VAN ORDEN v PERRY

SUPREME COURT OF THE UNITED STATES
125 S. Ct. 2854
June 27, 2005

THE TEN COMMANDMENTS
(Round Two)

OPINION: Chief Justice Rehnquist/Scalia/Kennedy/Thomas...The question here is whether the Establishment Clause of the 1st Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. We hold that it does.

The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the "people, ideals, and events that compose Texan identity." The monolith challenged here stands 6' high and 3' wide.., its primary content [being the Ten Commandments] ...Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

> The monuments are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.

...The Eagles paid the cost of erecting the monument, the dedication of which was presided over by two state legislators.

Thomas Van Orden is a native Texan and a resident of Austin...[He] testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds ...**Forty years** after the monument's erection and six years after Van Orden began to encounter the monument frequently, he [brought this action]...seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal ...[T]he District Court held that the monument did not contravene the Establishment Clause. It found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency. The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this **passive** monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed [and so do we.]

When "passivity" suits their purpose, the Justices typically use it as an argument to uphold some contested activity because, after all, it is merely passive. This issue does not speak to the outcome of this case; however, frustration is setting in on the "passive" routine. A swastika is passive. But, to suggest that "passivity" helps to make its display OK is ludicrous. Would the State of Texas permit a 6' x 3' swastika to be erected on the capitol grounds by the local Nazi organization? It, too, is passive and, like Van Orden, no one has to look in its direction. The only point being made here is that "passivity" is no substitute for sound constitutional doctrine.

Our cases, Janus like, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history ...The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.

This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces. Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage...

Whatever may be the fate of the *Lemon*[1] test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history...

In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own

[1]Case 1A-R-042 on this website.

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

Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives.

Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage. The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments. These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.

Of course, the Ten Commandments are religious...The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. *Lynch v. Donnelly*[2]; *Marsh v. Chambers*[3]; *McGowan v. Maryland*[4]; *Walz v. Tax Comm'n*[5].

The majority looks to *Lynch, Marsh, McGowan* and *Walz* for support. With the exception of *Walz* (which could have gone either way), I believe these cases were wrongly decided.

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[2]Case 1A-R-066 on this website.

[3]Case 1A-R-065 on this website.

[4]Case 1A-R-028 on this website.

[5]Case 1A-R-039 on this website.

There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every **public schoolroom**. *Stone v. Graham*[6]...[W]e have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*.[7] Compare *Lee v. Weisman*[8] (holding unconstitutional a prayer at a secondary school graduation) with *Marsh v. Chambers* (upholding a prayer in the state legislature). Indeed, *Edwards v. Aguillard* recognized that *Stone* -- along with *Abington*[9] and *Engel*[10] -- was a consequence of the "particular concerns that arise in the context of public elementary and secondary schools." Neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend to a legislative chamber (*Marsh)* or to capitol grounds.

The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone,* where the text confronted elementary school students every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. The monument is therefore also quite different from the prayers involved in *Abington* and *Lee*. Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. **We cannot say that Texas' display of this monument violates the Establishment Clause of the 1st Amendment.** Judgment affirmed.

CONCURRENCE: Justice Scalia/Thomas/Breyer...I join the opinion of the Chief Justice because I think it accurately reflects our current Establishment Clause jurisprudence -- or at least the Establishment Clause jurisprudence we currently apply some of the time. I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied -- the central relevant feature of which is that **there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments**.

CONCURRENCE: Justice Thomas...This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history

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[6]Case 1A-R-057 on this website.

[7]Case 1A-R-077 on this website.

[8]Case 1A-R-089 on this website.

[9]Case 1A-R-034 on this website.

[10]Case 1A-R-033 on this website.

"resist incorporation" against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.

Even if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily to involve actual legal coercion." *Lee v. Weisman* (Scalia, dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support **by force of law and threat of penalty.**") "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." And "government practices that have nothing to do with creating or maintaining...coercive state establishments" simply do not "implicate the possible liberty interest of being free from coercive state establishments."

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

Returning to the original meaning would do more than simplify our task. It also would avoid the pitfalls present in the Court's current approach to such challenges. This Court's precedent elevates the trivial to the proverbial "federal case," by making benign signs and postings subject to challenge. Yet even as it does so, the Court's precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance. Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or the nonadherent's beliefs, and provides no principled way to choose between them. Even worse, the incoherence of the Court's decisions in this area renders the *Establishment Clause* impenetrable and incapable of consistent application...**[T]his Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused**...

First, this Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion. For example, individuals frequenting a county courthouse have successfully challenged as an Establishment Clause violation a sign at the courthouse alerting the public that the building was closed for Good Friday and containing a 4-inch high crucifix. Similarly, a park ranger has claimed that a cross erected to honor World War I veterans on a rock in the Mojave Desert Preserve violated the Establishment Clause, and won. If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge. Still other suits have charged that city seals containing religious symbols violate the Establishment Clause. In every instance, the litigants are mere "passersby...free to ignore such symbols or signs, or even to turn their

backs, just as they are free to do when they disagree with any other form of government speech." *Allegheny*[11].

It is important to note, here, that Justice Thomas is referring to **lower court decisions** around the Country and is not suggesting that the Supreme Court would have rendered similar results.

Second, in a seeming attempt to balance out its willingness to consider almost any acknowledgment of religion an establishment, in other cases Members of this Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation. *Lynch v. Donnelly*. But words such as "God" have religious significance. For example, just last Term this Court had before it a challenge to the recitation of the Pledge of Allegiance, which includes the phrase "one Nation under God." The declaration that our country is "one Nation under God" necessarily "entails an affirmation that God exists." This phrase is thus anathema to those who reject God's existence and a validation of His existence to those who accept it. **Telling either nonbelievers or believers that the words "under God" have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning. Words like "God" are not vulgarities for which the shock value diminishes with each successive utterance.**

I must say I think I value "honesty" even more than outcome sometimes.

Even when this Court's precedents recognize the religious meaning of symbols or words, that recognition fails to respect fully religious belief or disbelief. This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display...In looking to the view of this unusually informed observer, this Court inquires whether the sign or display "sends the ancillary message to...nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist. v. Doe*[12] (quoting *Lynch*).

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

[11]Case 1A-R-085 on this website.

[12]Case 1A-R-099 on this website.

Court's effort to assess religious meaning is fraught with futility... The inconsistency between the decisions the Court reaches today in this case and in *McCreary County v. ACLU*[13] only compounds the confusion.

The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections...The outcome of constitutional cases ought to rest on firmer ground...

Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. **Courts would not act as theological commissions**, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application...

CONCURRENCE: Justice Breyer...In *Abington,* Justice Goldberg...wrote, in respect to the 1st Amendment's Religion Clauses, that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." One must refer instead to the basic purposes of those Clauses. They seek to "assure the fullest possible scope of religious liberty and tolerance for all." They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. They seek to maintain that "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in this country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reigning together" but in separate spheres "on the same soil." They seek to further the basic principles set forth today by Justice O'Connor in her concurring opinion in *McCreary County v. ACLU.*

Our populace, in the main, does not understand the struggle the Supreme Court has with protecting the lofty goals of these Clauses. If they would have read what you have read thus far on this journey, at a minimum, they would at least understand the issues far better.

The Court has made clear...that the realization of these goals means that government must "neither engage in nor compel religious practices," that it must "effect no favoritism among sects or between religion and nonreligion," and that it must "work deterrence of no religious belief." *Abington; Lee; Everson*[14]. The government must avoid excessive interference with, or promotion of, religion. *Allegheny.* **But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.** *Marsh.* **Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid**...

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[13]Case 1A-R-107 on this website.

[14]Case 1A-R-022 on this website.

Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are insufficient, both because it is sometimes difficult to determine when a legal rule is "neutral," and because "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."

Neither can this Court's other tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings (*Marsh*); certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving...

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

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

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

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency. The Eagles' consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscores the group's ethics-based motives. The tablets, as displayed on the monument, prominently acknowledge that the Eagles donated the display,

a factor which, though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments' message.

The physical setting of the monument, moreover, suggests little or nothing of the sacred. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the "ideals" of those who settled in Texas and of those who have lived there since that time. The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, **the context suggests that the State intended the display's moral message -- an illustrative message reflecting the historical "ideals" of Texans -- to predominate.**

Please, **let's get real**. One of those "historical ideals" is quite obviously the fact that "Texans" believe in the mainstream Judeo-Christian God. That is precisely why the Texas State Legislature does not have any monument to the Book of Mormon on its lawn. The point is that it is hard to understand why the Supreme Court feels the need to distance the Ten Commandments from what is inscribed unless it is to distort what they say in order to achieve a result not otherwise achievable.

If these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument...went unchallenged...And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practice," to "compel" any "religious practice," or to "work deterrence" of any "religious belief." *Abington*. Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. **The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state**. *Lee; Stone.* This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention

upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

For these reasons, I believe that the Texas display -- serving a mixed but primarily nonreligious purpose, not primarily "advancing" or "inhibiting religion," and not creating an "excessive government entanglement with religion," -- might satisfy this Court's more formal *Establishment Clause* tests. *Lemon*. But, as I have said, in reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the *1st Amendment's Religion Clauses* themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

...[A] contrary conclusion...would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid...

Is Justice Breyer suggesting that if the Court were to order the monument removed, it might result in such an uprising that no one around the Nation would comply with similar court orders? Additionally, because this Court based its ruling in large part on the fact that this monument is only one such monument in a veritable "monument museum" several acres in size, no one should be misled. The Court has **not** determined what we do with this identical monument erected as the **only** monument outside the County Courthouse in Anytown, Anystate, U.S.A.

I recognize the danger of the slippery slope. Still, where the Establishment Clause is at issue, we must "distinguish between real threat and mere shadow." Here, we have only the shadow...

DISSENT: Justice Stevens/Ginsburg...**The sole function of the monument on the grounds of Texas' State Capitol is to display the full text of one version of the Ten Commandments. The monument is not a work of art and does not refer to any event in the history of the State. It is significant because, and only because, it communicates the following message:**

> **I AM the LORD thy God**.
> **THOU SHALT HAVE NO OTHER GODS BEFORE ME.** [Emphasis added by ELL.]
> **Thou shalt not make to thyself any graven images.**
> **Thou shalt not take the Name of the Lord thy God in vain.**
> **Remember the Sabbath day, to keep it holy.**
> Honor thy father and thy mother, that thy days may be long upon the land which **the Lord thy God** giveth thee.
> Thou shalt not kill.

Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.

Justice Stevens and I do not agree often, but I appreciate the truth. At a minimum, his summary of the message appears to be accurate.

For those of us who learned to recite the King James version of the text long before we understood the meaning of some of its words, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause of the Constitution. If any fragment of Jefferson's metaphorical "wall of separation between church and State" is to be preserved -- if there remains any meaning to the "wholesome 'neutrality' of which this Court's Establishment Clause cases speak" (*Abington)* -- a negative answer to that question is mandatory.

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

Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state. This metaphorical wall protects principles long recognized and often recited in this Court's cases. The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality -- **government may not exercise a preference for one religious faith over another**. This essential command, however, is not merely a prohibition against the government's differentiation among religious sects. We have repeatedly reaffirmed that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different

beliefs." *Torcaso v. Watkins*[15]. This principle is based on the straightforward notion that governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State's banner.

Acknowledgments of this broad understanding of the neutrality principle are legion in our cases. Strong arguments to the contrary have been raised from time to time, perhaps the strongest in then-Justice Rehnquist's scholarly dissent in *Wallace v. Jaffree*[16]. Powerful as his argument was, we squarely rejected it and thereby reaffirmed the principle that the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. As we wrote, "the Court has unambiguously concluded that the individual freedom of conscience protected by the 1st Amendment embodies the right to select any religious faith or none at all."

In restating this principle, I do not discount the importance of avoiding an overly strict interpretation of the metaphor so often used to define the reach of the Establishment Clause. The plurality is correct to note that "religion and religious traditions" have played a "strong role...throughout our nation's history."...**The wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public view just because they also have religious significance.**

This case, however, is not about historic preservation or the mere recognition of religion...The monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it...be explained as a simple desire to preserve a historic relic. This Nation's resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God... The State may admonish its citizens not to lie, cheat or steal, to honor their parents and to respect their neighbors' property; and it may do so by printed words, in television commercials, or on granite monuments in front of its public buildings. Moreover, **the State may provide its schoolchildren and adult citizens with educational materials that explain the important role that our forebears' faith in God played in their decisions to select America as a refuge from religious persecution, to declare their independence from the British Crown, and to conceive a new Nation.** The message at issue in this case, however, is fundamentally different from either a bland admonition to observe generally accepted rules of behavior or a general history lesson...

Some believe the Supreme Court has prohibited even that which Justice Stevens says has not been prohibited. The ELL Point: "Let us at least understand what the High Court has not done."

Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people

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[15]Case 1A-R-032 on this website.

[16]Case 1A-R-068 on this website.

of faith.

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

...Even if, however, the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism...And, at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion...Any of those bases...would be sufficient to conclude that the message should not be proclaimed by the State of Texas on a permanent monument at the seat of its government.

I do not doubt that some Texans, including those elected to the Texas Legislature, may believe that the statues displayed on the Texas Capitol grounds, including the Ten Commandments monument, reflect the "ideals...that compose Texan identity." But Texas, like our entire country, is now a much more diversified community than it was when it became a part of the United States or even when the monument was erected. Today there are many Texans who do not believe in the God whose Commandments are displayed at their seat of government. Many of them worship a different god or no god at all. Some may believe that the account of the creation in the Book of Genesis is less reliable than the views of men like Darwin and Einstein...

Even more than the display of a religious symbol on government property,...displaying this sectarian text at the state capitol should invoke a powerful presumption of invalidity. As Justice Souter's opinion persuasively demonstrates, the physical setting in which the Texas monument is displayed -- far from rebutting that presumption -- actually enhances the religious content of its message. The monument's permanent fixture at the seat of Texas government is of immense significance. The fact that a monument:

> "is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of government itself. The 'reasonable observer' of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign -- which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory -- has sponsored and facilitated its message." *Pinette* (Stevens, J., dissenting).

Critical examination of the Decalogue's prominent display at the seat of Texas government, rather than generic citation to the role of religion in American life, unmistakably reveals on which side of

the "slippery slope" this display must fall. God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose -- to encourage Texans to abide by the divine code of a "Judeo-Christian" God. **If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow.**

The plurality relies heavily on the fact that our Republic was founded...by leaders who spoke then (and speak still) in plainly religious rhetoric. The Chief Justice cites...George Washington's 1789 Thanksgiving Proclamation in support of the proposition that the Establishment Clause does not proscribe official recognition of God's role in our Nation's heritage. Further, the plurality emphatically endorses the seemingly timeless recognition that our "institutions presuppose a Supreme Being."...I have already explained why Texas' display of the full text of the Ten Commandments, given the content of the actual display and the context in which it is situated, sets this case apart from the countless examples of benign government recognitions of religion. But there is another crucial difference. Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, **when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from the government because those oratories have embedded within them the inherently <u>personal views of the speaker</u> as an individual member of the polity**...

Anyone is free to speak of his or her God, including Presidents. That is quite a different animal from government "establishing a permanent monument" that purports to speak for government.

Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause. The Chief Justice and Justice Scalia disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite, see, *e.g.,* Letter from James Madison to Edward Livingston... arguing that Congress' appointment of Chaplains to be paid from the National Treasury was "not with my approbation" and was a "deviation" from the principle of "immunity of Religion from civil jurisdiction," and paper over the fact that Madison more than once repudiated the views attributed to him by many, stating unequivocally that with respect to government's involvement with religion, the "tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."

...**Many of the Framers understood the word "religion" in the Establishment Clause to encompass <u>only the various sects of Christianity</u>**.

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

understood to refer to Christ...One influential thinker wrote of the 1st Amendment that "the meaning of the term 'establishment'...is the preference and establishment given by law to one sect of Christians over every other."...Along these lines, for nearly a century after the Founding, many accepted the idea that America was not just a **religious** nation, but "a **Christian** nation."

...**The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, Justice Scalia is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions.** Perhaps this is because the history of the Establishment Clause's original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to "God" hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. Justice Scalia's inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is one that is unmoored from the Constitution's history and text, and moreover one that is **patently arbitrary in its inclusion of some, but exclusion of other (*e.g.*, Buddhism) widely practiced non-Christian religions...**Given the original understanding of the men who championed our "Christian nation" – men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern -- **one must ask whether Justice Scalia "has not had the courage (or the foolhardiness) to apply his originalism principle consistently."**

OUCH!

Indeed, to constrict narrowly the reach of the Establishment Clause to the views of the Founders would lead to more than this unpalatable result; it would also leave us with an unincorporated constitutional provision -- in other words, one that limits only the federal establishment of "a national religion." Under this view, not only could a State constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament, it would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as *the* official state religion. Only the Federal Government would be prohibited from taking sides (and only then as between Christian sects).

A reading of the 1st Amendment dependent on either of the purported original meanings expressed above would eviscerate the heart of the Establishment Clause. It would replace Jefferson's "wall of separation" with a perverse wall of exclusion -- Christians inside, non-Christians out. It would permit States to construct walls of their own choosing -- Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance.

Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross

back over the incorporation bridge (*Cantwell v. Connecticut*[17]), appeals to the religiosity of the Framers ring hollow. But even if there were a coherent way to embrace incorporation with one hand while steadfastly abiding by the Founders' purported religious views on the other, the problem of the **selective use of history** remains. As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the pre-incorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.

It is our duty, therefore, to interpret the 1st Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today...[W]e have construed the Equal Protection Clause of the 14th Amendment to prohibit segregated schools, even though those who drafted that Amendment evidently thought that separate was not unequal. We have held that the same Amendment prohibits discrimination against individuals on account of their gender, despite the fact that the contemporaries of the Amendment "doubted very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." And we have construed "evolving standards of decency" to make impermissible practices that were not considered "cruel and unusual" at the founding.

To reason from the broad principles contained in the Constitution does not, as Justice Scalia suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the 1st Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate. We serve our constitutional mandate by expounding the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations...Constitutions, after all, "are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. **In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas."** *Weems v. United States*[18].

The principle that guides my analysis is neutrality. The basis for that principle is firmly rooted in our Nation's history and our Constitution's text. **I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. Fortunately, we are not bound by the Framers' expectations -- we are bound by the legal principles they enshrined in our Constitution.** Story's vision that States should not discriminate

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[17]Case 1A-R-011 on this website.

[18]Case 6A-CUP-3 on this website.

between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, "polytheists, and believers in unconcerned deities," *McCreary County*, (Scalia, J., dissenting), is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, forbids Texas from displaying the Ten Commandments monument the plurality so casually affirms.

The Eagles may donate as many monuments as they choose to be displayed in front of Protestant churches, benevolent organizations' meeting places, or on the front lawns of private citizens. The expurgated text of the King James version of the Ten Commandments that they have crafted is unlikely to be accepted by Catholic parishes, Jewish synagogues, or even some Protestant denominations, but the message they seek to convey is surely more compatible with church property than with property that is located on the government side of the..."wall."

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

DISSENT: Justice O'Connor...I respectfully dissent.

DISSENT: Justice Souter/Stevens/Ginsburg...The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them, the frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers. While Moses holds the tablets of the Commandments showing some Hebrew text, no one looking at the lines of figures in marble relief is likely to see a religious purpose behind the assemblage or take away a religious message from it. Only one other depiction represents a religious leader, and the historical personages are mixed with symbols of moral and intellectual abstractions like Equity and Authority. Since Moses enjoys no especial prominence on the frieze, viewers can readily take him to be there as a lawgiver in the company of other lawgivers; and the viewers may just as naturally see the tablets of the Commandments (showing the later ones, forbidding things like killing and theft, but without the divine preface) as background from which the concept of law emerged, ultimately having a secular influence in the history of the Nation. Government may, of course, constitutionally call attention to this influence, and may post displays or erect monuments recounting this aspect of our history no less than any other, **so long as there is a context and that context is historical. Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable. And the Decalogue could, as *Stone* suggested, be integrated constitutionally into a course of study in public schools.**

Texas seeks to take advantage of the recognition that visual symbol and written text can manifest

a secular purpose in secular company, when it argues that its monument (like Moses in the frieze) is not alone and ought to be viewed as only 1 among 17 placed on the 22 acres surrounding the state capitol. Texas, indeed, says that the Capitol grounds are like a museum for a collection of exhibits, the kind of setting that several Members of the Court have said can render the exhibition of religious artifacts permissible, even though in other circumstances their display would be seen as meant to convey a religious message forbidden to the State. So, for example, the Government of the United States does not violate the Establishment Clause by hanging Giotto's Madonna on the wall of the National Gallery.

But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not a museum, and anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass. One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. The themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator. In like circumstances, we rejected an argument similar to the State's, noting in *Allegheny* that "the presence of Santas or other Christmas decorations elsewhere in the...courthouse, and of the nearby gallery forum, fail to negate the creche's endorsement effect...The record demonstrates...that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building."...To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment..., this distinction should make no difference. The monument in this case sits on the grounds of the Texas State Capitol. There is something significant in the common term "statehouse" to refer to a state capitol building: it is the civic home of every one of the State's citizens. **If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion...**I would reverse the judgment of the Court of Appeals.