THROUGH A GLASS DARKLY: *VAN ORDEN*, *MCCREARY*, AND THE DANGERS OF TRANSPARENCY IN ESTABLISHMENT CLAUSE JURISPRUDENCE

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INTRODUCTION

In this age of "sunshine," "transparency," and other celebrations of open government, it is difficult to argue that critical aspects of government decision-making should remain opaque and unrevealed. Indeed, such a notion seems particularly indefensible when "the law," or the rules articulated by government, is at issue. The law must give notice of what it requires, and the reasons that it does so. The law must deal with persons and situations consistently. The law must be rooted in articulated principles, not arbitrariness or caprice.

Yet, I shall argue, there is at least one area of constitutional jurisprudence where these generally unassailable truths falter. In this area, transparency in rules and in the reasons for those rules is, in fact, undesirable. Indeed, transparency may be dangerous, carrying unique and hidden costs. This is the area dealing with the equal (or unequal) treatment of religion by government.

For decades, the Establishment Clause[1] of the Constitution has been interpreted by the United States Supreme Court to require the even-handed treatment of religion and nonreligion by government. From the "neutrality" prong of the longstanding *Lemon* test,[2] to the articulation of

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

2. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that a challenged law must have a secular purpose; its primary effect must be "neutral" – i.e., neither advancing nor inhibiting religion; and it must not foster excessive entanglement with religion).

the more recent "endorsement" test,[3] a foundational principle of the Establishment Clause has been that government cannot "convey[] or attempt[] to convey a message that religion [generally] or a particular religious belief is *favored* or *preferred*."[4] This principle has been motivated by the belief that for government to "choose" one religion over another religion, or religion over non-religion, violates principles of equality. All people—religious and nonreligious—will not be treated equally by government if government "establishes" religion or nonreligion generally, or one religion particularly, to the exclusion of other points of view.

In practice, of course, this principle of equal treatment has often been violated. The implementation of the idea that government cannot establish one religion in preference to others (the "equality of sects") has been relatively easy, at least in principle, when the religious nature of the competing ideologies is something on which we can agree. Thus, government cannot establish Protestantism to the exclusion of Catholicism, or Judaism to the exclusion of Islam, and the idea that this is a "Christian nation"[5] is decidedly passé. More difficult problems have arisen when what are generally believed to be secular beliefs are characterized as religious ones,[6] triggering claims that government's

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3. *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 249-50 (1990) (plurality opinion) (government may not endorse religion or particular religious beliefs); County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (suggesting that on religious matters, government may not endorse a particular point of view).

4. *County of Allegheny*, 492 U.S. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)) (alterations added). *See also* Rosenberger v. Rector & Visitors, 515 U.S. 819, 839 (1995) (the Establishment Clause involves a "guarantee of neutrality"); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government . . . must be neutral in matters of religious theory, doctrine, and practice."); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (Government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another.").

5. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (courtroom oaths, observance of the Sabbath by government, and "the churches and church organizations which abound in every city, town and hamlet," establish that "this is a Christian nation.").

6. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (stating that religions in this country include "Ethical Culture, Secular Humanism and others").

secular nature is, in fact, religious-sect favoritism, or when government's secular nature is *itself* challenged as a violation of religion/non-religion equal-treatment guarantees.[7] Claims of the last type are particularly intractable, as a theoretical matter. Since government must necessarily establish *something*—whether religious or nonreligious—through its choices of principles and practices, equal treatment of religion and nonreligion is, in this sense, impossible to achieve.

The governing majorities of the United States Supreme Court have lived with these problems and contradictions for a long time—repeating, as an obvious, foundational principle, that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion,"[8] while ignoring (or rationalizing) the extent to which secularism, monotheism, and Judeo-Christian beliefs have been privileged and promoted by government.[9] The belief apparently has been that the prophylactic benefits of the maintenance of the principle of absolutely equal treatment outweigh the costs incurred in the revelation of its often fictitious nature. Even dissenters, over the years, generally have been careful to skirt any direct challenge to this principle or its sanctity.

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7. *See, e.g.*, Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (considering a challenge to two exhibitions at the Smithsonian Museum of Natural History, on the ground that they established secular humanism in violation of Free Exercise and Establishment Clause guarantees).

8. *Epperson*, 393 U.S. at 104 (alteration added).

9. For instance, the imperative of equal treatment has been tempered by assertions that religion should be "accommodated" by government, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (holding the state must accommodate workers' Sabbath day practices), and that certain Judeo-Christian or monotheistic practices by government are immunized by tradition or history. *See, e.g.*, *County of Allegheny*, 492 U.S. at 602-03 (stating that legislative prayer, the national Motto ("In God We Trust"), and religious references in the Pledge of Allegiance ("One Nation Under God") are permissible as historical, "nonsectarian references to religion by . . . government"); Marsh v. Chambers, 463 U.S. 783, 786 (1983) (finding that certain government religious practices are permissible because they are "deeply embedded in the history and tradition of this country").

In *Van Orden v. Perry*[10] and *McCreary County v. ACLU*,[11] both decided in 2005, this tacit agreement ruptured. In these cases, which dealt with the constitutionality of Ten Commandments displays, two blocks of justices emerged on the Court. The first block of justices—what I shall call the "Neutralist Block"—insisted that the ideal of equal treatment be retained. The second block of justices—what I shall call the "Monotheist Block"—explicitly jettisoned the ideal of equal treatment by government when it comes to religion-vs.-nonreligion, or monotheism-vs.-non-monotheism, debates. In their view, we should abandon the charade, and acknowledge that our government, historically and currently, favors religion—particularly, monotheistic religion—over other religious or nonreligious beliefs. For these justices, this favoritism is both culturally understandable and eminently constitutional.

Beneath the obvious doctrinal differences in these approaches, there is, I believe, a deep—and largely unarticulated—difference in belief about the role that transparency should play in this area of law. The Neutralist Block, I shall argue, does not seriously differ from the Monotheist Block in most outcomes; for instance, the Neutralist Block would undoubtedly uphold, for various reasons, almost all of the monotheist practices in which state and federal governments currently engage. The disagreement, in the main, is not whether particular practices are "in" or "out"; it is whether constitutional law should explicitly recognize and sanctify the promotion of religion—and monotheistic religion, particularly—by government.

Does this matter? Does it matter whether our constitutional scheme implicitly sanctions the favoring of monotheistic practices by government—in the form of myriad "exceptions" to the equal treatment rule—or that it *explicitly* does so? In these remarks, I shall argue that it does. Although the Monotheist Block is correct in its assessment of Establishment Clause jurisprudence in this area, transparently viewed, there are excellent reasons why this area of law has remained cloaked in opaqueness and obfuscation for so long. Furthermore, the transparency

10. 125 S. Ct. 2854 (2005) (plurality opinion).
11. 125 S. Ct. 2722 (2005).

that the Monotheist Block advances would involve dangers and hidden costs that we, as a religiously pluralistic society, should not wish to pay.

I. THE *VAN ORDEN* AND *MCCREARY* CASES

The *Van Orden* and *McCreary* cases might seem, in some ways, to have been unlikely candidates for triggering an overt attack on the long-standing principle of government religious neutrality. Government posting of the Ten Commandments and other government engagement in monotheistic, historical, or cultural religious exercise had long been handled by conventional equal-treatment doctrine and its copious exceptions as articulated by the Court.[12] It is true that in *Stone v. Graham*,[13] the posting of the Ten Commandments in a public-school classroom was invalidated. However, under the traditional rules, public-school settings have always been treated as arenas of particular sensitivity, and numerous doctrinal avenues—such as the immunization of the practice by history[14] or the finding of secular legislative purpose or context[15]—were available to the *Van Orden* and *McCreary* displays' supporters on the Court.

Van Orden involved a challenge to a Ten Commandments monument placed by a civic group on the Texas State Capitol grounds in 1961. The civic organization paid the cost of erecting the monument, although it was done with the approval of the state legislature.[16] The

12. *See, e.g.*, *County of Allegheny*, 492 U.S. at 602-03 (distinguishing legislative prayer, the national motto ("In God We Trust"), and religious references in the Pledge of Allegiance ("One Nation Under God") from prohibited practices, because they are historical, "nonsectarian references to religion by the government"); *Marsh*, 463 U.S. at 787-90 (holding that nonsectarian legislative prayer had historical and civic, not predominantly religious, meaning).

13. 449 U.S. 39 (1980) (per curiam).

14. *See, e.g.*, *Marsh*, 463 U.S. at 786-92 (upholding legislative prayer as "deeply embedded in . . . history and tradition").

15. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (articulating the "secular purpose" test); Lynch v. Donnelly, 465 U.S. 668, 681-82 (1984) (holding that inclusion of a crèche in a town holiday display was not, in that context, the use of a religious symbol to endorse religion).

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

monument is large—measuring six feet high and three feet wide—and sits on grounds that cover twenty-two acres.[17] There are sixteen other monuments and twenty-one historical markers on the grounds, "commemorating the 'people, ideals, and events that compose Texan identity.'"[18]

Chief Justice Rehnquist announced the judgment of the Court, upholding the monument's constitutionality, and delivered a plurality opinion in which Justices Scalia, Kennedy, and Thomas joined. The Ten Commandments, Rehnquist wrote, "are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance."[19] However, "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[20] "Our institutions presuppose [the existence of] a Supreme Being . . . ."[21] Government institutions cannot "press religious observances upon their citizens."[22] However, government need not and cannot "evince a hostility to religion" by refusing to recognize "our religious heritage" and the needs of religious groups.[23]

As for the equal-treatment principle itself, Rehnquist described this in terms that echo the more strident articulation of the views of the Monotheist Block in the *McCreary* case.[24] Despite what equal treatment might appear to guarantee, "we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion."[25] "Recognition of the role of God in our Nation's heritage has . . . been reflected in our decisions. We have acknowledged, for example, that 'religion has been closely

17. *See id.*

18. *Id.* (quoting Tex. H. Con. Res. 38, 77th Leg. (2001)).

19. *Id.* at 2863.

20. *Id.* (citations omitted) (alteration added).

21. *Id.* at 2859 (alteration added).

22. *Id.*

23. *Id.*

24. McCreary County v. ACLU, 125 S. Ct. 2722 (2005). *See* discussion *infra* pp. 67-71.

25. *Van Orden*, 125 S. Ct. at 2860 n.3 (citations omitted).

identified with our history and government . . . .'"[26] Indeed, even the dissenters in this case "do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion."[27] Neutrality—even if required—does not prevent this.

In this case, Rehnquist wrote, the monument is "passive,"[28] pressuring no passerby to adhere to its message. It has not been placed in a particularly sensitive context, such as elementary and secondary schools.[29] Although the Ten Commandments are a religious text, in this display they have "a dual significance, partaking of both religion and government."[30] As such, this monument presents no violation of the Establishment Clause.[31]

Justice Breyer concurred in the judgment, but declined to endorse the plurality's implicit discard of the equal-treatment test. In his view, "neutrality" is the governing principle, although the implementation of this idea may be complex.[32] Whether a challenged government action is "neutral," and constitutional, depends upon its "context and consequences measured in light of [the Establishment Clause's] . . . purposes."[33] In Breyer's view, where—as here—the monument's history reflects no particular religious objective by government, and where it "has stood apparently uncontested for nearly two generations,"[34] the requirement of *practical* government neutrality has not been violated. Indeed, removal of the monument after so many years could have exactly the opposite effect to that desired: it "could . . . create the very kind of religiously-based divisiveness that the Establishment Clause seeks to avoid."[35]

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26. *Id.* at 2861-62 (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963)).

27. *Id.* at 2860 n.3 (plurality opinion) (characterizing the argument of the dissenting opinion).

28. *See id.* at 2861, 2864.

29. *See id.* at 2863-64.

30. *Id.* at 2864.

31. *See id.*

32. *See id.* at 2868-72 (Breyer, J., concurring in the judgment).

33. *Id.* at 2869 (Breyer, J., concurring in the judgment) (alteration added).

34. *Id.* at 2871 (Breyer, J., concurring in the judgment).

35. *Id.* (Breyer, J., concurring in the judgment).

The dissenters in *Van Orden*—Justices Stevens, Ginsburg, Souter, and O'Connor—staked their ground on a reaffirmation of the need for the equal-treatment test.[36] In their view, "the Establishment Clause demands religious neutrality"[37]—and this means no privilege for religion over nonreligion, or for particular religions over others.[38] Government may acknowledge the religious beliefs and practices of the American people, and preserve works of art or historic memorabilia that reflect religious themes.[39] Individual government actors may share their personal views, and express their personal religious beliefs.[40] "A governmental display of an obviously religious text . . . [may be permissible] in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others."[41] However, government may not endorse religion generally, or Judeo-Christian principles particularly, in its policies, pronouncements, or practices.[42]

Evaluated against this backdrop, this Commandments monument, in the dissenters' view, clearly fails. It states unequivocally that "there is one, and only one, God."[43] The "official state endorsement" of this message "is flatly inconsistent" with our nation's "resolute commitment to neutrality."[44] In short,

> Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian

36. *See id.* at 2873-90 (Stevens, J., dissenting); *id.* at 2891 (O'Connor, J., dissenting); *id.* at 2892-97 (Souter, J., dissenting).

37. *Id.* at 2875 (Stevens, J., dissenting).

38. *See id.* at 2875, 2889 (Stevens, J., dissenting); *id.* at 2892, 2897 (Souter, J., dissenting).

39. *See id.* at 2876 (Stevens, J., dissenting).

40. *See id.* at 2883 (Stevens, J., dissenting).

41. *Id.* at 2892 (Souter, J., dissenting) (alteration added).

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

43. *Id.* at 2877 (Stevens, J., dissenting).

44. *Id.* (Stevens, J., dissenting).

> message of piety would have the tendency to make nonmonotheists and nonbelievers "feel like [outsiders] in matters of faith, and [strangers] in the political community."[45]

For these justices, there was no doubt but that this monument violates the Establishment Clause.

The *McCreary* case trod much of the same ground, although it was an arguably more egregious situation. In 1999, the executives of two counties in Kentucky posted large copies of an abridged text of the King James version of the Ten Commandments in county courthouses.[46] In response to a lawsuit brought by the ACLU, the displays were expanded to include excerpts from other public documents, such as the Declaration of Independence and the Preamble to the Constitution of Kentucky.[47] All of these documents contained references to God, the Bible, and other religious themes.[48] After a preliminary injunction was issued by a federal district judge, the displays were changed again.[49] This time, they consisted of nine framed documents, including the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Mayflower Compact.[50] The collection was entitled "The Foundations of American Law and Government Display."[51]

In this case, the dispositional roles of the Neutralist Block and the Monotheist Block were reversed. Because Justice Breyer joined the result urged by the Neutralist Block, these displays were struck down. The Monotheist justices who comprised the plurality in *Van Orden* were left—in *McCreary*—to dissent.

Justice Souter, writing for the majority, began with a reiteration of the principle "that the 'First Amendment mandates governmental

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45. *Id.* at 2881 (Stevens, J., dissenting) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting)) (alterations in original).

46. McCreary County v. ACLU, 125 S. Ct. 2722, 2728 (2005).

47. *Id.* at 2729-30.

48. *Id.*

49. *Id.* at 2730.

50. *Id.*

51. *Id.* at 2730-31.

neutrality between religion and religion, and between religion and nonreligion.'"[52] Furthermore, when determining whether neutrality is breached, the government's purpose is a critical inquiry.[53] "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[54] "Manifesting a purpose to favor one faith over another, or adherence to religion generally,"[55] "sends [a] . . . message to . . . 'nonadherents that they are outsiders'"[56] and "clashes with 'the understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .'"[57]

In this case, the majority held, a religious purpose permeated all three displays. The Ten Commandments are clearly religious.[58] They are "a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god . . . . They regulate details of religious obligation . . . ."[59] The original display, comprised of the Commandments alone, was "an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When government initiates an effort to place this statement alone in public view, a religious object is unmistakable."[60] Nor did the second or third display "cure" this purpose.[61] The religious purpose of the second display, whose documents were united by the sole common element of religious

52. *Id.* at 2733 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

53. *See id.* at 2734-35 (reiterating the importance of the government's purpose as part of the Establishment Clause inquiry).

54. *Id.* at 2733.

55. *Id.*

56. *Id.* (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-310 (2000)) (alteration added).

57. *Id.* (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)).

58. *See id.* at 2727-45.

59. *Id.* at 2738.

60. *Id.* at 2739.

61. *See id.* at 2739-40.

references, was obvious.[62] The third display, "which quoted more of the purely religious language of the Commandments than the first two displays had done," perpetuated this objective.[63] "No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays."[64]

Justice Scalia, writing in dissent for Justices Rehnquist, Thomas, and Kennedy (in part), set forth a starkly different vision. Citing evidence of the religious and monotheistic assumptions of both Founding Era figures and many contemporary government practices, he asked, "how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion,' . . . and that '[m]anifesting a purpose to favor . . . adherence to religion generally' . . . is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society," in view of our perpetuation of religious references in government documents and symbols.[65]

Indeed, Justice Scalia argued, "[w]hat 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."[66] To trumpet the principle of neutrality—and then to carve, from this principle, a myriad of exceptions—erodes public trust in the rule of law. "[A]n enforced neutrality that contradicts both historical fact and current practice . . . [risks] losing all that sustains it: the willingness of the people to accept [the Court's] . . . interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches."[67]

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62. *See id.*

63. *Id.* at 2740.

64. *Id.*

65. *Id.* at 2750 (Scalia, J., dissenting) (internal quotation and citation omitted) (alteration in original).

66. *Id.* at 2751 (Scalia, J., dissenting) (alterations added).

67. *Id.* at 2752 (Scalia, J., dissenting) (alteration added).

The unavoidable conclusion, Scalia wrote, is that the asserted rule that government cannot favor religion over nonreligion is "demonstrably false."[68] In fact, government—with the Court's blessing—aids religion (in tax exemptions, in exemptions from religious-discrimination-in-employment provisions and in other ways), protects the free exercise of religion, and publicly acknowledges the Creator and citizens' religious beliefs.[69] Nor is the other tenet of "religious neutrality"—that government cannot favor one religious belief over another—any more realistic:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.[70]

Indeed, Scalia argued, monotheism—as exhibited by Christianity, Judaism, and Islam—accounts for 97.7% of all religious believers in the United States.[71] For practical reasons if for no other, "the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities" by government in its acknowledgments of American religious life.[72]

This part of Scalia's dissent—the conceptual heart of the Monotheist Block—was joined by Rehnquist and Thomas. Kennedy joined other parts, which declared that the majority was wrong even if the pertinent inquiry were the "purpose" prong of the traditional *Lemon* test.[73]

The Neutralist Block responded to Scalia's challenges in its majority opinion. Souter acknowledged that their approach did not

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68. *See id.* (Scalia, J., dissenting).
69. *See id.* at 2751-52. (Scalia, J., dissenting).
70. *Id.* at 2752-53 (Scalia, J., dissenting).
71. *See id.* at 2753 (Scalia, J., dissenting).
72. *Id.* (Scalia, J., dissenting).
73. *See id.* at 2757-64 (Scalia, J., dissenting).

provide "an elegant interpretative rule to draw the line in all of the multifarious situations" where government involvement with religion is presented.[74] Indeed, "given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance . . . ."[75] This principle, like others, can only provide a "sense of direction";[76] beyond this, one must consider the context in which the government action occurs, and the purposes of the First Amendment's Establishment Clause.[77] Those purposes include not only the integrity of individual conscience, but the prevention of "the civic divisiveness that follows" when government takes sides in religious debates.[78]

Thus, taking *Van Orden* and *McCreary* together, the views of the Monotheist Block and the Neutralist Block can be summarized as follows:

For the Monotheist Block (Scalia, Rehnquist, Thomas, and to some extent Kennedy):

- *Religion and religious traditions have played a strong role throughout our Nation's history.* In particular, there is a rich and continuing tradition of the acknowledgement of the Creator/One God/the Almighty by government. We are a religious people. Our institutions presuppose a Supreme Being. Any case regarding religious references and religious displays by government must be decided against this background.

- *Government can purposely engage in the acknowledgment, preference, accommodation, even assistance of religion in this monotheistic sense.* If monotheistic references—if acknowledgment of the Creator by government—are simply offered, that is acceptable. Government cannot *actively*

74. *Id.* at 2742.
75. *Id.* at 2743.
76. *Id.* at 2742.
77. *See id.* at 2742-43.
78. *See id.* at 2742.

intervene in religious matters. It cannot require religious observances of its citizens. It cannot engage in coercion—it cannot press people to act or agree. It *can* acknowledge the monotheistic beliefs of the vast majority of Americans.

- It is true that this favors religion (particularly monotheistic religion) over other beliefs. It is true that this discriminates, in turn, against polytheists, believers in unconcerned deities, and atheists.

- However, discrimination in this context is unavoidable. Government "neutrality" in this context is impossible. We face, in fact, an irreducible choice: allowing government recognition of religion ("favoring" monotheistic religion), or preventing government recognition of religion ("suppressing" or "hostility to" monotheistic religion). Given this choice, we choose the former. Suppression of religious acknowledgment would be acquiescence to the wishes of atheists/non-monotheists—itself, a substantive position by government. Making this choice would deny the reality of American history and American life.

- Other groups are protected by free exercise, non-disparagement, and non-proselytization guarantees.

- *Within monotheism, endorsement of a particular religious viewpoint by government is prohibited.* However, this refers to choices among monotheists themselves. It does not refer to a general, monotheistic choice.

For the Neutralist Block (Souter, Ginsberg, O'Connor, and Breyer):

- *As an official matter, government must remain neutral between religion and nonreligion, and between religion and religion.* There is no neutrality when the government's ostensible object is to take sides in any of these disputes.

- *To allow government to intentionally or purposely espouse monotheism means that government is free to approve the core beliefs of a favored religion over the tenets of others.* This the government cannot do. It cannot have an expressed preference for monotheism over other religious or nonreligious beliefs.

- *For government to violate this principle of neutrality is to make some citizens feel like outsiders.* The increasing diversity of the population underscores the need for government neutrality in religious matters, but the principle transcends this. Government cannot convey the message that some are outsiders, whatever their percentage of the population may be.

- *The critical issue is government preference, endorsement, exclusion, and the potential for divisiveness.* Statements made by government leaders and actions by government that do not convey these meanings or carry this risk are not prohibited (e.g., expressions of personal views by political leaders, historical practices and monuments clearly recognized by the reasonable observer as such, and so on). Those that do convey these meanings or carry these risks are prohibited.

The ways in which these positions differ, as stated, are obvious. Indeed, the gulf between these positions is illustrated by the outcomes in the *Van Orden* and *McCreary* cases. The existence of a prominent statement of Judaic and Christian religious and moral principles on the buildings or grounds of state or local government, whether placed by a civic group (with government's blessing) or by government itself, is acceptable to the Monotheists and unacceptable to the Neutralists. For the Monotheists, such a display is simply an acknowledgment of Americans' religiosity. For the Neutralists, it is a forbidden endorsement of religion by government.

Indeed, the abandonment of even a rhetorical fig leaf of neutrality by the Monotheist Block is a startling development in First Amendment jurisprudence. For decades, the Court has retained as bedrock principle the idea that government must maintain neutrality between religion and nonreligion, and between religious sects. This has

been maintained even as it has been contradicted by the apparent promotion of monotheism by government (e.g., under the guise of "historical practice"[79]), special preferences afforded to religion (e.g., tax exemptions, free-exercise guarantees, and so on), and the special disabilities under which religion has been placed (non-establishment guarantees). To be sure, the Monotheist Block carefully notes that neutrality between religion and nonreligion is still a valid principle where public aid or assistance (presumably, financial assistance) to religion is concerned.[80] However, its abandonment in other contexts seems stunningly wide. If government is free to "disregard . . . polytheists, . . . believers in unconcerned deities, [and] . . . devout atheists,"[81] what may government now do? May it call upon "God," "the Creator," or "the Almighty" in any government proclamation or other document? May it conduct monotheistic prayer at any public gathering (exempting, of course, the special case of public schools[82])? May it emblazon Old Testament scriptures (or other "monotheistic" documents) on every government administrative building and courthouse facade?

As this parade of possibilities illustrates, there is surely a range of practices that the Monotheist Block's principles would permit and that traditional, Neutralist principles would not. However, what is *also* stunning about this list is the extent to which it simply reiterates what American federal, state, and (often) local governments already do. We *already* have pervasive government expressions—and implicit endorsements—of "God," "the Creator," and "the Almighty" in government proclamations, symbols, and documents. We already have monotheistic prayer in legislative assemblies and other government fora. We already have references to "our Judeo-Christian heritage" in statute-creation and case-deciding. We already, *de facto*, largely ignore the views of "polytheists, . . . believers in unconcerned deities, [and] . . . atheists."[83] If we are honest with ourselves about current practices, we must admit that the Monotheist Block is, in fact, at least

79. *See id.* at 2749-50 (Scalia, J., dissenting).
80. *See id.* at 2752 (Scalia, J., dissenting).
81. *See id.* at 2753 (Scalia, J., dissenting) (alteration added).
82. *See* Van Orden v. Perry, 125 S. Ct. 2854, 2863-64 (2005).
83. *McCreary*, 125 S. Ct. at 2753 (Scalia, J., dissenting) (alteration added).

substantially correct. Religion *is*—in a monotheistic sense—already "chosen," acknowledged, preferred, and assisted by American government. For the vast majority of situations, the principles urged by the Monotheist Block would not radically alter the outcome; they would simply end the "Neutralist charade."

Should we, then, simply jettison "neutrality," as the Monotheists urge? Is there any reason why we, as a society and government, should perpetuate the idea of neutrality, even as we know that we will—overwhelmingly—honor it only in the breach?

II. THE DANGERS OF TRANSPARENCY

Generally, the idea that we should face what we are doing and align the principles of law with actual practice seems unassailable. If we have, in fact, a religion-privileging, monotheistic government, and if we have no intention of changing that character, concerns for the integrity of law (as Scalia argues) would require that we align the law to reflect this reality.

However, let us consider this apparently obvious proposition more critically. To begin, is transparency—in this sense—what we routinely implement? When actual practice (for whatever reason) conflicts with deeply held principle, do we modify or jettison the principle to reflect this truth?

Let us take, for instance, one of the most fundamental principles underlying our culture, public policymaking, and government: that "life is a pearl beyond price." The idea that human life is priceless, and that it should be protected at all cost, is something with which few citizens, politicians, or judges would disagree. In service of this sacred principle, we pull out all of the stops to rescue mountain climbers caught in storms and miners trapped in underground explosions. We keep people alive for months or years in hospitals on costly machines and convulse, as a society, when a publicized decision is made to terminate treatment. We agonize over the fact that someone in another country is starving, or that an innocent man in this country might be executed. In every setting and in every act, we vindicate the foundational belief that life is a pearl beyond price.

At the same time, of course—in practice—we systematically and legally subvert this principle. There is no legal right to prescription drugs, or medical specialists, or costly interventionist procedures; there is no legal claim that a destitute foreigner can mount to our food, clothing, or shelter; and we haggle over whether society or law owes to men on death row a DNA test that might clear them. We find, in short, that the principle of life's pricelessness is riddled with "exceptions" in practice. Despite our feel-good moments of rescues, wrenching hospital stories, and foreign children flown to the United States for food and medical care, our principle of sanctity of life is honored—in part, nationally, and surely, globally—more often in the breach.

Why, then, do we cling to the absolute statement of this principle? Why don't we recognize, transparently, this charade?

In a classic work published almost thirty years ago,[84] Guido Calabresi and Philip Bobbitt explored this question. The core issue, considered in this book, is how and why society allocates tragically scarce resources, such as vaccines, dialysis machines, draft exemptions, and immigration permissions. The choosing may be by design, or by default (that is, from other, independent actions); in either case, for the chosen, the result is the same. Society—for reasons of true physical limitation, or (more likely) costs or unwillingness to forego other goods or benefits—makes decisions of who shall live, and who shall die.[85]

The idea that such a "tragic choice" exists, and is being made—that certain people must suffer or die, because of society's other (conscious) choices—contradicts the postulate that life is priceless.[86] To explicitly face this truth would be to arouse terror and outrage, anger and violence. (Consider, for instance, the outrage that always accompanies the idea that medical care for the poor should be rationed, or the violence that occurred when supplies of vaccines for children in a recent meningitis outbreak were acknowledged to be short). Thus, we engage in methods that allow us to make the allocation without acknowledging our role in the creation of the tragic choice. Domestic access to health care becomes a question of "worthiness" (e.g., employment status or

84. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

85. *See id.* at 17-22.

86. *See id.* at 19.

personal financial resources); selection of a foreigner for food, life-saving medicine or asylum becomes a question of perseverance (e.g., a market in time, or political sophistication, or literacy), or a matter of fate (e.g., discovery by an American soldier or aid worker); and so on.[87]

In short, we recognize that the maintenance of often fictitious principle in the face of contrary practice may serve important—indeed, critical—cultural, societal, and legal goals. There are costs to our moral and social fabric if we explicitly acknowledge that life-saving food, shelter, and protection are a question of money or other calculated choice. There are costs, in this context, that are incurred in the pursuit of honesty and transparency—costs for our maintenance of a critical moral value, costs for our confidence in government, costs for our willingness to accept the outcome of the tragic choice itself.

Similarly, there are costs in the seemingly simple pursuit of honesty and transparency in our treatment of the principle of state religious neutrality. There are cultural, societal, and legal costs in the move from a "dishonest" proclamation of government neutrality to an "honest" proclamation that neutrality in government practices and principles does not exist.

First, *there are costs to the value of aspiration.* Few moral or legal principles are observed with anything resembling complete consistency in practice. We believe, for instance, in the ideal of the right to counsel, yet we restrict this right to certain procedures, and are reluctant to commit the resources necessary to ensure the counsel's competence. We believe in the right to free speech, yet, of necessity, there are myriad exceptions for fighting words, libel, hate speech, and others. We believe in the right to due process of law, but this concept in practice is an elastic one that affords little in many contexts.

Yet—despite these "hypocrisies"—we would never consider abandoning these principles or ideals that they represent. The reason is that these principles establish our aspirations, albeit imperfectly. They establish societal and legal ideals toward which we believe that we must strive, even as resource limitations, practical considerations, and our own conflicting material and ideological goals prevent their attainment. They

87. *See id.* at 72-78, 92-98, 195-99.

force us to justify deviation or neglect. They hold our collective feet to the "principled" fire.

The principle of government neutrality in religious matters, as imperfect in practice as it is, is similar in its aspirational qualities and justificatory demands. There is, in fact, a vast difference between declaration of a principle that government must be neutral between religion and nonreligion, and religion and religion—and a declaration that our government favors religious institutions and practices of a monotheistic or "Abrahamic" kind. This is true even though we now refer to a monotheistic God in government proclamations, art, symbols, and policies. There is a difference between a neutrality that is highly valued, but sometimes breached—and a theocratic declaration. These differences inhere in the presumptions that we bring to legal questions, and the way that we, as a society, view transgressions. There is a difference in *the culture* of goals, attitudes, and boundaries that we encourage and create. There is a difference in our acts, our aspirations, and our sense of self.

Consider, for instance, the following story, recently reported in *The New York Times*.[88] A woman, Mona Dobrich, grew up as the only Jew in school in Georgetown, Delaware.[89] As an adult, she "married a local man, bought the house behind her parents' home and brought up her two children as Jews. For years, she and [her children] . . . listened to Christian prayers at public school potlucks, award dinners and parent-teacher group meetings . . . ."[90] However, it was a minister's prayer at her daughter's high school graduation—which proclaimed Jesus as the only way to truth—that caused her to act.[91] "'It was as if no matter how much hard work, no matter how good a person you are, the only way you'll ever be anything is through Jesus Christ,' Mrs. Dobrich said."[92]

"After the graduation, Mrs. Dobrich asked the [school district] to consider prayers that were more generic and . . . less exclusionary."[93]

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88. Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, N. Y. TIMES, July 29, 2006, at A10.

89. *See id.*

90. *Id.* (alteration added).

91. *See id.*

92. *Id.*

93. *Id.* (alteration added).

The response by local residents included "[a]nger [that] spilled out on to talk radio, in letters to the editor [of local papers], and at school board meetings attended by hundreds of people."[94] "After receiving several threats, Mrs. Dobrich took her son . . . to Wilmington in the fall of 2004, planning to stay until the controversy blew over. It never has."[95]

The Dobriches later sued the school district, "joined by 'the Does,' a family still in the school district who have remained anonymous because of the response against the Dobriches. Meanwhile, a Muslim family in another school district [in the same county] has filed suit, alleging proselytizing in the schools and the harassment of their daughters."[96] The *Times* article continued, "[t]he Dobrich and Doe legal complaint portrays a district in which children were given special privileges for being in Bible club, Bibles were distributed in 2003 at an elementary school, Christian prayer was routine at school functions and teachers evangelized."[97] Rev. Jerry Fike, the minister who gave the graduation speech described above, explained his actions this way: "'Because Jesus Christ is my Lord and Savior, I will speak out for him' . . . . 'The Bible encourages that. Ultimately, He is the one I have to please.'"[98]

Now, to be fair, this kind of merger of religion and state would almost certainly be unacceptable to the justices of the Monotheist Block, as it surely would be to those who are members of the Neutralist Block. In their opinions, the Monotheist justices were strong and consistent in their positions that government endorsement of one monotheistic sect (Christianity) over other monotheistic sects (Judaism and Islam) is unacceptable, particularly in the public schools.[99] Thus, we can certainly assume that none of them would in any way condone the school district's practices here.

However, this story is evocative of our question in the following sense. What if—instead of a school graduation speech—the setting was a civic gathering or a courthouse entryway? What if—instead of

94. *Id.* (alterations added).
95. *Id.*
96. *See id.* (alteration added).
97. *Id.* (alteration added).
98. *Id.*
99. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854. 2863-64 (2005).

Christianity—the religion that was touted as superior to all others was "the Monotheist tradition," or "the great Abrahamic faiths"? Furthermore, what if such touting or proselytizing was explicitly permitted—and, thus, implicitly endorsed—to the exclusion of all other religious (or nonreligious) beliefs by government?

It is obvious that this would have legal and cultural ramifications beyond the neutrality-with-exceptions principle under which we have lived. The overt preference for monotheism or "Abrahamic" religions which this government endorsement exhibits would eliminate any need for legal justification, inter-religious sensitivity, or cultural restraint. Those who hold monotheistic or "Abrahamic" views would not only be *permitted* to fuse their particular beliefs and practices with government—they would be endowed with a mantle of *justified* and *state-sanctioned superiority* (over Hindus, Jains, Sikhs, Taoists, others) while doing so.

This points out the other great cost in the discard of the principle of government neutrality: *the cost to efforts in collective understanding*. The principle of neutrality, whatever its flaws in operation, sends a powerful message to "outsiders." That message is: We are aware of your plight. To the "Dobriches" who are Hindus, Jains, Taoists, or atheists, the principle of neutrality says: We (the majority) are aware of you. Your struggles and pain are not invisible. We acknowledge—by the principle of neutrality—that our government and culture must strive to be inclusive, and reject what is disparaging or offensive. And—toward that end—you have legal rights.

CONCLUSION

Human affairs and human institutions are rarely perfect. Indeed, considering the fractious, self-important, and self-interested nature of the human animal, it is perhaps a wonder that as much harmony, shared aspirations, and inter-human understanding as we experience, in fact exists. In evaluating our carefully constructed social and legal landscape, and in considering radical changes in principle, we must be cautious. The idea that law should mirror practice, and that we should transparently confront our actions, has much to commend it. However, we must remember that with articulated, embraced, and celebrated abandonment of principle, may come steep costs. Sometimes there are

reasons why principle has been, and should be, sustained in the face of its acknowledged practical failures. Sometimes, in a heady rush toward transparency, we forget what it might mean to have no principle at all.