observe the Ten Commandments, teach them to their children, and display them in their homes, business, schools, and places of worship, and that ten days, starting the fifth day of May in the year of our LORD nineteen hundred and ninety-six, be set aside particularly to honor these Commandments."²³⁶

First of all I would like to say that its time that decent, law-abiding folks opened their eyes to the loss of freedom and the desperate condition of this country. It's high time that honest, law-abiding citizens realize the fear that's gripping our state and nation. Senior citizens are prisoners in their own home. Children are killing children. Gangs are rampant to the degree that even many policemen are in fear of their lives. Drugs and drug lords are in control of a vast part of our state and our nation. In other words, we are at war in our own country. If you wanna know if were in war, see how many casualties that we have – look at your newspapers everyday. In this nation we have killings, rapes and murders – wholesale. In my fifty plus years of living, I have seen the living conditions in this country deteriorate dramatically. I remember when we left our homes unlocked, when we could walk freely in our communities without fear of death, when we had prayer in our classrooms, the Bible was on the teacher's desk, and the Ten Commandments were on the wall. However, in the sixties the all-knowing jury of the Warren Court decided that prayer, the Bible, and the Ten Commandments might cause psychological harm to our students. So what happened? Prayer, the Bible, and the Ten Commandments were thrown out. What's happened since the sixties?"

²³⁵ For analysis of the role of the jeremiad in American politics see generally MURPHY.

²³⁶ See SJR328, at

http://www.legislature.state.tn.us/Info/Leg_Archives/99GA/Bills/BillStatus/SJR0328.htm (last visited July 11, 2008).

He distributed statistics showing that unwed birth rates for girls ten to fourteen had increased 553 percent and that achievement had dropped dramatically “except for private schools where you do have God, Ten Commandments, prayer. That’s very important.” Further, scholastic aptitude test have decline dramatically, rates of STD has increase, the divorce rate is up, along with the rates of unmarried couples living together and violent crime offenses - “No wonder this country is in pieces. How can you have a solid society when you have such a fractious situation?” He concludes: “All these numbers are shocking, but true. But I think we’ve heard so much of them that maybe it is not shocking any more, but we better get serious ‘cause we’re in trouble in this country.”

The myth then has four essential elements: a vision of the enchanted past, a vision of decline from that past, an agent of that decline, a symbolization of the Decalogue that combats that agent of decline. I treat each in order.

II. The Enchanted Past

While the temporal location of the enchanted past is unspecified – it is sometime before the reign of the Warren Court – we do know that this enchanted past was inhabited by our pious and moral fore-fathers. The ways of these great men made this nation prosperous and only an emulation of their lifestyle can we remake the it. An integral part of this narrative then, is the display of the piety and greatness of the nation’s fore-fathers, who are constantly quoted as authoritative.

For instance, before the Rutherford Commission, a mother who introduced her self as a mother of 2.5 boys (she was pregnant at the time), advocated for the display of the Ten Commandments. She claimed that the Decalogue “has served as the basis of civil law for over 2,000 years” and that “previous generation never questioned the use of and the display of and the reliance on the Ten Commandments” before quoting John Quincy Adams,²³⁷ John Adams,²³⁸ James Wilson,²³⁹ and Noah Webster.²⁴⁰

Even Thomas Jefferson, whose piety is otherwise dubious, is authoritative. In this regard, one particular quote from his Notes on Virginia is put to heavy work: “And can the liberties of nation be thought secure when we have removed their only firm basis, a

²³⁷ “The law given from Sinai was a civil and municipal as well as a moral and religious code, law essential to the existence of men in society and most of which have been enacted by every nation which ever professed any code of laws.” (This and the following quotes are a report of the mother of 2.5’s words; I have not verified the authenticity of these quotes.)

²³⁸ “If thou shalt not covet and thou shalt not steal were not commandment of heaven, they must be made inviolable precepts in every society before it can be civilized or made free.”

²³⁹ “Law, natural or revealed, made for men or for nations, flows from the same divine source. It is the law of God. Human law must rest its authority ultimately upon the authority of that law which is divine. Far from being rivals and enemies, religion and law are twin sisters, friends and mutual assistants. Indeed, these two sciences run into each other.”

²⁴⁰ “All the miseries and evils from which men suffer vice, crime, ambition, injustice, oppression, slavery and war proceed from their neglecting the precepts contained in the Bible.”

conviction in the minds of the people that these liberties are the gift of God?”²⁴¹ Senator Fowler, in the Tennessee Senate, cited this quotation and it is one of the phrases engraved upon Roy Moore’s Ten Commandment monument. This phrase, always excised from its context (a discussion of the inequities of slavery found under the chapter entitled “Manners”), is usually presented as proof that for a people to be free they must believe that there is a God who is the giver of liberties and rights.

Some of the quotations from the Founding Fathers circulating in these controversies have been shown to be inaccurate, or even hoaxes, and the conclusions that are drawn from them are frequently non sequiturs.²⁴² Their frequency nonetheless demonstrates the central place that the “Founding Fathers” hold within the structure of this narrative: they establish law; they tell us how to order society; they pronounce upon the necessity of the law in maintaining peace and community solidarity; they profess the Biblical origin of the law and cherish its civilizing effects.

The Founding Fathers even rebut Jesus the Christ. For instance, Tennessee State Senator Cohen, who is Jewish and the only Senator to vote against the resolution, quoted Matthew 22:21 (the “render unto Caesar” passage). His conclusion was that voting in favor of the resolution to post the Ten Commandments was not only unconstitutional, but it was un-Biblical as well. Senator Fowler replied with a quote from Abraham Lincoln: “in response to the question that we should submit to Ceasar what is Ceasar’s and unto God what is God’s, and Abraham Lincoln, on March 30, 1863, said . . .” and he then quoted extensively from President Lincoln’s Proclamation for a Day of Prayer.²⁴³

²⁴¹ More completely: “For in a warm climate, no man will labour for himself who can make another labour for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labour. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.” Made to do work in these political contests, it is susceptible to various distortions. Senator Fowler, for instance, presented the quote as “Can the liberties of nation be thought secure when we have removed from the mind the sound conviction that they are dependent upon the belief in God?”

²⁴² STEVEN K. GREEN, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 *Journal of Law and Religion* 525 (1999-2000).

²⁴³ The Senator’s quotation of Lincoln seems to be correct, albeit incomplete: “Whereas it is the duty of nations as well as of men to own their dependence upon the overruling power of God, . . .” He then skips to the third paragraph of the Proclamation: “We have been preserved, these many years, in peace and prosperity. We have grown in numbers, wealth, and power as no other nation has ever grown. But we have forgotten God. We have forgotten the gracious hand which preserved us in peace, and multiplied and enriched and strengthened us; and we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us! It behooves us, then to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.” Then skipping the fourth paragraph, and partially quoting from the fifth: “(and therefore,) all this being done in sincerity and truth, let us then rest humbly in the hope authorized by the Divine teachings, (that we can be united again.)”

That the Founding Fathers are quoted in rebuttal to scripture is not the only sign of their apotheosis. It is not just that advocates of posting cite the Founding Fathers, but that they do not, at all, cite scripture as authority for posting. Within the subject discourse, advocates of posting cited the scripture only to quote from the Decalogue itself and never as a source of authority in support of posting. The authority of the Founding Fathers seems to have supplanted the authority of scripture.

The sought for past, then, is not enchanted so much because it was Biblically organized, but because it was a time of high morality. For the Myth of the Covenant of American Republicanism, that morality is encoded in the practices of school-directed prayer, school-direct Bible reading, and the display of the Ten Commandments in the classroom. Part of the reason, then, that advocates attempt to post the Decalogue is that doing so would reinstitute one of the practices of the enchanted past, and bring us closer to re-living that past.

There is more to the story, however. There are other obstacles block the path to our return to the enchanted past, and the posting of the Decalogue is an attempt to overcome these obstacles. Understanding the parameters of decline and that agent of that decline are critical to understanding how the posting of the Decalogue might overthrow those obstacles.

III. Decline and Corruption

The Myth of the Covenant of American Republicanism imagines decline in terms of criminality and sexual licentiousness. Hence, in his speech Representative Peach cites statistics associated with crime (e.g., violent crime rates) and the sexual immorality (e.g., birth rates amongst unwed mothers). For the sake of contrast, neither he nor any other advocate of posting cited statistics concerned with, say, cancer rates, time and energy wasted in traffic jams, environmental degradation, or the imbalance in trade between the U.S. and China.

The association between criminality and sexual licentiousness and the Decalogue is particularly strong. The one (anonymous) reply I received from a commissioner in favor of posting expressed his or her faith that while the Decalogue had been posted, crime rates in his or her county had declined. The same sentiment is expressed by another commissioner from Hamilton County, who, in the course of deliberating about the lawsuit, said that

As you know, there's been much discussion concerning this body's decision on September 19th to post the Ten Commandments in the county's courts-buildings. We've been sued in federal court by the ACLU and other concerned citizens. When I introduced this resolution in September I said then that it was my hope that by posting the documents that many of us felt was the basis and summary of all the laws of our country many of citizens would be reminded of the importance of obeying the law and treating one

another with respect. Well, I've done some checkin' and I wanted you to know of some findings that I have found out since what we have done on September the 19th by posting the Ten Commandments. I have asked the sheriff's department for some statistics. And what I have found from the sheriff's department has been amazing to me and I want to share that with you today. The Ten Commandments were posted in December of 2001. After months of public discussion – the records obtained from the sheriff's department in (unintelligible) with crime rates: January and February of 2001 versus the crime rate of January and February 2002 – major crimes in Hamilton County have decreased by 38%. I was amazed that some may say so what or other's might try to explain away the statistics as having nothing to do with the three plaques hanging on the walls of our courts-buildings, but I hope that the public will conclude that our effort to encourage compliance with our laws has bore some good fruit. The crime rate in Hamilton County of this January and February is 38% less than the crime rate in Hamilton County one year ago." (4-3-02)

For this commissioner, the posting of the Decalogue promotes obedience to the law and re-establishes interpersonal respect. He believes the posting to have accomplished its goal, with the result that there have been fewer "major" crimes in the county.

While criminality and sexual licentiousness are the concrete ills that our society is presently suffering, the myth imagines them to be the result of other sorts of decline as well. In this respect, the Myth of the Covenant of American Republicanism weaves together, in a rather intricate and imaginative way, elements of an Old Testament covenant theology and classical republicanism.

First, the narrative is one in which God delivers His commands, His chosen violate those commands, and He then punishes them for that violation. This myth therefore imitates the grand leitmotif of the Old Testament.²⁴⁴ The typical Biblical punishment is exile, and according to the myth we are also in exile, temporally estranged from the enchanted past when it was safe to the doors of one's house unlocked.

Second, the narrative incorporates elements of classical republican thought. The republican ideal has two aspects. First, governmental institutions must be arranged in a way that prevents, as much as possible, officeholders from exercising power in excess of that granted by their office. In the Myth of the Covenant, this concern for the arrangement of political power manifests as an insistence upon the maintenance of boundaries – first, between the federal government and states and second between the three branches of the federal government. Second, republican institutions do not

²⁴⁴ See generally DAVID FREEDMAN, *The Nine Commandments: Uncovering the Hidden Pattern of Crime and Punishment in the Hebrew Bible* (Doubleday 2000).

themselves protect against political tyranny. To remain free, the citizens of republican governments must be moral, or as the Founding Father would have put it, virtuous.

The covenant theology and classical republicanism share a common theme, and that theme is of central importance to the Myth of the Covenant of American Republicanism. For both, a nation falls from grandeur when the populace becomes corrupt, either by turning toward foreign gods (in the Bible this is often because the political leaders first turned to such gods) or by losing their patriotic commitment to the political community (for classical republicanism, self-interest was antipathetic to the good of the community). Hence, while the Myth of the Covenant retains the motif of corruption, it jettisons both of these specific conceptions of corruption. Corruption is not conceived in terms of impiety or self-interest, but in terms of criminality and sexual licentiousness, both of which are the product of a lack of morality and values.

IV. The Agent of Decline

Having outlined the parameters of decline – criminality, sexual licentiousness, the disarrangement of the division of governmental institutions, and a lack of personal morality (which leads to criminality and sexual licentiousness) – the agent of that decline is obvious. The Supreme Court, the “all knowing jury of the Warren Court” as Representative Peach put it, has overstepped its authority, violated boundaries, broken the covenant, perpetrated the moral corruption of the populace, and thereby incubated criminality and sexual licentiousness.

First, it has not adhered to the original meaning of the Constitutional text, which it is supposed to be “applying,” as opposed to either “interpreting” or “legislating.” For instance, Senator Gilbert during floor debates in the Tennessee Senate commented that

the First Amendment Establishment Clause, in my opinion – and it’s not a very important opinion but it’s shared by a lot of legal scholars – did not mean that we would get to this result in 1980. (alluding to *Stone*). It had a lot to do historically about the establishment of a federally or governmentally sanctioned church and for two hundred and four years that was a fine interpretation until some folks on the Supreme Court decided it wasn’t good enough.

Here, the “original meaning” of the Constitutional verbiage is the only appropriate interpretation (good enough for two hundred and four years²⁴⁵) and any movement away from that interpretation is the whim of “some folks on the Supreme Court” for whom this long tradition “wasn’t good enough.” The Court’s authority, then, is limited to the application of the plain or original meaning of the Constitutional text, and any movement

²⁴⁵ The 204 years seem to be between 1776 and 1980.

away from this interpretation (or “non-interpretation”) is a violation of constitutional boundaries and an act of judicial tyranny.

Second, not only has the Supreme Court violated constitutional boundaries by moving way from the plain or original meaning of its verbiage, it has also violated the boundaries of the transcendent moral law. During these debates, it is frequently pointed out that the proposed legislation respecting the posting of Ten Commandments is, or is likely to be, unconstitutional. Voting for it, then, would be a violation of the legislator’s oath of office, which included the promise to uphold the constitution of the United States of America. In response to such a contention in the Tennessee Senate, Senator Gilbert remarked that:

I think that the oath we took was to support the United States Constitution. I do not believe that means that we should blindly follow the decisions of the Supreme Court of the United State. If you argue that it means that, then you are immediate on thin ice because I can take you back into history when the United State’s Supreme Court rendered horrendous decisions. 1858 – Dredd Scott decision: it said slavery was legal. You can go to the 1890s – I think my historian Senator Jordan gave me the dates just a minute ago – on the *Plessy v. Furgeson* decision: it said separate but equal was constitutional.

The Myth of the Covenant, then, also incorporates an important element of Bellah’s conception of civil religion; namely, that there is a moral law and the veracity of this moral law is independent of the will of the people. Hence, the will of the people, as well as the Supreme Court, can be wrong. It is the transcendent moral law and the knowledge of it that allows us to critique “horrendous decisions” such as *Dred Scott* and *Plessy*. Hence, Senator Fowler remarked during deliberations, that

there was an understand that law transcended what the people in this room or the people in the Supreme Court thought, that there was a transcendent law so Abraham Lincoln was able to stand before Justice Taney after the *Dred Scott* decision and say, sir, you are wrong. And he issued the emancipation proclamation because there was a law higher than the Judges on that Supreme Court.

The danger that the Supreme Court poses to the transcendent moral law is therefore two fold. First, its decisions have violated and will continue to violate the prohibitions of the transcendent moral law. Second, that by removing the Decalogue from the schools it has attempted to excise from the American consciousness knowledge of this transcendent moral law, without which we would not be able to critique the government, a prelude to tyranny and in particular the Supreme Court’s tyranny.

These three concerns coalesce strongly around *Engel*, *Schempp*, and *Stone*. Taken as a whole, these three cases represent the overextension of the Court's authority. In these cases it misinterprets the meaning of the Establishment Clause, violates the sovereignty of local and state polities, breaks the covenant by removing from the local classroom the symbols and practices of morality, and ignores the transcendent moral law while attempting to remove it from the popular consciousness so as to immunize its own immoral, unconstitutional, and tyrannical decisions from critique. The results are predictable, without exposure to the symbols and practices of morality, the citizenry, and in particular the children, will lack morals and character. Criminality and sexual licentiousness will be rampant.

So, while part of posting the Decalogue is an attempt to re-institute the practices of morality that constituted the enchantment of the past, a greater part of this attempt is to reform the Supreme Court by instigating a confrontation between it and the Decalogue. Throughout these debates, the frustration with the Court is palpable. Indeed, many proponents of posting understood posting as a means to generate litigation that might "go all the way" to the Supreme Court. During the debate between the commissioners in Rutherford, for instance, one of them professed that,

"I'm very conservative . . . and I hate to spend a nickel extra on anything that we don't absolute have to have to provide for the needs of this county, but this is a need and there is a need. (Applause). And this could be, this could be the case that makes it to the Supreme Court. You never know when it's going to happen. If we quite trying – an effort . . . just because of idle threats, then in my opinion we'll never get there. . . . I'd like to see us post those as soon as possible."

Again in Rutherford County, one private speaker in Rutherford County introduced himself as the "pastor of the Bellwood Baptist Church, but that's not the reason I'm here tonight. I'm here as a parent and a grand-parent" and concluded his statement by noting the possibility of a lawsuit and hoped that the Commissioners would not be intimidated,

number one by the anti-Christian lawyers union, the ACLU. (applause) We've been intimidated long enough (shouts of approval). We've taken the Bible out of our schools. We've run the Gideons out. They can't even pass out a copy of the New Testament in our schools any more because we've been intimidated by a bunch of liberals. (Crowd mumbling). And I think . . . and I think . . . hey, listen. I think its time we go ahead and pass this thing and if you folks want to sue, have at it!" (rambunctious applause).

The posting of the Decalogue, then, is a means of “standing up” to threats and intimidation. Taking a stand will naturally provoke a confrontation, but this ought to be a welcomed confrontation, for it means that a lawsuit will be filed. The filing of a lawsuit provides the opportunity for going all the way to the Supreme Court, the only way to reform that Court. Placing the Ten Commandments in courts is particularly salient not only because it is the courts who initially broke the covenant but also because in doing so those courts will be called upon to be the judge of the appropriateness of that presentment. They are thus forced either to affirm the appropriateness of the presence of the Ten Commandments, thereby restoring the covenant relationship, or to deny that appropriateness, thereby confirming the belief that they are the antagonist.

In contrast, opponents of posting typically understand the posting of the Decalogue as an attempt to convert the populace, rather than reform the Supreme Court. They are therefore frequently baffled as to why advocates of posting insist upon presenting the Decalogue in governmental buildings, and why advocates do not find it sufficient that it be displayed in homes and churches, even in a public manner.²⁴⁶ According to the myth, it is not the people or the churches which have broken the covenant – it is the courts. As with the Old Testament leitmotif, it is usually government officials who first turn from God and the people who follow them. Since displaying the Ten Commandments in homes and churches does not force the judiciary to pass judgment upon itself, it is not a possible technique for the reformation of that institution. Personal expressions of piety, even if they were to be widespread, are not a sufficient technique for reform.

We also have some clue as to why proponents insist upon placing the Ten Commandments in certain places, like courts and the legislative building, where they are unlikely to have much of a conversion effect upon the citizenry. Opponents of posting often note that these places are most frequented by the good citizens. Even the courthouses, which have been symbolically aligned crime, judgment and punishment, are most used simply by people who need to collect their marriage certificates or pay a few fines, as in the Hamilton County Courthouse. Indeed, during its short presence there, the Decalogue became a popular backdrop for wedding photos, rather than a site for the conversion of criminals. But conversion of the citizenry is not the goal of the posting. Realigning the courts with the transcendent moral law is.

V. The Symbolic Meaning of the Decalogue

In this effort to reform the Supreme Court, advocates symbolize the Decalogue with meanings that fit it for this purpose. Generally, it is an antidote to the Court’s pernicious activity.

First, the Decalogue *is* the covenant, delivered by God to Moses on Mount Horeb. Presenting the Decalogue in the courthouse, then, is a symbolic restitution of the

²⁴⁶ See next chapter.

covenant. Its presentment in governmental building, and especially in courts, realigns the government with the covenant, repairing the break for which it is itself responsible.

Second, and more importantly, advocates of posting represent the Decalogue as the “transcendent moral law.” As the transcendent moral law, the Decalogue absorbs subsidiary symbolic meanings, each of which is the opposite of that ersatz morality which advocates of posting perceive as holding sway over secular and liberal modernity. This ersatz morality panders to the will and desires of men. Moore identifies it as “secular humanism,” the belief that men are gods, and it is encapsulated in Raymond Bragg’s *Humanist Manifesto*.²⁴⁷ This liberal morality is overly complicated, relative, and permissive. In contrast, when taken as the transcendent moral code, the Decalogue is simple, universal, and prohibitive.

Advocates of posting perceive modern ersatz morality as overly complicated in a disingenuous way. It attempts to mold morality to the will and desires of individuals and therefore sees nuance where there should be clarity and apologizes where there should be condemnation. The simplicity of the transcendent moral law eschews such complexity. The number of commandments – ten – is the primary repository of the Decalogue’s simplicity. Various redactions of the Ten Commandments further foreground this simplicity, presenting in five or six words a commandment that might actually run for some five or six sentences.

Second, in contrast to the relativity of contemporary morality, proponents of posting the Ten Commandments conceive of them as universal and eternal, that is, invariant with respect to time, place, or the desires of individual. Again, the Ten Commandments are well situated to take on this symbolic meaning. Each is presented as a categorical prohibitive, that is, a prohibition that makes no reference to the situation, subjectivity, or social station of the individual. Unlike other laws in the Old Testament, the duties of the Ten Commandments are imposed upon all, irrespective of one’s tribal affiliations, one’s profession in society, or one’s age or gender. This is especially so for the second pentad. Hence, advocates of posting, when referencing the Decalogue, quoted exclusively from the second pentad, neglecting completely the first.²⁴⁸ For instance, one gentleman from Rutherford County, speaking in support of posting, said,

Two things I think we need to consider. Number one is this thing about the Ten Commandments is supposed to offend people if they see this thing hanging on the wall. It doesn’t offend me because I believe in it. We have a law in this county, that its against the law to sell crack cocaine. I have no problem with that law because I don’t sell crack cocaine. It seems to me that the only people that’d be offended by seeing “Thou shalt not kill” is somebody that’s got murder in his heart. (Cheering). Seems to me like the only person that would be offended of reading “Thou shalt not steal” is a thief and the only people that would be offended at ‘Thou shalt not

²⁴⁷ Personal conversation.

²⁴⁸ In contrast, opponents frequently cite the first pentad. See next chapter.

commit adultery' is someone running around with his wife. I don't know why people take offense at something like that.

Again, the mother of 2.5 from Rutherford County said, had to disagree with some comments that were made earlier about other religions as far as Judaism and Islam and Hinduism – I don't propose to be a theologian, but can tell you there is no religion that would be supported by law that would say it was right to lie, it was right to murder, it was right to steal.

Focusing on the second pentad allows the Ten Commandments to be presented as common to many peoples, in many places and at many times. Hence, the Ten Commandments are often spoken of as being "Judeo-Christian," but this is not the extent of their universality. As with the quote from the mother of 2.5 presented above, they are also presented as common to other religions, such as Islam and Hinduism. Hence, one commissioner in Hamilton County in favor of posting recalled that he had recently been listening to a PBS broadcast of a dialogue between representatives from "four major religions." "Every one of them," he remembered, said that the Ten Commandments were part of the tenets of their religion. "And my recollection was that it was all the major – not every one of them – but all the major religions of the world."

Not only is the transcendent moral law simple and universal, it is also prohibitory. Most the commandments, and (importantly) all of the second pentad, contain the negative particle. The only commandment lacking the negative particle (remember or keep the Sabbath) is also a prohibition. Reading beyond the first sentence, it is plain that to keep the Sabbath is to avoid certain prohibited activities. Proponents of posting make frequent use of this negative particle to set the Decalogue apart from the contemporary ethos of America. For instance, on the floor of the Tennessee House, in the course of a longer discourse, Representative Peach said, "many people have forgotten the moral values that have made us so great. Scores of young people have never heard 'thou shalt not.' There are people in our school that will kill over a designer jacket or a pair of tennis shoes." This short statement encapsulates the themes of decline from the greatness of our forefathers, conceived in terms of wanton criminality brought about by amnesia of the moral law, and counteracted only through the re-imposition of prohibition. In this regard, the negative particle also gives the Decalogue the semblance of a criminal code. It is therefore well situated to combat America's decline into criminality and sexual-licentiousness.

Once symbolized as the transcendent moral law, the Decalogue is well situated to function as the antidote to the Court's pernicious activity. Presenting the Decalogue in the courts symbolically re-aligns the Court, the agent of America's decline, with the covenant. Within the classical republican thread of the narrative, the transcendent moral law is that morality that must be possessed by the citizenry if they are to remain uncorrupt. Also within this thread, the Decalogue represents the proper limit on the Court's authority to interpret the Constitution. Because the validity of Decalogue is

independent of the will of men, its prohibitions can not be “interpreted” and therefore offer a standpoint from which citizens can critique governmental activity, especially the activity of the Court. In this respect the discourse indicates, although it is never expressly stated, that textual literalism is a part of the transcendent moral law. That is, the transcendent moral law includes a hermeneutic, literalism, which is as valid for the constitutional text as it is for the transcendent moral law. Words have a literal or natural meaning that is independent of their usage. Any move away from this literal meaning is necessarily a distortion thereof and leads to legislating from the bench. The Decalogue, whose words are inscribed in stone and therefore have unchanging, literal meanings, collect this textual literalism and make it the required hermeneutic for constitutional interpretation.

VI. Roy Moore and the Myth of the Covenant of American Republicanism

Advocates of posting the Decalogue in governmental buildings tell a mythic narrative of the decline of American Republicanism. The enchanted past was a time of high morality in which the Founding Father’s conceived of the perfect relationship between the various levels of government. The Supreme Court was the agent of our decline. It violated the various governmental barriers, removed the symbols of morality from the local classrooms, and incubated criminality and sex-licitiousness. The posting of the Decalogue re-institutes one of the practices of the enchanted past, but it also instigates a confrontation between the transcendent moral law and the Supreme Court. The aim of this confrontation is not the conversion of the populace but the reformation of the Supreme Court, which continues to block our return to the enchanted past.

Roy Moore’s political agenda enacts this mythic narrative, and since he has been so influential in popularizing the Decalogue, we shall take a look at two instances during which he situates his political activity within this mythic narrative.

First, during the debate in the State and Local Government Committee, one of the representatives invited Judge Moore to present testimony on behalf of the proposed resolution. Although only beginning his battle with the ACLU, he was already able to speak extemporaneously upon the issue of the Ten Commandments, the Lemon test, and the relationship between God and Country. After he had already begun his remarks, the chair interrupted, informing him, and the others who were to follow, that he would be limiting all remarks to five minutes. With un-hesitant aplomb, Judge Moore plunged into quoting the first paragraph of the Declaration of Independence, laying stress upon “the Law’s of Nature and of Nature’s God.” Then, in an evidently oft repeated conclusion:

Lady’s and Gentlemen with those words, our nation began. It began upon a foundation of God and God’s Law. That was the law in 1776. But listen to the words applicable to every person in this room, democrat, republican, black or white – we hold these truths to be self evident that all men are created equal, that they are endowed by their (pause, for emphasis) Creator with certain

unalienable rights, amongst these are life, liberty, and the pursuit of happiness.’ But they didn’t stop there Ladies and Gentlemen. They next told us the role of government. We have forgotten the role of government today. ‘That to secure these rights’ – not to give them – ‘that to secure these rights governments are instituted amongst men, deriving their just powers from the consent of the governed.’ To secure the rights that God gave us. Well, we live in a country today where we teach our children in our public schools that there’s no God. We teach them they evolved from monkeys, that they evolve from reptiles. We’re teaching them exactly contrary to what our fore-fathers founded this country upon. Now, we can deceive ourselves and say its not true. But its absolutely true.

He then quoted the next line of the Declaration – whenever any Form of Government becomes destructive of these ends . . . – and concluded from this that

our fore-fathers laid the foundation of this government upon God. What have we done today? Oh, have a wall of separation between church and state. We say that we can’t mention God in our government. Pull out the money out of your pockets and look on it. See what’s printed: In God We Trust – Printed by the Federal Government. And you say that you can’t display the Ten Commandments in our home, in our schools, and in our office buildings.

Guess who wrote the Declaration of Independence: Thomas Jefferson. Guess where the phrase wall of separation between church and state comes from: Thomas Jefferson, on January 1 of 1802. You see, that phrase is not in the Constitution, that phrase is not in the Declaration. You wonder today, do we have a right to acknowledge God? Well, let me tell you a little about the first amendment – Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. It was debated from June to September of 1789. On 24 and 25 of September of 1789, the House of Representative and the Senate consecutively approved the final wording of that amendment. Guess what the first thing that came to their minds to do on 25 September, 1789: They asked President Washington to declare a day of national thanksgiving to Almighty God. On October 3rd of 1789, merely eight days later he did so. These are his word: ‘Whereas it is the duty of all nations to acknowledge the

Providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore his protection and favor, and whereas both house of Congress have by joint resolution asked me to do so this, we thank Him for the good and plenty that we enjoy, for the Revolutionary War which we have just completed, for all that was, that is, or that will be.’ You see, the first act of our Congress was to acknowledge God, and throughout the history of this country that’s exactly what they have done.

You know we have a law in this country of a national motto, that can be posted on this wall. Does anyone know what it is, or when it was passed by the United States Congress? 1956. That national motto is In God We Trust. We gotta make up our mind today: do we trust in God, or do we trust in government. Because, Ladies and Gentlemen, I don’t care who you are, if you trust in government you will lose the liberties, you will lose the freedoms which God gave us. We had men fight and die for these freedoms.

Our Congress in 1954 added some words to the pledge of allegiance. You know the words: I pledge allegiance to the flag of the United State of American and to the Republic for which it stands, one nation, under God . . . They added those words ‘under God’ and when they did, they did just like you do – they have a legislative history. Listen to the words of their legislative history: By the addition of the phrase ‘under God’ to the pledge the consciousness of the American people will be more alerted to true meaning of our country and its form of government. More importantly, the children of our land in the daily recitation of the pledge at school will be daily impressed with a true understanding our way of life and its origin.

It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment of the Constitution. This is not an act establishing a religion or one interfering with the free exercise of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. You’re called upon this day to make that decision in your minds, and in your hearts: are we a nation under God, as we claim to be, or are we gonna give it up to some other religion?”

Because you see, our Congress has changed – not Congress, our Supreme Court has changed the definition of religion. To our fore-

fathers, the definition of religion was not God. James Madison, the chief architect of the Constitution said this in 1785. ‘Because we hold it as a fundament and undeniable truth that religion, or the duty we owe the Creator and the manner of discharging it, can be directed only by reason and conviction not by force and violence. He said it was the duty of every man to render to the Creator such homage, and such only as he believes acceptable to him, and that this duty is precedent, both in order of time and in degree of obligation, to the claims of civil society.’ In the Virginia Bill of Right of 12 June of 1776, they use those exact words. In our early Supreme Court cases, *Henry v. Reynolds* – or *Henry Reynolds v. United States* – in 1787, they used exactly those words.

Then, abruptly, “My time is up. I thank you very much.”

Notice the chronological and narrative direction of the speech. It begins with the founding of the nation, which he locates at the Declaration of Independence rather than the ratification of the Constitution. He emphasizes the role of government vis-à-vis rights: government is to “secure” the rights that God has already given us. We have forgotten this foundation because the Supreme Court has “changed the definition of religion” from that accepted by our fore-fathers and the subsequent generations of Congress. There is here a deification of the founding fathers: Jefferson is quoted, Washington is quoted, and Madison is quoted. The national motto, the pledge of allegiance, the Virginia Bill of Rights, and the Supreme Court cases are presented. The speech contains nary a word of scripture and only those names of god that are contained in the various documents written by the Founding Fathers (God, Creator, Providence, Almighty God). There is some focus upon corruption – we are teaching our children that “they evolve from reptiles” – but this is a muted theme in this speech, as is the Decalogue itself.

In the second example, however, the Decalogue and corruption take center stage. In January of 2001 was sworn in as the Chief Justice of the Alabama Supreme Court. After meticulous planning he had a 5,200 granite monument of the Ten Commandments installed in the rotunda of the Supreme Court building. The iconography of this monument – its shape, size, content, location, and accompanying presentation to the public – reiterates all of the themes of the Myth of the Covenant of American Republicanism: covenant, corruption (indicated by criminality and lack of personal sexual morality), symbolization of the Ten Commandments as the transcendent moral law, apotheosis of the founding fathers, and the repossession of the court for the sake of turning it to the true and narrow path.

A redacted version of the Ten Commandments is depicted atop the monument, the preamble (“I am the Lord your God”) through “Remember the Sabbath Day” on the first of two tablets and the remainder of the commandments upon the second.²⁴⁹ Each

²⁴⁹ Including the preamble, then, there are eleven statements upon the two tablets, five on the first and six on the second.

side of the monument is inscribed with a short, central element of Americana, above and below which are quoted various of the founding fathers, legislative history, or constitutional text. On the front, the central phrase is “The Law’s of Nature and Nature’s God” above which is a quotation from George Mason and below which are quotations from James Madison and William Blackstone.²⁵⁰ On the right panel, the central quotation is “In God We Trust” along with the indication that this is the national motto. Above is the preamble to the Alabama State Constitutions and below, the little-sung fourth stanza of the national anthem.²⁵¹ The back panel contains the phrase “So Help Me God”, citing the Judiciary Act of 1789. The quotation above this is from George Washington and the one below from John Jay.²⁵² On the left panel, the central phrase is from the pledge of allegiance (“one nation, under God . . .”), above which is text from the legislation history enacting this addition and below which are quotations from James Wilson and Thomas Jefferson.²⁵³

The quotations from the founding fathers and from other magisterial documents are not, said Moore during his unveiling speech, designed to present the Ten

²⁵⁰ Respectively: "The laws of nature are the laws of God; whose authority can be superseded by no power on earth." George Mason 1772 "The transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed." James Madison "This law of nature, being co-eval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; ?upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." William Blackstone

²⁵¹ From the Alabama Constitution: "We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following constitution and form of government for the State of Alabama."

From the national anthem:

O, thus be it ever when freemen shall stand,
Between their lov'd homes and the war's desolation;
Blest with vict'ry and peace, may the heav'n-rescued land
Praise the Pow'r that hath made and preserv'd us a nation!
Then conquer we must, when our cause is just,
And this be our motto: "In God is our trust"

And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave!

²⁵² From George Washington: "Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?" From John Jay: "The greater part of evidence will always consist of the testimony of witnesses. This testimony is given under those solemn obligations which an appeal to the God of Truth impose; and if oaths should cease to be held sacred, our dearest and most valuable rights would become insecure."

²⁵³ Legislative History: "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our government upon the moral directions of the Creator." James Wilson: "Human law must rest its authority ultimately upon the authority of that law which is divine." Thomas Jefferson: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?"

Commandments as a historical document amongst other historical documents. Such, he thinks, is nothing but a strategy for surviving an Establishment Clause challenge that degrades the real, religious content of the Ten Commandments. Rather, “surrounding this monument, you see every ounce of support for the acknowledgement of the sovereignty of that God and those absolute standards upon which our laws are based. Oh, *this isn’t surrounding the plaque with history, historical documents. All history supports the acknowledgment of God.*”²⁵⁴ The founding fathers and their magisterial words provide for Moore, as they did for the mother of 2.5 in Rutherford County, the authoritative reasons for the presentment of the Ten Commandments, what Moore calls (using his central sound bite) the acknowledgement of God. In this history is to be found “every ounce of support for the acknowledgement of God” and “all history supports the acknowledgment of God.” Both Sekulow and Moore, then, like to present the Decalogue surrounded by “history”, but for entirely different reasons. For Sekulow, it is a part of his quarantine strategy. But Moore refuses to quarantine the Decalogue to history. It is not merely another document that had some influence upon the course of American history. Instead, history and the past sayings of the Founding Fathers (not scripture) are presented as the authority for its presentment. Moore’s use of history, then, represents the apotheosis of the Founding Fathers.

Once, not so long ago, government and its officials (such as the Founding Fathers) were aware of our moral foundations, “but today,” said Moore during the unveiling ceremony, “many judges and other government officials across our land deny that there’s a higher law. They forbid teaching your children that they’re created in the image of Almighty God, and they purport all the while that it is government and not God who gave us our rights. Not only have they turned away from those absolute standards which form the basis of our morality and the moral foundation of our law, but they have divorced the Constitution and the Bill of Rights from these principles. As they have sown the wind, so we have reaped the whirlwind, in our homes, in our schools and in our workplaces.”²⁵⁵

Since judges and other governmental officials (who have mis-educated our children) are the origination of our decline, we can only return to the happy past if we overcome them, overturn their decisions, and realign those institutions with the covenant. These judges and officials, and the institutions they manage, must be reminded of our moral foundations. Doing so will return both them and the Constitution and the Bill of Rights to “absolute standards.”

The Biblical reference here, that of the people reaping the whirlwind which these judges and officials have sown, is from the Old Testament (Hosea 8), which itself reiterates the theme of covenant, transgression, and decline, situating the monument within a narrative in which the unfaithfulness and idolatry of Israel’s leaders has brought about the suffering of the people.

Other aspects of the monument are made to conform to the narrative of the Covenant of American Republicanism. First, its heft and majesty not meant to merely

²⁵⁴ Roy Moore reproduces his speech in his book, emphasis in the original. MOORE & PERRY, 147.

²⁵⁵ Id. at 143-44.

inspire awe. The monument has a particular habitation for which it was designed: the rotunda of the Alabama Supreme Court building, and Moore's preparations for presenting the monument in this particular location were meticulous. Moore writes that selecting the appropriate size, color, texture, and design of the monument were second only to acknowledging that "this nation was founded upon a sovereign God."²⁵⁶ Additionally, the great weight of the monument, some two and a half tons, threatened the integrity of the building's architecture, but Moore showed great solicitude towards the building's preservation, examining the blueprints with structural engineers and selecting not only a safe place to rest the monument but also a path along which the monument could be transported to that location without falling through the floor and into the parking garage below, or deeper.²⁵⁷ For Moore, then, the presentment of the Ten Commandments must compliment the architecture of the judicial building. The presence of God must not wreck the judiciary, merely reform it.

Finally, despite the monument's great size, the two tablets atop the monument provide very little space for the text of the Commandments. For the scripture to fit this space, they must be presented in a very truncated form. In contrast, the quotes from the founding fathers, which provide the authority for the presence of God's law, are given all the space they need in order to be displayed in full (albeit out of context).

In sum, Moore's political program, represented in his rhetoric and Ten Commandments monument, recites all the themes of the myth of the Covenant of American Republicanism: the Ten Commandments are presented as the transcendent moral law, authorized by the pantheon of the Founding Fathers. They are prohibitory and limiting, establishing boundaries for non-criminal conduct, the interpretation of the constitution, and the authority of the Supreme Court. They are symbolic of the covenant with God. They will, if recognized by judges and other government officials, settle the whirlwind which the court hath sown. All of this is presented in a narrative context, beginning with the Declaration of Independence and passing through the generations of pious fore-fathers until the 1960s when the Supreme Court severs the nation from its enchanted past. We need to return to that past by reforming the court and the presentation of the Decalogue is a strategy for achieving this.

VII. Conclusion: The Crèche and the Cross Compared

One aim of presenting this myth was to answer what I called the content question; that is, why did the Decalogue and not some other symbol from Christianity's rich

²⁵⁶ "The size, color, texture, and design had to complement the stately design of the rotunda. What was more important, it had to convey the message that this nation was founded on a sovereign God and His divine, revealed law." *Id.* at 140.

²⁵⁷ "A major concern of mine was the proper location for the monument to prevent damage to the judicial building. When the weight was determined to be approximately two and one-half tons, I knew that it had to be located on a portion of the floor with sufficient support. We consulted with engineers and blueprints of the building to ensure the monument's proper placement." *Id.* at 141. See also JOSHUA GREEN, *Roy and His Rock*, *The Atlantic Online* October, 2005. available at <http://www.theatlantic.com/doc/200510/roy-moores-ten-commandments>. (last visited 6-11-2009).

tradition become a popular subject of litigation. The answer is that the Decalogue is capable of absorbing those symbolic meanings that allow it to be used as an antidote to the Supreme Court's pernicious activity. Given the content of the Myth of the Covenant of American Republicanism, other symbols, such as the crèche and the cross, can not so function.

The antidote to the Court's activity must be capable of being represented as a covenant, as eternal and universal, and as a prohibitory criminal law. The native features of the crèche and the cross are incapable of taking on one or more of these features. While many Christians do take Jesus the Christ to be a new covenant, this new covenant is profoundly disruptive to the law of the Old Testament. The revelation of Jesus – even if he has not come to abolish the law and the prophets, as Roy Moore is found of noting – places the Christian in an uncertain position vis-à-vis the requirements of the Old Testament.²⁵⁸

Neither can the cross and the crèche be presented as eternal and universal in the same way that the Decalogue can. For one, the crèche represents a kairotic moment, a moment in secular time when the sacred entwines itself into our ordinary, quotidian lives, disrupting those quotidian lives while at the same time giving them temporally patterned meaning. These events are seasonal (hence kairios = seasonal, timely) and their representation is coherent only during certain times of the year. The presentment of the crèche, representative of the birth of Jesus of Nazareth, is sensible only during the Christmas season. While the cross is eternal in the sense that it does not represent a kairotic moment (its significance has expanded much beyond its association with Easter), it and the crèche both lack universality. Both of these symbols are intelligible only from within the Christian metaphysics and morality of eschatological hope and eternal salvation. They can not, therefore, be represented as “Judeo-Christian”, much less as common to other major world religions. The presentation of the cross, therefore, carries with it the impulse towards spiritual conversion, rather than, as with the Decalogue, moral reformation. The cross emphasizes the spiritual aspects of the Christian religion against its moral aspects. It is too firmly entrenched in the Christian metaphysics to coherently absorb the symbolic functions it would need to in order to be presented as a counteractant to the Supreme Court.

Other common Biblical symbols and text are also incapable of functioning as an antidote to the Court's corrupting influence. The remainder of the Mosaic code, for instance, while in many places prohibitory, lacks various aspects of universality, having the appearance of rules appropriate only to an agrarian society.²⁵⁹ Some of these rules also lack the appearance of being categorical because they are manifestly directed at

²⁵⁸ Even a cursory examination of Saint Paul's epistles shows the resolution of this tension to be their main problematic. Some Christians have thought the revelation of Christ required the complete rejection of the Old Testament law, such as John Bunyan in *The Pilgrim's Progress*. The theologian Richard Niebuhr has articulated this tension extensively. See RICHARD NIEBUHR, *Christ and Culture* (Harper & Brothers Publishers 1951).

²⁵⁹ For instance, Exodus 21: 28, “And should an ox gore a man or a woman and they die, the ox shall surely be stoned and its flesh shall not be eaten, and the ox's owner is clear.”

individuals qua their social status.²⁶⁰ Other of these laws are simply insufferable²⁶¹ or, as with the crèche and cross, intelligible only from within the Jewish metaphysics and morality.²⁶²

Another symbol of the Old Testament covenant, the rainbow,²⁶³ can also not function as an antidote to the Court. Besides having become associated with hippies and the gay rights movement, it lacks prohibitory content. The anchor and the fish, both symbols of Christ, also lack this prohibitory content, and, again, can not function as the eternal moral law. They, like the cross and the crèche, are intelligible only from within the metaphysics and morality of eschatological hope and eternal salvation. The Beatitudes, while propositional, again lack prohibitory content: “Blessed are the peacemakers, for they shall be called sons of God” can not limit the authority of the court, turn its officials towards the “acknowledgement” of eternal law, or re-establish moral boundaries. Hence, while Mr. Moore is plainly familiar with the Beatitudes, having memorized Matthew 5:17 (“Think not that I have come to abolish the law and the prophets”), he has not found any part of it appropriate for display, nor does any other content from the Sermon on the Mount appear in the discourse that I examined.²⁶⁴

In contrast, the Decalogue is capable of carrying all the symbolic functions required of it by the narrative of the Covenant of American Republicanism: it is propositional; each of its commandments contains the negative particle; it is capable of being presented as eternal, rather than kairotic; it is common to both the Jewish and the Christian tradition, and its second pentad is, or is capable of being presented as, common to many other faiths as well. The Decalogue has the additional benefit of popularity: its deliverance to Moses upon Mount Horeb is pyrotechnic, which has made it a subject of cinematic depiction, so that even those incapable of listing any of its commandments are still likely to remember that Moses collected them from God upon some mountain. In short, the Decalogue, but not other popular symbols of Christianity, can be woven into the myth of Covenant of American Republicanism, and this, I submit, provides some explanation for the great prevalence of Ten Commandments litigation.

²⁶⁰ For instance, Leviticus 24: 3 “if the anointed priest should offend, incurring guilt for the people, he shall bring forward for his offense that he has committed an unblemished bull from the herd for the LORD as a offense offering.”

²⁶¹ For instance, Exodus 21: 7, “And should a man sell his daughter as a slavegirl, she shall not go free as the male slaves go free. If she seems bad in the eyes of her master, for whom she was intended, he shall let her be redeemed; to an outsider he shall have not power to sell her since he has broken faith with her.”

²⁶² Such seems to be the case with the dietary prohibitions, to which most Christians pay little heed. See Leviticus 11, 2 *et seq*: “These are the beast that you may eat of all the animals that are on the land: Everything that has hooves and that has split hooves, bring up the cud, among beasts, this you may eat.”

²⁶³ Genesis 9:13, “My bow have I set in the clouds to be a sign of the covenant between Me and the earth, and so, when I send clouds over the earth, the bow will appear in the clouds. Then I will remember My covenant, between Me and you and every living creature of all flesh, and the waters will no more become a Flood to destroy all flesh.”

²⁶⁴ Personal conversation.

Chapter Seven: The Myth of Separation

I. Introduction

The liberal myth of separation is a story in which America is unique because of its early and continuing commitment to democracy, toleration, and the separation of church and state. These three values were hard won and must be preserved against those who would, out of ignorance and intolerance, return us to the bad old past of religious bigotry. The following speech, delivered by an individual during the public comment period in Rutherford County, is paradigmatic.

I just want to say, I'm a Vietnam veteran. I volunteered for military service and I volunteered to serve in Vietnam. I volunteered because I believe in this country, what it stand for, and I volunteered to keep America free. I volunteered because I believe in the Ten Commandments. I volunteered to protect the weak from the strong. I volunteered to come here this evening once again to defend the principles of this great country and to protect the weak from the strong. There's a strong voice in America today. It's a harsh voice and it's a loud voice and its demanding that Christian principles be forced on our citizens. Using the position of strength to force others is not Christian. It's not American. We elected you (gesturing at the Commissioners) all of you here tonight, to protect us, to protect the weak from the strong. We elected you, our friends and our neighbors, to do what's right. We elected you to protect the rights of all people, but especially the weak so that we can speak free, so that we can act free and so that we can worship freely. It's your duty and it's mine, to assure that our American government – right here in Rutherford County – that our America under God opens its arms to all faiths, to all religions, to all beliefs. (clapping). Please, please, volunteer with us tonight to keep the Ten Commandments out of the Courthouse. Keep the Ten Commandments in our minds, and in our hearts where they belong. Volunteer tonight to show the world that in Rutherford County America is free.

The myth of separation is a defensive myth. The past is not perfect, but things have gotten better, and the myth of separation imagines itself as defending the hard fought gains against conservative backsliding. Also as a defensive myth, it attempts to disrupt the various elements of the myth of the covenant of American Republicanism. It does not valorize either the past or the Founding Fathers. Nor does it think of America as having declined from the enchanted past. Rather, it has made ameliorative gains in

justice, liberty, and equality. The posting of the Decalogue, however, threatens decline. It imagines this threat to be the product of an irrational outburst of majoritarian politics. Therefore, instead of seeing the Court as the agent of decline, it views it as a last bastion against such irrational and dangerous outbursts. Finally, rather than viewing the Decalogue as the transcendent moral law, it sees it as a creedal element of faith, authoritative to adherents of the Jewish and Christian faiths. Hence, it is neither simple nor universal and the attempt to post it is an act of religious intolerance to be protected against by the judiciary.

II. History and the Past

The Myth of the Covenant of American Republicanism looks to the enchanted past for its normative touchstone and aims to recreate that past. The Myth of Separation agrees that there are some good things about America's past: as the Vietnam Vet said, it stands for freedom and champions the weak rather than the strong. But America is not always at its best. America's past manifest a number of social and political injustices, including a tight connection between church and state. Incrementally, at great cost and with frequent backsliding, the good has slowly won out over the bad and things have improved. Particularly, the church has been separated from the state and people have become more tolerant of religious differences.

Much of America's past, therefore, is something to be overcome, not reproduced. As a result, opponents of posting constantly work to disassemble the perception of the perfection of the enchanted past. For instance, Hedy Weinberg, Director of the Tennessee ACLU, speaking before the State and Local Government Committee of the Tennessee House, said the following.

We need to realize what the 1950s were like, and they were not perfect: we had segregation, we had lynchings, we had poverty. Prayer certainly didn't make a difference in that area. We also need to recognize that putting prayer in the schools will not in any way solve the violence within the schools, will not take care of the poverty, will not solve teenage pregnancy. We need to be serious about those problems and not think that this band-aid will make a difference.

Weinberg identifies the enchanted past with the 1950s and attempts to deflate the idyllic image of that past. Rather than thinking of it as a time when "we left our doors unlocked" she populates the past with some of the nation's most prevalent and shameful ills: poverty and racism. She also disassociates the state of the enchanted past from its protagonists role in the war on crime. Far from protecting victims from criminality, the state has itself created victims ("we had segregation") and has been complicit in the

perpetration of injustice (“we had lynchings”). We would not want to reproduce any of these social or political ills.

Likewise, the plaintiffs to whom I spoke also frequently pointed out the moral ambiguity of the past. In particular, they focused on the northern colonies which they conceived of as being founded in the quest for religious liberty, but which quickly became intolerant and tyrannical once the colonialist had acquired sovereign political power. The repetition of such a past, either the 1950s or the colonial period, could hardly be hoped for.

Since opponents of posting do not attempt to re-institute an enchanted past, they have less need to valorize that past by populating it with our heroic fore-fathers. Nonetheless, opponents of posting frequently call upon them as allies. Thomas Jefferson, in particular, is frequently evoked as a fellow traveler. For instance, one speaker in Rutherford County (“the freedom fighter”) quoted Jefferson twice in his attack upon the idea of posting the Ten Commandments in the courthouse: “In every country in every age, the priest has been hostile to liberty” and “I have sworn upon the alter of God eternal hostility against every form of tyranny over the mind of men.” However, it is not Thomas Jefferson’s world which the freedom fighter wishes to re-institute. Rather, the freedom fighters commitment is to liberty over tyranny. The ameliorative part of history is to be found in the ever expanding enactment of these values into social and political life and, according to the Myth of Separation, contemporary political actors are to build upon those few and precarious advances that our fore-fathers have achieved.

III. The Antagonist

The Myth of the Covenant of American Republicanism identifies one, concrete antagonist, the Supreme Court, and directs its attention at reforming that institute. In contrast, the Myth of Separation does not identify any particular institution or individual as the antagonist. Instead, it focuses on social facts and personal motives.

Plaintiffs, for instance, tended to understand the posting of the Ten Commandments as a part of a zealous movement to Christianize the nation. The “Christian Right” (itself designating an abstract) was the appellation for this movement. This movement has leaders and figure heads – Falwell and Judge Moore, for instance – but these individuals were not the real worry. Their social and political influence is only the accretion of various benighted social forces distributed more generally throughout society. In particular, opponents of posting thought that ignorance of difference led to intolerance and zealous conviction, which was then mobilized by fear and self-interest.

First, the unquestioned commitment to the Truth, which remains undisrupted by an atavistic education, produces a zealotry disrespectful and dangerous to others. Hence, Commissioner Bullen of Rutherford County, addressing proponents of posting in the audience, asserted that, “the hope of the world is education. Through education we learn to understand other cultures and different people. We learn to understand other religions.” This knowing and understanding of difference is the key to toleration and respect: “Do you really believe in free speech? Do you really believe in freedom of

religion? If you do, then you are tolerant of those who say things that are repulsive to you. You are tolerant of those who have views entirely different from you. That's what the American way is all about." And elsewhere in the same speech: "We have an establishment clause in the first amendment that says there'll be no state religion. We're lucky that we can feel strongly and express our opinions. Hopefully, we will have practiced the American way and have respect for other who differ from us." And again: "And the key issue in this tonight is having respect for those who have views different from us."

Ignorance of difference, then, is for the Myth of Separation one of the chief antagonists and fails to erect any barriers to intolerant and disrespectful legislation. This ignorance allows free play to zealous conviction and disrespect. Education, "the hope of the world," familiarizes individuals with others who are different than themselves.

By itself, however, zealous convictions and intolerance are somewhat passive; they need a mobilizing agent, and the fear and moral outrage generated by calamity are that agent. Plaintiffs consistently identified the commissioners of both Rutherford and Hamilton Counties as motivated by the fear and moral outrage generated by the 9/11 Terror Attacks. As one plaintiff jokingly articulated it, the County Commission posted the Ten Commandments to keep Bin Laden out of Chattanooga, the possession of which was what he wanted most in the world. Other plaintiffs said that the Commissioners meant well, but that the 9-11 Terror Attacks had simply overwhelmed them, giving expression to what they considered to be a useless, even counterproductive, attempt to establish social unity.

Further, the Myth of Separation imagines self-interested politicians as exploiting these conditions for the sake of procuring votes. Hence, a political cartoon in the Chattanooga Times Free Press published during the Ten Commandments dispute depicted an archeologist in the rubble at the base of a mountain, holding a fragment of a tablet and inspecting it through a magnifying glass: "What's this?" says the archeologist, "An asterisks with a footnote . . . that says . . . oh yeah, thou shalt not use the Ten Commandments for personal political gain."²⁶⁵ In Rutherford County Commissioner Bullen expressed this sentiment when he said, "I have confidence in my fellow Commissioners that you would not reduce yourself to the despicable position of playing on people's religious passions and beliefs in order for you to get a few votes in order to stay in office, and I don't believe that any of you would do that." Finally, in the Tennessee Senate, one Senator frankly acknowledged that he had to vote for the resolution because "this is a political issue. Tomorrow morning people are going to read who voted for this and who didn't vote for this. I don't have the time to knock on 150,000 doors. . . . I wish we could stand here and debate this on the merit without looking in the context of what's going to be in the paper tomorrow."

For the Myth of Separation, the Taliban is the symbolic repository of these benighted forces. Perhaps advocates of posting are not yet quite *this* bad, but the posting of the Decalogue takes manifest the same impulse of religious domination. In Rutherford

²⁶⁵ Chattanooga Times Free Press, Friday December 7, 2002.

County, for instance, opponents of posting twice identified this proposed action as the forced imposition of religious belief and practice tending in the direction of the Taliban. The freedom fighter said, “the forced presence of Christian beliefs in a government building such as this is the very kindling that fuels the fire of hate and resentment and it fans the flames of terrorism.” (applause, calls of approval from audience). Another woman, whose speech focused upon the worth of minority citizenship, said, “One only has to look to the Taliban to see what can happen when the state begins dictating questions of faith.”

In sum, according to the Myth of Separation the antagonist is zealous conviction, enabled by fear and moral outrage and exploited by political leaders for their own personal gain, all tending towards a terroristic theocracy. This antagonist does not reside in any one particular individual or institution. Even if certain geographical regions and institutions tend to produce and reproduce intolerance and zealotry (perhaps America generally and the South particularly have more than their fair share of it), it is nonetheless these forces and not the institutions that are dangerous. Because these forces are pervasive and diffuse, their expression tends to occur in those political institutions most responsive to the sentiments of the populace; that is, the legislative body. Resistance to these forces, then, must proceed through those institutions most resilient to the sentiments of the populace, namely, the courts. Plaintiffs therefore tend to view the courts as guardians of rights, rather than a threat to the moral and political order.

III. Symbolic Meanings of the Decalogue

The Myth of Separation is also defensive insofar as it attempts to deconstruct those symbolic meanings given to the Decalogue by the Myth of the Covenant of American Republicanism. That myth takes the Decalogue to be the transcendent moral law and infuses it with various symbolic meanings: covenant, simplicity, universality, and prohibitory criminal law. In contrast, the Myth of Separation understands the Decalogue as a creedal element of faith and infuses it with a set of divergent set of symbolic meanings. It is a superannuated covenant, it is complex, it is not universal, and it is, therefore, not a moral code.

A. Not the Covenant

First, the Myth of the Covenant of American Republicanism takes the Decalogue to be the covenant. While the Myth of Separation might accept that the Decalogue is one of God’s covenants, it tends to see that covenant as superseded by the covenant of Christ. Hence, in Hamilton County, Commissioner Cassavant advanced the following reasons for voting against the proposal to post the Ten Commandments in the county’s courthouses.

I would like to explain my vote because I am voting against this. I share a faith that most people in this county, and indeed, nation share and it’s draw from both the Old and

New Testament. Talking about the Ten Commandments, a story which is of course from the Old Testament, I'm reminded of a story from the New Testament. When Jesus was challenged by some of the scholars of his day who were, of course, trying to get him in trouble with the people – and they were very concerned about the letter of the law. And they asked Jesus what is the most important commandment. And his reply was 'love God' and he went ahead and said the second 'love your neighbor.' And to me that's been a story from the New Testament I've lived with most of my life as soon as I was old enough to understand it. They were trying, of course, to determine who was the most religious, and He was trying to point out that the love of God and your neighbor was really the focus. My God, my personal God, is not just a God of laws but also a God of love.

Opponents of posting frequently cite from the New Testament to show that, however venerable the Decalogue might be, it has been superannuated by a new covenant with Jesus the Christ. Jesus swept away the old, legalist formulations of faith which, by Commissioner Cassavant's reading aimed at an ostentatious display of piety (exactly what advocates of posting mean to do) and replaced them with a religion concerned with the care of the immaterial soul. For Cassavant, this care entails the development of a loving attitude towards one's neighbors, which, he implies, advocates of posting lack.

The Myth of Separation also makes consistent use of the Pauline epistles, in which the central conceit is the relationship that the newly formed Christian community is to have towards the Jewish law. Many of the plaintiffs to whom I spoke, especially those who understood themselves as faithful Christians, frequently pointed out the superannuated nature of the Ten Commandments through reference, often elliptically, to New Testament passages such as Romans 13, verse 9: "The commandments, 'You shall not commit adultery, You shall not kill, You shall not steal, You shall not covet,'" and any other commandment, are summed up in this sentence: You shall love your neighbor as yourself." As with Cassavant's speech, the effort here is two fold: first, to minimize the relevance of the Decalogue and, second, to conceptualize religion, and Christianity in particular, as concerned with the care of the soul rather than mere obedience to rules.

B. Not Simple

The Myth of Separation also attempts to show that the Decalogue is not as simple as advocates of posting conceive. The activity of posting therefore requires the state to make a number of theological judgments. Plaintiffs, along with one Senator in Tennessee, frequently noted that the Old Testament actually contains two recitations of

the Decalogue, one in Exodus and one in Deuteronomy.²⁶⁶ They also noted that the Hebrew text indicates there to be ten commandments,²⁶⁷ but does not itself enumerate them, so that any attempted enumeration is an interpretive endeavor which has been resolved differently by different traditions of faith. Protestants and Catholics, they note, disagree about this enumeration, so that electing to post one enumeration over another appears as an mini reenactment of one of history's most bloody (and apparently pointless) theological conflicts. Many plaintiffs also pointed out that the posted versions of the Decalogue contains mistranslations and other inaccuracies: "kill" where there should be "murder" and "lie" where there should be "bear false witness." These mistranslations were especially irksome to the Jewish plaintiff whom I interviewed.

Proponents of posting see these complexities as sophisticated irrelevancies and dismiss them. For instance, in the Tennessee Senate, Senator Atchely, in answer to a query as to which of the two versions of the Decalogue he would encourage citizens to post, said, "any one they want to use – they say the same thing virtually." Similarly, the gentleman from Rutherford County, in discussing pamphlets distributed by opponents of posting, commented that

I also was given several papers tonight about which Ten Commandments and its says there's a big variation. I've looked at several of these: Protestant – 'thou shalt have no other gods before me'; Catholic – 'thou shalt have no other gods before me'; Hebrew – "thou shalt have no other gods before me.' Yeah, that's a big difference. 'Thou shalt not kill' – Protestant; Hebrew – 'Thou shalt not kill'; Catholic – 'Thou shalt not kill.' Somebody's not using their head when they make a comment like, ya know, which Ten Commandments and these things don't agree.

When the Decalogue is conceptualized as a creedal element of faith, enumeration and tiny linguistic variations are important. They signal real theological differences. When the Decalogue is symbolized as the transcendent moral, these differences are meaningless and irrelevant.

²⁶⁶ It is noteworthy that this is largely as far as opponents go in noting the complexity of the Ten Commandments. Not once did any opponent note that Moses collects a second set of tablets whose content is radically different from the first. It includes, for instance, the prohibition on boiling a kid in its mother's milk. Ex 34:26. This second and different set of commandments creates a quite an interpretative conundrum. See DAVID H. AARON, *Etched in Stone: The Emergence of the Decalogue* (t&t clark 2006).

²⁶⁷ Again, the interpretive difficulties are deeper than these. Neither of the two presentations of the ethical Decalogue indicate that these statements are to be segmented into ten discrete commands. Before the presentation of the ritual Decalogue, Scripture says they are to be ten "words." It requires, therefore, an interpretive jump to conclude that the ethical Decalogue is to be segmented into ten discrete commands.

C. *Not Universal*

Furthermore, while the Myth of the Covenant of American Republicanism sees the Decalogue as transcendent and universal, the Myth of Separation points out the social and political contingency of their content. Plaintiffs, for example, emphasize that the prologue directs the commandments specifically to the tribes of Israel; that they require inherited guilt; that they assume the existence of slavery; that they established a particular Sabbath day; and that they promise to reward obedience with continued possession of the Promised Land.

D. *Decalogue as Creed*

In short, opponents of posting consistently portray the Decalogue as a tenet of faith authoritative only to those who adhere to one of the faith traditions of which it is a part. Hence, while advocates of posting cite exclusively from the second pentad, opponents of posting cite exclusively from the first pentad. For instance, during the public comment period in Rutherford County, a pastor from one of the local Presbyterian Churches opined that the Ten Commandments are “an essential part of the Christian faith and that is exactly why our government should not promote them. . . . I read the Ten Commandments as a declaration of faith in the God of Israel and the God and Father of Jesus Christ.” He then quoted the prologue and the first commandment and emphasized the theological, rather than moral, importance of this commandment: “This is not just a nice moral code. This is a direct command. It is spoken personally to believers.” With this statement the pastor both disassociates the Decalogue from the transcendent moral law and situates it within a particular tradition of faith. He also gently denigrates that understanding of it which would take it as a “nice” moral code.

Likewise, plaintiffs pointed out that while the second pentad might be universal, the commands of the first pentad condemn the practices of other faith traditions. Plaintiffs found the first and second commandments, prohibiting apostasy and idolatry, particularly worrisome, since they conceived of them as forbidding the practices of non-Christian and non-Jewish traditions – Hinduism and Buddhism were the two traditions most frequently mentioned.

IV. **What’s Wrong with Posting the Decalogue?**

Opponents find three things worrisome about posting the Decalogue. First, it is inexpedient. This by itself is no problem except that posting also, second, dilutes faith and, third, threatens the equal citizenship of minorities.

A. *Inexpedient*

The posting of the Decalogue can not be expected to cure our social ills and is therefore inexpedient. Advocates of posting tend to think of America’s degradation in

terms of a lack of personal morality that has resulted in high levels of crime and sexual licentiousness. They therefore think of the government's chief business as conducting the war on crime, part of which includes insuring that the citizenry know the transcendent moral law and have "character" and "values."²⁶⁸

In contrast, opponents of posting conceive of social ills differently than do advocates of posting: there is both a greater and richer variety of social ills to be contended with and a more nuanced connection between state action and the diminishment or elimination of those ills. For instance, Commissioner Bullen, in arguing against posting, pleaded for the commission to "do things that bring us together. Let us deal with the things that we know – schools, public safety, roads, the ambulance department, animal control – those things that we know how to do." Here, the prevention of criminality is not chief end of government. Indeed, it does not even make the list, which is one of public services. Likewise, plaintiffs frequently noted that nothing in the Decalogue helps us solve what they considered to be some of the most pressing problems facing humanity and America – global warming, racism, sexism, and various forms of inequality were those most often mentioned. They thereby indicated that these, more so than criminality, were an arena for government activity whose resolution required practical, real world solutions.

Further, even with regard to criminality and sexual licentiousness, opponents tend to see posting as an ineffective remedy. The nexus between morality and criminality is too nuanced and complicated to suppose that the posting of the Decalogue will give people morality and that they will then be law-abiding and chaste. Hence, Hedy Weinberg, in her speech quoted above, argues that introducing the Decalogue into the classroom can not be expected to alleviate any of society's most pressing ills (segregation, lynchings, poverty), even those associated with criminality (violence in the schools) and lack of personal sexual morality (teenage pregnancy). Indeed, from this point of view, introducing prayer into the schools is a superficial remedy ("we need to be serious about these problems") and a waste of time (this "band-aid will not make a difference"). The weakness of this connection for the myth of separation is exacerbated by its conception of the Decalogue as a creedal element of faith. As such, it could not effectively give people "character" or "values". Therefore, even if "character" and "values" were the solution to criminality and sexual licentiousness, the Decalogue is not the right tool for the job.

B. Watering Down Faith

However, opponents of posting do not litigate merely because they think the posting to be inexpedient. Posting, from their point of view, also produces two substantive ills. The first is that it "waters down faith" and the second is that it poses a threat to the equal citizenship of minorities.

²⁶⁸ JONATHAN SIMON, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007).

Many opponents claim that to post the Decalogue is a misuse of a creedal tenet of faith. It “purloins” religion, as one Tennessee Senator put it, and renders the Decalogue into nothing but a “nice” moral code, as one private speakers from Rutherford County put it. My interviews with plaintiffs, many of whom considered themselves to be strong adherent to their tradition of faith, supply more detail about this “purloining.”

To begin, plaintiffs saw the posting of the Decalogue as a threat to the integrity of religious tradition, both their own and that of other congregations. Their complaint was not that in being exposed to the Decalogue, they themselves were thereby threatened with a conversion experience – as one plaintiff put it jokingly, in coming close to the Ten Commandments plaque in the courthouse, he did not feel himself becoming more Jewish. Rather, for the plaintiffs, the posting of the Ten Commandments posed a threat to the integrity of religious tradition because it usurped the theological authority of the church or synagogue and replaced it with a bleached out version of faith.²⁶⁹

Plaintiffs thought, not without reason,²⁷⁰ that those pushing for the posting of the Decalogue lacked access to the expertise needed to make a sound theological judgment about the meaning and appropriate use of this article of faith, generating two attitudes about the county’s posting of the Decalogue.

First, because of this lack of theological knowledge and authority, the County’s use of the Decalogue in the courthouse was theologically naïve, even simple-minded. For instance, one Jewish plaintiff voiced the complaint that using the Decalogue alone neglected the other laws of the Torah which, for him, are as authoritative as the Decalogue. The Christian plaintiffs also thought the use of the Decalogue theologically inappropriate because the new covenant of Jesus of Nazareth fundamentally altered the authority of the Old Testament law. These Christian plaintiffs did not always agree about the relationship between Christ and the Old Testament, but they did agree that the presentation of the Decalogue not only did not capture this relationship but tended to ignore the importance of Christ. By presenting the Decalogue alone, the state, plaintiffs felt, incorrectly emphasized the Old Testament over the New. The more secular plaintiffs frequently pointed out that the posted versions of the Decalogue was redacted (or expurgated) of unacceptable material, such as the countenance of slavery and the command of inherited guilt, and that these redactions had the effect of hiding from public view those elements of the Decalogue that would show it to be contingent upon the sociological and historical circumstance of its production. In short, the political use of the Decalogue concealed all the nuance would make it either theological compelling or political objectionable.

²⁶⁹ See, STEVEN GOLDBERG, *Bleached Faith: The Tragic Cost When Religion Is Forced into the Public Square* (Stanford Law Books 2008). For examples of some of the ways in which the Ten Commandments lose their theological importance when they are made to do political work.

²⁷⁰ For instance, in Hamilton County the decision as to how to redact the Decalogue was apparently left to the architect who designed the monument. One of the commissioners who provided major support for posting the Ten Commandments was apparently unaware that such decisions had to be made, much less who made them or what redactions it resulted in. He was also apparently unaware that there is a dispute as to how the commandments are to be enumerated.

The sense that the County was watering down the content of faith was exacerbated by the plaintiff's perception that the Commissioners had a non-theological motive in posting the Ten Commandments. Since the County Commissioners lacked access to the principles of theology that would allow them to make accurate judgments about the appropriate uses of the Decalogue, plaintiffs perceived them as basing their endorsement upon some principle of expediency: the Commissioners were either using the Decalogue to attract voters²⁷¹ or were motivated by the fear and anxiety caused by the 9-11 Terror Attacks. For plaintiffs, neither of these was a sound principle of either theology or democratic action. Whatever the value of the Decalogue, that value is not dependent upon its usefulness to government or elected officials. The value of religion and faith was for the religious plaintiffs more personal, more spiritual, than this.

Second, the plaintiffs to whom I spoke all had a strong commitment to protecting the autonomy and integrity of their religious congregations. For an Episcopalian, for instance, this concern was expressed as a commitment to the liturgy, the performance of which required a well-trained officiant. Plaintiffs of other traditions expressed their concern for the autonomy of the church or synagogue in different ways, but all tending in one direction: decisions in matters of theology, ritual, liturgy, and ceremony must be left entirely to the authorities of each faith tradition. Now, no plaintiff thought that this one particular decision to post the Decalogue infringed upon that autonomy. Churches and synagogues in Hamilton and Rutherford counties still retained control over their ritual and liturgy. However, plaintiffs thought that in making the decision to post the Decalogue, the County was arrogating to itself a power that did not properly belong to it. They worried that, were the government to remain unchallenged in this one instance, it would become habituated to making such decisions, with the long term effect that religious communities would find the state in possession of the power to make theological decisions both small and large.

In sum, plaintiffs saw the posting of the Decalogue as a threat to the integrity of their faith and the faith of others, but they did not conceive of the Decalogue itself as posing a threat of conversion. Rather, they were concerned that the political usage of the Decalogue threatened both the richness of faith by concealing theological nuance and reducing it to charismatic sound-bites and to the long-term integrity and autonomy of religious congregations, both their and others.

C. Protection of Citizenship

Since the Decalogue is a central part of a particular faith tradition, the Myth of Separation conceives of the proposal to post it as a theological judgment about its veracity, accompanied by an ancillary, yet unavoidable, judgment about the value of both other faith traditions and the members of those traditions. Since advocates and opponents

²⁷¹ Such a perception is common amongst detractors of posting religious symbols; however, I believe it to be largely false. My observations have led me to believe that those most stringently in favor of posting the Decalogue are motivated by a real sense that doing so will improve society. They are sincere and not merely conniving for votes.

agree that the Decalogue is a prohibitory criminal code, this ancillary judgment about other faith traditions is condemnatory. Placing this condemnation within the actual and symbolic homes of law and justice, the courts and the legislative building, aligns the government with that condemnation, indicating that the government is using a tenet of faith to distinguish between good, law-abiding citizens and those citizens who can not be trusted. This dynamic is evident in the following speech, delivered by a private speaker during the Rutherford County debates:

for someone who is not religious, the posting of the Ten Commandments will suggest that religious perspectives generally – and the Judeo-Christian perspectives specifically – are used in the governing practices of Rutherford County. For Muslims, Buddhist, and Hindu Americans, to take three examples of non-Christian religious perspective held by residents of Rutherford County, the posting of the Ten Commandments gives a similarly clear message: that the tenets of their religion are of less value, worth, and relevance in our nation and hence that they are not as fully citizens of worth as our Christian or Jewish Americans.

The posting of the Ten Commandments aligns the government with a particular faith tradition (“the Judeo-Christian perspective” is “used in the governing practices of Rutherford County”) while concomitantly disparaging the tenets of differing faiths and denigrating the value of the citizenship of those who are members of those other faiths.

Plaintiffs articulated similar concerns about equality of citizenship. All of the plaintiffs to whom I spoke were well respected members of the community, with secure careers and strong social relationships. They did not, therefore, conceive of themselves as suing for the protecting their *own* political equality.²⁷² Instead, these plaintiffs were concerned that the presence of the Decalogue in the governmental building (either the county courthouse or the county commission building) would dissuade other citizens of minority faiths from utilizing these organs of government. Plaintiffs therefore largely considered their participation in the lawsuit as a type of volunteer service on behalf of others, and they were concerned about their own equality only insofar as the presence of the Decalogue signaled a breach in the wall of separation between church and state that, if allowed to remain un-repaired, could work future harm upon them or people like them. Plaintiffs consistently identified three aspects of the attempt to post the Decalogue which they found to be a threat to equal citizenship.

First, plaintiffs cited commandments from the first pentad which, unlike the second pentad, they considered to be highly sectarian. The commandments of the first pentad condemn apostasy and idolatry (both punishable by death), establish a particular Sabbath day, and assume that compliance is a condition of possession of the Promised

²⁷² Indeed, if plaintiffs had any trepidation, it was not over the Decalogue but over the publicity of being a plaintiff. Hence, a few endeavored to keep their name out of the media and conceal their participation from work colleagues and clients.

Land. These, thought plaintiffs, were incompatible with various minority religions – Hinduism and Buddhism were the two most frequently mentioned. Plaintiffs therefore thought that the Decalogue’s presence in the Courthouse or legislative building, forums of political rather than religious activity, implied that members of these groups are less than ideal citizen. If state law did not denounce these minorities, the presence of the Decalogue in the courthouse implied that it ought to.

Second, plaintiffs were alarmed by characters of some of those who advocates for the posting. Plaintiffs perceived these people as dangerous, ignorant, intolerant, and hateful. In Hamilton County, for instance, the Chairman allowed the testimony of private citizens, and these commission meetings often became a forum for those advocating the continuance of the Civil War, or even the Revolutionary War. One speaker asserted that the judge in the case owed his true allegiance to the English Crown, rather than to the Constitution and was therefore a treasonous enemy of liberty.²⁷³ Even the moderate supporters of posting the Ten Commandments frequently claimed that doing so was legitimate because “this is a Christian nation.”²⁷⁴ This indicated to plaintiffs that the Commissions were basing their decision to post on the grounds that that Christians have those values and character dispositions that make them good citizens of a free nation; non-Christians, supporters implied (sometimes explicitly), lack those characteristics and therefore do not deserve the same degree of citizenship as do Christians. This legislative judgment about the value of non-Christians, coupled with a text that condemns these non-Christians seemed to plaintiffs to identify a class of inferior citizens and therefore to be a threat to political equality.

Third, plaintiffs took the courthouse and the legislative building to be paradigmatic forums of equality. Citizens must enter these buildings in order to do things both grand and petty: both the pursuit of justice and the attainment of various certificates and licenses occur in these buildings. Plaintiffs thought that these activities are for many citizens, burdensome, time consuming and even frightening, especially those citizens already politically marginalized. If potential petitioners do not expect equal treatment in these forums, they might decide to not pursue their claim, preferring to endure injustice or go without the necessary licenses and certificates. Citizens who do not pursue their legitimate claims are denied equal treatment just as much as those who pursue their legitimate claim but are turned aside by religious bigotry. Hence, plaintiffs thought that these forums ought carefully to preserve the perception that the government is impartial

²⁷³ The man said, amongst other things, “Each and every attorney, every bar association attorney – a franchise of the English bar association – is a foot soldier of treason! . . . J. Allen Edgar (the judge for this particular case) is a bar association attorney. He has no allegiance to the Constitution of the United States. He has already made very clear his antipathy to everything that this country every stood for (literally yelling) and he’s anti-God – and he’s not your friend, by the way Mr. Cocker – with friends like that you don’t need enemies.”

²⁷⁴ This phrase is a common refrain amongst evangelical Christians, but is fraught with ambiguity. Evangelicals disagree both about what it means for a nation to be Christian and about the normative consequences of such a sociological claim. CHRISTIAN SMITH, *Christian America? What Evangelicals Really Want* (UC Press 2000). When I asked plaintiffs why they thought the County had posted the Decalogue in support of Christianity rather than Judaism, they uniformly pointed to statements like these.

to its citizen's religious beliefs. The presence of the Decalogue, with its prohibitions on various non-Jewish and non-Christian practices and seemingly based upon the principle that non-Christians are inferior citizens, defeated this perception and therefore threatened the political equality of just those most likely to be in need of institutions of justice.

D. Sub-text: The Good Citizen

The theme of citizenship also provides an important sub-text to the entire debate. The question of who is and who is not a good citizen, and what makes someone a good citizen most operated in the background. However, particular visions of the good and bad citizen, unspoken and perhaps unconscious, supplied the plinth upon which rested the overt arguments.

For the most part, personal and idiomatic biographical elements do not enter the public discourse, which typically existed at a general level of mythic narrative. When they do make an entrance, however, they supply revealing clues as to each side's image of both the ideal citizen and the ideal bad citizen. The two sides operate with competing conceptions of the good citizen and so advance different biographical elements into the public discussion.

First, opponents of posting advance biographical elements that closely associate themselves with traditional, even conservative, symbols of citizenship. For example, the freedom fighter from Rutherford County, perhaps the speaker most openly hostile to religion per se, began his speech with an announcement that his ancestry was traceable to the original settlers of Rutherford County, and that the Daughters of the American Revolution had recognized some of his ancestors as contributors to the war of independence, as well as to the War of 1812. He thus aligned himself with a noble tradition of those who had fought for the country. Another private speaker opposed to posting authenticated his citizenship via his own military service in Viet Nam. He began: "I just want to say, I'm a Vietnam veteran. I volunteered for military service and I volunteered to serve in Vietnam. I volunteered because I believe in this country, what it stands for, and I volunteered to keep America free."

Second, for opponents of posting the authentication of citizenship often occurred in close rhetorical proximity to a profession their religious affiliation. The purpose of this profession was to decouple the link between Christianity and good citizenship, which opponents of posting thought to be advocate's conception of good citizenship.

If the opponent of posting was a Christian, then the profession of religious conviction was designed to disassociate one's political persona from one's religious persona. For instance, opponent of posting the Decalogue began his speech by saying his name and that he "is here tonight as a citizen of Rutherford County who happens to be Christian and fervently believes in defending the rights guaranteed to us by the Constitution." The speaker foregrounds his political identity, that of a citizen of Rutherford County who ("fervently"!) believes in the rights of the constitution. Importantly, his adherence to Christianity does not exclude the possibility of allegiance to the constitution, and in this context the speaker portrays his religious persona as

incidental to his political persona (“a citizen . . . who happens to be Christian.”) The effort is to display how one might have Christian convictions without also believing that one had a special claim to citizenship because of those convictions.

If the opponent of posting was of a minority faith, the profession of religious affiliations is also designed to decouple the link between Christian convictions and good citizenship. The profession of a minority faith, however, is not designed to display the incidental nature of that religious affiliation. Instead, the effort is to present that religious affiliation as essential to the speaker’s persona, to show how the posting of the Decalogue threatens the speaker’s equal citizenship, and to associate minority faith with legal probity. For instance during the public comment period in Rutherford County, Ron Luell, soon to be a plaintiff in the suit against the county, began by announcing his name, that he was a resident of Murfreesboro, and the name of his representative. He then said that it was

strange to be noted as a minority, and the fervor of the audience is frightening. Understood, but frightening. And I must say too, your prayer was heart felt (gesturing at the Commissioner who had delivered an invocation) but as an elected official, delivering a prayer in a public place that excludes many people of different faiths is hurtful and divisive. (clapping) This is the first commission meeting I’ve been to, and I don’t know if I would be comfortable coming back to sit through a meeting from the very beginning.

Here, Mr. Luell authenticates his citizenship and proclaims his competence to participate in the debate by laying claim to his representative. He then moves immediate to a profession of his religious status, that of a minority (we later discover he is Jewish), and how the religious practices of the commission negatively impact the value of his citizenship. The invocation “excluded many people of different faiths” and was “hurtful and divisive.” This, in combination with the “fervor of the audience,” made him so uncomfortable he thought he would not return to participate in another meeting of the commission. That is, for Mr. Luell, the inclusion of Christianity in the political process was the agent of his exclusion from political participation, and a denigration of his citizenship and, implicitly, others like him. The prayer, and by implication the possible posting of the Decalogue, announced his incompetence to enter the political sphere as an equal participant.

Opponents of posting, then, advance biographical elements into the public discourse as a means of laying claim to good citizenship. They feel compelled to profess their religious affiliations as a means of decoupling the link between good citizenship and membership in the “right” church. Opponents employ this rhetorical strategy not only on the individual level – I’m a minority and also a good citizen – but also on a generalized level as well. Not only is this particular individual a good citizen (despite being a non-Christian) but so are all these other non-Christians as well.

Opponents then also attempt to associate religious diversity with legal probity and political strength. For instance, in the subsequent to Commissioner Cassavant's speech quoted earlier, he said,

At this time in our history, there is no more important time to be inclusive and not alienate people and create enemies. This is not the Christians versus the world. The personal connectivity between Americans and citizens of other states is more pervasive today than ever before in our history. When the World Trade Center collapsed, from my understanding, there were involved men and women from over forty countries and I would assume from many faiths. We're certainly a part of a global community that shares a faith in freedom and democracy. There's no more important time for us, and for our leader, President Bush, and for our Congress and as Representative Wamp said earlier, this is really about unity and oneness. There's no more important time to gain the loyalty of peoples throughout the world, especially those nations in which the enemy, the terrorists, the criminals dwell.

Again, Commissioner Bullen from Rutherford County took a similar tack:

Think about 9/11. Who were those victims? They were people like you and me, but they all had cultural diversity. When you looked at the names, it wasn't 'Jones' and 'Smith' – there were all types of names, from every type of ethnic background that you could think of. They had religious diversity. They were us. They were Americans. They had the same rights as all of us do. The heroes in all of this – who were they? The people in the fire departments, the police department, the rescue squad – what were they? When you look at the names of all those people – again, diversity. Ethnic backgrounds, different. Wide range of religious views.

Both speeches recognize the presence of religious diversity, but, in an effort to decouple religious identity from political identity, emphasize that, despite these differences, we all have the same rights. (“They had religious diversity. They were us. They were Americans. They had the same rights as all of us do.”) The effort is not only to display the nation's diversity, but to associate this diversity with political strength and non-Christian others with moral and legal probity, and even heroism.

Opponents of posting, then, advance biographical elements into their public narratives as a means of authenticating their own citizenship, which, they imply, is not dependent and ought not to depend upon their religious affiliations. Additionally, they attempt to associate the diversity of the nation, which they contribute to, with legal

probity and heroism. The sub-text here is that opponents of posting feel that their religious affiliations are endangering their equal standing within the political community and they aim to protect that equality by decoupling religious affiliation from an ideal of good citizenship. One may be a good citizen no matter what one's religious affiliations, they say.

Advocates of posting have different worries than do opponents of posting. They also have competing conception of the good citizen. They therefore advance different elements of biography into the public discussion, and for a different end than that of opponents of posting. Unlike opponents of posting, advocates of posting do not seem to feel that the posting (or non-posting) of the Decalogue threatens their standing within the political community. They do apparently feel that the non-posting of the Decalogue (symptomatic of a collective amnesia about the transcendent moral law) threatens their familial and other private relationships.

The mother of 2.5, who was a new resident to the county, authenticated her citizenship through her commitment to raise her children there. She did not announce her religious affiliations. Another proponent of posting did make his religious affiliations, but, in doing so both gave them a secondary status and associated them with his professional life (rather than either his personal life or civic life). "I'm pastor of the Bellwood Baptist Church, but that's not the reason I'm here tonight. I'm here as a parent and a grand-parent." This speaker was plainly well-known to the audience, so it is not clear whether by this statement he also intends to authenticate his citizenship, or whether he is merely assuming such authenticity before a friendly audience. The third supporter of posting neither announced his religious affiliations nor felt it necessary to authenticate his citizenship. He was there, he said, only because his friends had asked him to come and speak.

In sum, each mythic narrative of American republicanism operates with a, mostly unspoken, vision of the ideal citizens. Opponents of posting feel that the posting, and other aspects of the debate (e.g., the prayer), threaten the equality of minority citizenship, whether they themselves are a minority or not. They therefore advance biographical elements into the public discussion that are designed to disassociate good citizenship from membership in the right church. Advocates of posting feel that the absence of the Decalogue threatens the integrity of their familial and other personal relationship and accordingly advance these elements of biography into the public debate.

Each side also operates with a dystopian vision of the bad citizen and associates the other side with this pathological stereotype. I leave the discussion of these pathological stereotypes for chapter 8 where they play an important role.

V. Conclusion

In conclusion, I analyze the speech that began this chapter. It instantiates most of the elements of the Myth of Separation.

First, the speaker authenticates his citizenship by advancing his his military persona into the public discussion. The word "volunteer" appears seven times in the first

six sentences. He might have selected this word so as to resonate with Tennessee's sobriquet – the volunteer state. He is there to defend others (the weak). He is also there to defend the principles that make the country great, but which are now threatened by diffuse but nonetheless zealous social forces (it is “a harsh voice . . . demanding that Christian principles be forced upon our citizens.”) Political personas are to be protected (“the rights of all people” so “that we can speak free”) as well as the religious personas (“so that we can worship freely”). We are to be inclusive of religious diversity (“that our America under God opens its arms to all faiths, to all religions, to all beliefs”) as a display of America's exceptionalism (“to show the world that in Rutherford County America is free”). The Decalogue is to be accepted privately as a creedal element of faith rather than used as a political tool (“keep the Ten Commandments in our minds . . . where they belong”).

Chapter Eight: Culture Wars Revisited

I. Introduction

In this chapter I return briefly to the standard theory of the culture war, primarily as a prelude to the normative chapters that follow. In these chapters I argue that the vocabulary of both political theory and constitutional jurisprudence privileges the distinction between religion and secularity. This distinction, I will argue, is insufficiently nuanced to do the normative work that both political theorist and jurist wish it to. Examining the relationship between the case study and the standard theory of culture war provides some of the nuanced need to make this critique.

II. Culture War and Mythic Conceptions

The two mythic conceptions of American republicanism presented in the preceding two chapters can not be understood as mere instantiations of the standard theory of the cultural war, despite initial appearances that they could be.

First, consider Hunter's claim that the chief disagreement between the two camps is over the source of moral authority. Orthodox morality "defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are. It is an authority that is sufficient for all time."²⁷⁵ Orthodox morality is characterized by its objective other-worldliness. It is immutable in the face of altering human desires and social organization. In contrast, progressive morality authority "tends to be defined by . . . rationalism and subjectivism. . . . From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding."²⁷⁶ This morality is this-worldly, supposedly sensitive to changing human needs and desires.

The case study manifests some of this distinction. The Myth of the Covenant of American Republicanism conceives of the Decalogue as the transcendent moral law, whose immutability is guaranteed by God against changing human desires. The Myth of Separation conceives of the Decalogue as an article of faith, and seems to cherish faith as an important means of satisfying an "innate" psychological need. There are, however, two slippages between this general theory and the case study.

First, the emphasis on the sources of morality tends to overlook the saliency of narrative to the participants in the case study. It is true that some participants to these conflicts present themselves as acting on behalf of general principles. Many plaintiffs thought of themselves as volunteering to protect others, or to defend the wall of separation, or to promote toleration. The problem here is that adherence to these principle is not sufficient to determine the choice of political action. Why does suing, for instance, seem to be a tolerant reaction to the county's posting of the Decalogue? Why

²⁷⁵ HUNTER, 44.

²⁷⁶ Id.

does it seem to plaintiffs to be an effective way of protecting the wall of separation, or of volunteering on behalf of others? The mythic narrative provides the answer to these questions: suing seems to plaintiffs to support these principles because the Myth of Separation conceives of the antagonist as irrational and zealous forces that have overwhelmed the rationality of legislature. The courts are immune (or supposed to be immune) from these forces and can therefore be relied upon to protect individual rights.

The same is true of the relationship between the “orthodox” and the case study’s conservatives. One might attempt to understand the conservative attachment to the Decalogue as an instantiation of the orthodox adherence to other-worldly absolutes. Again, such an observation, even if accurate, underdetermines the conservative’s choice of political action. It might be that values are imperial, seeking dominion over every conceivable aspect of everyone’s personal, social, and political life. The attempt to post them could then be understood of as an expression of this imperial impulse. As occasionally pointed out by opponents of posting however, presenting the Decalogue in the courthouse is not a particularly effective expression of this impulse. The proposed location of the Decalogue can be expected to reform or convert only a few individuals and certainly no more than if advocates of posting were to place a copy in their own lawn. However, the posting of the Decalogue in governmental buildings seems a sensible strategy once it is seen as an attempt to instigate a confrontation between the transcendent moral law and the Supreme Court. This confrontation is an attempt to reform the Court, the agent of America’s decline from the enchanted past.

For both sides of the conflict, then, political action is not merely the instantiation of some abstract moral principles grounded in competing sources of moral authority. If adherence to abstract principles is in fact a motivator, this motivation must first pass through some medium before being articulated into political action. For both the “orthodox” and the “progressive”, a mythic conception of American republicanism is that medium.

There is a second and perhaps more pressing slippage between Hunter’s conception of culture war and the case study. I assumed above that Hunter’s categories accurately captured general features of the two mythic conceptions of American republicanism. It initially appeared that the conservatives could be classified as “orthodox” because of their adherence to an absolute, other-worldly source of moral authority and that the liberal’s could be classified as “progressives” because they seemingly refused to acknowledge such moral authority. By looking at the case study from a slightly different point of view, however, this conclusion reverses itself.

There is no doubt that advocates of posting conceptualize the Decalogue as the transcendent moral law, and that this transcendence makes the Decalogue absolute. But when defending the Decalogue, advocates of posting consistently look to the usefulness or necessity of moral absolutes. If there are no moral absolutes, they say, then we will be unable to critique the Supreme Court. If there are no moral absolutes, then kids will have no “character” and will lack “values.” If there are no moral absolutes, then there will be excessive criminality, families and communities will fall apart, and there will be neither civility nor civilization.

In each case, advocates defend the absoluteness of the Decalogue on the basis of its necessity or usefulness for some this-worldly end: critique of government, moral pedagogy, and the maintenance of civility and civilization. Obeying absolutes is what people must do if they are to be non-criminal members of society. The absoluteness of the transcendent moral law has a this-worldly and utilitarian derivation, not an other-worldly and deontological derivation. Its other-worldliness, its God-giveness, and its transcendent, are merely another part of its this-worldly utility. Were it not absolute, or were it perceived as other than absolute, it would not produce the salutary social effect which advocates of posting wish it to. Its utility would be greatly diminished.

The Myth of Separation also initially seems to be a direct instantiation of the “progressive” worldview. It conceives of the Decalogue as a creedal article of faith, coherent only to those already adhering to a particular faith tradition. To the degree that it also conceives of faith as responsive to a this-worldly psychological need, it de-transcendentalizes the Decalogue, removing it from its absoluteness and universality. This is not the only attitude that the Myth of Separation takes towards the Decalogue, however: in lodging the Decalogue with in particular traditions of faith, it acknowledges that adherents of that faith might well find it to be absolute, and that fidelity to it might be a part of attaining other-worldly goals. In accepting religious pluralism, then, the myth of separation does not deny the possibility of other-worldly absolutes, but relocates those absolutes to particular religious communities.

Perhaps Wuthnow’s theory of the culture war is closer to the truth. He also thinks the difference between the two sides is moral, conservatives holding “particularistic” commitments to America that liberals reject in favor of “eternal verities” that transcend Americanism. The Myth of the Covenant of American Republicanism certainly has a particularistic commitment to America that the Myth of Separation does not. Its focus is upon the way that the Supreme Court’s activity has led to America’s (but not other nation’s) moral depravity. Its political project is not, say, the redemption of all souls or the conversion of the nations, but is squarely focused upon the reformation of the American polity. But this is far from determinative: while the Myth of the Covenant of American Republicanism is indeed particularistic, it also incorporates “eternal verities” into its political program, as indicated by its persistent representation of the Decalogue as transcendent, universal, and accepted by (successful) cultures and religions around the world.

Conversely, Wuthnow correctly recognizes that the Myth of Separation abandons the conceit of America’s uniqueness and aligns itself with “eternal verities” (separation, toleration) that transcend America. Perhaps America has hitherto expressed these transcendent values in a unique but not providential manner, this is incidental to the authority and validity of these values. The Myth of Separation, however, does not abandon particularism, but relocates it to communities of faith. The demands placed upon members of religious communities are to be respected and honored and the autonomy of communities of faith is to be protected against external political distortions. Neither does it abandon America particularism, it merely makes it contingent upon the degree to which contemporary politics recognizes diversity and religious pluralism.

Hunter and Wuthnow, with respect to the case study, both get something right. Conservatives hold particularistic commitments to America (they want to reform the Supreme Court) and act on behalf of absolute, other-worldly sources of moral authority (the Decalogue). Liberals adhere to “eternal verities” (psychological need for religion, toleration) and acknowledge that from within particular religious communities, tenets of faith might appear to be absolute. However, to the degree that each theory correctly categorizes the two mythic conceptions of American republicanism, it eschews just that aspect of the other theory that also seems to get it right.

Both the orthodox and the progressives have features that are absolute and other-worldly and particularistic and this-worldly. The orthodox adhere to absolute other-worldly sources of morality, but legitimate the absoluteness of those values through their utility to the community. In contrast, the progressives acknowledge the particularistic commitments of differing religious commitments. It further acknowledges that the adherents of those differing faiths might take their own faith commitments as absolutes.

Finally, vis-à-vis the case study shows, the standard theory of culture war seems to completely mischaracterizes the phenomenon. For instance, Wuthnow thinks that, in some respects, the difference between the two groups is not all that great. Both sides, he correctly points out, share a commitment to the same Biblical vocabulary and pool of stories. In the case study, this is not at all true: here, there is a noticeable dearth of Biblical vocabulary and scriptural references. Further, the standard theory predicts that conservatives find the Bible authoritative, and it is they who are therefore more likely to quote it. But in the case study, liberals are most likely to quote scripture, while conservatives are more likely to quote the Founding Fathers. Additionally, while both conservatives and liberals in many cases refer to the same Bible, to the small extent that they do, they draw upon completely different stories and vocabulary. Liberals quote almost exclusively from the New Testament while conservatives, when they do reference the Bible, do so from the Old Testament. The division here is so distinct that it seems mistaken to suppose that the two sides are employing the same Biblical vocabulary and stories.

III. Alternative “Culture War” Hypothesis

The standard sociological theory of culture war correctly recognizes that the conflict is not creedal or dogmatic. But in re-locating the division between the two sides in the sources of morality, I think that the theory has moved too far away from religion as a continued source of political and social division in American life. My hypothesis aims at a middle ground between religious conflict and moral conflict while accounting for the following aspects of the case study, each of which is argued above and summarized here:

1. Each side to the conflict incorporates elements that are both other-worldly and this-worldly. The hypothesis must account for the utilitarian character of moral absolutes for the Myth of the Covenant and for the absoluteness of particularistic faith commitments for the Myth of Separation.

2. The hypothesis must account for the distribution and frequency of authoritative references, whether those references are to the New Testament, the Old Testament, or the Founding Fathers.

The case study suggests the following hypothesis about the contemporary American social and political divisions. While the division between the orthodox and the progressives is not over creed or dogma, it is over religion. Specifically, the two sides approach the world with differing visions of the social, political, and psychological functions of religion.

To put the point in general and genealogical terms: the conservatives in the case study are the inheritors of a classical republican vision of religion, which conceives of religion as morality and morality's function as the maintenance of order. They seem to have inherited this vision from the Founding Fathers. In contrast, the liberals in the case study are the inheritors of a Lockean vision of religion, which conceives of the chief purpose of religion as the care of the soul. Since the care of the soul is a private matter, it ought to be a right, and one that is a "trump" on state activity.

The orthodox of the case study understand religion as the exclusive source of morality and maintain that morality and the obedience to it are each necessary for an ordered society. Without morality and obedience, there will be disarray within every unit of social organization: the family, the county, the state, the economy, and the nation.

The various particularistic commitments of the Myth of the Covenant can be deduced from this focus on religion as a prerequisite to an ordered society. Since every unit of social life requires morality and obedience if they are to be orderly, the Myth of the Covenant naturally focuses on these particular social units as the locus of order and disorder. Hence, all the private speakers in Rutherford County were concerned that the disorder sown by the Supreme Court at the federal level, one of its particularistic commitments, was producing disorder in the state and the family, two of its other particularistic commitments.

The hypothesis also explains the utilitarian character of moral absolutes, as symbolized by the Decalogue. Since morality is necessary for social order and social order is static or else it is in disarray, morality itself must be immutable in the face of changing human desires. Its absoluteness must be guaranteed by God. Without God's certification, these absolute moral rules would not be able to maintain social order. Therefore, God must have pronounced them and they must be absolute.

The hypothesis further explains the paucity of scriptural references and the apotheosis of the Founding Fathers. Religion is morality, and morality functions to maintain social order. The content of religion, therefore, is not necessarily the content of scripture or theology. The content of religion is what maintains the social order. Both scripture and the founding fathers enter into this morality insofar as they bolster this functional conception of morality. Non-biblical figures and vocabulary pass easily into and out of this moralized religion. The founding fathers have made this advancement, both instantiating the particularized commitments of the Myth of the Covenant (viz. to the nation) and propounding the utilitarian necessity of moral absolutes for the maintenance of social order.

In contrast, the first pentad of the Decalogue is not a part of this moralized religion. Those commands can not be represented as absolute and therefore do not function to maintain social order, or at least not any of those social orders of concern to advocates – the nation and the family.

In contrast, the progressives conceive of religion as having a psychological function. Religion is about the care of the soul.

This hypothesis explains why progressives accept the absoluteness of particular faith commitments for those who are adherents of that faith tradition. It is an eternal yet this-worldly verity that everyone desires to live a meaningful human life. Religion is one, and perhaps the best source, of such meaningfulness. Once an individual is ensconced in a tradition of faith, this vision of the function of religion recognizes the authority of that religion's other-worldly commitments over the individual. Religious commitments therefore are particularistic in the sense that they are comprehensible only to members of the faith but they are (or could be) absolute for those members in a way that they are not for non-members.

The Myth of Separation also has a particularistic commitment to America, but that commitment is dependent upon the degree to which American politics and governance instantiate those ideal which allow individuals to care for their souls as they please. Hence, rather than emphasizing social order, as do the orthodox of the case study, progressive emphasize democracy, toleration, and the separation of church and state, all of which are conducive to the care of the soul in a pluralistic world.

This hypothesis also explains the distribution of citations to the Bible and the Founding Fathers. Progressives ignore scriptural claims that can not be understood as a type of care of the soul. Therefore, they tend to ignore the Old Testament, ignore the second pentad (whose truths are too obvious to be about the care of the soul), and emphasize the first pentad. Sometime the elements of the first pentad are taken as proof that the Decalogue is about the care of the soul but a sort of care of the soul that we can no longer live with, either because it contains superannuated moral demands (inherited guilt) or it is itself superannuated by the covenant with Jesus the Christ. For the Myth of Separation, the authority of the Founding Fathers is analogous to that of the Old Testament. Although they are an authority, they are authoritative only insofar as they can be portrayed as protectors of the political condition in which individuals (in a pluralistic world) can care for their souls. Since the Founding Fathers did not themselves live up to their ideals, progressive make use of their principles without any need to attempt to re-institute their world. Recall, for instance, the freedom fighter, who quoted Jefferson to show him to be an enemy of political and religious tyranny, which tyranny is antithetical to the care of the soul. In contrast, one of the chief themes of the New Testament is, or is commonly supposed to be, the preparation of the soul for heaven, and it is, therefore, a favored source of authority for the myth of separation.

IV. Conclusion

Media portrayals of the “culture war” frequently present these conflicts as between religious forces and secular forces, associating the conservatives with the religious forces and the liberals with the secular forces. The previous discussion of the slippages between the standard theory of the culture war and the case study shows there to be a great deal more nuance to the conflict than this. Not only are all liberals not “secularist” but it appears that some conservatives, judging by the distribution of their authoritative citations, *are* secularists. The Myth of the Separation and the Myth of the Covenant both have particularistic moral commitments and commitments to moral absolutes and “eternal verities.” I have offered a hypothesis that attempts to describe the ways that the two sides incorporate these two types of moral commitments. In the next chapters I incorporate this description into a two normative discussions. One is about the role of religious discourse in a deliberative democracy. The other is about the use of the religious/secular distinction in Establishment Clause jurisprudence.

**Part Three:
Normative Jurisprudence**

**Chapter Nine:
Civility and Religion**

I. Introduction: The Duty of Civility

Even when recognized as such, civility is expedient: the politician is civil towards her colleagues “on the other side of the isle” to procure votes and the huckster’s charm sells the meretricious. These are morally ambiguous practices, for in these cases civility is the means by which one obtains some end. Hence, while morally preferable to belligerency or violence it comes close to violating the Kantian categorical imperative that one treat others as ends, and never solely as means. Civility as expediency respects others only insofar as they might be useful to us. Through the eyes of expediency we see others as instrumentalities for achieving our own ends and thereby treat them disrespectfully.

When political theorists speak of the duty of civility, they are not thinking of civility in this way. Rather, they have in mind a duty of political morality, usually founded in one of the modern progeny of the Categorical Imperative. The largely agreed upon contours of this “duty of civility” has two aspects. First, political actors are to articulate and to rely upon only “public” reasons when advancing their political agenda. As Rawls puts it: “the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.”

A second commonly accepted aspect of the duty of civility concerns civic excellence, what is often called civic virtue.²⁷⁷ This is the Aristotelian or “aretaic” aspect of the duty of civility: not only must one rely upon public reason when deliberating upon political matters, but one must approach those deliberations with certain habits, attitudes, and character traits. As Rawls puts it: “This duty also involves a willingness to listen to

²⁷⁷ “Virtue” is common translation of the concept of aretê. This translation is universally recognized as misleading and inaccurate. In contemporary English, “virtue” is wholly associated with morality, and typically with sexual morality. In this case, the translation is too narrow and moralistic. Aretê is a non-moral concept, albeit one that includes that includes moral aspects. Being excellent for Aristotle does not simply mean being moral. The meaning of virtue for the classical republicans – self-sacrifice on behalf of the political community – probably comes closest to justifying this translation of aretê. It suggests that there is a difference between one’s own private happiness and the good of the community and one is morally obliged to sacrifice personal happiness for the public good. This also is too narrow a translation. Aretê includes “virtue” in this republican sense, but it is only one aspect of aretê. One can, for instance, have aretê in the field of art, not one of the human excellences usually trumpeted by the classical republicans. I find “excellence” to be a better translation. We can then use adjectives to differentiate between different types of human excellence. In this case, civic excellence designates those character traits and behavior required by political morality if one is to properly discharge one’s obligations as a citizen.

others and a fairmindedness in deciding when accommodation to their views should reasonably be made.”²⁷⁸

The normative foundations of the duty of civility are also largely agreed upon. First, the duty of civility is a constitutive norm of deliberative, democratic politics. As Rawls puts it: “As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality. Trying to meet this condition is one of the tasks that the ideal of democratic politics asks of us. Understanding how to conduct oneself as a democratic citizen includes understanding an ideal of public reason.”²⁷⁹

Deliberative democracy and the neo-Kantian conception of respect are bound up here in a reciprocally influential relationship. Deliberative democracy is required by the norm of respect and the norm of respect tells us what obligations citizens have within such a deliberative democracy. For the purposes of these chapters, however, we will approach these norms as if they were distinct obligations. Christopher Eberle supplies a particularly clear statement of the relationship between the norm of respect and the duty of civility. The liberal, he writes, “correctly argues that since each citizen has an obligation to respect her compatriots, she has an obligation to pursue public justification for each of the coercive laws she supports.”²⁸⁰

In sum, it is largely agreed that a commitment to deliberative democracy and the norm of respect require citizens to distinguish between private and public reasons. In accordance with civic excellence (e.g., willingness to listen to others), they are to advance only public reasons in the political discussion.

Beyond this, however, the duty of civility and the notion of public reason generate a panoply of questions. In this chapter I will address three. I choose these three questions for two reasons. First, they exist at the nexus between the empirical study and the theoretical material. They therefore offer an opportunity to develop that theory in the light of a particular, robust instance of reason-giving in the public sphere. Second, while the duty of civility does generate a vast amount of disagreement, it turns out that, besides agreement over the contours of the duty of civility, there is vast agreement concerning other aspect of the duty as well. There is, therefore, a standard theory of the duty of civility and the doctrine of public reason. This standard theory agrees upon the scope of the duty of civility, the importance of the epistemological distinction between religious and secular reasons, and the further prioritization of this epistemological distinction over the aretaic aspect of the duty of civility. The three questions I’m going to ask confront the standard theory of the duty of civility; therefore, we are not merely picking around the theoretical edges, but challenging widely shared theoretical elements of that theorizing concerned with the duty of civility.

²⁷⁸ JOHN RAWLS, *Political Liberalism* 217 (Columbia University Press 1993).

²⁷⁹ Id. at 218.

²⁸⁰ CHRISTOPHER EBERLE, *Religious Conviction in Liberal Politics* 84 (Cambridge University Press 2002).

First Question: Coercion and the Scope of the Duty of Civility

First, what sort of political action calls for the duty of civility? Rawls' limits his discussion to the "central case" of constitutional essentials and questions of basic justice, but other theorists think this constraint too limiting. The duty of civility, they argue, is called for, at the least, whenever a citizen's political decision might mobilize the coercive power of the state. Since it is typically thought that that everyday political activity, such as voting, mobilizes the coercive powers of the state and that this everyday political activity is more common and frequent than political activity concerned with constitutional essentials and questions of basic justice, a focus on coercion is typically thought to extend the scope of the duty of civility over a more expansive range of possible political activities. Coercion, therefore, has come to dominate the discussion of the duty of civility.

The empirical observations show that the deliberations over the posting of the Decalogue provide a great many temptations to violate the duty of civility, in both its epistemological and aretaic aspects. Yet, it must be conceded that there is no coercion involved in the posting of religious symbols. It must be asked, therefore, whether this is a political forum in which participants have obligations of civility. My answer to this question is yes. Getting to this answer requires identifying what is at stake in these debates. Following recent work by Nicolas Howe and relying upon the results of the case study, I conclude that both sides are attempting to take symbolic possession of the civic realm and that part of this possession is the erection of is the construction of the emotional subjectivity of the good citizen. Both sides are trying to define the emotive content of good citizenship by determining the appropriate emotive reactions that citizens are to have towards the display of the Decalogue. The appropriate emotive reaction to the display of the Decalogue is a mark of membership in the political community and to be a good citizen of the polity is feel the right way about that polity's monumental displays. One thing at stake in these debates, then, is the emotional subjectivity of the good citizen. While this is not a matter of coercion, I conclude in section II that it is the sort of political activity that calls for the duty of civility.

Second Question: What is a Public Reason?

Second, what does it mean for a reason to be "public"? The public-ness of a reason is meant to satisfy the demands of the principle of reciprocity: as Rawls articulates this principle, the exercise of political power "is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions."²⁸¹ It is agreed that a public reason is one that abstracts from an individual's own idiomatic point of view or one's comprehensive conception of the good, as Rawls likes to call it. It is disputed, however, as to what sort of abstraction is required.

²⁸¹ RAWLS, xlvii.

For Rawls, a reason is public if it is an element of a political conception of justice that is the object of an overlapping consensus of reasonable comprehensive conceptions of the good. To articulate a public reason, then, is to articulate a reason both that you find persuasive and that others, because participating in the same overlapping consensus, also find persuasive, or could find persuasive. A public reason, on this account, is one that abstracts from an individual's own idiomatic point of view to a set of reasons that are commonly shared.

Others abandon the idea of an overlapping consensus, so that to offer a "public" reason for political action is to offer reasons that "articulate *in the appropriate* with the very different points of view of the other members of the public."²⁸² On this view, a reason is "public" when it abstracts from an individual's own idiomatic point of view to another individual's idiomatic point of view, whether or not any elements of those points of view are shared. For instance, as Susan Liebell has recently argued, imagining one's self in another's situation seems to have been Locke's chief methodology in his *A Letter Concerning Toleration*. "John Locke asks the reader to image a scenario in which he – or his group – might be an interested party. Locke leads his reader to commit to a principle but then relocates the reader by switching or modifying power valences. Through reason, imagination, and emotion, Locke persuades his reader to remain faithful to the original principle."²⁸³ That is, rather than abstracting to shared concepts of politics and morality, Locke abstracts to the view points of concrete and particular others.

In either case, it is agreed that religious reasons are non-public. They are taken to be paradigmatic examples of non-public, idiomatic reason. This, I argue in section --, is a mistake. The distinction between religious reasons and secular reasons is of little importance, perhaps no importance, to a deliberative democracy. The distinction can not bear the great weight that the standard theory of the duty of civility places upon it: the religious/secular distinction does not track the distinction between public reason and idiomatic conceptions of the good, it does not identify anything particularly dangerous to deliberative democracy or disrespectful to others, and, examining the cases study, does not comport with liberals "intuitive" evaluation of the reasons and motives of either side to the debate over posting the Decalogue. Further, the acceptance of the distinction, and the attribution of "religious" to some reasons, is one mode by which those who offer such reasons seek to shield them from criticism. Criticism is just what these reason need, and in acquiescing to the attribution of religiousness, the liberal wrongly concedes that those reasons are inscrutable.

Third Question: Civil Excellence

The third question I engage concerns the relationship between the epistemological and aretaic components of the duty of civility. The standard theory of the duty of civility prioritizes the epistemological aspect and largely leaves the aretaic aspect unexplored. In

²⁸² EBERLE, 51.

²⁸³ SUSAN PL LIEBELL, *Lockean Switching: Imagination and the Production of Principles of Tolerations*, 7 Perspectives on Politics 823 (2009).

jettisoning the religious/secular distinction as unhelpful, I join the ranks of those who emphasize the aretaic aspect of the duty of civility. I do not think, however, that the duty of civility can completely do away with epistemological distinctions. What, however, is important about the epistemological distinction I will make – that between faith-commitments and non-faith-commitments – is not the distinction itself, but the attitude that we take towards our own faith-commitments. This attitude, I argue in Section V, enables us to fulfill the aretaic aspect of the duty of civility.

II. First Question: Coercion and Constitutional Essentials

Rawls would limit the duty of civility to matters of what he calls “constitutional essentials’ and questions of “basic justice.” These include “such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.”²⁸⁴ It now, however, seems that the preponderance of theorist believe that the duty of civility must be extended to all political action in which the citizen would be mobilizing the coercive powers of the state. Since voting is the chief means by which the citizen contributes to the activation of the state’s coercive power, the duty of civility extends not only to the question of the franchise but directly into the voting booth itself. Additionally, most think that the duty must extend not only to the individual’s own, direct political action but also to political advocacy: the duty of civility must not only construe one’s own motives for political action (e.g., voting) but must also temper one’s political advocacy, and perhaps other sorts of political discourse as well.

Taking the mobilization of the coercive powers of that state as the most salient of political activities does strike me as correct. Such coercion, however, is not present in the cases study. Indeed, the saliency of the posting of the Decalogue, or any other religious symbol, can not be explained by the presence of coercion. As proponents of posting are fond of saying, as Justice Scalia say here of Mr. Van Orden “[i]n no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way tot the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion.”²⁸⁵ Perhaps then proposals to post the Ten Commandments are not the sort of political action and advocacy that activates the duty of civility, and citizens have no obligations, qua citizens, towards each other when debating the state’s monumental displays of religious (or non-religious) symbols. When it comes to the mere posting of symbols, one may advance and act upon any idiomatic religious (or non-religious) belief whatsoever without any danger of violating the duty of civility.

Litigation and dispute over the state’s display of religious symbols has attracted too much attention and consumed too many resources, both political and financial, to

²⁸⁴ RAWLS, 213.

²⁸⁵ *Van Orden v. Perry*, 2865.

reach such a view. The atmosphere in the Rutherford County Commission's meeting, where there was booing and cheering, was thick with animosity and contempt. There were a plethora of opportunities to violate the duty of civility, and both citizens and commissioners took advantage of these opportunities. It is too much to suppose that this, of all places, is an arena where there is no duty of civility. Why then, if there is no coercion involved, have they in fact drawn so much concern and attention?

Nicolas Howe has recently and persuasively argued that a state's monumental or symbolic displays are not merely speech acts, but also performances. They articulate a script into a concrete activity, have a scene, require an audience and place various demands on that audience. With respect to the performative display of the Decalogue, several things are at stake. First, both sides to the debate contest over the legally recognized meaning of the symbol. Second, that legally recognized meaning of the symbol constitutes the meaning of the landscape of which it is apart, transforming that landscape into one of reverence or offense. Third, and most importantly from the point of view of this discussion, the constitution of the meaning of the landscape places "at issue . . . the cultural status of the 'citizen observer,' his or her competence to appear in public and participate in civic life." Having the law recognize a particular meaning for a symbol is important to both sides of the conflict because "law shows people how they should feel when they cast their gaze on a particular place and, perhaps more importantly, whether (and how) they should act on such feelings."²⁸⁶ Hence, the legal (and extra-legal) confrontation over the posting the Ten Commandments is, at bottom, an activity deeply concerned with subjectivity formation: both sides to the conflict are meaning to construct the reasonable citizen observer, who has the appropriate emotional response to the monumental display of the Decalogue, and which emotional response is a sign of inclusion in the political community. As Howe puts it, "when iconic landscapes are contested in the civil sphere, each side must accuse the other of acting beyond the democratic pale, of being guided by illicit, uncivil passions." Hence, "the symbol reproduces social boundaries and those boundaries can be *felt*."²⁸⁷

Howe's examination of the briefs in *Van Orden* and *McCreary County* is highly instructive. The state's briefing in *Van Orden*, for instance, "rested its case on two key propositions: that the Texas Capitol grounds constitute a kind of outdoor museum devoted to representing the 'cultural heritage' of Texas; and that the monument itself amounts to a 'passive acknowledgment' of Judeo-Christian law."²⁸⁸ The state's briefing presents the Capitol lawn as an "inclusive, multicultural place that 'gives voice' to all who have contributed to the many-hued social fabric of Texas."²⁸⁹ To do so, it adopts a distanced and synoptic perspective by appending two photographs to its briefing, one an aerial view and the other a view from one of the upper floors of the capitol building. From these views the text of the monument can not be read; indeed, as Howe points out,

²⁸⁶ NICOLAS HOWE, *Thou Shalt Not Misinterpret: Landscape as Legal Performance*, 98 *Annals of the Association of American Geographers*, 437 (2008).

²⁸⁷ *Id.* at 439. (emphasis in the original)

²⁸⁸ *Id.* at 445.

²⁸⁹ *Id.*

the monument can hardly be seen at all. The photos encourage the observer “to reflect upon the timeless integrity of the civic landscape. To some, perhaps most, that landscape will seem generic or banal This impression merely reinforces the case for the status quo.”²⁹⁰

By classifying this space as a museum, “the state uses the time-worn strategy of masking asymmetrical power relations beneath the impartial veneer of collection and display.”²⁹¹ It also depicts the monument as one viewpoint or voice amongst many others. The commanding metaphor employed by the state’s briefing, then, is not so much the museum as the market place of ideas. The effect of the metaphor in the state’s briefing is to “place[] white Protestants – the dominant group by any measure – on a ‘level playing field’ with all other groups.” Constructing such parity makes it appear as if removing the monument is an act of singling out one member from a group of peers that “would amount to an attack not only on Christians, but on the very principles supporting religious pluralism and free expression.”²⁹²

Both the state’s briefing and *amicus* briefing in support of the *Van Orden* monument depict its opponents as unreasonably “offended” by the Decalogue. They neither appreciate the value of free speech in the market place of ideas, nor the remembrance of the centrality of the “Judeo-Christian” tradition to the nation’s history. The harm that these opponents suffer is depicted as emotive, idiomatic, unreasonable, and selfish. In short, as offense. As Focus on the Family wrote, “federal judges act as prophylactic psychologists, sweeping ‘offensive’ religious content from sight before an ‘eggshell atheist’ plaintiff sees it.”²⁹³ Furthermore, this offense is depicted as willful. Wallbuilders, for instance, wrote that “the monument cannot capture an unwilling audience, and Mr. Van Orden can, of course, leave its premises at will or avoid it altogether. The delivery of the religious message is also inherently subject to the viewer’s free will. The viewer must, by deliberate affirmative act, choose to read the inscribed message and to ascertain its content.”²⁹⁴

In sum, advocates of the *Van Orden* monument, depict the location of the display as a neutral, timeless space for the presentation of different points of view, all equal, in the market place of ideas. Hostility towards the display of the Decalogue manifests an unreasonable emotional reaction to both the principles of free expression and the importance of “Judeo-Christianity” to the American republic. Such “offense” is not only unreasonable but uncivil – the having of it marks one as a political outsider, incompetent to participate in the political community.

Opponents of posting similarly contest over the symbolic meaning of the Decalogue, the social significance of the place wherein it is situated, and the emotions that it ought reasonably to elicit. Briefs against the continued display of the *Van Orden* monument emphasize the theological difference between the various translations and

²⁹⁰ Id. at 446.

²⁹¹ Id.

²⁹² Id. at 446-47.

²⁹³ Quoted at Id. at 448.

²⁹⁴ Quoted at Id.

enumeration of the Decalogue, focusing the audience upon the monument's actual text. These briefs also proffer an entirely different photo of the monument. This photo is taken from the ground so that monument occupies the entirety of the image and the words of the monument are legible. It is a "child's-eye view," as Howe puts it.²⁹⁵ It appears, then, as a religious text, rather than merely one more voice in the marketplace of ideas, or one more item in the museum. Hence, the site of the monument's display is consistently depicted as the seat of political power, the state capitol, "where the state declares the law of the land. To non-adherents confronted with the monument, that law would appear to leave them out."²⁹⁶

This briefing furthermore never mentions offense or hurt feelings. Instead, the non-adherent "will see this monument and realize it's not his or her government."²⁹⁷ The injury is "objective", located outside of the subjective and idiomatic preferences of the individual. In contrast to Wallbuilder's briefing, the non-adherent is not depicted as being expected to read the monument's text, an act that can plausibly be understood as willful, but rather as to revere it, which is understood as an involuntary emotive reaction.

Some briefing, that of "secular" opponents, depicts advocates of the display as "boorish,' 'malicious' and 'disdainful' of religious minorities."²⁹⁸ That is, supporters of the *Van Orden* monument are xenophobic, small-minded, and bigoted. Likewise, Americans United for the Separation of Church and State, "sought to historicize [the display of the Decalogue] by placing the Decalogue within the legacy of xenophobic Christian nationalism."²⁹⁹

A second "religious" constituency opposing the *Van Orden* monument "composed of Christians and Jews who believe that when government displays their sacred text and symbols it sullies them with politics," argued that "by displaying the Decalogue . . . the state inevitably drives a wedge between different sects by preferring one version over the other."³⁰⁰ What drew the secular and the religious constituency together in opposition to the display, notes Howe "was not a shared sense of stigmatic injury . . . but a belief that the state must not be allowed to exploit the ritual trappings of Christianity. In other words, their feelings were not at stake; it was the feelings of those awestruck, reverential, and penitent observers who, on viewing the monument, might identify with an image of America as a 'Christian nation.' What offended them was not the monument itself, but its use as a political tool."³⁰¹

In sum, opponents of the *Van Orden* monument depicted the civic space as the seat of political power (rather than a neutral market place of ideas), the Decalogue as a religious texts commanding reverence (rather than a merely one more voice amongst peers that might be avoided), and this reverence as an expression of boorish, xenophobic

²⁹⁵ Id. at 449.

²⁹⁶ Id.

²⁹⁷ Quoting Erwin Cherminsky, counsel to Mr. Van Orden, Id. at 450.

²⁹⁸ Quoting Freedom from Religion Foundation, Id. at 451.

²⁹⁹ Id.

³⁰⁰ Id.

³⁰¹ Id.

Christian-nationalism which, like “offense”, is unreasonable and uncivil and the possession of which marked one as an outsider to the political community.

Before drawing a philosophical conclusion from Howe’s argument, it is worth noting that these insights duplicate themselves, albeit with some variations, within the case study. The two myths present competing conceptions of American Republicanism. Each conceptualizes the meaning of the proposed place of display (the courthouse) differently: proponents of posting understood the state and, by extension, the courthouse through the metaphor of the war on crime, while opponents denied the appropriateness of considering the main function of the state to be combating criminality. Each champions a competing symbolization of the Decalogue, situating it with their favored mythic conception of American Republicanism. Symbolizing the Decalogue as the transcendent moral law mirrors the commitment to a synoptic perspective. Symbolizing the Decalogue as a creedal element of faith mirrors draws one’s attention to the text of the monument.

Each side depicts the other as alien to their favor mythic conception of American Republicanism, and therefore outside the civic norm. Opponents of posting take advocates of posting to be intolerant while advocates of posting take opponents to be unreasonable because offended by the transcendent moral law and therefore possessing a tendency towards criminality and sexually-licentious, both again outside the civic norm.

Although, I do not know how to best label this phenomena so that it would then be ranked amongst those subjects that count as matters of “constitutional essential and basic justice,” it does so seem to rank. The case study shows that the dispute is not just about the Decalogue, the Supreme Court, and the meaning of American Republicanism. It is about the appropriate emotive reactions to the state’s monumental displays. The appropriate reaction marks one as a member of the political community; inappropriate reactions (either reverence for a symbol of xenophobic Christian nationalism or offense at the transcendent moral law) mark one as alien to that political community. When Rawls speaks about constitutional essential and matters of basic justice, he seems to conceive of these two subject matters entirely in terms of propositions. So while the definition and construction of citizenship, which is at stake in this dispute, does seem to be a “constitutional essential” I am not sure that Rawls’ conception allows for the emotional aspect of citizenship. If it does not, then it should.

But labels should not concern us: there is no coercion here, but our understanding of citizenship is, clearly, in dispute. If the duty of civility holds when citizens are disputing amongst themselves about the mobilization of the coercive power of the state, it should hold when those same citizens are determining who, in fact, is a good citizen, a citizen who can lay good claim to participation in these deliberations.

III. Second Question: Public Reasons and the Secular/Religious Distinction

Within the theoretical literature, there is a great deal of disagreement about what makes a reason public. Nonetheless, there is little disagreement that “religious” reasons are paradigmatic examples of “personal” or non-public reasons and “secular” reasons are

paradigmatic examples of “public” reason; or, to be more precise, it is largely agreed that all religious reasons are personal, while only some secular reasons are. This section argues that making religious reasons the paradigmatic example of non-public reasons is a mistake. First, the religious/secular distinction does not track the private/public distinction (Sub-section A). Second, the distinction does not match the liberals’ “intuitive” moral-political judgments about the valence of political action undertaken under the Myth of the Covenant and the Myth of Separation (Sub-section B). Third, the concern about religious reasons over secular reasons is misguided because whatever features of religious reasons make them dangerous to deliberative democracy are, first, not shared by all religious reasons and, second, are possessed by some secular reasons. (Sub-section C). Fourth, assigning some reasons the adjective “religious” shields those reasons from immanent critique insofar as being religious entails being inscrutable. It is a mistake for liberals to treat religious reasons as inscrutable – it acquiesces in the “religiously” motivated political actor’s desire to remain free of criticism when criticism might very well be what their reasons most need. (Sub-section D).

A. *Religious/Secular – Private/Public*

While liberal theorists typically take religious reasons as paradigmatic examples of non-public reasons, it is patent that the Rawlsian distinction between a conception of justice and conceptions of the good does not track the religious/secular distinction. For Rawls, this distinction between the public and the personal is expressed in the difference between a political conception of justice subject to an overlapping consensus and the (reasonable) comprehensive conceptions of the good that participate in this political conception of justice. As Rawls notes, certain secular comprehensive doctrines, such as a moral (and non-political) conception of Kantian autonomy, must fall outside any overlapping consensus of reasonable political principles because “many citizens of faith reject moral autonomy as part of their way of life.”³⁰² Likewise, it would seem that doctrinal elements of some faiths must also fall outside any reasonable political principles because “under reasonable pluralism the religious good of salvation cannot be the common good of all citizens.”³⁰³

At the same time, Rawls recognizes the continuing influence that liberal religious traditions have upon western political institutions. He therefore allows for the possibility that reasonable political principles would be the object of an overlapping consensus of not only secular conceptions of the good, such as Kantianism and utilitarianism, but also of traditions of “free faith,” viz. those religious traditions that affirm “the political conception because its religious doctrine and account of free faith lead to a principle of toleration and underwrite the fundamental liberties of a constitutional regime.”³⁰⁴ Adherents to these differing traditions, because *arguendo* accepting liberal political

³⁰² RAWLS, xlv.

³⁰³ Id. at xli.

³⁰⁴ Id. at 145.

principles in an overlapping consensus, can all give political reasons that satisfy the principle of reciprocity.

Already we can see that there are some “religious” reasons and concepts that fall within the overlapping consensus (e.g., toleration) and some that do not (e.g., salvation). The problem is with the principle of reciprocity, the satisfaction of which is (or threatens to become) dependent upon socio-political circumstances in which the political actor advances reasons for political action. That is, in some (perhaps most) situations liberal political principles and the principle of reciprocity might themselves fail to overlap. Hence, millennialism might well have satisfied the principle of reciprocity in 19th century America while it is presently widely considered to be kooky mysticism, dangerous, irrational, and therefore not a possible participant to an overlapping consensus of liberal political principles. Political action and advocacy aimed at the Parousia can no longer satisfy the principle of reciprocity. Conversely, Rawls holds up the language of the Supreme Court as a possible example of public reasoning. One class of constitutional law, however, will make it plain that (supposing this judicial language to be liberal in the right way) it does not satisfy the principle of reciprocity. True, citizens could be inducted into the mysteries of this judicial language, but perhaps no more easily than they might be inducted into the mysteries of millennialism. Further, even after mastering either of these moral-political vocabularies there is no guarantee that the inductee would find either of them descriptively or normatively felicitous.

The philosophical difficulty is in specifying a set of condition under which reasons satisfy the principle of reciprocity without insisting that these reasons must, as a matter of sociological and psychological fact, be found to be reasonable by everyone to whom they might be directed. The challenges here are legion. As Christopher Eberle cogently points out in his exhaustive consideration of the subjection, this aspect of the doctrine of public reason naturally elicits two questions. A brief consideration of these two questions, and Eberle’s treatment thereof, highlights the saliency of the secular/religious distinction for the theorist of public reason.

The first question is, who constitutes the public? The second question is, on what sort of basis do the members of the public evaluate a prospective public justification? Eberle thinks that possible answers to these two question separate into two categories: populist accounts of public reasons and epistemic accounts of public reason.

Populist conceptions of public reason answer the first question inclusively: “the default position is that *each* citizen in a given liberal democracy counts as a member of the public and therefore plays a role in determining whether some rationale counts as a public justification.”³⁰⁵ It answers the second question by taking these citizens’ beliefs as they are: “the default populist position is that a rationale R counts as a public justification only if the members of the public find R acceptable in light of their existing evidentiary sets, irrespective of their epistemic pockmarks and doxastic defects.”³⁰⁶ Hence, populist conceptions of public justification resist any impulse to constrict the set of citizens. It also resists the idealization of those citizens by avoiding any conditional conception of

³⁰⁵ EBERLE, 200.

³⁰⁶ Id.

public justification; that is, a conception of public justification that holds a reason to be public in the case that citizens, appropriately idealized, *could* accept that justification as reasonable. Populist conceptions of public reason, then, express the principle of reciprocity (and the norm of respect upon which it is founded) to the fullest degree. In relying upon a populist conception of public reason, one directs reasons to one's fellow citizens as they actually are and avoids the temptation to give reasons for political action that others could accept, were they ideally situated, but in fact do not accept.

The problem with populist conceptions of public justification is that, given contemporary religious diversity, every possible public justification will be unacceptable to some reasonable citizen of some reasonable religious tradition or another. “[T]he actual disagreement among the citizens who inhabit large-scale liberal democracies requires the justificatory liberal to tinker with the most straightforward populist conceptions: only by weakening the most demanding and intuitively appealing populist conceptions is it feasible to suppose that central liberal commitments are amenable to public justification.”³⁰⁷ To find any public reasons that include core liberal commitments requires the populist conceptions of public justification to either constrict the domain of citizens or idealize those citizens. Doing so, however, unmoors the populist conception of public reason from the principle of reciprocity: “The appeal to what idealized citizens would believe is . . . a circuitous way for nonidealized citizens to express their disagreements with one another.” Idealized accounts of public reason simply provide a sophisticated and technical vocabulary for calling each other unreasonable, misinformed, or “doxastically defective” – hardly civil or respectful. The obvious means for avoiding this conclusion is the development of a criteria by which we all judge a reason to be the sort that would (and should) be agreed upon by all reasonable citizens. Hence, the difficulties with a populist conception of public reason provide the impetus for the development of an epistemic conception of public reason.

Epistemic conceptions of public reason maintain that a reason is public when it possesses one or more of several epistemic desideratum. The possession of this epistemic desideratum, in turn, imparts to the reason the appropriate degree of respect to allow it to satisfy the principle of reciprocity, even if that reason fails to meet the requirements of any possible populist conception of public justification. The idea is that there is some feature, or some collection of features, that makes a reason public, and that so long as one advances reasons that have this feature, one honors the principle of reciprocity irrespective of whether or not one's compatriots actually do accept that reason. Eberle surveys the literature and identifies eight desideratum that find favor with justificatory liberals: intelligibility, accessibility, in principle public accessibility, replicability, criticizability, dialogicality, independent confirmability, and provability. We need not go into the specifics here, but Eberle thinks that, at bottom, each has the same defect; namely, if the epistemic criterion can exclude a paradigmatic example of religious belief (Eberle takes this to be the mystically experience) then it must also exclude one or more moral beliefs that is absolutely essential to liberal, democratic political institutions. “An

³⁰⁷ Id. at 232.

epistemic conception that mandates restraint regarding mystical perception must accord due weight to the autonomy of CMP [Christian Mystical Practice]. If the justificatory liberal accords due weight to the autonomy of CMP, then she'll be unable to articulate a conception of public justification strong enough to mandate restraint with respect to CMP that doesn't *also* mandate restraint regarding beliefs essential to healthy political decision making and advocacy, and thus that must be arbitrarily exempted from even-handed treatment."³⁰⁸

Part of the point of discussing Eberle's work is to lay out the contours of public reason. The central lesson, however, is not so much about what sort of reasons ought to count as a public rather than personal, but about the alignment of that distinction with the secular/religious distinction. Although religious rationales are a paradigmatic example of non-public justifications, it is impossible, or at least not hitherto accomplished, to give a general specification of "public reason" that excludes just the sort of religious reasons the liberal intuitively believes ought to be excluded from the realm of public reason, and only such religious reasons. Whether adhering to a populist or epistemic conception of public justification, religious reasons must either be included within the set of public reasons or, in attempting to exclude them, the liberal must give up a central norm of liberal, democratic politics.

B. *The Secular/Religious Distinction and the Myths*

The difficulty of taking religious reasons as a paradigm of non-public reason is compounded by asking whether religious or secular reasons motivated the actors in the case study. To explore this question, we need a definition of "religious" and "secular." Robert Audi distinguishes secular reasons from religious reasons as follows. "I am taking a secular reason as roughly one whose normative force, that is, its status as a *prima facie* justificatory element, does not evidentially depend on the existence of God (or on denying it) or on theological considerations, or on the pronouncements of a person *qua* religious authority. Roughly, this is to say that a secular reason is a ground that enables one to know or have some degree of justification (roughly, evidence of some kind) for a proposition, such as a moral principle, independent of having knowledge of, or justification for believing, a religious position."³⁰⁹ The hemming and hawing here is evident: in these two sentences, there are four "or"s, three "roughly"s, two parenthetical statements, and one *qua*. We are also blessed with a *prima facie*. Nonetheless, the concept of "religion" is notoriously difficult to specify, and Audi's definition is intuitive. If the reason has to do with God, with His scripture, or the earthy authority's charged with, who have taken it upon themselves, to guard these, then the reason is religious. Otherwise, it is secular.

Now, do those who of the case study who propose posting the Decalogue have secular or religious reasons for doing so?

³⁰⁸ Id. at 291.

³⁰⁹ ROBERT AUDI, *Religious Commitment and Secular Reason* 86-7 (Cambridge University Press 2000).

As preamble to my answer, I suppose that liberal sympathies lie with those opposed to the posting of the Decalogue. So that, from this point of view, the correct answer to this question is that advocates of posting rely upon religious reasons for posting and that the duty of civility requires these citizens to refrain from voicing or acting upon these reasons. Conversely, on the standard theory of public reason, I assume that the liberal would wish to conclude that opponents of posting rely upon public, non-religious reasons. Their opposition to posting, then, is salutary because permitted by the duty of civility.

Also as preamble, recall that both proponents and opponents of posting conduct their political activity from within a mythic understanding of American republicanism. These political actors do not determine the content of their political action by deduction from general principle of justice (as the theorist would like) but by situating that political action within a narrative understanding. It is not therefore entirely clear that one can identify discrete propositional and principled statements that motivate this action. One must abstract such claims from the narrative in which they are embedded. While there is some speculation in such an activity, I nonetheless believe that it can be accomplished with sufficient accuracy. I begin by answering this question for proponents of posting before answering it for opponents of posting.

First observe that what would be the most obvious non-secular, religious reason for the attempt to post the Decalogue is entirely absent; namely, that God, either through personal revelation or scripture, has instructed us (me) to post the Ten Commandments in the courthouse. As noted earlier, proponents of posting make no references to scripture, with the exception of one radical from Hamilton County (more on this below), and no one at all claimed to have received private communiqués from the Almighty. No one claims to have a mystical experience, such as the sort that Eberle above calls CMP, directing them to undertake this political task.

God does provide a guarantee of the transcendence of the Decalogue and this transcendence is important to proponents of posting. By this transcendence, the Decalogue is represented as absolute and thereby an effective moral code. This probably makes the reason for posting dependent upon “a religious position.” But, remember, God’s guarantee has a rather utilitarian (which I suppose to be secular, rather than religious) function: without a transcendent moral law and obedience thereto, it is supposed that various social and political units will unravel in disorder. The Court will over reach its authority, the states will have their sovereignty violated, and the community and family will be ransacked by criminals and sexual licentiousness. These utilitarian reasons seem to boil down to the claim that posting the Decalogue will restore, or contribute to the restoration of, America to her former moral glory, part or all of which is the protection of children and family members from criminality (either from becoming victims or themselves becoming criminals) and sexual immorality. To all appearances, these secular utilitarian reasons and religious (albeit non-scriptural) reasons are inextricably intertwined.

Perhaps we can extricate them by making a further distinction. It is common in this theoretical material to distinguish between reasons and motives. Audi, for instance,

makes this distinction. As he puts it, reasons provide the *what* for political action and motives provide the *why* of political action. A citizen might have a panoply of reasons for political action, some of which are religious and some of which are secular. Audi argues that it is a requirement of democratic citizenship that, in addition to having a secular justification for one's political action, those secular reasons "explain" the citizen's political action in the sense that "one would act on it even if . . . one's other reasons were eliminated. Roughly, the idea is that one should be advocating or supporting the law or policy in question in part *for* some adequate secular reason, where the role of this reason is sufficiently important to explain why one is so acting (even if some other consideration is also sufficient for this)."³¹⁰ This distinction imagines reasons as discrete packets of data, propositional in form and warehoused in an individual's cognition. These discrete packets of data can be identified as either secular or religious. In particular situations, one of these reasons is activated, and this activated reason is the motivation for political action (or other types of action). The activated reason explains the political action, so that if all the activated reasons are secular and none religious, then we assay the political action as secular, rather than religious. It is possible, then, to have religious reasons that do not provide the motive for political action, even if those religious reasons *could* have motivated that very same action.

Now we may ask, does the secular or the religious part of the Myth of the Covenant of American Republicanism supply the motivation for political action? Does the religious or the secular aspect of this myth explain the actors political action? There are two general attitudes by which one might answer this question, either charitably or skeptically. On the charitable analysis, we take the advocate at their word: they think of themselves as religiously motivated and so will we. The religious aspect of the Myth of the Covenant motivates their political action and advocates of posting do so because the Decalogue is transcendent and absolute, given by God, who is the guarantor of their absoluteness.

On the skeptical analysis, we view the advocate of posting through a "hermeneutics of suspicion." People are motivated by a great many things; so many so that on many occasions they do not understand themselves. They are like one of Socrates' interlocutors, they believe that they know when they do not. Although they think of themselves as religious actors, they are in fact motivated by the secular, utilitarian aspect of the Myth of the Covenant. They think the posting of the Decalogue useful, which usefulness is subsumed under its absoluteness. God is merely the guarantor of this absoluteness, a necessary ancillary, but little more. Concomitantly, we would regard the religious motivation proffered by advocates as nothing more than professed. The utilitarian and secular aspect of the Myth of the Covenant holds unconscious sway over the advocate of posting.

Either approach places liberals who maintain the standard view of the religious/secular distinction into a difficulty. First, if we approach the Myth of the Covenant skeptically, we reach the conclusion that proponents of posting have a secular

³¹⁰ AUDI, 96.

motive. By the religious/secular criteria of public reason, one must conclude that advocates of posting have supplied the sort of public reason that satisfies the principle of reciprocity.

I take it, however, that the liberal's sympathies lie in the opposite conclusion, that the reasons and motives for political action supplied by the Myth of the Covenant are just the sort that fall outside the realm of public reason. Advocating for the posting of the Decalogue violates the duty of civility. It is only by approaching the advocate of posting with a charitable attitude that the liberal can reach their favored conclusion – that this myth supplies non-public, religious motives for political action.

The difficulty comes when we ask the same question of the opponents of posting: are they motivated by the secular or the religious aspect of the Myth of Separation?

First, approaching them with the charitable attitude, recall that opponents of posting attempt to disentangle the affairs of governance from the affairs of religion. They say that doing so minimizes political violence and enables religious flourishing. All of this seems secular enough, the enablement of religious flourishing grounded, say, in a commitment to pluralism rather than to any Biblical or theological principle.

There is, however, more to the story. Opponents of posting, unlike advocates of posting, quote scripture as authority for their actions. Indeed, the New Testament is their favored source. Not only does the New Testament, I suppose, not provide any secular reasons for political action, it is down-right sectarian, having no pretenses to universality or authority over non-believers (as does the Decalogue, when symbolized as the transcendent moral law). If liberals continue to view opponents of posting with a charitable attitude, they must conclude that the opponents of posting have religious motives, just as do proponents of posting. Opponents too, therefore, violate the duty of civility. Indeed, since their favored text is sectarian, their violation of this duty is more egregious than is that of the advocates of posting.

Now, since the liberal theorist would be sympathetic (I continue to assume) to those opposing the posting of the Decalogue, there are several means by which they might excuse the opponents' religiously motivated political action. It could be said that since they are advocating inaction, they are not, as a matter of fact, advocating at all; they are merely counseling restraint. Since they do not want to mobilize the coercive powers of the state they can have and act upon any idiomatic reason that they may like without concern for the duty of civility. But neither do advocates of posting desire to motivate the coercive powers of the state. As I just argued, the moral problem with the posting of the Decalogue is not to be found in the possibility of coercion, but in the performative and subjectivity forming aspects of the posting. In this respect, advocates and opponents of posting are vying over the same political turf. If advocates are subject to the duty of civility, then so must be opponents.

Liberal could also say that the duty of civility does not require citizens to refrain from religiously motivated political action, only that, when they engage in such political action, they make good faith efforts to find alternative non-religious reasons for that action. As Rawls indicates, "reasonable . . . [comprehensive] doctrines may be introduced in public reason at any time, provided that in due course public reasons, given

by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.”³¹¹ Call this the “due course proviso.”

While it seems likely to me that opponents of posting indeed satisfy the due course proviso, its introduction strikes me as an infelicitous theoretical move. It effectively requires that one approach the opponent of posting with a skeptical attitude. Although opponents of posting present themselves as having religious motives (indeed, scriptural and sectarian motives), the liberal theorist excuses those motives because they also have, or could have, secular reasons and motives for the same position that they do, or would, introduce in “due course.” The proviso asks us to take scriptural references as epiphenomenal and the secular reasons moving in the background as actual. By viewing opponents through such a “hermeneutics of suspicion” the liberal’s favored conclusion can be reached: opponents of posting do not violate the duty of civility because they advance secular reasons and act upon secular motives.

Now the infelicity of the “due course” proviso is apparent. I supposed the liberal’s favored conclusion was that advocates of posting violated the duty of civility while opponents of posting do not. The liberal can reach this conclusion only by approaching the Myth of the Covenant with a charitable attitude, taking advocates of posting at their word, while approaching the Myth of Separation with a skeptical attitude, perceiving secular reasons and motives even when opponents cite scripture.

This is a double standard. Perhaps it is an acceptable one, and the theorist could give good reasons for it. I do not think it worth while to attempt it, however. Rather, the liberal theorist should circumvent it altogether by abandoning the religious/secular criteria of the duty of civility and attacking the problem from a different direction. Instead of asking whether reasons and motives are religious or secular, and excluding reason based upon this epistemic determination, liberals should simply ask whether or not proffered reasons are good or bad and what attitude the political actor takes towards those reasons. But before we get there, it is worth asking why liberals have given so much attention to religious reasons as a potential threat to democratic politics.

C. *The Dangerousness of Religious Reasons*

I have hitherto argued that the religious/secular distinction, although taken as a paradigmatic example of the public/private distinction, can not be comfortably situated within that distinction. Examining a concrete example of reason-giving (the Myth of the Covenant and the Myth of Separation) I argued that the religious/secular distinction does not capture what the liberal theorist finds morally disturbing about this type of religiously motivated political action.

At this point, I want to approach the problem from a different angle and ask why the liberal finds there to be tension between religiously motivated political actors and

³¹¹ Rawls, *Political Liberalism*, lii.

democratic politics. Perhaps unearthing the un-democratic features of religious belief and motivation will resuscitate the usefulness of the religious/secular distinction.

Audi lists a number of features of religious reasons that make them a danger to democratic politics. Religious reasons, he says, rely upon an infallible supreme authority, possess condemnatory tendencies, threaten religious domination, can motivate cult formation and the “specter of fanaticism”, might dangerously inflate the believer’s sense of self-importance, and generate within the believer a passionate concern with outsiders. Further, he notes that religious liberty is both central to democratic politics and fragile; its preservation is therefore deserving of solicitous care. This is especially so, he says, because parents are greatly concerned to pass their faith on to their children. They will, therefore, go to great lengths, including politics, to insure that this happens.³¹²

One need not have a sophisticated view of history to know that various secular ideologies pose just these same threats. Given the great horrors these have inflicted upon the 20th century (religion might have given us the Crusades, but nationalism gave us the “genocide”) it is difficult to see why one would focus on religion to the exclusion of these secular ideologies. Audi does not miss this point: “There may be other kinds of reasons to which each of these eight points (or close counterparts) applies; but if there are any non-religious reason to which all of them apply, it is in a different way and is in any event a good prima facie reason to impose similar restrictions on the use of those reasons.”³¹³ Religious reasons, then, if a danger to democratic politics, are not uniquely so.

If religion alone does not possess those features antithetical to democratic politics, perhaps religious reasons ought nonetheless to be of especial concern to theorist of liberal democracy because all religious reasons necessarily harbor these pernicious tendencies, while only some secular ideologies do. The evidentiary record, however, will not sustain such a claim. Indeed, frequently just the opposite: impartial observers often point to religious institutions as incubators of that civic excellence necessary for the maintenance of democracy and to religious institutions as important repositories of social power counterbalancing the power of the state. It is as a member of a congregation that one might learn to interact with others with whom one disagrees, form collective decisions through compromise, and learn the value of self-sacrifice, forbearance, and service. While some religious institutions (both Christian and non-Christian) are bastions of hate, close-mindedness, and tyranny, this is certainly not universally, or even generally, true. This is why one sees the justificatory liberal back peddling so heavily, adding provisos and caveats to the standard theory of public reason, when confronted with the political activity (paradigmatically if not imaginatively) of Dr. Martin Luther King Jr.. Not only does religion not uniquely foster those vices mentioned by Audi, but in some instances disrupts them and replaces them with civic excellence.

The connection between the faults mentioned by Audi (which are real faults) and religion are too contingent to direct the theorist’s attention to religion alone: religion

³¹² AUDI, 100-103.

³¹³ Id. at 103.

promotes both bigotry and toleration, and does so neither more nor less than secular ideologies. It is all a matter of specifics.

It is hard to avoid the conclusion that while liberal theorists professes to be concerned with different types of reasons, they are in fact targeting a certain sort of reasoner. Audi for instance, while never mentioning any particular names, seems to have the Religious Right in mind, although he disavows this: “there is a division of judgment regarding the question whether fundamentalism is undermining democracy in the United States, but there is little disagreement on the powerful influence of the “religious right,” as it is often called, in American political life.”³¹⁴ Generally, throughout this theoretical material, liberals seem to have the corpulent and unctuous Reverend Jerry Falwell in mind when discussing the danger that religion poses to democratic politics.

But it is not clear to me that, to the extent liberals find the Falwells of the world politically and morally obnoxious, it is because they purport to be religiously motivated. To the contrary, the liberal’s focus upon types of reasons, and the impulse to engage in an epistemic taxonomy of those reasons is misleading. The distinction between religious reasons and secular reasons, as I have just argued, does not get the liberal what they want. A different approach to the problem is in order.

IV. Third Question: The Aretaic Aspect of Civility

In one way, I have already answered the third question: the standard theory of the duty of civility prioritizes the epistemological aspect of the duty over the aretaic aspect. In abandoning the distinction between secular and religious reasons, we abandon this prioritization and shift focus to the aretaic aspect of the duty. The types of reasons we act upon and introduce to the democratic discussion are secondary to the ways in which we do these things. In this regard, liberals should insist that, as a matter of civic excellence, participants to the democratic discussion have obligations both to speaking to others and to listening to others in ways that affirm the commitment to deliberative democracy and respect for individuals. We can satisfy these two obligations, I argue, only by taking the right attitude towards our own beliefs.

I will begin my elaboration of this claim by presenting two further examples that show the inappropriateness the religious/secular distinction while, and more importantly, leading into a discussion of my favored approach to the duty of civility. This approach is typified by Jeffrey Stout and (one version of) Richard Rorty. From these two I pick up a different epistemic distinction, that between faith-claims (or, before they are articulated, “faith-commitments”) and non-faith claims. I also pick up the commitment to “immanent critique”. I conclude that although these two differ in their specific approach to the problem of public reason, they both insist that participants to the democratic discussion satisfy their obligation to introduce faith-claims into that discussion only in a controlled manner and that they take other participants to that discussion seriously when they introduce their own reasons into the discussion.

³¹⁴ Id. at 100-3.

I contribute to the elaboration of these two commitments by arguing that both obligations can be satisfied only when the participant has “responsibly held faith-claims”. Another example displays the saliency of these commitments before I unpack the relationship between responsibly held faith-commitments and our obligations to introduce faith claims into the democratic discussion only in a controlled manner and to take others seriously when they introduce their reasons into the democratic discussion.

A. *Two Examples*

The following two examples display the great distance that exists between Biblically based principles and the political action supposedly inspired by those principles.

In considering these examples and for the remainder of the chapter, I will assume that the Bible is the paradigmatic source of religious reasons. For the Protestant tradition, at least, this is more than an assumption; it is descriptively accurate. Even for those Christian denominations that do not subscribe to the dictum *sola scriptura*, the Bible remains an important source of religious authority. For these traditions, there might very well be other sources of religious reasons: personal divine revelation, ecclesiastical authority, Biblical commentary, and so forth. But even so, the Bible plays a central role in all Christian traditions, and it therefore seems unproblematic to assume that, for those claiming Christian religious motives, the Bible would be an authoritative source. One example focuses on the attempt to post the Decalogue. The other, with which I begin, focuses on this issue of gay marriage.

1. *Gay Marriage*

Conservatives on the issue of gay marriage frequently cite Leviticus 22:18 in support of their political activity (“And with a male you shall not lie as one lies with a woman. It is an abhorrence.”). This prohibition underdetermines the political activity (legal prohibitions on same-sex marriages) it purports to support. First, the abhorrent and prohibited activity is only male on male sex. As Robert Alter notes in his commentary, “lesbianism, which surely must have been known in the ancient Near East, is nowhere mentioned.” Further, again following Alter, “lie as one lies with a woman” indicates that the prohibited sex is that which most closely mimic “traditional” sex – namely anal and intercrural sex. Again, as Alter notes, “other forms of homosexuality do not seem of urgent concern.”

Further, the passage prohibits certain types of male on male sex, but it says nothing of marriage. The inference from a prohibition on this sort of male-on-male sex to a prohibition on all same sex marriages must include a suppressed premises that go something like this: more male-on-male anal and intercrural sex occurs when homosexual men are married than when they are not; furthermore, allowing female-female marriages encourages the Biblically abhorred male-on-male sex. Therefore,

legally prohibiting gay marriage (both man-man and woman-woman) reduces the amount of the Biblically abhorred male-on-male sex.

The veracity of such premises is dubious, but I am not evaluating their truth. I am only asking whether or not they are Biblical or “religious.” It seems likely to me that they are not, and, furthermore, to show them to be so would require a great deal of fancy footwork. In fact, it is most likely that these are not the suppressed premises relied upon by opponents of gay marriage. They are the charitable interpretation thereof and I suspect that empirical research would reveal that, in fact, the gap between Biblical principles and the animosity towards gay marriage is bridged by other principles both less logical and less humane.

Nonetheless, opponents of gay marriage are correct insofar as they think male-on-male sex is not merely a private matter but one of concern to the polity as a whole. According to the scriptural passage, they have a deep personal and communal interest in prohibiting this sort of male-on-male sex. After a whole sequence of sexual mores (including female bestiality – “And a woman shall not present herself to a beast to couple with it. It is a perversion.”), we discover that God enforces these mores by means of the standard covenant theology: “Do not be defiled through all of these, for through all of these were the nations that I am about to send away before you defiled. And the land was defiled, and I made a reckoning with it for its iniquity, and the land spewed out its inhabitants.” (Lev. 18: 24-25) Hence, male-on-male sex defiles the whole land in which it takes place, and all that land’s inhabitants can expect to pay the penalty. God’s covenant does not recognize a realm of personal privacy distinct from matters of politics. An individual’s sexual (im)morality harms the collective, and God announces himself to be the agent of that harm.

This example shows how Biblical principles underdetermine the choice of political action. The second example, to which I now turn, shows the specificity of Biblical principles.

2. *The Decalogue and Deuteronomy*

With respect to the posting of the Decalogue, there is at least one passage of scripture directly on point, as the lawyers say. In Deuteronomy Moses addresses the Israelites before they enter the Promised Land. Amongst other topics, he re-iterates the “Ten Words” and immediately at 6:6-9 gives the following instructions: “And these words that I charge you today shall be upon your heart. And you shall rehearse them to your sons and speak of them when you sit in your house and when you go on the way and when you lie and when you rise. And you shall bind them as a sign on your hand and they shall be as circlets between your eyes. And you shall write them on the doorposts of your homes and your gates.”

We have here an explicit statement of how the Decalogue ought to be treated, how it ought to be taught to the younger generation and where it ought to be put on public display. Indeed, since “your gates” probably means the city’s gates, and the city’s gates were the gathering place of the elders, who there dispensed justice, it is possible to read

this statement as requiring just what advocates of posting wish to do: post the Decalogue at the place where justice is meted out, viz., the courthouse. It is curious, then, that within the subject discourse this passage is referenced only once – by one of Hamilton County’s extremists, who drew from it just this conclusion.

Getting to this conclusion, of course, requires that part of the passage be read from a historical and metaphorical point of view (recognizing gates as the place where justice is meted out) while simultaneously ignoring other parts of the passage (binding them as a sign on the hand and as circlets between the eyes, none of the participants, as far as I can tell, having done this). The suspicion, however (which can not be confirmed), is not that advocates refuse such a reading of the passage, but that the passage is simply not a part of their theological or political imagination.

Of course, the theological points I have just made are not at all sophisticated, but that is the very point. Because so obvious, they should have caught the attention of anyone who professes sincere reverence for God and His scripture. The two examples thus show the two sides of the same problem: sometimes scripture is presented as the impetus for political action when it in fact underdetermines that political action; at other times, scripture seems to be right on point and yet is ignored, almost completely. Now, what is the liberal to do about these phenomena? Calling these reasons religious and then refusing their admittance to the political debate is of no help. What is needed is immanent critique.

B. Stout, Rorty, and Immanent Critique

My consideration of the two examples shows that there are rather deep gaps between Biblical principles and certain political advocacy (anti-gay marriage and the posting of the Decalogue) which are typically taken to be “religiously” motivated. By accepting the proffer of religiousness, the liberal admits that those reasons are inscrutable and fails to engage them in critique. In any case, dividing reasons into those that are religious and those that are secular, conducted for the purposes of excluding “religious” reasons, seems to me to participate in this acquiescence. It encourages the classification of certain reasons as impermissible sources of political action merely by their type, thereby avoiding the effort of evaluating the strength of those reasons. This evaluation, through “immanent critique”, is just what is called for by the commitment to deliberative democracy and the norm of respect.

I thus join what seems to me to be a growing minority position that rejects the religion/secular distinction as signification to democratic theory and instead accepts the permissibility of “religious” reason while also demanding that those reasons, like all other reasons, be subject to testing and critique, and assayed as either good reasons or bad reasons irrespective of their supposed religiousness or secularness. Jeffrey Stout is a prominent member of this minority faction.

He rejects both Rawl’s original formulation of the doctrine of public reason and that revision of it that includes the “due course” proviso. His argument begins by noting

that the doctrine of public reason is at odds with two values central to modern democratic politics. The free expression of religious premises, he says, is

morally underwritten not only by the value we assign to the freedom of religion, but also by the value we assign to free expression, generally. All citizens in a constitutional democracy possess not only the right to make up their minds as they see fit but also the right to express their reasoning freely, whatever that reasoning may be. It is plausible to suppose that the right to free expression of religious commitments is especially weighty in contexts where political issues are being discussed, for this is where rulers and elites might be most inclined to enforce restraint.³¹⁵

Any doctrine that counsels such restraint therefore has high hurdles to clear, and the Rawlsian doctrine of public reasons comes up short. For Stout, the costs of insisting upon the doctrine of public reason are grave:

If [religiously committed citizens] are discouraged from speaking up in this way, we will remain ignorant of the real reasons that many of our fellow citizens have for reaching some of the ethical and political conclusions they do. We will also deprive them of the central democratic good of expressing themselves to the rest of us on matters about which they care deeply. If they do not have this opportunity, we will lose the chance to learn from, and to critically examine, what they say. And they will have good reason to doubt that they are being shown the respect that all of us owe to our fellow citizens as the individuals they are.³¹⁶

Rawls maintains that citizens can respectfully mobilize the coercive powers of the state only by appealing to those reasons that are the subject of an overlapping consensus. Perhaps appealing to the vocabulary and reasons supplied by the overlapping consensus is a way of showing respect to one's fellow citizens, but it is not the only one:

Suppose I tell you honestly why I favor a given policy, citing religious reasons. I then draw you into a Socratic conversation on the matter, take seriously the objections you raise against my premises, and make a concerted attempt to show you how *your* idiosyncratic premises give *you* reason to accept my conclusion. All the while, I take care to be sincere and avoid manipulating you. Now, I do not see why this would qualify as a form of disrespect.

³¹⁵ JEFFREY STOUT, *Democracy and Tradition* 63-4 (Princeton University Press 2004).

³¹⁶ *Id.* at 64.

Yet it does not involve basing my reasoning on principles that no reasonable citizen could reasonably reject.³¹⁷

This form of dialogical interaction, asserts Stout, shows respect for one's interlocutors in "his or her particularity."³¹⁸ In contrast, Rawls focuses on the sort of reasons "that *anyone* who is both properly motivated and epistemically responsible would find acceptable." Hence, "it appears that Rawls is too caught up in theorizing about an idealized form of reasoning to notice how much work candid expression and immanent criticism . . . perform in real democratic exchange."³¹⁹ Stout concludes that "real respect for others takes seriously the distinctive point of view *each* other occupies. It is respect for individuality, for difference."³²⁰

Might there not be, however, pragmatic reasons, albeit moral ones, for requiring that religiously motivated believers refrain from advancing religious reasons for their political action? Richard Rorty thinks so, or, since he has modified his claim some what, at one point did. Rorty's original claim, as Stout puts it is that "the public expression of religious premises is likely to bring a potentially productive democratic conversation grinding to a halt." And he quotes Rorty: "The main reason religion needs to be privatized is that, in political discussion with those outside the relevant religious community, it a conversation-stopper."³²¹

Stout's rebuttal is that religion in fact is not essentially a conversation-stopper or, if it is, no more so that other final commitments, including secular ones. Stout concedes that "there is one sort of religious premise that does have the tendency to stop a conversation, at least momentarily – namely, faith-claims." Such claims avow

a cognitive commitment without claiming entitlement to that commitment. In the context of a discursive exchange, if I make a faith-claim, I am authorizing others to attribute the commitment to me and perhaps giving them a better understanding of why I have undertaken other cognitive or practical commitments. I am also making the claim available to others as a premise they might wish to employ in their reasoning. But I am not accepting the responsibility of demonstrating my entitlement to it.³²²

Stout makes two observations about these faith-claims. First, not every religious premise is a faith-claim. Some assert religious claims while also being prepared to demonstrate their entitlement to those claims. Hence, "we need to distinguish between discursive problems that arise because religious premises are not widely shared and those

³¹⁷ Id. at 72.

³¹⁸ Id.

³¹⁹ Id. at 73.

³²⁰ Id.

³²¹ Id. at 85.

³²² Id. at 86-7.

that arise because people who avow such premises are not prepared to argue for them.” Second, not every faith-claim is religious. Following Brandom, Stout maintains that “everyone holds some beliefs on non-religious topics without claiming to know how they are true.” Non-religious faith-claims are “quite common in political discourse, because policy making often requires us to take some stand when we cannot honestly claim to know that our stand is correct. That is just the way politics is.”³²³

Confronted with the ubiquity of faith-claims, Stout thinks one has three options: “(1) to remain silent; (2) to give justifying arguments based strictly on principles already commonly accepted; and (3) to express their actual (religious) reasons for supporting the policy they favor while also engaging in immanent criticism of their opponents’ views.”³²⁴ Stout’s favored position, with which I agree, is (3). Insisting upon (1) violates the norms of free religion and free expression. (2) is impracticable, given the vast degree of diversity in all modern democracies: welfare assistance, punishment, military policy, abortion, euthanasia, and environmental policy all seem to be subjects lacking commonly accepted principles.³²⁵ As for (3),

there are many circumstances in which candor requires full articulation of one’s actual reasons. Even if it does lead to a momentary impasse, there is no reason to view this result as fatal to the discussion. One can always back up a few paces, and begin again, now with a broader conversational objective. It is precisely when we find ourselves in an impasse of this kind that it becomes most advisable for citizens representing various points of view to express their actual reasons in greater detail. For this is the only way we can pursue the objectives of understanding one another’s perspectives, learning from one another through open-minded listening, and subjecting each other’s premises to fair-minded immanent criticism.³²⁶

Because of this critique Rorty has reconsider his position concerning the appropriateness of introducing religious reasons into the democratic discussion. He does not abandon his anti-clericalism. He refines it. There is, he says, a difference between “congregations of religious believers ministered to by a pastor and . . . ‘ecclesiastical organizations’ – organizations that accredit pastors and claim to offer authoritative guidance to believers. Only the latter are the target of secularist like myself. Our anti-clericalism is aimed at the Catholic bishops, the Mormon General Authorities, the tele-evangelists, and all the other

³²³ Id. at 87.

³²⁴ Id. at 88.

³²⁵ Id. (citing Kent Greenawalt.)

³²⁶ Id. at 90.

religious professionals who devote themselves not to pastoral care but to promulgating orthodoxy and acquiring economic and political clout.”³²⁷

He is persuaded, he says, by Wolterstorff’s claim that both “law and custom should leave him free to say, in the public square, that his endorsement of redistributionist social legislation is a result of his belief that God, in such passages as Psalm 72, has commanded that the cause of the poor should be defended. For I can think of no law or custom that would hinder him from doing so that would not hinder me from citing passages in John Stuart Mill in justification of the same legislation.”³²⁸ On the other hand,

suppose that someone says that his reason for opposing legislation that permits same-sex marriage, or that repeals anti-sodomy laws, is his commitment to the belief that Scripture, and in particular, the familiar homophobic passages in Leviticus and in Paul, trump all the arguments in favor of such legislation. Here I cannot help feeling that, though the law should not forbid someone from citing such texts in support of a political position, custom *should* forbid it. . . . Religious people who claim a right to express their homophobia in public because it is a result of their religious convictions should, I think, be ashamed of themselves, and should be made to feel ashamed. Such citation should count as hate speech, and be treated as such.³²⁹

Rorty says he can think of no principle that can distinguish his differing attitudes towards Psalm 72 and Leviticus 18: “it would be nice if I could appeal to a principle which differentiated between citing Psalm 72 in favor of government-financed health insurance and citing Leviticus 18:22 in opposition to changes in the law that would make life in the U.S. more bearable for gays and lesbians. But I do not have one.”

However, when he says he has no principle that distinguishes the two examples, he seems to mean no epistemic principle; that is, there is nothing to distinguish the epistemically validity of these reasons that would make one Biblical source, but not the other, a permissible reason for political action. Psalm 72 and Leviticus 18 have the same epistemic status. Rorty does not say so explicitly, but he seems to locate the difference between the two not in the epistemic validity of their source but in the (perceived) character of the political advocate relying upon that source. For instance, Rorty’s suspicion is that the citation to Leviticus is merely cover for “everyday peacetime sadism that uses religion to excuse cruelty” towards homosexuals and that ecclesiastical organizations “encourag[e] exclusivist bigotry [to] bring money and power to

³²⁷ RICHARD RORTY, *Religion and the Public Square: A Reconsideration*, 31 *Journal of Religious Ethics* 141, 141 (2003).

³²⁸ *Id.* at 142-43.

³²⁹ *Id.* at 143.

ecclesiastical organizations.”³³⁰ The faults here are not with religion per se, but with the motivation and character of those who use, or purport to use, it for their own political purposes. Again,

It is one thing to explain how a political stance is bound up with one’s religious belief, and another to think that it is enough, when defending a political view, simply to cite authority, scriptural or otherwise.

It is OK for Christians to have Christian reasons for supporting redistribution of wealth or opposing same-sex marriage, but I am not sure it counts as having such reasons if the person who finds such marriages inconceivable is unwilling or unable to discuss, for example, the seeming tension between Leviticus 18:22 and I Corinthians 13. The believer’s fellow citizens should not take her as offering a reason unless she can say a lot more than that a certain ecclesiastical institution holds a certain view, or that such an institution insists that a given Scriptural passage be taken seriously, and at face value.³³¹

While religion is not essential a conversation-stopper (“because it is not ‘essentially’ anything”) an appeal to Scripture as authority is. Such appeals are not unique to religion, “so, instead of saying that religion was a conversation-stopper, I should have simply said that citizens of a democracy should try to put off invoking conversation-stoppers as long as possible. We should do our best to keep the conversation going without citing unarguable first principles, either philosophical or religious. If we are sometimes driven to such citation, we should see ourselves as having failed, not as having triumphed.”³³²

In the end, Rorty articulates a whole host of complaints against the use of religious reasons, most of which have nothing to do with their being religious. It is not the epistemic status of religious reasons that the liberal theorist of democracy finds troublesome, rather, it is the way that religio-political actors sometimes use such reasons. First of all what are purported to be religious reasons are, by a common sense understanding of religious, not. Instead, those reasons are (unconsciously) presented as a cover for other motives and policy goals, many of which the liberal finds disagreeable. Hence, Rorty thinks that the gap between the commands of Leviticus and anti-gay marriage activism is bridged by “everyday peacetime sadism.”

Additionally, these supposedly religious reasons are an intentional maneuver to shield the political actor from criticism. Presenting reasons as religious suggests that those reasons are inscrutable and therefore should not be scrutinized. The appeal to

³³⁰ Id. at 145, 146.

³³¹ Id. at 147.

³³² Id. at 148-49.

authority, for the philosopher an act treasonous to humanity's birthright of reason, reinforces this claim to inscrutability. The aim is to cut off discussion rather than perpetuate it and is therefore un-democratic. Further, Rorty indicates that because these reasons are presented as inscrutable one should not consider them to be reasons at all. Unless one has, to some degree, scrutinized one's own commitments, those commitments can not properly be considered to be reasons.

My introduction of responsibly and irresponsibly held faith-commitments is a refinement of Rorty's suspicion about reasons that one presents as inscrutable and therefore immune from critique. But before developing this claim I present one more example, as a means of contrasting responsibly held faith-claims with irresponsibly held faith-claims. I return to the Rutherford County debate over the posting of the Decalogue, this time taking an extended look at the commissioner's reaction to the purpose prong of the *Lemon* test.

C. *Rutherford County Commissioners' Debate*

The original motion in Rutherford County had been to post the Ten Commandments in the courthouse. Commissioner Gooch moved immediately to amend the proposal so as to require that the Ten Commandments be posted with other historical documents, which he took to be a friendly amendment. This, he believed and said so both on the floor and to news reporters, would make its presentment in the courthouse constitutional, or more likely to be so. At several points during the debate, commissioners specifically asked the county's attorney whether this was so. The county's attorney articulated the *Lemon* test and said "if the document is put with other historical documents, the court would at least have to at that point look at if the total tenor or decision or basis for the display was a secular or non-religious basis. If the court found it was still for a religious purpose, then the court could still hold that it violated the first amendment."

A few minutes later, Commissioner Anthony Johnson was recognized and again asked the county attorney whether a court would look at the intent behind the action. The attorney answer in the affirmative, at which point, Commissioner Anthony Johnson asked again, "so we would have to prove that we did not have the intent to display a religious document?" The county attorney answered in the affirmative and then Commissioner Anthony Johnson, referencing the June Griffin Resolution of 1999, further asked the attorney, "In June of 1999 I voted to support a resolution to support the right to post our Ten Commandments. Do we have that right by law?" The county attorney answered that this is unknown: "Until the court tells you one way or another whether you do, Commissioner Johnson, that answer can't be given to you." In response to Commissioner Anthony Johnson's follow up question, the attorney also said, "If you are doing it for a religious purpose, if the purpose is to establish or further a religious idea or impose a religious concept or whatever, the court will definitely hold that you can not display the Ten Commandments. If on the other hand, you are doing it for a non-religious or secular purpose – that is, as part of a historical display, a desire to educate the

public regarding history or legal matters or that sort of thing – then the court could very well uphold it. That question can't be answered until the matter is presented in court.” He then noted that the judicial building already contained a number of historical documents donated by the Exchange Club and he listed them.

The executive next recognized Commissioner Woods, who also took up the question of legislative intent. He asked Commissioner Jernigan, the bill's sponsor who was still standing at the podium before the body of commissioners, “was it your intention when you brought this resolution to us that the Ten Commandments were just another historical document or was it really your intention that this is a moral and religious view that, ya know, you hold strongly and you feel that this body ought to . . .”

Commissioner Jernigan answered, “When I was lookin' at it – if you go back it is historical. I mean . . . Moses, you know – what with the Ten Commandments. How much can you say it ain't historical. That's the reason I asked Steering, when we went to it, 'cause I wasn't sure we should study it for a month to see what other documents we should put with it. And that's the reason I say, I don't see that it hurts nobody. Nobody's makin' nobody read it. If they come down through there, all the things that Jim [the attorney for the county] added. How many of them goes through there and read 'em? If you go through there, you might read one or two or you may not. That's the reason I can't see that its hurtin' nobody.”

Commissioner Woods was not convinced: “I just want to make a couple of comments. First of all, as a Christian I believe it is much more than a historical document. You know, I really believe in it. It's my personal beliefs. However, just a couple of comments. I have a real problem with the fact that we're – as a Christian – that we're going to post it and basically feel like its going against the First Amendment to the Constitution to post it even though personally I do believe in it. I think we're going down a slippery slope when we do that. Basically, I believe in it so strongly that if we're saying it's just a historical document that we're going to put in the courthouse I couldn't vote for it for that reason either. (applause) I will be voting no on this. I just think it's a divisive issue. I don't think it's the type of issue that we need to be spending our time on.” He then went on to note that several months ago, the Commission had entertained a vote on the income tax and he voted no on that as well because “its been amazing to me some of the petty types of things that are brought before this body. Certainly, again, I believe in the Ten Commandments. That's not petty. But I do think we have some serious issues in this county that we need to be focusing on, spending our time on and you can see by all the cameras here tonight and all the attention this is getting that this is the wrong type of issue, a divisive issue, this county does not need to be bring attention to itself for.” (applause)

Earlier in the debate Commissioner Anthony Johnson had voiced his support for the resolution, but the attorney's answer to his question in conjunction with Commissioner Jernigan's statements changed his mind. His voice was trembling when he announced this: “I too believe in the Ten Commandments. I believe in God. I have my religion just like hopefully everybody else does. But I took an oath as a County Commissioner and I affirmed to the people of this County, to myself, and to God – like it

or not, that's what I did. For people that don't believe in God, that was our oath that we took. You didn't have to swear. You could affirm and that's what I did. But that oath was to uphold the laws and to support and to represent our people to the best of our ability and that means going along with the laws – to be truthful and to (choked up). . . . I stand before you tonight and say to be truthful and that's what we have to do. The Ten Commandments is a religious document – that's exactly what it is. I uphold that, but therefore . . . (choked up) as hard as it is I have to vote against posting because it is a religious document. You can call it historical but to be truthful before these people and before God I don't think you can call it historical. (applause). You have to call it what it is. It's religious. I would love to have it on the wall here. I'd love to have it on the wall in every house in the United States and the world but that won't happen. And it wouldn't be right for me to impose that on everyone in the world. But I have to uphold the law here and the way I see the law here is to be truthful and to go with what the law says. So I'll have to vote against this.”

Commissioner Peay also spoke against the posting of the Ten Commandments, emphasizing how the vote had troubled him: “I'm probably anguished over this vote more than any vote that we've had up here. I attend the same church that Commissioner Gooch attends. I've talked to my pastor. I've talked to our deacons. I've talked to our elders about this. I took an oath to uphold the Constitution of the United States of America. I took an oath to uphold the Constitution of the state of Tennessee, and I represent the people of the fourth district of this county. Many of them go to church, many of them don't. Joe [Commissioner Jernigan], several times you've said its not hurtin' anybody. Did you hear Mr. Nuell – I think I got the name right – when he came up here in front of us and said that he was afraid to be standing here. – I'm ashamed of this body.” (applause)

The Commission then voted in favor of the amendment to post the Ten Commandments with other historical documents and then in favor of the initial proposal, as amended.

D. Faith-Commitments and Reactions to the Purpose Prong

Some very interesting things happened in this short vignette. First, the commissioners, through their questioning of the attorney, become cognizant of the standard by which a federal court would judge their action, were they to post the Decalogue and be sued. Many of them, following the June Griffin resolution of 1999, as did Commissioner Anthony Johnson, conceived of the issue in terms of rights – either the commission (often “we”) had the right to post the (often “our”) Ten Commandments, or it did not. In the vignette, we see some of the commissioners realizing that they will be judged by their purposes and intentions. They further see that the court will assay those purposes as either “religious” or “secular” and this determination will render the display either constitutional or not.

The Rutherford County debate provides what must be an extremely rare instance where legislators come to feel directly the impact of the duty of civility. Indeed, the

purpose prong of the *Lemon* and Endorsement Test might provide the unique instance where the duty of civility is imposed not only as a matter of political morality, expediency, or custom, but as a matter of law. The purpose prong of both the *Lemon* test and the Endorsement test operationalize the duty of civility into a legal command, especially in its requirement that legislators be motivated only by secular reasons.

For some commissioners their vote over posting the Decalogue becomes an agonizing test of honesty. The display of the Decalogue can only be constitutional if its presentation has a secular motive, but the Decalogue is for these commissioners an element of creedal faith (“I believe it is much more than a historical document”). Their hope for its presentation is religious and they must either feign a secular motive or they must vote against posting. One’s vote, as Commissioner Anthony Johnson saw it, is a test of one’s truthfulness.

Notice that, at least for these commissioners, the obligation to truthfulness has two sources. The first is the oath of office and the second is the gaze of God (“But I took an oath as a County Commissioner and I affirmed to the people of this County, to myself, and to God – like it or not, that’s what I did.”). The drafters of the constitution probably thought of the oath of office as a mean for disrupting particularistic commitments – to localities, ethnicities, and religious communities – and directing the officeholder’s attention to the newly instituted nation.³³³ In Rutherford County, that effort bears mixed results. On the one hand, commissioners such as those depicted in the vignette find their oaths of office a compelling reason to “be truthful” and to vote against the proposal to post the Ten Commandments. On the other hand, commissioners who did not feel this conflict asserted that posting would not violate the constitution; it would only violate, if anything, some ersatz rule illegitimately promulgated by the Supreme Court. To vote for posting the Decalogue displays a higher fidelity to the constitution. For both groups, then, the oath of office disrupts particularistic commitments and directs the officeholder’s attention to the constitution. This disruption merely produces different results. For some, it means voting against the proposal to post the Decalogue; for others it means voting for the proposal, as this is an attempt to reform the Supreme Court and bring it back within its constitutional boundaries.

The second source of the obligation of truthfulness is the gaze of God, who discerns one’s motives, even when a court or one’s constituents can not. God’s gaze, in this case at least, also forces the individual’s gaze inwards, and we therefore see in the vignette agonizing and public displays of introspection. These commissioners are plainly moved by their fidelity to God and the obligation he places on them to be truthful. Since this is a religious reason or motive if there ever was one, we see here one more instance of the infelicity of the religious/secular distinction as a proxy for the public/private distinction.

This stark admission of an obligation to truthfulness and the painful confessions that result from it casts proponents of posting in a rather bad light. It is implied, and opponents of posting sometimes say, that they are dissimulators who are willingly to

³³³ SANFORD LEVISON, *Constitutional Faith* Chapter 3 (Princeton University Press 1988).

feign motives that they do not have for the sake of attaining some otherwise illegitimate policy. Advocates of posting seem sneaky and untrustworthy, not only on this matter but on others as well. Such, at least, is a perception commonly held by opponents of posting.

While there are probably indeed some dissimulators amongst advocates of posting, these are the exception rather than the rule. The most vocal advocates of posting are sincere and in earnest; they truly believe that posting the Decalogue will be of aid to the nation, the state, the family, and the community. If there is any dissimulation, it is amongst those legislators who say little about the matter, but vote for the posting anyhow. If advocates of posting have faults, dissimulation is not one of them.

Instead, one of three things seems to be going on when the advocate of posting is confronted with the purpose prong of the *Lemon* test and the legally imposed duty to civility. The first appears to liberals to be dissimulation, but is really something else. Here, the advocate of posting advances an interpretation of the Decalogue and of history or tradition which aims to satisfy the demands of the *Lemon* or Endorsement Test. They present the Decalogue as secular and as having an important role in some secular aspect of history, such as the development of the law. Such appears to liberals as dissimulation because, in fact, these arguments are weak and unconvincing. Seklow's argument, which interprets the Decalogue as a heuristic for the reorganization of the positive law during a time of intense social change, is the paradigmatic example of such an argument.

To liberals, both those who are secular and those who are religious, these arguments appear to kowtow to the reigning order. They play the secular game (and not very well) only for the sake of achieving some policy that will undermine the foundations of religious freedom. Advocates of this line of argument employ a strategy that aims to thrust their own idiomatic religious beliefs upon a diverse polity. Indeed, it appears much this way to some conservatives as well, albeit they interpret this strategy differently. It is seemingly the consensus opinion at the Foundation for Moral Law, for instance, that while arguments such as Seklow's may succeed in keeping the Decalogue posted upon state owned property, they secularize and therefore desecrate God's transcendent moral law. While the Decalogue ought to be posted, it must not be profaned along the way.

The Foundation for Moral Law and Roy Moore, then, represent the second possible reaction to the confrontation between the Decalogue and the purpose prong of the *Lemon* test. This reaction reasserts the religiousness of the Decalogue and insists that this is a reason for posting it, rather than one for privatizing it. They thus aim to de-secularize the public realm and restore it to its religious "foundations." Liberals do not worry about this reaction to posting the Decalogue because it is a strategy for undermining the foundations of religious liberty, but rather because it appears as an overt attempt at religious domination. Where Seklow seems dangerous because sneaky, Roy Moore appears dangerous because openly hostile to religious pluralism.

The third reaction, the one represented by Commissioner Jernigan's hesitant response, is that of intention formation. Much like Schrödinger's cat, which is neither dead nor alive until one gazes upon it, these intentions are neither religious nor secular until the law gazes upon them. The commands of the Decalogue (at least those of the second pentad) were to commissioners such a matter of "common sense" that no one had

ever before demanded a considered reaction to them, especially one that assayed it as secular or religious. These advocates of posting are literally making up their reasons and motives in reaction to the purpose prong. It is not poorly executed dissimulation.

The first two perceptions about Seklow and Moore are not entirely correct. There is nothing insincere in Seklow's arguments; he seems to be entirely convinced by them. Nor is Roy Moore completely immune from the temptation to secularize the Decalogue as a strategy for legitimating its presentation. As my discussion of his monument's iconography demonstrates, he makes considerable – and unconscious – concessions to the secular order, placing his monument not so much in a religious tradition as in a mythic understanding of American republicanism. Nor is Roy Moore so openly and consciously hostile to religious pluralism as many liberal perceive. For instance, he distinguishes the first pentad from the second pentad and asserts that, since the first pentad deals with matters of worship and ritual, the state may not use the criminal law to enforce them. Finally, there should be nothing astonishing about the spontaneous formation of intentions. It is common, if not the norm, for people to solidify their intentions and to reify them with content only once others have begun to scrutinize them. The social element is an essential part of intentions.

This does not mean, however, that liberals should not be alarmed by these three reactions to the confrontation between the Decalogue and the purpose prong. These reactions all share one thing in common, and this commonality ought to be the matter of concern: they all represent the advancement of irresponsibly held faith-claims. This in turn develops into a host of troubling practices. The next section unpacks the idea of a responsibly held faith-claim and the relationship of faith-claims to our civil obligations of speaking and listening while participating in the democratic discussion.

V. Irresponsibly Held Faith-Commitments

The commitment to responsibly held faith-claims is generated from fairly uncontroversial ground norms: deliberative democracy and respect for others. Additionally, as an ancillary matter, an ethics of self-care generates an obligation to develop responsibly held faith-claims.

A. Ground Norms

I will follow the standard theory of public reason by assuming a commitment to deliberative democracy and the norm of respect. From these, I claim, are generated two norms of civic excellence, one of which has to do with speaking and the other with listening. Deliberative democracy and respect for others require the responsible and controlled introduction of faith-claims into the democratic discussion and they require that during such a discussion we take others seriously. Both of these two norms of civic excellence are enabled by the possession of responsibly held faith-commitments and vitiated by the possession of irresponsibly held faith-commitments.

Rorty and Stout represent specific formulations of these two general commitments. Recall that they both make “concessions” (from the point of view of the standard theory of public reason) to religiously motivated political actors. They both hold that citizens may have and act upon religious reason when engaging in political activity, no less so than others may act on secular reasons. This concession, however, is not *carte blanche*. Although both theorists reject the Rawlsian stance on religion and public reason, they retain a suspicion that faith-claims, religious or secular, are dangerous to democratic discourse. They attempt to diffuse this dangerousness by encumbering their “concession” to religiously motivated citizens with the demand that faith-claims not be used to silence the democratic discussion. They both recognize the potency and ubiquity of faith-claims and, rather than demand their exclusion from public discourse (as does the standard theory of public reason) insist that they be introduced into the democratic discourse only in a responsible and controlled manner. Rorty encumbers faith-claims by demanding that the political actor forebear from introducing them into the democratic discourse for as long as possible and that when they do so, they consider such an interjection to be a failure rather than a success. Stout encumbers the introduction of faith-claims with the requirement that those who do so be prepared to engage in immanent critique. In either case, we are to continue the discussion for as long as possible.

Both also insist that we listen to others in the proper way. Stout’s commitment is more overt: the commitment to immanent critique includes an openness to such critique. Rorty is also committed to immanent critique, it seems, although he does not overtly so express; rather, his commitment, I suggest, is to be found in his own immanent critique of opponents of gay marriage. He presents himself as having listened to the reasons proffered by such opponents, e.g., Leviticus, found them wanting, and then identified the real source of their animosity towards gay marriage.

Christopher Eberle provides a third formulation of the two commitments to the controlled introduction of faith-claims and to taking others seriously. Rejecting the standard theory of public reason, he defends a vision of deliberative democracy founded upon the ideal of conscientious engagement. By this ideal, citizens might have and be motivated by whatever type of reason whatsoever, so long as they are also committed to the following procedures: (1) that citizens will pursue a high degree of rational justification for their favored policy; (2) that citizens will withhold support from this policy if they can’t acquire a sufficiently high degree of rational justification for the claim that the policy is morally appropriate; (3) that citizens will attempt to communicate to their compatriots their reasons for their favored policy; (4) that citizens will pursue public justification for her favored policies; (5) that citizens will listen to their compatriots’ evaluation of their reasons for their favored policy with the intention of learning from them about the moral (im)propriety of those policies; (6) that citizens will not support any policy on the basis of a rationale that denies the dignity of their compatriots.³³⁴

³³⁴ EBERLE, see 104 et seq.

There might be other specific formulations of the general commitment to responsible and controlled introduction of faith-claims into the democratic discourse and the commitment to take others seriously, but I do not mean to adjudicate between them. Instead, I mean to make some observations about the relationship between the ground norms of deliberative democracy and respect, the general obligations of speaking and listening, and the individuals citizen's duty to have responsibly held faith-commitments. I use the specific formulations of the obligations of speaking and listening in a illustrative manner.

B. Responsibly Held Faith-Commitments

That faith-claims be responsibly held is an initial, minimal, and necessary condition for the possibility that they be interjected into the democratic discourse only in a controlled manner. Such lack of control is disrespectful to others (on each of the three specific formulations presented here) and displays a lack of commitment to deliberative democracy. Deliberative democracy and the norm of respect therefore generate an obligation that citizens have responsibly held faith-commitments.

A responsibly held faith-claim has the following features. First, citizens must be able to identify their faith-claims and segregate them from non-faith claims. Second, a part of this practice of identification includes the recognition that a faith-claim is the sort of claim that one affirms but "without claiming entitlement to it." To put this in the metaphors common to epistemology, these are the beliefs that are the foundation of the pyramid of beliefs which themselves lack any foundation. Or, if one is fond of a different metaphor (as am I), faith-commitments are those beliefs that lie at the center of the web of beliefs, which give the web its tensile strength but are least susceptible to alteration by disconfirming evidence. A responsibly held faith-commitment is one where the citizen recognizes that the faith-commitment is foundational or central.

We can dramatize one critical difference between responsibly and irresponsibly held beliefs through a grammatical observation. Individuals hold responsible faith-claims, but we must transpose the object and subject when we speak of irresponsibly held faith-commitments: irresponsible faith-claims hold the individual rather than the other way around. Both responsibly and irresponsibly held faith-commitments have a strong, and perhaps dispositive influence, upon political and other forms of action, but irresponsibly held faith-commitments do so unbeknownst to the individual. They are the man behind the curtain, yanking the chains.

The demand for fallibilism towards one's own faith-commitments is stronger than the demand that faith-claims be responsibly held. When a citizen recognizes his or her own faith-claims (or any other claim) to be fallible, that recognition includes the first two conditions of a responsibly held faith-claim, but adds to it a third condition. Fallibilism requires the recognition of a faith-claim as such, the recognition that one holds it without being entitled to, and (the additional condition) that the citizen recognize that he or she might be mistaken in holding that faith-commitment. Although I think fallibilism towards faith-commitments is epistemologically appropriate, I do not think this strong

condition is required to meet the demands of democratic politics. The controlled introduction of faith-claims into the democratic discussion does not also require that the one advancing such claims think themselves to be possibly mistaken about their faith-claims.³³⁵ We can have a democracy without all its citizens taking the same attitude towards their faith-claims as would Sextus Empiricus.

The critical element of a responsibly held-faith commitment, then, is their self-conscious recognition. From the point of view of deliberative democracy (and other points of view as well), this self-conscious recognition is a great excellence. It allows us to satisfy our obligations to speak and to listen to other participants to the democratic discussion in a morally adequate manner. I turn now to these two obligations.

C. *Speaking*

When a faith-commitment is irresponsibly held, it vitiates the political actor's ability to satisfy his obligation as a speaking participant to the democratic discussion, namely to introduce faith-claims into that discussion only in a controlled manner. Consider each of our three models that demand that faith-claims be encumbered with various obligations before being advanced.

First, irresponsibly held-faith claims are not recognized as faith-claims by those who hold them, and so might (and are) advanced early in the discussion in the hopes of silencing the debate and determining the issue in their favor. Further, when faith-claims are not recognized as such, their advancement into the democratic discourse is often presented as a resounding triumph – the issue is settled! This violates Rorty's demand that faith-claims be withheld for as long as possible and that we consider their introduction to be a failure, rather than a success.

Second, it violates Stout's demand that the introduction of faith-claims be accompanied by a commitment to immanent critique. While third-parties can subject irresponsible faith-claims to immanent critique, those possessed by irresponsibly held faith-claims erect a variety of barrier to such critique. The case study provides illustrations of such barriers.

Some proponents of posting shield themselves from critique by claiming that their motives are religious and, as such, inscrutable. In pulling apart the Myth of the Covenant of American Republicanism, I have attempted to show that such self-attribution is misguided. In critiquing the distinction between religious and secular reasons, I have attempted to show how liberals acquiesce in this self-attribution and when they do so they only validate and reinforce this strategy.

In this respect, liberals should worry about some irresponsible faith-claims not because they are religious but because they are so masquerading. This masquerade is another technique by which irresponsibly held faith-commitments shield themselves from

³³⁵ On the other hand, fallibilism (or at least an honest calculation of probabilities) with respect to empirical matters seems to me to absolutely essential to a deliberative democratic politics. Such fallibilism is a requirement of good judgment so, while it might not be a matter of moral concern, it is one of pragmatic concern.

immanent critique. Liberals should attempt to end the masquerade, and therefore should be pleased if advocates of posting were to advance self-consciously religious reasons (say, Deut 6:6-9), rather than the unholy conglomeration of ideology that they do advance. Such, at least, would display that advocates conscientiously engaged their own authoritative texts and that they were not moved by the sway of ideology.

Other proponents of posting shield themselves from critique by attributing obviousness to the decision to post, and there are a couple of rhetorical tropes by which this is done. Proponents of posting lay claim to both common-sense and average-ness in ways that opponents do not. They, it is implied, are possessed of common-sense (everyone else is wrong-headed) and they represent the average (everyone else is an outlier). Their use of possessive pronouns is also revealing. The Decalogue is often referred to as “our Ten Commandments” where “our” encompasses the whole of the (relevant) political community. The attribution of one’s own point of view as the “average” and the conflation of this average point of view to that of the relevant political community protects it against the possibility of comparison and contrast. Considering one’s point of view to be common-sense further protects this point of view against any suspicions that something more complicated or nuanced might be going on.

The commitment to immanent critique, of course, is not merely that we allow it to go on around us, but that we also participate in it – both by critiquing others and by being open to such critique. These methods of shielding irresponsibly faith-commitments make it impossible for those who advance these faith-claims into the democratic discourse to encumber them with a commitment to immanent critique. Without this commitment, their advancement into the political discussion is simply another strategy for ending the democratic discussion and determining the issue in their own favor.

Closing off the possibility of immanent critique, however, is also dangerous because it makes politics strictly ideological, rather than deliberative. The uncontrolled introduction of faith-claims into the democratic discussion, then, is not only an abandonment of one’s obligation to introduce faith-claims in a responsible manner but also a systematic danger to a politics of deliberation. Because irresponsibly held faith-commitments are concealed from the individual, they are subject to immanent critique neither by others nor by the individual held by them. When possessed by irresponsibly held faith-commitments, one is unable to accurately assess one’s own position within the political ordering, and therefore to deliberate effectively over one’s political activity.

Irresponsibly held faith-commitments, then, render the citizen into a statistic to be managed and exploited by the powers that be. It might be that democratic politics does not place any demands upon its citizens to be deliberative. It is perhaps sufficient for democracy that the experts alone continue to deliberate, but I rather doubt it. We would not call Plato’s Kallipolis a democracy, were we to discover that philosopher-kings deliberate amongst themselves before making political choices. Rather, irresponsibly held faith-claims lead to irresponsible politics, not just irresponsible individual political action. Instead of a deliberative democracy, one in which citizens weight the pros and cons of any given position to the best of their ability given their limited resources, irresponsibly held faith-commitments move citizens to form knee-jerk political reactions.

When this happens, even if they also happen to make the “correct” political choice, they become another’s ideological pawn and are therefore a danger to the good functioning of deliberative democracy.

We can also see that the morality of deliberative democracy and the dictates of respect for others are not the only source of the duty to have responsibly held faith-commitments. Not only are responsibly held faith-commitments a pre-condition to the controlled introduction of faith-claims into democratic discussion, but those held by irresponsible faith-commitments harm themselves as well. Because irresponsibly held faith-claims are not recognized as such they can not be the subject of immanent criticism, either from others or from the one who holds them. Proponents of posting, for instance, advance reasons and narratives which, I suspect, they would reject, were they to give them some consideration. As I saw in Chapter 6 the Myth of the Covenant of American Republicanism mixes a variety of ideological elements: covenant theology, classical republicanism, the war on crime, and a “command” theory of morality. If those possessed by this ideology allowed themselves to be subject to immanent critique, it is not clear that they would any longer find such an ideological mixture to be attractive, especially to the extent that it involves the apotheosis of the Founding Fathers. Such, it seems to me, is just the sort of moral and metaphysical commitments that Christians would find completely un-Christian. Advocates of posting also, at least in their public statements, display a lack of conscientious engagement with their own authoritative text, which ought to be rather disturbing to them. Were one to discover a general ignorance of Deuteronomy 6:6-9, and were this ignorance the explanation for its absence from the discourse, proponents of posting should be deeply embarrassed. So long as self-honesty is an aspect of an ethic of self-care, that ethic of self-care generates an obligation to develop responsibly held faith-claims. Responsibly held faith-claims, then, are not concerned only with respecting others and the health of deliberative democracy, but with the individual as well.

Eberle’s ideal of conscientious engagement provides the third model for the controlled introduction of faith-claims into the democratic discussion. It demands that citizens “attempt to communicate to their compatriots their reasons for their favored policy.” In advancing irresponsibly held faith-claims, citizens do indeed advance reasons, and those reasons come from them, but it is not entirely clear that we should consider them their own. Just as Rorty suggests that we should refuse to call something a reason unless the one who proffers that reason is able, say, to discuss its strengths and weakness, I suggest that we should not say a person is in possession of a faith-claim until they have taken responsibility for it. Otherwise, the “reason” possesses them, rather than the other way around. Until citizens have responsibly held faith-claims, they are, in effect, mouth-pieces, of ideology advancing reasons that we should not call their own.

Irresponsibly held faith-commitments make it impossible, or at least very difficult, for citizens to meet their obligation to introduce faith-claims into the democratic discourse in only a controlled manner, one encumbered by a one or more of a variety of commitments to keeping the democratic discussion going and respecting others. One critical worry about the uncontrolled introduction of faith-claims into the democratic

discourse is the way that those introductions are designed to cut off the democratic discussion and determine the issue in the speaker's favor. Unsurprisingly, then, there is a close relationship between a citizen's speaking and listening obligations: we have an obligation, as citizens of a democracy, to speak in ways that do not demand the silence of others.

Further, just as there is a reciprocal relationship between one's speaking and listening obligations, there is a reciprocal relationship between the attitude that one takes towards one's own faith-commitments and the attitude that one takes towards others. The shielding of one's own irresponsibly held faith-commitments from immanent critique protects those beliefs against change. It also generates ancillary attitudes about those with differing faith-commitments, and some of these attitudes are repugnant to both deliberative democracy and respect for others. They interfere with one's ability to take others seriously and they lead to a wrongful denial of pluralism.

D. Listening

Citizens of democracy have an obligation, when engaging in the democratic discussion, to listen to others and, in listening to them, to take them seriously. Irresponsibly held faith-commitments vitiate citizen's ability to satisfy this obligation.

To take a view seriously is to make an honest effort to understand that view, from the position of the person holding it, and to be willing to react to that view as it is. First, taking others seriously requires that we take them as they are, part of which is taking them as they publicly present themselves through their speech and actions. However, although taking others serious begins with their own speech and actions, it need not end there. In taking others serious we might find that, in fact, what these others are and what they present themselves as are entirely different, and we might count this against them. Taking others seriously does not mean that we believe everything they tell us, only that we consider what they say at face value. One may then analyze their claim, find it wanting, and dismiss it. Such dismissal is not disrespectful and does no damage to deliberative democracy. It is just one result that might be produced by a practice of respectful listening and immanent critique.

Second, taking others seriously is a procedure which does not require any substantive reactions. After taking someone seriously, we need not accept their view, nor agree with their political program, nor even make accommodations for them, although these will, hopefully, frequently be the case. Indeed, we might take another's view seriously and be openly hostile to it, although other moral obligations will limit certain expressions of this hostility. Hence, in criticizing detractors of gay marriage, Rorty has taken them serious, found that their supposed reliance upon the Bible can not be trusted, and reacted with hostility.

Irresponsibly held faith-commitments vitiate a citizen's power to satisfy her obligations to take others serious when listening to them, and it does so in three ways: through an attempt to produce submissive silence, by projecting and then reacting to pathological stereotypes, and by generating a wrongful hostility toward pluralism.

One problem with irresponsibly held faith-commitments is that, as discussed above, they are advanced into the democratic discussion as a means of ending that discussion. They are designed to cut off the debate and produce submissive silence. One can not satisfy one's obligation to take others serious unless one acknowledges their right to speak in the first place and makes room for the expression of others' points of view. The demand for submissive silence engendered by irresponsibly held faith-claims is a rather overt violation of the obligation to take others seriously. The projection of a pathological stereotype is slightly more subtle and more frequent.

The projection of a pathological stereotype on to others takes that other as one wishes them to be, rather than as they are. Proponents of posting projected one consistent pathological stereotype on to those opposed to posting.

First, proponents continually represent themselves as "average." Not only does such an assertion prioritize their point of view, it implicitly situated others outside the average. These strangers are odd and out of place, roaming at the borders of normal society and inhabit the marginal realm of deviance. Concomitantly, advocates of posting frequently claim that opponents resist the posting because of some idiomatic psychological or emotion preference. They say, for instance, that opponents of posting do not want the Decalogue posted because such a posting would be a reminder that the transcendent moral law places limits on their desires, particularly their sexual desires. Along these same lines, advocates of posting assert that opponents of posting are "offended" by the Ten Commandments, locating the source of their resistance in a subjective and relativistic preference. These three tropes of social marginality, selfishness, and idiomatic offensive are then conflated into a pathological stereotype of the selfish criminal. As one speaker in Rutherford County said, only criminals could be opposed to posting the Ten Commandments, because, for example, only a thief would be offended by "Thou shall not steal."

This rendering of the other into a pathological stereotype is of obvious benefit in shielding one's own irresponsibly held faith-commitments from immanent critique. It erects a straw man who is easily defeated but whose defeat nonetheless affirms the correctness of one's own beliefs. It, however, involves two types of harm, corresponding to the norm of respect for others and to the commitment to deliberative democracy. One, then, is a personal harm to individuals and the other is a systemic harm to pluralism.

First, the erection of a demonic stereotype fails to take others seriously by refusing to attempt to understand others on their own terms. In this regard, the differences between advocates and opponents of posting are dramatic, perhaps no more so than in the tone of voice employed by each. Transcripts are unable to capture this feature of speech, but the proponents of posting are more likely to be self-righteous, belligerent, condemnatory, and accusatory than were opponents of posting. Of course, there were opponents of posting who condescended towards those who wished to post the Decalogue, comparing them to the Taliban. Even here, however, most of these distinguished between those who wanted to post the Decalogue, whose faith was somehow false or misguided, from other religiously minded individuals. Opponents of posting, then, understood the attempt to post the Decalogue as an expression of religious

domination, which expression is idiomatic to those wishing to post the Decalogue, not a more general phenomenon of religion. Although this is an unflattering understanding of the advocate of posting, it is an attempt to take them as they are. Taking others as they are does not mean that we have to agree or like them, only that we do not wrongfully reduce their point of view to something that it is not.

Furthermore, opponents of posting never associated themselves with common-sense or average-ness. They were more likely to point out the country's great diversity and to attempt to understand and sympathize with other's points of view. Plaintiffs, for instance, frequently said that one of their purposes in suing was to educate the commissioners as to the county's diversity; that is, to force them to listen to others' points of view and recognize the fact of religious pluralism. Commissioners opposed to posting considered themselves to be representatives of a diverse constituency, rather than a constituency that was just like them. Commissioner Peay, for instance, acknowledges this diversity in his statement that "I took an oath to uphold the Constitution of the state of Tennessee, and I represent the people of the fourth district of this county. Many of them go to church, many of them don't." Opponents of posting hence made honest, and more successful, attempts to understand the point of view of others.

Commissioner Peay also gives us a dramatic example of this attempt to understand others when he pleads with the other members of the commission to stop insisting that posting the Decalogue would not hurt anyone and to pay attention to those citizens (evidently law-abiding) who had just articulated the ways that posting the Decalogue would in fact disadvantage them and do them harm.

Within the case study (and I suspect more universally) irresponsibly held faith-commitments vitiate the power to take others seriously. They make it difficult, if not impossible, to listen to others and to understand them as they are, part of which is understanding them as they publicly present themselves through speech and action. Instead, irresponsibly held faith-commitments lead to the demand for submissive silence and the project of pathological stereotypes. Not only do irresponsibly held faith-commitments generate disrespectful attitudes towards individual others who are different, it produces a more systemic hostility directed at pluralism itself. A brief discussion of the origins of this hostility, as well as a short defense of pluralism, are therefore in order.

E. Listening and Pluralism

Pluralism in modern democracy is not only a fact of the matter to be endured, nor do I think that it needs to be cherished for its own sake. Our attitude towards pluralism can take a middle ground, and the commitment to responsibly held faith-commitments helps to delimit that ground.

Deliberative democracy and the norm of respect require that we take seriously the view points of others, at least when those view points are articulated in the attempt to influence political life. Taking others seriously does not mean that we have to agree with them. Indeed, taking others serious might lead to a hostile attitude. However, if one is going to come to such a conclusion, it must be just that – a conclusion and not an

assumption. When one makes it an assumption, one assigns a negative valence to difference even before the content of that difference has been manifest. This, besides an insult to the person who holds this view, is, when generally practiced, a denial of the legitimacy of pluralism.

One obstacle to the acceptance of pluralism, and the one that seemed to be most salient amongst proponents of posting the Decalogue, is the wrongful conflation of pluralism with relativism and subjectivism. Relativism is the claim that things, actions, or states of affairs are good or bad only in relationship to some other thing. Subjectivism is the claim that what a particular individual (i.e., a particular subject) finds good or bad is good or bad. The popular mind often combines subjectivism and relativism and doing so generates a morality of selfishness – that the good and the bad are relative to the subject's preferences. What is good and what is bad, then, is what the subject wants or desires them to be. This move is seen, for instance, when proponents of posting associate opposition to posting with their desire to not be offended, where offense is relative to the idiomatic and selfish preferences of the subject. Hostility towards difference results when the advocates of posting associate pluralism with subjectivism and relativism, which are themselves supposed to be the central motif of an ersatz morality antithetical to the transcendent of the Decalogue.

The conflation of subjectivism and relativism with pluralism might administer to the pride of the one who makes such a conflation, but it is not required by the concepts themselves. Pluralism is the recognition that there are a great variety of faith-claims, and that different people can hold these faith-claims responsibly. For some, a commitment to pluralism might be the result of an antecedent commitment to either relativism or subjectivism, but it need not be. Sometimes, as a matter of moral development, relativism and subjectivism generate a more mature commitment to pluralism, but one can reject both relativism and subjectivism (and I think that we should) without also rejecting pluralism. Fallibalism can also generate a commitment to pluralism, but it asks of individuals more than is necessary. One can be a pluralist without believing that one's own faith-commitments could possibly be mistaken.

Rather, responsibly held faith-commitments are sufficient to the development of a commitment to pluralism and this commitment to pluralism in turn generates a practice of taking seriously others who are different from ourselves. The line of reasoning is straight-forward: when we recognize that our own faith-commitments are affirmed without entitlement, and yet that those faith-commitments do not appear to us to be mistaken, to be willful, or to be mere expressions of selfishness, then we are in a position to understand how others' responsibly held faith-commitment appear from their own point of view. We can see that other's responsibly held faith-commitments are, to them just like ours are to us, not merely idiomatic expressions of moral selfishness. They stand where they are as best they can, just as do we. Knowing this, we are in a position to listen to those differing points of view without reducing those points of view to mere a morality of selfishness. Since this preparation is general, it leads to a commitment to pluralism.

VI. Conclusion

We began this chapter with the dismissal of the distinction between religious reasons and secular reasons from the debate about public reason. Instead of relying upon an epistemological taxonomy, I suggested that, following Rorty, Stout, and others, that liberals “concede” a place at the table of deliberative democracy to supposedly religiously motivated political actors. These, these actors, like “secular” actors, are permitted to advance faith-claims into the democratic discussion so long as they are encumbered with obligations that make such introductions controlled and responsive to others. These two general obligations have specific iterations (e.g., to forebear on their introduction, to expose one’s self to immanent critique) for which responsibly held faith-commitments are a necessary precursor. A commitment to deliberative democracy and to the norm of respect, then, generate an obligation scrutinize one’s own faith-commitments.

Concluding Chapter: Normative Recommendations

“And should a sojourner sojourn with you, you shall not wrong him. Like the native among you shall be the sojourner who sojourns with you, and you shall love him like yourself, for you were sojourners in the land of Egypt. I am the Lord your God.” (Lev. 19:34)

I. Introduction

In this chapter I offer suggestions about how to alter this contention area of litigation. One typical normative strategy that legal commentators undertake in such a situation is to propose new judicial rules that, if followed, would “solve” the problem. Not only would these rules comport with the demands of justice, manifest judicial restraint, and articulate in the appropriate way with constitutional language, they would also be uncontroversial and clearly formulated. Everyone would understand the boundaries of constitutional action and only those of ill will would violate those boundaries. The problem would literally be solved by eliminating all conflict over the matter – a goal of idealist on either side of the political spectrum.

I have no such ultimate suggestion. Rather, I want to make a qualified defense of the Endorsement Test by means of modifying it. First, I want to engage one common argument against the Endorsement Test – the “offense” argument – and show why such an argument is misguided. This argument asserts that the Endorsement Test is designed to protect people against being offended and, because such a harm is trivial, is not deserving of constitutional protection. This argument misconceives the phenomenon; instead of thinking about whether or not a religious symbol is “offensive” judges should think about political equality. In this respect, the concept of endorsement, an illocution, provides a good vehicle for thinking about the impact that a state’s symbolic displays can have upon political equality and, specifically, the value of one’s citizenship. Jettisoning “offense” as a moving norm and foregrounding political equality provides us with a guide by which we may re-tool the Endorsement Test. So, while I lack any suggestions about how jurists might rearrange doctrinal vocabulary, I have some suggests as to how jurists, both judges and lawyers, might use the Endorsement Test to think about political equality.

First, the vocabulary of effective doctrine must comport with the phenomena over which it purports to regulate. Endorsing is one way of classifying communicative acts. Symbolic displays are communicative acts. Endorsing, therefore, is an appropriate category for evaluating symbolic displays. It is not appropriate for evaluating governmental practices that are not speech acts, such as the transference of tax monies to religious institutions. My first suggestion, then, is to limit the applicability of the Endorsement Test to controversies concerned with the state’s display of religious

symbols or other speech acts. Different doctrine should be used for other areas of constitutional litigation over the relationship between church and state.

Second, the moving norm of analysis should be political equality, specifically the implications that a particular display has upon the value of any particular individual's citizenship. One's religious affiliations should not, either overtly or implicitly, diminish the value of one's citizenship. The first step of articulating this norm into a doctrine is a forum analysis. Judges should ask whether the place of display is one of equality and neutrality. With this established, judges can evaluate how a particular display does nor does articulate a conception of ideal citizenship that comports with that equality.

Third, in enquiring about the purpose of a display, jurist should eschew examining the purposes of any particular legislators or other individuals involved in the attempt to post a religious symbol. Instead, they should ask what cultural script the display enacts. Similarly, and fourth, instead of asking about the "effects" of a display, jurist should ask about the significance of a symbol from within the tradition of which it is a part. Fifthly, in both cases the normative analysis should not depend upon the religious/secular distinction but rather the norm of political equality.

After making these suggestions, I conclude with an example and take note of some additional benefits to this approach. Before tackling these normative suggestions, however, I discuss the offense argument – and where it goes wrong – and argue that endorsement is an effective tool for protecting political equality.

II. Two Examples of the Offense Argument

In an argument that has drawn much attention, Professor Noah Feldman argues that the Court ought to interpret the Religion Clauses so as to simultaneously "offer greater latitude for public religious discourse and religious symbols" and "insist on a stricter ban on state funding of religious institutions and activities."³³⁶ Both the *Lemon* test and the Endorsement Test, therefore, must be abandoned and the Court must return to "the two guiding rules that historically lay at the core of our church-state experiment . . . : the state may neither coerce anyone in matters of religion, nor expend its resources so as to support religious institutions and practices."³³⁷ Hence,

When it comes to religious symbols, typically some group of citizens will ask the state for an opportunity to acknowledge their holiday or tradition. Following a popularized version of Justice O'Connor's endorsement test, legal secularists typically object on the ground that if the state acquiesces, then the state is embracing the religious symbol and communicating exclusion to adherents of other religions. But this interpretation may not be the best or most natural

³³⁶ NOAH FELDMAN, *Divided by God: America's Church-State Problem and What to Do About It* 237 (Farrar, Straus and Giroux 2005).

³³⁷ *Id.*

one. The fact that others have asked for and gotten recognition implies nothing about the exclusion of any religious minority except for the brute fact that it *is* a religious minority. There is no reason whatever for religious minorities to be shielded from that fact, since there is nothing shameful or inherently disadvantageous in being a religion minority, so long as that minority is not subject to coercion or discrimination.

Take the fact that the government treats Christmas as a nation holiday. It would be very strange if Jews or Muslims or Hindus or Buddhists felt fundamentally excluded from citizenship by this fact Just what is threatening to religious minorities about Christians celebrating the holiday and the state acknowledging the fact? The state has not made Christianity relevant to citizenship – it has just acknowledged the preferences of the majority. Perhaps some members of religious minorities may choose to spend December feeling bad that they are not part of the majority culture, but they would have this same problem even if Christmas were not a national holiday, since Christmas would still be all around them. The answer is for them to strengthen their own identities and be proud of who they are, not insist that the majority give up its own celebration to accommodate them.³³⁸

This argument is worrisome for several reasons, most having to do with the way that Professor Feldman depicts the nature and substance of conflicts over the state's displays of religious symbols. First, Professor Feldman conceives of some religious minorities as making loud (and obnoxious) objections, but it is far from plain as to what he conceives them as objecting to. In the first paragraph, he announces that he will be considering the display of religious symbols but in the next paragraph considers the example of treating Christmas as a national holiday. A state's display of a religious symbol (presumably Professor Feldman has the crèche in mind, but he does not say so) and treating Christmas as a national holiday are not the same thing, nor does one entail the other. This ambiguity enables Professor Feldman to present objectors as responding to the *cultural* celebration of Christmas and the possible symbols associated with this celebration, rather than objecting to the state activity involved in displaying a crèche. Such a conflation of state and non-state action is also present in Professor Feldman's demand that Religion Clause doctrine and jurisprudence "offer greater latitude for public religious discourse and religious symbols." There are critical differences between

³³⁸ Id. at 239-240.

“public religious discourse” – by which Professor Feldman seems to mean discussions undertaken by citizens, both those who are private and those who are officeholders – and the state’s display of religious symbols. These are critical conflation, as they allow Professor Feldman to ignore the potential significance of the association between the state and the symbol, rather than the symbol itself. It allows him to depict plaintiffs as objecting to the symbol (and the culture of which it is a part) itself, rather than to the state’s use thereof.

Second, Professor Feldman takes the “typical” objector to feel “excluded” by the state’s “acknowledgment” or “recognition” of Christmas as a national holiday. These strange minorities, whose interpretation of the situation “might not be the best or most natural one” (note that this is Professor Feldman’s interpretation of their reaction, not necessarily their’s), might even “spend December feeling bad that they are not a part of the majority culture” and therefore attempt to force the majority to “give up its own celebration.”

As with “offense” vocabulary employed by other proponents of posting, this language depicts plaintiffs and other objectors as strange, shallow, and unable to comprehend their actual position and the social and political world. They feel excluded and hurt because they misunderstand their social and political situation and they mobilize the law on their behalf in order to protect themselves from feeling hurt. Any doctrine, such as the Endorsement Test, responsive to such an ordering of feeling is obviously illegitimate.

It is plain that Professor Feldman’s argument fails even upon its own terms. Possibly, he has accurately described the thoughts, feelings, and sentiments of some people who object to the state’s recognition of Christmas as a national holiday (or to the state’s display of the crèche). But if so, this motivation can not explain why these citizens engage in either litigation or political lobbying with the purpose of removing the symbol. Given that these two activities are likely to expose them to the intense social opprobrium of some of their “good” Christian neighbors,³³⁹ the decision either to sue or to lobby could hardly be a strategy for disburdening themselves of feelings of exclusion.

The interviews with plaintiffs show that Professor Feldman’s empirics are simply inaccurate: at least some plaintiffs are not motivated by the need to disburden themselves of feelings of offense and exclusion. As we saw above, the Hamilton and Rutherford County plaintiffs were neither offended nor excluded; rather, they conceived of themselves as volunteers acting on behalf of other to maintain the separation of church and state which, they conceived, was necessary for both political equality and religious liberty. To put it differently, they saw the presence of the Decalogue in the courthouse as altering the attitude that the state took towards its citizens, making one’s religious affiliations pertinent to the quality of one’s citizenship, and defeating the expectation of equal treatment from that institution. There is no offense involved and they were not

³³⁹ The ACLU regularly advises potential plaintiffs that they are likely to be subjected to mistreatment from their fellow citizens. Note also that this branch of litigation bears a disproportionate number of plaintiffs named “Doe”, indicating that courts regularly agree with this assessment. See also PETER IRONS, *God on Trial: Dispatches from America's Religious Battlefields* (Viking, 2007).

trying to arrange the institutions so as to feel included; rather, they were trying to arrange the institutions so that they and others could expect those institutions to treat them equally. Of course, one can not generalize the attitudes of these particular plaintiffs, but that is not the point. Their introduction here is only meant to show that Professor Feldman's generalization is not only overly broad but potentially misleading.

Interestingly, Professor Feldman notes, seemingly in passing, that in treating Christmas as a national holiday (or displaying the crèche) "the state has not made Christianity relevant to citizenship." The relationship between one's religious affiliation and the value of one's citizenship ought, I conceive, to be a critical component of any interpretation of the Religion Clauses. Professor Feldman is therefore on the right track, even if in this particular instance he has not substantiated his claim about the value of citizenship in the face of the state's acknowledgment of Christmas as a national holiday (or displaying the crèche). However, given that he wants the Court to determine Religion Clause questions by considering only whether a practice involves the transference of tax dollars to religious institution or is coercive, it does not seem that such should be a matter of concern for him. Whether a state practice devalues the worth of an individual's citizenship or discriminates against a person because of their religious affiliations is not a question Professor Feldman, given his two preferred norms, is entitled to ask, although it is an important one. Hence, not only has he done no work to show that the state's "acknowledgment" of Christmas as a national holiday (or display of the crèche) does not debilitate the value of the dissenter's citizenship, but he's not entitled to make such a claim, at least from within the framework of his proposed jurisprudence.

The exclusion of equal citizenship as a moving norm for Religion Clause jurisprudence is all the more perplexing because it prevents Professor Feldman from correctly deciding *Torcaso v. Watkins*. In this case, the Court struck down a Maryland religious oath of office that required potential officeholders to affirm the existence of God.³⁴⁰ Such oaths involve neither coercion to religious practice nor the transfer of tax money. On Professor Feldman's standard then, he would have to uphold the Maryland religious oath, which is odd because, amongst a panoply of confused Establishment Clause decisions, *Torcaso* is perhaps the only one that is unequivocally correct.

It is no use for Professor Feldman to decide the question under the Article VI prohibition of religious oaths, which the Court refused to do in *Torcaso* so as to avoid the question of whether the 14th Amendment had "selectively incorporated" that Article against the states. To do so would show that political equality and the impact that religious affiliation might have on that political equality to have been of importance to the crafters of the constitution. The originalist hermeneutic would then have to include political equality in the set of values of concern to the Establishment and Free Exercise Clauses, a conclusion that Professor Feldman is apparently uninterested in entertaining.

My goal is to include political equality within the panoply of norms which animate the Religion Clauses. The jurist should confront this question directly rather than hiding it behind other norms or dismissing it in passing.

³⁴⁰ Maryland's oath was ecumenical for its time, as most other state constitutions written contemporaneously required the affirmation of the God of the Protestant Religion.

Professor Steven Smith levels a similar claim against the Endorsement Test in his book *Foreordained Failure*. Contending that the minimization of “alienation” can not found an interpretation of the Establishment Clause, he writes that

although government involvement in or endorsement of religion undoubtedly may alienate or offend some citizens, governmental involvement in any area of life or endorsement of any belief may have the same consequence. Government endorses free enterprise but not socialism, war against Vietnam or Panama or Iraq rather than nonmilitary sanctions or pacifism, policies of natural-resource development over certain kinds of environmental policies. Any of these messages may offend some citizens and cause them to feel like “outsiders,” and it is not clear that governmental endorsement or disapproval of religion produces more alienation than other controversial messages that government may send.”³⁴¹

And in a footnote, Professor Smith writes that

Indeed, the very concept of “alienation,” or symbolic exclusion, is difficult to grasp. What exactly is “alienation”? How, if at all, does “alienation” differ from “anger,” “annoyance,” “frustration,” or “disappointment” that every person who finds himself in a political minority is likely to feel? “Alienation” might refer to nothing more than an awareness by an individual that she belongs to a religious minority, accompanied by the realization that at least on some kinds of issues she is unlikely to be able to prevail in the political process.³⁴²

Professor Smith’s argument, like Professor Feldman’s, assumes that plaintiffs, or potential plaintiffs, feel alienated by the display of religious symbols. To the extent that such an attribution is descriptively inaccurate, the argument fails for the same reason that Professor Feldman’s argument fails. But Professor Smith’s argument also dislikes the Endorsement Test, with its supposed goal of minimizing alienation, because there is no way to distinguish the sort of alienation brought about by the display of religious symbols from either, on the one hand, other types of alienation brought about when the government pursues a policy believed to be wrong by some citizen or, on the other, from other types of trivial feelings (from a constitutional point of view) such as frustration and

³⁴¹ STEVEN D. SMITH, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 110 (Oxford University Press 1995).

³⁴² *Id.* at 164 FN66.

disappointment. This being so, the natural conclusion is that any doctrine designed to protect against these feelings is not well-wrought.

Now, I concede that Professors Feldman and Smith draw the correct conclusion from the premise that the Endorsement Test is designed to protect citizens against feelings of exclusion, alienation, offense, and sadness. Governments and their officials who intentionally cause these feelings violate important norms of morality and civility (including Christian norms). This, however, does not make the action unconstitutional.

Further, the supposition that the Endorsement Test is designed to protect people from feelings of offense and alienation is not unreasonable. This vocabulary permeates Establishment Clause decisions as well as the public rhetoric circulating around these kerfuffles. “Alienation” appears, for instance, in Justice Blackmun’s dissent in *Lynch*³⁴³ and since then has been used more frequently than can be traced; it would be a part of the vocabulary of anyone remotely familiar with Establishment Clause jurisprudence. Additionally, standing doctrine requires that a plaintiff have suffered a particularized injury. When the lawsuit is over the government’s display of a symbol, some courts have accepted the convention of calling such a particularized injury “offense” and such offense is said to be generated by the plaintiff’s unwelcome direct experience of the religious symbol.³⁴⁴ “Offense” therefore, would also be a part of the vocabulary of anyone versed in Religion Clause jurisprudence and scholarship.

As we saw in the last chapter, the vocabulary also pervades both legislative and public discourse on the subjection of church and state. In Hamilton County, after the Federal Court had found the County’s display of the Decalogue unconstitutional and the County Commission was deliberating on whether to appeal, one the Commissioners lamented that “We had thirteen people who sued us and the judge threw eleven of those out of the court and ruled only on two because those two had, in my opinion, had gone out of their way to get offended – as it was pointed out in court.”³⁴⁵ And again, Mike Huckabee, on his cable TV show, uses the vocabulary of “offense” to characterize the sentiments of those who oppose the presence of religious symbols and practices in schools.

The language of “offense,” along with the supposition that plaintiffs mobilize the law on their behalf so as to unburden themselves of this or other similar emotions is therefore common to legal, scholarly, and popular discourse. The difficulty then is not that the conclusions drawn from this supposition are wrong or invalid, but rather that the

³⁴³ *Lynch v. Donnelly*, 727.

³⁴⁴ See, for instance, *Harvey v. Cobb County*, 675. (“‘unwelcome’ direct contact with the offensive object is enough to establish injury for purposes of standing.”) However, this vocabulary is not ubiquitous in legal opinions. In neither Rutherford nor Hamilton, for instance, did the judge describe the plaintiffs as offended; rather, the plaintiffs are described as finding the display of the Ten Commandments “objectionable” (Rutherford) and as coming into “unwelcome direct contact” with the Ten Commandments. *American Civil Liberties Union v. Rutherford County*, 2006 WL 2645198, 7 (M.D. Tenn.) and *ACLU of Tenn. v. Hamilton County*, 761., respectively. Indeed, “offense” vocabulary seems to be more common to scholarly discourse than to judicial discourse and one worries that it is the common discourse that has colonized scholarly discourse, rather than vice versa.

³⁴⁵ Public record audio files in possession of the author.

supposition is wrong: this common discourse, as with so much common discourse, misguides and deceives. One purpose of this chapter, then, is to shorn the scholarly literature of this deception and to replace it with the vocabulary of political equality. The first task leading to this objective is the reconceptualization of the activity of endorsing. Both Professors Feldman and Smith, as well as many others, take endorsing to be a politically innocuous activity. In section IV, I argue that endorsing is an activity highly charged with normative implications, both moral and political. First, however, I want to do a little work regarding the concept of political equality, and to show that such a norm is, like most every other norm, consistent with originalism.

III. Free Speech, Political Equality, and Originalism

I here support a reading of the Constitution's religion clauses embodying two values. The first, and the one which is of most importance at present, is political equality. The second value is religious liberty – the freedom to think, to believe, and to form voluntary associations of like-minded believers without state interference. Other values commonly supposed as central to these clauses – such as non-coercion, non-conversion, and non-transference of money – can in many instances be subsumed under these greater values. Both non-coercion and non-conversion, for instance, can be assimilated under the heading of freedom of religion, and the non-transference of tax money implicates both freedom of religion and political equality.

While it seems to me that both the Establishment Clause and the Free Exercise Clause, taken individually and synergistically, protect both political equality and religious liberty, the Establishment Clause most naturally manifests the value of political equality and the Free Exercise Clause the value of religious liberty. While these two values are in most instances mutually reinforcing, legal commentators frequently note that, at the margins, these two clauses generate conflicting mandates. Such claims are also made with respect to a state's monumental displays of religious symbols.

In this respect, supporters of monumental displays mobilize two types of arguments on their behalf. The first of these arguments is utterly unpersuasive. The second, to the degree that it might be persuasive, fails to make important distinctions between citizen speakers and the state as speaker. In both instances, the real conflict between the Endorsement Test and Free Exercise is concealed. A part of the goal of the subsequent discussion is to reveal this real conflict.

The first argument is that the religion of some requires some sort of church-state combination, part of which combination is the monumental display of Christian symbols (presently, this is a claim made only by those professing to be Christians). To prohibit or remove such symbols infringes upon these believers' ability to practice their own religion in violation of the Free Exercise Clause.

This claim has yet to make any headway in the case law. The Free Exercise Clause protects voluntary associations and their members in the practice of their religion. It does not license those voluntary associations to compel others to involuntarily join the association, but, at least as these groups conceive of their own worship, this is exactly

what they are doing. Since, by this argument, the state's display of a symbol is conceived of as part of that group's liturgy, and that practice takes place in a forum where non-members of the voluntary religious association also gather, those non-members are participating in this association's religious practices. The claim essentially maintains that some citizens' religion requires them to use the organs and institutions of the state qua state for their religious practice. The Free Exercise Clause as presently read does not protect such a religious practice, nor do there seem to be any grounds, or any scholarly commentary, that would suggest that it should. Nor should it since the demand here is for the restoration of a confessional state.

The second constitutional argument on behalf of the state's display of religious symbols has garnered a great deal of traction in the case law. It is a combination of free exercise and free speech claims, with the free speech clause taking primacy. The claim here is that, in prohibiting the state's display of religious symbols the Supreme Court is violating some individual's right to speak freely and openly. This argument has made great headway insofar as, with respect to monumental displays, there is some ambiguity as to the identity of the speaker. Advocates of posting have been able to locate the origin of the monumental speech act in either a private speaker or the state, depending upon which location is most likely to preserve the display of the monument.

The exploitation of this ambiguity is disappointingly disingenuous. The argument wants to consider the monument as private speech when viewed from the point of view of the Establishment Clause, and therefore protected by the Free Speech Clause, and as state speech when viewed from the point of view of Free Speech Clause, allowing the state to close off a public forum to other potential speakers. The apparent desire is to associate the symbolic display with the authority of the state while shielding it from any sort of constitutional challenge.

The danger here is that such a strategy allows private speakers to clandestinely force the state to speak their message, lending to that message the imprimatur of the state's authority. This not only gives to the message a sort of salience it might not otherwise possess, but places the state in a position where it is articulating a message of which it does not approve, as with the KKK cross in --. To avoid these dangers, we need to make a couple of basic distinctions. The first distinction is between citizen speakers and the state as speaker. The second distinction is between citizen speakers who are officeholders and those who are not; that is, between office-holding citizens and private citizens. These distinctions force the advocate of posting to lend some specificity to their free speech claim, and they might do so in the following ways.

First, suppose the argument is that, in prohibiting the state from displaying religious monuments, the Endorsement Test violates some private citizen's free speech rights. This is the claim when the state displays a donated monument, as is the case with all FOE Decalogue monuments. Were courts to rule that the Establishment Clause prohibits such displays, it is claimed, courts would be violating the FOE's free speech rights. This argument, to the degree that it is at all persuasive, requires that the monument be identified as the FOE's speech act, rather than the state's. It is only then that its removal can be seen as an infringement upon a non-state entity.

The argument plays upon an ambiguity in the possessor of the speech act. In most cases, the location, ownership, and maintenance of the monument all indicate that the state has assumed control of the monument and that it is therefore its speech act. Courts should resolve this ambiguity by locating the origin of the speech act with the state.

This forces private speakers to take clear responsibility for their speech acts if they wish them to be protected by the free exercise clause while prohibiting private speakers from capitalizing on the ambiguity and commandeering the state for the communication of its private message. This rule will incentivize states and municipalities to promulgate regulations that force private speakers to take responsibility for their monumental speech acts. These regulations, in turn, will protect the state from such commandeering and thus from being perceived as articulating a message which it does not wish to be perceived as speaking. It also disables the state from evading an Establishment Clause challenge by attempting to relocate the origin of the monumental speech act in a citizen speaker.

Making the distinction between citizen speech and state speech and resolving ambiguities by identifying the state as speaker makes it clear that this second free speech claim can also make no headway. The free speech right claimed by this argument is not merely that some private speaker be allowed to use monuments to articulate their own point of view. That might very well be perfectly acceptable as both a matter of constitutional jurisprudence and of political morality. Rather, if the advocate of posting develops this argument, the free speech claim would be that citizen speakers have a free speech right to have their own monumental speech acts appear as the speech acts of the state, even though they are their own. I know of no First Amendment jurisprudence or principle of justice that would support such a right.

The distinction between citizen speakers and the state as speaker, however, does not resolve all the difficulties. When the citizen speaker is also an officeholder at the time they articulate a message via a monumental display, the problem is more difficult to resolve. Here, the claim is that, just because someone is an officeholder, they do not relinquish their free speech rights. Prohibiting them from speaking via a monumental display violates those rights.

Behind this argument is a good free speech claim. As mobilized by advocates of posting, who desire to preserve a state's monumental display, it is unpersuasive. We proceed on the assumption that the individual in question is an office-holding citizen and note that the constitutive rules of some offices authorize the officeholder to speak on behalf of the state and some do not.

There is not a great quantity of offices that authorize the officeholder to speak on behalf of the state. The office of legislators, for instance, does not authorize individual legislators who exercise that office to speak on behalf of the state, even, e.g., the Speaker of the House. Their offices give them no more authority than a private speaker to commandeer the organs of the state and force it to articulate their particular message.

Some non-legislative offices, such as the Presidency and Governorships, do authorize a particular individual to speak on the state's behalf and other offices allow the office-holder to speak for some sub-division of the state. However, in both cases this

authority is limited in either substantial or procedural ways. As a simplified example, the President's authority to speak on behalf of the state is limited to foreign affairs; on matters of internal policy, he is constrained by the other branches of government. Even in foreign affairs, the scope of his authority to speak for the federal state is limited by the Senate, which must ratify treaties. The President is not the law speaking.

Procedural and substantive limitations on the authority of officeholders to speak on behalf of a subdivision of the state are even more obvious. The Chairmen of the Federal Reserve Bank, for instance, is authorized to promulgate that Bank's official policy, but only after having followed certain procedural rules and only within the scope of that Bank's authority. He can not, for instance, treat with foreign nations or alter the Clean Air Act.

There are, then, two types of offices, those who constitutive rules authorize the officeholder to speak on behalf of the state or some subdivision thereof, and those that do not. Of those that do, the constitutive rules of that office limit both the substance of what they may say on behalf of the state and the procedure they must perform before so speaking.

Having made these distinctions, the real free speech question is not about whether the Establishment Clause disables a private individual from expressing their religious opinions in violation of their free exercise or free speech rights; the question is rather about the powers and authority of the office itself to speak on behalf of the state. In this regard, any limitations on monumental displays required by the Establishment Clause merely place another constitutive limit upon the authority of offices, rather than those who administer them, to speak on behalf of the state.

An Establishment Clause limitation on an officeholder's power to articulate monumental speech acts on behalf of the state will make officeholding a less attractive activity for some, but only to the degree that they are not able to consciously distinguish between their personal selves and the office of state which they administer. Such a limitation on the authority of offices leaves unhindered all the free speech rights of individual officeholders when they are not, in fact speaking on behalf of the state. By this limitation, therefore, Roy Moore's authority, as Chief Justice of the Alabama Supreme Court, to speak on behalf of that court through a monumental display of the Decalogue, but he is not at all prohibited, for instance, from praying to God for guidance before entering the courtroom. Even if, by these prayers, he were asking for God's favor in his official capacity as a judge, they are not also spoken on behalf of the state.

We can now distinguish the ersatz free speech claim, which aims to preserve monumental displays, from the free speech claim that is of real worry. An Establishment Clause limitation on monumental display constricts the authority of those offices whose constitutive rules authorizes them to speak on behalf of the state. However, most offices of state, such as all legislative offices, are not authorized to speak on behalf of the state. There ought, then, to be no Establishment Clause limitation on what individual's administering these offices may say. From the point of view of the Establishment Clause, they remain private citizens. The Establishment Clause ought not to disable them from articulating whatever reason they would like on behalf of their favored legislation. When

we limit their power to speak, we are not limiting the authority of an office qua the powers of that office to speak on the state's behalf, we are limiting their power to speak qua citizens who are officeholders not claiming to speak on behalf of the state but on their own behalf.

To put it differently, the real free speech worry is that the purpose prong of the Endorsement Test operationalizes the duty of civility so that to evade a holding of unconstitutionality officeholders supportive of posting a religious symbol must conceal their "purpose" by remaining silent. Attention ought to be given to solving this free speech problem, rather than attempting to validate the state's right to engage in monumental speech acts of a religious nature. The purpose prong of the Endorsement Test ought not to be construed in any way that limits legislators' or citizens' rights to speak freely and to give what reasons, religious or otherwise, they think best. I give this issue some care below.

In conclusion, advocates of posting mobilize free exercise and free speech claims in defense of a state's monumental displays. These arguments are unpersuasive to the degree that they require the conflation of private citizens with the state itself, either by allowing for a right of private citizens to commandeer the organs of state to articulate their own idiomatic message or by conflating the office with the officeholder. The conflict between freed speech/exercise and the Establishment Clause is pretended: the Establishment Clause may place constitutive limitation on the state and its offices without interfering with the free speech or free exercise rights of the individuals who administer state offices. The real free speech worry, ignored by advocates of posting in their zeal to preserve a state's monumental displays, is in the pressure that the purpose prong of the Endorsement Test places on individual legislators to conceal their reasons and remain silent.

We can, therefore, set aside, for the moment, free speech and free exercise as values implicated in a state's monumental display of a religious symbol. Political equality ought to take center stage. The rest of this chapter defends this claim and offers suggestions as to how jurist can make this a central element of the application of the Endorsement Test while avoiding, as best as possible, the free speech issues generated by the purpose prong, or by the current application of that prong.

I first make a brief foray into the originalism before arguing that endorsement is an illocution that implicates, or can implicate, important question in political equality.

"Originalism"

Religious affiliation disabled one's participation in the political community. For much of the history of Christianity, allegiance to the "wrong" faith was thought by the ruling powers to make one incompetent to participate in the exercise of political power. Various of the Kingdoms of Christendom, for instance, disabled Jews from holding office. Since the Protestant Reformation, one's religious identification (in England, "Puritan", Anglican, Chatholic) threaten one with political exile and various diminishments of one's political rights. When Louis XVI issued the 1787 edict of

toleration, that edict rehabilitated some of the civic rights (such as to marry) that had been withdrawn from them by Louis the XIV's revocation (1685) of the Edict of Nantes (1598). It did not, however, resort their rights to worship, only to participate, albeit in a limited way, in the political community. Many of America's original state constitutions affirmed the liberty of conscience while at the same time requiring officeholders to the affirmation of the Protestant religion. (cf. *Torcaso*) Heresy was dangerous not because it put the heretics soul in danger of eternal damnation, but because it threatened to homogeneity of society and threaten the stability of the political community.

While I do not think one need approach the Constitution as an originalist, it is worth pointing out that the protection of political equality and specifically the equal value of citizenship is an important aspect of various precursors to the Religion Clauses of the First Amendment. It is one of Locke's concerns, for instance, albeit an ancillary one and one of limited scope. In his *Letter on Toleration* he writes that, "No private Person has any Right, in any manner, to prejudice another Person in his Civil Enjoyments, because he is of another Church or Religion. All the Rights and Franchises that belong to him as a Man, or as a Denison, are inviolably to be preserved to him."³⁴⁶ Here, Locke separates the individual into his religious and civic personas. Locke's distinction between things mundane and things spiritual allows him to recognize that one's religious persona can not debilitate one civic persona. Of course, Locke limits this claim to Protestants: allegiance to the Pope made the disagreement between Catholics and Protestants not merely one of dogma, but of politics.

Separating religious affiliation from citizenship and political participation was an important part of the Virginia Statute for Religious Freedom, a document of particular importance to originalist, who profess to look to both Jefferson and Madison as oracles of constitutional law. In this statute's preamble, it is written,

that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry, that therefore the proscribing any citizen as unworthy the public confidence, by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages, to which, in common with his fellow citizens, he has a natural right, that it tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments those who will externally profess and conform to it.

This concern for political equality is also manifest in the actual legislation: "Be it enacted by General Assembly that no man shall be compelled to frequent or support any

³⁴⁶ JOHN LOCKE, *A Letter Concerning Toleration* 31 (Hacket Publishing Company 1983).

religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.”

Amongst the evils of a church-state combination is the incapacitation of some individual’s “civil capacities” because of their religious affiliations.

I take it, then, that a concern for political equality, particularly in the way that one’s religious affiliation might be made to debilitate one’s competency to appear and act in the political realm, is consistent with the originalist hermeneutic. Political equality ought to be a central norm in the consideration of questions respecting the relationship between church and state. A state’s monumental display of a religious symbol might well be one means by which one’s religious affiliations debilitate one’s standing within the civic community. The a state’s display of monuments arranges citizen’s expectation about how they might be treated by the state and announces their competency to appear and act in the political realm. This does not mean, of course, that every state display of a monumental religious symbol, or religious them, incapacities one’s civic status. The concept of endorsement, I argue next, is an appropriate concept for evaluating whether or not a state’s monumental displays incapacitate the value of one’s citizenship.

IV. Endorsing as an Illocution, General Observations

A survey of the OED reveals that “endorse” has three main senses. The etymologically primary sense of “endorse” is “to put on the back of,” deriving from the Old French *endosser*, from the Latin *dorsum* plus the prefix *in*. This usage of the word is literal and non-technical, but this literal meaning of the word also had a specialized role: it is used to describe the activity of affixing a signature or seal to the back of a document, often a legal instrument, and often for the purpose of effectuating some legal end. In present times, the check is the thing most often endorsed, but there are any number of legal instruments that can be, and historically have been endorsed: charters, licenses, tickets, royal warrants, bundles of letters, bills, notes, and writs. Plainly, the Endorsement Test does not have either of these two usages in mind.

The third OED meaning of endorse is figurative: “To confirm, sanction, countenance, or vouch for (statements, opinions, acts, etc.; occasionally, persons) as by an endorsement. Chiefly modern.” Also, in this figurative sense it means “to declare one’s approval of.” Another dictionary defines “endorse” as “to approve, support, or sustain.”³⁴⁷ In turn, the noun “endorsement” means, again figuratively, “confirmation, ratification, approving testimony.” This is the sense of the word that we are after. The next three sub-sections attempt to describe the unique features of the endorsing illocution, by examining, first, the subject and object class of the illocution, the normative principle that backs an endorsing illocution, and the typical audience of such an illocution.

³⁴⁷ Random House.

A) Subject and Object Class

The verb “endorse”, in the modern, figurative sense, seems to have a fairly restricted class of subjects and objects. First of all, the subject of an illocutionary act is an authority figure of one type or another. Hence, in the political realm we see politicians, celebrities, clergy, and special interests groups (Unions, Environmental Groups, the NRA, etc.) endorsing candidates for political office. The speaker’s authority might be based on any number of things: the speaker’s office (as with politicians), the speaker’s charisma (as with, supposedly, celebrities like Oprah and Chuck Norris), the speaker’s link with tradition (as with clergy), or the speaker’s expertise (as with special interests groups).

Hence, how successful the speaker’s endorsement is depends upon how well that speaker’s authority, which might be contingent upon the type of thing endorsed, resonates with the audience: members of the Sierra Club are more likely to vote in accordance with the Sierra Club’s endorsements upon questions of environmental protection than are members of the NRA, while the Sierra Club’s opinion upon matters of national security might be a matter of indifference to both Sierra Club members and NRA members. Likewise, it is claimed that Oprah’s endorsements resonate with women, but not with men, and that Chuck Norris’ endorsement resonates with a certain sub-set of conservatives.

In each case, the endorser’s authority is dependent upon his access, or perceived access, to some truth-seeking principle. The nature of the principle, as well as the path of access to it, could take on any number of forms. The principle could be vatic, as with oracles, or rational, as with certain parts of economic theory. It could also be based upon familiarity (I know the candidate personally) or philosophical speculation. This analysis of endorsing is indifferent to the validity or accuracy of the truth-seeking principle. Validity, accuracy, and any other epistemic or moral virtue that the truth-seeking principle might play an important part in determining the effectiveness of the endorsement, but they do not alter the communicative act’s illocutionary force. For the speaker’s illocution to be one of endorsing, the speaker must have the intent that the audience come to believe that the speaker endorses something because of the truth-seeking principle. While the nature and content of this truth-seeking principle is open and variable, it nonetheless has important features common to all endorsements, which I examine in the next sub-section.

There are many types of authorities, and therefore many individuals who can endorse, but the subject class of endorsing is nonetheless restricted to authorities. When one “endorses” while lacking the authority conditions necessary for an effective endorsement, I shall argue in sub-section C below, then the “endorser” is doing one of two things; either, the endorser is grossly unaware of their lack of authority vis-à-vis their audience, in which case the illocution is still an endorsement, but one whose intended perlocutionary effect can not be expected to bear fruit, or the endorser, despite initial appearances, is not endorsing, but performing some other illocutionary act.

The object class of the endorsement is broad. Most commonly, the object of an endorsement is a political candidate or a consumer product. Hence, endorsements (at least by a person with the right type of authority) are cherished by those running for office, and celebrities are sought to endorse various commercial products. However, ideas, opinions, values, principles, rules, laws, and beliefs (and perhaps other such things as well) can also be endorsed. For the sake of simplicity, I will yoke this last group together as “ideals,” and it seems that when one speaks of the endorsement of religion or of any particular religion, one is speaking of the endorsement of an ideal.

B) Based Upon a Comparative Normative Principle and Judgment

When a speaker endorses something, it is because the thing endorsed is to be thought valuable by the audience, and because of this value the audience is to alter its behavior in accordance with the thing’s value. I will adopt the convention of calling this altered behavior “supporting” and will say that the perlocutionary intent of an endorsement is the audience’s support of the thing endorsed.

In the case of an object that is valuable because effective or potentially effective, support means an alteration in behavior that brings about, continues, or increases that effectiveness. For instance, some candidates for political office are endorsed because that candidate is believed to be an effective minister of the office, and the support that brings about that effectiveness is voting for that candidate. If the thing is valuable because it satisfies some desire, then the altered behavior is the acquisition and consumption of the valuable thing, and we see this with commercial endorsements. As for ideals, sometimes those ideals are supported when the audience has come to believe in them; the mere believing is the alteration of behavior, and there is no further demand on the part of the speaker that the audience alter their behavior because of this new belief. The perlocutionary intent, then, is the acquisition or retention of certain beliefs, irrespective of the behavior that might result from having those beliefs. Such, however, strikes me as infrequent.³⁴⁸ More frequently, when a speaker endorses an ideal it is because he hopes that the audience will both come to have that ideal and, because having that ideal, alter their behavior. In this case, belief is the nexus through which action passes. Hence, a speaker might endorse a moral principle with the perlocutionary intention of changing people’s behavior – because the audience has come to believe in the truth of the moral principle they alter their behavior so as to comport with its demands. Supporting an ideal, then, simply means acting in accordance with its demands. For example, when advocates of posting endorse the posting of the Decalogue their intent is to give people “values,” and to thereby have the behave in a moral, non-criminal, non-lascivious manner.

In endorsing, then, the speaker employs a normative judgment: the thing endorsed is valuable and the audience is to believe it to be so. The perlocutionary intention is that

³⁴⁸ Also, being inclined towards a pragmatic understanding of belief, it seems a mistake to describe someone as having altered beliefs when, in fact, there is no concomitant alteration of behavior; but these matters of metaphysics and epistemology can be left alone for now.

the audience alters its behavior so as to support the thing endorsed. Now, there appear to be few limitations on the character of the principle motivating the normative judgment. For our purposes, three are worthy of mention. First and second, one might endorse for moral reasons, either consequentialist or deontological. Hence, a policy (of economic stimulus, for instance) or a candidate for office might be endorsed because each would be effective at achieving some end (economic prosperity). In contrast, other policies might be endorsed because thought to be categorically required, as seems to be the case with those who endorse a policy that would make abortion illegal under all circumstances.

Third, the endorsement might rely upon a status principle. In these cases, the thing endorsed is endorsed because it ought to be supported by people like us, who are the virtuous, the brave, the youthful and out-going, the wealthy, the elect-to-heaven, and so forth. Commercial endorsements rely primarily upon this sort of principle, usually coupled with some form of vanity: Real American Men drive Fords, the Wealthy wear Rolex, etc..

No matter which of these three types of normative principle (and there are others) motivate the speaker's endorsement, the normative judgment is always a comparative one. A candidate, product, or ideal is endorsed not simply because it is to be thought valuable, but because it is to be thought to be superior to those things not endorsed.

Hence, the endorsing illocution implicitly acknowledges that the audience is required to make a choice between the endorsed thing and one or more competitors. Without the endorsement, the speaker is concerned that the audience might wrongly identify one of the competitors as superior and support it. The endorsement is designed to ward off this possibility. The endorsing illocution, then, accepts that the competitors, although inferior, have some feature that some others might identify as choice-worthy.

The internal logic of the endorsing illocution, therefore, supposes that those who support the inferior thing have erred in their support of it, and this is one point where questions of political equality become salient. Often, the endorsement traces this error to the status of the person making the error. The inference is that the person who supports the inferior thing errs because of who one is, rather than because of, e.g., reasonable disagreement about the value of the competitors. Hence, in the activity of endorsing there is an implicit (or not so implicit, depending upon the endorser) judgment as to the cause of the competitor's inferiority and *this* judgment may implicate the further judgment about the nature of the individual who might be tempted to support this inferior thing.

Whether or not this is so is an empirical matter, to be discerned by scrutinizing the speech act itself. For instance, an endorsement of abstinence includes the judgment that abstinence's competitor, fornication, is an attractive option because pleasurable and therefore attractive to many youth because (1) they are full of sinful desires or because (2) their "hormones are raging." The first of these causes for this attractiveness relies on a Christian morality and metaphysics (sin), the second one, a medicalized morality and metaphysics (hormones). In either case, the reason for the teenager's error is located in something about being a teenager.

The correlative judgments about the cause of the competitor's inferiority and the reasons some find this inferior thing to be choice-worthy might be either benign or more or less pernicious and, again, this is an empirical judgment to be made by scrutinizing particular endorsements. An advertisement endorsing milk, for instance, relies upon the normative judgment not only that milk is good, but that it is superior to other beverages, such as soda-pop. Milk builds bones, but soda-pop rots your teeth and makes you fat. This invites a comparison of those who drink milk and those who drink soda. Depending upon the particulars of the endorsing advertisement, this comparison may or may not have implications for one's competency to participate in the political community. When it does not, the judgment might merely be that those who drink milk care more about their looks than do those who drink soda-pop. However, given the degree that our culture moralizes diet and child rearing, the normative comparison might be indeed implicate one's competency to participate in the political community, or at least in some aspects of social life. An endorsement for milk, articulate in a certain way in a certain setting might in fact demonize soda-pop drinkers: parents who feeds their children milk rather than soda-pop is not only better parents but also concerned to make sure that the potential obscenity of their children does not place burdens on the systems of public and private health care. Here, the judgment is that those who drink soda-pop do not care about their bodies or the bodies of their children, their bad habit increases health insurance costs for everybody, and they take up too many seats on the airplane.

Of course, advertisements for milk, at least those concerned to ensure their effectiveness by not alienating potential milk drinkers (i.e., those who presently drink soda-pop) will avoid any particulars that generate such an implication about those who drink soda-pop. Nonetheless, an endorsement could generate such implications. Whether or not the endorsement contains a benign or a pernicious status judgment is an empirical matter, dependent upon the propositional content of the illocution, the authority of the speaker who uttered the endorsement, and the context of the endorsement.

Those endorsing the Decalogue often propose consequentialist arguments for posting the Decalogue in governmental buildings, saying that the posting will lead to the moral reformation of the citizenry. However, in this endorsing there is contained the supposition, sometime explicit rather than suppressed, that those who do not support the Ten Commandments have erred. Further, they have erred not because they have deliberated about the meaning of religious freedom and reached the conclusion that such freedom is best assured when the government does not post the Decalogue; rather, they have erred (and endorsers of the Decalogue often make this explicit) because of who they are. The gentleman from Rutherford County, in the "offense" quote presented above, plainly displays this attitude: only those people who have murder in their heart, are thieves, or are running around with their wife could be offended by the Decalogue. This endorsement of the Decalogue contains the rather explicit comparison between those who follow the rules of the Decalogue and those who do not and asserts the incompetence of those who do not to fully participate in the political community because they are criminals.

C) Audience

So far in this discussion of endorsing we have assumed that the communicative act was occurring between two individuals, or, more accurately, between two separate bundles of unified intentions and beliefs, some of which are mutually held, and believed to be so. We have also assumed that both interlocutors can deliver and receive semantic content, either through speaking and hearing or some other method, such as writing and reading. We have also assumed that the interlocutors exist in a shared world or context (e.g., the same room) and speak to one another without mediation. None of these are true in the case of the standard endorsement.

First, in the standard endorsement, the speaker is a unified bundle of intentions and beliefs (with organs of communication), but the audience is not; rather, it is a multitudinous conglomeration of such bundles. This conglomeration's unity, if we must locate one, is to be found in the statistical commonalities amongst its individuals' intentions and beliefs. Hence, as a general matter, the larger the audience, the fewer the statistical commonalities, although it is not impossible that a small conglomeration of individuals also exhibit few statistical commonalities, and a large one exhibit a high degree of statistical regularity. Large groups can be homogenous and small ones diverse.

The speaker who desires that his endorsement be effective in supporting the thing endorsed will aim his endorsement at a certain, calculated segment of these statistical commonalities, namely those who are as-of-yet-undecided-but-might-be-swayed. In calculating the content of an effective endorsement, then, speakers will take into account the nature of the thing to be endorsed, the nature of their authority, the normative principle that generated their superlative evaluation of the thing to be endorsed, and the distribution of the audience's statistical regularities. In particular instances there will be a more or less complicated relationship between these four factors. Depending upon the nature of the authority asserted by endorsers, they will have to, as part of the endorsement, establish their authority to make the endorsement, and this, in turn, might require that they reveal a portion of the normative principle upon which the endorsement is based and a portion of the reasoning which led them to that endorsement. Technocrats or scientists, for instance, will have to reveal their credentials, and, depending upon the sophistication of the audience and the medium through which the locution is delivered, some of the reasoning that led to their endorsements. A charismatic authority, on the other hand, might have to reveal very little of these things. Their endorsements are accepted when it appears to the audience that they are sincere.

Now, a locution might on first blush appear to be an endorsement, but if further examination reveals that its content is not well-calculated to achieve its purported perlocutionary effect (the support of the thing endorsed), then the speaker is either a clumsy endorser or had some other perlocutionary intention in mind. For instance, an endorsement of an abstinence only program before an audience of known supporters of such a program should raise the suspicion that the endorser, by his locution, intends to achieve some other perlocutionary effect than that of having the audience support abstinence only programs. Since they already do the speaker might have intended for the

audience to believe that he is one of them – a supporter of abstinence only programs – and therefore that *he* is worthy of being supported by them (i.e., of receiving their vote). In this case, the endorsing illocution is being used indirectly to achieve some other illocution.³⁴⁹

Second, the speaker's illocution is frequently mediated. At the minimal end, there is the mere microphone, with which the speaker must be adroit, and at the maximal end is the full panoply of print and other technology through which the communicative act can be mediated and this mediation plays no small part in determining the content and perlocutionary effect of the endorsement. The effective endorsement, then, considers how the media will edit the locution, and it must, therefore, contain a charismatic and spliceable sound bite.

Third, these first two features together – that the audience is a conglomeration that receives a mediated illocution – challenges a third feature of the standard model of the communicative act, namely, that the speaker and audience share a world, or a “context”, as it is sometimes put. The richness and sophistication of the shared world of speaker and audience determine, to a large degree, the degree of sophistication permitted to the speaker. Hence, local farmers can speak concisely to one another about the expectations for this year's crops, where the outsider, even an otherwise sophisticate outsider (say, one who is a farmer), will be only able to participate in the conversation at a rudimentary level. In general, there is available to interlocutors with a rich mutual world a whole range of puns, metaphors, short-hand expressions (e.g., acronyms), and referents which make it possible to engage in communicative acts which would be unavailable to them in a less rich mutual world.

The upshot is that the less rich the mutual world of speaker and audience, the more conventional we ought to expect the content of the speaker's locution to be. Since the inner logic of the endorsement requires a statistically (more or less) diverse corporate audience, one can expect that endorser and audience share a more or less impoverished mutual world and that the propositional content of the endorsement will hence be composed of rote vocabulary and tropes. Clichés will be common; allusions to *Paradise Lost* and *The Pilgrim's Progress* will be infrequent.

Fourth, the audience of an endorsement is largely not a participant in the conversation. This follows from a number of features of the endorsement. The fact that the audience is a conglomeration, that the message is mediated, and that an endorser relies upon his authority as one reason that the audience ought to promote the thing endorsed, all give impetus to the audience's passivity. Audience participation is limited to approval and disapproval of what the speaker has said, with volume perhaps giving some sign of the intensity of their approving or disapproving. Further, the inner logic of the endorsement does not include the solicitation of a responsive speech act, in the way that an offer does³⁵⁰ or an apology or a proposal might.³⁵¹ Some types of communicative acts, such as asking, do solicit from the audience a responsive communicative act, but others,

³⁴⁹ BACH & HARNISH, 240.

³⁵⁰ For those familiar with the taxonomy of illocutions, offer is a type of commissive. Id.

³⁵¹ A type of acknowledgment and constative, respectively. Id.

such as demanding, do not, and the logic of the endorsement seems to partake in this later category of communicative acts.³⁵² The perlocutionary intent of an endorsement is support, not a responsive speech act.

D) Summary: Endorsing and Political Equality

Endorsing takes as its subject an authority figure and has as its object a political candidate, a commercial product, or an ideal. This authority, of whatever sort it might be, is based in the fact that the speaker has access to some truth-seeking principle. The analysis is indifferent to the validity or accuracy of this truth-seeking principle; it is only necessary that speaker intend that the audience come to believe that the speaker endorses something because of his access to this truth-seeking procedure.

Access to this truth-seeking procedure generates a comparative normative judgment: the audience is to believe a person, product, or ideal to be superior to its competitors; because of this superiority the audience is to support it. This support involves differing activity depending upon the nature of the thing endorsed and the enthusiasm of the supporter. The comparative nature of the normative judgment requires an ancillary judgment about the thing not endorsed: this competitor is inferior to the thing endorsed, although the endorser realizes that it has certain features that appear attractive to others. The endorsing illocution, therefore, contains an implicit judgment about those other people who would support the inferior thing, as seen in the offense quote from the endorser from Rutherford County.

An endorsing illocution, when undertaken by the state, therefore implicates questions of its authority and, indeed, its authority to declare one thing superior to another. Because the endorsing illocution relies upon a comparative judgment, it arranges an audience's expectations as to how they might be treated by the endorsing entity. It is one part of political equality that one be treated equally by the state; it is another part of political equality that citizens have a reasonable expectation of such equal treatment. To the degree that an endorsing illocution, in the form of a state's display of a monument, vitiates or even nullifies such an expectation, the endorsing illocution is deeply implicated in the question of political equality. It announces whose citizenship makes them sufficiently competent to participate in the civic realm and whose does not.

V. Modifications for the Endorsement Test

The axioms for these suggested modifications are: that a state's monumental displays are speech acts, that they enact a cultural script and that the monument's performance of that script imparts social meaning to both the civic space of its displays and, importantly, citizenship. Monumental displays announce who is and who is not competent to enter that civic space.

³⁵² Again to place the endorsement within the taxonomy of illocutions, it appears to be a species of directive.

The critical value is political equality and the concept of endorsement provides a sufficient vehicle for analyzing whether any particular display is a danger to this value. However, to make the Endorsement Test responsive to political equality, it must be seriously retooled. The modifications I suggest are: one, to keep in mind the complicated and reflective nature of the communicative intention; two, de-prioritize the religious/secular distinction; three, since civic space embodies ideals of political equality, make an explicit holding regarding the civic meaning of particular civic spaces wherein the contested symbol is displayed; four, instead of asking about “purpose” and “effect”, courts should ask what script the monument enacts and what is the significance of the displayed symbol from within the tradition of which it is a part.

1. *Purpose and Effect of a Locution*

As an initial matter, jurists should keep in mind the reflective nature of the communicative intention. The purpose in speaking and the effects of that speech can sometime only be segregated from one another as a analytic matter. In concrete, particular instances, one will only be able to discuss the effect of speech through reference to intentions and to the purpose of speech through the intended effects of that speech. Hence, approaching the purpose and effect prongs of the Endorsement Test as if they were entirely distinct is infelicitous. The distinction actualizes the folk metaphysics of autonomy: that the world is populated by separate, autonomous agents who communicate to each other by transporting semantic content to one another through speech acts. This metaphysics is simply inaccurate. By focusing on script enactment and the significance of the symbol from within the tradition of which it is a part, interrelation of “purpose” and “effect” are made clear, as discussed below.

Additionally, jurist should be cognizant that communicative acts have two types of effects upon their audiences. One is the perlocutionary effect, which is what the speaker would have the audience do upon their understanding the speech act. The perlocutionary intent is embedded in the illocutionary intent and, along with the proposition content of the communicative act, impart to that speech act its illocutionary force. The perlocutionary intent is part of what distinguishes one speech act from another.

However, another effect a successful communicative act has on an audience is their mere understanding of the communicative act. Such understanding is usually the necessary antecedent to the effectiveness of the perlocutionary intention. Only by understanding the speaker’s communicative act can the audience go about performing the perlocutionary effect. It is not until I understand that some one warning me that there is a bear in the camp ground that I can run away.

The distinction between these two types of effects – perlocutionary and understanding – is import to the jurist. It is one part of the movement away from a jurisprudence focused upon “offense” and “alienation”, which are “subjective” perlocutionary effects dependent upon an individual’s idiomatic disposition. An Endorsement Test focused upon “offense” asks about perlocutionary effects, but we can

understand a communicative act without that communicative act effectively bringing about its intended perlocutionary effects. My suggested alterations focus on what we can understand by a state's monumental display, and this, unlike an inquiry into offense, is an "objective" inquiry. It asks for an "objective" analysis of the way that symbolic displays construct our shared social and political world.

2. *The Religious/Secular Distinction*

The religious/secular distinction is built into the Endorsement Test. It has hitherto been determinative of the constitutional question: if the purpose or effect is deemed "religious" then the monument is unconstitutional. This distinction, as I argued in chapter 9, is of very little use to that theoretical material concerned with public reason. For the same reasons, it is an infelicitous part of the Establishment Clause's doctrinal vocabulary: the supposed religiousness of a monument's purpose or an effect tells us very little about that monument's impact upon political equality. Additionally, when employed in the purpose prong, the religious-secular distinction creates the impression, or emphasizes the impression that some already have, that religious believers are under assault in America and that Constitutional law is actively participating in this assault. By emphasizing political equality, courts can alter this perception. A conclusion that a particular display is unconstitutional will no longer depend upon the religiousness of the display; rather, the court holding will be that a particular monumental display is unconstitutional because of the way that display negatively impacts the value of political equality.

The distinction can not be jettisoned entirely, however, as it is built into the constitutional language. Articulating the word "religion" will therefore be a necessary part of any Establishment Clause claim. Nonetheless, as I demonstrate below, its use can and ought to be circumscribed.

3. *Forum Analysis*

Foregrounding political equality requires that jurist shift their focus in a number of ways. Taking a monumental display as a performative speech act with implications for the construction of the subjectivity of citizenship (and hence for political equality), the first task of the jurist is to understand the meaning of civic space in which the monument is displayed and the way that that space expresses, or fails to express, political equality. As we have already seen, participants to these debates already build social meaning into civic spaces. Advocates of the *Van Orden* monument, recall, take the Texas Capitol lawn to be a market place of ideas while opponents of posting take it to be the site of political power. Furthermore, as the examples from chapter -- show, the employment of the Endorsement Test already forces judges to explore the meaning of civic space in their opinions. Indeed, they often have to make forays from the courtroom to the site of the display to more accurately understand the "impression" it creates.

What my modification therefore asks is that jurists make explicit what has hitherto been implicit in their Endorsement Test analysis. It is to be an analysis that jurist must undertake, rather than one that occurs unconsciously.

The question regarding the social meaning of place should be, how close, either physically or symbolically, is the display to the exercise of political power or the meaning of citizenship. The closer the space is to the exercise of political power, the more inclined should be a judge towards finding the display unconstitutional. Again, the closer the symbol is to a place where citizenship is given meaning, the more inclined should be a judge towards finding that display to be unconstitutional. Such an inquiry is place specific – we ought not lump together the Alabama Supreme Court with, say, the courts in Hamilton County. Nonetheless, it is possible to articulate some generalities about different types of civic places. State monumental displays of religious symbols tend to occur, and advocates of posting tend to push for their display, in these five locations: cemeteries (as war memorials), courthouses, state capitols, parks, and schools. Additionally, the museum is typically presented as a forum where the display of religious symbols or works is innocuous. It is therefore often used as either analogy or foil for other civic spaces.

War Memorials

War memorials present an example of a monumental display that may be physically distanced from the seat of political power but symbolically close to the meaning of citizenship. War memorials mark the site of one of the highest expressions of citizenship, the sacrificing of one's life for the sake of the political community. Marking war cemeteries with only crosses says something rather worrisome about the identity of those who sacrificed themselves. It says only Christians sacrificed themselves for their country and that others did not do so. Instead, these others enjoyed the benefits of the polity without sacrifice. Their costless benefit marks them as less committed to the polity and, hence, less competent to participate in the political community.

Some interpretations of the Religion Clauses that emphasize coercion, conversion, or the transference of money have a hard time dealing with the display of religious symbols as war memorials, especially to the degree that the display of such symbols, when part of a personally chosen headstone, are completely uncontroversial. Yet such headstones pose the same threat of coercion, conversion, and the transference of money (when the state pays for the headstone) as do religious symbols erected to mark an entire cemetery. A focus on political equality easily distinguishes the cases. A cross on the headstone indicates the sacrifice of one particular Christian citizen without also conveying the suggestion that all who sacrificed themselves were Christians. Not only, then, is a personal headstone not an act of governmental speech, but that speech plays no part in constructing the symbolic meaning of citizenship. It says something only about a particular citizen, not all of the war dead.

Courts

Courts, at least as presently conceived, are clad in the garments of neutrality. It is supposed that through these tribunals the law acts neutrally upon its citizens, who approach the bench as *sui juris* citizens. Although citizens in fact bear many signs that distinguish them from one another, such as wealth, age, color, gender, sexual orientation, religion, and ethnicity, those signs are to be stripped from the citizen at the courthouse door. Before the bar, only what they have done is to be of concern; what they are is a matter of indifference.

The law/politics distinction moves this conceit of neutrality. By this distinction it is supposed that politics is the forum for the expression of idiomatic policy preferences and a place where it is appropriate that policy reflect asymmetries in power. In contrast, courts, where law touches the citizen, are supposed to be free of idiomatic preferences and impartial to the power differentiation of the litigants before it. It is merely the law's agent.

However descriptively inaccurate and normatively misleading this conceit maybe, there seems to be very little doubt that it is ours. It seems, for instance, to be one of the reasons that the Supreme Court, the "least democratic" of the branches of the federal government, continually enjoys high approval ratings. So long as we retain this conceit, the institution of the courts, and the buildings they inhabit, must be considered a forum of strong equality grounded in neutrality and impartiality towards who and what the litigants are. The display of religious symbols in this forum, then, ought to be extremely suspect.

State Capitols and Other Legislative Assemblies

State capitols, county commissions, and city halls are other popular sites for the display of monuments. These are sites of legislation, where all competent participants in the political community might gather for the passage of laws. They are thus physically close to the exercise of political power. But they are also recognized sites for the expression of idiomatic points of view, for the advancement of one's own interests, and are thought to legitimately reflect asymmetries in power. Now, again, we may wish to abandon this conceit – we might, for instance, wish to reaffirm a commitment to legislation aimed at the common good rather than legislation aimed at person gain – but until we do, it seems to me that site of legislation ought to receive a mid-level classification on the equality scale.

Indeed, part of the difficulty with the *Van Orden* monument is that the symbolic meaning of the place of its display is ambiguous – it might be either the site of political power or simply a park that happens to be close to the Capitol Building. One might conceive of the lawsuit as an attempt to resolve this ambiguity and to lay claim to one meaning or the other. However, since few park-like activities go on there (i.e., there are neither picnic tables nor picnickers) and the only voices "speaking" there are the state's other monumental displays, I am inclined to resolve the question in favor of understanding the lawn of the Texas Capitol as being close to the exercise of political

power. When Wallbuilder, therefore, writes in its briefing that “Mr. Van Orden can, of course, leave its premises at will or avoid it altogether” they have uttered an inculpatory statement, rather than, as they seem to take it, an exculpatory one. To the degree that avoiding the monument altogether would require that Mr. Van Orden also avoid participating in legislative politics or otherwise making use of the legislative building, the monument debilitates the value of his citizenship. Even if the presence of the monument leaves Mr. Van Orden still competent to participate in these important aspects of self-governance, it nonetheless debilitates his participation insofar as it requires Mr. Van Orden to walk the long way around. Such walking around might seem innocuous from the point of view of “offense” or the possibility of conversion, but from the point of view of political equality, it is an important and visible stigmatic injury marking one’s citizenship as inferior.

Parks

Parks tend to be both symbolically and physically distanced from the seat of political power and the meaning of citizenship seems to be here less at stake. They are places of recreation and while we should desire that all citizens (and others too) feel comfortable, safe, and happy in such places, political equality in these forums seems to be little at stake. Of course, this is not invariantly true: exclusion from public parks, for instance, was an important part of Southern Apartheid and the National Park System plays an important part in the construction of citizenship, especially to the degree that they provide a forum for the remembrance of American history and enshrine the principle of political equality.

However, the sort of analysis I imagine here can take account of these variances, as it is site specific rather than merely general. Hence, there are many circumstances where parks can become intimately linked with the exercise of political power and the definition of citizenship. There is a national park at Jamestown, for instance, and this site is closely linked in the popular imagination with the founding of a new continent. To the degree that a meaning of citizenship appropriates the past as ideological support, populating that past with certain good citizens and exiling or ignoring bad citizens, this seems to draw this particular park symbolically closer to the meaning of citizenship. The cross there on display, although announcing itself to have been donated by a private organization, ought to generate the suspicion that it announces American to be a Christian nation.

In other instances, the city park might be physically close to either a courthouse or a legislative building. Again, parks might be symbolically linked with the institutions of political power, as when, for instance, the crèche is stored in one of the city’s buildings and ceremonially and ostentatiously transported to the city park every year. Again, if the park is the frequent (or only) site of local political rallies, this might draw the park symbolically closer to the exercise of political power, even if there are no governmental buildings physically near the park.

Schools

While public schools are not often physically close to the buildings in which political power is exercised, but they are symbolically close. Schools are an undisputed site of subjectivity formation and an arena where is crafted the next generation of citizens. Schools are, at least presently, the site of two things that determine one's competence in the political community. First, it is in schools that we are given those experiences and teachings which, to a large degree, determine our future possibilities as both private individuals and public citizens. They are not the only place where these possibilities are realized, but to the extent that success, say wealth, connections, etc., continues to be a source of political influence and power, the school is symbolically close to the exercise of political power. Political equality requires that nothing about schools should debilitate those chances, or mark off some pupils as inferior.

Second, it is in schools where we become habituated to differences and where we develop tastes concerning what is normal and what not normal. In schools, one of the few places where we are required to gather together in an involuntary association, social inequalities can be reified into political equalities. In schools, students should be habituated to difference in a way that conforms to the dictates of political equality. Nothing in schools, therefore, should suggest that anyone is any less a citizen than everyone else. Indeed, courts are already solicitous of schools, often and frequently opining that, because of the impressionable nature of children, certain things may not take place in schools that are otherwise constitutionally permissible.

There is another danger with posting religious symbols in schools. While other locations for the display of monuments pose little danger of conversion, this is not the case in schools. The threat to Mr. Van Orden in seeing the FOE monument is not that he will convert to Judaism (or maybe Christianity). This is a threat within the schools, where the habitual recitation and exposure to religious symbols will influence children's perceptions of normality and constructs their habitual interpretations of the world. Hence, just like the display of symbols, the recitation of the pledge of allegiance ought to be suspect. In these few lines, before students are able to evaluate the strength of the evidence, they are habituated to the existence of God and accustomed to the idea that He is especially concerned for the American republic. God's especial concern suggests that those who reject the existence of God also reject the authenticity of the republic. The recitation of the pledge constructs an ideal of citizenship in which belief in God is an indispensable element of one's competency to appear and participate in the political community.

Museums

An analysis of the meaning of civic space also allows us to see why jurist often present the museum as a forum where the display of religious symbols is innocuous.

Typically, by this argument, the museum is present as a forum that somehow

cancels the religiousness of the message conveyed by the religious work. This message emanates from the religious work but evaporates in the dry museum air before it reaches the observer. The museum setting, say some, embodies the difference between using a word and mentioning that word: when in a museum a religious work has scare quotes about it. The museum's communicative act is in some way ironic. This seems to me to be the right conclusion – that displays in this setting are not violations of the Establishment Clause, all other things being equal – but not quite for the right reason.

This understanding of the museum is only partially correct. First, it is not clear that the museum setting actually does put scare quotes around it in the way that is asserted. If it does, then it might well be that such scare quotes are merely a way of masking the state's power. The collection and display of works in the museum reflects what the powers that be think to be important. Placing scare quotes around a work does not cancel out the exercise of state power. Second, and I think more importantly, putting scare quotes around a religious work has little and perhaps has no impact on diminishing the conversion effects that such a work might have upon its audience. A Caravaggio might be better viewed in its native habitat, but even when in a museum, where it supposedly has scare quotes about it, it is more likely to induce a conversion experience than is, e.g., the monumental display of the Decalogue.

The conclusion is that to the extent that the display of religious works and symbols in a museum appears to be innocuous, it is less because the museum setting vitiates the religious message and more because the museum is a place both physically and symbolically distanced from the exercise of political power and the construction of the subjectivity of citizenship. This is not always true: some museums are close, both physically and symbolically, to the exercise of political power. When this is so, courts should give extra attention to religious works displayed in those museums.

Summary

Assaying the social meaning of a particular civic place along the dimension of political equality is the first step in evaluating whether or not any particular religious display debilitates political equality or diminishes anyone's citizenship. This civic meaning interacts with the meaning of the displayed symbol and this symbol enacts a cultural script. In inquiring into a symbol's purpose, then, jurists ought not to ask, as a primary matter, what sort of intentions legislators might have had, but about the script enacted by the monument's display.

VI. Purpose: Script Enactment and Free Speech

Sojourns in Their Own Land: Free Speech and Resentment

Courts should be cognizant that the purpose prong of the Endorsement Test operationalizes the duty of civility and that this operationalization places pressures on the

freedom of speech. The forced silence produced by such pressure threatens to create communities of resentment. This resentment, when directed at the Supreme Court, seems to be the major genesis of the Myth of the Covenant. Furthermore, according to the best sociology, conservative Christian evangelicals find solidarity in considering themselves to be sojourners in their own land.³⁵³

By this conceit, they and Christians like them, were once the dominant group in America. Everyone had principles and good morals and therefore society and politics both ran smoothly. Now, they are embattled upon all sides by the forces of secular modernity. This sense of being embattled, of fighting to retain what once was and redeeming the lost order, according to the Christian Smith, is one of the great sources of social solidarity for this particular community. Pluralism, says Smith,

Continually maintains the contest, the struggle, the tension for evangelicals, who feel compelled to continue to carry on their mission as “salt and light” in the “needy world.” And it is precisely the tension-generating confrontation between the activist, expansive, engaging evangelical subculture and the pluralistic, nonevangelical dominant culture that it inhabits – which to evangelicals seems increasingly hostile and in need of redemptive influence – that generates evangelicalism’s vitality. It is precisely evangelicalism’s heavy exposure to and engagement with modern pluralism – and the attendant distinctions, tensions, and conflicts that necessarily arise – which reinforces evangelical boundaries, identities, solidarity, mobilization, and membership retention.

I think there is little doubt that the purpose prong exacerbates this sense of being embattled, for it requires, or is thought to require, advocates of posting to be silent and to not voice their real reasons for want to post. The attorneys for the defendants in both cases studies, for instance, advised their clients to not say anything to the media. I suspect this is why I was unable to procure any interviews with advocates of posting.

Stout’s worry about resentment, then, is a real worry, especially since it seems as if religious and political community might be forming around this sense of resentment. The effectiveness of the conceit in generating such resentment depends upon the unjustified sense that when Christians were the dominant group (which they still are) everything in society and politics ran smoothly. By this supposition, members of this group wrongly claim title to a superior degree of citizenship by linking themselves with the dominant (and better) group of the past. The conceit also includes an undue hostility towards pluralism, which, at least by the Myth of the Covenant, is wrongfully conflated with a morality of selfishness. This does not mean, however, that their resentment is not real, nor that jurists ought not to be alert for means by which they might defuse such resentment.

³⁵³ CHRISTIAN SMITH, *American Evangelicalism: Embattled and Thriving* (University of Chicago Press 1998).

Part of the pressure on free speech is eased by the excision of the religious/secular distinction from the discourse. By this removal, legal doctrine no longer identifies certain and central beliefs as themselves illicit. Religiously motivated political actors should, therefore, no longer feel as if their types of reasons are being explicitly identified and marked as impermissible, thereby removing one possible source of resentment.

Script Enactment

To further ease the pressure on free speech, I suggest that instead of looking at the motives of particular individuals engaged in these conflicts, jurist should ask what script the monument enacts, and they should analyze this script in terms of political equality, rather than religiousness.

A display of the monument says something, and therefore has an illocutionary force, but it also enacts a script embedded in our cultural material. Courts should ask about the themes, tropes, metaphors, plot, and characters of the narrative which any particular monument enacts. They should further ask whether this is a script is one of political inclusion, and thus of equality, or political exclusion, and thus of inequality.

This script might have some elements that are discernibly religious (i.e., that America is a chosen nation, that all the nation's warrior are Christians), and identifying these religious elements might be an important part of the analysis, but those elements do not per se make the script one hostile to political equality.

Further, while the identification of the script might make use of statements made by particular political actors involved in those disputes, those statements are to be used as evidence about the content of the script, rather than about the purpose of the monument. In some instances, perhaps crosses and war memorials, there will be little need for a court to understand the purposes of individual legislators who sponsored the display. It must be admitted, however, that this will not always be the case. In some instances, courts will find that statements made by particular political actors are either good or necessary evidence for determining the content of the script.

Hence, giving attention to script enactment and de-emphasizing the religious/secular distinction goes a long way towards both easing the pressure on free speech and removing one genesis of communities of resentment. These two moves, however, do not remove these effects of the purpose prong entirely. Religiousness will still be a part of determining the content of an enacted script and the purposes of individual legislators will still provide some evidence of the content of that script. However, I do not think that the doctrine needs to relieve these pressures entirely.

The purpose prong as modified does not prohibit speech, nor criminalize it; nor does it make a content-based classification, or require a "pre-publication" license. Nor does the modified purpose prong incentive silence in the same way that the original purpose prong does. Since religion is no longer an essential part of the constitutional inquiry, religiously motivated actors are not placed on the defensive vis-à-vis their religious beliefs. Replacing "religion" as an analytic category with political equality, might continue to place pressure on lawmakers, but now not vis-à-vis their religious

beliefs. Since the question is not whether the enacted script is religious, but how that script implicates the norms of political equality, they are placed on the defensive vis-à-vis their political beliefs. In a deliberative democracy, there seems to me to be nothing wrong in making this an important and central question, both in the courtroom and outside.

We can also see that the modified version of the purpose prong has a welcome ancillary consequence as well. It continues to place pressure on law makers, and those who would litigate these claims, but rather than incentivizing silence, it incentivizes the self-scrutiny of one's faith-commitments. It thus incentivizes the development of responsibly held faith-commitments.

Responsibly Held Faith-Commitments

Examining script enactment does a better job of forcing individuals to scrutinize their own faith commitments than does an examination of whether or not a political actor has religious motives. Instead of forcing them to identify some commitments as religious (and therefore inscrutable, so don't be rude by asking) it asks them to place those purposes and reasons in the cultural context in which they are being articulated. Belief is an essentially social phenomenon, and attempting to understand the relationship that one's belief has with the culture one inhabits invites an inquiry into the relationship between one's beliefs and the social world one inhabits. This inquiry is an invitation to take pluralism seriously and to understand the relationship that one's own beliefs has with that pluralism.

While the development of responsibly held faith-commitments can not be an explicit goal of the Court's jurisprudence, we can, from the theoretical point of view, consider such to be a happy incident attendant upon the otherwise felicitous modifications of the Endorsement Test.

In sum, the purpose prong of the Endorsement Test, as presently conceived, places unacceptable pressure on the freedom of speech. It incentivizes silence in a way repulsive to deliberative democracy and threatens the formation of communities of resentment. De-prioritizing the religious/secular distinction and the purposes of individual legislators and instead asking about political equality and script enactment greatly diminishes this pressure. It also has the ancillary benefit of acting as a catalyst of the development of responsibly held faith-commitments.

VII. Effects: Symbolic Analysis

As with the purpose prong, the secular/religious distinction is of no or little use in analyzing the effects of a display. Instead, jurist should ask about the significance of the symbol from within the tradition of which it is a part. Again, as detailed in Chapter --, judges already find cause to ask and answer this question. The call here is to make this inquiry explicit. An understanding of this meaning will then enable the jurist to understand the dialectic relationship between the symbol, the civic space of its display,

and the script that it enacts. By analyzing these things, one can understand how a particular symbolic display constructs the subjectivity of citizenship and the threat, or lack of threat, posed to political equality by the monumental display.

Reasonable Observer

By ceasing to ask what effect a display has upon its observers, judges avoid one sticky question that has annoyed detractors of the Establishment Test for some time, namely, the reasonable observer. A jurisprudence focused upon “offense” (or any other of the emotions) must posit a subject experiencing that offense. That subject can not be the plaintiffs themselves, it is usually supposed, because their filing suit is *res ipsa loquitor* of offense and the filing of the suit would be sufficient evidence to determine the issue in their favor. Nor can the subject be the judge, for this would merely make the answer depend upon the judge’s own “subjective” inclinations. Hence, what is needed is a judicially constructed reasonable observer, supposedly a brother of the common law’s reasonable man, who will have reasonable and civil reactions to a state’s monumental displays. By assaying this reasonable observer’s reactions, we can know if any particular monumental display is constitutional or not. This only relocates the difficulty. Now the question is about the characteristics of this reasonable observer and it is correctly charged that judges merely pour into this reasonable observer those characteristics that make his (her?) reactions such that they lead to just the reaction that renders the display constitutional or unconstitutional, as the judge desires.

Analyzing the civic forum in which the monument is displayed, the script the symbol enacts, and the meaning of a symbol from within the tradition of which it is a part eliminates the need for a reasonable observer who might either be alienated or offended by the state’s endorsement. These inquiries are “objective” and can be conducted using the ordinary evidence available to judges. One does not need to psychoanalyze a fictional person. Perhaps the best way to see this is by means of an example, with which I conclude this chapter.

An Example: The Ten Commandments in Hamilton County

The district courts found the Decalogue displays in both Rutherford and Hamilton counties to be unconstitutional. In Rutherford County, the district court thought that there was a religious purpose in displaying the Decalogue but that there was no religious effect since it was displayed amongst a collection of other magisterial documents from America’s past which would not have a religious effect upon a reasonable observer. In Hamilton County, the district court found the Decalogue displays unconstitutional both because those displays had a religious purpose and religious effect, being hung alone without other documents that might suggest that the Decalogue display was merely one of several other historical documents.

Under my analysis a jurist would reach these same conclusions, but for entirely different reasons. In Hamilton County, the Decalogue plaques were displayed in three of

the county's courthouses, forums of strong equality because they are neutral, at least under present social convention. Politics is to remain outside the courthouse door, litigants are to be stripped of their differentiating social marks, such a wealth and religious affiliation, and the law is to work on them impartially. The architecture and décor of each of the three Hamilton County courthouses confirms these generalities. There are no other monumental displays and nothing else about the forum suggests that it is either a museum or a market place of ideas in which the Decalogue is merely one more voice amongst peers. Here, nothing is to take place but efficient and just sorting according to the law.

The script enacted by these displays is the Myth of the Covenant of American Republicanism. The theme of this myth is that Christians are good citizens, that when these good citizens were in charge, the nation was moral and strong, and that other, non-Christians who do not follow the Decalogue, tend towards criminality and sexual-licentiousness. This script strongly implicates the meaning and subjectivity of citizenship, degrading the citizenship of some to a secondary status. This script can be discerned in the public statements made by proponents of posting.

The Decalogue itself, when situated within the tradition of which it is a part, is a symbol of separation and inequality. One can not hide the discriminating tendencies in the Decalogue by feigning to ignore the first pentad, or by redacting certain of its more repressive elements, such as the command of inherited guilt. However much the second pentad is capable of being represented as Transcendent Moral Law (and this might not be much), the first pentad establishes positions of apostasy and orthodoxy. It announces who is, and who is not, a good person.

As for its position within Holy' Scripture, the Decalogue, along with other of Old Testament law, is concerned with the social and political differentiation between the people of Israel and the "pagans" amongst who they were living. It should also be remembered that some of the harshest punishment described in scripture are for violations of the commandments. After the worship of the Golden Calf, Moses gathers to himself the other members of Levites, his own tribe, and "he said to them 'Put every man his sword on his thigh, and cross over and back from gate to gate in the camp, and each man kill his brother and each man his fellow and each man his kin.' And the Levites did according to the word of Moses, and about three thousand men of the people fell on that day." (Ex. 32:27-29). For thieving and coveting, Achan, along with his sons, daughters, oxen, assess, sheep, and "all that he had" was brought up the Valley of Achor, where "all Israel stoned him with stones; they burned them with fire, and stoned them with stones." (Joshua 7, esp. 16-26). It will not be of any additional comfort to know that Achan was found guilty by the procedure of cleromancy, the casting of lots as a means of divination, although after the lots pointed his way, he did confess.

Finally, as plaintiffs correctly note, the enumeration of the displays enacts, whether proponents of posting wish it to or not, one of the bloodiest episodes in western history, the wars of religion. To take a stand on the enumeration is to take a stand, albeit a minor one, on one side or the other. In this respect, it should also be remembered that

the display of the Decalogue is a part of Protestant's anti-Catholic iconoclasm, so that its mere presences, irrespective of the enumeration, re-enacts that controversy.

By observations such as these, a jurist would be forced to conclude that the Decalogue display was unconstitutional. It takes place in a forum of neutrality, enacts a highly inegalitarian script, and itself, even apart from this script, establishes positions of apostasy and orthodoxy as a means to separate the Israelites from the pagans, a separation enforced by the most stringent means. All combined, the Decalogue displays in Hamilton County attempt to structure (or restructure) an egalitarian civic space so as to render incompetent to enter the civic sphere those who do not adhere to this particular form of Christian Nationalism. If you do not revere the Decalogue as an expression of national solidarity, you are not competent to litigate in the Hamilton County courts. These displays endorse the competency of one class of citizens over another and that competency is identified by their religious affiliations.

Conclusion

The first thing to note about these suggests is that they are not in fact entirely novel. As documented in chapter 4, many judges, in employing the Endorsement Test already ask some of these questions. Judge Posner, for instance, found the display of the cross during Christmas to be unconstitutional because, from the point of view of the tradition of which it is a part, the cross is not a Christmas symbol. It is a symbol of death rather than birth. Hitherto, however, jurist have not prioritized these question, nor have they tried to understand the implications of endorsement on political equality, at least not in a way that does not make incorrect use of the concepts of "religion", "secular" and "alienation" or "offensive".

Jettisoning these concepts allows the jurist to prioritize political equality. It also ease the pressure that the purpose prong places on free speech and, thereby, hopefully, is less likely to participate in the constitution of communities of resentment. By refocusing on "objective" aspects of social life, the meaning of civic space, script enactment, and the meaning of a symbol from within the tradition of which it is a part, we have the added benefit of casting aside the reasonable observer. All of these are overt benefits of these suggestions, but it is not unimportant to my theoretical agenda that it is the asking and answering of just these sorts of question which might catalyze the development of responsibly held faith-commitments.

The real audience of these questions is not so much judges or individual legislators. Rather, the most pertinent audience to which these questions are addressed is the cause lawyers who, in marshalling ideology to defend their cause, would have to answer them. Rather than pilfer the historical record, cause lawyers, in answering these questions, would have to make a conscientious effort to understand themselves, our political institutions, and the meaning of political equality. By answering these questions, these cause lawyers would travel some distance towards satisfying the two demands of the duty of civility, those of speaking in a manner that affirms the

commitment to keeping the discussion going and of taking others seriously when listening to them.

References

Legal Cases

- ACLU Nebraska Foundation v. City of Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. en banc 2005).
- ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 186 F.Supp.2d 1024 (D.Neb. 2002).
- ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).
- ACLU of Kentucky v. Mercer Co.*, 432 F.3d 624 (6th Cir. 2005).
- ACLU of Ky. v. Garrard Co.*, 517 F.Supp.2d 925 (E.D.Ky. 2007).
- ACLU of Ky. v. Grayson Col*, 591 F.3d 837 (6th Cir. 2010).
- ACLU of Ky. v. Rowan Co.*, 513 F.Supp.2d 889 (E.D.Ky. 2007).
- ACLU of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004).
- ACLU of Ohio Foundation, Inc. v. Ashbrook*, 211 F.Supp.2d 873 (N.D. Ohio 2002).
- ACLU of Ohio v. Board of Com'rs of Lucas County*, 444 F.Supp.2d 805 (N.D. Ohio 2006).
- ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002).
- ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).
- Adland v. Russ*, 307 F.3d 471 (C.A.6 2002).
- Adland v. Russ*, 107 F.Supp.2d 782 (E.D.Ky. 2000).
- Alabama Freethought Association v. Moore*, 893 F.Supp. 1522 (N.D. Ala. 1995).
- Allen v. Morton*, 333 F.Supp. 1088 (D.C.D.C. 1971).
- Allen v. Morton*, 495 F.2d 65 (U.S.App.D.C. 1973).
- American Civil Liberties Union of Illinois v. City of St. Charles*, 622 F.Supp. 1542 (1985).
- American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).
- American Civil Liberties Union of Kentucky v. Wilkinson*, 701 F.Supp. 1296 (E.D.Ky. 1988).
- American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (C.A.3 1997).
- American Civil Liberties Union v. City of Birmingham*, 588 F.Supp. 1337 (E.D.Mich.S.Div. 1984).
- American Civil Liberties Union V. City of Birmingham*, 791 F.2d 1561 (C.A.6.Mich 1986).
- American Civil Liberties Union v. Ruther County*, 2006 WL 2645198 (M.D. Tenn.).
- American Jewish Congress v. City of Chicago*, 827 F.2d 120 (C.A. 7, Ill. 1987).
- Anderson v. Salt Lake City*, 475 F. 2d 29 (10th Cir. 1973).
- Anderson v. Salt Lake City Corp.*, 348 F.Supp. 1170 (D.C. Utah 1972).
- Baer v. Board of Education*, 181 N.Y.S.2d 230 (1958).
- Board of Ed. Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).
- Books v. City of Elkhart*, 79 F.Supp.2d 279 (N.D.Ind. 1999).
- Books v. City of Elkhart, Indiana*, 235 F.3d 292 (C.A.7 2000).
- Burell v. City of Nasha*, 599 F.Supp. 792 (D.N.H. 1984).

Card v. City of Everett, 386 F.Supp.2d 1171 (W.D.Wash. 2005).
Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008).
Chambers v. City of Frederick, 373 F.Supp.2d 567 (D.Md. 2005).
Church of the Lukumi Babaul Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).
Citizens Concerned for the Separation of Church and State v. City and County of Denver, 508 F.Supp. 823 (1981).
Citizens Concerned for the Separation of Church and State v. Denver, 481 F.Supp. 522 (D.C. Colo. 1979).
CLU of Kentucky v. Mercer Co., 240 F.Supp.2d 623 (E.D.Ky. 2003).
Coleman v. Miller, 307 U.S. 433 (1939).
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
Creatore v. Town of Trumbull, 68 F.3d 59 (C.A.2 1995).
DiLoreto v. Downey Unified School Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999).
Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982).
Donnelly v. Lynch, 525 F.Supp. 1150 (D. R.I. 1981).
Elewski v. City of Syracuse, 123 F.3d 51 (C.A.2 1997).
Engel v. Vital, 370 U.S. 421 (1962).
Epperson v. Arkansas, 393 U.S. 97 (1968).
Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976).
Eugene Sand & Gravel, Inc. v. City of Eugene, 552 P.2d 596 (Or. App. 1976).
Everson v. Board of Education of Ewing TP., 330 U.S. 1 (1947).
Ex parte State ex rel. James, 711 So. 2d 952 (Ala. 1998).
Freedom From Religion Foundation, Inc. v. State, 872 P.2d 1256 (Colo.App. 1993).
Freethought Soc. of Greater Philadelphia v. Chester County, 191 F.Supp.2d 589 (E.D.Pa 2002).
Freethought Soc. of Greater Philadelphia v. Chester County, 334 F.3d 247 (3d Cir. 2003).
General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).
Glassroth v. Moore, 229 F.Supp.2d 1290 (M.D. Ala. 2002).
Green v. Bd. of County Comm'rs of the County of Haskell, 450 F. Supp. 2d 1273 (E.D. Okla. 2006).
Green v. Haskell Co. Board of Com'rs, 568 F.3d 784 (10th Cir. 2009).
Harvey v. Cobb County, 811 F.Supp. 669 (N.D.Ga. 1993).
Herold v. Parish Board of School Directors, 136 La. 1034 (1915).
Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).
Indiana Civil Liberties Union Inc. v. O'Bannon, 110 F.Supp.2d 842 (S.D.Ind. 2000).
Indiana Civil Liberties Union Inc. v. O'Bannon, 259 F.3d 766 (7th Cir. 2001).
Jocahm v. Tuscola County, 239 F.Supp.2d 714 (E.D.Mich.N.Div. 2003).
Kimby v. Lawrence County, Ind., 199 F.Supp.2d 856 (S.D.Ind. 2000).
King v. Village of Waunakee, 517 N.W.2d 671 (Wis. 1994).
Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F.3d 25 (C.A.1 2001).

Knights of Columbus, Council No. 94 v. Town of Lexington, 124 F.Supp.2d 119 (D.Mass. 2000).

Kreisner v. City of San Diego, 788 F.Supp. 445 (S.D.Cal. 1991).

Kreisner v. City of San Diego, Cal., 1 F.3d 775 (C.A.9 1993).

Lawrence v. Board of Education, 243 N.Y.S.2d 87 (1963).

Lowe v. City of Eugene, 459 P.2d 222 (Or. 1969).

Lowe v. City of Eugene, 451 P.2d 117 (Or. 1969).

Lowe v. City of Eugene, 463 P.2d 360 (Or. 1969).

Lynch v. Donnelly, 465 U.S. 668 (1983).

Lynch v. Donnelly, 465 U.S. 668 (1984).

Mather v. Village of Mundelein, 864 F.2d 1291 (C.A.7 1989).

Mather v. Village of Munelein, 699 F.Supp. 1300 (N.D. Ill. E. Div. 1988).

McCollum v. Board of Education of School Dist. No. 71, 333 U.S. 203 (1948).

McCreary County v. ACLU, 545 U.S. 844 (2005).

McGowan v. State of Maryland, 366 U.S. 420 (1961).

Mercier v. City of La Crosse, 305 F.Supp.2d 999 (W.D.Wisc. 2004).

Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005).

Meyer v. Oklahoma City, 496 P.2d 789 (Okl. 1972).

Mordovich v. Allegheny Co., 385 F.3d 397 (3d Cir. 2004).

Osediacz v. City of Cranston ex rel. Rossi, 344 F.Supp.2d 799 (D.R.I 2004).

Paul v. Dade County, 202 So.2d 833 (Fla. App. 1967).

Ring v. Grand Forks, 483 F.Supp. 272 (D.C.N.D. 1980).

Ring v. Grand Forks Public Schools District Number 1, 483 F.Supp. 272 (D.C.N.D. 1980).

Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).

Smith v. Lindstrom, 699 F.Supp 549 (W.D. Va. 1988).

Snowden v. Town of Bay Harbor Islands, Florida, 358 F.Supp.2d 1178 (S.D.Fla. 2004).

State ex rel. Weiss v. District Board of School District No. 8, 44 N.W. 967 (1890).

State ex. rel Singelmann v. Morrison, 57 So.2d 238 (La.App. 1952).

State v. Freedom From Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995).

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

Suhre v. Board of Com'rs, 894 F.Supp. 927 (W.D.NC. 1995).

Suhre v. Haywood County, 131 F.3d 1083 (C.A.4 1997).

Summun v. City of Ogden, 297 F.3d 995 (10th Cir. 2002).

Summun v. City of Ogden, 152 F.Supp.2d 1286 (D.Utah 2001).

Torcaso v. Watkins, 367 U.S. 488 (1961).

Turner v. Habersham Co., 290 F.Supp.2d 1362 (N.D.Ga. 2003).

Twombly v. City of Fargo, 388 F.Supp.2d 983 (D.N.D. 2005).

Van Orden v. Perry, 125 S.Ct. 2854 (2005).

Washington v. Davis, 426 U.S. 229 (1976).

Wieman v. Updegraff, 344 U.S. 183 (1952).

Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Zorach v. Clauson, 343 U.S. 306 (1952).

Books, Journals and other Media

- DAVID H. AARON, *Etched in Stone: The Emergence of the Decalogue* (t&t clark 2006).
- ROBERT AUDI, *Religious Commitment and Secular Reason* (Cambridge University Press 2000).
- J. L. AUSTIN, *How To Do Things With Words* (J.O. Urmson & Marina Sbisa eds., Harvard University Press. 1962).
- KENT BACH & ROBERT M. HARNISH, *Linguistic Communication and Speech Acts* (MIT Press 1979).
- CHRISTOPHER BELL, *Brooksville Group Asks for Vote*, The Huntsville Times February 24, 1999.
- ROBERT BELLAH, *The Broken Covenant* (The Seabury Press 1975).
- ROBERT BELLAH, *Civil Religion in America*, 96 *Daedalus* (1967).
- CHRIS CHRISTENSEN, *Downey Man Pushes Morals*, Press-Telegram August 23, 1997.
- COLEMAN, *Of God, the State and the Law*, Mobile Register April 18, 1999.
- MICHAEL DEVITT & RICHARD HANLEY, *The Blackwell Guide to the Philosophy of Language* (Steven Cahn ed., Blackwell Publishing 2006).
- THEO DOUGLAS, *Man Still Pushing for Sign*, Press-Telegram May 21, 1997.
- CHRISTOPHER EBERLE, *Religious Conviction in Liberal Politics* (Cambridge University Press 2002).
- NOAH FELDMAN, *Divided by God: America's Church-State Problem and What to Do About It* (Farrar, Straus and Giroux 2005).
- DAVID FREEDMAN, *The Nine Commandments: Uncovering the Hidden Pattern of Crime and Punishment in the Hebrew Bible* (Doubleday 2000).
- STEVEN GOLDBERG, *Bleached Faith: The Tragic Cost When Religion Is Forced into the Public Square* (Stanford Law Books 2008).
- DANIEL GORDON, *Dead Student, an American Story and Answer: A Sociological Analysis of Fundamentalism Explaining the Legalization fo Religious Textualism*, 40 *Washburn Law Journal* 13 (2000).
- JOSHUA GREEN, *Roy and His Rock*, The Atlantic Online October, 2005.
- STEVEN K. GREEN, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 *Journal of Law and Religion* 525 (1999-2000).
- PHILIP HAMBURGER, *Separation of Church and State* (Harvard University Press 2002).
- MARK DEWOLFE HOWE, *The Garden and the Wilderness* (The University of Chicago Press 1965).
- NICOLAS HOWE, *Thou Shalt Not Misinterpret: Landscape as Legal Performance*, 98 *Annals of the Association of American Geographers* 435 (2008).
- JAMES DAVISON HUNTER, *Culture Wars: The Struggle to Define America* (Basic Books 1991).
- PETER IRONS, *God on Trial: Dispatches from America's Religious Battlefields* (Viking 2007).

- SANFORD LEVISON, *Constitutional Faith* (Princeton University Press 1988).
- SUSAN PL LIEBELL, *Lockean Switching: Imagination and the Production of Principles of Tolerations*, 7 *Perspectives on Politics* 823 (2009).
- JOHN LOCKE, *A Letter Concerning Toleration* (Hackett Publishing Company 1983).
- GEORGE MCEVOY, *Congress' Simpletons Answer Shootings Simply: 'Hang Ten'*, *The Palm Beach Post* November 15, 1999.
- ROY MOORE & JOHN PERRY, *So Help Me God: The Ten Commandments, Judicial Tyranny, and the Battle for Religious Freedom* (Broadman & Holman Publishers 2005).
- ANDREW MURPHY, *Prodigal Nation: Moral Decline and Divine Punishment from New England to 9/11* (Oxford University Press 2009).
- RICHARD NIEBUHR, *Christ and Culture* (Harper & Brothers Publishers 1951).
- AMANDA PORTERFIELD, *Forum: American Civil Religion Revisited*, 4 *Religion and American Culture* 1 (1994).
- ASSOCIATED PRESS, *Inmate Wins Suit, but Jail Can Post Bible-based Rules*, *The Dallas Morning Star* July 17, 1998.
- ASSOCIATED PRESS, *Moses Plays Part in ABCs Golden Week in TV Ratings*, *The Commercial Appeal* April 20, 2000.
- THE ASSOCIATED PRESS, *Evangelist Loses Incorporation Bid in Ala., - Judge Doesn't Explore Plan to Use Bible as Law*, *The Commercial Appeal* April 14, 1999.
- THOMAS J. PROHASKA, *Bible Battle: Why Hang the Ten Commandments in Schools and other Public Buildings? A Lockport Man Who's Pushing the Idea Says Kids Today Need a Dose of Moral Fiber*, *The Buffalo News* May 27, 2000.
- JOHN RAWLS, *Political Liberalism* (Columbia University Press 1993).
- MARTIN RIESEBRODT, *Pious Passion, The Emergence of Modern Fundamentalism in the United States and Iran* (University of California Press 1990).
- RICHARD RORTY, *Religion and the Public Square: A Reconsideration*, 31 *Journal of Religious Ethics* 141 (2003).
- ROSALIND ROSSI, *Thous shall not trespass, Vallas says*, *Chicago Sun-Times* August 15, 2000.
- JOHN SANKO, *Bill Spurs Emotion Hearing: Plan Would Force Schools to Post Ten Commandments*, *Rocky Mountain News* January 28, 2000.
- DR. LAURA SCHLESSINGER & RABBI STEWART VOGEL, *The Ten Commandments: The Significance of God's Laws in Everyday Life* (Cliff Street Books 1998).
- JOHN R. SEARLE, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969).
- JAY SEKULOW, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* (Rowman & Littlefield Publishers, Inc. 2006).
- JONATHAN SIMON, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007).
- CHRISTIAN SMITH, *American Evangelicalism: Embattled and Thriving* (University of Chicago Press 1998).
- CHRISTIAN SMITH, *Christian America? What Evangelicals Really Want* (UC Press 2000).

STEVEN D. SMITH, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford University Press 1995).

JEFFREY STOUT, *Democracy and Tradition* (Princeton University Press 2004).

STEPHANIE WALTON, *Ask Us - Q: Ten Commandments*, Daily Breeze April 23, 1997.

ROBERT WUTHNOW, *The Restructuring of American Religion: Society and Faith Since World War II* (John R. Wilson ed., Princeton University Press 1988).