

[NOTE from PROF SMITH: I have generally removed the citation numbers (but not the case names and dates) for Supreme Court cases cited in the *Van Orden* and *McCreary* opinions...]

## **A. The *Van Orden* Decision: Upholding the 10 Commandments Monument at the Texas State Capitol**

Supreme Court  
of the United States

Thomas VAN ORDEN, Petitioner,

v.

Rick PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.

Argued March 2, 2005.  
Decided June 27, 2005.

Chief Justice [REHNQUIST](#) announced the judgment of the Court and delivered an opinion, in which Justice [SCALIA](#), Justice [KENNEDY](#), and JUSTICE THOMAS join.

The question here is whether the Establishment Clause of the First 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." Tex. H. Con. Res. 38, 77th Leg. (2001). The monolith challenged here stands 6-feet high and 3 1/2 -feet wide. It is located to the north of the Capitol building, between the Capitol and the Supreme Court building. Its primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of 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." App. to Pet. for Cert. 21.

The legislative record surrounding the State's acceptance of the monument from the Eagles--a national social, civic, and patriotic organization--is limited to legislative journal entries. After the monument was accepted, the State selected a site for the monument based on the recommendation of the state organization responsible for maintaining the

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

Petitioner Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.

Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities under Rev. Stat. § 1979, [42 U.S.C. § 1983](#), seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal....

Our cases, Januslike, 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. As we observed in [School Dist. of Abington Township v. Schempp](#):

"It is true that religion has been closely identified with our history and government .... The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself .... It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as ... in duty bound, that the Supreme Lawgiver of the Universe ... guide them into every measure which may be worthy of his [blessing ... .]' "

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:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the

government show a callous indifference to religious groups ... .[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." [Zorach v. Clauson \(1952\)](#).

See also *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, \*2860 which could undermine the very neutrality the Establishment Clause requires"). [FN3]

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FN3. Despite Justice STEVENS' recitation of occasional language to the contrary, *post*, at 2876, and n. 7 (dissenting opinion), we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion. See, e.g., [Lynch v. Donnelly, \(1984\)](#); [Marsh v. Chambers, \(1983\)](#)...Even the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion....

These two faces are evident in representative cases both upholding and invalidating laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to [Lemon v. Kurtzman \(1971\)](#), \*2861 as providing the governing test in Establishment Clause challenges.[FN6] Compare [Wallace v. Jaffree, \(1985\)](#) (applying [Lemon](#)), with [Marsh v. Chambers, \(1983\)](#) (not applying [Lemon](#)). Yet, just two years after [Lemon](#) was decided, we noted that the factors identified in [Lemon](#) serve as "no more than helpful signposts." [Hunt v. McNair \(1973\)](#). Many of our recent cases simply have not applied the [Lemon](#) test. See, e.g., [Zelman v. Simmons-Harris, \(2002\)](#); [Good News Club v. Milford Central School \(2001\)](#). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

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FN6. [Lemon](#) sets out a three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

Whatever may be the fate of the [Lemon](#) 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.

As we explained in [Lynch v. Donnelly, \(1984\)](#): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* For example, both Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of

Almighty God." 1 Annals of Cong. 90, 914. President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation....

Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," \*2862 [School Dist. of Abington Township v. Schempp](#), and that "[t]he history of man is inseparable from the history of religion," [Engel v. Vitale \(1962\)](#). This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. [Marsh v. Chambers, \[FN8\]](#) Such a practice, we thought, was "deeply embedded in the history and tradition of this country." *Id.* As we observed there, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.* With similar reasoning, we have upheld laws, which originated from one of the Ten Commandments, that prohibited the sale of merchandise on Sunday....

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[FN8.](#) Indeed, we rejected the claim that an Establishment Clause violation was presented because the prayers had once been offered in the Judeo-Christian tradition: In [Marsh](#), the prayers were often explicitly Christian, but the chaplain removed all references to Christ the year after the suit was filed.

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 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 \*2863 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. [\[FN9\]](#)

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[FN9](#). Other examples of monuments and buildings reflecting the prominent role of religion abound. For example, the Washington, Jefferson, and Lincoln Memorials all contain explicit invocations of God's importance. The apex of the Washington Monument is inscribed "Laus Deo," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two of Lincoln's most famous speeches, the Gettysburg Address and his Second Inaugural Address. Both inscriptions include those speeches' extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as "the year of our Lord, 1804, and in the 28 year of the independence of the United States."

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. See, e.g., Public Papers of the Presidents, Harry S. Truman, 1950, p. 157 (1965); S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H. Con. Res. 31, 105th Cong., 1st Sess. (1997). These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.

Of course, the Ten Commandments are religious--they were so viewed at their inception and so remain....But Moses was a lawgiver. 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. See [Lynch v. Donnelly](#); [Marsh v. Chambers](#), [McGowan v. Maryland](#), [Walz v. Tax Comm'n of City of New York](#), (1970).

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](#), (1980) (*per curiam*). In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose. *Id.* As evidenced by [Stone's](#) almost exclusive reliance upon two of our school prayer cases, *id.* (citing [School Dist. of Abington Township v. Schempp](#), (1963), and [Engel v. Vitale](#) (1962)), it stands as an example of the fact that we have "been particularly vigilant in monitoring compliance\*2864 with the Establishment Clause in elementary and secondary schools," [Edwards v. Aguillard](#) (1987). Compare [Lee v. Weisman](#), (1992) (holding unconstitutional a prayer at a secondary school graduation),

with [Marsh v. Chambers, supra](#) (upholding a prayer in the state legislature). Indeed, [Edwards v. Aguillard](#) recognized that [Stone](#)--along with [Schempp](#) and [Engel](#)--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, see [Marsh v. Chambers, supra](#), or to capitol grounds. [\[FN11\]](#)

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[FN11](#). Nor does anything suggest that [Stone](#) would extend to displays of the Ten Commandments that lack a "plainly religious," "pre-eminent purpose," [See Edwards v. Aguillard](#) ("[Stone](#)" did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization"). Indeed, we need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case.

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 [Schempp](#) and [Lee v. Weisman](#). 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 First Amendment.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

Justice [SCALIA](#), concurring.

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. See [McCreary County v. American Civil Liberties Union of Ky., --- U.S. ----, ----](#), (SCALIA, J., dissenting).

Justice [THOMAS](#), concurring.

The Court holds that the Ten Commandments monument found on the Texas State Capitol grounds does not violate the Establishment Clause. Rather than trying to suggest meaninglessness where there is meaning, THE CHIEF JUSTICE rightly recognizes that the monument has "religious significance." *Ante*, at 2863. He \*2865 properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history. *Ante*, at 2861-2862. For those reasons, I join THE CHIEF JUSTICE's opinion in full.

...[O]ur 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." [Newdow, supra](#), (THOMAS, J., concurring in judgment); [Lee v. Weisman, \(1992\)](#) (SCALIA, J., 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* ")....

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....

Justice [BREYER](#), concurring in the judgment.

In [School Dist. of Abington Township v. Schempp, 1963](#)), Justice Goldberg, joined by Justice Harlan, wrote, in respect to the First 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." *Id* (concurring opinion). 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." *Id* They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. [Zelman v. Simmons-Harris, \(2002\)](#) (BREYER, J., dissenting). 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," "reign[ing] together" but in separate spheres "on the same soil." A. de Tocqueville, *Democracy in America* 282-283 (1835) (H. Mansfield & D. Winthrop trans. and eds.2000). They seek to further the basic principles set forth today by Justice O'CONNOR in her

concurring opinion in [McCreary County v. American Civil Liberties Union of Ky., --- U.S., at ---](#)

The Court has made clear, as Justices Goldberg and Harlan noted, 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." [Schempp](#) (concurring opinion); see also [Lee v. Weisman, \(1992\)](#); [Everson v. Board of Ed. of Ewing, \(1947\)](#). The government must avoid excessive interference with, or promotion of, religion. See generally [County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, \(1989\)](#); [Zelman](#), (BREYER, J., dissenting). But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. See, e.g., [Marsh v. Chambers, \(1983\)](#). Such absolutism is not only inconsistent with our national traditions, see, e.g., [Lemon v. Kurtzman, \(1971\)](#); [Lynch v. Donnelly, \(1984\)](#), but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Thus, as Justices Goldberg and Harlan pointed out, the Court has found no single mechanical formula that can accurately draw the constitutional line in every case. See [Schempp](#), (concurring opinion). Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are \*2869 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." [Ibid.](#)

Neither can this Court's other tests readily explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, see [Marsh, supra](#); 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. See, e.g., [Lemon](#), (setting forth what has come to be known as the "[Lemon](#) test"); [Lynch](#), (O'CONNOR, J., concurring) (setting forth the "endorsement test"); [Capitol Square Review and Advisory Bd. v. Pinette, \(1995\)](#) (STEVENS, J., dissenting) (agreeing that an "endorsement test" should apply but criticizing its "reasonable observer" standard); [Santa Fe Independent School Dist. v. Doe, \(2000\)](#) (REHNQUIST, C. J., dissenting) (noting [Lemon's](#) "checkered career in the decisional law of this Court"); [County of Allegheny](#), (KENNEDY, J., joined by REHNQUIST, C. J., and White and SCALIA, JJ., concurring in judgment in part and dissenting in part) (criticizing the [Lemon](#) test).

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. See [Schempp](#)

(Goldberg, J., concurring); cf. [Zelman](#), (BREYER, J., dissenting) (need for similar exercise of judgment where quantitative considerations matter). That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts--and might well lead to the same result the Court reaches today, see, e.g., [Lemon, Capitol Square](#), (O'CONNOR, J., concurring in part and concurring in judgment)--no exact formula can dictate a resolution to such fact-intensive cases.

The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. 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 **\*2870** 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. See generally App. to Brief for United States as *Amicus Curiae* 1a-7a.

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. See 1961 Tex. Gen. Laws 1995. 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. See Brief for Respondents 5-6, and n. 9. 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. See Appendix A, *infra*. 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. Tex. H. Con. Res. 38, 77th Leg. (2001); see Appendix B, *infra*. 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.

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, legally speaking, went unchallenged (until the single legal objection raised by petitioner). 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 practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." [Schempp](#), (Goldberg, J., concurring). 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 \*2871 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. See, e.g., [Weisman, Stone v. Graham, \(1980\)](#) (*per curiam*). 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. See, *post*, at 2738-2740 (opinion of the Court). 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 "advanc[ing]" or "inhibit[ing] religion," and not creating an "excessive government entanglement with religion,"--might satisfy this

Court's more formal Establishment Clause tests. [Lemon](#); see also [Capitol Square](#), (O'CONNOR, J., concurring in part and concurring in judgment). 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 First 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.

At the same time, to reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text 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. [Zelman](#), (BREYER, J., dissenting).

Justices Goldberg and Harlan concluded in [Schempp](#) that

"[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have meaningful and practical impact." (concurring opinion).

That kind of practice is what we have here. 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." [Ibid.](#) Here, we have only the shadow.

In light of these considerations, I cannot agree with today's plurality's analysis. See, e.g., *ante*, at 2860, n. 3, 2861-2862. Nor can I agree with Justice SCALIA's \*2872 dissent in [McCreary County, --- U.S., at ----](#) I do agree with Justice O'CONNOR's statement of principles in [McCreary County, --- U.S., at ----](#) though I disagree with her evaluation of the evidence as it bears on the application of those principles to this case.

I concur in the judgment of the Court.

Justice [STEVENS](#), with whom Justice [GINSBURG](#) joins, dissenting.

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 [message of the words of the Ten Commandments].

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.

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,"--a negative answer to that question is mandatory.

I

In my judgment, at 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 "offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." [Allegheny County](#) (STEVENS, J., concurring in part and dissenting in part).

**\*2875** 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.

....

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 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 .... Thou shalt not covet").

Moreover..., The Ten Commandments display **\*2880** projects not just a religious, but an inherently sectarian message. There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance.

The Establishment Clause, if nothing else, forbids government from "specifying details

upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ." [Lee v. Weisman, \(1992\)](#) (SCALIA, J., dissenting). Given that the chosen text inscribed on the Ten Commandments monument invariably places the State at the center of a serious sectarian dispute, the display is unquestionably unconstitutional under our case law....

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 **\*2881** 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....

....

....it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian 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."

### III

The plurality relies heavily on the fact that our Republic was founded, and has been governed since its nascence, by leaders who spoke then (and speak still) in plainly religious rhetoric....

The speeches and rhetoric characteristic of the founding era, however, do not answer the question before us. 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 personal views of the speaker as an individual member of the polity. The permanent placement of a textual religious display on state property is different in kind; it amalgamates otherwise discordant individual views into a collective statement of government approval....

....

Not insignificant numbers of colonists came to this country with memories of religious persecution by monarchs on the other side of the Atlantic. See A. Stokes & L. Pfeffer, *Church and State in the United States* 3-23 (rev. ed.1964). Others experienced religious intolerance at the hands of colonial Puritans, who regrettably failed to practice the tolerance that some of their contemporaries preached. [Engel v. Vitale, \(1962\)](#). THE

CHIEF JUSTICE and Justice SCALIA ignore the separationist impulses--in accord with the \*2885 principle of "neutrality"-- that these individuals brought to the debates surrounding the adoption of the Establishment Clause.

**\*2886**

Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross back over the incorporation bridge, see [Cantwell v. Connecticut, \(1940\)](#), appeals to the religiosity of the Framers ring hollow. [A]s the divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.

It is our duty, therefore, to interpret the First 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....

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 First Amendment is, in any event, no more \*2889 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....

[The principle that guides my analysis is neutrality.\[FN35\]](#) The basis for that principle is firmly rooted in our Nation's history and our Constitution's text....

#### IV

....

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.

The disconnect between this Court's approval of Texas's monument and the constitutional prohibition against preferring religion to irreligion cannot be reduced to the exercise of plotting two adjacent locations on a slippery slope. Cf. *ante*, at 2871 (BREYER, J., concurring in judgment). Rather, it is the difference between the shelter of a fortress and

exposure to "the winds that would blow" if the wall were allowed to crumble. See [TVA v. Hill, \(1978\)](#) (internal quotation marks omitted). That wall, however imperfect, remains worth preserving.

I respectfully dissent.

Justice [O'CONNOR](#), dissenting.

For essentially the reasons given by Justice SOUTER, *post*, pp. 2892-2897 reasons given in my concurrence in [McCreary County v. American Civil Liberties Union of Ky., --- U.S. ---](#), I respectfully dissent.

**\*2892** Justice [SOUTER](#), with whom Justice [STEVENS](#) and Justice [GINSBURG](#) join, dissenting.

Although the First Amendment's Religion Clauses have not been read to mandate absolute governmental neutrality toward religion, cf. [Sherbert v. Verner, \(1963\)](#), the Establishment Clause requires neutrality as a general rule...

....Until today, only one of our cases addressed the constitutionality of posting the Ten Commandments, [Stone v. Graham, \(1980\)](#) (*per curiam*). A Kentucky statute required posting the Commandments on the walls of public school classrooms, and the Court described the State's purpose (relevant under the tripartite test laid out in [Lemon v. Kurtzman, \(1971\)](#)) as being at odds with the obligation of religious neutrality.

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

What these observations underscore are the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same

**\*2893....**

The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to **\*2894** 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.... 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. *Stone*

**\*2895** 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. [County of Allegheny](#), (opinion of Blackmun, J., joined by STEVENS, J.); [Lynch v. Donnelly, \(1984\)](#) (O'CONNOR, J., concurring). 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.....The themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator....

If the State's museum argument does nothing to blunt the religious message and manifestly religious purpose behind it, neither does the plurality's reliance on generalities culled from cases factually different from this one....

When the plurality finally does confront [Stone](#), it tries to avoid the case's obvious applicability by limiting its holding to the classroom setting. The plurality claims to find authority for limiting [Stone's](#) reach this way in the opinion's citations of two school-prayer cases, [School Dist. of Abington Township v. Schempp, \(1963\)](#), and [Engel v. Vitale, \(1962\)](#). But [Stone](#) relied on those cases for widely applicable notions, not for any concept specific to schools[;] the schoolroom was beside the point of the citations, and that is presumably why the [Stone](#) Court failed to discuss the educational setting, as other opinions had done when school was significant....[Stone](#) did not, for example, speak of children's impressionability or their captivity as an audience in a school class. In fact, [Stone's](#) reasoning reached the classroom only in noting the lack of support for the claim that the State had brought the Commandments into schools in order to "integrat[e] [them] into the school curriculum." Accordingly, our numerous prior discussions of [Stone](#) have never treated its holding as restricted to the classroom.

....

**\*2897**....If neutrality of religion means something, any citizen should be able to visit that civic home [of the state Capitol] 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. See [County of Allegheny](#), (O'CONNOR, J., concurring in part and concurring in judgment) ("I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community .... The display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community" (alteration and internal quotation marks omitted)).

Finally, though this too is a point on which judgment will vary, I do not see a persuasive argument for constitutionality in the plurality's observation that Van Orden's lawsuit comes "[f]orty years after the monument's erection ...," *ante*, at 2858...It is not that I think the passage of time is necessarily irrelevant in Establishment Clause analysis. We have approved framing-era practices because they must originally have been understood as constitutionally permissible, *e.g.*, [Marsh v. Chambers, 1983](#) (legislative prayer), and we have recognized that Sunday laws have grown recognizably secular over time, [McGowan v. Maryland, \(1961\)](#).... [The State seems to argue that] 40 years without a challenge shows that as a factual matter the religious expression is too tepid to provoke a serious reaction and constitute a violation. Perhaps, but the writer of Exodus chapter 20 was not lukewarm, and other explanations may do better in accounting for the late resort to the courts. Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.

I would reverse the judgment of the Court of Appeals

## **B. The McCreary Decision: Rejecting the 10 Commandments at Kentucky Court Houses**

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al., Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY et al.

**No. 03-1693.**

125 S. Ct. 2722

Argued March 2, 2005.

Decided June 27, 2005.

\*2723 Justice [SOUTER](#) delivered the opinion of the Court.

....

I

In the summer of 1999, petitioners McCreary County and Pulaski County, Kentucky (hereinafter Counties), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the placement of the Commandments responded to an order of the county legislative body requiring "the display [to] be posted in 'a very high traffic area' of the courthouse." [96 F.Supp.2d 679, 684 \(E.D.Ky.2000\)](#). In Pulaski County, amidst reported controversy over the propriety of the display, the Commandments were hung in a ceremony presided over by the county Judge-Executive, who called them "good rules to live by" and who recounted the story of an astronaut who became convinced "there must be a divine God" after viewing the Earth from the moon. Dodson, *Commonwealth Journal*, Jul. 25, 1999, p. A1, col. 2, in Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction in Civ. A. No. 99-509 (ED Ky.) (internal quotation marks omitted). The Judge-Executive was accompanied by the pastor of his church, who called the Commandments "a creed of ethics" and told the press after the ceremony that displaying the Commandments was "one of the greatest things the judge could have done to close out the millennium." *Id.*, at A2, col. 3 (internal quotation marks omitted). In both counties, this was the version of the Commandments posted:

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee 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.

"Thou shalt not kill.

"Thou shalt not commit adultery.

"Thou shalt not steal.

"Thou shalt not bear false witness.

"Thou shalt not covet.

"Exodus 20:3-17." Def. Exh. 9 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. A. No. 99-507 (ED Ky.) (hereinafter Def. Exh. 9).

In each county, the hallway display was "readily visible to ... county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." [\\*272996 F.Supp.2d., at 684; American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky, 96 F.Supp.2d 691, 695 \(E.D.Ky.2000\)](#).

In November 1999, respondents American Civil Liberties Union of Kentucky et al. sued the Counties in Federal District Court under Rev. Stat. § 1979, [42 U.S.C. § 1983](#), and sought a preliminary injunction against maintaining the displays, which the ACLU charged were violations of the prohibition of religious establishment included in the First Amendment of the Constitution. Within a month, and before the District Court had responded to the request for injunction, the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of ... Kentucky are founded," and stating several grounds for taking that position: that "the Ten Commandments are codified in Kentucky's civil and criminal laws"; that the Kentucky House of Representatives had in 1993 "voted unanimously ... to adjourn ... 'in remembrance and honor of Jesus Christ, the Prince of Ethics' "; that the "County Judge and ... magistrates agree with the arguments set out by Judge [Roy] Moore" in defense of his "display [of] the Ten Commandments in his courtroom"; and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction." Def. Exh. 1, at 1-3, 6.

As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted, *id.*, at 9. In addition to the first display's large framed copy of the edited King James version of the Commandments, [FN4](#) the second included eight other documents in smaller frames, each either having a religious theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower \*2730 Compact. [96 F.Supp.2d, at 684](#); [96 F.Supp.2d, at 695-696](#).

[FN4](#). The District Court noted that there was some confusion as to whether the Ten Commandments hung independently in the second display, or were incorporated into the copy of the page from the Congressional Record declaring 1983 "the Year of the Bible." [96 F.Supp.2d, at 684, and n. 4](#); [96 F.Supp.2d, at 695-696, and n. 4](#). The exhibits in the record depict the Commandments hanging as a separate item, Def. Exh. 9, and that is more consistent with the Counties' description of the second display in this Court....

After argument, the District Court entered a preliminary injunction on May 5, 2000, ordering that the "display ... be removed from [each] County Courthouse IMMEDIATELY" and that no county official "erect or cause to be erected similar displays." [96 F.Supp.2d,](#)

at 691; [96 F.Supp.2d, at 702-703](#). The court's analysis of the situation followed the three-part formulation first stated in [Lemon v. Kurtzman, \(1971\)](#). As to governmental purpose, it concluded that the original display "lack[ed] any secular purpose" because the Commandments "are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God." [96 F.Supp.2d, at 686](#); [96 F.Supp.2d, at 698](#). Although the Counties had maintained that the original display was meant to be educational, "[t]he narrow scope of the display--a single religious text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions." [96 F.Supp.2d, at 686-687](#); [96 F.Supp.2d, at 698](#). The court found that the second version also "clearly lack[ed] a secular purpose" because the "Count[ies] narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity." [\[FN5\] 96 F.Supp.2d, at 687](#); [96 F.Supp.2d, at 699](#).

[FN5](#). The court also found that the display had the effect of endorsing religion: "Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion." [96 F.Supp.2d, at 688](#); [96 F.Supp.2d, at 699-700](#).

The Counties filed a notice of appeal from the preliminary injunction but voluntarily dismissed it after hiring new lawyers. They then installed another display in each courthouse, the third within a year. No new resolution authorized this one, nor did the Counties repeal the resolutions that preceded the second. The posting consists of nine framed documents of equal size, one of them setting out the Ten Commandments explicitly identified as the "King James Version" at Exodus 20:3-17....\*2731

Assembled with the Commandments are framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. The collection is entitled "The Foundations of American Law and Government Display" and each document comes with a statement about its historical and legal significance. The comment on the Ten Commandments reads:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.*, at 180a.

The ACLU moved to supplement the preliminary injunction to enjoin the Counties' third display, [\[FN6\]](#) and the Counties responded with several explanations for the new version, including desires "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law

and government." [145 F.Supp.2d, at 848](#) (internal quotation marks omitted). The court, however, took the objective of proclaiming the Commandments' foundational value as "a religious, rather than secular, purpose" under [Stone v. Graham, \(1980\)](#) (*per curiam*), [145 F.Supp.2d, at 849](#), and found that the assertion that the Counties' broader educational goals are secular "crumble[s] ... upon an examination of the history of this litigation," *Ibid*. In light of the Counties' decision to post the Commandments by themselves in the first instance, contrary to *Stone*, and later to "accentuat[e]" the religious objective by surrounding the Commandments with "specific references to Christianity," the District Court understood the Counties' "clear" purpose as being to post the Commandments, not to educate.[\[FN7\]](#) [145 F.Supp.2d, at 849-850](#) (internal quotation marks omitted).

[FN6](#). Before the District Court issued the modified injunction, the Counties removed the label of "King James Version" and the citation to Exodus. [145 F.Supp.2d 845, 847 \(E.D.Ky.2001\)](#).

[FN7](#). The Court also found that the effect of the third display was to endorse religion because the "reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents" and because the "reasonable observer [would know] something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments." [Id., at 851, 852](#).

....

We granted certiorari, and now affirm.

## II

Twenty-five years ago in a case prompted by posting the Ten Commandments in Kentucky's public schools, this Court recognized that the Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and held that their display in public classrooms violated the First Amendment's bar against establishment of religion. *Stone* found a predominantly religious purpose in the government's posting of the Commandments, given their prominence as " 'an instrument of religion,' " The Counties ask for a different approach here by arguing that official purpose is unknowable and the search for it inherently vain. In the alternative, the Counties would avoid the District Court's conclusion by having us limit the scope of the purpose enquiry so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case.

## A

....The touchstone for our analysis is the principle that the "First Amendment mandates

governmental neutrality between religion and religion, and between religion and nonreligion." ....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.... Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens ...." [Zelman v. Simmons-Harris, \(2002\)](#) (BREYER, J., dissenting). By showing a purpose to favor religion, the government "sends the ... 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 ....'" [Santa Fe Independent School Dist. v. Doe, \(2000\)](#) (quoting [Lynch v. Donnelly, \(1984\)](#) (O'CONNOR, J., concurring))....

C

....

1

*Lemon* said that government action must have "a secular ... purpose," [403 U.S., at 612, 91 S.Ct. 2105](#), and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective....

2

The Counties'...argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us \*2737 to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show...The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose." [FN14] [Santa Fe Independent School Dist. v. Doe,](#)

[FN14.](#) {T]he same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters. Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose....

III

....

A

The display rejected in *Stone* had two obvious similarities to the first one in the sequence here: both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods). They regulate details of religious obligation (no graven images, no sabbath breaking, no vain oath swearing). And they unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction of the divinity proclaimed at the beginning of the text. Displaying that text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view. The display in *Stone* had no context that might have indicated an object beyond the religious character of the text, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the postings at issue in *Stone*....

This is not to deny that the Commandments have had influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply **\*2739** that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.

B

Once the Counties were sued, they modified the exhibits....

[The] second display...include[d] the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content....

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as "dead and buried."...

C

1

After the Counties changed lawyers, they mounted a third display, without a new resolution or repeal of the old one. The result was the "Foundations of American Law and Government" exhibit, which placed the Commandments in the company of other documents the Counties thought especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."....

These new statements of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second display passed [just months earlier were not repealed or otherwise repudiated. \[FN20\]](#)

[FN20.](#) The Counties argue that the objective observer would not continue to believe that the resolution was in effect after the third display went up because the resolution authorized only the second display. But the resolution on its face is not limited to any particular display....

Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." App. to Pet. for Cert. 205a, ¶ 33. If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the "Ten \*2741 Commandments' ... influence is clearly seen in the Declaration," *id.*, at 180a; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed," *id.*, at 190a. If the observer had not thrown up his hands, he would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality.

2

In holding the preliminary injunction adequately supported by evidence that the Counties'

purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense....

Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the [National Government was violating neutrality in religion.](#) [\[FN23\]](#)

[FN23.](#) The dissent notes that another depiction of Moses and the Commandments adorns this Court's east pediment. *Post*, at 2760. But as with the courtroom frieze, Moses is found in the company of other figures, not only great but secular.

#### **\*2742 IV**

The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in [Everson v. Board of Ed. of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 \(1947\)](#), and a word needs to be said about the different view taken in today's dissent.....

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of about interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

....

Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause. The principle has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses. The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, [Wallace v. Jaffree](#), but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans

and Cavaliers (or Massachusetts Puritans and Baptists). *E.g.*, [Everson](#), ("A large proportion of the early settlers of this country came here from Europe to escape [religious persecution]"). A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying \*2743 it. To be sure, 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, a point that has been clear from the Founding era to modern times....

....The dissent identifies God as the God of monotheism, all of whose three principal strains (Jewish, Christian, and Muslim) acknowledge the religious importance of the Ten Commandments. *Post*, at 2752-2753. On the dissent's view, it apparently follows that even rigorous espousal of a common element of this common monotheism, is consistent with the establishment ban.

But the dissent's argument for the original understanding is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed....

But the fact is that we do have more to go on, for there is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging \*2744 religion....

The historical record, moreover, is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison....

The fair inference is that there was no common understanding about the limits of the establishment prohibition, and the dissent's conclusion that its narrower view was the original understanding, *post*, at 2748-2749, stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." [McCulloch v. Maryland, 1819](#)).

....\*2745Other members of the Court have dissented on the ground that the Establishment Clause bars nothing more than governmental preference for one religion over another, *e.g.*, [Wallace v. Jaffree](#) (REHNQUIST, J., dissenting), but at least religion has previously been treated inclusively. Today's dissent, however, apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty....

[T]he divisiveness of religion in current public life is inescapable. This is no time to deny

the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.

V

Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.

*It is so ordered.*

\*2746 Justice [O'CONNOR](#), concurring.

I join in the Court's opinion. The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions--one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees--of free speech, a free press, and the rights to assemble and petition--the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that "[w]e are a religious people," [Zorach v. Clauson, \(1952\)](#), has proved true. Americans attend their places of worship more often than do citizens of other developed nations, R. Fowler, A. Hertzke, & L. Olson, *Religion and Politics in America* 28-29 (2d ed.1999), and describe religion as playing an especially important role in their lives, Pew Global Attitudes Project, *Among Wealthy Nations U.S. Stands Alone in its Embrace of Religion* (Dec. 19, 2002). Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

....

\*2748 Justice [SCALIA](#), with whom THE CHIEF JUSTICE and Justice THOMAS join, and with whom Justice [KENNEDY](#) joins as to Parts II and III, dissenting.

....

I

A

On September 11, 2001 I was attending in Rome, Italy an international conference of judges and lawyers, principally from Europe and the United States. That night and the next morning virtually all of the participants watched, in their hotel rooms, the address to the Nation by the President of the United States concerning the murderous attacks upon the Twin Towers and the Pentagon, in which thousands of Americans had been killed. The address ended, as Presidential addresses often do, with the prayer "God bless America." The next afternoon I was approached by one of the judges from a European country, who, after extending his profound condolences for my country's loss, sadly observed "How I wish that the Head of State of my country, at a similar time of national tragedy and distress, could conclude his address 'God bless \_\_\_\_\_.' It is of course absolutely forbidden."

That is one model of the relationship between church and state--a model spread across Europe....Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words "so help me God."... The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." The First Congress instituted the practice of beginning its legislative sessions with a prayer. [Marsh v. Chambers, \(1983\)](#). The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God." See H.R. Jour., 1st Cong., 1st Sess. 123 (1826 ed.); see also Sen. Jour., 1st Sess., 88 (1820 ed.). President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 on behalf of the American people "to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,'...

These actions of our First President and Congress and the Marshall Court were not idiosyncratic; they reflected the beliefs of the period. Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality....[several paragraphs of historical examples are omitted...]

Nor have the views of our people on this matter significantly changed. Presidents

continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, remains commonplace. Our coinage bears the motto "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." [Zorach v. Clauson, \(1952\)](#), repeated with approval in [Lynch v. Donnelly, \(1984\)](#); [Marsh, Abington Township,](#)

With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that " 'the First Amendment mandates governmental neutrality between ... religion and nonreligion,' " *ante*, at 2733, and that "[m]anifesting a purpose to favor ... adherence to religion generally," *ante*, at 2733, 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, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only 5 nays in the House of Representatives, see 148 Cong. Rec. S6226 (2002); *id.*, at H7186, criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century....

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

....

Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today's opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another. See *ante*, at 2743; see also *Van Orden*, --- U.S., at ---- - ----, (STEVENS, J., dissenting). That is indeed a valid principle where public aid or assistance to religion is concerned, see [Zelman v. Simmons-Harris, \(2002\)](#), or where the free exercise of religion is at issue, [Church of Lukumi Babalu Aye, Inc. v. Hialeah, \(1993\)](#); but it necessarily applies in a more limited sense to public acknowledgment of the Creator. 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 \*2753 people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's

historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists. The Thanksgiving Proclamation issued by George Washington at the instance of the First Congress was scrupulously nondenominational--but it was monotheistic.[FN3] In *Marsh v. Chambers*, *supra*, we said that the fact the particular prayers offered in the Nebraska Legislature were "in the Judeo-Christian tradition," posed no additional problem, because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief,"

FN3. The Court thinks it "surpris[ing]" and "truly remarkable" to believe that "the deity the Framers had in mind" (presumably in all the instances of invocation of the deity I have cited) "was the God of monotheism." *Ante*, at 2744-2745. This reaction would be more comprehensible if the Court could suggest what other God (in the singular, and with a capital G) there *is*, other than "the God of monotheism." This is not *necessarily* the Christian God (though if it were, one would expect Christ regularly to be invoked, which He is not); but it is *inescapably* the God of monotheism.

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, "a tolerable acknowledgment of beliefs widely held among the people of this country." The three most popular religions in the United States, Christianity, Judaism, and Islam--which combined account for 97.7% of all believers--are monotheistic. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2004-2005, p. 55 (124th ed. 2004) (Table No. 67). All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life. See 13 Encyclopedia of Religion 9074 (2d ed.2005); The Qur'an 104 (M. Haleem trans.2004). Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population--from Christians to Muslims-- that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint. [FN4]

FN4. This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque's explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.

B

....

Justice STEVENS argues that original meaning should not be the touchstone anyway, but that we should rather "expoun[d] the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations." [Van Orden, --- U.S., at ---- - ----](#), (dissenting opinion). This is not the place to debate the merits of the "living Constitution"....Even assuming, however, that the meaning of the Constitution ought to change according to "democratic aspirations," why are those aspirations to be found in Justices' notions of what the Establishment Clause ought to mean, rather than in the democratically adopted dispositions of our current society?....

II

....

III

Even accepting the Court's *Lemon*-based premises, the displays at issue here were constitutional.

A

To any person who happened to walk down the hallway of the McCreary or Pulaski County Courthouse during the roughly nine months when the Foundations Displays were exhibited, the displays must have seemed unremarkable--if indeed they were noticed at all. The walls of both courthouses were already lined with historical documents and other assorted portraits; each Foundations Display was exhibited in the same format as these other displays and nothing in the record suggests that either County took steps to give it greater prominence.

Entitled "The Foundations of American Law and Government Display," each display consisted of nine equally sized documents: the original version of the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, \*2759 the Mayflower Compact of 1620, a picture of Lady Justice, the National Motto of the United States ("In God We Trust"), the Preamble to the Kentucky Constitution, and the Ten Commandments. The displays did not emphasize any of the nine documents in any way: The frame holding the Ten Commandments was of the same size and had the same appearance as that which held each of the other documents. See [354 F.3d 438, 443 \(C.A.6 2003\)](#).

Posted with the documents was a plaque, identifying the display, and explaining that it "contains documents that played a significant role in the foundation of our system of law and government." *Ibid.* The explanation related to the Ten Commandments was third in the list of nine and did not serve to distinguish it from the other documents. It stated:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, 'We hold these truths to be

self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Ibid.*

B

....[W]hen the Ten Commandments appear alongside other documents of secular significance in a display devoted to the foundations of American law and government, the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system. This is doubly true when the display is introduced by a document that informs passersby that it "contains documents that played a significant role in the foundation of our system of law and government."

The same result follows if the Ten Commandments display is viewed in light of the government practices that this Court has countenanced in the past. The acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage is surely no more of a step towards establishment of religion than was the practice of legislative prayer we approved in [Marsh v. Chambers, \(1983\)](#), and it seems to be on par with the inclusion of a crèche or a menorah in a "Holiday" display that incorporates other secular symbols, see [Lynch; Allegheny County](#). The parallels between \*2760 this case and *Marsh* and *Lynch* are sufficiently compelling that they ought to decide this case, even under the Court's misguided Establishment Clause jurisprudence

....Display of the Ten Commandments is well within the mainstream of this practice of acknowledgment. Federal, State, and local governments across the Nation have engaged in such display. The Supreme Court Building itself includes depictions of Moses with the Ten Commandments in the Courtroom and on the east pediment of the building, and symbols 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." [Van Orden, --- U.S., at ----](#), Similar depictions of the Decalogue appear on public buildings and monuments throughout our Nation's Capital. *Ibid.* The frequency of these displays testifies to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.

....\*2761

....By virtue of details familiar only to the parties to litigation and their lawyers, McCreary and Pulaski Counties, Kentucky, and Rutherford County, Tennessee, have been ordered to remove the same display that appears in courthouses from Mercer County, Kentucky to Elkhart County, Indiana. been "tainted with any prior history"). Displays erected in

silence (and under the direction of good legal advice) are permissible, while those hung after discussion and debate are deemed unconstitutional. Reduction of the Establishment Clause to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation.

C

In any event, the Court's conclusion that the Counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful....

The Court has in the past prohibited government actions that "proselytize or advance any one, or ... disparage any other, faith or belief," see [Marsh](#), or that apply some level of coercion (though I and others have disagreed about the form that coercion must take), see, e.g., [Lee v. Weisman](#), (prayer at high-school graduation invalid because of \*2762 "subtle coercive pressure") The passive display of the Ten Commandments, even standing alone, does not begin to do either. What Justice KENNEDY said of the crèche in *Allegheny County* is equally true of the Counties' original Ten Commandments displays:

"No one was compelled to observe or participate in any religious ceremony or activity.... [T]he count[ies] [did not] contribut[e] significant amounts of tax money to serve the cause of one religious faith. [The Ten Commandments] are purely passive symbols of [the religious foundation for many of our laws and governmental institutions]. Passersby who disagree with the message conveyed by th[e] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." (opinion concurring in judgment in part and dissenting in part).

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given. See 13 *Encyclopedia of Religion* 9074 (2d ed.2005).[\[FN12\]](#)

[FN12](#). Because there are interpretational differences between faiths and within faiths concerning the meaning and perhaps even the text of the Commandments, Justice STEVENS maintains that *any* display of the text of the Ten Commandments is impermissible because it "invariably places the [government] at the center of a serious sectarian dispute." [Van Orden, --- U.S., at ----](#) (dissenting opinion). I think not. The sectarian dispute regarding text, if serious, is not widely known. ...In any event, the context of the display here could not conceivably cause the viewer to believe that the government was taking sides in a doctrinal controversy.

....

Turning at last to the displays actually at issue in this case, the Court faults the Counties for not *repealing* the resolution expressing what the Court believes to be an impermissible

intent. Under these circumstances, the Court says, "no reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *Ante*, at 2740. Even were I to accept all that the Court has said before, I would not agree with that assessment. To begin with, of course, it is unlikely that a reasonable observer *would even have been aware* of the resolutions, so there would be nothing to "cast off." The Court implies that the Counties may have been able to remedy the "taint" from the old resolutions by enacting a new one. See *ante*, at 2740. But that action would have been wholly unnecessary in light of the explanation that the Counties included *with the displays themselves*: A plaque next to the documents informed all who passed by that each display "contains documents that played a significant role in the foundation of our system of law and government." Additionally, there was no reason for the Counties to repeal or repudiate the resolutions adopted with the hanging of the second displays, since they related *only to the second displays*. ....

In sum: The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the \*2764 first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, see *supra*, at 2737 n. 9, the Court has identified no evidence of a purpose to advance religion in a way that is inconsistent with our cases. The Court may well be correct in identifying the third displays as the fruit of a desire to display the Ten Commandments, *ante*, at 2740, but neither our cases nor our history support its assertion that such a desire renders the fruit poisonous

.For the foregoing reasons, I would reverse the judgment of the Court of Appeals.