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The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes

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BACKGROUND

The sin in America today is so great that America is ripe for repentance¹ or will face the inevitable judgment of God's anger.² What was once immoral and unlawful is now socially acceptable and legal.³

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1. The Bible warns believers that God will punish people for disobeying the Ten Commandments and living a sinful life, "If you ever forget the Lord your God and follow other Gods you will surely be destroyed. Like the nations the Lord destroyed before you, so you will be destroyed for not obeying the Lord your God." *Deuteronomy* 8:19-20. The way out of this destiny is genuine repentance. "If my people, which are called by my name, shall humble themselves, and pray, and seek my face, and turn from their wicked ways; then will I hear from heaven, and will forgive their sin, and will heal their land." *2 Chronicles* 7:14. For representative sins that offend God, see Evangelical Outreach, <http://www.evangelicaloutreach.org/americanrepent.htm> (listing representative offenses that offends God: pride, witchcraft, murder, abortion, sexual immorality, homosexuality, pornography, divorce).

2. According to the Bible, God permits people free will to either follow the Ten Commandments (and be blessed by God), or to disobey those same commandments (and be cursed). See *Deuteronomy* 11:26-28. Disobedience inevitably invites the unleashing of God's wrath upon the land, our bodies and our nation, through bad weather, disease, military defeat, and natural disasters. For a list of blessings and curses, see *Deuteronomy* 28:1-68. Devout believers in God's promises, such as the members of Repent America, explicitly reference the Ten Commandments in their explanation of what they believe. See The Mission Statement of Repent America, available at <http://www.repentamerica.com/webelieve.html> (whose members follow the Ten Commandments).

3. Examples of legalized sin include homosexuality, adultery, and abortion. According to historical biblical records, the sin of homosexuality so offended God it resulted in the catastrophic destruction of the cities of Sodom and Gomorrah. *Genesis* 18:20-35; 19:1-29. Today in America, sex between consenting homosexuals is legal.

Individual autonomy, personal liberty, the right to privacy, and political correctness, provide philosophical and legal excuses for Americans to: worship other gods, including themselves, money and demons; profane the name of God; love themselves over their neighbors; dishonor their parents by disobedience and abandonment; kill their unborn children; cheat others in legal business deals; make grossly excessive economic profits at the expense of the poor and helpless; and remain silent about crimes committed by others. These sample moral outrages are indicative of the depths to which America as a nation has sunk by departing from the faithful observance of the Ten Commandments (the Decalogue) given by God to Moses,⁴ with the consequence of social and cultural disintegration, damage, and discord.

Lawrence v. Texas, 539 U.S. 558 (2003). Gay couples may legally marry in Massachusetts. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). At one time, adultery was a capital offense, punishable by death. *Deuteronomy* 22:22. While 23 states still criminalize adultery, the constitutional validity of these laws is now in jeopardy after *Lawrence*. See Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, n.6 (2006). In the time of Moses, whosoever harmed the unborn infant of a pregnant woman was put to death if the unborn infant died. *Exodus* 21:22-23. Abortion was once a crime; today is not. See Charles I. Lugosi, *When Abortion was a Crime: A Historical Perspective*, 83 U. DET. MERCY L. REV. 51 (2006).

4. The Ten Commandments are recorded in the Book of Exodus and Deuteronomy in the Old Testament. The text was originally in the Hebrew language and was eventually translated into English. There are variations between Jews, Catholics, and Protestants regarding the classification and the numerical assignment of the portions of the text. The unifying significance of the Ten Commandments, no matter which official version is accepted by an individual, is the ethical code that sets out God's covenantal relationship with human beings. One Roman Catholic version of the Ten Commandments is set out below. The reader is advised to bear in mind that the Old Testament contains 613 commandments, and that religious sects disagree over just what is expected from an observant follower. For example, the Roman Catholic Church continues to promote the keeping of the Sabbath, but changed that day from sunset on Friday to sunset on Saturday to Sunday. Jews and Seventh Day Adventists follow the historical day of rest. However, it is not my intention to focus on differences, but to inform the reader that there are theological disputes among believers that are not resolved. Reproduced below is the Roman Catholic translation of *Exodus* 20: 1-17 contained in the New King James Version:

And God spoke all these words, saying: I am the LORD your God, who brought you out of the land of Egypt, out of the house of bondage. You shall have no other gods before Me. You shall not make for yourself a carved image – any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; you shall not bow down to them nor serve them. For I, the LORD your God am a jealous God, visiting the iniquity of the fathers upon the children to the third and fourth generations of those who hate Me, but showing mercy to thousands, to those who love Me and keep My commandments. You shall not take the name of the Lord your God in vain, for the Lord will not hold him guiltless who takes His name in vain. Remember the Sabbath day, to keep it holy. Six days you shall labor and do all your work, but the seventh day is the Sabbath of the Lord your God. In it you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who is within your gates. For in six days, the LORD

The Ten Commandments in and of themselves do not per se constitute a religion: rather, they instruct people how to live spiritually moral lives. Abiding by the Ten Commandments fosters one's spiritual relationship with God and with one's neighbor. Major world religions, among them Judaism, Christianity, and Islam, and sub-sects thereof, to various degrees, have incorporated the Ten Commandments into the tenets of their faith, and view the Ten Commandments as sacred with deep religious significance.⁵ God's promise was clear and unmistakable: Obedience leads to blessing;⁶ Disobedience leads to utter destruction.⁷ The Ten Commandments is a covenant between human beings and God that is intended to last forever.⁸

It is equally true that the Ten Commandments have deep legal significance, for natural law is inseparable from God's divine laws revealed in the Ten Commandments. The Ten Commandments heralded the genesis of a new civilization, where moral values and mutual obligations would establish a just society, held together by the rule of law built upon the foundation of God's laws. The common law of England owes its moral compass to the Divine law of the Ten Commandments, as does America, which modeled its laws after the common law of England, following the teachings of Blackstone, and other English legal scholars who unashamedly understood that moral and legal judgments to evaluate what is right and what is wrong comes from an awareness of knowing God's laws.

Thus the Ten Commandments were not intended to be historical fossils to be carved in stone as a remembrance of the legal heritage of this nation. These Ten Commandments are meant to be living stones upon which we are to build our lives in relation to God and our fellow man and to be the bedrock of diverse organized religions. Founded as a Christian nation, Americans are a religious people⁹ who worship a monotheistic God that has infused human laws with moral certainty and absolute standards of right and wrong.

made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the LORD blessed the Sabbath day and hallowed it. Honor your father and your mother, that your days may be long upon the land which the LORD your God is giving you. You shall not murder. You shall not commit adultery. You shall not steal. You shall not bear false witness against your neighbor. You shall not covet your neighbor's house; you shall not covet your neighbor's wife, nor his male servant, nor his female servant, nor his ox, nor his donkey, nor anything that is your neighbor's. *Exodus* 20: 1-17.

5. See 13 *ENCYCLOPEDIA OF RELIGION* 9074 (2d ed. 2005); The Qur'an 104 (M. Haleem trans., 2004).

6. *Deuteronomy* 11:26-32.

7. *Id.*

8. *Deuteronomy* 4:13. Putting the Ten Commandments on stone constitutes intent that they last forever – especially given that they were taken to Heaven and that Jesus Christ is the fulfillment of the law and whose body and blood constitute a new covenant between God and His people.

9. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

When the First Amendment was adopted, there was no intent to abolish God from public life, thanks to the lasting influence of the great evangelists, George Whitefield,¹⁰ and Jonathan Edwards.¹¹ By their powerful preaching, these men ignited such a religious revival in the generation that lived through the American Revolution that America experienced what is now referred to as the Great Awakening. Thus, in 1789, President George Washington readily acceded to the request of Congress to proclaim a national day of prayer and thanksgiving on November 26.¹² When he was sworn in as President, George Washington added the words, "so help me God," to the oath of office.¹³ From the time that John Marshall was Chief Justice, the Supreme Court opened its sessions with the prayer, "God save the United States and this Honorable Court."¹⁴ The First Congress of the United States commenced an unbroken practice of beginning its sessions with the invocation of prayer led by its official chaplain.¹⁵ The Founding Fathers were devoted to God, and this is evidenced by the content of their writings.¹⁶ Government was to be the

10. George Whitefield reputedly preached more than 18,000 sermons before he died in 1770. See Rimas J. Orentas, *George Whitefield: Lightning Rod of the Great Awakening*, available at <http://grove.ship.edu/ubf/leaders/whitfield.htm>.

11. Jonathan Edwards is best remembered for his fire and brimstone sermon, *Sinners in the Hands of an Angry God*, delivered on July 8, 1741 in Enfield, Connecticut. Here is an excerpt:

The bow of God's wrath is bent, and the arrow made ready on the string, and justice bends the arrow at your heart, and strains the bow, and it is nothing but the mere pleasure of God, and that of an angry God, without any promise or obligation at all, that keeps the arrow one moment from being made drunk with your blood. Thus all you that never passed under a great change of heart, by the mighty power of the Spirit of God upon your souls; all you that were never born again, and made new creatures, and raised from being dead in sin, to a state of new, and before altogether unexperienced [sic] light and life, are in the hands of an angry God. However you may have reformed your life in many things, and may have had religious affections, and may keep up a form of religion in your families and closets, and in the house of God, it is nothing but his mere pleasure that keeps you from being this moment swallowed up in everlasting destruction. However unconvinced you may now be of the truth of what you hear, by and by you will be fully convinced of it. Those that are gone from being in the like circumstances with you, see that it was so with them; for destruction came suddenly upon most of them; when they expected nothing of it, and while they were saying, Peace and safety: now they see, that those things on which they depended for peace and safety, were nothing but thin air and empty shadows.

<http://www.ccel.org/e/edwards/sermons/sinners.html>.

12. See H.R. Jour., 1st Cong., 1st Sess. 123 (1826 ed.); Sen. Jour., 1st Sess. 88 (1820 ed.).

13. Robert F. Blomquist, *The Presidential Oath, the National American Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 34 (2004).

14. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 469 (Rev. ed. 1926).

15. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983).

16. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963).

embodiment of Godly principles and values, so that God's blessings would flow upon both individuals and the American people as a whole. Law was never intended to be divorced from morality, nor were Americans ever intended to be persecuted for practicing their faith, for every individual was granted by the Free Exercise Clause¹⁷ the constitutional freedom to choose to live by their conscience and decide whether or not to follow a religious faith.

While the U.S. Constitution bestowed two headships on the President, one as the Chief Executive, and the other as the Commander in Chief of the military forces, conspicuously absent was the headship of an official state religion. When Henry the VIII of England, a practicing Roman Catholic, refused to obey one of the Ten Commandments (the one about adultery), he rebelled from the authority of the Pope, the leader of the Catholic Church and anointed himself head of his own breakaway religion, the Church of England, which under his leadership, sanctioned adultery by permitting divorce and remarriage.¹⁸ Thereafter various Christian sects emerged, including Quakers, Puritans, Lutherans, Baptists, Presbyterians and these denominations, amongst others, made their way to the American colonies in the hope of escaping religious persecution and to find religious freedom.¹⁹

What was prohibited by the Establishment Clause²⁰ was the evil of making the civil head of state the head of an official state religion, or the favoring of one religious sect over another.²¹ In response to a mistaken understanding of history by Justice Black and other members of the Supreme Court, Chief Justice Rehnquist took the opportunity in his dissenting judgment in *Wallace v. Jeffree*²² to set the record straight on the original intent of the Establishment Clause. A close examination of history surrounding the adoption of the First Amendment reveals that there was never any intent to build a "wall of separation" between Church and State, nor was the government required to take a "neutral" position between religion and irreligion:

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring

17. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

18. See RICHARD REX, *HENRY VIII AND THE ENGLISH REFORMATION* (Palgrave Macmillan 2d ed. 2006).

19. See generally SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (MacMillan 1902).

20. U.S. CONST. amend. I.

21. *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

22. *Id.*

neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion does not make it any sounder historically. Finally, the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly. If one were to follow the advice of [Justice Brennan], and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.²³

In support of his position that government neutrality is a relatively recent Supreme Court distortion of history, Chief Justice Rehnquist noted that just one day after the final version of the Establishment Clause was

23. *Id.* at 98-101 (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 236 (1963) (internal citations omitted)).

passed in the House of Representatives, a resolution was proposed by Representative Elias Boudinot to ask President Washington to proclaim a national day of thanks “to Almighty God” “for the many blessings” bestowed upon the American people.²⁴

In contrast, writing in 1947, Justice Hugo Black set out in *Everson v. Board of Education*²⁵ the constitutional boundary in the Establishment Clause, beyond which the government must not tread:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”²⁶

Sixteen years later, in *Engel v. Vitale*,²⁷ Justice Black, writing for the majority, held that interdenominational school prayer violated the Establishment Clause. Justice Black concluded that the purposes of the Establishment Clause extended beyond the prohibition of the coercion of religious observance upon an unwilling individual:

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 non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the

24. *Id.* at 100-01. See 1 ANNALS OF CONG. 914 (1789).

25. 330 U.S. 1 (1947).

26. *Id.* at 15-16 (citation omitted).

27. 370 U.S. 421 (1962).

Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That 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. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its “unhallowed perversion” by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding ‘unlawful [religious] meetings . . . to the great disturbance and distraction of the good subjects of this kingdom’ And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.²⁸

As Justice Black recognized, the Establishment Clause was intended to stand as a shield against state interference with religious freedom, but there is nothing in Justice Black’s opinions that the Establishment Clause was ever intended to be used as a sword to attack public expressions of belief in God, given the historical public respect and honoring of God by the leaders of our government, especially in the formative years of this nation’s life.

28. *Id.* at 430-33 (quoting John Bunyan, *A Relation of the Imprisonment of Mr. John Bunyan*, reprinted in *GRACE ABOUNDING AND THE PILGRIM’S PROGRESS* 103-32 (Brown ed., 1907)).

Over the last 100 years, two pronged constitutional attacks were mounted against the teachings of the Ten Commandments. The first prong of attack took place under the Fourteenth Amendment under the Due Process Clause, to legalize conduct that is in disobedience to the Ten Commandments. For example, *Roe v. Wade*²⁹ changed the law to permit abortion in violation of the Commandment not to murder human life. We may now be at the point of no return, for as Justice Scalia prophesied in the case of *Lawrence v. Texas*,³⁰ which legalized homosexuality between consenting adults, the end of all morals legislation is near, once the Supreme Court vacated laws enforcing the moral values set out in the Ten Commandments and replaced them with the hedonist permissiveness of individual autonomy essential to secular humanism:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.³¹

. . . .

The Court embraces instead Justice Stevens' declaration in his Bowers dissent, that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,' . . . This effectively decrees the end of all morals legislation.³²

The second prong of the attack, utilizes the First Amendment to discriminate against Christians so that even the text of the Ten Commandments may not be publicly displayed on government property for fear of treading upon a mythical separation of Church and State. It is this latter attack which is the focus of this article, although some of my observations may have applicability to the first attack.

In a set of twin cases, *McCreary Co. v. A.C.L.U.*,³³ and *Van Orden v. Perry*,³⁴ a sharply divided Supreme Court delivered rather useless precedents which are marked by discordant reasoning and sincerity that resembles more the script of Eugene Ionesco's theatre of the absurd³⁵ than

29. 410 U.S. 113 (1973).

30. 539 U.S. 558 (2003).

31. *Id.* at 590.

32. *Id.* at 599.

33. 125 S. Ct. 2722 (2005).

34. 125 S. Ct. 2854 (2005).

35.

Inonesco: Oh yes, I am sincere.

Bart III: Let him prove it, then, by his works.

Bart I: Not by his works.

Bart II: His works don't count.

Bart I: It's only his theories that count.

Bart II: What one *thinks* of one's work.

Bart I: For the work in itself. . .

Bart II: Doesn't exist. . .

Bart I: Except in what one says about it. . .

Bart I: In the interpretation you're willing to give it. . .

Bart II: That you impose on the work. . .

Bart I: That you impose on the public.

. . .

Bart II: [to Bart III] The only real sincerity. . .

Bart I: [to Bart III] . . . is when you're double-faced. . .

Bart II: [to Bart III] And ambiguous.

. . .

Bart III: It seems obscure to me.

Bart II: It's clear-obscure.

Bart I: I'm sorry, it's clear obscurity. . .

Bart III: Forgive me, but clear obscurity is not clear-obscure.

Bart II: You're mistaken. . .

Bart I: Gentlemen, I maintain that obscurity is clear, just as a lie is truth. . .

Bart II: You mean, just as truth is a lie!

Bart III: Not quite to the same extent!

Bart II: Yes, exactly the same!

Bart III: Not quite.

Bart I: Oh yes.

Bart II: My dear Bartholomeus. . .

Bart III: No. . .

Bart I: Yes.

Bart III: No.

Bart I: Yes...

Bart II: Yes and no.

Bart III: No.

Bart I: Yes.

Bart II: No and Yes.

Bart III: No.

Bart II: My dear Bartholomeus, there's a subtle distinction there. . .

Bart I: I don't hold with distinctions. . .

Bart III: Neither do I.

Bart II: [to Bart I] You know perfectly well I quite agree with you about general principles . . . But on this particular point. . .

Bart I: To hell with particular points: mystification is demystification, confession is dissimulation, trust is abuse. . .abuse of trust.

Bart II: That's really profound!

EUGENE IONESCO, *Improvisation or The Shepherd's Chameleon*, printed in *THE KILLER AND OTHER PLAYS* 129-30 (Donald Watson trans., Grove Press, Inc. 1960).

the clarity and courage of Thomas More, the Lord Chancellor of England, who unashamedly kept faithful to the eternal values of the Ten Commandments, and willingly paid the cost of discipleship with his very life.³⁶

I have examined these twin cases to find some thread of consistency to guide future conduct, and not finding principled judgments upon which to guide future conduct, I conclude that the current Establishment Clause jurisprudence is ridiculous, offensive to the doctrine of stare decisis, and boils down to the “clear obscurity” of the swing voter on the Supreme Court, rather than the rule of law. The entire line of cases³⁷ that have led to the conflicting results in these twin cases ought to be abandoned, and replaced with a bright-line precedent in favor of religious liberty to not only celebrate, but also to unapologetically observe the Ten Commandments in public life.

Our civilization is built upon the values contained in the Ten Commandments and derived from natural law. To adopt a posture of assumed “neutrality” is in essence hostility toward God and the rule of law. Without taking a firm stand to reclaim our moral heritage, this nation will crumble from within. Professor Patrick Devlin foresaw this trend back in 1965:

But in an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.³⁸

Already the signs of social disintegration and loss of moral fabric are evident. The First Amendment, which was intended to defend our way of life from attack by our enemies, ought not to be the seed that leads to its

36. ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* 87 (Samuel French, 1960).

I will discharge my mind – concerning my indictment and the King’s title. The indictment is grounded in an Act of Parliament which is directly repugnant to the law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy. And more to this, the immunity of the Church is promised both in Magna Carta and the King’s own Coronation Oath ... it is not for the Supremacy that you have sought my blood – but because I would not bend to the marriage. *Id.* at 87.

37. Representative cases of this line of authority include *Stone v. Graham*, 449 U.S. 39 (1980), *Lemon v. Kurtzman*, 411 U.S. 192 (1971), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Wallace v. Jaffree*, 472 U.S. 38 (1985).

38. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 22 (Oxford Univ. Press 1965).

self-destruction by those who are offended that God's law is the backbone of our civilization.

It is my contention that the foundational issue at the heart of this debate is whether natural law, and in particular, divine law is part of American jurisprudence. If it is, then to publicly display the Ten Commandments honors much more than a fossilized heritage, but a living Supra Constitution that serves as an eternal standard for human laws that are prone to result in injustice and that can license immoral conduct. However, if natural law has been rejected and supplanted by a regime of legal positivism that deviates from natural law, then it makes sense to tear down ornamental displays of the Ten Commandments, beginning with the one in the courtroom of the Supreme Court of the United States itself,³⁹ lest we hypocritically pay lip service to the Ten Commandments after turning over final authority over what is legal and just to the human gods on the Supreme Court, as the crowning achievement in the ultimate cleavage between God and the United States.

I. THE TEN COMMANDMENTS AS NATURAL LAW

To understand the furious tempest in the Supreme Court about public displays of the Ten Commandments, it is vital to set out just what the Ten Commandments are and their place in natural law. Moses, the author of the first five books of the Old Testament, known as the Torah, tells us in the books of Deuteronomy and Exodus that God himself inscribed on two tablets of stone his divine law, known to us as the Ten Commandments, in order to govern relations between man and God, and between fellow men. This revelation of divine law completed the liberation of the people of Israel from slavery in Egypt for it established freedom under law – a kind of ordered liberty that allowed for individual autonomy, yet puts restraint upon individual liberty to prevent harm to others.

These Ten Commandments are at their foundation, a legal system built upon a foundation of love, by the lawgiver of love – God. When questioned by an attorney to identify which was the greatest of all the Commandments, Jesus Christ answered,

You shall love the LORD your God with all your heart, with all your soul, and with all your mind. This is the first and great commandment. And the second is like it: You shall love your

39. The late Chief Justice Rehnquist observed,

We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east faced of the building holding the Ten Commandments tablets.

Van Orden, 125 S. Ct. at 2862.

neighbor as yourself. On these two commandments hang all the Law and the Prophets.⁴⁰

Christ's answer echoed the words written down by Moses in Deuteronomy, "Hear, O Israel: The LORD our God, the LORD is one! You shall love the LORD your God with all your heart, with all your soul, and with all your strength,"⁴¹ and Leviticus, "You shall not take vengeance, nor bear any grudge against the children of your people, but you shall love your neighbor as yourself: I am the LORD."⁴² To resolve any uncertainty, Christ gave a new commandment at His Last Supper, the night before His trial and execution: "A new commandment I give to you: that you love one another; as I have loved you, that you also love one another."⁴³ It was Love that freed the people of Israel from the chains of slavery. It was Love that gave the Ten Commandments to the nation of Israel. It was Love that promised the coming of the Messiah. It was Love that sent Christ to dwell among men so that whosoever believed in Him could have eternal life.⁴⁴ This Love is a gift to all humanity from God, who is the very definition of Love.⁴⁵

By word and by inscription, God gave divine law to human beings to direct them in their thoughts and actions, for human laws are inadequate when it comes to knowing the hidden desires of the heart. Observance of the Ten Commandments is proof of our love of God⁴⁶ and gives human beings the framework of constitutional government that promotes respect, dignity, autonomy and equality. Obeying God's commandments secures for all human beings the earthly blessings of life, liberty and the pursuit of happiness. Respect for the sanctity of human life gives all human beings the opportunity to make choices for themselves in fulfillment of their dreams, so long as their conduct does not impinge on the liberty of another human being to do the same.

What if there were an absence of love and respect for one another? Does it matter if we disobey just one of God's commandments?

The Fifth Commandment states, "You shall not kill." Suppose a mother, Betty arranges for the killing of her nine month old unborn child, Rachel, a human being, in a late term abortion. She simply doesn't want Rachel, for she is angry with the Rachel's father, Billy, who had sexual relations with a man, Willie. This direct and voluntary killing of Rachel, an innocent human being, violates right reason and offends against our conscience. As human beings, we recognize in our conscience the murder

40. *Matthew* 22:37-40.

41. *Deuteronomy* 6:4-5.

42. *Leviticus* 19:18.

43. *John* 13:34.

44. *John* 3:16.

45. 1 *John* 4:8; 4:16.

46. *John* 14:15.

of the innocent to be a grave injustice. This is a self-evident truth, for it is a natural law that is inscribed in our hearts, enabling our conscience to distinguish the difference between right and wrong. A human law that punishes the wicked for murder is in harmony with divine law and natural law, for there is justice in the result. However a human law that permits the killing of innocent human beings is a perversion, for it lacks moral authority and is void law, being contrary to divine law that is integral to the natural law. Dressing up murder in the clothing of a lawful act does not transform its underlying character of naked lawlessness and injustice. An unjust law is an act of violence,⁴⁷ for it is contrary to both the divine law and to natural law. By utilizing our reason, we are able to discern in this situation what is just, for the destruction of innocent human beings by abortion is a preventable evil, offends against the common good, and the eternal law of loving your neighbor as yourself (doing to Rachel as you would want Rachel to do to you).

In current American jurisprudence, human law is not inferior to natural law, nor is it subject to God's commandments. In our above example, state laws that permit late term abortion are accountable only to the ultimate authority of the Supreme Court of the United States, which has ascribed to itself the power of life and death over Rachel and others in her place. This appropriation by the Supreme Court usurps God's admonition to us that He alone brings both life and death.⁴⁸ In America, human laws that permit abortion provide proof that our courts and legislatures have supplanted God's laws, by succumbing to the temptation to be like God.⁴⁹ Ignored is God's warning that "From man in regard to his fellow man I will demand an accounting for human life."⁵⁰

Instead, a jurisprudence of legal positivism reigns, where law needs no validation other than the coercive ability of the state to enforce its rules. Law is not the servant of justice; rather law is the servant of the triumph of the political will of human beings that are legally defined as "persons" and thus hold the balance of power, for good or for evil. For the legal positivist, the source of the law is not God, but man. In this model lies the seed of tyranny, for legal positivism lends itself to the oppression of the weak, including those aborted children who are legally depersonalized, politically unequal and defenseless. Law is used as a means to an end, and the inevitable result is injustice. Legal positivism gives Betty the constitutional right to abort Rachel, and exercise an unrestrained liberty to do violence to her daughter. Betty now has her revenge against Billy, for her will has triumphed over any love she may have once had for her daughter or husband.

47. THOMAS AQUINAS, TREATISE ON LAW 57 (Richard J. Regan trans., Hackett Publ'g Co., Inc. 2000).

48. *Deuteronomy* 32:39.

49. *Genesis* 3:50.

50. *Genesis* 9:5.

Could Billy have argued natural law is paramount to any human law permitting Betty to abort Rachel? Legal positivism precludes any such argument today, for divine law and natural law have theological roots that are forbidden by the Supreme Court's adherence to First Amendment jurisprudence of its own making, so that there is a separation of church and state, coupled with the Supreme Court's abdication of its role as the guardian of natural law. Yet the text of the Ninth Amendment of the Constitution offers hope,⁵¹ for there remains an entire body of legal rights retained by the people, including presumably a vast reservoir of natural law imbedded in the common law from which American law is derived.

Historically, the common law of England was inseparable from the natural law. William Blackstone imparted natural law principles to his students at Oxford, teaching them that God's eternal unchanging laws comprehensively addressed good and evil, and that these laws were discoverable by human reason, and applicable to all human conduct. So long as human laws (positive law) conformed to natural law (including the divine commandments of the Decalogue), individual happiness was assured. The pursuit of happiness was thus linked to natural law, which protects the family and parental authority (fourth commandment); protects human life (fifth commandment); the unity of a man and a woman in marriage (sixth commandment); property (seventh commandment); honor (eighth commandment); and protects us from the greed, jealousy and wrongful desires of others who covet what we possess and enjoy (ninth and tenth commandments).⁵²

However, when positive law no longer conforms to the natural law, and there is a divergence from the law of love to one that exploits or oppresses others, then these positive laws from a natural law perspective are null and void from the moment of their proclamation. Having the form, label or appearance of law cannot cure fatal incompatibility with natural law, which is superior to any human law that may be devised. Sir William Blackstone wrote:

This law of nature, being coeval 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; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.⁵³

51. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

52. See HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 46 (Liberty Fund Inc. 1998).

53. WILLIAM BLACKSTONE, *1 COMMENTARIES ON THE LAW OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765-69* § 2, 41 (Univ. Chicago Press 1979).

Sir Edward Coke instinctively knew his duty as a judge was to do justice, even if that meant the voiding of legislation that conflicted with the common law. In *Dr. Bonham's Case*, Coke declared, "the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."⁵⁴

The "law of nature," was described by Coke in *Calvin's Case* as: that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction and this is *lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world.⁵⁵

Our founders, including Alexander Hamilton and George Mason, were schooled in the works of Sir Edward Coke and Sir William Blackstone, for their writings echoed the common law jurisprudence that any human laws that were contrary to natural law were void and of no effect. Hamilton believed in divinely ordained eternal law that could not be repealed or impaired by any human law: "No tribunal, no codes, no systems can repeal or impair this law of God, for by his eternal laws it is inherent in the nature of things."⁵⁶ George Mason invoked natural law in the General Court of Virginia when he argued about the legality of slavery:

[A]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice.⁵⁷

The number of times presidents, jurists, teachers, elected representatives and leaders of American society have cited to the Ten Commandments and their influence in law is legion. In a comprehensive

54. *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (K.B. 1610).

55. *Calvin's Case*, 77 Eng. Rep. 377, 392 (K.B. 1608).

56. CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW (Ignatius Press 1999) (quoting Alfons Beitzinger, *The Philosophy of Law of Four American Founding Fathers*, 21 AM. J. JURIS. 1:5 (1976)).

57. *Robin v. Hardaway*, 1 Jeff. 109, 114, 1772 Va. LEXIS 1, 13-14 (1772).

study authored by William J. Federer,⁵⁸ the evidence is overwhelming that the Ten Commandments are more than a set of divine laws, or a historical event. The Ten Commandments are the cornerstone of American civilization, for they articulate the law of obligations and responsibilities that govern the freedom of individuals. Former British Prime Minister Margaret Thatcher captured the essence of the unique meaning of the Ten Commandments in American jurisprudence when she made the following observation in 1996:

The Decalogue [Ten Commandments] are addressed to each and every person. This is the origin of our common humanity and of the sanctity of the individual. Each one has a duty to try to carry out those commandments. . .

If you accept freedom, you've got to have principles about the responsibility. You can't do this without a biblical foundation. Your Founding Fathers came over with that. They came over with the doctrines of the New Testament as well as the Old. They looked after one another, not only as a matter of necessity, but as a matter of duty to their God. There is no other country in the world which started that way.⁵⁹

Remembering the Ten Commandments and their place in American jurisprudence is fundamental to ensure God's future blessings upon America, for the alternative is to be cursed with disasters of biblical proportions. Moses warned his people they had a choice, to follow the commandments and be blessed, or to disobey the commandments and be cursed.⁶⁰ Devout Jews today still obey scripture that tells them to teach God's commandments to their children, to wear reminders of God's commandments on their wrists and foreheads, and to put the commandments on the doorposts of their homes.⁶¹

II. TRIVIAL PURSUIT?

These humble daily reminders adopted by devout orthodox Jews are in stark contrast to the cultural war between secular humanists and the religious right in America over public displays of the Ten Commandments. Each side claims the high moral ground under the First Amendment, the secularists protesting the establishment of religion, and Christian evangelicals pushing into the public arena an agenda to evangelize the unbeliever, disguising their religious intent by using secular code names

58. William J. Federer, *The Ten Commandments and their Influence on America*, available at <http://www.alliancealert.org/2005/commandments/federerinformation.pdf>.

59. Interview by Joseph A. Cannon with Margaret Hilda Thatcher, former Prime Minister of England, in New York, N.Y. (February 5, 1996); *The Conservative Vision of Margaret Thatcher*, HUMAN EVENTS, March 29, 1996, at 12-14.

60. *Deuteronomy* 11:26-32.

61. *Deuteronomy* 11:18-21.

like “tradition,” “heritage” or some variant thereof to get around legal barriers like the *Lemon* test.⁶²

One consequence is that court battles are fought over displays of the Ten Commandments inside public schools,⁶³ inside a courthouse,⁶⁴ and on the lawns of public property.⁶⁵ The lack of clear guidance from the Supreme Court has thrust lower courts into taken on a micromanaging role to decide cases that turn on trivial details such as whether the Ten Commandment displays are be clumped together with a remembrance of Davy Crocket and the Alamo (acceptable)⁶⁶ or near a very large clock (not acceptable)⁶⁷ or next to the Magna Charta and the Declaration of Independence (not acceptable)⁶⁸ or next to the American flag and an American Eagle (not acceptable)⁶⁹ or next to a historical marker and a no-skateboarding sign (acceptable).⁷⁰ So long as the Ten Commandments are viewed as relics without moral or legal authority, and intended to have a secular purpose, they may be displayed as historical artifacts.⁷¹ Merely

62. *Lemon v. Kurtzman*, 411 U.S. 192 (1971). The classical formulation of the *Lemon* test sets out a three part analysis: Does the statute or conduct under challenge have a secular religious purpose? Does the statute or the questioned conduct have as its principal or primary effect something other than the advancement or inhibition of religion? Does the statute or conduct foster an excessive government entanglement with religion? Despite scholarly observations that the *Lemon* test has been discarded in favor of a simpler coercion test, the U.S. Supreme Court continues to apply the *Lemon* test if it leads to the outcome desired by the Justices in the particular case. See Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993), but see Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865 (1993); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding unconstitutional student led prayers at high school football games).

63. *Stone v. Graham*, 449 U.S. 39 (1980) (holding unconstitutional the posting of the text of the Ten Commandments inside public school classrooms); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000) (holding unconstitutional public school's multiple displays of the Ten Commandments).

64. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (holding unconstitutional a two and a half ton monument of the Ten Commandments in the rotunda of the state courthouse of Alabama, that was placed there by the Chief Justice in recognition of the supremacy of God's laws over that of human beings); *contra* *Suhre v. Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999) (holding constitutional a county courtroom display of plaques inscribed with an abridged version of the Ten Commandments).

65. *Books v. Elkhart*, 235 F.3d 292 (7th Cir. 2000) (holding unconstitutional the display of a monument inscribed with the Ten Commandments on the lawn in front of City Hall); *Adlan v. Russ*, 107 F. Supp. 2d 782 (E.D. Ky. 2000) (holding proposed site to put a monument inscribed with the Ten Commandments on state capital ground to be unconstitutional); *contra* *State v. Freedom from Religion Foundation*, 898 P.2d 1013 (Colo. 1995).

66. *Van Orden v. Perry*, 351 F.3d 173, 175-76 (5th Cir. 2003).

67. *Adland v. Russ*, 307 F.3d 471, 477 (6th Cir. 2002).

68. *A.C.L.U. of Kentucky v. McCreary*, 354 F.3d 438, 443 (6th Cir. 2003).

69. *Books v. City of Elkhart*, 235 F.3d 292, 296 (7th Cir. 2000).

70. *Freethought Soc'y v. Chester County*, 334 F.3d 247, 254 (3d Cir. 2003).

71. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (9th Cir. 1973); *State v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013, 1026 (Colo. 1995).

articulating a secular purpose may not be enough to save a display, for judges take it upon themselves to decide if the avowed secular purpose is a sham tailored to withstand constitutional attack.⁷² It is the “eye of the beholder” that ultimately determines whether or not an impugned display offends the sensibilities of those who fear the reintegration of law with morality infused with religious values, and thereby constitutes the endorsement or advancement of religion.

This misconceives the issue, for the Ten Commandments displays defy neat categorization, on an either/or basis. It is too superficial to suggest that there is only a secular purpose to a display in a public courthouse that reminds one individual of history, a source of moral law to someone else, guilt of sin to another, and religious dictatorship to yet another, when gazing upon at the Ten Commandments. It all depends on which part of the elephant the blind judge (or passerby) touches.⁷³

72. *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842, 852 (S.D. Ind. 2000); *McCreary Co. v. ACLU* 125 S. Ct. 2722, 2736-37 (2005).

73. Udana, *Parable of the Blind Men and the Elephant*, 68-69, available at <http://www.cs.princeton.edu/~rywang/berkeley/258/parable.html>.

A number of disciples went to the Buddha and said, “Sir, there are living here in Savatthi many wandering hermits and scholars who indulge in constant dispute, some saying that the world is infinite and eternal and others that it is finite and not eternal, some saying that the soul dies with the body and others that it lives on forever, and so forth. What, Sir, would you say concerning them?” The Buddha answered, “Once upon a time there was a certain raja who called to his servant and said, ‘Come, good fellow, go and gather together in one place all the men of Savatthi who were born blind. . . and show them an elephant.’ ‘Very good, sire,’ replied the servant, and he did as he was told. He said to the blind men assembled there, ‘Here is an elephant,’ and to one man he presented the head of the elephant, to another its ears, to another a tusk, to another the trunk, the foot, back, tail, and tuft of the tail, saying to each one that that was the elephant. “When the blind men had felt the elephant, the raja went to each of them and said to each, ‘Well, blind man, have you seen the elephant? Tell me, what sort of thing is an elephant?’ “Thereupon the men who were presented with the head answered, ‘Sire, an elephant is like a pot.’ And the men who had observed the ear replied, ‘An elephant is like a winnowing basket.’ Those who had been presented with a tusk said it was a ploughshare. Those who knew only the trunk said it was a plough; others said the body was a grainer; the foot, a pillar; the back, a mortar; the tail, a pestle, the tuft of the tail, a brush. “Then they began to quarrel, shouting, ‘Yes it is!’ ‘No, it is not!’ ‘An elephant is not that!’ ‘Yes, it’s like that!’ and so on, till they came to blows over the matter. “Brethren, the raja was delighted with the scene.” Just so are these preachers and scholars holding various views blind and unseeing. . . . In their ignorance they are by nature quarrelsome, wrangling, and disputatious, each maintaining reality is thus and thus.” Then the Exalted One rendered this meaning by uttering this verse of uplift,

O how they cling and wrangle, some who claim

For preacher and monk the honored name!

For, quarreling, each to his view they cling.

Such folk see only one side of a thing.

Jainism and Buddhism.

III. VAN ORDEN V. PERRY

Justice Breyer provides the perfect example of the micromanagement style in vogue to decide Ten Commandment cases. As the swing vote in *Van Orden*, Justice Breyer is responsible for saving the monument in Texas and by voting with the plurality in *McCreary*, he is in part responsible for removing the display in Kentucky. His philosophy is one of legal realism, requiring an intensive fact based legal judgment, devoid of any legal formula to resolve borderline cases.⁷⁴ This he argues, is not a personal judgment, but one that reflects and remains faithful to the historical purposes behind the First Amendment, and contemplates both context and consequences.⁷⁵

In *Van Orden*, the text of the Ten Commandments was just the starting point of his analysis, for it is the use of that text in the context of the display that is critical.⁷⁶ It is context that reveals whether there is a secular moral message about social conduct, a historical message about the relationship between moral standards and the law, or a religious message that promotes religion, favors a particular religious belief over another, which has the consequence of deterring other religious beliefs.⁷⁷

In holding that the Texas display was constitutional, Justice Breyer identified three additional factors that he considered. First, he hinted there were at least two levels of constitutional scrutiny, one on the lawn of the state capital, and a higher standard of constitutionality required when the context of the display was a public school, necessitated by the assumption that young people were especially susceptible to exploitation and influence because they are impressionable.⁷⁸ The second factor is the passage of time the display has been in existence without complaint from anyone. The longer the period of time without dispute means the more unlikely the display is a source of divisiveness in the community.⁷⁹ Finally, the impact of the court's decision is relevant, for a refusal to permit the display of the Ten Commandments based solely on the words of the text itself, might be perceived to be hostility to religion, and thereby spark divisiveness, turmoil, and unrest in the community,⁸⁰ and by implication, distrust of and disrespect for the Supreme Court.

This willingness by Justice Breyer to walk the tightrope of neutrality by a carefully crafted and nuanced reasoning makes it impossible to set a bright-line precedent, and thrusts the Supreme Court into an unwelcome role to micromanage each and every Ten Commandments case that is

74. *Van Orden v. Perry*, 125 S. Ct. 2854, 2869 (2005).

75. *Id.*

76. *Id.* (emphasis in original).

77. *Id.* at 2869-70.

78. *Id.* at 2871.

79. *Id.* Over 40 years had elapsed before a constitutional challenge was launched.

80. *Id.*

contested. Without a guiding principle, the Breyer approach is pragmatic and subject to change at any time, to please the shifting winds of public opinion. This approach makes it difficult for lawyers to make reliable predictions about the outcome of future Ten Commandment cases yet to be litigated in order to advise their clients.

Justice Thomas, concurring in the result, disapproved of Justice Breyer's methodology, and in general criticized the Supreme Court's role to indulge in fact intensive inquiries and apply personal predilections to determine the outcome of cases.⁸¹ Since the Establishment Clause was historically intended to prevent the coercion of religious orthodoxy, Justice Thomas urged that a return to this test would provide a simple principle that could be easily applied by the lower courts.⁸² Displays of the Ten Commandments do not involve coercion and are no different than any other kind of display that gives the passerby an option to look at or ignore. Mere existence of a monument depicting the Ten Commandments may provoke offense, but intolerance for the respectful and dignified expressions of other people in a free and democratic society does not amount to a violation of the First Amendment.

For the Court to engage in constitutional battles over the Ten Commandments is to elevate "the trivial into the proverbial 'federal case,' by making benign signs and postings subject to challenge."⁸³ Justice Thomas took the Court to task for its unprincipled decisions and incoherent principles that achieved only confusion and inconsistent results. A "fundamental rethinking" of establishment clause jurisprudence is required, so that "precedents would be capable of consistent and coherent application."⁸⁴

Chief Justice Rehnquist, joined by Justices Kennedy, Scalia, and Thomas, declared that the *Lemon* test was not applicable to the facts of *Van Orden*,⁸⁵ and developed an analysis based on both the nature of the monument and national history. Conceding that the Ten Commandments are "religious," Chief Justice Rehnquist also recognized they have a "historical meaning" in the history of law.⁸⁶ In holding that the monument was constitutional, Chief Justice Rehnquist wrote, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."⁸⁷ Justice Breyer refused to join this opinion, but because of his separate reasons, the monument in Texas survived.

81. *Id.* at 2867.

82. *Id.* at 2865.

83. *Id.* at 2866.

84. *Id.* at 2868.

85. *Id.* at 2861.

86. *Id.* at 2863.

87. *Id.*

Justice Souter wrote a dissenting opinion that was joined by Justices Ginsburg, Stevens, and O'Connor (who voiced additional reasons in her concurrence in *McCreary*). The general rule of government neutrality was violated by the Texas monument.⁸⁸ The Ten Commandments are religious in nature,⁸⁹ and as one of seventeen monuments spread out over twenty-two acres of lawn, it stood alone, isolated from other messages.⁹⁰ A government display of a religious symbol is open to constitutional challenge, whether or not the setting is a public school or a lawn next to the seat of government.⁹¹ As long as the display is open to public view,⁹² its constitutionality boils down to the "judgment" of the individual judge,⁹³ who must apply "inexact" Establishment Clause jurisprudence.⁹⁴ In the end, neutrality must be preserved: "If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his religion, or with rejection of religion."⁹⁵ The passage of time might have the effect of "numbing" "ritualistic religious expression" that constitutes a facial violation of the Establishment Clause,⁹⁶ but the text of the Ten Commandments is anything but tepid.⁹⁷

Cutting to the core issue is the dissent in *Van Orden* by Justice Stevens, joined by Justice Ginsburg, who voted to remove the monument because it sent a message that "there is one, and only one God."⁹⁸ The Ten Commandments are the sacred and literal words of God that command His worship and that of no other deity.⁹⁹ The display is more than a symbol or a reminder, for it is an authoritative text that tugs at the conscience of believers. As such, it is presumptively invalid as a violation of the Establishment Clause.

IV. COMMENTARY: THE POWER OF DIVINE LAW

The implications of Justice Steven's dissent are clear. God's divine law is an imperative that must be obeyed, and if the Government endorses at the seat of government the public honoring of this Divine legal code, or *Supra* Constitution, it sends the message that all human made law in

88. *Id.* at 2892.

89. *Id.*

90. *Id.* at 2895.

91. *Id.* at 2896.

92. *Id.*

93. *Id.* at 2897.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 2877.

99. *Id.* at 2879.

America is inferior and subordinate to the ultimate authority of God. If all this is so, is not this the establishment of an official national religion? This is not neutrality, but an official recognition of the God of Moses, Abraham and Isaac.

Human beings cannot serve two masters. The first Commandment explicitly states, "You shall have no other gods before me." Where there is a collision between the law of God and the law of Government, a choice must be made. Only the natural law known to the Founding Fathers is perfectly compatible with the Ten Commandments. To a Supreme Court dominated by philosophical relativism, which recognizes only relative truth and relative values,¹⁰⁰ and has long ago discarded natural law and God as the ultimate law maker, public displays of the Ten Commandments represent the thin edge of the wedge that just might uproot the jurisprudence of Realism that feeds the growth of secular humanism.¹⁰¹ This is why there is such resistance to displays of the Ten Commandments by those on the Supreme Court who reject the revival of natural law. Justice Stevens concludes: "If a State may endorse a particular deity's command to 'have no other gods before me,' it is difficult to conceive of any textual display that would run afoul of the Establishment Clause."¹⁰²

Justice Stevens is right that divine law is much more than history, and cannot be equated to the faces of former Presidents carved into the rock on Mt. Rushmore¹⁰³ or that of a Native American hero on a nearby mountain in the Black Hills of South Dakota.¹⁰⁴ But neither are the Ten Commandments a means to advance religious conversion nor do they symbolize the coronation of the Pope in place of the government. Instead, taking the Ten Commandments out of the closet may be seen as part of the restoration of natural law, given the failure of secular humanism to promote justice and moral values for the good of all members of society.

Today, strong arguments can be made that secular humanism is the new religion of the majority of Americans.¹⁰⁵ At what cost, one may ask?¹⁰⁶ Since the case of *Stone*,¹⁰⁷ which ordered the removal of the Ten Commandments from the public classroom, instead of using divine law to

100. HANS KELSEN, *ABSOLUTISM AND RELATIVISM IN PHILOSOPHY AND POLITICS* (Irvington Pub. 1993) (1948).

101. Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 524-33 (1942).

102. *Van Orden*, 125 S. Ct. at 2890.

103. These larger than life sculptures are of George Washington, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt. See http://www.nps.gov/moru/park_history/carving_hist/carving_history.htm.

104. <http://www.crazyhorse.org/index.shtml>.

105. CHARLES E. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* (Franciscan Herald Press 1979).

106. See JOEL TURTEL, *PUBLIC SCHOOLS, PUBLIC MENACE* (1st ed., Liberty Books 2005).

107. *Stone v. Graham*, 449 U.S. 39 (1980).

teach our youth not to steal, kill, covet, swear, and disrespect the authority of their parents and teachers, our children learn to be selfish,¹⁰⁸ dabble in the occult,¹⁰⁹ celebrate Halloween, the high holy day of Satanists;¹¹⁰ lust for material goods from a fictitious fat man in a red suit, Santa Claus;¹¹¹ glorify evergreen trees glittering with tinsel;¹¹² over indulge in the consumption of candy, colored eggs and chocolate bunnies at Easter;¹¹³ and gun down fellow students and teachers in the classroom.¹¹⁴ It is hard to believe that in this cultural and social climate anyone could seriously suggest a display of the Ten Commandments inside a public school could tip the scales toward an abandonment of institutionalized paganism, anymore than the current observance of the Thanksgiving Day holiday. Yet this is what is feared by secularists, and perhaps with good reason. Something positive may happen in our schools: like a sense of duty to others, respect for one another, honesty, and love – all derived from reading the Ten Commandments. Who knows, a return to biblical literacy might lead to the next Great Awakening.¹¹⁵

V. MCCREARY CO. v. A.C.L.U.

In *McCreary*, Justice Breyer flip-flopped, voting with Justices Souter, Stevens, O'Connor and Ginsburg, to force the removal of the abridged King James text of the Ten Commandments that had been posted in the courthouses of McCreary and Pulaski Counties, Kentucky.¹¹⁶ Justice

108. See ROBERT SHAW, *THE EPIDEMIC: THE ROT OF AMERICAN CULTURE, ABSENTEE AND PERMISSIVE PARENTING, AND THE RESULTANT PLAGUE OF JOYLESS, SELFISH CHILDREN* (Reganbooks 2003).

109. Craig Branch, *Public Education or Pagan Indoctrination? A Report on New Age Influence in the Schools*, Statement DN-118, CHRISTIAN RESEARCH INSTITUTE, available at <http://www.equip.org/free/DN118.htm>.

110. Deborah Caldwell, *Banning Halloween: The October Bacchanalia Turns into a Religious Issue for the Nation's Public Schools*, available at http://www.beliefnet.com/story/48/story_4828_1.html.

111. *Brainwashing Consumers and Children: The Dangerous Spread of Commercialized Culture*, March 25, 2005, available at <http://www.organicconsumers.org/school/commercialism32805.cfm>; Moniek Buijzen and Patti Valkenburg, *The Impact of Television Advertising on Children's Christmas Wishes*, 44 J. OF BROADCASTING & ELECTRONIC MEDIA (2000).

112. *The Christmas Tree*, <http://www.jesus-is-lord.com/tree.htm>.

113. David Johnson, *Sweet Easter Facts: \$1.9 Billion of Easter Candy Bought*, available at <http://www.infoplease.com/spot/eastercandy1.html>.

114. See *Columbine High School Massacre*, http://en.wikipedia.org/wiki/Columbine_High_School_massacre; *Bowling for Columbine*, available at <http://www.bowlingforcolumbine.com>.

115. Charles Colson, *The Next Great Awakening: A Return to Biblical Literacy*, BREAKPOINT COMMENTARY, June 2, 2005, available at http://www.pfm.org/AM/Template.cfm?Section=BreakPoint_Commentaries1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16086.

116. *McCreary Co. v. A.C.L.U.*, 125 S. Ct. 2722, 2728, 2730 (2005).

Souter's opinion reveals distinguishing facts in *McCreary* that presumably persuaded Justice Breyer to switch sides.

Unlike the private donation by the Fraternal Order of the Eagles of the monument in *Van Orden*,¹¹⁷ in *McCreary*, the idea for the displays originated with the legislative bodies of each county to honor the role the Ten Commandments played in the development of law, to remember and honor, Jesus Christ, the Prince of Ethics, to support Chief Justice Roy Moore of Alabama, in his attempt to display a monument of the Ten Commandments inside a courthouse, and to follow the example of the Founding Fathers to "publicly acknowledge God as the source of America's strength and direction."¹¹⁸ The displays were held to be unconstitutional, because the underlying purpose was religious designed to advance religion,¹¹⁹ and subsequent modifications of the nature and context of the displays to validate a secular purpose to overcome legal hurdles were viewed as ineffective shams.¹²⁰ Applying the *Lemon* test, Justice Souter emphasized the secular purpose had to be "genuine" and "not merely secondary to a religious objective."¹²¹

For a Ten Commandment display to pass constitutional scrutiny, the devil is in the details.¹²² For example, displaying the text of the Ten Commandments is a far cry from a symbolic depiction, such as two blank tablets on which is only written Roman Numerals I through X.¹²³ A general suggestion of divine law might be acceptable, whereas a sectarian religious text is probably going too far.¹²⁴ Both context and purpose need to be examined with regard to the tiniest detail so that the neutrality principle is not compromised in the smallest way.

Sensitive to criticism that the Supreme Court is inconsistent in its Establishment Clause jurisprudence, Justice Souter conceded at times concessions have been made to allow for the vitality of the Free Exercise Clause.¹²⁵ It is this "tension of competing values"¹²⁶ that produces an inconsistent track record of jurisprudence, for neither the Establishment Clause nor the Free Exercise Clause is "open to realization to the logical limit."¹²⁷ Justice Souter concludes, "trade-offs are inevitable, and an

117. *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005).

118. *McCreary Co.*, 125 S. Ct. at 2729.

119. *Id.* at 2733.

120. *Id.* at 2736, 2741.

121. *Id.* at 2735.

122. "Commandments might be set out by the government, and under the *Establishment Clause* detail is the key." *Id.* at 2738.

123. *Id.*

124. *Id.*

125. *Id.* at 2742.

126. *Id.*

127. *Id.*

elegant interpretative rule to draw the line in all the multifarious situations is not to be had.”¹²⁸

This explanation was rejected by dissenting Justice Scalia, who claimed the common denominator in the Supreme Court’s inconsistent Establishment Clause jurisprudence is one of simple self-preservation:

What, then, could be the genuine ‘good reason’ for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which ‘has no influence over either the sword or the purse,’ The Federalist No. 78, p. 412 (J. Pole ed. 2005), cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.¹²⁹

In her concurrence, Justice O’Connor elaborated on the importance of the neutrality principle, for religious liberty in a secular society can only be protected by confining religion to the individual conscience and outside the scope of government direction or influence.¹³⁰ Freedom of belief necessarily includes the freedom of conscience.¹³¹ Encroachment on an individual’s conscience occurs when the government favors one religion over another, even if that religion is that of the majority of Americans.¹³² There is no list of approved and disapproved beliefs, for believers and non-believers have equal rights in the market place of ideas.¹³³ Once line-drawing between competing religions begins, there is no logical stopping point.¹³⁴ It is the job of the Supreme Court to withdraw from public politics controversies over religious expression away from the control of the majority and decide cases according to legal principles.¹³⁵

In response, Justice Scalia observed that in matters of Establishment Clause jurisprudence, the absence of legal precedents for lack of a governing principle threatens the rule of law:

What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that – thumbs up or thumbs down – as their

128. *Id.*

129. *Id.* at 2752.

130. *Id.* at 2746.

131. *Id.*

132. *Id.* at 2747.

133. *Id.*

134. *Id.*

135. *Id.*

personal preferences dictate. Today's opinion forthrightly (or actually somewhat less than forthrightly) admits it does not rest upon consistently applied principle.¹³⁶

The admission of a lack of consistency referred to by Justice Scalia is disclosed in footnote 10 of Justice Souter's opinion:

At least since *Everson v. Board of Ed. of Ewing*, it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold government action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.¹³⁷

Justice Scalia reminded his colleagues of his dissenting opinion in *Edwards v. Aguillard*,¹³⁸ wherein he listed a catalogue of cases decided after *Lemon* which approved government action designed to advance religion. It is thus hypocritical for the Supreme Court allow for Divine guidance in the legislative chamber of Nebraska and not to allow the simple viewing of the text of the Ten Commandments in the courthouses of McCreary and Pulaski Counties. If "the tolerable acknowledgement of beliefs widely accepted by the people of this country" concerning the matter of prayer is constitutional in *Marsh*, ought not there be equal respect for displays of the Ten Commandments, which would similarly constitute another "tolerable acknowledgement of beliefs widely accepted by the people of this country?"¹³⁹

Expressing his exasperation with his colleagues, Justice Scalia lambasted Justice Souter's subtle shift in analysis, which employs an inquiry of a perceived "apparent" purpose by a fictitious "objective" observer from one of actual purpose, under *Lemon*. Increased hostility toward religion is consistent with such an approach, for mere misperception of government intent of secular purpose by a Justice (who in reality is that "objective observer") is enough to establish a violation of the Establishment Clause. This approach opens the door to a rigorous review of the full record to discern from the details any scintilla of evidence that hints at an impermissible government purpose to advance religion. Justice Scalia bemoans this trivial pursuit:

Displays erected in silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame

136. *Id.* at 2751.

137. *Id.* at 2733 (internal citations omitted).

138. *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987).

139. *McCreary Co.*, 125 S. Ct. at 2752.

religious passions by making the passing comments of every government official the subject of endless litigation.¹⁴⁰

Notwithstanding Justice Souter's platitude to the contrary,¹⁴¹ Justice Scalia foresees the inevitable sandblasting of the Ten Commandments from the public square across the country.¹⁴² While in theory fine intellectual distinctions may be able to discern an appropriate context in which a display of the Ten Commandments may pass constitutional scrutiny, in practice this is an absurd expectation,¹⁴³ for only the "objective" observer will have the final say on whether or not there is an unconstitutional sectarian heritage to the display.¹⁴⁴ Faced with a litany of complainants and the costs of litigation, the path of least resistance will often be the path chosen by weary and wary public officials.

The most significant contribution offered by Justice Scalia to this debate is his observation that "the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government."¹⁴⁵ While Justice Scalia's definition of the rule of law differs from mine,¹⁴⁶ for he emphasizes legality over justice,¹⁴⁷ his instincts lead him to the underlying war at the heart of what is symbolized in the battle to display the Ten Commandments. That war is

140. *Id.* at 2761.

141. "Nor do we occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law or American history." *Id.* at 2741.

142. *Id.* at 2760-61.

143. *Id.* at 2761.

144. *Id.*

145. *Id.* at 2760.

146. I define the "rule of law" as government by laws that people of moral conscience are willing to obey because the laws are inherently just. The ideal of the "rule of law" is to live in a democratic society that places constitutional limits on the power of government, permanently protects inalienable human rights and fundamental freedoms from undue encroachment, and provides equality before laws administered by an independent judiciary. I define "rule by law" as the antithesis of the "rule of law," meaning to be governed by unjust laws in any society, including democratic societies, where the government may exercise arbitrary powers and may abridge at will inalienable human rights and remove from constitutional protection the inalienable civil rights of any human being. The main difference between these opposite concepts is that *justice* is the defining characteristic in a society governed by "rule of law," and *deferential coerced obedience* is the defining characteristic in a "rule by law" society. Without a moral component that squares with the eternal and natural law of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law. The idea of a "government of laws and not of men" has nothing to do with morality or just laws or rule by law as I have defined it. A "government of laws, and not of men," is after all not necessarily rule by law. It is a mistake to label mere legality as compliance with the rule of law. For example, totalitarian regimes can be fastidiously legal, pass unjust laws, and maintain the separation of executive, legislative and judicial powers.

147. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

the struggle for legal supremacy, between God's infallible divine laws that give shape to natural law that is imbued with justice, and fallible human made law, that artificially erects a parallel legal system that is often prone to injustice.

VI. COMMENTARY: THE VESTIGES OF NATURAL LAW

The Ten Commandments do serve as a reminder that natural law has not yet been extinguished in this country, for judges and juries still seek to do justice, even on that rare occasion when to obey the law will result in injustice. Natural law is found in the Supreme Court's decision in *Brown v. Board of Education*,¹⁴⁸ where the Court unanimously held it was wrong to follow decades old doctrine of separate but equal, for little African American girls and boys cried from thinking they were morally inferior to white-skinned boys and girls. Natural law is found in the Nuremberg trials, where the judges held that following orders and positive law was not a defense to genocide of millions of human beings.¹⁴⁹ Natural law is also found in the *Letter from the Birmingham Jail*, wherein Dr. Martin Luther King Jr. cited to Thomas Aquinas to claim the high moral ground in his civil rights war against racism in America:

How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distort the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things.

148. *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

149. In Nazi Germany, there was a separation of Christianity from Government, to break the influence of Christian morality. Hans Frank, who was convicted of war crimes, shared his insights with the Military Tribunal, which sentenced him to death:

At the beginning of our course, we did not suspect that our turning away from God could have such disastrous, deadly consequences and that we would necessarily become more and more deeply involved in guilt. . . Thus, by turning away from God, we were overthrown and had to perish . . . I beg our people not to continue in this direction, not even a single step: because Hitler's road was the way without God, the way of turning from Christ, and, in the last analysis, the way of political foolishness, the way of disaster, and the way of death.

22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 392 (His Majesty's Stationery Office, 1950).

Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and awful. Paul Tillich said that sin is separation. Is not segregation an existential expression 'of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.¹⁵⁰

All these foregoing illustrations remind us that the Ten Commandments are as good today, as they ever were, for law devoid of justice, is no law at all.

It is natural law that establishes that there is a higher law that holds kings and presidents equally accountable, for no one is above the law of God. Is not this worth celebrating, let alone remembering, especially in a time of war against terrorist and an unprecedented expansion of presidential authority that has authorized indefinite detentions,¹⁵¹ torture,¹⁵² the invasion of Iraq,¹⁵³ and domestic surveillance without judicial oversight?¹⁵⁴

American jurisprudence has regrettably been hypocritical when it comes to implementing the ideals of equality and justice for all. Seared into our collective conscience are the concentration camps where American born Japanese were forcibly removed hundreds of mile from their homes,¹⁵⁵ the genocide of the American Indian, many of whom who were poisoned by blankets infested with smallpox given as currency in exchange for goods,¹⁵⁶ and the slavery of the African American, who enriched the American colonies by the sweat of their brow and the blood on their

150. Martin Luther King, Jr., *Letter from the Birmingham Jail*, April 16, 1963, available at <http://www.nobelprizes.com/nobel/peace/MLK-jail.html>.

151. See Charles I. Lugosi, *The Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 AM. J. OF CRIM. L. 225 (2003).

152. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua Dratel eds., Cambridge Univ. Press 2005).

153. Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004); see also Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 26 MICH. J. INT'L L. 691 (2004).

154. See Terrorist Surveillance Bill of 2006, intended to legalize previous questionable warrantless surveillance of Americans, Terrorist Surveillance Act, S. 2455, 109th Cong. (2006), available at http://www.fas.org/irp/congress/2006_cr/s2455.html; Elizabeth B. Bazan and Jennifer K. Elsea, Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, January 5, 2006, available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

155. *Korematsu v. United States*, 323 U.S. 214 (1944).

156. DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (30th Anniversary ed., Owl Books 2001).

backs.¹⁵⁷ These are examples of injustice that were sanctioned by law. These events took place in the last three hundred years when natural law declined into obscurity with the rise of legal positivism.¹⁵⁸

The Supreme Court's historical decision in *Calder v. Bull*¹⁵⁹ was a pivotal case, for a clear choice was made by Justice James Iredell in favor of a constitutional doctrine of judicial review that preferred positive law over natural justice. According to Justice Iredell, legislation is valid if the Legislature acts within its delegated authority and void if the authority of the Legislature is exceeded. Laws are valid even if they are contrary to natural law:

"If . . . the Legislature. . . shall pass a law, with the general scope of their legislative power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."¹⁶⁰

In such a case, all a court can say is its opinion that the Legislature has passed an act inconsistent with the abstract principles of natural justice.

Justice Samuel Chase disagreed with the majority, for he found independent free standing authority in natural law to prohibit ex post facto legislation where such legislation was a flagrant abuse of power and would result in injustice. According to Justice Chase, it would be against all reason and justice to retroactively criminalize conduct that was once legal and would now punish an innocent individual, or to take property that belonged to one and given to another. Legislatures are not omnipotent creatures which have unlimited license to act unjustly without judicial restraint:

There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.¹⁶¹

Since *Calder*, the prevailing attitude of judges is one of technically correct legalism emblematic of a rule by law mentality modeled by the case

157. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (Oxford Univ. Press 1978).

158. HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* (Thomas R. Hanley trans., B. Herder Book Co. 1947).

159. *Calder v. Bull*, 3 Dall. 386 (1798).

160. *Id.* at 399.

161. *Id.* at 387-88.

of *Dred Scott*,¹⁶² which held that slaves were property and not persons. While *Brown v. Board of Education* departed from that model, the Supreme Court has returned to its rule by law mentality. The case of *Roe v. Wade*,¹⁶³ which denies legal personhood to unborn human beings to clear the way for their destruction, follows in the tradition of *Dred Scott*. In this line of authority, there is no place for natural law, for the highest law of the land is the Supreme Court itself. If all human law, including the U.S. Constitution were subordinate to the natural law, which contains within it the divine law of God, abortion would be illegal. The individual right to choose life or death for one's unborn child would be replaced by one's obligation to love and care for one's baby, and to forbid the killing of all innocent human beings.

It is in this context, then, that the battle over public displays of the Ten Commandments can be best understood, for secular humanism cannot allow any encroachment of divine law that might ultimately lead to the substitution of natural law (labeled as religious values) for positive law (that sanctions immoral choices like abortion, same sex marriage, common law relationships) that is likely void, because of non-conformance to the natural law. This is why it is fiction to assume a position of neutrality in First Amendment jurisprudence, for no compromise is possible when it comes to choosing the ultimate legal authority in the contest for supremacy between humans and God.

VII. THE STARS AND STRIPES FOREVER

In the wake of the decisions in *Van Orden* and *McCreary*, the Ten Commandments displays have been desecrated and relegated to the status of nativity scenes that can only pass constitutional scrutiny by being displayed next to secular objects like Christmas trees decked out in colored lights and tinsel, plastic molds of reindeers and Santa Claus, glowing images of cheery-faced revelers; cut-out characters of clowns, elephants and teddy bears; all lumped together on public property by a neutral banal banner that reads "Seasons Greetings."¹⁶⁴ This is not neutrality, but a demeaning neutering of the Ten Commandments.

The Ten Commandments ought to be accorded the same respect owed to American flag.¹⁶⁵ There is no constitutional impediment that prevents

162. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

163. *Roe v. Wade*, 410 U.S. 113 (1973).

164. See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *County of Allegheny v. A.C.L.U.* 492 U.S. 573 (1989).

165. Deserving of respect is one thing; getting respect is another, especially when the flag is burned and thus desecrated in an act of political violence. Justice Stevens, who vigorously opposes public displays of the Ten Commandments, as a war veteran, opposes flag burning as a means of political expression, for the flag is more than a symbol of history and freedom, but an intangible national asset. Arguably, the Ten Commandments are such

the American flag from being flown alone. No American needs to apologize for flying our flag in his or her front yard as a solemn tribute in quiet dignity to be a somber reminder of what the people of this nation value and cherish. No corporation, government body, church or cultural organization would ban the veneration of the American flag from display on public or private property. We are patriots and consider it unthinkable to forbid the flying of the Stars and Stripes unless "Old Glory" was next to, say, the national flags of Israel, Iran, India, China, Mexico, and Nigeria, just to name a few countries that represent the multicultural diversity of America. So too then the Ten Commandments ought to take its proper place without fear of offending others.

When school children recite the pledge of allegiance, they pledge to honor their God, country and flag. Since 1954, the pledge of allegiance has included the words, "under God."¹⁶⁶ So far, challenges to the text of the pledge have been ultimately unsuccessful.¹⁶⁷ While no one is coerced into reciting the oath of allegiance, for that would be prescribing what is orthodox in matters of religion, politics and nationalism,¹⁶⁸ the practice of reciting the oath is not impeded or impaired.

Chief Justice Warren, in *McGowan v. Maryland*,¹⁶⁹ observed that the Establishment Clause "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."¹⁷⁰ Thus laws against murder, adultery, polygamy, fraud and theft that are derived from the Ten Commandments are constitutional, for they benefit the general welfare of society. Despite the fact that Maryland's Sunday closing laws were religious in origin, traceable to the Commandment not to work on the Sabbath, the Sunday closing laws were held to be constitutional, for they had a valid secular purpose because of the social benefit obtained from resting one day in

an intangible national asset too. See *Texas v. Johnson*, 491 U.S. 397, 436-39 (1989) (Stevens, J., dissenting).

166. *Newdow v. United States Cong.*, 292 F.3d 597, 600-01 (2002) ("On June 22, 1942, Congress first codified the Pledge as 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.'" Pub. L. No. 623, ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172). On June 14, 1954, Congress amended Section 172 to add the words "under God" after the word "Nation." Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998). Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4).

167. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

168. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

169. *McGowan v. Maryland*, 366 U.S. 420 (1961).

170. *Id.* at 442.

seven. The resulting harmony with divine law did not amount to using the coercive power of the state to aid religion.¹⁷¹

Short of coercion to aid religion, which is presumptively unconstitutional, the government may presumably seek to promote the moral code contained within the Ten Commandments for the general welfare of society, by permitting the public placement of the Ten Commandments, by any means, including monuments, plaques, and posters, to help people live moral lives. While such conduct may be in harmony with the goals of various religions to encourage the faithful to abide by God's laws, there can be no establishment of religion when the limited public forum is used to allow privately financed ways to express ideas that are consistent with the free exercise of religion.¹⁷² Just as the unadorned free-standing wooden cross sponsored by a state chapter of the Ku Klux Klan was permitted to be displayed as a purely religious symbol in Capital Square in Columbus, Ohio, so too ought displays of the Ten Commandments to take their place in traditional public forum, even next to the seat of government.¹⁷³

I contend the freedom to believe and freedom to act are indivisible elements of the Free Exercise Clause notwithstanding legal precedent to the contrary.¹⁷⁴ The language of the First Amendment is instructive, for the text does not translate into the "Free Belief Clause." Scripture tells us that faith without works is dead.¹⁷⁵ The Great Commission directs Christian

171. *Id.* at 453.

172. See Bradley M. Cowan, Note, *The Decalogue in the Public Forum: Do Public Displays of the Ten Commandments Violate the Establishment Clause?*, 2 AVE MARIA L. REV. 183 (2004).

173. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

174. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (Chief Justice Waite upholding legislation criminalizing polygamy); *Employment Division v. Smith*, 494 U.S. 872 (1990) (limiting the free exercise of religion when there is a conflict with generally applicable criminal law, such as the smoking of peyote).

175. *James* 2:14-26.

What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister has nothing to wear and has no food for the day, and one of you says to them, 'Go in peace, keep warm, and eat well,' but you do not give them the necessities of the body, what good is it? So also faith of itself, if it does not have works, is dead. Indeed someone might say, 'You have faith and I have works.' Demonstrate your faith to me without works, and I will demonstrate my faith to you from my works. You believe that God is one. You do well. Even the demons believe that and tremble. Do you want proof, you ignoramus, that faith without works is useless? Was not Abraham our father justified by works when he offered his son Isaac upon the altar? You see that faith was active along with his works, and faith was completed by the works. Thus the

believers to engage in conduct to inform others of the gospel message.¹⁷⁶ The Ten Commandments mandates the supremacy of God. Freedom of conscience and religious expression is meaningless if a human being is prohibited by law from practicing the tenets of one's faith, which includes the honoring of the supremacy of God, as directed by the First Commandment. Just as religious practices of Seventh Day Adventists must be accommodated in the workplace,¹⁷⁷ in the public forum of door to door proselytizing by Jehovah Witnesses,¹⁷⁸ and in education,¹⁷⁹ so too accommodation must be made under the Free Exercise Clause to those whose faith embraces the natural law and the divine law of the Founding Fathers of this nation.

Imagine if the Supreme Court dictated to Americans that we could believe in liberty, but did not have the right to fly the Stars and Stripes in any public forum, unless our flag was flown alongside other flags in order to be politically correct. Just as the Stars and Stripes can be displayed alone at the local courthouse, school or city hall, so too ought solo displays of the Ten Commandments, without the need to stoop to the charade of Christian heritage or secular purpose mandated by the Supreme Court in *Van Orden* and *McCreary*. In *Abington School District v. Schempp*,¹⁸⁰ Justice Clark stated in 1963 that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"¹⁸¹ That day has finally arrived.

CONCLUSION

The text of the Ten Commandments is more than mere prose to a person of faith, for that text is the actual Word of God. Obedience to the Ten Commandments strikes at the heart of the current prevailing

scripture was fulfilled that says, 'Abraham believed God, and it was credited to him as righteousness,' and he was called 'the friend of God.' See how a person is justified by works and not by faith alone. And in the same way, was not Rahab the harlot also justified by works when she welcomed the messengers and sent them out by a different route? For just as a body without a spirit is dead, so also faith without works is dead. *Id.*

176. *Matthew* 28:19-20.

Go therefore, and make disciples of all the nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all things that I have commanded you; and lo, I am with you always, even until the end of the age. Amen. *Id.*

177. *Sherbert v. Verner*, 374 U.S. 398 (1963).

178. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

179. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

180. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional daily opening exercises consisting of the recitation of the Lord's Prayer and the reading of ten verses from the Bible).

181. *Id.* at 225.

jurisprudential theories that have ousted God, and replaced divine law with secular humanism. Displays of the Ten Commandments are very real threats to upsetting the prevailing order that presides over "cultural decadence, spiritual corruption, and personal rotteness."¹⁸²

Societal spiritual health is not dependent upon the First Amendment alone, which can only do so much to prevent religious bigotry, coercion, intolerance, and encourage the exploration and cultivation of religious faith. In my view, there is an indissoluble marriage between Church and State, allowing for accommodation of prayer, expressions of faith in speech, and displays of the Ten Commandments in the public square, including schools, city halls, legislative chambers and courthouses. In his book, *The Prophet*, Kahlil Gibran illustrates the mutual co-operation that can be accomplished in marriage:

Then Almitra spoke again and said, "And what of Marriage, master?"

And he answered saying:

You were born together, and together you shall be forevermore.

You shall be together when white wings of death scatter your days.

Aye, you shall be together even in the silent memory of God.

But let there be spaces in your togetherness,

And let the winds of the heavens dance between you.

Love one another but make not a bond of love:

Let it rather be a moving sea between the shores of your souls.

Fill each other's cup but drink not from one cup.

Give one another of your bread but eat not from the same loaf.

Sing and dance together and be joyous, but let each one of you be alone,

Even as the strings of a lute are alone though they quiver with the same music.

Give your hearts, but not into each other's keeping.

For only the hand of Life can contain your hearts.

And stand together, yet not too near together:

For the pillars of the temple stand apart,

And the oak tree and the cypress grow not in each other's shadow.¹⁸³

The decision in *McCreary* amounts to a divorce between Church and State, a result that was never intended by the First Amendment.

State-enforced discrimination that exiles displays of the Ten Commandments from the public forum infringes more than the free exercise of religion: It symbolizes the death of natural law and the rule of law in American jurisprudence. Unless this is understood and rectified, all

182. William Smith, *The First Amendment and Progress*, 2 HUMANITAS 1, 8 (1987).

183. KAHILIL GIBRAN, *THE PROPHET* 15 (Knopf 1923).

that will remain is hostility toward religion, rule by law and the supremacy of the secular state.
