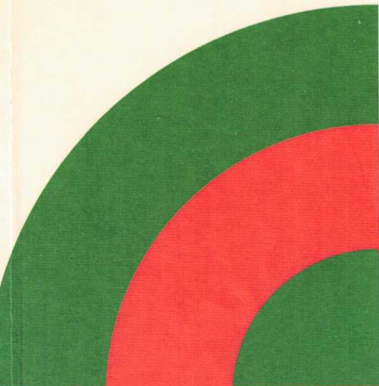




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Struttura della rivista:

Parte I

SEZIONI

Antropologia culturale
Diritto canonico
Diritti confessionali
Diritto ecclesiastico
Sociologia delle religioni e teologia
Storia delle istituzioni religiose

DIRETTORI SCIENTIFICI

M. Minicuci, A. Pandolfi
A. Bettetini, G. Lo Castro,
G. Fubini, A. Vincenzo
S. Ferlito, L. Musselli,
A. Autiero, G. J. Kaczyński,
R. Balbi, O. Condorelli

Parte II

SETTORI

Giurisprudenza e legislazione amministrativa
Giurisprudenza e legislazione canonica
Giurisprudenza e legislazione civile
Giurisprudenza e legislazione costituzionale
Giurisprudenza e legislazione internazionale
Giurisprudenza e legislazione penale
Giurisprudenza e legislazione tributaria
Diritto ecclesiastico e professioni legali

RESPONSABILI

G. Bianco
P. Stefanì
A. Fuccillo
F. De Gregorio
G. Carobene
G. Schiano
A. Guarino
F. De Gregorio, A. Fuccillo

Parte III

SETTORI

Lettere, recensioni, schede,
segnalazioni bibliografiche

RESPONSABILI

P. Lo Iacono, A. Vincenzo

Supreme Court of the United States, 27 june 2005 - n. 03-1693

Può legittimamente fondare il riconoscimento di una insanabile violazione della clausola separatista del Primo Emendamento del Bill of Rights per effetto della esposizione dei Dieci Comandamenti nei palazzi di giustizia, il rilievo della presenza di uno scopo di natura religiosa dedotto argomentando dalle modalità dell'esposizione e dal complessivo contegno assunto dalle autorità pubbliche.

After petitioners, two Kentucky Counties, each posted large, readily visible copies of the Ten Commandments in their courthouses, respondents, the American Civil Liberties Union (ACLU) et al., sued under 42 U. S. C. §1983 to enjoin the displays on the ground that they violated the First Amendment's Establishment Clause. The Counties then adopted nearly identical resolutions calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code". The resolutions noted several grounds for taking that position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics." The displays around the Commandments were modified to include eight smaller, historical documents containing religious references as their sole common element, e.g., the Declaration of Independence's "endowed by their Creator" passage. Entering a preliminary injunction, the District Court followed the *Lemon v. Kurtzman*, 403 U. S. 602, test to find, inter alia, that the original display lacked any secular purpose because the Commandments are a distinctly religious document, and that the second version lacked such a purpose because the Counties narrowly tailored their selection of foundational documents to those specifically referring to Christianity. After changing counsel, the Counties revised the exhibits again. No new resolution authorized the new exhibits, nor did the Counties repeal the resolutions that preceded the second one. The new posting, entitled "The Foundations of American Law and Government Display," consists of nine framed documents of equal size. One sets out the Commandments explicitly identified as the "King James Version," quotes them at greater length, and explains that they have profoundly influenced the formation of Western legal thought and this Nation. With the Commandments are framed copies of, e.g., the Star Spangled Banner's lyrics and the Declaration of Independence, accompanied by statements about their historical and legal significance. On the ACLU's motion, the District Court included this third display in the injunction despite the Counties' professed intent to show that the Commandments were part of the foundation of American Law and Government and to educate County citizens as to the documents. The court took proclaiming the Commandments' foundational value as a religious, rather than secular, purpose under *Stone v. Graham*, 449 U. S. 39, and found that the Counties' asserted educational goals crumbled upon an examination of this litigation's history. Affirming, the Sixth Circuit stressed that,

under Stone, displaying the Commandments bespeaks a religious object unless they are integrated with a secular message. The court saw no integration here because of a lack of a demonstrated analytical or historical connection between the Commandments and the other documents.

Held: 1. A determination of the Counties' purpose is a sound basis for ruling on the Establishment Clause complaints. The Counties' objective may be dispositive of the constitutional enquiry. Pp. 10-19.

(a) Lemon's "secular legislative purpose" enquiry, 403 U. S., at 612, has been a common, albeit seldom dispositive, element of this Court's cases, *Wallace v. Jaffree*, 472 U. S. 38, 75. When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 335. A purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding ... that liberty and social stability demand a ... tolerance that respects the religious views of all citizens." *Zelman v. Simmons-Harris*, 536 U. S. 639, 718. Pp. 11-12.

(b) The Court declines the Counties' request to abandon Lemon's purpose test. Their assertions that true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent, are as seismic as they are unconvincing. Examination of purpose is a staple of statutory interpretation for every American appellate court, e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 600, and governmental purpose is a key element of a good deal of constitutional doctrine, e.g., *Washington v. Davis*, 426 U. S. 229. Scrutinizing purpose makes practical sense in Establishment Clause analysis, 3 Cite as: 545 U. S. where an understanding of official objective emerges from readily discoverable fact set forth in a statute's text, legislative history, and implementation or comparable official act. *Wallace v. Jaffree*, 472 U. S., at 73-74. Nor is there any indication that the purpose enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. Pp. 12-15.

(c) The Court also avoids the Counties' alternative tack of trivializing the purpose enquiry. They would read the Court's cases as if the enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for these arguments, or reason supporting them. Pp. 15-19.

(1) A legislature's stated reasons will generally warrant the deference owed in the first instance to such official claims, but Lemon requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective, see, e.g., *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 308. In those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one. See, e.g., *Stone*, supra, at 41. Pp. 15-17.

(2) The Counties' argument that purpose in a case like this should be inferred only from the latest in a series of governmental actions, however close they may all be in time and subject, bucks common sense. Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose." *Santa Fe*, supra, at 315. Pp. 17-19.

2. Evaluation of the Counties' claim of secular purpose for the ultimate displays may take their evolution into account. The development of the presentation should

be considered in determining its purpose. Pp. 19-26.

(a) Stone is the Court's initial benchmark as its only case dealing with the constitutionality of displaying the Commandments. It recognized that the Commandments are an "instrument of religion" and that, at least on the facts before the Court, their text's display could presumptively be understood as meant to advance religion: although state law specifically required their posting in classrooms, their isolated exhibition did not allow even for an argument that secular education explained their being there. 449 U. S., at 41, n. 3. But Stone did not purport to decide the constitutionality of every possible way the government might set out the Commandments, and under the Establishment Clause detail is key, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 595. Hence, the Court looks to the record showing the progression leading up to the Commandments' third display, beginning with the first. Pp. 19-20.

(b) There are two obvious similarities between the display Stone rejected and the first one here: both set out the Commandments' text as distinct from any traditionally symbolic representation like blank tablets, and each stood alone, not as 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, 449 U. S., at 42, 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), regulate details of religious obligation (no graven images, sabbath breaking, or vain oath swearing), and unmistakably rest even the universally accepted prohibitions (as against murder, theft, etc.) on the sanction of the divinity proclaimed at the text's beginning. Displaying that text is thus different from symbolic representation, 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 such context, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the Stone postings. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message. Pp. 20-21.

(c) The Counties' second display, unlike the first, did not hang the Commandments in isolation, but included the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents whose references to God were highlighted as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties posted the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolutions' claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose. Pp. 21-22.

(d) The lower courts' conclusion that no legitimizing secular purpose prompted the Counties' third display, the "Foundations of American Law and Government" exhibit, is amply justified. That display placed the Commandments in the company of other documents the Counties deemed 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 County citizens as to the significance of the docu-

ments displayed. The Counties' claims, however, persuaded neither that court, which was intimately familiar with this litigation's details, nor the Sixth Circuit. Where both lower courts were unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one. *Edwards v. Aguillard*, 482 U. S. 578, 594. The Counties' new statements of purpose were presented only as a litigating position, there being no further authorizing resolutions 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 displays passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the resolutions found enhanced expression in the third display, which quoted more of the Commandment's purely religious language than the first two displays had done. No reasonable observer, therefore, could accept the claim that the Counties had cast off the objective so unmistakable in the earlier displays. Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. For example, it is at least odd in a collection of documents said to be "foundational" to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original framing. An observer would probably suspect the Counties of reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality. Pp. 22-25.

(e) In holding that the preliminary injunction was adequately supported by evidence that the Counties' purpose had not changed at the third stage, the Court does not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. The Court holds only that purpose is to be taken seriously under the Establishment Clause and is to be understood in light of context. District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions. Nor does the Court hold that a sacred text can never be integrated constitutionally into a governmental display on law or history. Its own courtroom frieze depicts Moses holding tablets exhibiting a portion of the 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 religious neutrality. P. 26. 354 F. 3d 438, affirmed.

(omissis)

Justice Souter delivered the opinion of the Court.

Executives of two counties posted a version of the Ten Commandments on the walls of their courthouses. After suits were filed charging violations of the Establishment Clause, the legislative body of each county adopted a resolution calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code," Def. Exh. 1 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. A. No. 99-507, p. 1 (ED Ky.) (hereinafter Def. Exh. 1). The result in each instance was a modified display of the Commandments surrounded by texts containing religious references as their sole common element. After changing counsel, the counties revised the exhibits again by eliminating some documents, expanding the text set out in another, and adding some new ones. The issues are whether a determination of the counties' purpose is a sound basis for ruling on the Establishment Clause complaints, and whether evaluation of the counties' claim of secular

purpose for the ultimate displays may take their evolution into account. We hold that the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose.

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 Exodus¹. 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 (ED 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 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"². 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." 96 F. Supp. 2d., at 684; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F. Supp. 2d 691, 695 (ED 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 Constitution³. Within a month, and before the District Court

¹ We do not consider here a display of the Ten Commandments in schoolrooms in Harlan County, Kentucky, that was litigated in consolidated proceedings in the District Court and Court of Appeals. That display is the subject of a separate petition to this Court.

² This text comes from a record exhibit showing the Pulaski County Commandments that were part of the County's first and second displays. The District Court found that the displays in each County were functionally identical. 96 F. Supp. 2d 679, 682, n. 2 (ED Ky. 2000); 96 F. Supp. 2d 691, 693, n. 2 (ED Ky. 2000).

³ The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...". This prohibition of establishment applies to "the States and their political subdivisions" through the Fourteenth Amendment. *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 301 (2000).

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 court-room”; 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 Commandments⁴, 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 Compact. 96 F. Supp. 2d, at 684; 96 F. Supp. 2d, at 695-696.

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*, 403 U. S. 602 (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 of the second display in this Court. “[A]fter erecting the first display]

Petitioners posted additional donated documents. ... This display consisted of the Ten Commandments along with other historical documents.” Brief for Petitioners 2. Like the District Court, we find our analysis applies equally to either format.

⁴ 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.

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”⁵. 96 F. Supp. 2d, at 687; 96 F. Supp. 2d, at 699. 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, 145 F. Supp. 2d 845, 847 (ED Ky. 2001) and quoted at greater length than before: “Thou shalt have no other gods before me. “Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me. “Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain. “Remember the sabbath day, to keep it holy. “Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.” “Thou shalt not kill. “Thou shalt not commit adultery.” “Thou shalt not steal. “Thou shalt not bear false witness against thy neighbour.” “Thou shalt not covet thy neighbour’s house, thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor’s.” App. to Pet. for Cert. 189a. 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 back-ground 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 Coun-

⁵ 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.

ties' third display⁶, 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*, 449 U. S. 39 (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 educate⁷. 145 F. Supp. 2d, at 849-850 (internal quotation marks omitted). As requested, the trial court supplemented the injunction, and a divided panel of the Court of Appeals for the Sixth Circuit affirmed. The Circuit majority stressed that under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with other material so as to carry "a secular message," 354 F. 3d 438, 449 (2003). The majority judges saw no integration here because of a "lack of a demonstrated analytical or historical connection [between the Commandments and] the other documents." *Id.*, at 451. They noted in particular that the Counties offered no support for their claim that the Ten Commandments "provide[d] the moral backdrop" to the Declaration of Independence or otherwise "profoundly influenced" it. *Ibid.* (Internal quotation marks omitted). The majority found that the Counties' purpose was religious, not educational, given the nature of the Commandments as "an active symbol of religion [stating] 'the religious duties of believers'", *Id.*, at 455. The judges in the majority understood the identical displays to emphasize "a single religious influence, with no mention of any other religious or secular influences," *id.*, at 454, and they took the very history of the litigation as evidence of the Counties' religious objective, *id.*, at 457. Judge Ryan dissented on the basis of wide recognition that religion, and the Ten Commandments in particular, have played a foundational part in the evolution of American law and government; he saw no reason to gainsay the Counties' claim of secular purposes. *Id.*, at 472-473⁸. The dissent

⁶ 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 (ED Ky. 2001).

⁷ 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 sword to strike down an otherwise constitutional display".

⁸ *Id.*, at 478. The Sixth Circuit did not decide whether the display had the impermissible effect of advancing religion because one judge, having found the display motivated by a religious purpose, did not reach that issue. 354 F. 3d, at 462 (Gibbons, J., concurring). The other judge in the majority concluded that a reasonable observer would find that the display had the effect of endorsing religion given the lack of analytical connection between the Commandments and the other documents in

denied that the prior displays should have any bearing on the constitutionality of the current one: a “history of unconstitutional displays can[not] be used as a of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments.” *Id.*, at 851, 852.

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*, 449 U. S., at 41. *Stone* found a predominantly religious purpose in the government’s posting of the Commandments, given their prominence as “an instrument of religion,” *id.*, at 41, n. 3 (quoting *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 224 (1963)). 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 Ever since *Lemon v. Kurtzman* summarized the three familiar considerations for evaluating Establishment Clause claims, looking to whether government action has “a secular legislative purpose” has been a common, albeit seldom dispositive, element of our cases. 403 U. S., at 612. Though we have found government action motivated by an illegitimate purpose only four times since *Lemon*⁹, and “the secular purpose requirement alone may rarely be determinative ..., it nevertheless serves an important function”¹⁰. *Wallace v. Jaffree*, 472 U. S. 38, 75 (1985) (O’Connor, J., concurring in judgment). The touchstone for our analysis is the principle that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion”. *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968); *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947); *Wallace v. Jaffree*, *supra*, at 53. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 335 (1987) (“*Lemon*’s ‘purpose’ requirement aims at pre-venting [government] from abandoning neutrality and acting with the intent

the display, the courthouse location of the display, and the history of the displays. *Id.*, at 458-459. The dissent found no effect of endorsement because it concluded that a reasonable observer would only see that the County had merely acknowledged the foundational role of the Ten Commandments rather than endorsed their religious content. *Id.*, at 479-480.

⁹ *Stone v. Graham*, 449 U. S. 39, 41 (1980) (*per curiam*); *Wallace v. Jaffree*, 472 U. S. 38, 56-61 (1985); *Edwards v. Aguillard*, 482 U. S. 578, 586-593 (1987); *Santa Fe Independent School District v. Doe*, 530 U. S., at 308-309.

¹⁰ At least since *Everson v. Board of Ed. of Ewing*, 330 U. S. 1 (1947), it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. See, e.g., *Marsh v. Chambers*, 463 U. S. 783 (1983) (upholding legislative prayer despite its religious nature). No such reasons present themselves here.

of promoting a particular point of view in religious matters"). 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*, 536 U. S. 639, 718 (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*, 530 U. S. 290, 309-310 (2000) (quoting *Lynch v. Donnelly*, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring)).

Indeed, the purpose apparent from government action can have an impact more significant than the result ex-pressly decreed: when the government maintains Sunday-closing laws, it advances religion only minimally because many working people would take the day as one of rest regardless, but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable. This is the teaching of *McGowan v. Maryland*, 366 U. S. 420 (1961), which upheld Sunday closing statutes on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws. *Id.*, at 449-451.

B Despite the intuitive importance of official purpose to the realization of Establishment Clause values, the Counties ask us to abandon Lemon's purpose test, or at least to truncate any enquiry into purpose here. Their first argument is that the very consideration of purpose is deceptive: according to them, true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent. The assertions are as seismic as they are unconvincing.

Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 600 (2004) (interpreting statute in light of its "text, structure, purpose, and history"), and governmental purpose is a key element of a good deal of constitutional doctrine, e.g., *Washington v. Davis*, 426 U. S. 229 (1976) (discriminatory purpose required for Equal Protection violation); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U. S. 333, 352-353 (1977) (discriminatory purpose relevant to dormant Commerce Clause claim); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993) (discriminatory purpose raises level of scrutiny required by free exercise claim). With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.

But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. *Wallace v. Jaffree*, *supra*, at 74 (O'Connor, J., concurring in judgment). The eyes that look to purpose belong to an "objective observer", one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act. *Santa Fe Independent School Dist. v. Doe*, *supra*, at 308 (quoting *Wallace v. Jaffree*, 472 U. S., at 73) (O'Connor, J., concurring in judgment); see also *Edwards v. Aguillard*, 482 U. S. 578, 594-595 (1987) (enquiry looks to "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statu-

te, ... and the specific sequence of events leading to [its] passage”). There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause.

The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace*, for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. 472 U. S., at 58-60. And in *Edwards*, we relied on a statute’s text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution. 482 U. S., at 586-588. In other cases, the government action itself bespoke the purpose, as in *Abington*, where the object of required Bible study in public schools was patently religious, 374 U. S., at 223-224; in *Stone*, the Court held that the “[p]osting of religious texts on the wall serve[d] no ... educational function,” and found that if “the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” 449 U. S., at 42. In each case, the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government’s action.

Nor is there any indication that the enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. In the past, the test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing religion. That said, one consequence of the corollary that Establishment Clause analysis does not look to the veiled psyche of government officers could be that in some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the “objective observer, acquainted with the text, legislative history, and implementation of the statute”, *Santa Fe Independent School Dist. v. Doe*, 530 U. S., at 308 (quoting *Wallace*, *supra*, at 73) (O’Connor, J., concurring in judgment)), cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.

C After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the Counties’ alternative tack of trivializing the enquiry into it. The Counties would read the cases as if the purpose enquiry were so naïve that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for the Counties’ arguments, or reason supporting them.

1 *Lemon* said that government action must have “a secular ... purpose,” 403 U. S., at 612, 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. See, e.g., *Santa Fe Independent School Dist. v. Doe*, *supra*, at 308 (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to ‘distinguish[h] a sham secular purpose from a sincere one’”); *Edwards*, 482

U. S., at 586-587 (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham”); *id.*, at 590, 594 (referring to enquiry as one into “preeminent” or “primary” purpose); *Stone*, *supra*, at 41 (looking to the “pre-eminent purpose” of government action).

Even the Counties’ own cited authority confirms that we have not made the purpose test a pushover for any secular claim. True, *Wallace* said government action is tainted by its object “if it is entirely motivated by a purpose to advance religion,” 472 U. S., at 56, a remark that suggests, in isolation, a fairly complaisant attitude. But in that very case the Court declined to credit Alabama’s stated secular rationale of “accommodation” for legislation authorizing a period of silence in school for meditation or voluntary prayer, given the implausibility of that explanation in light of another statute already accommodating children wishing to pray. *Id.*, at 57, n. 45 (internal quotation marks omitted). And it would be just as much a mistake to infer that a timid standard underlies the statement in *Lynch v. Donnelly* that the purpose enquiry looks to whether government “activity was motivated wholly by religious considerations,” 465 U. S., at 680; for two cases cited for that proposition had examined and rejected claims of secular purposes that turned out to be implausible or inadequate¹¹: *Stone*, 449 U. S., at 41; *Abington*, 374 U. S., at 223–224¹². See also *Bowen v. Kendrick*, 487 U. S. 589, 602 (1988) (using the “motivated wholly by an impermissible purpose” language, but citing *Lynch* and *Stone*). As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one¹³.

2 The Counties’ second proffered limitation can be dispatched quickly. They 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

¹¹ Moreover, Justice O’Connor provided the fifth vote for the *Lynch* majority and her concurrence emphasized the point made implicitly in the majority opinion that a secular purpose must be serious to be sufficient. 465 U. S., at 691 (The purpose inquiry “is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes”).

¹² *Stone* found the sacred character of the Ten Commandments preeminent despite an avowed secular purpose to show their “adoption as the fundamental legal code of Western Civilization and the Common Law ...” 449 U. S., at 39-40, n. 1 (internal quotation marks omitted). And the *Abington* Court was unconvinced that music education or the teaching of literature were actual secular objects behind laws requiring public school teachers to lead recitations from the Lord’s Prayer and readings from the Bible. 374 U. S., at 273.

¹³ The dissent nonetheless maintains that the purpose test is satisfied so long as any secular purpose for the government action is apparent. *Post*, at 18-19 (opinion of *Scalia, J.*). Leaving aside the fact that this position is inconsistent with the language of the cases just discussed, it would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action. While heightened deference to legislatures is appropriate for the review of economic legislation, an approach that credits any valid purpose, no matter how trivial, has not been the way the Court has approached government action that implicates establishment.

all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us 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, *Santa Fe Independent School Dist. v. Doe*, 530 U. S., at 308 (objective observer is familiar with "'implementation of'" government action) (quoting *Wal-lace*, *supra*, at 73) (O'Connor, J., concurring in judgment)); *Edwards*, *supra*, at 595 (enquiry looks to "the historical context of the statute ... and the specific sequence of events leading to [its] passage"); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears"). The Counties' position just bucks commonsense: 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"¹⁴.

III This case comes to us on appeal from a preliminary injunction. We accordingly review the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion¹⁵. *Ashcroft v. American Civil Liberties Union*, 542 U. S. 656 (2004). We take *Stone* as the initial legal benchmark, our only case dealing with the constitutionality of displaying the Commandments. *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion: although state law specifically required their posting in public school classrooms, their isolated exhibition did not leave room even for an argument that secular education explained their being there. 449 U. S., at 41, n. 3 (internal quotation marks omitted). But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 595 (1989) (opinion of Blackmun, J.)

¹⁴ One consequence of taking account of the purpose underlying past actions is that the 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. The dissent, apparently not giving the reasonable observer as much credit as Holmes's dog, contends that in practice it will be "absur[d]" to rely upon differences in purpose in assessing government action. *Post*, at 24. As an initial matter, it will be the rare case in which one of two identical displays violates the purpose prong. In general, like displays tend to show like objectives and will be treated accordingly. But where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another. See *supra*, at 11-12. While posting the Commandments may not have the effect of causing greater adherence to them, an ostensible indication of a purpose to promote a particular faith certainly will have the effect of causing viewers to understand the government is taking sides.

¹⁵ We note that the only factor in the preliminary injunction analysis that is at issue here is the likelihood of the ACLU's success on the merits.

("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears") (internal quotation marks and citation omitted). Hence, we look to the record of evidence showing the progression leading up to the third display of the Commandments.

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, *supra*, at 42, 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*¹⁶. See also *County of Allegheny, supra*, at 598 ("Here, unlike in *Lynch v. Donnelly*], nothing in the context of the display detracts from the crèche's religious message"). Actually, the posting by the Counties lacked even the *Stone* display's implausible disclaimer that the Commandments were set out to show their effect on the civil law¹⁷. What is more, at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.

This is not to deny that the Commandments have had influence on civil or secu-

¹⁶ Although the Counties point out that the courthouses contained other displays besides the Ten Commandments, there is no suggestion that the Commandments display was integrated to form a secular display.

¹⁷ In *Stone*, the Commandments were accompanied by a small disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 449 U. S., at 39-40, n. 1 (internal quotation marks omitted). 145 F. Supp. 2d, at 848 (internal quotation marks omitted). The Counties' claims did not, however, persuade the court, intimately familiar with the details of this litigation, or the Court of Appeals, neither of which found a legitimizing secular purpose in this third version of the display. "When both courts [that have already passed on the case] are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one". *Edwards*, 482 U. S., at 594, n. 15 (quoting *Wallace*, 472 U. S., at 66 (Powell, J., concurring)). The conclusions of the two courts preceding us in this case are well warranted.

lar law; a major text of a majority religion is bound to be felt. The point is simply 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 and invited additional insight into their purpose in a display that hung for about six months. This new one was the product of forthright and nearly identical Pulaski and McCreary County resolutions listing a series of American historical documents with theistic and Christian references, which were to be posted in order to furnish a setting for displaying the Ten Commandments and any “other Kentucky and American historical document[t]” without raising concern about “any Christian or religious references” in them. Def. Exh. 1, at 1. As mentioned, the resolutions expressed support for an Alabama judge who posted the Commandments in his courtroom, and cited the fact the Kentucky Legislature once adjourned a session in honor of “Jesus Christ, Prince of Ethics.” *Id.*, at 2-3.

In this second display, unlike the first, the Commandments were not hung in isolation, merely leaving the Counties’ purpose to emerge from the pervasively religious text of the Commandments themselves. Instead, the second version was required to include 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. That demonstration of the government’s objective was enhanced by serial religious references and the accompanying resolution’s claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

Today, the Counties make no attempt to defend their undeniable objective, but instead hopefully describe version two as “dead and buried.” Reply Brief for Petitioners¹⁵. Their refusal to defend the second display is understandable, but the reasonable observer could not forget it.

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”¹⁸.

These new statements of purpose were presented only as a litigating position,

¹⁸ The Counties’ other purposes were: “to erect a display containing the Ten Commandments that is constitutional; ... to demonstrate that the Ten Commandments were part of the foundation of American Law and Government; ... [to include the Ten Commandments] as part of the display for their significance in providing ‘the moral background of the Declaration of Independence and the foundation of our legal tradition’”. 145 F. Supp. 2d, at 848 (some internal quotation marks omitted).

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 purpose¹⁹, the extraordinary resolutions for the second display passed just months earlier were not repealed or otherwise repudiated²⁰. Indeed, the sectarian spirit of the common resolution found enhanced expression in the third display, which quoted more of the purely religious language of the Commandments than the first two displays had done; for additions, see App. to Pet. for Cert. 189a ("I the Lord thy God am a jealous God") (text of Second Commandment in third display); ("the Lord will not hold him guiltless that taketh his name in vain") (from text of Third Commandment); and ("that thy days may be long upon the land which the Lord thy God giveth thee") (text of Fifth Commandment). No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays. 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 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.²¹ 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 con-

¹⁹ Following argument in this case, in which the resolutions were discussed, the McCreary and Pulaski County Boards did repeal the resolutions, acts of obviously minimal significance in the evolution of the evidence.

²⁰ 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. On the contrary, it encourages the creation of a display with the Ten Commandments that also includes such documents as "the National anthem ... the National Motto ... the preamble to the Kentucky Constitution[,] the Declaration of Independence [and] the Mayflower Compact ... without censorship because of any Christian or religious references." Def. Exh. 1, at 1. The third display contains all of these documents, suggesting that it fell within the resolutions as well. The record does not indicate whether the resolutions were posted with the third display.

²¹ The Counties have now backed away from their broad assertion that the Commandments provide "the" moral background of the Declaration of Independence, and now merely claim that many of the Commandments "regarding murder, property, theft, coveting, marriage, rest from labor and honoring parents are compatible with the rights to life, liberty and happiness." Brief for Petitioners 10, n. 7.

stitutionally required to embody religious neutrality²². 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. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions. See *Ashcroft v. American Civil Liberties Union*, 542 U. S. 656 (2004). 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 religion²³.

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 (1947), and a word needs to be said about the different view taken in today's dissent. We all agree, of course, on the need for some interpretative help. The First Amendment contains no textual definition of "establishment," and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation, *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940), a state) church, but nothing in the text says just how much more it covers. There is no simple answer, for more than one reason. 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

²² The Counties grasp at *McGowan v. Maryland*, 366 U. S. 420 (1961), but it bears little resemblance to this case. As noted *supra*, at 12-13, *McGowan* held that religious purposes behind centuries-old predecessors of Maryland's Sunday laws were not dispositive of the purposes of modern Sunday laws, where the legislature had removed much of the religious reference in the laws and stated secular and pragmatic justifications for them. 366 U. S., at 446-452. But a conclusion that centuries-old purposes may no longer be operative says nothing about the relevance of recent evidence of purpose, and this case is far more like *Santa Fe*, with its evolution of a school football game prayer policy over the course of a single lawsuit. Like that case, "[t]his [one] comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." 530 U. S., at 315. (describing the evolution of the school district's football prayer policy). Thus, as in *Santa Fe*, it makes sense to examine the Counties' latest action "in light of [their] history of" unconstitutional practices. *Id.*, at 309.

²³ The dissent notes that another depiction of Moses and the Commandments adorns this Court's east pediment. *Post*, at 23. But as with the courtroom frieze, Moses is found in the company of other figures, not only great but secular.

respectable, but none open to realization to the logical limit. The First Amendment has not one but two clauses tied to "religion," the second forbidding any prohibition on the "the free exercise thereof," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. See *Cutter v. Wilkinson*, 544 U. S. (2005) (slip. op., at 8-9). At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). The dissent, then, is wrong to read cases like *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664 (1970), as a rejection of neutrality on its own terms, post, at 7-8, for trade-offs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not be had.

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*, 472 U. S., at 52-54, and n. 38, 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*, supra, at 8 ("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 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. E.g., *Letter from J. Madison to R. Adams* (1832), in 5 *The Founders' Constitution* at 107 (P. Kurland & R. Lerner eds. 1987) ("[In calling for separation] I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points"); *Sherbert v. Verner*, 374 U. S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' ... is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation"). But invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.

The dissent, however, puts forward a limitation on the application of the neutrality principle, with citations to historical evidence said to show that the Framers understood the ban on establishment of religion as sufficiently narrow to allow the government to espouse submission to the divine will. 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 9-10. 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. The dissent is certainly correct in putting forward evidence that some of the Framers thought some endorsement of religion was compatible with the establishment ban; the dissent quotes the first President as stating that “national morality [cannot] prevail in exclusion of religious principle,” for example, post, at 3, and it cites his first Thanksgiving proclamation giving thanks to God, post, at 2 (internal quotation marks omitted). Surely if expressions like these from Washington and his contemporaries were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers’ understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle)²⁴.

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 religion. The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and, the final language instead “extended [the] prohibition to state support for ‘religion’ in general.” See *Lee v. Weisman*, 505 U. S. 577, 614-615 (1992) (Souter, J., concurring) (tracing development of language). 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. Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated the Constitution. See Letter to S. Miller (Jan. 23, 1808), in 5 *The Founders’ Constitution* at 98. And Madison, whom the dissent claims as supporting its thesis, post, at 4, criticized Virginia’s general assessment tax not just because it required people to donate “three pence” to religion, but because “it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” 505 U. S., at 622 (internal quotation marks omitted); see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 *The Founders’ Constitution*, at 106 (“[R]eligion & Govt. will both exist in greater purity, the less they are mixed together”); Letter from J. Madison to J. Adams (Sept. 1833) in *Religion and Politics in the Early Republic* 120 (D. Dresbach ed. 1996) (stating that with respect to religion and government the “tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference”); *Van Orden v. Perry*, 545 U. S. ____ (2005) (Stevens, J., dissenting) (slip op., at 19-20)²⁵.

²⁴ The dissent also maintains that our precedents show that a solo display of the Commandments is a mere acknowledgement of religion “on par with the inclusion of a crèche or a menorah” in a holiday display, or an official’s speech or prayer, post, at 22. Whether or not our views would differ about the significance of those practices if we were considering them as original matters, they manifest no objective of subjecting individual lives to religious influence comparable to the apparent and openly acknowledged purpose behind posting the Commandments. Crèches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens; the history of posting the Commandments expressed a purpose to urge citizens to act in prescribed ways as a personal response to divine authority.

²⁵ The dissent cites material suggesting that separationists like Jefferson and Madison were not

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 2-3, 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 fore-seen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819).

While the dissent fails to show a consistent original understanding from which to argue that the neutrality principle should be rejected, it does manage to deliver a surprise. As mentioned, the dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view. Other 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*, 472 U. S., at 98-99 (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. Certainly history cannot justify it; on the contrary, history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his *Commentaries* that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 13 (1988) (emphasis omitted). The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation²⁶. Even on originalist critiques of existing precedent there is, it seems, no

absolutely consistent in abstaining from official religious acknowledgment. *Post*, at 4. But, a record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle. And it is worth noting that Jefferson thought his actions were consistent with non-endorsement of religion and Madison regretted any backsliding he may have done. *Lee v. Weisman*, 505 U. S. 577, 622-25 (1992) (Souter, J., concurring). "Homer nodded." *Id.*, at 624, n. 5 (corrected in erratum at 535 U. S., at II).

²⁶ There might, indeed, even have been some reservations about monotheism as the paradigm example. It is worth noting that the canonical biography of George Washington, the dissent's primary exemplar of the monotheistic tradition, calls him a deist. J. Flexner, *George Washington: Anguish and Farewell (1793-1799)* 490 (1972) ("Washington's religious belief was that of the enlightenment: deism"). It would have been odd for the First Congress to propose an Amendment with Religion Clauses that took no account of the President's religion. As with other historical matters pertinent here, however, there are conflicting conclusions. R. Brookhiser, *Founding Father: Rediscovering George Washington* 146 (1996) ("Washington's God was no watchmaker"). History writ small does not give clear and certain answers to questions about the limits of "religion" or "establishment."

escape from interpretative consequences that would surprise the Framers. Thus, it appears to be common ground in the interpretation of a Constitution “intended to endure for ages to come,” *McCulloch v. Maryland*, *supra*, at 415, that applications unanticipated by the Framers are inevitable.

Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent), whereas public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew’s Day massacre and the treatment of heretics in early Massachusetts, but the 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.

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 descendants 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. Claunson*, 343 U. S. 306, 313 (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? Our guiding principle has been James Madison’s that “[t]he Religion ... of every man must be left to the conviction and conscience of every man.” *Memorial and Remonstrance Against Religious Assessments*, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901) (hereinafter

Memorial). To that end, we have held that the guarantees of religious freedom protect citizens from religious incursions by the States as well as by the Federal Government. *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947); *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Government may not coerce a person into worshipping against her will, nor prohibit her from worshipping according to it. It may not prefer one religion over another or promote religion over nonbelief. *Everson*, *supra*, at 15-16. It may not entangle itself with religion. *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 674 (1970). And government may not, by "endorsing religion or a religious practice," "mak[e] adherence to religion relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U. S. 38, 69 (1985) (O'Connor, J., concurring in judgment). When we enforce these restrictions, we do so for the same reason that guided the Framers respect for religion's special role in society. Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

Given the history of this particular display of the Ten Commandments, the Court correctly finds an Establishment Clause violation. See *ante*, at 19-25. The purpose behind the counties' display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer. See *Lynch v. Donnelly*, 465 U. S. 668, 690 (1984) (O'Connor, J., concurring).

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. See *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"). Nor can we accept the theory that Americans who do not accept the Commandments' validity are outside the First Amendment's protections. There is no list of approved and disapproved beliefs appended to the First Amendment and the Amendment's broad terms ("free exercise," "establishment," "religion") do not admit of such a cramped reading. It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that "the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects." Memorial 186. The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.

*** We owe our First Amendment to a generation with a profound commitment to religion and a profound commitment to religious liberty visionaries who held their faith "with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Zorach*, *supra*, at 324-325 (Jackson, J., dissenting). In my opinion, the display at issue was an establishment of religion in violation of our Constitution. For the reasons given above, I join in the Court's opinion.

Judge Scalia, with whom The Chief Justice and Justice Thomas join, and with whom Justice Kennedy joins as to Parts II and III, dissenting.

I would uphold McCreary County and Pulaski County, Kentucky's (hereinafter Counties) displays of the Ten Commandments. I shall discuss first, why the Court's oft repeated assertion that the government cannot favor religious practice is false; second, why today's opinion extends the scope of that falsehood even beyond prior cases; and third, why even on the basis of the Court's false assumptions the judgment here is wrong.

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 by the armies of Napoleon, and reflected in the Constitution of France, which begins "France is [a] . . . secular ... Republic." France Const., Art. 1, in 7 *Constitutions of the Countries of the World*, p. 1 (G. Flanz ed. 2000). 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." See Blomquist, *The Presidential Oath, the American National Interest and a Call for Presprudence*, 73 *UMKC L. Rev.* 1, 34 (2004). The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court"²⁷. 1 C. Warren, *The Supreme Court in United States History* 469 (rev. ed. 1926). The First Congress instituted the practice of beginning its legislative sessions with a prayer. *Marsh v. Chambers*, 463 U. S. 783, 787 (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. *Id.*, at 788. The day after the First Amendment was

²⁷ See, e.g., President's Thanksgiving Day 2004 Proclamation (Nov. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/11/20041123-4.html> (all internet materials as visited June 24, 2005 and available in Clerk of Court's case file).

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’”, *Van Orden v. Perry*, ante, at 7-8 (plurality opinion) (quoting President Washington’s first Thanksgiving Proclamation), thus beginning a tradition of offering gratitude to God that continues today. See *Wallace v. Jaffree*, 472 U. S. 38, 100-103 (1985) (Rehnquist, J., dissenting). The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *Id.*, at 52, n. (a). And of course the First Amendment itself accords religion (and no other manner of belief) special constitutional protection.

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 wellbeing of society and that encouragement of religion was the best way to foster morality. 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.” *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 213 (1963). See Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First-Amendment Theory*, 36 Wm. & Mary L. Rev. 837, 896-918 (1995). President Washington opened his Presidency with a prayer, see *Inaugural Addresses of the Presidents of the United States* 1, 2 (1989), and reminded his fellow citizens at the conclusion of it that “reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.” *Farewell Address* (1796), reprinted in 35 *Writings of George Washington* 229 (J. Fitzpatrick ed. 1940). President John Adams wrote to the Massachusetts Militia, “we have no government armed with power capable of contending with human passions unbridled by morality and religion. ... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” *Letter* (Oct. 11, 1798), reprinted in 9 *Works of John Adams* 229 (C. Adams ed. 1971). Thomas Jefferson concluded his second inaugural address by inviting his audience to pray: “I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.” *Inaugural Addresses of the Presidents of the United States*, at 18, 22-23. James Madison, in his first inaugural address, likewise placed his confidence “in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.” *Id.*, at 25, 28. 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. Claiborn*, 343 U. S. 306, 313 (1952), repeated with approval in *Lynch v. Donnelly*, 465 U. S. 668, 675 (1984); *Marsh*, 463 U. S., at 792; *Abington Township*, *supra*, at 213. 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 11, and that “[m]anifesting a purpose to favor ... adherence to religion generally,” *ante*, at 12, 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. See Act of Nov. 13, 2002, §§1(9), 2(a), 3(a), 116 Stat. 2057, 2058, 2060-2061 (reaffirming the Pledge of Allegiance and the National Motto (“In God We Trust”) and stating that the Pledge of Allegiance is “clearly consistent with the text and intent of the Constitution”). 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. See *ante*, at 11, citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327, 335 (1987), in turn citing *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971), in turn citing *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U. S. 236, 243 (1968), in turn quoting *Abington Township*, *supra*, at 222, in turn citing *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947)²⁸. And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today’s majority) have, in separate opinions, repudiated the brain-spun “Lemon test” that embodies the supposed principle of neutrality between religion and irreligion. See *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 398-399 (1993) (Scalia, J., concurring in judgment) (collecting criticism of *Lemon*); *Van Orden*, *ante*, at 1, 6 (Thomas, J., concurring);

²⁸ The fountainhead of this jurisprudence, *Everson v. Board of Ed. of Ewing*, based its dictum that “[n]either a state nor the Federal Government ... can pass laws which ... aid all religions,” 330 U. S., at 15, on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty, see *id.*, at 11-13. A prominent commentator of the time remarked (after a thorough review of the evidence himself) that it appeared the Court had been “sold ... a bill of goods”. Corwin, *The Supreme Court as National School Board*, 14 *Law & Contemp. Prob.* 3, 16 (1949).

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U. S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U. S. 573, 655-656, 672-673 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Wallace, 472 U. S., at 112 (Rehnquist, J., dissenting); see also Committee for Public Ed. and Religious Liberty v. Regan, 444 U. S. 646, 671 (1980) (Stevens, J., dissenting) (disparaging "the sisyphian task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon"). And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently. 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. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, ante, at 11, n. 10, the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not. The footnote goes on to say that "[i]n special instances we have found good reason" to dispense with the principle, but "[n]o such reasons present themselves here." Ibid. It does not identify all of those "special instances," much less identify the "good reason" for their existence.

I have cataloged elsewhere the variety of circumstances in which this Court even after its embrace of Lemon's stated prohibition of such behavior has approved government action "undertaken with the specific intention of improving the position of religion," *Edwards v. Aguillard*, 482 U. S. 578, 616 (1987) (Scalia, J., dissenting). See id., 616-618. Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice but we have approved it. See *Amos*, supra, at 338 (exemption from federal prohibition of religious discrimination by employers); *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 673 (1970) (property tax exemption for church property); *Zorach*, 343 U. S., at 308, 315 (law permitting students to leave public school for the purpose of receiving religious education). Indeed, we have even approved (post-Lemon) government-led prayer to God. In *Marsh v. Chambers*, supra, the Court upheld the Nebraska State Legislature's practice of paying a chaplain to lead it in prayer at the opening of legislative sessions. The Court explained that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not ... an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U. S., at 792. (Why, one wonders, is not respect for the Ten Commandments a tolerable acknowledgment of beliefs widely held among the people of this country?)

The only "good reason" for ignoring the neutrality principle set forth in any of these cases was the antiquity of the practice at issue. See *Marsh*, supra, at 786-792, 794; *Walz*, supra, at 676-680. That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution, but it is hardly a good reason for letting an unconstitutional practice continue. We did not hide behind that reason in *Reynolds v. Sims*, 377 U. S. 533 (1964), which found unconstitutional bicameral

state legislatures of a sort that had existed since the beginning of the Republic. And almost monthly, it seems, the Court has not shrunk from invalidating aspects of criminal procedure and penology of similar vintage. See, e.g., *Deck v. Missouri*, 544 U. S. ___, ___ (2005) (slip op., at 10-11) (invalidating practice of shackling defendants absent “special circumstances”); *id.*, at ___ (slip op., at 7-11) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U. S. ___, ___ (2005) (slip op., at 14) (invalidating practice of executing under-18-year-old offenders); *id.*, at ___ (slip op., at 2, n. 1) (Scalia, J., dissenting). What, then, could be the genuine “good reason” for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which “has no influence over either the sword or the purse,” *The Federalist* No. 78, p. 412 (J. Pole ed. 2005), cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.

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 19; see also *Van Orden*, *ante*, at 11-13 (Stevens, J., dissenting). That is indeed a valid principle where public aid or assistance to religion is concerned, see *Zelman v. Simmons-Harris*, 536 U. S. 639, 652 (2002), or where the free exercise of religion is at issue, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 532-533 (1993); *id.*, at 557-558 (Scalia, J., concurring in part and concurring in judgment), 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, could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. 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 monotheistic²⁹. In *Marsh v. Chambers*, *supra*, we said that the fact the particular prayers offered in the Nebraska Legislature were “in the Judeo-Christian tradition,” *id.*, at 793, 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,” *id.*, at 794-795.

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,

²⁹ 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 32. 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.

as *Marsh v. Chambers* put it, “a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.*, at 792. 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 can not be reasonably understood as a government endorsement of a particular religious viewpoint³⁰.

A few remarks are necessary in response to the criticism of this dissent by the Court, as well as Justice Stevens’ criticism in the related case of *Van Orden v. Perry*, ante, p.

1. Justice Stevens’ writing is largely devoted to an attack upon a straw man. “[R]eliance on early religious proclamations and statements made by the Founders is . . . problematic,” he says, “because those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution’s text.” *Van Orden*, ante, at 18-19 (dissenting opinion) (footnote omitted). But I have not relied upon (as he and the Court in this case do) mere “proclamations and statements” of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress’s beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President’s issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court. The only mere “proclamations and statements” of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity Washington’s prayer at the opening of his Presidency and his Farewell Address, President John Adams’ letter to the Massachusetts Militia, and Jefferson’s and Madison’s inaugural addresses. The Court and Justice Stevens, by contrast, appeal to no official or even quasi-official action in support of their view of the Establishment Clause only James Madison’s Memorial and Remonstrance Against Religious Assessments, written before the federal Constitution had even been proposed, two letters written by Madison long after he was President, and the quasi-official inaction of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation. See ante, at 30-31; *Van Orden*, ante, at 19 (Stevens, J., dissenting). The Madison Memorial and Remonstrance, dealing as it does with enforced contribution to religion rather than public acknowledgment of God, is irrelevant;

³⁰ 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.

one of the letters is utterly ambiguous as to the point at issue here, and should not be read to contradict Madison's statements in his first inaugural address, quoted earlier; even the other letter does not disapprove public acknowledgment of God, unless one posits (what Madison's own actions as President would contradict) that reference to God contradicts "the equality of all religious sects." See Letter from James Madison to Edward Livingston (July 10, 1822), in 5.

The Founders' Constitution 105-106 (P. Kurland & R. Lerner eds. 1987). And as to Jefferson: the notoriously self-contradicting Jefferson did not choose to have his nonauthorship of a Thanksgiving Proclamation inscribed on his tombstone. What he did have inscribed was his authorship of the Virginia Statute for Religious Freedom, a governmental act which begins "Whereas Almighty God hath created the mind free ...". Va. Code Ann. § 57-1 (Lexis 2003).

It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." Van Orden, ante, at 18 (dissenting opinion). The Establishment Clause, upon which Justice Stevens would rely, was enshrined in the Constitution's text, and these official actions show what it meant. There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. Justice Stevens says that reliance on these actions is "bound to paint a misleading picture," Van Orden, ante, at 19, but it is hard to see why. What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?

Justice Stevens also appeals to the undoubted fact that some in the founding generation thought that the Religion Clauses of the First Amendment should have a narrower meaning, protecting only the Christian religion or perhaps only Protestantism. See Van Orden, ante, at 20-22. I am at a loss to see how this helps his case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, he proposes that it be construed not to permit any government invocation of religion at all.) At any rate, those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones. Washington's First Thanksgiving Proclamation is merely an example. All of the actions of Washington and the First Congress upon which I have relied, virtually all Thanksgiving Proclamations throughout our history³¹, and all the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ³². Rather than relying upon Justice Stevens' assurance that "[t]he

³¹ The two exceptions are the March 23, 1798 proclamation of John Adams, which asks God "freely to remit all our offenses" "through the Redeemer of the World," <http://www.pilgrimhall.org/ThankProc1789.htm>, and the November 17, 1972 proclamation of Richard Nixon, which stated, "From Moses at the Red Sea to Jesus preparing to feed the multitudes, the Scriptures summon us to words and deeds of gratitude, even before divine blessings are fully perceived," Presidential Proclamation No. 4170, 37 Fed. Reg. 24647 (1972).

³² Justice Stevens finds that Presidential inaugural and farewell speeches (which are the only speeches upon which I have relied) do not violate the Establishment Clause only because everyone knows that they express the personal religious views of the speaker, and not government policy. See Van Orden, ante, at 17-18 (dissenting opinion). This is a peculiar stance for one who has voted that a

original understanding of the type of 'religion' that qualified for constitutional protection under the First amendment certainly did not include . . . followers of Judaism and Islam," Van Orden, ante, at 22; see also ante, at 32-33, I would prefer to take the word of George Washington, who, in his famous Letter to the Hebrew Congregation of Newport, Rhode Island, wrote that,

"All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." 6 The Papers of George Washington, Presidential Series 285 (D. Twohig et al. eds. 1996). The letter concluded, by the way, with an invocation of the one God: "May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy." Ibid.

Justice Stevens says that if one is serious about following the original understanding of the Establishment Clause, he must repudiate its incorporation into the Fourteenth Amendment, and hold that it does not apply against the States. See Van Orden, ante, at 24-26 (dissenting opinion). This is more smoke. Justice Stevens did not feel that way last Term, when he joined an opinion insisting upon the original meaning of the Confrontation Clause, but nonetheless applying it against the State of Washington. See *Crawford v. Washington*, 541 U. S. 36 (2004). The notion that incorporation empties the incorporated provisions of their original meaning has no support in either reason or precedent.

Justice Stevens argues that original meaning should not be the touchstone anyway, but that we should rather "expound[d] the meaning of constitutional provisions with one eye towards our Nation's history and the other fixed on its democratic aspirations." Van Orden, ante, at 27-28 (dissenting opinion). This is not the place to debate the merits of the "living Constitution," though I must observe that Justice Stevens' quotation from *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819), refutes rather than supports that approach³³. 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? As I have observed above, numerous provisions of our laws and numerous continuing practices of our people demonstrate that the government's invocation of God (and hence the government's invocation of the Ten Commandments) is unobjectionable including a statute enacted by Congress almost unanimously less than three years ago, stating that "under God" in the Pledge of Allegiance is constitutional, see 116 Stat., at 2058. To ignore all this is not to give effect to "democratic aspirations" but to frustrate them.

Finally, I must respond to Justice Stevens' assertion that I would "marginaliz[e] the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic. Van Orden, ante, at 13-14, n. 18 (dissenting opinion). Surely

studentled invocation at a high school football game and a rabblided invocation at a high school graduation did constitute the sort of governmental endorsement of religion that the Establishment Clause forbids. See *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000); *Lee v. Weisman*, 505 U. S. 577 (1992).

³³ See Scalia, *Originalism: The Lesser Evil*, 57 *Cincinnati L. Rev.* 852-853 (1989).

that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment. Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate competing interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority³⁴. It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: “God watches over little children, drunkards, and the United States of America”.

II As bad as the Lemon test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today’s opinion is no different. In two respects it modifies Lemon to ratchet up the Court’s hostility to religion. First, the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an “objective observer”. Ante, at 13. Because in the Court’s view the true danger to be guarded against is that the objective observer would feel like an “outside[r]” or “not [a] full membe[r] of the political community,” its inquiry focuses not on the actual purpose of government action, but the “purpose apparent from government action.” Ante, at 12. Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court’s objective observer would think otherwise. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 776-777 (1995) (O’Connor, J., concurring in part and concurring in judgment) (stating that “when the reasonable observer would view a government practice as endorsing religion, ... it is our duty to hold the practice invalid,” even if the law at issue was neutral and the benefit conferred on the religious entity was incidental).

I have remarked before that it is an odd jurisprudence that bases the unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so. See *Edwards*, 482 U. S., at 639. But that oddity pales in comparison to the one invited by today’s analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion.

Second, the Court replaces Lemon’s requirement that the government have “a secular ... purpose,” 403 U. S., at 612 (emphasis added), with the heightened requirement that the secular purpose “predominate” over any purpose to advance reli-

³⁴ Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence as Justice O’Connor’s stirring concurrence in the present case. “[W]e do not,” she says, “count heads before enforcing the First Amendment.” Ante, at 4. But Justice O’Connor joined the opinion of the Court in *Marsh v. Chambers*, 463 U. S. 783 (1983) which held legislative prayer to be “a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.*, at 792.

gion. Ante, at 15-17. The Court treats this extension as a natural outgrowth of the longstanding requirement that the government's secular purpose not be a sham, but simple logic shows the two to be unrelated. If the government's proffered secular purpose is not genuine, then the government has no secular purpose at all. The new demand that secular purpose predominate contradicts Lemon's more limited requirement, and finds no support in our cases. In all but one of the five cases in which this Court has invalidated a government practice on the basis of its purpose to benefit religion, it has first declared that the statute was motivated entirely by the desire to advance religion. See *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 308-309 (2000) (dismissing the school district's proffered secular purposes as shams); *Wallace*, 472 U. S., at 56 (finding "no secular purpose") (emphasis added); *Stone v. Graham*, 449 U. S. 39, 41 (1980) (per curiam) (finding that "Kentucky's statute requiring the posting of the Ten Commandments in public school room has no secular legislative purpose") (emphasis added); *Epperson v. Arkansas*, 393 U. S. 97, 107-109 (1968). In *Edwards*, supra, the Court did say that the state action was invalid because its "primary" or "preeminent" purpose was to advance a particular religious belief, 482 U. S., at 590, 593, 594, but that statement was unnecessary to the result, since the Court rejected the State's only proffered secular purpose as a sham. See *id.*, at 589.

I have urged that Lemon's purpose prong be abandoned, because (as I have discussed in Part I) even an exclusive purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of Lemon's purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record³⁵. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.

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 court-houses 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

³⁵ The Court's reflexive skepticism of the government's asserted secular purposes is flatly inconsistent with the deferential approach taken by our previous Establishment Clause cases. We have repeated many times that, where a court undertakes the sensitive task of reviewing a government's asserted purpose, it must take the government at its word absent compelling evidence to the contrary. See, e.g., *Edwards v. Aguillard*, 482 U. S. 578, 586 (stating that "the Court is ... deferential to a State's articulation of a secular purpose," unless that purpose is insincere or a sham); *Mueller v. Allen*, 463 U. S. 388, 394-395 (1983) (ascribing the Court's disinclination to invalidate government practices under Lemon's purpose prong to its "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"); see also *Wallace v. Jaffree*, 472 U. S. 38, 74 (O'Connor, J., concurring in judgment) ("the inquiry into the purpose of the legislature ... should be deferential and limited").

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, 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 (CA6 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.*

On its face, the Foundations Displays manifested the purely secular purpose that the Counties asserted before the District Court:

"to display documents that played a significant role in the foundation of our system of law and government." Affidavit of Judge Jimmie Green in Support of Defendants' Opposition to Plaintiffs' Motion for Contempt or, in the Alternative, for Supplemental Preliminary Injunction in Civ. A. No. 99-507 (ED Ky.), p. 2. That the Displays included the Ten Commandments did not transform their apparent secular purpose into one of impermissible advocacy for Judeo-Christian beliefs. Even an isolated display of the Decalogue conveys, at worst, "an equivocal message, perhaps of respect for Judaism, for religion in general, or for law." *Allegheny County*, 492 U. S., at 652 (Stevens, J., concurring in part and dissenting in part). But when 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. See *id.*, at 652-653. 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*, 463 U. S. 783 (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*, *supra*, at 679-680; *Allegheny County*, *supra*, at 621. The parallels between this case and *Marsh* and *Lynch* are sufficiently compelling that they ought to decide this case, even under the Court's misguided

Establishment Clause jurisprudence³⁶. Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition. Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era. See *Lynch*, *supra*, at 674-678; *Marsh*, *supra*, at 786-788; *Lee v. Weisman*, 505 U. S. 577, 633-636 (1992) (Scalia, J., dissenting); *Wallace*, 472 U. S. at 100-106 (Rehnquist, J., dissenting); *Engel v. Vitale*, 370 U. S. 421, 446-450, and n. 3 (1962) (Stewart, J., dissenting). 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 display³⁷. 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*, *ante*, at 9 (plurality opinion). 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.

Perhaps in recognition of the centrality of the Ten Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square. See *ante*, at 26. The constitutional problem, the Court says, is with the Counties' purpose in erecting the Foundations Displays, not the displays themselves. The Court adds in a footnote: "One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Ante*, at 18, n. 14.

This inconsistency may be explicable in theory, but I suspect that the "objective

³⁶ The Court's only response is that the inclusion of the Ten Commandments in a display about the foundations of American law reflects "a purpose to call on citizens to act in prescribed ways as a personal response to divine authority," in a way that legislative prayer and the inclusion of a crèche in a Holiday display do not. See *ante*, at 30, n. 24. That might be true if the Commandments were displayed by them-selves in a church, or even in someone's home. It seems to me patently untrue given the Decalogue's "undeniable historical meaning" as a symbol of the religious foundations of law, see *Van Orden*, *ante*, at 11 (plurality opinion) when they are posted in a courthouse display of historical documents. The observer would no more think himself "called upon to act" in conformance with the Commandments than he would think himself called upon to think and act like William Bradford because of the courthouse posting of the Mayflower Compact especially when he is told that the exhibit consists of documents that contributed to American law and government.

³⁷ The significant number of cases involving Ten Commandments displays in the last two years suggests the breadth of their appearance. See, e.g., *Books v. Elkhart County*, 401 F. 3d 857, 858-859 (CA7 2005) (Ten Commandments included in a display identical to the Foundations display); *Mercier v. Fraternal Order of Eagles*, 395 F. 3d 693, 696 (CA7 2005) (Ten Commandments monument in city park since 1965); *Modrovich v. Allegheny County*, 385 F. 3d 397, 399 (CA3 2004) (Ten Commandments plaque, donated in 1918, on wall of Allegheny County Courthouse); *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F. 3d 247, 249 (CA3 2003) (Ten Commandment plaque, donated in 1920, on wall of Chester County Courthouse); *King v. Richmond County*, 331 F. 3d 1271, 1273-1274 (CA11 2003) (Ten Commandments depicted in county seal since 1872).

observer” with whom the Court is so concerned will recognize its absurdity in practice. 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 court-houses from Mercer County, Kentucky to Elkhart County, Indiana. Compare *American Civil Liberties Union of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799, 808-809 (MD Tenn. 2002) (holding Foundations Display to be unconstitutional based on prior actions of county commission) with *Books v. Elkhart County*, 401 F.3d 857, 869 (CA7 2005) (sustaining Foundations Display as “secular ... in its purpose and effect”); *American Civil Liberties Union of Ky. v. Mercer County*, 219 F. Supp. 2d 777, 787-789 (ED Ky. 2002) (rejecting Establishment Clause challenge to an identical Foundations Display and distinguishing *McCreary County* on the ground that the County’s purpose had not 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.

In any event, the Court’s conclusion that the Counties exhibited the Foundations Displays with the purpose of promoting religion is doubtful. In the Court’s view, the impermissible motive was apparent from the initial displays of the Ten Commandments all by themselves: When that occurs, the Court says, “a religious object is unmistakable.” *Ante*, at 21. Surely that cannot be. If, as discussed above, the Commandments have a proper place in our civic history, even placing them by themselves can be civically motivated especially when they are placed, not in a school (as they were in the *Stone* case upon which the Court places such reliance), but in a courthouse. Cf. *Van Orden*, *ante*, at 4 (Breyer, J., concurring in judgment) (“The circumstances surrounding the display’s placement on the capital grounds, and its physical setting suggest that the State itself intended the . . . nonreligious aspects of the tablets’ message to predominate”). And the fact that at the posting of the exhibit a clergyman was present is unremarkable (clergymen taking particular pride in the role of the Ten Commandments in our civic history); and even more unremarkable the fact that the clergyman “testified to the certainty of the existence of God,”.

21. The Court has in the past prohibited government action that “proselytize or advance any one, or ... disparage any other, faith or belief,” see *Marsh*, 463 U. S., at 794-795, 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*, 505 U. S., at 592 (prayer at high-school graduation invalid because of “subtle coercive pressure”); *id.*, at 642 (Scalia, J., dissenting). 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.” 492 U. S., at 664 (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)³⁸.

The Court also points to the Counties' second displays, which featured a number of statements in historical documents reflecting a religious influence, and the resolutions that accompanied their erection, as evidence of an impermissible religious purpose³⁹. In the Court's view, "[t]he [second] display's unstinting focus ... on religious passages, show[s] that the Counties were posting the Commandments precisely because of their sectarian content." Ante, at 22. No, all it necessarily shows is that the exhibit was meant to focus upon the historic role of religious belief in our national life which is entirely permissible. And the same can be said of the resolution. To forbid any government focus upon this aspect of our history is to display what Justice Goldberg called "untutored devotion to the concept of neutrality," *Abington Township*, 374 U. S., at 306 (concurring opinion), that would commit the Court (and the Nation) to a revisionist agenda of secularization. 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 un-mistakable in the earlier displays." Ante, at 24. 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 23-24. But that

³⁸ 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, ante, at 13 (dissenting opinion). I think not. The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not). 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.

³⁹ Posted less than a month after respondents filed suit, the second displays included an excerpt from the Declaration of Independence, the Preamble to the Kentucky Constitution, a page from the Congressional Record declaring 1983 to be the Year of the Bible and the proclamation of President Reagan stating the same, a proclamation of President Lincoln designating April 30, 1863 as a National Day of Prayer and Humiliation, an excerpt from Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" stating that "[t]he Bible is the best gift God has ever given to man," and the Mayflower Compact. 96 F. Supp. 2d 679, 684 (ED Ky., 2000). The Counties erected the displays in accordance with a resolution passed by their legislative bodies, authorizing the County-Judge Executives "to read or post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded," and to display alongside the Ten Commandments copies of the documents listed above "without censorship because of any Christian or religious references in these writings, documents, and historical records." Def. Exh. 1 in Memorandum in Support of Defendants' Motion to Dismiss in Civ. A. No. 99-507, p. 1 (ED Ky.) (hereinafter Def. Exh. 1).

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. After complying with the District Court’s order to remove the second displays “immediately,” and erecting new displays that in content and by express assertion reflected a different purpose from that identified in the resolutions, the Counties had no reason to believe that their previous resolutions would be deemed to be the basis for their actions⁴⁰. After the Counties discovered that the sentiments expressed in the resolutions could be attributed to their most recent displays (in oral argument before this Court), they repudiated them immediately.

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 first and second displays to the third. Given the presumption of regularity that always accompanies our review of official action, see *supra*, at 18-19 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 24, 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.

⁴⁰ Contrary to the Court’s suggestion, see *ante*, at 24, n. 20, it is clear that the resolutions were closely tied to the second displays, but not to the third. Each of the documents included in the second displays was authorized by the resolutions, and those displays, consistent with the resolutions’ direction to “post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded,” Def. Exh. 1, consisted of a large copy of the Ten Commandments alongside much smaller framed copies of other historical, religious documents. The third displays, in contrast, included documents not mentioned in the resolutions (the Magna Carta and a picture of Lady Justice) and did not include documents authorized by the resolutions (correspondence and proclamations of Abraham Lincoln and the Resolution of Congress declaring 1983 to be the Year of the Bible). The resolutions also provided that they were to be posted beside the displays that they authorized. Def. Exh. 1, at 9. Yet respondents have never suggested the resolutions were posted next to the third displays, and the record before the Court indicates that they were not. The photos included in the Appendix show that the third displays included 10 frames the nine historical documents and the prefatory statement explaining the relevance of each of the documents. See App. to Pet. for Cert. 177a (McCreary County), 178a (Pulaski County).

Supreme Court of the United States

27 june 2005 - n. 03-1500

Non contrasta con il Primo emendamento del Bill of Rights ovvero, in particolare, con la clausola di separazione, la presenza, nel parco del Palazzo del Governo, di una lapide recante l'incisione dei Dieci Comandamenti, laddove possa ritenersi, in ragione della particolarità del contesto dell'esposizione, in cui sono presenti varie altre opere di significato più chiaramente civile, che essa si ricolleggi alla tradizione del popolo statunitense e comunque non trasmetta un chiaro messaggio di natura religiosa.

Among the 21 historical markers and 17 monuments surrounding the Texas State Capitol is a 6-foot-high monolith inscribed with the Ten Commandments. The legislative record illustrates that, after accepting the monument from the Fraternal Order of Eagles a national social, civic, and patriotic organization the State selected a site for it based on the recommendation of the state organization that maintains the capitol grounds. Petitioner, an Austin resident who encounters the monument during his frequent visits to those grounds, brought this 42 U. S. C. §1983 suit seeking a declaration that the monument's placement violates the First Amendment's Establishment Clause and an injunction requiring its removal. Holding that the monument did not contravene the Clause, the District Court found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency, and that a reasonable observer, mindful of history, purpose, and context, would not conclude that this passive monument conveyed the message that the State endorsed religion. The Fifth Circuit affirmed.

Held: The judgment is affirmed. 351 F. 3d 173, affirmed.

The Chief Justice, joined by Justice Scalia, Justice Kennedy, and Justice Thomas, concluded that the Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. Reconciling the strong role played by religion and religious traditions throughout our Nation's history, see *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 212-213, with the principle that governmental intervention in religious matters can itself endanger religious freedom requires that the Court neither abdicate its responsibility to maintain a division between church and state nor evince a hostility to religion, e.g., *Zorach v. Clauson*, 343 U. S. 306, 313-314. While the Court has sometimes pointed to *Lemon v. Kurtzman*, 403 U. S. 602, for the governing test, *Lemon* is not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds. Instead, the analysis should be driven by both the monument's nature and the Nation's history. From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. *Lynch v. Donnelly*, 465 U. S. 668, 674. Texas' display of the Commandments on government property is typical of such acknowledgments. Representations of the Commandments appear throughout this Court and its grounds, as well as the Nation's Capital. Moreover, the Court's opinions, like its building, have recognized the role the Decalogue plays in America's heritage. See, e.g., *McGowan v. Maryland*, 366 U. S. 420, 442, 462. While the Commandments are religious, they

have an undeniable historical meaning. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. See, e.g., *Lynch v. Donnelly*, supra, at 680, 687. There are, of course, limits to the government's display of religious messages or symbols. For example, this Court held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham*, 449 U. S. 39, 41-42. However, neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend beyond the context of public schools to a legislative chamber, see *Marsh v. Chambers*, 463 U. S. 783, or to capitol grounds. Texas' placement of the Commandments monument on its 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, petitioner here apparently walked by the monument for years before bringing this suit. *Schempp*, supra, and *Lee v. Weisman*, 505 U. S. 577, distinguished. Texas has treated her capitol grounds monuments as representing several strands in the State's political and legal history. The inclusion of the Commandments monument in this group has a dual significance, partaking of both religion and government, that cannot be said to violate the Establishment Clause. Pp. 3-12.

Justice Breyer concluded that this is a difficult borderline case where none of the Court's various tests for evaluating Establishment Clause questions can substitute for the exercise of legal judgment. See, e.g., *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 305 (Goldberg, J., concurring). 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 First Amendment's Religion Clauses to assure the fullest possible scope of religious liberty and tolerance for all, to avoid the religious divisiveness that promotes social conflict, and to maintain the separation of church and state. No exact formula can dictate a resolution to factintensive cases such as this. Despite the Commandments' religious message, an inquiry into the context in which the text of the Commandments is used demonstrates that the Commandments also convey a secular moral message about proper standards of social conduct and a message about the historic relation between those standards and the law. The circumstances surrounding the monument's placement on the capitol grounds and its physical setting provide a strong, but not conclusive, indication that the Commandments' text as used on this monument conveys a predominantly secular message. The determinative factor here, however, is that 40 years passed in which the monument's presence, legally speaking, went unchallenged (until the single legal objection raised by petitioner). Those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their belief systems, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to establish religion. See *ibid.* The public visiting the capitol grounds is more likely to have considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. For these reasons, the Texas display falls on the permissible side of the constitutional line. Pp. 1-8.

Rehnquist, C. J., announced the judgment of the Court and delivered an opinion, in which Scalia, Kennedy, and Thomas, JJ., joined. Scalia, J., and Thomas, J., filed concurring opinions. Breyer, J., filed an opinion concurring in the judgment. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined. O'Connor, J., filed a dissenting opinion. Souter, J., filed a dissenting opinion, in which Stevens and Ginsburg, JJ., joined.

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)¹. The monolith challenged here stands 6-feet high and 32-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. After a bench trial, the District Court held that the monument did not contravene the Establishment Clause. It found that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency. The District Court also determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion. The Court of Appeals affirmed the District Court’s holdings with respect to the monument’s purpose and effect. 351 F. 3d 173 (CA5 2003). We granted certiorari, 543 U. S. ____ (2004), and now affirm.

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 Town-*

¹ The monuments are: Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts’ Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.

ship v. Schempp, 374 U. S. 203 (1963): "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 Law-giver of the Universe ... guide them into every measure which may be worthy of his [blessing ...]'. " *Id.*, at 212–213.² 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*, 343 U. S. 306, 313–314 (1952). See also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 845–846 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires")³.

Opinion of Rehnquist, C. J.

These two faces are evident in representative cases both upholding⁴ and invalida-

² See also *Engel v. Vitale*, 370 U. S. 421, 434 (1962) ("The history of man is inseparable from the history of religion"); *Zorach v. Clauson*, 343 U. S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being").

³ Despite Justice Stevens' recitation of occasional language to the contrary, *post*, at 4–5, 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., *Cutter v. Wilkinson*, 544 U. S. ___ (2005); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U. S. 327 (1987); *Lynch v. Donnelly*, 465 U. S. 668 (1984); *Marsh v. Chambers*, 463 U. S. 783 (1983); *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664 (1970). Even the dissenters do not claim that the First Amendment's Religion Clauses forbid all governmental acknowledgments, preferences, or accommodations of religion. See *post*, at 6 (opinion of Stevens, J.) (recognizing that the Establishment Clause permits some "recognition" or "acknowledgment" of religion); *post*, at 5, and *n.* 4 (opinion of Souter, J.) (discussing a number of permissible displays with religious content).

⁴ *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002) (upholding school voucher program); *Good*

ting⁵ laws under the Establishment Clause. Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman*, 403 U. S. 602 (1971), as providing the governing test in Establishment Clause challenges⁶. Compare *Wallace v. Jaffree*, 472 U. S. 38 (1985) (applying *Lemon*), with *Marsh v. Chambers*, 463 U. S. 783 (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*, 413 U. S. 734, 741 (1973). Many of our recent cases simply have not applied the *Lemon* test. See, e.g., *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002); *Good News Club v. Milford Central School*, 533 U. S. 98 (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test. 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 ground. 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*, 465 U. S. 668 (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.*, at 674. For example, both Houses passed

News Club v. Milford Central School, 533 U. S. 98 (2001) (holding that allowing religious school groups to use school facilities does not violate the Establishment Clause); *Agostini v. Felton*, 521 U. S. 203 (1997) (approving a program that provided public employees to teach remedial classes at religious and other private schools), overruling *Aguilar v. Felton*, 473 U. S. 402 (1985) (barring public school teachers from going to parochial schools to provide remedial education to disadvantaged children), and *School Dist. of Grand Rapids v. Ball*, 473 U. S. 373 (1985) (striking down a program that provided classes to religious school students at public expense in classrooms leased from religious schools); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (holding that the Establishment Clause does not bar disbursement of funds from student activity fees to religious organizations); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993) (allowing a public school district to provide a sign language interpreter to a deaf student at a Catholic high school as part of a federal program for the disabled); *Lynch v. Donnelly*, *supra* (upholding a Christmas display including a crèche); *Marsh v. Chambers*, *supra* (upholding legislative prayer); *Mueller v. Allen*, 463 U. S. 388 (1983) (upholding tax deduction for certain expenses incurred in sending one’s child to a religious school).

⁵ *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000) (holding unconstitutional student-initiated and student-led prayer at school football games); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U. S. 687 (1994) (invalidating a state law that created a new school district for a single religious community); *Lee v. Weisman*, 505 U. S. 577 (1992) (prohibiting officially sponsored graduation prayers); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989) (holding the display of a crèche in a courthouse unconstitutional but allowing the display of a menorah outside a county building); *Texas Monthly, Inc. v. Bullock*, 489 U. S. 1 (1989) (plurality opinion) (invalidating a sales tax exemption for all religious periodicals); *Edwards v. Aguillard*, 482 U. S. 578 (1987) (invalidating a law mandating the teaching of creationism if evolution was taught); *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703 (1985) (invalidating state law that gave employees an absolute right not to work on their Sabbath); *Wallace v. Jaffree*, 472 U. S. 38 (1985) (invalidating law mandating a daily minute of silence for meditation or voluntary prayer).

⁶ *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’”. 403 U. S., at 612-613 (citation omitted).

resolutions in 1789 asking President George Washington to issue a Thanks-giving 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: “Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing use-ful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.” 1 J. Richardson, *Messages and Papers of the Presidents, 1789-1897*, p. 64 (1899). 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,” *School Dist. of Abington Township v. Schempp*, 374 U. S., at 212, and that “[t]he history of man is inseparable from the history of religion,” *Engel v. Vitale*, 370 U. S. 421, 434 (1962)⁷. 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*, 463 U. S., at 792⁸. Such a practice, we thought, was “deeply embedded in the history and tradition of this country.” *Id.*, at 786. 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.*, at 790-791. With similar reasoning, we have upheld laws, which originated from one of the Ten Commandments, that prohibited the sale of merchandise on Sunday. *McGowan v. Maryland*, 366 U. S. 420, 431-440 (1961); see *id.*, at 470-488 (separate opinion). In this case we are faced with a display of the Ten Commandments on government property outside the Texas State

⁷ See also *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 26 (2004) (REhnquist, C. J., concurring in judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound”); *id.*, at 35-36 (O’Connor, J., concurring in judgment) (“It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths”); *Lynch v. Donnelly*, 465 U. S., at 675 (“Our history is replete with official references to the value and invocation of Divine guidance”).

⁸ 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. 463 U. S., at 793-794, and n. 14.

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 Com-mandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets. Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives⁹. Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage. See, e.g., *McGowan v. Maryland*, 366 U. S., at 442; *id.*, at 462 (separate opinion of Frankfurter, J.)¹⁰. 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. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Comandments

⁹ 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".

¹⁰ See also *Edwards v. Aguillard*, 482 U. S., at 593-594; *Lynch v. Donnelly*, 465 U. S., at 677-678; *id.*, at 691 (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S., at 652-653 (Stevens, J., concurring in part and dissenting in part); *Stone v. Graham*, 449 U. S. 39, 45 (1980) (Rehnquist, J., dissenting).

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*, 465 U. S., at 680, 687; *Marsh v. Chambers*, 463 U. S., at 792; *McGowan v. Maryland*, *supra*, at 437-440; *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 676-678 (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*, 449 U. S. 39 (1980) (*per curiam*). In the classroom context, we found that the Kentucky statute had an im-proper and plainly religious purpose. *Id.*, at 41. As evidenced by *Stone's* almost exclusive reliance upon two of our school prayer cases, *id.*, at 41-42 (citing *School Dist. of Abington Township v. Schempp*, 374 U. S. 203 (1963), and *Engel v. Vitale*, 370 U. S. 421 (1962)), it stands as an exam-ple of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U. S. 578, 583-584 (1987). Compare *Lee v. Weisman*, 505 U. S. 577, 596-597 (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." 482 U. S., at 584-585. 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 grounds¹¹. 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

¹¹ Nor does anything suggest that *Stone* would extend to displays of 12 *Van Orden v. Perry* the Ten Commandments that lack a "plainly religious," "pre-eminent purpose," *id.*, at 41. See *Edwards v. Aguillard*, *supra*, at 593-594 ("[*Stone*] did not mean that no use could ever be made of the Ten Com-mandments, 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.

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.*, post, at 1-11 (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 10. He properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history. Ante, at 6-8. For those reasons, I join The Chief Justice's opinion in full. This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause. I have previously suggested that the Clause's text and history "resist incorporation" against the States. See *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 46, (2004) (opinion concurring in judgment); see also *Zelman v. Simmons-Harris*, 536 U. S. 639, 677-680, and n. 3 (2002) (opinion concurring). If the Establishment Clause does not re-strain the States, then it has no application here, where only state action is at issue.

Even if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, see *Cutter v. Wilkinson*, 544 U. S. ___, ___, n. 3 (2005) (slip op., at 3, n. 3) (Thomas, J., concurring), our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily [to] involve actual legal coercion." *Newdow*, supra, at 52 (Thomas, J., concurring in judgment); *Lee v. Weisman*, 505 U. S. 577, 640 (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"). "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." *Cutter*, supra, at ___ (slip op., at 4) (Thomas, J., concurring). And "government practices that have nothing to do with creating or maintaining ... coercive state establishments" simply do not "implicate the possible liberty interest of being free from coercive state establishments." *Newdow*, supra, at 53 (Thomas, J., concurring in judgment). There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause.

Returning to the original meaning would do more than simplify our task. It also would avoid the pitfalls present in the Court's current approach to such challenges.

This Court's precedent elevates the trivial to the proverbial "federal case," by making benign signs and postings subject to challenge. Yet even as it does so, the Court's precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance. Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or the nonadherent's beliefs, and provides no principled way to choose between them. Even worse, the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused an observation that is hardly new. See *Newdow*, *supra*, at 45, n. 1 (Thomas, J., concurring in judgment) (collecting cases).

First, this Court's precedent permits even the slightest public recognition of religion to constitute an establishment of religion. For example, individuals frequenting a county courthouse have successfully challenged as an Establishment Clause violation a sign at the courthouse alerting the public that the building was closed for Good Friday and containing a 4-inch high crucifix. *Granzeier v. Middleton*, 955 F. Supp. 741, 743, and n. 2, 746-747 (E.D. Ky. 1997), *aff'd* on other grounds, 173 F.3d 568, 576 (CA6 1999). Similarly, a park ranger has claimed that a cross erected to honor World War I veterans on a rock in the Mojave Desert Preserve violated the Establishment Clause, and won. See *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204-1205, 1215-1217 (C.D. Cal. 2002). If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge. Still other suits have charged that city seals containing religious symbols violate the Establishment Clause. See, e.g., *Robinson v. Edmond*, 68 F.3d 1226 (CA10 1995); *Murray v. Austin*, 947 F.2d 147 (CA5 1991); *Friedman v. Board of Cty. Comm'rs of Bernalillo Cty.*, 781 F.2d 777 (CA10 1985) (*en banc*). In every instance, the litigants are mere "[p]layers by ... free to ignore [such symbols or signs], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part).

Second, in a seeming attempt to balance out its willingness to consider almost any acknowledgment of religion an establishment, in other cases Members of this Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation. See, e.g., *id.*, at 630-631 (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 716-717 (1984) (Brennan, J., dissenting). But words such as "God" have religious significance. For example, just last Term this Court had before it a challenge to the recitation of the Pledge of Allegiance, which includes the phrase "one Nation under God." The declaration that our country is "one Nation under God" necessarily "entail[s] an affirmation that God exists." *Newdow*, *supra*, at 48 (Thomas, J., concurring in judgment). This phrase is thus anathema to those who reject God's existence and a validation of His existence to those who accept it. Telling either nonbelievers or believers that the words "under God" have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning. Words like "God" are not vulgarities for which the shock value diminishes with each successive utterance. Even when this Court's precedents recognize the religious meaning of symbols or words, that recognition fails to respect fully religious belief or disbelief. This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged di-

splay. See, e.g., *Cape Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 780 (1995) (O'Connor, J., concurring) (presuming that a reasonable observer is "aware of the history and context of the community and forum in which the religious display appears"). In looking to the view of this unusually informed observer, this Court inquires whether the sign or display "sends the ancillary message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 309-310 (2000) (quoting *Lynch*, *supra*, at 688 (O'Connor, J., concurring)). This analysis is not fully satisfying to either nonadherents or adherents. For the nonadherent, who may well be more sensitive than the hypothetical "reasonable observer," or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views. In sum, this Court's effort to assess religious meaning is fraught with futility.

Finally, the very "flexibility" of this Court's Establishment Clause precedent leaves it incapable of consistent application. See *Edwards v. Aguillard*, 482 U. S. 578, 640 (1987) (Scalia, J., dissenting) (criticizing the *Lemon* test's "flexibility" as "the absence of any principled rationale" (internal quotation marks omitted)). The inconsistency between the decisions the Court reaches today in this case and in *McCreary County v. American Civil Liberties Union of Ky.*, *post*, p. ?????, only compounds the confusion. The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. See, e.g., *Harris v. Zion, Lake Cty., Ill.*, 927 F.2d 1401, 1425 (CA7 1991) (Easterbrook, J., dissenting) ("Line drawing in this area will be erratic and heavily influenced by the personal views of the judges"); *post*, at 3 (Breyer, J., concurring in judgment) ("I see no test-related substitute for the exercise of legal judgment"). The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges. Much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application. While the Court correctly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order.

Justice Breyer, concurring in the judgment.

In *School Dist. of Abington Township v. Schempp*, 374 U. S. 203 (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.*, at 306 (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.*, at 305. 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*, 536 U. S. 639, 717-729 (2002) (Breyer, J., dissenting). They seek to maintain that “separation of church and state” that has long been critical to the “peace-ful 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.*, post, at 1. 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*, supra, at 305 (concurring opinion); see also *Lee v. Weisman*, 505 U. S. 577, 587 (1992); *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15-16 (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*, 492 U. S. 573, 593-594 (1989); *Zelman*, supra, at 723-725 (Breyer, J., dissenting). But the Establishment Clause does not com-pel the government to purge from the public sphere all that in any way partakes of the religious. See, e.g., *Marsh v. Chambers*, 463 U. S. 783 (1983). Such absolutism is not only inconsistent with our national traditions, see, e.g., *Lemon v. Kurtzman*, 403 U. S. 602, 614 (1971); *Lynch v. Donnelly*, 465 U. S. 668, 672-678 (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*, 374 U. S., at 306 (concurring opinion). Where the Establishment Clause is at issue, tests designed to measure “neutrality” alone are insufficient, both because it is sometimes difficult to determine when a legal rule is “neutral,” and because “untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.” *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*, supra, at 612-613 (setting forth what has come to be known as the “Lemon test”); *Lynch*, supra, at 687 (O’Connor, J., concurring) (setting forth the “endorsement test”); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 800, n. 5 (1995) (Stevens, J., dissenting) (agreeing that an “endorsement test” should apply but criticizing its “reasonable observer” standard); *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 319 (2000) (Rehnquist, C. J., dissenting) (noting *Lemon*’s “checked career in the decisional law of this Court”); *County of Allegheny*, supra, at 655-656 (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, *supra*, at 305 (Goldberg, J., concurring); cf. Zelman, *supra*, at 726-728 (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 guide-posts and might well lead to the same result the Court reaches today, see, e.g., Lemon, *supra*, at 612-613; Capitol Square, *supra*, at 773-783 (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 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*, 374 U. S., at 305 (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 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*, 505 U. S., at 592; *Stone v. Graham*, 449 U. S. 39 (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 21-25 (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*, 403 U. S., at 612-613 (internal quotation marks omitted); see also *Capitol Square*, 515 U. S., at 773-783 (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*, 536 U. S., at 717-729 (Breyer, J., dissenting).

Justices Goldberg and Harlan concluded in *Schempp* that 8 *Van Orden v. Perry* Breyer, J., concurring in judgment

“[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.” 374 U. S., at 308 (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 3-4, n. 3, 6-9. Nor can I agree with Justice Scalia’s dissent in *McCreary County*, *post*, at 1. I do agree with Justice O’Connor’s statement of principles in *McCreary County*, *post*, at 1, 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.

APPENDIX A TO OPINION OF BREYER, J.
ß Red Arrow = Ten Commandments Monument

APPENDIX B TO OPINION OF BREYER, J. SEVENS, J., 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 following message: “I AM the LORD thy God. “Thou shalt have no other gods before me. “Thou shalt not make to thyself any graven images. “Thou shalt not take the Name of the Lord thy God in vain. “Remember the Sabbath day, to keep it holy. “Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee. “Thou shalt not kill. “Thou shalt not commit adultery. “Thou shalt not steal. “Thou shalt not bear false witness against thy neighbor. “Thou shalt not covet thy neighbor’s house. “Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.” See Appendix, *infra*. 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”¹² is to be preserved if there remains any meaning to the “wholesome

¹² *Reynolds v. United States*, 98 U. S. 145, 164 (1879); see also *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947).

‘neutrality’ of which this Court’s [Establishment Clause] cases speak,” *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 222 (1963) 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. See, e.g., *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 797 (1995) (Stevens, J., dissenting). 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*, 492 U. S., at 651 (Stevens, J., concurring in part and dissenting in part)¹³. 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 state¹⁴. This metaphorical wall protects principles long recognized and often recited in this Court’s cases. The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality government may not exercise a preference for one religious faith over another. See, e.g., *McCreary County v. American Civil Liberties Union, Ky.*, post, at 27-29¹⁵. This essential command, however, is not merely a prohibition against the government’s differentiation among religious sects. We

¹³ As Senator Danforth recently reminded us, “efforts to haul references of God into the public square, into schools and courthouses, are far more apt to divide Americans than to advance faith.” Danforth, *Onward, Moderate Christian Soldiers*, N. Y. Times, June 17, 2005, p. A27.

¹⁴ The accuracy and utility of this metaphor have been called into question. See, e.g., *Wallace v. Jaffree*, 472 U. S. 38, 106 (1985) (Rehnquist, J., dissenting); see generally P. Hamburger, *Separation of Church and State* (2002). Whatever one may think of the merits of the historical debate surrounding Jefferson and the “wall” metaphor, this Court at a minimum has never questioned the concept of the “separation of church and state” in our First Amendment jurisprudence. THE Chief Justice’s opinion affirms that principle. Ante, at 4 (demanding a “separation between church and state”). Indeed, even the Court that famously opined that “[w]e are a religious people whose institutions presuppose a Supreme Being,” *Zorach v. Clauson*, 343 U. S. 306, 313 (1952), acknowledged that “[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated,” id., at 312. The question we face is how to give meaning to that concept of separation.

¹⁵ There is now widespread consensus on this principle. See *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947) (“Neither a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another”); *School District of Abington Township v. Schempp*, 374 U. S. 203, 226 (1963) (“In the relation-ship between man and religion, the State is firmly committed to a position of neutrality”); *Larson v. Valente*, 456 U. S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another”); see also *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U. S. 687, 748 (1994) (Scalia, J., dissenting) (“I have always believed ... that the Establishment Clause prohibits the favoring of one religion over others”); but see *Church of Holy Trinity v. United States*, 143 U. S. 457, 470-471 (1892).

have repeatedly reaffirmed that neither a State nor the Federal Government “can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins*, 367 U. S. 488, 495 (1961) (footnote omitted)¹⁶. This principle is based on the straightforward notion that governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State’s banner. See *Abington*, 374 U. S., at 222. Acknowledgments of this broad understanding of the neutrality principle are legion in our cases¹⁷. Strong arguments to the contrary have been raised from time to time, perhaps the strongest in then-Justice Rehnquist’s scholarly dissent in *Wallace v. Jaffree*, 472 U. S. 38, 91-114 (1985)¹⁸. Powerful as his argument was, we squarely rejected it and thereby reaffirmed the principle that the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith. As we wrote, “the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embodies the right to select any religious faith or none at all.” *Id.*, at 52-53. In restating this principle, I do not discount the importance of avoiding an overly strict interpretation of the metaphor so often used to define the reach of the Establishment Clause. The plurality is correct to note that “religion and religious traditions” have played a “strong role ... throughout our nation’s history.” *Ante*, at 3. This Court has often recognized “an unbroken history of official acknowledgment ... of the role of religion in American life.” *Lynch v. Donnelly*, 465 U. S. 668, 674 (1984); accord, *Edwards v. Aguillard*, 482 U. S. 578, 606-608 (1987) (Powell, J., concurring). Given this history, it is unsurprising that a religious symbol may at times become an important feature of a familiar landscape or a reminder of an important event in the history of a community. The wall that separates the church from the State does not prohibit the government from acknowledging the religious beliefs and practices of the American people, nor does it require governments to hide works of art or historic memorabilia from public

¹⁶ In support of this proposition, the *Torcaso* Court quoted James Iredell, who in the course of debating the adoption of the Federal Constitution in North Carolina, stated: “it is objected that the people of America may perhaps choose representatives who have no religion at all, and that Pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?” 367 U. S., at 495, n. 10 (quoting 4 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 197 (1836 ed.)).

¹⁷ See *Everson*, 330 U. S., at 18 (the Establishment Clause “requires the state to be ... neutral in its relations with groups of religious believers and non-believers”); *Abington*, 374 U. S., at 216 (rejecting the proposition that the Establishment Clause “forbids only governmental preference of one religion over another”); *Wallace*, 472 U. S., at 52-55 (the interest in “forestalling intolerance extends beyond intolerance among Christian sects or even intolerance among ‘religions’ to encompass intolerance of the disbeliever and the uncertain”); cf. *Zorach*, 343 U. S., at 325 (Jackson, J., dissenting) (“The day that this country ceases to be free for irreligion it will cease to be free for religion except for the sect that can win political power”).

¹⁸ Justice Scalia’s dissent in the other Ten Commandments case we decide today, see *McCreary County v. American Civil Liberties Union of Ky.*, post, at 1-11, raises similar objections. I address these objections directly in Part III.

view just because they also have religious significance. This case, however, is not about historic preservation or the mere recognition of religion. The issue is obfuscated rather than clarified by simplistic commentary on the various ways in which religion has played a role in American life, see ante, at 3-8 (plurality opinion), and by the recitation of the many extant governmental “acknowledgments” of the role the Ten Commandments played in our Nation’s heritage¹⁹. Ante, at 8-9, and n. 8. Surely, the mere compilation of religious symbols, none of which includes the full text of the Commandments and all of which are exhibited in different settings, has only marginal relevance to the question presented in this case. The monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State’s refusal to remove it upon objection be explained as a simple desire to preserve a historic relic. This Nation’s resolute commitment to neutrality with respect to religion is flatly inconsistent with the plurality’s wholehearted validation of an official state endorsement of the message that there is one, and only one, God.

II When the Ten Commandments monument was donated to the State of Texas in 1961, it was not for the purpose of commemorating a noteworthy event in Texas history, signifying the Commandments’ influence on the development of secular law, or even denoting the religious beliefs of Texans at that time. To the contrary, the donation was only one of over a hundred largely identical monoliths, and of over a thousand paper replicas, distributed to state and local governments throughout the Nation over the course of several decades. This ambitious project was the work of the Fraternal Order of Eagles, a well-respected benevolent organization whose good works have earned the praise of several Presidents²⁰. As the story goes, the program was initiated by the late Judge E. J. Ruegemer, a Minnesota juvenile court judge and then-Chairman of the Eagles National Commission on Youth Guidance. Inspired by a juvenile offender who had never heard of the Ten Commandments, the judge approached the Minnesota Eagles with the idea of distributing paper copies of the Commandments to be posted in courthouses nationwide. The State’s Aerie undertook this project and its popularity spread. When Cecil B. DeMille, who at that time

¹⁹ Though this Court has subscribed to the view that the Ten Commandments influenced the development of Western legal thought, it has not officially endorsed the far more specific claim that the Ten Commandments played a significant role in the development of our Nation’s foundational documents (and the subsidiary implication that it has special relevance to Texas). Although it is perhaps an overstatement to characterize this latter proposition as “idiotic,” see Tr. of Oral Arg. 34, as one Member of the plurality has done, at the very least the question is a matter of intense scholarly debate. Compare Brief for Legal Historians and Law Scholars as Amicus Curiae in *McCreary County v. American Civil Liberties Union of Ky.*, O. T. 2004, No. 03-1693, with Brief for American Center for Law and Justice as Amici Curiae. Whatever the historical accuracy of the proposition, the District Court categorically rejected respondent’s suggestion that the State’s actual purpose in displaying the Decalogue was to signify its influence on secular law and Texas institutions. App. to Pet. for Cert. A-32.

²⁰ See Brief for Fraternal Order of Eagles as Amicus Curiae 2-3. The Order was formed in 1898 by six Seattle theater owners, promptly joined by actors, playwrights, and stagehands, and rapidly expanded to include a nationwide membership numbering over a million. Id., at 2; see also *Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 229, 59 P. 3d 655, 657 (2002) (en banc); *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 180 Ore. App. 420, 422, 43 P. 3d 1130, 1131 (2002).

was filming the movie *The Ten Commandments*, heard of the judge's endeavor, he teamed up with the Eagles to produce the type of granite monolith now displayed in front of the Texas Capitol and at court-house squares, city halls, and public parks throughout the Nation. Granite was reportedly chosen over DeMille's original suggestion of bronze plaques to better replicate the original Ten Commandments²¹. The donors were motivated by a desire to "inspire the youth" and curb juvenile delinquency by providing children with a "code of conduct or standards by which to govern their actions"²². It is the Eagles' belief that disseminating the message conveyed by the Ten Commandments will help to persuade young men and women to observe civilized standards of behavior, and will lead to more productive lives. Significantly, although the Eagles' organization is nonsectarian, eligibility for membership is premised on a belief in the existence of a "Supreme Being"²³. As described by the Eagles themselves: "in searching for a youth guidance program, [we] recognized that there can be no better, no more defined program of Youth Guidance, and adult guidance as well, than the laws handed down by God Himself to Moses more than 3000 years ago, which laws have stood unchanged through the years. They are a fundamental part of our lives, the basis of all our laws for living, the foundation of our relationship with our Creator, with our families and with our fellow men. All the concepts we live by freedom, democracy, justice, honor are rooted in the Ten Commandments..." "The erection of these monoliths is to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life." *Anderson v. Salt Lake City Corp.*, 348 F. Supp. 1170, 1172 (Utah 1972), rev'd, 475 F.2d 29 (CA10 1973). The desire to combat juvenile delinquency by providing guidance to youths is both admirable and unquestionably secular. But achieving that goal through biblical teachings injects a religious purpose into an otherwise secular endeavor. By spreading the word of God and converting heathens to Christianity, missionaries expect to enlighten their converts, enhance their satisfaction with life, and improve their behavior. Similarly, by disseminating the "law of God" directing fidelity to God and proscribing murder, theft, and adultery the Eagles hope that this divine guidance will help wayward youths conform their behavior and improve their lives. In my judgment, these significant secular by-products that are intended consequences of religious instruction indeed, of the establishment of most religions are not the type of "secular" purposes that

²¹ See *Books v. Elkhart*, 235 F.3d 292, 294-295 (CA7 2000); *State v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013, 1017 (Colo. 1995) (en banc); see also U. S. Supreme Court will hear *Ten Commandments Case* in Early 2005, <http://www.foe.com/tencommandments/index.html> (all Internet materials as visited June 24, 2005, and available in Clerk of Court's case file).

²² *Freedom from Religion Foundation*, 898 P.2d, at 1017; accord, 1961 Tex. Gen. Laws 1995 ("These plaques and monoliths have been pre-sented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency"); Brief for Fraternal Order of Eagles as Amicus Curiae 4.

²³ According to its articles of incorporation, the Eagles' purpose is to: "Unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, all persons of good moral character who believe in a Supreme Being to inculcate the principles of liberty, truth, justice and equality..." Fraternal Order of Eagles, 148 Wash. 2d, at 229, 59 P.3d, at 657. See also *Aerie Membership Application-Fraternal Order of Eagles* <http://www.foe.com/membership/applications/aerie.html> ("I, being of sound body and mind, and believing in the existence of a Supreme Being ...").

justify government promulgation of sacred religious messages.

Though the State of Texas may genuinely wish to combat juvenile delinquency, and may rightly want to honor the Eagles for their efforts, it cannot effectuate these admirable purposes through an explicitly religious medium. See *Bowen v. Kendrick*, 487 U. S. 589, 639-640 (1988) (Blackmun, J., dissenting) (“It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes”). The State may admonish its citizens not to lie, cheat or steal, to honor their parents and to respect their neighbors’ property; and it may do so by printed words, in television commercials, or on granite monuments in front of its public buildings. Moreover, the State may provide its schoolchildren and adult citizens with educational materials that explain the important role that our fore-bears’ faith in God played in their decisions to select America as a refuge from religious persecution, to declare their independence from the British Crown, and to conceive a new Nation. See *Edwards*, 482 U. S., at 606-608 (Powell, J., concurring). The message at issue in this case, however, is fundamentally different from either a bland admonition to observe generally accepted rules of behavior or a general history lesson. The reason this message stands apart is that the Decalogue is a venerable religious text²⁴. As we held 25 years ago, it is beyond dispute that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths.” *Stone v. Graham*, 449 U. S. 39, 41 (1980) (per curiam) (footnote omitted). For many followers, the Commandments represent the literal word of God as spoken to Moses and repeated to his followers after descending from Mount Sinai. The message conveyed by the Ten Commandments thus cannot be analogized to an appendage to a common article of commerce (“In God we Trust”) or an incidental part of a familiar recital (“God save the United States and this honorable Court”). Thankfully, the plurality does not attempt to minimize the religious significance of the Ten Commandments. Ante, at 10 (“Of course, the Ten Commandments are religious they were so viewed at their inception and so remain”); ante, at 1 (Thomas, J., concurring); see also *McCreary County v. American Civil Liberties Union of Ky.*, post, at 19 (Scalia, J., dissenting). Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.

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

Moreover, despite the Eagles’ best efforts to choose a benign nondenominational

²⁴ In *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989), I noted that certain displays of religious images may convey “an equivocal message, perhaps of respect for Judaism, for religion in general, or for law.” *Id.*, at 652 (opinion concurring in part and dissenting in part). It is rather misleading, however, to quote my comment in that case to imply that I was referring to the text of the Ten Commandments simpliciter. See *McCreary County*, post, at 13-14.

text²⁵, the Ten Commandments display 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 significance²⁶. See *Lubet, The Ten Commandments in Alabama*, 15 *Constitutional Commentary* 471, 474-476 (Fall 1998). In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate. The reasonable observer, after all, has no way of knowing that this text was the product of a compromise, or that there is a rationale of any kind for the text's selection²⁷. 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*, 505 U. S. 577, 641 (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. See *Larson v. Valente*, 456 U. S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"). Even if, however, the message of the monument,

²⁵ See ante, at 5 (Breyer, J., concurring in judgment). Despite the Eagles' efforts, not all of the monuments they donated in fact conform to a "universally-accepted" text. Compare, e.g., Appendix, *infra* (including the command that "Thou shalt not make to thyself any graven images"), and *Adland v. Russ*, 307 F. 3d 471, 475 (CA6 2002) (same), with *Freedom from Religion Foundation*, 898 P. 2d, at 1016 (omitting that command altogether). The distinction represents a critical divide between the Protestant and Catholic faiths. During the Reformation, Protestants destroyed images of the Virgin Mary and of Jesus Christ that were venerated in Catholic churches. Even today there is a notable difference between the imagery in different churches, a difference that may in part be attributable to differing understandings of the meaning of what is the Second Commandment in the King James Bible translation and a portion of the First Commandment in the Catholic translation. See *Finkelman, The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *Ford. L. Rev.* 1477, 1493-1494 (2005).

²⁶ For example, in the Jewish version of the Sixth Commandment God commands: "You shall not murder"; whereas, the King James interpretation of the same command is: "Thou shalt not kill." Compare *W. Plaut, The Torah: A Modern Commentary* 534 (1981), with Appendix, *infra*. The difference between the two versions is not merely semantic; rather, it is but one example of a deep theological dispute. See *Finkelman, supra*, at 1481-1500; *P. Maier, Enumerating the Decalogue; Do We Number the Ten Commandments Correctly?* 16 *Concordia J.* 18, 18-26 (1990). Varying interpretations of this Commandment explain the actions of vegetarians who refuse to eat meat, pacifists who refuse to work for munitions makers, prison officials who refuse to administer lethal injections to death row inmates, and pharmacists who refuse to sell morning-after pills to women. See *Finkelman, supra*, at 1494-1496; *Brief for American Jewish Congress et al. as Amici Curiae* 22-23. Although the command is ambiguous, its power to motivate likeminded interpreters of its message cannot be denied.

²⁷ Justice Scalia's willingness to dismiss the distinct textual versions adhered to by different faiths in the name of generic "monotheism" based on mere speculation regarding their significance, *McCreary County*, post, at 19, is not only somewhat ironic, see *A. Scalia, A Matter of Interpretation* 23-25 (1997), but also serves to reinforce the concern that interjecting government into the religious sphere will offend "adherents who consider the particular advertisement disrespectful." *Allegheny County*, 492 U. S., at 651 (Stevens, J., concurring in part and dissenting in part).

despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism²⁸. See, e.g., *Allegheny County*, 492 U. S., at 615 (opinion of Blackmun, J.) (“The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone”). And, at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion. See, e.g., *id.*, at 590 (The Establishment Clause “guarantee[s] religious liberty and equality to the ‘infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism’ ” (quoting *Wallace*, 472 U. S., at 52)). Any of those bases, in my judgment, would be sufficient to conclude that the message should not be proclaimed by the State of Texas on a permanent monument at the seat of its government. I do not doubt that some Texans, including those elected to the Texas Legislature, may believe that the statues displayed on the Texas Capitol grounds, including the Ten Commandments monument, reflect the “ideals ... that compose Texan identity”. *Tex. H. Con. Res. 38*, 77th Leg. 6473 (2001). But Texas, like our entire country, is now a much more diversified community than it was when it became a part of the United States or even when the monument was erected. Today there are many Texans with the Establishment Clause, he does not deny that our cases whole-heartedly adopt this expression of neutrality. Instead, he suggests that this Court simply discard what he terms the “say-so of earlier Courts,” based in part on his own “say-so” that nonmonotheists make up a statistically insignificant portion of this Nation’s religious community. *McCreary County*, post, at 6. Besides marginalizing the belief systems of more than 7 million Americans by deeming them unworthy of the special protections he offers monotheists under the Establishment Clause, Justice Scalia’s measure of analysis may be cause for concern even for the self-proclaimed “popular” religions of Islam and Judaism. The number of Buddhists alone is nearly equal to the number of Muslims in this country, and while those of the Islamic and Jewish faiths only account for 2.2% of all believers, Christianity accounts for 95.5%. 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) who do not believe in the God whose Commandments are displayed at their seat of government. Many of them worship a different god or no god at all. Some may believe that the account of the creation in the Book of Genesis is less reliable than the views of men like Darwin and Einstein. The monument is no more an expression of the views of every true Texan than was the “Live Free or Die” motto that the State of New Hampshire placed on its license plates in 1969 an accurate expression of the views of every citizen of New Hampshire. See *Wooley v. Maynard*, 430 U. S. 705 (1977). Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian 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.” Pinette,

²⁸ See Brief for Hindu American Foundation et al. as Amici Curiae. Though Justice Scalia disagrees that these sentiments are consistent.

515 U. S., at 799 (Stevens, J., dissenting). “[D]isplays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal.” *Allegheny County*, 492 U. S., at 651 (Stevens, J., concurring in part and dissenting in part)²⁹. Even more than the display of a religious symbol on government property, see *Pinette*, 515 U. S., at 797 (Stevens, J., dissenting); *Allegheny County*, 492 U. S., at 650-651 (Stevens, J., concurring in part and dissenting in part), displaying this sectarian text at the state capitol should invoke a powerful presumption of invalidity. As Justice Souter’s opinion persuasively demonstrates, the physical setting in which the Texas monument is displayed far from rebutting that presumption actually enhances the religious content of its message. See post, at 6-8. The monument’s permanent fixture at the seat of Texas government is of immense significance. The fact that a monument: “is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of government itself. The ‘reasonable observer’ of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory has sponsored and facilitated its message.” *Pinette*, 515 U. S., at 801-802 (Stevens, J., dissenting). Critical examination of the Decalogue’s prominent display at the seat of Texas government, rather than generic citation to the role of religion in American life, unmistakably reveals on which side of the “slippery slope,” ante, at 8 (Breyer, J., concurring in judgment), this display must fall. God, as the author of its message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose to encourage Texans to abide by the divine code of a “Judeo-Christian” God. If this message is permissible, then the shining principle of neutrality to which we have long adhered is nothing more than mere shadow.

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 Chief Justice cites, for instance, George Washington’s 1789 Thanksgiving Proclamation in support of the proposition that the Establishment Clause does not proscribe official recognition of God’s role in our Nation’s heritage, ante, at 7-8³⁰. Further, the plurality emphatically endorses the seemingly timeless recognition that our “institutions presuppose a Supreme Being,” ante, at 4. Many of the submissions made to this Court by the parties and amici, in accord with

²⁹ The fact that this particular display has stood unchallenged for over forty years does not suggest otherwise. One need look no further than the deluge of cases flooding lower courts to realize the discord these displays have engendered. See, e.g., *Mercier v. Fraternal Order of Eagles*, 395 F. 3d 693 (CA7 2005); *ACLU Nebraska Foundation v. Plattsmouth*, 358 F. 3d 1020 (CA8 2004); *Adland v. Russ*, 307 F. 3d 471 (CA6 2002); *Sumnum v. Ogden*, 297 F. 3d 995 (CA10 2002); *Books v. Elkhart*, 235 F. 3d 292 (CA7 2000); *State v. Freedom From Religion Foundation, Inc.*, 898 P. 2d 1013 (Colo. 1995); *Anderson v. Salt Lake City Corp.*, 475 F. 2d 29 (CA10 1973).

³⁰ This is, of course, a rhetorical approach not unique to the plurality’s opinion today. Appeals to such religious speeches have frequently been used in support of governmental transmission of religious messages. See, e.g., *Wallace*, 472 U. S., at 98-104 (Rehnquist, J., dissenting); *Lee v. Weisman*, 505 U. S. 577, 633-636 (1992) (Scalia, J., dissenting); *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290, 318 (2000) (Rehnquist, C. J., dissenting); cf. *Lynch v. Donnelly*, 465 U. S. 668, 675-676 (1984).

the plurality's opinion, have relied on the ubiquity of references to God throughout our history. 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 polity³¹. 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. Moreover, the message never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze. Cf. *Allegheny County*, 492 U. S., at 664 (Kennedy, J., concurring in judgment in part and dissenting in part); ante, at 4 (Thomas, J., concurring). In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed³².

The plurality's reliance on early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional Convention in 1787³³ nor enshrined in the Constitution's text. Thus, the presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture. It does so here. In according deference to the statements of George Washington and John Adams, The Chief Justice and Justice Scalia, see ante, at 7 (plurality opinion); *McCreary County*, post, at 3-4 (dissenting opinion), fail to account for the acts and publicly espoused views of other influential leaders of that time. Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment

³¹ It goes without saying that the analysis differs when a listener is coerced into listening to a prayer. See, e.g., *Santa Fe Independent School Dist.*, 530 U. S., at 308-312.

³² With respect to the "legislative prayers" cited approvingly by The Chief Justice, ante, at 8, I reiterate my view that "the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause." *Marsh v. Chambers*, 463 U. S. 783, 823 (1983) (Stevens, J., dissenting). Thus, Justice Scalia and I are in agreement with respect to at least one point this Court's decision in *Marsh* "ignor[ed] the neutrality principle" at the heart of the Establishment Clause. *McCreary County*, post, at 8 (Scalia, J., dissenting).

³³ See, e.g., J. Hutson, *Religion and the Founding of the American Republic* 75 (1998) (noting the dearth of references to God at the Philadelphia Convention and that many contemporaneous observers of the Convention complained that "the Framers had unaccountably turned their backs on the Almighty" because they "found the Constitution without any acknowledgement of God").

Clause³⁴. The Chief Justice and Justice Scalia disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite, see, e.g., Letter from James Madison to Edward Livingston (July 10, 1822), in 5 *The Founders' Constitution* 105-106 (P. Kurland & R. Lerner eds. 1987) (hereinafter *Founders' Constitution*) (arguing that Congress' appointment of Chaplains to be paid from the National Treasury was "not with my approbation" and was a "deviation" from the principle of "immunity of Religion from civil jurisdiction")³⁵, and paper over the fact that Madison more than once repudiated the views attributed to him by many, stating unequivocally that with respect to government's involvement with religion, the "tendency to a usurpation on one side, or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference, in any way what-ever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others"³⁶. These seemingly nonconforming sentiments should come as no surprise. 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*, 370 U. S. 421, 427-429 (1962). The Chief Justice and Justice Scalia ignore the separationist impulses in accord with the principle of "neutrality" that these individuals brought to the debates surrounding the adoption of the Establishment Clause³⁷. Ardent separationists aside, there is another critical nuance lost

³⁴ See Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 *Founders' Constitution* 98; 11 *Jefferson's Writings* 428-430 (1905); see also Lee, 505 U. S., at 623-625 (Souter, J., concurring) (documenting history); Lynch, 465 U. S., at 716, n. 23 (Brennan, J., dissenting) (same).

³⁵ See also James Madison, *Detached Memoranda*, in 5 *Founders' Constitution* 103-104. Madison's letter to Livingston further argued that: "There has been another deviation from the strict principle in the Executive Proclamations of fasts & festivals, so far, at least, as they have spoken the language of injunction, or have lost sight of the equality of all religious sects in the eve of the Constitution. ... Notwithstanding the general progress made within the last two centuries in favour of this branch of liberty, & the full establishment of it, in some parts of our Country, there remains in others a strong bias towards old error, that without some sort of alliance or coalition between [Government] & Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on both the parties, that the danger cannot be too carefully guarded [against]. ... Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & [Government] will both exist in greater purity, the less they are mixed together." *Id.*, at 105-106.

³⁶ *Religion and Politics in the Early Republic* 20-21 (D. Dreisbach ed. 1996) (hereinafter *Dreisbach*) (quoting Letter from James Madison to Jasper Adams (1833)). See also Letter from James Madison to Edward Livingston (July 10, 1822), in 5 *Founders' Constitution* 106 ("We are teaching the world the great truth that [Governments] do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of [Government]").

³⁷ The contrary evidence cited by The Chief Justice and Justice Scalia only underscores the obvious fact that leaders who have drafted and voted for a text are eminently capable of violating their own

in the plurality's portrayal of history. Simply put, many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a narrower proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.

The evidence is compelling. Prior to the Philadelphia Convention, the States had begun to protect "religious freedom" in their various constitutions. Many of those provisions, however, restricted "equal protection" and "free exercise" to Christians, and invocations of the divine were commonly understood to refer to Christ³⁸. That historical background likely informed the Framers' understanding of the First Amendment. Accordingly, one influential thinker wrote of the First Amendment that "[t]he meaning of the term "establishment" in this amendment unquestionably is, the preference and establishment given by law to one sect of Christians over every other." Jasper Adams, *The Relation of Christianity to Civil Government in the United States* (Feb. 13, 1833) (quoted in Dreisbach 16). That definition tracked the understanding of the text Justice Story adopted in his famous Commentaries, in which he wrote that the "real object" of the Clause was: "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus sought to cut off the means of religious persecution, (the vice and pest of former ages,) and the power of subverting the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age." 2 J. Story, *Commentaries on the Constitution of the United States* §991, p. 701 (R. Rotunda & J. Nowak eds. 1987) (hereinafter Story); see also Wallace, 472 U. S., at 52-55, and n. 36³⁹. Along these lines, for nearly a century after the Founding, many accepted the idea that America was not just a religious nation, but "a Christian nation." *Church of Holy Trinity v. United States*, 143 U. S. 457, 471 (1892).

The original understanding of the type of "religion" that qualified for constitu-

rules. The first Congress was just as the present Congress is capable of passing unconstitutional legislation. Thus, it is no answer to say that the Founders' separationist impulses were "plainly rejected" simply because the first Congress enacted laws that acknowledged God. See McCreary County, post, at 13 (Scalia, J., dissenting). To adopt such an interpretive approach would misguidedly give authoritative weight to the fact that the Congress that passed the Fourteenth Amendment also enacted laws that tolerated segregation, and the fact that the Congress that passed the First Amendment also enacted laws, such as the Alien and Sedition Act, that indisputably violated our present understanding of the First Amendment. See n. 36, *infra*; Lee, 505 U. S., at 626 (Souter, J., concurring).

³⁸ See, e.g., Strang, *The Meaning of "Religion" in the First Amendment*, 40 Duquesne L. Rev. 181, 220-223 (2002).

³⁹ Justice Story wrote elsewhere that "Christianity is indispensable to the true interests & solid foundations of all free governments. I distinguish ... between the establishment of a particular sect, as the Religion of the State, & the Establishment of Christianity itself, without any preference of any particular form of it. I know not, indeed, how any deep sense of moral obligation or accountableness can be expected to prevail in the community without a firm persuasion of the great Christian Truths." Letter to Jasper Adams (May 14, 1833) Dreisbach 19.

tional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred “mono-theistic” religions Justice Scalia has embraced in his *McCreary County* opinion. See post, at 10-11 (dissenting opinion)⁴⁰. The inclusion of Jews and Muslims inside the category of constitutionally favored religions surely would have shocked Chief Justice Marshall and Justice Story. Indeed, Justice Scalia is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions. Perhaps this is because the history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to “God” hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. See *supra*, at 21. Justice Scalia’s inclusion of Judaism and Islam is a laudable act of religious tolerance, but it is one that is unmoored from the Constitution’s history and text, and moreover one that is patently arbitrary in its inclusion of some, but exclusion of other (e.g., Buddhism), widely practiced non-Christian religions. See *supra*, at 12, 13-14, and n. 16 (noting that followers of Buddhism nearly equal the number of Americans who follow Islam). Given the original understanding of the men who championed our “Christian nation” men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern one must ask whether Justice Scalia “has not had the courage (or the foolhardiness) to apply [his originalism] principle consistently.” *McCreary County*, post, at 7. Indeed, to constrict narrowly the reach of the Establishment Clause to the views of the Founders would lead to more than this unpalatable result; it would also leave us with an unincorporated constitutional provision in other words, one that limits only the federal establishment of “a national religion.” See *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 45 (2004) (Thomas, J., concurring in judgment); cf. A. Amar, *The Bill of Rights* 36-39 (1998). Under this view, not only could a State constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament, it would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as the official state religion. Only the Federal Government would be prohibited from taking sides, (and only then as between Christian sects). A reading of the First Amendment dependent on either of the purported original meanings expressed above would eviscerate the heart of the Establishment Clause. It would

⁴⁰ See 143 U. S., at 471 (“[W]e are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of... imposters’ ” (quoting *People v. Ruggles*, 8 Johns. 290, 295 (N. Y. Sup. Ct. 1811)); see also *Vidal v. Philadelphia*, 2 How. 127, 198-199 (1844). These views should not be read as those of religious zealots. Chief Justice Marshall himself penned the historical genesis of the Court’s assertion that our “institutions presuppose a Supreme Being,” see *Zorach*, 343 U. S., at 313, writing that the “American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it.” Letter from John Marshall to Jasper Adams (May 9, 1833) (quoted in *Dreisbach* 18-19). Accord, *Story* §988, p. 700 (“[A]t the time of the adoption of the constitution, ... the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state ...” (footnote omitted)).

replace Jefferson's "wall of separation" with a perverse wall of exclusion Christians inside, non-Christians out. It would permit States to construct walls of their own choosing Baptists inside, Mormons out; Jewish Orthodox inside, Jewish Reform out. A Clause so understood might be faithful to the expectations of some of our Founders, but it is plainly not worthy of a society whose enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance. Cf. *Abington*, 374 U. S., at 214; *Zelman v. Simmons-Harris*, 536 U. S. 639, 720, 723 (2002) (Breyer, J., dissenting). Unless one is willing to renounce over 65 years of Establishment Clause jurisprudence and cross back over the incorporation bridge, see *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940), appeals to the religiosity of the Framers ring hollow⁴¹. But even if there were a coherent way to embrace incorporation with one hand while steadfastly abiding by the Founders' purported religious views on the other, the problem of the selective use of history remains. As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star⁴². It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law re-specting 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. As we have said in the context of statutory interpretation, legislation "often [goes] beyond the principal evil [at which the statute was aimed] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by

⁴¹ Justice Scalia's characterization of this conclusion as nothing more than my own personal "assurance" is misleading to say the least. *McCreary County*, post, at 13. Reliance on our Nation's early constitutional scholars is common in this Court's opinions. In particular, the author of the plurality once noted that "Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared." *Wallace*, 472 U. S., at 104 (Rehnquist, J., dissenting). And numerous opinions of this Court, including two notable opinions authored by Justice Scalia, have seen it fit to give authoritative weight to Joseph Story's treatise when interpreting other constitutional provisions. See, e.g., *United States v. Gaudin*, 515 U. S. 506, 510-511 (1995) (Fifth Amendment); *Harmelin v. Michigan*, 501 U. S. 957, 981-982 (1991) (Eighth Amendment).

⁴² Justice Scalia's answer that incorporation does not empty "the incorporated provisions of their original meaning," *McCreary County*, post, at 15 ignores the fact that the Establishment Clause has its own unique history. There is no evidence, for example, that incorporation of the Confrontation Clause ran contrary to the core of the Clause's original understanding. There is, however, some persuasive evidence to this effect regarding the Establishment Clause. See *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 49 (2004) (Thomas, J., concurring in judgment) (arguing that the Clause was originally understood to be a "federalism provision" intended to prevent "Congress from interfering with state establishments"). It is this unique history, not incorporation writ large, that renders incoherent the postincorporation reliance on the Establishment Clause's original understanding. Justice Thomas, at least, has faced this problem headon. See *id.*, at 45 (opinion concurring in judgment). But even if the decision to incorporate the Establishment Clause was misguided, it is at this point unwise to reverse course given the weight of precedent that would have to be cast aside to reach the intended result. See Cardozo, *The Nature of the Judicial Process* 149 (1937) ("The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case").

which we are governed.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). In similar fashion, we have construed the Equal Protection Clause of the Fourteenth Amendment to prohibit segregated schools, see *Brown v. Board of Education*, 349 U. S. 294 (1955), even though those who drafted that Amendment evidently thought that separate was not unequal⁴³. We have held that the same Amendment prohibits discrimination against individuals on account of their gender, *Frontiero v. Richardson*, 411 U. S. 677 (1973), despite the fact that the contemporaries of the Amendment “doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision,” *Slaughter-House Cases*, 16 Wall. 36, 81 (1873). And we have construed “evolving standards of decency” to make impermissible practices that were not considered “cruel and unusual” at the founding. See *Roper v. Simmons*, 543 U. S. (2005) (slip op., at 1) (Stevens, J., concurring). 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 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. See *McCulloch v. Maryland*, 4 Wheat. 316, 407, 415 (1819) (“[W]e must never forget, that it is a constitution we are expounding” that is intended to “endure for ages to come, and, consequently, to be adapted to the various crises of human affairs”). Constitutions, after all, “are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas.” *Weems v. United States*, 217 U. S. 349, 373 (1910).

The principle that guides my analysis is neutrality⁴⁴. The basis for that principle is

⁴³ See *Lee*, 505 U. S., at 626 (Souter, J., concurring) (“[A]t best, ... the Framers simply did not share a common understanding of the Establishment Clause,” and at worst, their overtly religious proclamations show “that they... could raise constitutional ideals one day and turn their backs on them the next”); *Lynch v. Donnelly*, 465 U. S. 668, 716 (1984) (Brennan, J., dissenting) (same); cf. *Feldman*, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 404-405 (2002) (noting that, for the Framers, “the term ‘establishment’ was a contested one” and that the word “was used in both narrow and expansive ways in the debates of the time”).

⁴⁴ See *Hovenkamp*, *The Cultural Crises of the Fuller Court*, 104 Yale L. J. 2309, 2337-2342 (1995) (“Equal protection had not been identified with social integration when the Fourteenth Amendment was drafted in 1866, nor when it was ratified in 1868, nor when *Plessy v. Ferguson*, 163 U. S. 537 was decided in 1896”); see also 1 L. Tribe, *American Constitutional Law* §1-14, pp. 54-55, and n. 19 (3d ed. 2000) (collecting scholarship).

firmly rooted in our Nation's history and our Constitution's text. I recognize that the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians. But cf. Letter from George Washington to the Hebrew Congregation in New-port, R. I. (Aug. 18, 1790), in 6 Papers of George Washington 284, 285 (D. Twohig ed. 1996). Fortunately, we are not bound by the Framers' expectations; we are bound by the legal principles they enshrined in our Constitution. Story's vision that States should not discriminate between Christian sects has as its foundation the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, "polytheists, lauding Catholicism as the only pure religion. Under the reasoning endorsed by Justice Thomas, those programs would not be coercive because the viewer could simply turn off the television or ignore the ad. See ante, at 3 ("[T]he mere presence of the monument . . . involves no coercion" because the passerby "need not stop to read it or even to look at it").

Further, the notion that the application of a "coercion" principle would somehow lead to a more consistent jurisprudence is dubious. Enshrining coercion as the Establishment Clause touchstone fails to eliminate the difficult judgment calls regarding "the form that coercion must take." *McCreary County*, post, at 25 (Scalia, J., dissenting). Coercion may seem obvious to some, while appearing nonexistent to others. Compare *Santa Fe Independent School Dist.*, 530 U. S., at 312, with *Lee*, 505 U. S., at 642 (Scalia, J., dissenting). It may be a legal requirement or an effect that is indirectly inferred from a variety of factors. See, e.g., *Engel v. Vitale*, 370 U. S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"). In short, "reasonable people could, and no doubt would, argue about whether coercion existed in a particular situation." Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 415 (2002) and believers in unconcerned deities," *McCreary County*, post, at 10 (Scalia, J., dissenting), is in my view a direct descendant of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, forbids Texas from displaying the Ten Commandments monument the plurality so casually affirms.

IV The Eagles may donate as many monuments as they choose to be displayed in front of Protestant churches, benevolent organizations' meeting places, or on the front lawns of private citizens. The expurgated text of the King James version of the Ten Commandments that they have crafted is unlikely to be accepted by Catholic parishes, Jewish synagogues, or even some Protestant denominations, but the message they seek to convey is surely more compatible with church property than with property that is located on the government side of the metaphorical wall. The judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to "have no other gods before me," it is difficult to conceive of any textual display that would run afoul of the Establishment Clause. 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 8 (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*, 437 U. S. 153, 195 (1978) (internal quotation marks omitted). That wall, however imperfect, remains worth preserving. I respectfully dissent.

(*Omissis*)

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*, 374 U. S. 398 (1963), the Establishment Clause requires neutrality as a general rule, e.g., *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 18 (1947), and thus expresses Madison’s condemnation of “employ[ing] Religion as an engine of Civil policy,” *Memorial and Remonstrance Against Religious Assessments*, 2 Writings of James Madison 183, 187 (G. Hunt ed. 1901). A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others. Until today, only one of our cases addressed the constitutionality of posting the Ten Commandments, *Stone v. Graham*, 449 U. S. 39, 41-42 (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*, 403 U. S. 602 (1971)) as being at odds with the obligation of religious neutrality. “The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably 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.” 449 U. S. at 41-42 (footnote and citations omitted). 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 same⁴⁵. In the present case,

⁴⁵ Justice Thomas contends that the Establishment Clause cannot include such a neutrality principle because the Clause reaches only the governmental coercion of individual belief or disbelief. Ante, at 4 (concurring opinion). In my view, although actual religious coercion is undoubtedly forbidden by the Establishment Clause, that cannot be the full extent of the provision’s reach. Jefferson’s “wall” metaphor and his refusal to issue Thanksgiving proclamations, see supra, at 19, would have been nonsensical if the Clause reached only direct coercion. Further, under the “coercion” view, the Establishment Clause would amount to little more than a replica of our compelled speech doctrine, see, e.g., *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 639 (1943), with a religious flavor. A Clause so interpreted would not prohibit explicit state endorsements of religious orthodoxies of particular sects, actions that lie at the heart of what the Clause was meant to regulate. The government could, for example, take out television advertisements.

the religious purpose was evident on the part of the donating organization. When the Fraternal Order of Eagles, the group that gave the monument to the State of Texas, donated identical monuments to other jurisdictions, it was seeking to impart a religious message. See *Adland v. Russ*, 307 F. 3d 471, 475 (CA6 2002) (quoting the Eagles' statement in a letter written to Kentucky when a monument was donated to that Commonwealth: "Most of today's younger generation either have not seen the Ten Commandments or have not. Thus, a pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones. In this case, moreover, the text is presented to give particular prominence to the Commandments' first sectarian reference, "I am the Lord thy God." That proclamation is centered on the stone and written in slightly larger letters than the subsequent recitation. To ensure that the religious nature of the monument is clear to even the most casual passerby, the word "Lord" appears in all capital letters (as does the word "am"), so that the most eye catching segment of the quotation is the declaration "I AM the LORD thy God." App. to Pet. for Cert. 21. What follows, of course, are the rules against other gods, graven images, vain swearing, and Sabbath breaking. And the full text of the fifth Commandment puts forward filial respect as a condition of long life in the land "which the Lord thy God giveth thee." See *ibid.* These "[w]ords ... make [the] . . . religious meaning unmistakably clear." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 598 (1989). To drive the religious point home, and identify the message as religious to any viewer who failed to read the text, the engraved quotation is framed by religious symbols: two tablets with what appears to be ancient script on them, two Stars of David, and the superimposed Greek letters Chi and Rho as the familiar monogram of Christ. Nothing on the monument, in fact, detracts from its religious nature⁴⁶, see *ibid.* ("Here, unlike in *Lynch v. Donnelly*, 465 U. S. 668 (1984)], nothing in the context of the display detracts from the crèche's religious message"), and the plurality does not suggest otherwise. It would therefore be difficult to miss the point that the government of Texas⁴⁷ is telling everyone who sees the monument to live up to a moral code because God requires it, with both code and conception of God being rightly understood as the inheritances specifically of Jews and Christians. And it is likewise unsur-

⁴⁶ The clarity of the religious manifestation in *Stone* was unaffected by the State's effort to obscure it: the Kentucky statute that mandated posting the Commandments in classrooms also required the addition to every posting of a notation reading, "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 449 U. S., at 39-40, n. 1. been taught them. In our opinion the youth of today is in dire need of learning the simple laws of God ..."). Accordingly, it was not just the terms of the moral code, but the proclamation that the terms of the code were enjoined by God, that the Eagles put forward in the monuments they donated.

⁴⁷ That the monument also surrounds the text of the Commandments with various American symbols (notably the U. S. flag and a bald eagle) only underscores the impermissibility of Texas's actions: by juxtaposing these patriotic symbols with the Commandments and other religious signs, the monument sends the message that being American means being religious (and not just being religious but also subscribing to the Commandments, i.e., practicing a monotheistic religion).

prising that the District Court expressly rejected Texas's argument that the State's purpose in placing the monument on the capitol grounds was related to the Commandments' role as "part of the foundation of modern secular law in Texas and elsewhere." App. to Pet. for Cert. 32. The monument's presentation of the Commandments with religious text emphasized and enhanced stands in contrast to any number of perfectly constitutional depictions of them, the frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers. While Moses holds the tablets of the Commandments showing some Hebrew text, no onelooking at the lines of figures in marble relief is likely to see a religious purpose behind the assemblage or take away a religious message from it. Only one other depiction represents a religious leader, and the historical personages are mixed with symbols of moral and intellectual abstractions like Equity and Authority. See County of Allegheny, *supra*, at 652 (Stevens, J., concurring in part and dissenting in part). Since Moses enjoys no especial prominence on the frieze, viewers can readily take him to be there as a lawgiver in the company of other lawgivers; and the viewers may just as naturally see the tablets of the Commandments (showing the later ones, forbidding things like killing and theft, but without the divine preface) as background from which the concept of law emerged, ultimately having a secular influence in the history of the Nation. Government may, of course, constitutionally call attention to this influence, and may post displays or erect monuments recounting this aspect of our history no less than any other, so long as there is a context and that context is historical. Hence, a display of the Commandments accompanied by an exposition of how they have influenced modern law would most likely be constitutionally unobjectionable⁴⁸. And the Decalogue could, as Stone suggested, be integrated constitutionally into a course of study in public schools. Stone, 449 U. S., at 42⁴⁹. Texas seeks to take advantage of the recognition that visual symbol and written

⁴⁸ There is no question that the State in its own right is broadcasting the religious message. When Texas accepted the monument from the Eagles, the state legislature, aware that the Eagles "for the past several years have placed across the country ... parchment plaques and granite monoliths of the Ten Commandments ... [in order] to promote youth morality and help stop the alarming increase in delinquency," resolved "that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation." App. 97. The State, then, expressly approved of the Eagles' proselytizing, which it made on its own.

⁴⁹ For similar reasons, the other displays of the Commandments that the plurality mentions, *ante*, at 9, do not run afoul of the Establishment Clause. The statues of Moses and St. Paul in the Main Reading Room of the Library of Congress are 2 of 16 set in close proximity, statues that "represent men illustrious in the various forms of thought and activity ...". The Library of Congress: The Art and Architecture of the Thomas Jefferson Building 127 (J. Cole and H. Reeds eds. 1997). Moses and St. Paul represent religion, while the other 14 (a group that includes Beethoven, Shakespeare, Michelangelo, Columbus, and Plato) represent the nonreligious categories of philosophy, art, history, commerce, science, law, and poetry. *Ibid*. Similarly, the sculpture of the woman beside the Decalogue in the Main Reading Room is one of 8 such figures "represent[ing] eight characteristic features of civilized life and thought," the same 8 features (7 of them nonreligious) that Moses, St. Paul, and the rest of the 16 statues represent. *Id.*, at 125. The inlay on the floor of the National Archives Building is one of four such discs, the collective theme of which is not religious. Rather, the discs "symbolize the various types of Government records that were to come into the National Archive."

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*, 492 U. S., at 595 (opinion of Blackmun, J., joined by Stevens, J.); *Lynch v. Donnelly*, 465 U. S. 668, 692 (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. One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. The themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator. In like circumstances, we rejected an argument similar to the State's, noting in *County of Allegheny* that "[t]he presence of Santas or other Christmas decorations elsewhere in the ... [c]ourthouse, and of the nearby gallery forum, fail to negate the [crèche's] endorsement effect. ... The record demonstrates ... that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building." 492 U. S., at 598-599, n. 48⁵⁰. 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. E.g., ante, at 8 ("We have acknowledged, for example, that 'religion has been closely identified with our history and government,' *School Dist. of Abington Township v. Schempp*, 374 U. S., at 212, and that '[t]he history of man is inseparable

Letter from Judith A. Koucky, Archivist, Records Control Section to Catherine Millard, Oct. 1, 2003 (on file with Clerk of the Court). (The four categories are war and defense, history, justice, and legislation. Each disc is paired with a winged figure; the disc containing the depiction of the Commandments, a depiction that, notably, omits the Commandments' text, is paired with a figure representing legislation. *Ibid.*) As for Moses's "prominen[t] featur[ing] in the Chamber of the United States House of Representatives," ante, at 9 (plurality opinion), Moses is actually 1 of 23 portraits encircling the House Chamber, each approximately the same size, having no religious theme. The portraits depict "men noted in history for the part they played in the evolution of what has become American law." *Art in the United States Capitol* 282; *House Doc. No. 94-660* (1978). More importantly for purposes of this case, each portrait consists only of the subject's face; the Ten Commandments appear nowhere in Moses's portrait.

⁵⁰ Similarly permissible, though obviously of a different character, are laws that can be traced back to the Commandments (even the more religious ones) but are currently supported by nonreligious considerations. See *McCreary County v. American Civil Liberties Union of Ky.*, post, at 10 (opinion of the Court) (noting that in *McGowan v. Maryland*, 366 U. S. 420 (1961), the Court "upheld Sunday closing laws on practical secular grounds after finding that the government had forsaken the religious purposes motivating centuries-old predecessor laws").

from the history of religion,' *Engel v. Vitale*, 370 U. S. 421, 434 (1962)"). In fact, it is not until the end of its opinion that the plurality turns to the relevant precedent of *Stone*, a case actually dealing with a display of the Decalogue. 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*, 374 U. S. 203 (1963), and *Engel v. Vitale*, 370 U. S. 421 (1962). But *Stone* relied on those cases for widely applicable notions, not for any concept specific to schools. The opinion quoted *Schempp*'s statements that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," *Schempp*, *supra*, at 225, quoted in *Stone*, 449 U. S., at 42; and that "the place of the Bible as an instrument of religion cannot be gainsaid," *Schempp*, *supra*, at 224, quoted in *Stone*, *supra*, at 41, n. 3. And *Engel* was cited to support the proposition that the State was responsible for displaying the Commandments, even though their framed, printed texts were bought with private subscriptions. *Stone*, *supra*, at 42 ("[T]he mere posting of the [Commandments] under the auspices of the legislature provides the official support of the State Government that the Establishment Clause prohibits" (omission and internal quotation marks omitted)). Thus, 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. E.g., *Edwards v. Aguillard*, 482 U. S. 578, 584 (1987). *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." 449 U. S., at 42. Accordingly, our numerous prior discussions of *Stone* have never treated its holding as restricted to the classroom⁵¹. Nor can the plurality deflect *Stone* by calling the Texas monument "a far more passive use of [the Decalogue] than was the case in *Stone*, where the text confronted elementary school students every day." *Ante*, at 12. Placing a monument on the ground is not more "passive" than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it. To be sure, Kentucky's compulsory-education law meant that the schoolchildren were forced to

⁵¹ It is true that the Commandments monument is unlike the display of the Commandments considered in the other Ten Commandments case we decide today, *McCreary County*. There the Commandments were posted at the behest of the county in the first instance, whereas the State of Texas received the monument as a gift from the Eagles, which apparently conceived of the donation at the suggestion of a movie producer bent on promoting his commercial film on the Ten Commandments, *Books v. Elkhart*, 235 F. 3d 292, 294-295 (CA7 2000), cert. denied, 532 U. S. 1058 (2001). But this distinction fails to neutralize the apparent expression of governmental intent to promote a religious message: although the nativity scene in Allegheny County was donated by the Holy Name Society, we concluded that "[n]o viewer could reasonably think that [the scene] occupies [its] location [at the seat of county government] without the support and approval of the government." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 599-600 (1989).

see the display every day, whereas many see the monument by choice, and those who customarily walk the Capitol grounds can presumably avoid it if they choose. But in my judgment (and under our often inexact Establishment Clause jurisprudence, such matters often boil down to judgment, see ante, at 3-4 (Breyer, J., concurring in judgment)), this distinction should make no difference. The monument in this case sits on the grounds of the Texas State Capitol. There is something significant in the common term “state-house” to refer to a state capitol building: it is the civic home of every one of the State’s citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion. See *County of Allegheny*, 492 U. S., at 626 (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 2, an observation that echoes the State’s contention that one fact cutting in its favor is that “the monument stood ... in Austin ... for some forty years without generating any controversy or litigation,” Brief for Respondents 25. 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*, 463 U. S. 783 (1983) (legislative prayer), and we have recognized that Sunday laws have grown recognizably secular over time, *McGowan v. Maryland*, 366 U. S. 420 (1961). There is also an analogous argument, not yet evaluated, that ritualistic religious expression can become so numbing over time that its initial Establishment Clause violation becomes at some point too diminished for notice. But I do not understand any of these to be the State’s argument, which rather seems to be 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 Appeals⁵².

⁵² In any event, the fact that we have been, as the plurality says, “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,” ante, at 11, does not of course mean that anything goes outside the schoolhouse. As cases like *County of Allegheny* and *Lynch v. Donnelly*, 465 U. S. 668 (1984), illustrate, we have also closely scrutinized government displays of religious symbols. And for reasons discussed in the text, the Texas monument cannot survive even a relaxed level of scrutiny.

Regolamentazione giuridica del fenomeno religioso e crisi di sovranità: spunti problematici dalle più recenti decisioni della Corte Suprema statunitense in tema di clausola di separazione.

GIUSEPPE D'ANGELO

1. L'interesse della dottrina ecclesiasticistica per la realtà statunitense nell'ambito dell'attuale dibattito sulla crisi di sovranità e la rilevanza del rapporto diritto/religione

Già oggetto di attenzione da parte degli studiosi del diritto ecclesiastico, particolarmente interessati, attraverso le loro ampie e circostanziate analisi¹, a porre l'accento sulla necessità di indagarne "l'intrinseca realtà"², determinandone genesi e contenuti e quindi verificando la coerenza degli svolgimenti giurisprudenziali rispetto al dato costituzionale, l'approccio statunitense alla regolamentazione giuridica del fenomeno religioso ha ripreso più di recente a fornire utili spunti di riflessione, anche in relazione a profili che, almeno per certi aspetti, appaiono di più recente emersione nel contesto del più generale dibattito scientifico e dottrinale.

Tra questi, un posto di primario rilievo è certo rivestito dalla problematica indotta dalla c.d. "crisi di sovranità", spesso ricondotta nell'alveo degli effetti più tipici e rilevanti della globalizzazione³ – dell'economia e dei mercati finanziari, prima ancora che del diritto – e comunque testimoniata, sotto il profilo giuridico, dal più profondo significato assunto dalle recenti dinamiche di trasformazione dell'assetto isti-

¹ Sono specifici sul tema, secondo impostazioni e con finalità diversificate, gli studi di M. Tedeschi, *Alle radici del separatismo americano*, in *Saggi di diritto ecclesiastico*, Torino, 1987, pp.213 ss., id., *Stato e Chiesa negli U.S.A.*, in S. Gherro (a cura di), *Studi sui rapporti tra la Chiesa e gli Stati*, Padova, 1989, pp. 97 ss.; F.N. Capponi – L.A. Missir – F. Onida – V. Parlato, *Il separatismo nella giurisprudenza degli Stati Uniti*, Milano, 1968; F. Onida, *Uguaglianza e libertà religiosa nel separatismo statunitense*, Milano, 1970, id., *Separatismo e libertà religiosa negli Stati Uniti. Dagli anni sessanta agli anni ottanta*, Milano, 1984, id., *Scuola e religione nella giurisprudenza della Suprema Corte americana dell'ultimo decennio*, in *Dir. eccl.*, 1992, I, pp. 879 ss., id., *La libertà religiosa nella giurisprudenza della Suprema Corte americana dell'ultimo decennio*, in *Dir. eccl.*, 1993, I, pp. 306 ss..

² M. Tedeschi, *Alle radici cit.*, p.83.

³ Per i necessari chiarimenti di ordine terminologico ed un'accurata indagine delle più rilevanti questioni che alla globalizzazione si ricollegano, tra i contributi più recenti, D. Zolo, *Globalizzazione. Una mappa dei problemi*, Roma-Bari, 2004, cui si rimanda per le ulteriori indicazioni bibliografiche.

tuzionale e costituzionale dello Stato e dei suoi rapporti con la società civile.

In effetti, affacciatisi all'attenzione degli studiosi in termini non proprio recentissimi⁴, quella relativa all'ampia rimeditazione, quando non alla completa dissoluzione, cui sarebbe ormai inevitabilmente andata incontro la tradizionale idea di sovranità, quale connotazione maggiormente significativa del paradigma organizzativo del potere politico costituito dallo Stato-Nazione, costituisce notazione dottrinale di pressoché comune rilievo e dalla *vis expansiva* veramente notevole.

I termini della questione di fondo che viene così sollevata sono, a grandi linee, sufficientemente delineati: nell'età della c.d. "globalizzazione", si è soliti rilevare, le dinamiche economiche mostrano, sul piano fattuale, una tendenza alla "ultrateritorialità" tanto spiccata da rendere ormai quasi del tutto improponibile il riferimento al tradizionale paradigma dello Stato quale *dominus* dell'economia e dei processi regolativi del mercato, sicché, in buona sostanza, non corrispondendo più i confini dello Stato con quelli dell'economia, quest'ultima si mostra indipendente ed anzi in grado di dominare essa stessa lo Stato⁵. Di qui l'ulteriore considerazione per cui «il futuro di ciascun paese dipende sempre meno dalla politica interna e sempre più da decisioni esterne, assunte in sedi politiche sopranazionali o da poteri economici globali»⁶, venendosi così ad arricchire significativamente un processo ideale di declino avviatosi con la fine della seconda guerra mondiale e il conseguente stabilirsi «di un sistema di norme internazionali caratterizzabili come *ius cogens*, cioè come diritto immediatamente vincolante per gli Stati membri»⁷.

All'aggravamento della crisi di sovranità, sotto il profilo c.d. "esterno", che così si determina, si affiancano peraltro i più recenti processi erosivi diversamente operanti dall'interno e che, richiamando il valore del principio costituzionale del pluralismo autonomistico ed istituzionale, tendono al deciso potenziamento di nuovi livelli organizzativi infrastatali, ora da ricostruire come espressione di vera e propria autonomia politica, finendo così col rimettere ampiamente in discussione la tradizionale pretesa del potere statale a non riconoscere, nell'ambito di riferimento territoriale suo proprio, alcun potere concorrente⁸.

⁴ Come rileva S. Cassese, *La crisi dello Stato*, Roma-Bari, 2002, p. 3, «di "crisi dello Stato" si discute dagli inizi del XX secolo».

⁵ S. Cassese, *La crisi cit.*, pp. 36 ss., che ricorda al riguardo le conclusioni di M.R. Ferrarese, *Globalizzazione (aspetti istituzionali)*, in *Enciclopedia delle scienze sociali*, vol. di aggiornamento, Istituto della Enciclopedia Italiana, Roma, 2001.

⁶ S. Cassese, *La crisi cit.*, ivi.

⁷ «Nel nuovo ordinamento sono infatti soggetti di diritto internazionale non più solo gli Stati, ma anche gli individui e i popoli: i primi in quanto titolari nei confronti dei loro stessi Stati dei diritti umani loro conferiti dalla Dichiarazione del '48 e dai Patti del '66; i secondi in quanto titolari del diritto di autodeterminazione riconosciuto dall'art. 1 dei medesimi Patti»: L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, Roma-Bari, 1997, p. 81.

⁸ Lungo questa direzione, si segnala, in particolare, «la ricerca – anch'essa talvolta o in certi contesti molto insistita – dell'affermazione di nuovi livelli organizzativi in cui si esprima il bisogno di autogoverno di comunità territoriali più ristrette, che peraltro non intendono o non possono pretendere di assumere la forma di Stato». Anche in questi casi, di sicuro rilievo si evidenziano fattori di natura economica, fondamentalmente legati alla «pretesa di conservazione alla comunità ristretta di riferimento della ricchezza da questa prodotta» o tesi «alla separazione o comunque alla esclusione delle comunità territoriali più svantaggiate e alla instaurazione invece di un circuito virtuoso di

In un caso e nell'altro a venire decisamente meno è la praticabilità stessa di un approccio rigidamente positivista, legato ai postulati dello statalismo giuridico, fonte a sua volta di un diritto che si pretenderebbe statico ed immutabile: mentre il mondo degli affari «ha preso strade sue, ha rifiutato il diritto degli Stati immobilizzato in un coacervo di leggi, ha rifiutato i Tribunali statali, le loro lentezze, i loro burocratismi e formalismi, ha cominciato a costruire al di là delle leggi, al di là dei Codici, un proprio diritto (...) oggi si ripete più volentieri l'affermazione dell'antica sapienza che il diritto, tutto il diritto, è costruito *hominum causa*, ha una ineliminabile dimensione strutturale, è strumento per l'uomo e alle sue esigenze deve piegarsi ed elasticizzarsi», si è autorevolmente osservato a tale proposito⁹.

La notazione, evidentemente, riveste un interesse ed una rilevanza di ordine strategico e metodologico, inducendo l'interprete a ridefinire lo strumentario concettuale di riferimento e riorientare l'indagine verso aspetti della questione più propriamente contenutistici.

In effetti, a fronte delle cennate trasformazioni, invero tangibili e rilevanti, nel sistema delle fonti e dei poteri, appare produttivo e maggiormente rispondente alla reale ispirazione degli attuali ordinamenti di democrazia contemporanea, propendere per una più decisa caratterizzazione del principio di sovranità, e ancor prima, del bisogno di unità politica che vi è sotteso, in senso sostanziale, ovvero quale peculiare tensione per il rispetto e la realizzazione di valori di fondo unanimemente condivisi.

Su queste basi, la rimeditazione del principio di sovranità, doverosa in ragione della pervasività delle dinamiche appena accennate, se, da un lato, riporta all'attenzione dell'interprete la rilevanza del rapporto diritto/religione per una migliore comprensione del problema di fondo dell'unità politica, non può che indurre l'interprete ad interrogarsi sull'effettivo rispetto delle indeclinabili esigenze di tutela che legittimano l'ordinamento giuridico, trattandosi, in buona sostanza, di verificare volta per volta piuttosto che la tenuta formale del sistema la coerenza e la compatibilità rispetto a siffatto obiettivo di fondo delle soluzioni che vanno emergendo sul piano del diritto positivo e della sua applicazione ai casi concreti della vita¹⁰.

scambio con comunità territoriali pur appartenenti a Stati diversi, in conformità ad una sorta di regionalismo transnazionale», ma non sono estranee esigenze di più ampio respiro legate alla affermazione di una «maggiore possibilità di partecipazione del cittadino al governo della cosa pubblica, di riduzione della distanza, anche fisica, tra istituzioni e cittadino, di avvicinamento delle strutture che esercitano le funzioni pubbliche, e in particolare amministrative, ai cittadini che dell'esercizio di quelle funzioni sono i destinatari»: A. Massera, *Oltre lo Stato: Italia e Europa tra locale e globale*, in *Riv trim. dir. pubb.*, I, 2001, p. 18. Trattasi di dati che, a nostro modo di vedere, danno ampiamente conto delle rilevanti trasformazioni del quadro normativo di riferimento – anche costituzionale – già postesi all'attenzione dell'interprete e tuttavia continuamente rimesse in discussione, sotto il profilo dei rapporti tra centro e periferia e nell'ottica del potenziamento dell'ideale federalista o, più realisticamente, della concreta attuazione dei principi di sussidiarietà e di adeguatezza funzionale ed organizzativa.

⁹ P. Grossi, *Diritto canonico e cultura giuridica*, in C. Fantappiè (a cura di), *Itinerari culturali del diritto canonico del Novecento*, Torino, 2003, p. 15, che ne fa derivare interessanti notazioni per riguardo alla utilità di un atteggiamento di maggiore apertura nei confronti delle specificità del diritto canonico.

¹⁰ Trattasi di una linea interpretativa che, per entrambi i profili delineati e sulla scia dei rilievi della migliore dottrina, anche di diritto ecclesiastico, ci è parsa suscettibile di ulteriori approfondimenti.

Come si è tentato di ribadire recuperando le acquisizioni della migliore dottrina, si tratta di una prospettiva di indagine per la quale risulta di assoluto rilievo l'apporto delle scienze ecclesiasticistiche, che hanno così modo di confermare la loro centralità per la formazione del giurista ed il più ampio e corretto svolgimento del dibattito scientifico e la plausibilità dei relativi esiti¹¹.

Si consideri, per esemplificare, a quanto è dato registrare riflettendo più profondamente sulla specificità degli ordinamenti confessionali e sul controverso ruolo giocato dalle diverse sensibilità religiose per il complessivo svolgersi del percorso, invero accidentato, che avrebbe dovuto condurre ad un più deciso (e facile) ancoramento valoriale l'agognata costruzione di una casa comune europea¹², o interrogandosi sulla reale portata della affermata tutela internazionale della libertà religiosa, o ancora indugiando sulle molteplicità di configurazione del rapporto tra potere politico e fattore religioso a seconda dei contesti di riferimento: prospettive di indagine che paiono convergere tutte, in maniera più o meno decisa, nell'indicare, quale dato di fondo imprescindibile, una certa resistenza dei singoli sistemi ordinamentali ad una sorta di "omologazione forzata"¹³.

Mentre, invero, da un punto di vista generale, il mutato atteggiamento degli attuali ordinamenti di democrazia pluralistica nei confronti del fenomeno religioso e delle sue molteplici manifestazioni ben può essere considerato come naturale conseguenza di una più convincente riconsiderazione del momento dell'unità in quanto implicante la comune accettazione di valori fondanti l'ordinamento costituzionale, nel senso appena veduto¹⁴, recenti vicende giurisprudenziali tendono ad evidenziare il peso tutt'altro che irrilevante ancora giocato dalle specificità nazionali¹⁵.

Sul punto, sia consentito rinviare al nostro G. D'Angelo, *Crisi dello Stato, riforme costituzionali, principio di sussidiarietà*, Roma, 2005, in particolare per quanto evidenziato alle pp. 40 ss. e 111 ss.

¹¹ Di là di ogni intento polemico, rispetto a recenti tentativi, peraltro non del tutto riusciti, di svilire il senso e la portata dell'insegnamento delle discipline ecclesiasticistiche e canonistiche nelle Università italiane, cfr. gli interventi confluiti in G. B. Varnier (a cura di), *Il nuovo volto del diritto ecclesiastico italiano*, Soveria Mannelli, 2004.

¹² All'influenza, reale o presunta, dei gruppi religiosi nel processo di costruzione della nuova Europa, è dedicato lo studio di G. Macrì, *Europa, lobbying e fenomeno religioso. Il ruolo dei gruppi religiosi nella nuova Europa politica*, Torino, 2004.

¹³ Al riguardo, sia consentito l'ulteriore rinvio a G. D'Angelo, *Crisi cit.*, in particolare, pp. 66 ss..

¹⁴ In certa misura confermando l'imponibilità di operazioni ricostruttive che muovano nella direzione del perseguimento di un obiettivo di unificazione facente leva sullo specifico ancoramento ad un diffuso sentimento di appartenenza fondato, a sua volta, su una condizione di sostanziale omogeneità di natura etnica e culturale.

¹⁵ Si intende alludere alla decisione recentemente resa dalla Corte Europea dei diritti dell'Uomo in occasione del caso *Leyla Sabin c. Turchia* – ricorso n. 44774/98 – con cui la stessa Corte, trovatisi a giudicare delle doglianze di una studentessa, maggiorenne, che non era stata ammessa ai corsi ed agli esami presso l'Università di Istanbul cui era iscritta, perché, in violazione di una specifica circolare, aveva continuato ad indossare il velo islamico, ha respinto il relativo ricorso, sulla base del rilievo per cui, pur costituendo un'ingerenza nella libertà di religione, quel divieto sancito dall'autorità universitaria turca trova giustificazione in via di principio e risulta proporzionale agli obiettivi perseguiti, potendo in definitiva, le misure predisposte dall'autorità nazionale, essere considerate «necessarie in una società democratica» ai sensi dell'art. 9 CEDU. Al di là del merito della decisio-

In questo contesto, tornano d'attualità, in certa misura riadattandosi alle mutate circostanze di tempo e di luogo, le motivazioni addotte a fondamento dell'interesse già mostrato, secondo quanto si ricordava all'inizio, nei confronti dello specifico statunitense dalla ecclesiasticistica più autorevole ed avveduta, per tale via confermando la lungimiranza della dimensione prospettica allora delineata al riguardo¹⁶.

Mentre infatti molti degli elementi che, sullo specifico terreno della regolamentazione giuridica del fenomeno religioso, sembravano rappresentare un *unicum* del modello americano e comunque si ponevano quali fattori di per sé stessi idonei a determinarne «l'indubbio fascino»¹⁷ vanno riproducendosi, sia pur ancora con difficoltà ma comunque in maniera ormai irreversibile, nella nostra realtà sociale ed ordinamentale¹⁸, la più generale caratterizzazione di quel sistema quale ordinamento di

ne, merita segnalare al riguardo che, ad avviso della Corte, «quando entrano in gioco questioni concernenti i rapporti tra lo Stato e le religioni, sulle quali, in uno Stato democratico, possono ragionevolmente esistere divergenze profonde, è opportuno attribuire una particolare importanza al ruolo dell'organo decisionale nazionale», imponendosi, in particolare, un margine di valutazione «quando gli Stati contraenti disciplinano l'uso dei simboli religiosi negli istituti d'istruzione dato che le norme in materia variano da paese a paese in funzione delle tradizioni nazionali e i paesi europei non hanno una concezione uniforme dei requisiti concernenti “la tutela dei diritti altrui” e “l'ordine pubblico”». Ed ancora, «la Corte ricorda al tempo stesso il ruolo essenzialmente sussidiario del meccanismo della Convenzione. Secondo la giurisprudenza consolidata della Corte, come principio generale, le autorità nazionali possono pronunciarsi sulle esigenze e sui contesti locali meglio del giudice internazionale (...). Spetta a queste autorità nazionali valutare in primo luogo la “necessità” di un'ingerenza, in relazione sia al quadro normativo sia alle specifiche misure di attuazione. Anche se, in questo senso, tali autorità beneficiano di un certo margine di valutazione, la loro decisione resta soggetta al controllo della Corte che deve verificarne la conformità con i requisiti della Convenzione». La decisione in questione è consultabile integralmente, oltre che sul sito dello stessa Corte, sul sito www.associazionedeicostituzionalisti.it. La traduzione non ufficiale da cui sono tratte le citazioni appena riportate si trova invece in *Guida al diritto* n.38/2004, pp. 101 ss..

¹⁶ Sottolineando che, tra i molti modi con cui accostarsi ad una realtà diversa dalla propria, «il peggiore è sicuramente quello di compararla, di riguardarla, cioè, limitatamente, da un precostituito angolo visuale», M. Tedeschi, *Alle radici* cit., ivi, evidenzia l'opportunità di «una diversa analisi su come si sia stabilizzato il sistema del separatismo negli Stati Uniti d'America, con particolare riguardo al periodo della colonizzazione, ai padri fondatori e alle dichiarazioni dell'art.6 § 3 della Costituzione americana e del primo e del quattordicesimo emendamento». Secondo l'Autore, «che la comparazione possa risultare difficile lo si deduce subito dal fatto che le teoriche di stampo illuminista o liberale tendenti a determinare il concetto di separazione nei rapporti tra Stato e Chiesa non appaiono valide a definire il separatismo americano e che questo vale anche se ci si pone dall'opposto punto di vista».

¹⁷ Tanto, in particolare, per il suo essere l'unico esempio in cui trovavano completa attuazione «l'aconfessionalità dello Stato, la riduzione della Chiesa al diritto comune, l'abolizione del sistema concordatario, la completa eguaglianza delle singole confessioni e una maggiore tutela della libertà religiosa»: M. Tedeschi, *Separatismo* (voce), in Appendice del *Novissimo Digesto Italiano*, Torino, 1983, p. 15., nonché, prescindendo dalla realtà statunitense, id., *Chiesa e Stato* in *Novissimo Digesto Italiano*, Appendice A – cod., Torino, 1980, pp. 1145 ss..

¹⁸ Così è, in particolare, per riguardo all'emergere ed al progressivo affermarsi, nel nostro contesto socio-giuridico, di gruppi e movimenti religiosi che si discostano in maniera sensibile dalla comune, e per noi consueta e tradizionale, matrice giudaico-cristiana, venendo genericamente definiti “nuovi movimenti religiosi” e ponendo fondamentali questioni non molto tempo addietro praticamente

*common law*¹⁹ continua a costituire circostanza di non poco momento, ora anche in relazione al suo segnalare, sotto il profilo ricostruttivo, la necessità di ricercare non più solo sul piano della mera unità formale assicurata dalla legge i dovuti riscontri all'effettività delle opzioni valoriali su cui fonda il patto di civile di convivenza, rinviando l'impressione dell'essenzialità del ruolo dei pubblici poteri quali garanti, oltre che del pluralismo, del solidarismo sociale e della tutela del valore della persona umana.

2. *Recenti tensioni del separatismo statunitense: la Corte Suprema federale alle prese con il problema della esposizione pubblica dei Dieci Comandamenti*

È particolarmente significativo, da questo punto di vista, quanto ci è dato rilevare dal confronto tra due recenti decisioni rese dalla Corte Suprema federale in tema di presenza simbolica del religioso nello spazio pubblico.

Il tema, assunto nuovamente agli onori della cronaca giornalistica²⁰, è tornato ad

sconosciute. Al riguardo, sia consentito rinviare, anche per i necessari riferimenti bibliografici, a G. D'Angelo, *Ultime vicende giudiziarie della Chiesa di Scientology*, in *Dir. eccl.*, 2/1998, pp. 384 ss., nonché id., *A proposito della natura giuridica della Chiesa di Scientology: una significativa presa di posizione della sezione tributaria della Corte di Cassazione* in *Quad. dir. e pol. eccl.*, 3/2002, pp. 731 ss. e, più ampiamente, *Nuovi movimenti religiosi tra (pretesa) uniformità di qualificazione e (reale) diversificazione dei relativi profili disciplinari: la Chiesa di Scientology nella più significativa giurisprudenza*, in *Dir. eccl.*, 2/2003, pp. 710 ss..

Si tratta, in effetti, di movimenti che «hanno mutato di molto il tradizionale panorama religioso italiano, indipendentemente dal fatto che si immedesimino o meno in vere e proprie confessioni religiose, concetto questo ancor oggi indeterminato, facendo accostare la nostra situazione a quella statunitense»: M. Tedeschi, *Stato cit.*, p. 99, nonché, più ampiamente, id., *Nuove religioni e confessioni religiose*, in *Studium*, 3/1986, pp. 393 ss..

¹⁹ Circostanza che «aiuta ad evitare il rischio di scambiare il diritto di carta per diritto vivente, dato che il suo studio non può avvenire che sulla giurisprudenza e dunque essere sempre guardato nella sua concreta applicazione»: F. Onida, *Il fenomeno religioso nei sistemi giuridici extraeuropei* in F. Margiotta Broglio – C. Mirabelli – F. Onida, *Religioni e sistemi giuridici cit.*, p. 255.

²⁰ In maniera certo poco funzionale ad una serena ed obiettiva valutazione delle ripercussioni di ordine giuridico che vi si ricollegano: valgano a tal proposito le considerazioni, al solito lucide e convincenti di G. Casuscelli, *Il crocifisso nelle scuole: neutralità dello Stato e «regola della precauzione»*, relazione tenuta al Seminario di studio su “Il simbolo del Crocifisso dopo l’ordinanza n. 389/2004 della Corte Costituzionale”, organizzato dal Dipartimento giuridico delle istituzioni, amministrazione e libertà della Facoltà di Giurisprudenza dell’Università di Bari (17 maggio 2005). In attesa della pubblicazione dei relativi atti, facciamo riferimento alla versione apparsa sul sito dell’Osservatorio delle libertà ed istituzioni religiose www.olir.it cui peraltro rinviamo per gli ulteriori riferimenti bibliografici ivi puntualmente citati. L’Autore, ricordato come «– dopo la controversia sulla rimozione del crocifisso da un’aula scolastica adibita a seggio elettorale che aveva dato luogo alla sentenza della Corte di Cassazione n. 4273 del 2000 (il c.d. “caso Montagnana”) della quale era stata subito segnalata la “significativa importanza generale” – era stato saggiamente auspicato di “chiarirci per tempo le idee trovando le soluzioni migliori prima di trovarci di fronte a casi più esplosivi”», sottolinea che «l’auspicio non ha trovato ascolto», ulteriormente rilevando che «un’improvvisa inerzia (del legislatore e/o del potere esecutivo) e la sovraesposizione mediatica del “caso Adel Smith” nel 2003 hanno fatto sì che la “inopinata richiesta” della rimozione del simbolo

essere tra i più dibattuti nel nostro specifico contesto sociale ed ordinamentale²¹, riportando all'attenzione degli interpreti una delle tensioni tipiche del diritto ecclesiastico ovvero quella tra libertà ed autorità²², ed altresì sollecitando – sul riscontro delle indiscutibili capacità di aggregazione/identificazione del fattore religioso e, per tale via, della sua indiscutibile valenza sociale – una più ampia riflessione sulla complessità del rapporto tra principio di sovranità, unità politica, legittimazione del potere²³.

della religione cattolica negli edifici pubblici, ed in quelli scolastici in particolare, desse l'avvio alla "piccola guerra dei crocifissi". Le battaglie si sono trasferite dal piccolo schermo, dalle radio e dai giornali alle aule del giudice ordinario e del giudice amministrativo per approdare all'ancora più solenne aula del Palazzo della Consulta» (citazioni tratte rispettivamente da C. Ottino, *Montagnana assolto. Ma i crocifissi restano fuori posto*, in *Laicità*, n. 2-3/2000, p. 9; S. Ceccanti, *I crocifissi nelle scuole pubbliche. Rimuovere solo sulla base di una esplicita richiesta*, in www.unife.it/forumcostituzionale/contributi; F. Margiotta Broglio, *La riforma dei Patti Lateranensi dopo vent'anni*, in *Quad. dir. e pol. eccl.*, 1/2004, p. 8; id., *Il fenomeno religioso nel sistema giuridico dell'Unione europea*, in F. Margiotta Broglio – C. Mirabelli – F. Onida, *Religioni* cit., p. 203). «La tecnicità della questione della sopravvivenza o no delle norme regolamentari cui è ricollegata l'esposizione del crocifisso nelle scuole pubbliche e la diffusa indifferenza della gente comune alla problematica della laicità» – conclude sul punto l'Autore – «non hanno impedito che l'eco dei mezzi di comunicazione del caso Smith fosse ampia, ed innescasse una polemica dai toni spesso accesi».

²¹ È indubbio, invero, che la tematica in questione si è ripresentata all'attenzione degli operatori giuridici a seguito della discussa decisione con cui il Tribunale dell'Aquila, ai sensi e per gli effetti di cui all'art. 700 c.p.c., aveva stabilito la rimozione di un crocifisso da un'aula di una scuola abruzzese. In realtà, l'esecuzione dell'ordinanza è stata prontamente sospesa ex art. 669 terdecies, comma 5, c.p.c., e su reclamo dell'Avvocatura dello Stato, dal Presidente dello stesso Tribunale abruzzese, che ha così ritenuto di poter condividere l'assunto del reclamante per cui l'ordinanza oggetto del reclamo avrebbe causato un sicuro turbamento degli alunni cattolici presenti in quella scuola, così concretizzando il grave danno richiesto dalla norma per l'adozione del provvedimento di sospensione. La circostanza (sulla quale, tra i molteplici contributi, R. Botta, *Simboli religiosi ed autonomia scolastica*, in *Corr. Giur.* 2/2004, pp. 235 ss.) non ha evidentemente impedito l'immediato manifestarsi di contrastanti opinioni, anche autorevoli, così dando vita ad un interessante dibattito alimentatosi ulteriormente a seguito della diversa vicenda giudiziaria che ha preso le mosse dalla ordinanza di rimessione del Tar Veneto, che ha così sollevato la questione di legittimità costituzionale delle norme che, in qualche maniera, sembrerebbero porre l'obbligo di esposizione. Com'è noto, investita della questione, la Corte, con ordinanza n. 389/2004, si è peraltro determinata nel senso di ritenere manifestamente inammissibile la relativa questione. Il Tar Veneto, da parte sua, con sentenza n. 1110 del 22 marzo 2005, preso atto della posizione assunta dall'organo di legittimità costituzionale, ha infine respinto le doglianze della ricorrente, in buona sostanza riconoscendo, con motivazioni invero discutibili, che l'affissione del Crocifisso nello spazio pubblico scolastico si giustifica in ragione della sua valenza affermativa e confermativa del valore della laicità. Un'ampia ed articolata serie di commenti e contributi sulle vicende testè richiamate è fruibile sul citato sito dell'Osservatorio sulle libertà e le istituzioni religiose, www.olir.it, nell'apposita area tematica che vi risulta dedicata.

²² Un implicito, ma efficace, richiamo alla opportunità di tenere conto di siffatta inerenza ci perviene dall'interessante valutazione delle ultime vicende relative alla questione della presenza simbolica del religioso nello spazio pubblico recentemente proposta da S. Domianello, *La rappresentazione di valori nei simboli: un'illusione che alimenta ipocrisia e fanatismo*, nel corso del Seminario di studio tenutosi nell'Università degli Studi di Salerno lo scorso 20 aprile.

²³ La rilevanza del collegamento sovranità dello Stato/principio di unità/istanze identitarie, con riferimento alla questione della presenza simbolica del religioso nello spazio pubblico trova significative conferme per riguardo alla ulteriore problematica, in parte diversa, dei simboli e degli abbi-

Per tornare allo specifico delle decisioni poc'anzi richiamate, merita ricordare che entrambe concernono l'esposizione in luogo pubblico dei Dieci Comandamenti, diversificandosi tuttavia tempi e modi dell'esposizione, nonché caratteristiche esteriori dell'iscrizione contestata.

Più in particolare, in *Van Orden v. Perry* (d'ora innanzi, *Van Orden*) si tratta di un monolite esposto nel parco circostante il Palazzo del Governo, nello stato del Texas, in un contesto in cui, come ricorda l'estensore dell'opinione della maggioranza, il *Chief Justice* Rehnquist²⁴, sono contenute varie altre riproduzioni di elementi rappresentativi del sostrato storico sociale dell'identità texana²⁵: un'iscrizione posta nella parte inferiore si preoccupa di chiarirne la provenienza ricordando che si tratta di una sorta di donazione fatta «to the people and youth of Texas by the fraternal order of Eagles of Texas» nel 1961²⁶.

A venire in questione in *Mc Creary County, Kentucky et Al. v. American Civil Liberties Union of Kentucky et Al.* (d'ora innanzi, *Mc. Creary*) sono invece due diverse esposizioni dei Dieci Comandamenti nei Palazzi di Giustizia delle contee di *Mc. Creary* e *Pulasky*, nel *Kentucky*.

gliamenti di appartenenza religiosa. In questa direzione, nell'approfondire il senso della emergente contrapposizione tra il "modello laico occidentale" ed i "modelli religiosi di genere", si è così evidenziato che il primo è entrato in crisi «nel momento in cui, cadute le strutture economico-giuridiche "coloniali" ed avanzando con la globalizzazione l'isolamento dei paesi "in via di sviluppo", i modelli religioso-etnici di tali paesi si sono presentati all'Occidente attraverso il dramma dell'immigrazione e dei profughi, delle guerre etniche e di religione» e si è quindi ulteriormente sottolineato che, a fronte della analoga crisi «delle strutture giuridico-sociali degli Stati territoriali nazionali-borghesi, (...) mentre nella vecchia Europa e nell'Occidente si è cercata una nuova sicurezza in nuovi sistemi di costituzionalizzazione (Carta dei diritti fondamentali dell'Unione Europea), nei paesi di nuova istituzione (Jugoslavia e paesi ex-sovietici) e nei paesi "altri", la struttura stessa costituzionale di essi ha trovato un principio di stabilità e di continuità nelle radici etnico-religiose più antiche che permettevano di riunificare la comunità politica in nome di uno specifico principio accentratore. (...) I simboli e gli abbigliamenti di appartenenza religiosa sono, quindi, diventati una carta d'identità religiosa in Occidente e nei singoli paesi "altri", nei quali i simboli religiosi e l'abbigliamento servono, nuovamente, ad identificare ed a diversificare o a ghettizzare in uno stesso paese le componenti etnico-religiose»: M.G. Belgiojorno De Stefano, *Foulard islamico e Corte Europea dei diritti dell'uomo (modello laico e modelli religiosi di genere di fronte al diritto alla libertà di coscienza e religione)*, in *Rivista della cooperazione giuridica internazionale*, 2/2001, pp. 73 ss..

²⁴ Com'è noto, successivamente deceduto. È altrettanto noto, peraltro, che il Presidente degli Stati Uniti, G.W. Bush si è affrettato a promuovere al posto dello stesso Rehnquist il giudice J. Roberts frattanto candidato alla Corte Suprema in sostituzione della O'Connor, a sua volta dimessasi dall'incarico.

²⁵ Ovvero, in particolare, «17 monuments and 21 historical markers commemorating the "people, ideas, and events that compose Texan identity"».

²⁶ È lo stesso *Chief Justice* a descrivere accuratamente il monolite sia sotto il profilo delle dimensioni che dei contenuti: alto 6 piedi e largo 3 piedi e mezzo, prevede come suo contenuto essenziale il testo dei Dieci Comandamenti e reca, nella sua parte superiore, la rappresentazione di un'aquila che stringe la bandiera statunitense, di un occhio all'interno di una piramide e di due piccole tavole. A conclusione del testo, due stelle di Davide e le due lettere dell'alfabeto greco che, sovrapposte, stanno a rappresentare la parola "Cristo". Nella parte bassa del monumento si colloca quindi l'iscrizione che, come già ricordato, precisa la provenienza del monolite.

In queste due diverse ipotesi, quindi, i Dieci Comandamenti risultano collocati all'interno dell'edificio pubblico e, soprattutto, non sono, almeno inizialmente, accompagnati da rappresentazioni e documenti evocativi di vicende più chiaramente civili²⁷: qui peraltro finiscono per giocare un ruolo per certi aspetti determinante circostanze non più solo direttamente riguardanti l'esposizione per come essa appare all'occhio dell'osservatore esterno ma episodi più ampiamente concernenti l'intero svolgersi della vicenda politico-amministrativa legata alla contestata decisione delle autorità locali.

In effetti, come si avrà modo di vedere, è proprio il complessivo svolgersi della vicenda giunta al vaglio della Corte ovvero, più in particolare, il tentativo di accomodamento operato a più riprese dalle autorità locali a fornire ai Supremi Giudici elementi di convincimento ulteriore per ciò che attiene al rilievo di un effettivo scopo di ordine religioso perseguito attraverso l'esposizione.

Comunque sia, la varietà delle situazioni di fatto sottoposte al vaglio della giurisprudenza statunitense trova inevitabile e significativa conferma sul piano delle decisioni adottate e delle argomentazioni giuridiche che vi risultano sottese.

Ed invero, per cominciare dall'aspetto pratico della vicenda ovvero dalla sostanza delle decisioni adottate, mentre nel primo caso (*Van Orden*) la Corte salva l'esposizione contestata dalla declaratoria di incostituzionalità per violazione della clausola separatista del primo emendamento²⁸ (favorevoli alla decisione i giudici Rehnquist, Scalia, Thomas, Kennedy e Breyer, contrari i giudici O' Connor, Souter, Stevens, Ginsburg), nel secondo la Corte diversamente ritiene incostituzionale, per violazione della stessa *Establishment Clause*, l'esposizione dei Dieci Comandamenti (con una decisione che, questa volta, vede favorevoli i giudici O' Connor, Souter, Stevens, Ginsburg e Breyer e contrari i giudici Rehnquist, Scalia, Thomas e Kennedy)²⁹.

Come si vede, trattasi in entrambi i casi di decisioni controverse, assunte a stretta maggioranza (5 contro 4) che inevitabilmente inducono l'interprete a calarsi nella specificità del sistema di giustizia costituzionale vigente negli *States*, e, di conseguenza, ad andare oltre l'iter argomentativo formalizzato nella c.d. "opinione della Corte" per soffermarsi con più attenzione sulle motivazioni complessivamente addotte, rispettivamente, da quei giudici che, pur nella diversità di opinioni, concordano quantomeno nel risultato ultimo della decisione e da quegli altri giudici che, diversamente, di quell'iter non condividono né impostazione di fondo né esiti conclusivi.

²⁷ Diciamo inizialmente perché, come si avrà modo di ricordare più avanti, le autorità civili del Kentucky avevano tentato di salvare l'esposizione pubblica dei Dieci Comandamenti accostandovi documenti di natura chiaramente laica quali la Dichiarazione di Indipendenza ed il *Bill of Rights*.

²⁸ Già nei precedenti gradi di giudizio, la Corte di Appello distrettuale (*Fifth Circuit*), con sentenza del 12 novembre 2003, aveva in effetti negato – con argomentazioni che possono essere lette in www.olir.it – che l'esposizione contestata violasse il disposto della *Establishment Clause*.

²⁹ Anche in questo caso, la posizione della Corte Suprema finisce col confermare, negli esiti ultimi, la posizione espressa dalla Corte di Appello distrettuale (*Sixth Circuit*): con sentenza del 18 dicembre 2003 – anch'essa fruibile sul sito dell'Osservatorio – quest'ultima aveva infatti rilevato che l'esposizione contestata viola il Primo Emendamento, in quanto lesiva della sua clausola separatista.

3. *L'opzione separatista statunitense ed il suo significato: peculiarità delle origini e permanenza di un essenziale "favor religionis"*

Prima di entrare nel merito delle argomentazioni seguite dai giudici federali, ed essendo nostra intenzione proporre una collocazione delle due citate decisioni nel contesto del più complessivo svolgersi della giurisprudenza costituzionale statunitense, sembra opportuno indugiare, sia pur brevemente ma recuperando le acquisizioni della migliore e consolidata dottrina, su genesi, coordinate normative e direzioni interpretative di fondo relative al sistema che ci occupa.

In effetti, si appalesa ancora di una certa utilità, a tutt'oggi, il rilievo della iniziale derivazione del sistema separatista da una serie concomitante di fattori del tutto particolari, ovvero «dalla mancanza di uno Stato forte; dalla volontà delle varie confessioni di separarsi dalla madre-patria e dalla difficoltà di far coesistere, anche per motivi politici, i vari gruppi religiosi; dal desiderio, in un primo periodo fallito, di creare una nuova frontiera religiosa – che aveva costituito una delle motivazioni più profonde della colonizzazione – e da quello, invece riuscito, di non instaurare, per tutti gli Stati, una Chiesa stabilita, dominante»³⁰.

Il separatismo statunitense, si fa notare lungo questa direzione, si innesta quindi su una peculiare condizione di molteplicità di gruppi etnici e confessionali che è profondamente diversa «rispetto alla tradizione italiana che non conosce lo Stato federale ed è, fin dall'inizio, unificata da una religione comune ai singoli Stati, una delle caratteristiche fondamentali del concetto di nazionalità»³¹.

In realtà, al pluralismo confessionale "di fatto", mera riproduzione – sul piano religioso – del pluralismo delle colonie, che è dato cogliere riguardando la realtà statunitense da un'ottica, per così dire, "federale", non corrisponde una condizione di garanzia giuridica all'interno delle singole realtà coloniali: «i coloni che riparano nel nuovo mondo perché perseguitati per motivi religiosi diventano a loro volta persecutori, non riescono ad attuare una piena tolleranza religiosa, perdono le connotazioni che li avevano caratterizzati nel vecchio continente, si aggregano o si separano per ragioni confessionali, creano spesso nei vari Stati delle Chiese stabilite, mortificano cioè quella libertà religiosa cui avevano così ardentemente aspirato».

In un contesto in cui, di conseguenza, «prima della rivoluzione nove delle tredici colonie avevano una Chiesa stabile», la formalizzazione di principi separatisti al livello federale finisce evidentemente col costituire una sorta di necessità per la neonata organizzazione statale, preoccupata di non lasciarsi travolgere dal tutt'altro che remoto pericolo del prodursi di scontri e divisioni religiosamente motivate.

Il processo in questione viene descritto in maniera suggestiva dal Ruffini che non manca di sottolinearne il carattere «in apparenza paradossale ed inesplicabile», derivante dal fatto che «quegli stessi uomini, i quali in Europa avevano propugnato con ogni loro forza il sistema della *Separazione*, attuassero, non appena ebbero le mani

³⁰ M. Tedeschi, *Alle radici* cit., p.91, laddove si rileva che «tutto ciò avviene in modo contraddittorio e confuso in quella fase della colonizzazione che va sino al periodo rivoluzionario, con maggiore chiarezza dopo l'avvento della Costituzione e la creazione dello Stato federale».

³¹ M. Tedeschi, *Stato* cit., p. 101.

libere, un sistema di vera *Teocrazia*³², e quindi di osservare che «più tardi, quando, formatosi un organismo statuale superiore alle singole colonie, e cioè la Federazione sorta dalla guerra d'indipendenza della fine del secolo XVIII, la persistenza delle varie Teocrazie coloniali, fra loro nemiche, perché sorte da confessioni differenti, fu resa impossibile, l'America del Nord rifece ancora il trapasso nel primitivo senso; e cioè da quelle varie Teocrazie coloniali a quel Separatismo federale, che tuttora vi dura»³³.

Ben può parlarsi allora di un separatismo che, in una prima fase, è in sostanza «prevalentemente confessionale e intollerante» e quindi molto differente dall'attuale comune percezione del modello: la sua instaurazione al momento della costituzione dello Stato federale più che legarsi ad «un diffuso sentimento di tolleranza o per l'evoluzione di ideologie libertarie», si spiega cioè con «ragioni di carattere politico ed economico»³⁴, di opportunità, se si vuole, in relazione alla esigenza di assicurare la sopravvivenza della nuova organizzazione politica.

«Nel processo che portò all'indipendenza delle ex colonie inglesi» – si è ribadito al riguardo – «occorreva superare i contrasti esistenti tra le varie teocrazie locali, costituite sulla base di differenti confessioni, e la via praticabile era quella del separatismo fondato sulla libertà religiosa», a sua volta proclamata dalla *Dichiarazione di Virginia* del 1776³⁵.

Come si è ulteriormente sottolineato, «allorché i padri fondatori dichiarano che il governo federale non deve instaurare alcun rapporto con le confessioni, essi dimostrano di comprendere che la religione, “necessaria alla vita morale della società civile”, non può “costituire motivo di disunione e di dissidio e che ciò che era ammissibile all'interno delle singole colonie e dei vari Stati, non lo era più nel momento in cui si costituiva lo Stato federale, poiché la raggiunta unità poteva garantirsi solo se una confessione non prevaricava sulle altre»³⁶.

³² F. Ruffini, *Relazioni tra Stato e Chiesa, lineamenti storici e sistematici* a cura di F. Margiotta Broglio, Bologna, 1974, pp.144 ss.. L'Illustre studioso ricorda al riguardo che i *Pellegrini* che fondarono la prima delle colonie puritane non esitarono a dichiararne la Bibbia statuto fondamentale ed a rendere le relative congregazioni di coloni luogo in cui «si decidevano ad un tempo stesso le faccende civili e quelle ecclesiastiche» e quindi a richiamare le valutazioni del Rieker che «ha posto in chiaro, come per tutte le confessioni rampollate dal grande ceppo del Calvinismo i due sistemi in apparenza opposti della Teocrazia e del Separatismo siano invece strettamente collegati e quasi correlativi; così che essi si alternano a seconda delle circostanze e a seconda dei tempi. Ideale primario di tutte coteste confessioni è la Teocrazia. Ed esse l'attuarono a pieno, come già aveva fatto Calvino in Ginevra, sempre che fosse loro dato. Ma quando questo loro ideale si mostrava inattuabile, esse ripiegavano immediatamente verso un ideale secondario o subordinato, e cioè verso il Separatismo. Allo Stato» – proseguiva il Ruffini – «si direbbe che esse pongano il dilemma: o piegarsi supinamente innanzi alla Chiesa, informando scrupolosamente ai dettami di essa tutte le sue leggi e l'intera sua azione e accordandole, senza discutere, l'appoggio della sua forza materiale; oppure tirarsi completamente in disparte e non immischiarsi più nelle cose religiose, riconoscendo così la sua assoluta incompetenza per rispetto a queste. In altre parole, il dilemma era: o Teocrazia o Separatismo. Ogni termine intermedio era soppresso. Ma» – come si verifica subito dopo proprio con riferimento all'esperienza statunitense – «il trapasso non può essere soltanto, e non fu di fatti sempre, dalla Teocrazia al Separatismo; ma anche, e cioè di bel nuovo, dal Separatismo alla Teocrazia».

³³ F. Ruffini, *Relazioni* cit., ivi.

³⁴ M. Tedeschi, *Stato* cit., p. 108.

³⁵ F. Finocchiaro, *Diritto ecclesiastico*, Bologna, 2003, p. 29.

³⁶ M. Tedeschi, *Stato*, cit. p.101.

La notazione coglie evidentemente tutta la complessità dell'approccio statunitense ed in questo senso si apre, integrandovisi, alle ulteriori peculiarità che pure caratterizzano quel contesto socio-giuridico.

Merita sottolineare, al riguardo, che a rendere difficilmente praticabile dallo Stato federale – quantomeno sotto il profilo della effettività della scelta eventualmente compiuta – la deriva confessionista intervengono specifici dati socio-demografici e persino di natura geografica, nel complesso convergenti, come si è fatto osservare, nell'evidenziare l'impossibilità di registrare una qualche condizione di "dominio" a vantaggio di determinate confessioni³⁷.

A ciò si aggiunga l'ulteriore dato posto in evidenza da chi ha inteso riguardare come caratterizzante la specifica esperienza nordamericana non solo la «presenza di Chiese e sette religiose le più diverse» ma altresì «*l'assenza di una questione patrimoniale ecclesiastica*»: nel momento in cui dichiarano la propria indipendenza, si è rilevato lungo questa direzione, gli Stati Uniti non hanno «un papa contro cui combattere o recriminare», né «beni ecclesiastici da incamerare» e neppure «nemici confessionali che in qualche modo siano elementi antinazionali»³⁸.

A fronte di siffatta realtà, invero complessa, non può quindi sorprendere che la Costituzione del 1787 contenga un solo riferimento, peraltro indiretto, alle questioni religiose, sancendo all'art.6 § 3, il principio per cui «nessun giuramento religioso sarà mai richiesto dal governo degli Stati Uniti come qualifica o requisito per esercitare uffici o incarichi pubblici»³⁹, così come non sorprende la complessiva timidezza delle clausole religiose del primo emendamento che in effetti, col sancire il principio per cui «*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof*», si riferisce testualmente al solo livello di governo federale, lasciando liberi i singoli stati membri di determinarsi sul punto.

È solo nel 1940, invero, con la decisione resa per il caso *Cantwell v. Connecticut* che la Suprema Corte degli Stati Uniti riconosce che il primo emendamento è disposizione applicabile agli stati membri, rientrando la libertà religiosa tra i diritti garantiti dal XIV emendamento, in ragione del quale, com'è noto, «*no state shall deprive*

³⁷ In questo senso, C. Cardia, *Manuale di diritto ecclesiastico*, Bologna, 1999, p.120, ove si rileva che «gruppi religiosi, sfuggiti alle persecuzioni in Europa, ma anche gruppi di coloni di ogni fede, finiscono col trovarsi insieme in territori sterminati – che non facilitano certo la ricerca dei dissidenti religiosi – senza che ad un certo punto nessuno possa più dire quale è veramente la religione o la Chiesa dominante. Anche gli ebrei, che in Europa sono perseguitati da tutti, trovano nelle città mercantili costiere una tolleranza e una libertà di fatto che non avrebbero mai immaginato».

³⁸ «Antinazionale negli Stati Uniti sarebbe soltanto colui che volesse imporre una Chiesa rispetto alle altre»: C. Cardia, *Manuale cit.*, ivi, che prosegue rilevando che «per tale ragione la *Dichiarazione di indipendenza* del 2 luglio 1776, pur senza affrontare la questione in termini giuridici, afferma che «è verità di per sé evidente che tutti gli uomini sono stati creati uguali e che il Creatore li ha dotati di alcuni diritti inalienabili fra i quali la vita, la libertà, il perseguimento della felicità». È la traduzione politica più nobile dei principi filosofici del secolo XVII-XVIII con una sottolineatura della *fede comune in Dio* che è posta tra i fondamenti del nuovo Stato».

³⁹ Si tratta in realtà di una disposizione che «passa certamente in secondo piano rispetto al primo emendamento voluto nel 1791, ma assume un particolare valore se si considera che si era evitato con ogni cura, nei sette articoli della Costituzione qualsiasi accenno a questioni religiose considerate materie intercorrenti tra Dio e gli uomini e quindi sicuramente fuori dall'ambito costituzionale più ristretto»: M. Tedeschi, *Stato cit.*, ivi.

any persons of life, liberty or property without due process of law»: a partire da questo momento, il principio per cui il quattordicesimo emendamento inabilita sia il livello di governo federale che i singoli stati membri a legiferare in contrasto con la clausola di separazione, si afferma senza serie eccezioni anche se, come non si è mancato di sottolineare, la c.d. *establishment clause* (ovvero quella parte della disposizione che concerne il rapporto Stato/confessioni⁴⁰) «assai meno chiaramente poteva vedersi compresa tra le garanzie richiamate dal 14° emendamento»⁴¹.

Comunque sia, è un dato di comune rilievo che la particolare origine del separatismo statunitense ne spieghi il fondamentale *favor religionis*, in ciò contrapponendosi a sistemi pur apparentemente accomunati da una impostazione in senso separatista dei rapporti⁴² tra Stato e confessioni.

Argomendo dai rilievi poc'anzi ricordati ed ulteriormente precisando il rilievo per cui «lo Stato separatista lungi dall'essere un archetipo valido per diverse epoche ed aree geopolitiche si è realizzato in forme storico-giuridiche diverse e tra loro contrapposte», si è così fatto osservare che «addirittura le due forme coeve di separatismo, quella nordamericana e quella francese, sono state per oltre un secolo l'una l'esempio dell'accordo e dell'armonia tra Stato e Chiese, l'altra espressione del più aspro conflitto (non solo di idee) tra Stato e Chiesa cattolica»⁴³.

In effetti, che il separatismo abbia «seguito altre vie negli Stati Uniti», in qualche modo confermando che «nel sistema separatista era possibile armonizzare gli interessi della società civile e della società religiosa»⁴⁴ è conclusione che trova precisi riscontri sul piano della concreta configurazione del sistema, ovvero riflettendo sulla scissione ivi perpetrata tra la dimensione istituzionale e quella socio-civile⁴⁵, o sull'ostilità manifestata nei confronti delle posizioni ateistico o non-religiose⁴⁶ o ancora

⁴⁰ L'altra concerne invece la tutela della libertà religiosa: la c.d. *free exercise clause*.

⁴¹ F. Onida, *Il fenomeno cit.*, p. 257.

⁴² Ovvero, come pure si è fatto rilevare, di un “non sistema”: F. Onida, *Il fenomeno cit.*, ivi.

⁴³ C. Cardia, *Manuale cit.*, p. 119, per il quale «la spiegazione è a suo modo semplice. Mentre nella Francia del '700 realizzare lo Stato moderno (nella nostra terminologia, lo Stato separatista) ha voluto dire *distruggere l'ancien regime* nel quale si identificava il precedente sistema confessionista, nel continente nordamericano si è invece trattato di *costruire un ordine nuovo* in terre che non avevano storia, e nelle quali non si erano stratificati interessi, accumulazioni patrimoniali, odi e recriminazioni, come era avvenuto in Europa per oltre quindici secoli. Negli Stati Uniti il separatismo ha unito gruppi etnici e confessionali diversi, perché è stato un separatismo amico delle religioni e di tutte le Chiese. In Europa il separatismo ha diviso realtà che erano unite da secoli: ha diviso la Chiesa dallo Stato, la vita privata da quella pubblica, la scuola dalla religione, e via di seguito. Molte di queste divisioni sono segno di liberazione, ma è pur sempre una liberazione ottenuta a mezzi di conflitti aspri e duri. Questa dunque la differenza tra i due tipi di separatismo. Quello nordamericano è fondato sull'armonia e sul consenso, quello europeo è geneticamente intriso di acrimonia e di contrapposizioni».

⁴⁴ F. Finocchiaro, *Diritto cit.*, p. 29.

⁴⁵ Si determina, cioè, «una netta *separazione istituzionale* che rifiuta ogni forma di confessionismo dell'ente-Stato, ma non laicizza – nei modi che saranno propri del separatismo illuminista – la rete delle strutture civili e sociali, che restano invece strettamente collegate alle confessioni religiose»: C. Cardia, *Manuale cit.*, p. 121.

⁴⁶ Come rileva lo stesso C. Cardia, *Manuale cit.*, p. 122, trattasi di circostanza “emblematica” di

sulle conseguenze derivanti dalla particolare “armonia” che «in un contesto politico nel quale, essendo pienamente rispettate tutte le libertà fondamentali e, fra esse, la libertà di associazione, è, altresì, libero lo svolgimento dell’attività delle varie confessioni religiose, anche se abbia luogo alla stregua del diritto comune», viene a stabilirsi «tra assetto sociale privatistico e le articolazioni confessionali»⁴⁷.

Ma è altresì conclusione che, com’è noto, in qualche misura contribuisce, per così dire, a ridimensionare la portata universale del modello, sottolineando la già ricordata esigenza di considerarlo per la sua intrinseca realtà⁴⁸.

quello stretto legame tra separatismo statunitense e fattore religioso, che «ha radice nella formazione stessa delle colonie, nelle quali la religiosità e il rigorismo morale sono talmente compenetrati da rendere inconcepibile l’indifferenza religiosa» ed in effetti «si perpetua nel tempo fino ad esprimersi, nel nuovo ordinamento, al massimo livello della vita politica». Sono note, al riguardo, le conseguenze fatte derivare da F. Ruffini, *Relazioni* cit., p. 175 sul piano dell’improponibilità stessa di sistemi realmente separatisti: «quando noi vediamo che negli Stati Uniti in alcuni stati sono esclusi da cariche gli atei, sono esenti da imposte i beni ecclesiastici e in altri vi sono vincoli all’aumentare degli acquisti ecclesiastici, possiamo dire di essere dinanzi a disposizioni di diritto particolare contrarie al concetto di una completa e perfetta separazione; così neppure il paese proverbiale, classico del separatismo non l’ha attuato in realtà in tutta la sua pienezza». Secondo l’Autore, «il separatismo, comunque lo si intenda, o all’americana o alla francese, è una dottrina per origine storica, o forse per fatale necessità ulteriore di cose, fondamentalmente, irriducibilmente e puramente utopistica», p. 178.

⁴⁷ Sul punto, ancora, C. Cardia, *Manuale* cit., p. 123 che rileva come «nell’ordinamento statunitense l’ambito privatistico ha sin dalle origini un ruolo qualitativo e quantitativo sconosciuto agli ordinamenti europei, ed è nettamente prevalente su quello pubblicistico» e, di conseguenza, «nell’ordinamento nordamericano i gruppi confessionali si sentano sostanzialmente appagati, nel momento in cui possono agire con la più ampia autonomia nella sfera scolastica, educativa, assistenziale e culturale, fruendo di solide garanzie e di sostegno giuridico e finanziario, e tenendosi strettamente collegati alla comunità civile e alle sue articolazioni», determinando quella situazione di complessivo sbilanciamento dei rapporti tra confessioni e privati, a tutto vantaggio delle prime, su cui appunta le proprie valutazioni critiche il Ruffini gli elementi di maggiore significato per le valutazioni critiche di cui alla nota che segue.

⁴⁸ Come opportunamente ricorda M. Tedeschi, *Alle radici* cit., p. 84 ss., nonché *Stato e Chiese* cit. p. 99, che i dati di fondo del separatismo statunitense – ovvero l’eguaglianza delle singole confessioni, derivante dall’indiscriminata loro sottoposizione al diritto comune, e la maggiore della libertà religiosa dei gruppi – costituissero nel loro insieme un progresso rispetto alla tradizione europea è conclusione contestata dallo stesso Ruffini, preoccupato «di sostenere come esso non garantisse una maggiore libertà religiosa poiché tendeva a mortificare l’individuo a vantaggio dell’organizzazione». Secondo lo stesso Tedeschi, peraltro, «il rilievo del Ruffini, che ha costituito uno dei punti di riferimento fondamentali per la successiva pubblicistica italiana (...) oggi si presta alla duplice osservazione che il separatismo americano non può essere considerato solo in rapporto alla libertà religiosa e che la volontà di dimostrare la preminenza del sistema italiano induce il Ruffini ad un esame di tipo comparatistico, apprezzabilissimo per l’epoca in cui fu proposto ma (...) limitato nelle sue prospettive».

4. Le linee essenziali dello sviluppo giurisprudenziale federale sulla clausola di separazione

Comunque sia, è probabile che proprio la particolare origine del separatismo statunitense, espressione, come si è visto, di un più generale *favor religionis* dei relativi attori istituzionali, ne abbia condizionato le vicende più propriamente tecnico-giuridiche, in particolare, impedendo l'affermarsi di interpretazioni rigorose della *establishment clause* comunque limitandone la reale portata in svariate ipotesi applicative.

In effetti, non è che manchino, nello svolgimento della giurisprudenza della Suprema Corte, posizioni di particolare rigore: in particolare, muovendo dalla possibilità di interpretare in maniera autonoma la clausola separatista e recuperando gli insegnamenti del precedente *Chief Justice* Frankfurter, la Corte, sotto la presidenza Warren giunge persino ad estendere l'ambito di riferimento oggettivo dell'imperativo separatista, affermandone la rilevanza non solo quale divieto «di porre una religione di Stato o comunque di privilegiare con le proprie norme una o più confessioni rispetto alle posizioni ateistiche o comunque non caratterizzate da tal punto di vista»⁴⁹.

Trattasi, come non si è mancato di rilevare ulteriormente, di posizione che ribadisce il più classico separatismo, quale regolamentazione del fenomeno religioso doverosamente lasciata al diritto comune, accompagnata peraltro dalla indicazione di precisi canoni interpretativi cui subordinare il riconoscimento di compatibilità delle norme impugnate rispetto alla *establishment clause*: fine legislativo di ordine temporale ed effetto primario di non promozione o impedimento della religione⁵⁰.

Tuttavia, come pure si ricorda in dottrina, «sarebbe gravemente sbagliato vedere in tale presa di posizione un atteggiamento di avversione nei confronti del fenomeno religioso. Al contrario, la Suprema Corte ha saputo ben conciliare il favore del popolo americano per la religione con le esigenze laiche della cultura liberale, evitando sempre di irrigidirsi in posizioni estremistiche anche se «di principio». Perciò un'altra delle linee portanti della sua giurisprudenza in materia è sempre consistita nell'affermazione che il «il muro di separazione non può essere assoluto», «che un minimo contatto tra Stato e religione è ineliminabile», che «è legittimo favorire la religio-

⁴⁹ F. Onida, *Il fenomeno* cit., p. 273 ove si ricorda che «le sentenze prime e più classiche sul punto sono quelle che eliminano dalla scuola pubblica due pratiche di vasta ed antica tradizione, quella della recita di una preghiera genericamente cristiana o addirittura genericamente religiosa all'inizio delle lezioni e quella della lettura in classe, senza commento, di un breve brano della Bibbia». Trattasi delle sentenze rese per i casi *Engel v. Vitale* ed *Abington School District v. Schempp*, su cui più diffusamente nel corso della trattazione.

⁵⁰ Come ricorda F. Onida, *Il fenomeno* cit., p. 276 la Corte formalizza in maniera chiara la propria posizione in occasione dell'appena ricordato caso *Schempp*: «...la clausola toglie ogni potere legislativo riferentesi alle credenze religiose o agli atti di culto. La prova può essere formulata domandandosi: qual è il fine e l'effetto primario di una certa norma? Se il fine o l'effetto primario è l'aiuto o l'impedimento alla religione, allora cade nell'ambito di potere legislativo circoscritto dalla Costituzione. Questo significa che per superare efficacemente i divieti della *establishment clause* deve esserci un fine legislativo di ordine temporale e un effetto primario che ne promuova e non impedisca la religione».

ne quando un risultato religiosamente importante può derivare da un piccolo aiuto dello Stato»⁵¹.

In particolare, l'esigenza di un qualche temperamento è avvertita allorché si tratta di riportare gli esiti di una interpretazione rigidamente separatista sul piano della garanzia contestualmente assicurata dalla *free exercise clause*, recuperando una tipica argomentazione di fondo chiaramente seguita caso *Everson*⁵²: qui, chiamata a giudicare della legittimità della spesa pubblica per il trasporto gratuito anche degli alunni delle scuole private confessionali, la Corte, in un primo tempo, aveva riconosciuto nella pratica impugnata una diretta violazione della clausola di separazione ma nel contempo non aveva fatto derivare da siffatto riscontro, come pure sarebbe stato conseguente, una dichiarazione di illegittimità, in considerazione della prevalenza assegnata, nel caso di specie e nel rapporto tra le due clausole, alla garanzia posta dalla *free exercise clause*⁵³.

Al riguardo, si è osservato che siffatta impostazione del problema – in ragione della quale, in buona sostanza, si preferisce «dare a ciascuna delle due clausole una interpretazione estesa e totalmente autonoma, come se nel trattare dell'una non fosse affatto necessario tener presente e fare i conti anche con l'altra» – ha finito col condizionare negativamente tutta l'impostazione del problema delle clausole religiose del Primo Emendamento, costituendo vero e proprio «vizio d'origine» dell'interpretazione giurisprudenziale, cui possono farsi risalire le non infrequenti situazioni di forte tensione tra le due clausole e di conseguente gravissima crisi, a seconda dei casi, dei postulati separatisti o delle garanzie di libertà pur contestualmente assicurate dal Primo Emendamento⁵⁴.

⁵¹ «In quanto caso iniziale ed esemplare di questa linea vale la pena di ricordare, ancora in campo scolastico, le sentenze *Mc. Collum* e *Zorach*, le quali hanno ritenuto compatibile con la laicità e il separatismo della *establishment clause* non certo l'insegnamento della religione all'interno della scuola pubblica bensì una piccola collaborazione tra scuola e chiese, consistente nel permettere agli alunni di uscire una volta alla settimana da scuola un'ora prima per consentire loro di recarsi a ricevere l'insegnamento religioso nelle rispettive chiese e templi»: F. Onida, *Il fenomeno* cit., p. 274.

⁵² *Everson v. Board of Education*, 330 U.S.1 (1947).

⁵³ Per più precisi ragguagli sulla vicenda, oltre ai lavori di Onida già citati, D. Marocco Stuardi, *Libertà religiosa e autorità dello Stato negli U.S.A. Le contrastanti interpretazioni del Primo Emendamento nelle sentenze della Corte Suprema relative al sistema scolastico americano*, Milano, 1978.

⁵⁴ Come lo stesso F. Onida, *Il fenomeno* cit., p. 273 ricorda, «ciò avviene nel 1968 nel caso *Allen*, relativamente al dibattutissimo tema della costituzionalità del pagamento da parte dello Stato dei libri di testo degli studenti che frequentano la scuola confessionale. In questa occasione, applicando il precedente del vecchio caso *Everson*, la Suprema Corte dichiara legittima tale spesa pubblica, pur ammettendo che essa contrasta con la *establishment clause*, in quanto ritiene prevalente la garanzia della libertà religiosa, che sarebbe lesa se gli alunni frequentanti la scuola confessionale fossero penalizzati non potendo usufruire di vantaggi che lo Stato provvede agli alunni delle scuole pubbliche». L'Autore, rilevata la «pericolosità» del precedente, «da cui logica apre una strada in fondo alla quale potrebbe trovarsi il pagamento degli stessi insegnanti della scuola confessionale (con la sola eccezione dell'insegnante di religione) e in ultima analisi la fine dell'attuale modello separatista americano», evidenzia che «a questa situazione di esasperato contrasto tra le due clausole del primo emendamento la Corte giunge perché non solo essa non ha mai voluto o saputo proporre una loro interpretazione coordinata, ma nemmeno si è resa conto del contributo che avrebbe potuto portare a quella interpretazione una maggiore utilizzazione del principio di uguaglianza,

5. In particolare, le acquisizioni della Suprema Corte per riguardo alla presenza simbolica del religioso nello spazio pubblico

Pur con le perplessità e le riserve segnalate, in particolare sotto il profilo della coerenza complessiva del sistema per come interpretato dalla giurisprudenza della Suprema Corte⁵⁵, rimane peraltro da sottolineare come appaia tuttora fondata l'opinione per cui un separatismo parziale risulta complessivamente «più confacente alla realtà americana», la cui specifica esperienza, dando conto «dell'incongruità di un separatismo assoluto», prova piuttosto «quanto pericolosa possa essere una rigida interpretazione del separatismo»⁵⁶.

Occorre pur considerare, per converso, che l'apertura dimostrata dal sistema statunitense nei confronti delle esigenze della religiosità rischia spesso di andare al di là delle legittime istanze di libertà dei singoli, dando vita ad arretramenti ben più significativi⁵⁷, da un punto di vista generale e di principio, nei confronti dei postulati separatisti.

Ce ne fornisce una qualche conferma l'atteggiamento assunto dai supremi giudici federali proprio con riferimento alla tematica della presenza *lato sensu* simbolica del religioso nello spazio pubblico.

Se è infatti vero che proprio escludendo la legittimità della recita di una preghiera o di un brano della Bibbia nelle scuole pubbliche, senza dare rilievo alcuno alla natura non specificamente confessionale ma più genericamente religiosa della pratica contestata, la Corte si è fatta propugnatrice della particolare estensione contenutistica della clausola di separazione sopra segnalata, nondimeno occorre ricordare come la stessa Corte non abbia diversamente mancato di legittimare l'esercizio di pratiche religiose sotto l'egida pubblica, così ponendosi al limite della violazione del principio di non identificazione.

Tanto la Corte ha ritenuto di poter fare al dichiarato scopo di preservare dalla dichiarazione di incostituzionalità pratiche di antico consolidamento nell'ambito della

forse l'unico principio davvero in grado di conciliare e coordinare le esigenze delle due clausole religiose. Al contrario, la Suprema Corte – tranne rare fortunate eccezioni che però non vengono sfruttate come 'precedenti' – si trova spesso condizionata dalla stessa impostazione secondo cui ciascuna clausola deve avere una interpretazione del tutto indipendente dall'esistenza dell'altra, a contrapporre diritto speciale a diritto speciale; al privilegio negativo che parrebbe talvolta imposto dalla *establishment clause* si contrappone il privilegio positivo spesso assicurato dalla *free exercise clause*: e nel contrasto il principio separatista può finire per morire del tutto». Sul punto, per più specifiche indicazioni, si veda oltre, sub nota (73).

⁵⁵ Secondo lo stesso F. Onida, *Il fenomeno* cit., p. 258 si tratta di difficoltà che possono, almeno in parte, ricondursi alle specificità del sistema americano, «nel quale la dottrina, avvezza a lavorare su un diritto giurisprudenziale, com'è proprio di un sistema di *common law*, tende a seguire, anche se magari criticando, più che a precedere la giurisprudenza; cosicché quest'ultima deve spesso tracciare il primo solco in un terreno non predisposto; e lo deve fare sotto l'impulso condizionante di una fattispecie particolare, che può essere disadatta a consentire di cogliere tutti i vari aspetti di un problema giuridico complesso».

⁵⁶ M. Tedeschi, *Alle radici* cit., p. 115.

⁵⁷ Proprio perché non più giustificati dal concorrere delle esigenze di garanzia poste dalla *free exercise clause*.

tradizione statunitense, altresì facendo leva, in maniera più o meno chiara e consapevole, sulla diversità del contesto – comunque pubblico – in cui quelle pratiche andavano a svolgersi.

In particolare, in *Marsh v. Chambers*, del 1983, la Corte aveva riconosciuto come legittima la lettura di una preghiera all'apertura della legislatura dello Stato, proprio argomentando dalla inerenza della pratica in questione ad una «antica tradizione» statunitense.

Non si tratta di particolare trascurabile tant'è vero che il ritorno a posizioni più nettamente separatiste, scandito in particolare dalla decisione resa per il caso *Lee v. Weisman* e, come si avrà modo di ricordare, ribadito ancor più recentemente è, in dottrina, considerato «importante perché ridimensiona il principio affermato dalla Corte in *Marsh v. Chambers*, secondo cui l'antica tradizione di una certa pratica religiosa potrebbe salvare tale pratica dalla illegittimità nonostante il contrasto sicuramente esistente col principio della separazione tra Stato e religione»⁵⁸.

6. Il significato delle decisioni della Corte Suprema federale tra sostanza delle soluzioni adottate e rilevanza delle singole opinioni

Come si anticipava poc'anzi, peraltro, si tratta di questioni di una certa complessità, per la cui soluzione pare giocare un ruolo altrettanto determinante la peculiare caratterizzazione dello spazio pubblico che, di volta in volta, costituisce lo specifico scenario in cui le pratiche contestate sono destinate a svolgersi.

Viene naturale, a questo punto, richiamare un elemento distintivo del sistema statunitense di giustizia costituzionale che può rivelarsi utile ad una approfondita valutazione delle decisioni della Corte che ci apprestiamo a valutare e, per tale via, ad una più ampia riflessione sul tema oggetto di indagine.

In particolare, la specificità del *judicial review* statunitense, che prevede la possibilità non solo per i giudici dissenzienti ma per gli stessi giudici di maggioranza di formulare proprie specifiche “*opinions*”, consente di avere maggiore contezza della complessità delle questioni evocate dai casi di specie giunti all'esame della Corte e di coglierne l'estrema varietà di implicazioni non solo sul piano della concretezza delle decisioni adottate ma anche sotto un profilo più generale e di principio⁵⁹.

È cioè proprio dal confronto tra le rispettive posizioni che possono cogliersi nella loro interezza, da un lato, le motivazioni che fondano, rispettivamente, la decisione della maggioranza e le ragioni oppositive della minoranza e, dall'altro, le differenti interpretazioni del dato costituzionale che esse presuppongono.

Ciò è particolarmente evidente con riferimento alla posizione assunta dalla Corte per il caso *Van Orden*, siccome evidenziata dalla opinione resa dal *Chief Justice* Rehnquist: una posizione che invero assume una più chiara ampiezza di significato attraverso una sua lettura congiunta alle *concurring opinions* dei favorevoli alla decisione ed in particolare a quella del giudice Breyer.

Quest'ultima, in particolare, come avremo modo di vedere di qui a poco, contri-

⁵⁸ F. Onida, *Il fenomeno cit.*, p. 281.

⁵⁹ Il che, se può rappresentare un utile riferimento di natura dogmatico-ricostruttiva, sotto un profilo più squisitamente pragmatico tende forse a complicare oltre misura il quadro delle posizioni.

buisce a svelare, sia pure indirettamente, l'impostazione generale della problematica relativa alla interpretazione della clausola separatista ovvero quei presupposti dell'intero ragionamento che ad una prima impressione, nella ricostruzione dello stesso *Chief Justice*, pur se indubitabilmente presenti, rimangono in gran parte sullo sfondo dell'argomentazione perché, forse volutamente, non del tutto svelati.

7. *L'affermazione della legittimità dell'esposizione pubblica dei Dieci Comandamenti nel caso Van Orden v. Perry tra riconoscimento del significato religioso e sua possibile rilevanza civile: l'incidenza della tradizione*

In questa occasione, invero, lo stesso Rehnquist pare fondare la decisione del caso su valutazioni attinenti, in maniera decisiva, alla peculiarità della fattispecie ed in particolare alla specifica caratterizzazione, nel caso considerato, della presenza "simbolica" religiosa nello spazio pubblico, sotto il profilo della sua indiscutibile inerenza alla storia degli Stati Uniti ed alle più antiche tradizioni del popolo statunitense, in buona misura limitandosi a presupporre valutazioni più direttamente concernenti la reale estensione contenutistica della clausola separatista del primo emendamento.

In buona sostanza, secondo l'impostazione Rehnquist, è la particolare configurazione della fattispecie discussa ovvero la specificità della presenza simbolica del religioso nel caso di specie – una presenza che allo stesso Rehnquist appare, nell'ipotesi considerata, ampiamente giustificata da valutazioni storico-sociologiche piuttosto che da una reale volontà di *establishment* – a consentire di determinarsi in senso favorevole alla costituzionalità della esposizione in luogo pubblico del monumento oggetto di contestazione e persino di collocare siffatta decisione – nonostante la evidente diversità degli esiti conclusivi – nell'alveo dei più significativi precedenti della stessa giurisprudenza costituzionale statunitense ovvero, in particolare, dei noti casi *Engel v. Vitale*⁶⁰, *Abington School District v. Schempp*⁶¹, *Lee v. Weisman*⁶², e degli ulteriori *Stone v. Graham*⁶³ e *Santa Fe Independent School District v. Doe*⁶⁴.

⁶⁰ *Engel v. Vitale*, 370 U.S. 421 (1962), in cui viene riconosciuta l'illegittimità costituzionale della preghiera, genericamente religiosa, recitata all'inizio delle lezioni nelle scuole pubbliche.

⁶¹ *Abington School District v. Schempp*, 374 U.S. 203 (1963), in cui a venire riconosciuta illegittima è la lettura in classe, senza commento, di un breve brano della Bibbia.

⁶² *Lee v. Weisman*, 112 S.Ct. 2649 (1992), in cui la Corte ha sancito l'illegittimità costituzionale delle solenni cerimonie di chiusura dei corsi annuali nelle scuole pubbliche in cui un ministro di culto – di confessioni volta per volta diverse – è chiamato a leggere una breve preghiera od invocazione a carattere genericamente religioso.

⁶³ *Stone v. Graham*, 101 S.Ct. 192 (1980), ove si è riconosciuta illegittima la disposizione statale volta ad imporre l'esposizione dei Dieci Comandamenti in ogni aula scolastica pubblica. Per una valutazione complessiva ed una ricollocazione di questa decisione, delle altre appena citate, e delle ulteriori più significative nel contesto dei processi evolutivi della giurisprudenza statunitense in tema di *establishment clause* e *free exercise clause* rimangono fondamentali i molteplici contributi di F. Onida ed in particolare i suoi *Uguaglianza e libertà religiosa nel separatismo statunitense*, Milano, 1970 e *Separatismo e libertà religiosa negli Stati Uniti. Dagli anni sessanta agli anni ottanta*, Milano, 1984.

⁶⁴ *Santa Fe Independent School District v. Doe et al.*, 530 U.S. 290 (2000), in cui la Corte ha ritenuto

Più nello specifico, e con maggiore riguardo all'aspetto tecnico-interpretativo della decisione, nella ricostruzione fornita dal *Chief Justice* Rehnquist appare centrale il rilievo dell'uso meramente passivo del simbolo religioso derivante dalla sua particolare inclusione nella rappresentazione scultorea collocata nel giardino antistante il palazzo del Governo nonché dalla presenza, ivi, di ulteriori monumenti di natura chiaramente civile: consegue a siffatto rilievo, infatti, l'opinione relativa alla sostanziale improponibilità del ricorso al c.d. *Lemon test* nel caso di specie e alla correlativa necessità di procedere nella soluzione del caso lasciandosi guidare da valutazioni ricavate «*by our Nation's history*»⁶⁵.

Viene così ripresa un'argomentazione di fondo già implicitamente affacciata nel precedente *Lynch v. Donnelly*⁶⁶ – di cui anzi, per certi versi, vengono persino estremizzate le conclusioni⁶⁷ – non a caso esplicitamente citato da Rehnquist: anche in quella occasione, invero, la natura passiva del simbolo contestato aveva indotto ad abbandonare il *Lemon test* (o, meglio, ad intenderlo e quindi applicarlo in maniera parzialmente diversa da quanto fatto in passato⁶⁸) e, per tale via, ad assumere una decisione favorevole alla esposizione di quel simbolo religioso in luogo pubblico⁶⁹.

Anche prescindendo da questo importante precedente – su cui, d'altra parte, avremo modo di tornare di qui a poco – è peraltro evidente che l'operazione compiuta dal *Chief Justice* in *Van Orden* è tale da indurre un duplice ordine di considera-

illegittima la prassi adottata dal distretto scolastico di Santa Fe, che consente allo studente che ricopre la carica di cappellano del concilio studentesco di recitare pubblicamente una preghiera prima di ogni partita di football del campionato universitario. Sulla decisione in questione, E. Relano Pastor, *Las desventajas del principio de neutralidad en Estados Unidos: una relectura de la clausula de non establecimiento*, in Quad. Dir e Pol. Eccl. 3/2003, pp. 843 ss..

⁶⁵ «*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*».

⁶⁶ *Lynch v. Donnelly*, 465 U.S. 668 (1984)

⁶⁷ In particolare, come avremo modo di vedere di qui a poco, la decisione resa per il caso *Van Orden* conduce a più esplicite conseguenze l'iniziale reinterpretazione del *Lemon test* sino a ritenerlo del tutto inoperante laddove si tratti di simboli passivi.

⁶⁸ Come si evince dalle impostazioni seguite dai primi commentatori statunitensi, in questa prima fase non si è trattato di un vero e proprio abbandono del principio quanto di una sua diversa applicazione alla luce del rilievo accordato alla possibile eredità storica del fatto religioso. Cfr., al riguardo il commento redazionale apparso in *Harv. law rev.*, Nov. 1984, all'indomani della decisione della Corte, da cui – in particolare, p. 175 in fine, 176 – pare emergere, piuttosto che la necessità di abbandonare il *Lemon test*, l'opportunità di interpretarlo in maniera rispettosa della rilevanza civile del fatto religioso, nel senso appena indicato: «*The Court's perception that the crèche was merely a "passive symbol", through which the city appropriately acknowledged the religious heritage embodied in the national Christmas holiday, informed its application of each branch of the tripartite test*», sicché, in sostanza, «*viewing the crèche within the context of the city's celebration of a national public holiday, the Court found that the display met all three requirements of the standard tripartite test*». In questo caso, peraltro, sembrerebbe assistersi ad una riconsiderazione del criterio del c.d. «*excessive entanglement*», preferendosi piuttosto focalizzare l'attenzione sulla esigenza di impedire il prodursi di situazioni di divisione sociale su base religiosa.

⁶⁹ Ovvero, più precisamente, alla spesa del denaro pubblico per il suo allestimento.

zioni, il primo, concernente l'abbandono (dichiaratamente riconosciuto come non definitivo ovvero limitato a specifici casi) del già citato *Lemon test*, l'altro più direttamente riguardante la natura ed il significato dei parametri valutativi utilizzati, per così dire, "in sostituzione" dello stesso e quindi, in buona sostanza, del ricorso al riconoscimento del ruolo della religione nella storia della Nazione statunitense.

Dal primo punto di vista, merita invero evidenziare come già l'abbandono di quel criterio interpretativo in questa specifica ipotesi sia di per sé stesso significativo di una volontà di arretramento ulteriore rispetto alla garanzia posta dal primo emendamento del *Bill of Rights*, sotto lo specifico profilo del divieto di *establishment of religion*.

Torna di una certa utilità, in questa direzione, quanto acutamente evidenziato in sede dottrinale proprio con riferimento alla emersione ed alla iniziale affermazione del citato canone interpretativo.

Al riguardo, in via preliminare, può peraltro essere utile ricordare come, in buona sostanza, piuttosto che della definizione di un (del tutto) nuovo canone interpretativo si sia più semplicemente trattato di aggiungere ai due precedenti criteri dello «scopo d'ordine secolare» e dell'«effetto primario», che sino alla decisione resa per il caso *Lemon v. Kutzman* avevano decisamente orientato l'interpretazione costituzionale del principio separatista, l'ulteriore criterio del c.d. «*excessive government entanglement with religion*»⁷⁰.

Ma il punto su cui maggiormente va posta l'attenzione dell'interprete è costituito dall'ulteriore, significativo rilievo per cui «l'aggiustamento» derivante dall'introduzione del nuovo limite si spiega proprio con la necessità «di precisare meglio l'interpretazione della *establishment clause* del primo emendamento, dettando criteri atti a stabilire un nuovo confine alla legittimità degli interventi pubblici a favore della scuola confessionale»⁷¹ ed a fronte dei non più tollerabili sfondamenti che il tradizionale, preteso, «muro di separazione» tra Stato e Chiesa aveva già subito.

Più in particolare, la Corte, trovatasi di fronte al problema di leggi che erano giunte a porre a carico dello stato parte della «retribuzione degli insegnanti di materie secolari» (quindi escludendo solo quella degli insegnanti di religione) nelle scuole private di orientamento confessionale, era riuscita, proprio grazie al nuovo criterio, «a bloccare quelle leggi, senza rovesciare i propri precedenti *Everson* e *Allen*»⁷². Quelle leggi sono così, in questo caso, dichiarate illegittime «in quanto la loro applicazione, per non essere lesiva della *establishment clause*, richiederebbe che gli organi pubblici fossero messi in grado di controllare efficacemente che gli insegnanti retribuiti dallo stato non reintroducessero in qualche surrettizio modo l'insegnamento di principi religiosi all'interno delle stesse materie secolari: e, appunto, l'organizzazio-

⁷⁰ Sicché, in definitiva, nel valutare la ricorrenza del contrasto con il divieto di *establishment* contenuto nel primo emendamento di una pratica di richiamo al fatto religioso giunta al vaglio della Corte, occorrerebbe operare in una triplice direzione: «...*First, the (practice) must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, (it) must not foster an excessive government entanglement with religion*».

⁷¹ F. Onida, *Separatismo cit.*, p. 24 ss..

⁷² Trattasi, rispettivamente, di *Everson v. Board of Education*, 330 U.S. 1 (1947), in cui si era riconosciuta legittima la spesa pubblica per il trasporto gratuito anche degli alunni delle scuole private e *Board of Education of Central School District n. 1 v. Allen*, 392 U.S. 236 (1968).

ne di un tale penetrante controllo da parte degli organi pubblici contrasterebbe nuovamente col principio della separazione in quanto comporterebbe un eccessivo coinvolgimento (*aggrovigliamento*) pubblico con la religione»⁷³.

In buona sostanza, allora, attraverso l'elaborazione del nuovo criterio si era inteso garantire, a fronte della pericolosità del precedente costituito dal caso *Allen*⁷⁴, «la cui logica apre una strada in fondo alla quale potrebbe trovarsi il pagamento degli stessi insegnanti della scuola confessionale (con la sola eccezione dell'insegnante di religione)» la sopravvivenza del modello separatista, «sia pure attestato su una linea difensiva nettamente arretrata rispetto alle posizioni precedentemente raggiunte»⁷⁵.

Mentre infatti, sotto il profilo tecnico, «il nuovo criterio si aggiunge ai primi due, e sembra dunque rinsaldare e rendere più severo il modello del separatismo statunitense (...) in realtà la sua stessa nascita dipende dal fatto che la coscienza politico-sociale del paese era ormai riuscita ad imporre una applicazione dei primi due criteri che li aveva dapprima aggirati e poi praticamente svuotati di contenuto, rendendo perciò necessario approntare almeno una linea di resistenza più arretrata»⁷⁶.

Sicché per tornare alla stretta attualità, se quanto sopra ricordato è vero, si conferma che l'abbandono, pur dichiaratamente “parziale” di quel criterio è già di per sé stesso indice significativo di una diversa, ancor meno rigorosa, sensibilità del potere giudiziario per riguardo alle esigenze del principio separatista, determinando, almeno in una particolare ipotesi, il ritorno alla situazione di fatto venutasi a creare all'indomani della decisione resa dalla Corte per il già ricordato caso *Allen*.

Trattasi, d'altra parte, – giungiamo così alla seconda delle considerazioni indotte dall'argomentazione del *Chief Justice* – di una linea di tendenza che risulta confermata dall'ulteriore svolgimento della *opinion* dello stesso Rehnquist.

In particolare, riconosciuta espressamente l'impraticabilità del ricorso al *Lemon test* per riguardo a casi in cui si discuta di “simboli passivi”, l'attenzione viene spostata sul significato ascrivibile al tradizionale riconoscimento pubblico della presen-

⁷³ F. Onida, *Separatismo cit.*, p.25, ove si evidenzia che l'aggiustamento apportato col nuovo criterio «permette in pratica alla Suprema Corte di continuare ad evitare di affrontare alla radice il problema di una interpretazione coordinata delle due clausole religiose del primo emendamento nonché del principio di uguaglianza. La Corte evita per quanto possibile – ed ora anche grazie al correttivo apportato in sede di interpretazione della clausola separatista – di ripetere esplicitamente l'affermazione di *Everson* secondo cui in caso di contrasto tra le due clausole religiose la *free exercise* prevale sulla *establishment clause*, ma sullo sfondo, e come indicazione di tendenza suggerita alla giurisprudenza inferiore, proprio quella è la essenziale conseguenza dell'aver preferito una interpretazione dei due principi nettamente distinta; mantenendo quindi in vita la possibilità di un loro netto contrasto risolvibile solo con la prevalenza dell'uno sull'altro».

⁷⁴ Come si è già avuto modo di ricordare, in questo caso la Corte prende posizione per riguardo al «dibattutissimo tema della costituzionalità del pagamento da parte dello Stato dei libri di testo degli studenti che frequentano la scuola confessionale. In questa occasione, la Suprema Corte dichiara legittima tale spesa pubblica, pur ammettendo che essa contrasta con la *establishment clause*, in quanto ritiene prevalente la garanzia della libertà religiosa, che sarebbe lesa se gli alunni frequentanti la scuola confessionale fossero penalizzati non potendo usufruire di vantaggi che lo Stato provvede agli alunni delle scuole pubbliche»: F. Onida, *Il fenomeno cit.*, p. 277.

⁷⁵ F. Onida, *Il fenomeno cit.*, ivi.

⁷⁶ F. Onida, *Il fenomeno cit.*, p. 278.

za simbolica del fatto religioso quale elemento significativo della stessa storia nazionale⁷⁷.

Ebbene, è su questo piano che il ricorso al precedente *Lynch v. Donnelly* si appalesa ancor più significativo.

In effetti, di questo rilevante precedente viene ripresa non soltanto l'impostazione di fondo, relativa alla necessità stessa di approfondire il tema della valenza storica del messaggio veicolato attraverso il simbolo (non più solo) religioso, quanto l'esito sostanziale di questo approfondimento, che in effetti dimostrerebbe l'esistenza di un indiscusso riconoscimento pubblico – legislativo, esecutivo, giudiziario – del ruolo della religione⁷⁸.

Trattasi, peraltro, di una ricognizione piuttosto ampia ed articolata che muove dal significato attribuibile a pratiche di più remota origine per poi ulteriormente registrare analoga rilevanza storica ed inerenza all'eredità nazionale statunitense, con più specifico riferimento ai Dieci Comandamenti⁷⁹: una rilevanza, anche qui, che risulterebbe non limitata alla sola sensibilità della Corte ma più ampiamente colta dall'esecutivo e dal legislativo⁸⁰.

Evidentemente, le risultanze di siffatta ricostruzione non sono tali da escludere la valenza (anche) religiosa dei Dieci Comandamenti ed è a questo riguardo che la posizione di Rehnquist si rivela di maggiore ambiguità: proprio la compresenza di (almeno) una duplicità di significato ovvero, più in particolare, il permanere di una sicura caratterizzazione religiosa del simbolo non costituisce invero particolare da sottovalutare soprattutto da un punto di vista sistematico-interpretativo più generale, pregiudicando la linearità del ragionamento e comunque imponendo di precisare l'effettiva portata "scusante" del ricorso alla contestuale valenza storica e civile degli

⁷⁷ Merita evidenziare, a questo proposito, che l'espressione "simbolo passivo" pare assumere nello svolgimento complessivo delle argomentazioni della Corte (almeno) una duplicità di significato, intendendo registrare, in prima battuta, il dato esteriore costituito dal suo non comportare nell'ipotesico destinatario alcuna attività (come invece tipicamente accade nel caso della recita di una preghiera) e, in un momento successivo, volendo diversamente indicare la riconducibilità del simbolo stesso «ad una sorta di religione puramente civile, come tale non coinvolgente lo Stato nell'apprezzamento del patrimonio dogmatico di una determinata religione positiva», secondo quanto rileva A. Vitale, *Scuola e fattore religioso*, in *Quad. dir. e pol. eccl.* n. 1/1989, p. 112. In questa ottica – con riferimento alla questione del crocifisso ed evidenziando la «evidente forzatura» consistente «nell'ignorare quella che può essere definita la storicità della croce, come immagine evocante il sacrificio del figlio di Dio per la redenzione dell'umanità e, come tale, usata nella liturgia di tutte le chiese cristiane – si è parlato di "simbolo passivo" quale simbolo «il cui significato sarebbe determinabile, in modo potenzialmente diverso per tutti gli individui, attraverso l'investimento simbolico che su di esso ciascuno opera»: M. Manco, *Esposizione del crocifisso e principio di laicità dello Stato*, in *Quad. dir. e pol. eccl.* n. 1/2005, p. 50.

⁷⁸ «As we explained in *Lynch v. Donnelly*» – si legge ulteriormente nella opinione del Chief Justice – «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».

⁷⁹ «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».

⁸⁰ «The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments (...) These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments».

stessi simboli religiosi e, in particolare, del monumento oggetto di contestazione.

Di qui l'esigenza, avvertita dallo stesso Rehnquist, di ribadire l'ovvia esistenza di «*limits to the display of religious messages or symbols*», anche in considerazione della necessità di tenere conto di importanti precedenti di segno apparentemente contrario della Corte, quali proprio i già ricordati, *Abington School District v. Schempp*, *Engel v. Vitale*, *Stone v. Graham*, *Lee v. Weismann*, *Santa Fe Independent School District v. Doe*.

Il successivo sforzo del *Chief Justice* è quindi quello di chiarire quali siano le effettive differenziazioni tra i casi testè ricordati e quello ora giudicato e come, quindi, la decisione per il caso *Van Orden* possa ritenersi coerente con i consolidati sviluppi della giurisprudenza della Suprema Corte.

È su questo piano, più in particolare, che vengono richiamate, a giocare un ruolo determinante, le diverse circostanze di tempo e, soprattutto, di luogo in cui si colloca l'esposizione.

Si fa leva, così, sulla dichiarazione di incostituzionalità che, in occasione del citato *Stone v. Graham*, ha colpito la disposizione dello stato del Kentucky volta ad imporre l'esposizione dei Dieci Comandamenti in ogni aula scolastica pubblica per sottolineare il particolare rigore mostrato allorquando la presunta violazione della clausola separatista faccia riferimento a pratiche che si svolgono nelle scuole primarie e secondarie: proprio la peculiarità del contesto scolastico, aveva invero consentito di inferire, in quella determinata circostanza, l'esistenza di un preordinato proposito religioso nella disposizione impugnata⁸¹, così alimentando una specifica linea interpretativa che allo stesso *Chief Justice* appare ulteriormente rafforzata dal confronto tra le decisioni rese per i casi *Lee v. Weisman*, già citato, e *Marsh v. Chambers*⁸²: il primo, come ricordato, risoltosi con la dichiarazione di incostituzionalità della recita della preghiera nel contesto delle cerimonie ufficiali di consegna dei diplomi finali, il secondo, invece, con il riconoscimento della costituzionalità della preghiera che precede l'inizio delle sessioni di lavoro del parlamento statale⁸³.

8. La via alternativa nella valutazione della rilevanza civile del riferimento religioso: la peculiarità dei contesti e delle modalità dell'esposizione

Decisivamente incentrata sulla ricostruzione del significato complessivo del simbolo religioso e della sua peculiare caratterizzazione o, più precisamente, sulla reale

⁸¹ «In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose», ricorda infatti Rehnquist.

⁸² *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁸³ D'altra parte, rileva ulteriormente il Chief Justice, non v'è alcun accenno, in *Stone* e nella giurisprudenza successiva, alla eventuale riproduzione del medesimo iter argomentativo ivi utilizzato per il caso di luoghi pubblici diversi dalle scuole primarie e secondarie: «*neither Stone itself nor subsequent opinions have indicated that Stone's holding would extend to a legislative chamber (...) or to capitol grounds*». In questo contesto, è conseguente la conclusiva sottolineatura della peculiare caratterizzazione del monumento in contestazione che, a parere dello stesso Rehnquist, in definitiva evidenzia «*a far more passive use of those texts than was the case in Stone, where the text confronted elementary school students every day*», mentre evidentemente, per le stesse ragioni, «*the monument is therefore also quite different from the prayers involved in Schempp and Lee v. Weismann*».

portata della sua inclusione nella rappresentazione del monumento pubblico oggetto di contestazione – di cui si inferisce infine la contestuale valenza storica e civile – e, quindi, sul rilievo di una sua sostanziale duplicità di significato che si assume tale da non ledere la clausola separatista del primo emendamento, la posizione del *Chief Justice* fa leva su di un elemento storico-sociologico che tenderebbe inevitabilmente a lasciare sullo sfondo del dibattito valutazioni inerenti la tutela della libertà religiosa e, soprattutto, la reale portata normativa della clausola separatista.

Il che, per certi versi, costituisce una sorta di tradimento delle attese che la stessa motivazione aveva contribuito ad alimentare⁸⁴.

Ma, soprattutto, finisce col trasmettere l'impressione di una sostanziale ambiguità proprio per riguardo alla ricostruzione del significato ascrivibile alla clausola separatista: un'impressione che risulta invero confermata dal tenore delle stesse concorrenti opinioni, in particolare, rispettivamente, dei giudici Scalia e Thomas.

In effetti, le scelte argomentative del Rehnquist appaiono tali non solo, da un lato, da scontentare, come pure è naturale, fautori di una lettura rigorosa del principio di separazione ma anche, dall'altro, – in maniera che solo ad una lettura superficiale potrebbe dirsi inaspettata – da non convincere appieno i fautori di una sua interpretazione più elastica⁸⁵.

Lo testimonia, in maniera particolarmente significativa, l'opinione del giudice Scalia, il quale se, da un lato, riconosce che l'interpretazione del Chief Justice in buona sostanza riflette la posizione prevalente della stessa giurisprudenza costituzionale statunitense – e, proprio per questo decide di condividerla formalmente⁸⁶ – contestualmente manifesta la propria personale preferenza per una interpretazione della clausola separatista che, in maniera ritenuta più consona alla storia della Nazione, diversamente preveda quale suo nucleo essenziale la legittimità di pratiche che riconoscano la rilevanza del fattore religioso genericamente inteso, così intendendo il divieto di *establishment* come riferito a specifiche confessioni religiose e non alla religiosità in generale.

Come a dire che, nell'ottica del giudice Scalia, la clausola separatista consentirebbe un generale apprezzamento per la valenza religiosa del simbolo, a patto che ciò non si traduca nel riconoscimento di una sua più specifica caratterizzazione confessionale e, per tale via, realizzi una pratica tesa alla diffusione del messaggio specificamente religioso ovvero faccia opera di proselitismo⁸⁷.

⁸⁴ In effetti, nell'introdurre le motivazioni che fondano "in diritto" la decisione resa per il caso Van Orden, il Chief Justice Rehnquist pare avvertire la necessità di procedere conciliando la duplice esigenza, per così dire, di "rispettare il passato", ovvero il ruolo giocato dalla religione e dalle tradizioni religiose lungo la storia della Nazione, contestualmente "guardando al presente", ovvero alla legittima aspirazione al rispetto della libertà di religione.

⁸⁵ Non tanto e non solo, evidentemente, sotto il profilo degli esiti quanto, da un punto di vista più ampio, sotto il profilo del contenuto generale e di principio della clausola in questione.

⁸⁶ «*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*».

⁸⁷ «*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 practises, 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,*

Ma altrettanto è a dirsi, con le dovute differenziazioni rispetto all'impostazione Scalia, per riguardo alla *concurring opinion* del giudice Thomas: anche questi invero concorda con la ricostruzione del *Chief Justice* in ordine al significato religioso del monumento e sul suo contestuale riconoscimento di una portata anche civile per effetto della rilevanza assunta dal fattore religioso sul piano della costruzione del sentimento nazionale (profilo storico) e tuttavia anch'egli riconosce come ad esiti maggiormente persuasivi si sarebbe potuti pervenire sulla base di una diversa interpretazione della clausola separatista.

In buona sostanza, secondo Thomas piuttosto che indagare la reale portata religiosa del simbolo e, nel caso questa si riveli sussistente/prevalente, dichiararne l'incostituzionalità sarebbe molto più produttivo e suscettibile di condurre ad esiti lineari ed oggettivamente verificabili propendere per una lettura del primo emendamento più rispettosa dal suo originario significato quale norma intesa (semplicemente) ad impedire ogni disposizione legislativa di un obbligo di professione religiosa in capo ai singoli o ai gruppi.

A fronte del simbolo, cioè, ci si può limitare a verificare se la sua esposizione pubblica comporti un implicito obbligo di adesione in capo a chi lo osserva, senza indugiare ad indagarne il significato intrinsecamente religioso e, del caso, la inerenza alla storia della Nazione.

Ora, in questo peculiare contesto interpretativo, tutt'altro che univoco, una posizione di rilievo è assunta dalle argomentazioni, più chiaramente distanti dall'analisi maggioritaria, del giudice *Breyer*, peraltro concorrente nel giudizio finale, che finisce invero per costituire il vero e proprio ago della bilancia nella soluzione della vicenda giudiziaria che ci occupa, in buona sostanza determinando, con il proprio voto, la diversità degli esiti rispettivamente riguardanti i casi *Van Orden* e *Mc. Creary*.

Trattasi, peraltro, di posizione che pare segnalarsi per una più compiuta consapevolezza delle difficoltà poste dal caso di specie e della conseguente necessità di condurre l'indagine debitamente potenziando il riferimento alle peculiarità del contesto in cui si colloca l'esposizione ed alla attualità delle conseguenze che ne derivano nelle ipotesi di volta in volta considerate.

Non è un caso che, in definitiva, ad una sostanziale identità delle motivazioni adottate in *Van Orden* e *Mc. Creary* corrispondano nell'impostazione dello stesso *Breyer* una diversa valutazione dei rispettivi fatti oggetto di causa e, di conseguenza, decisioni di segno diametralmente opposto per riguardo alla questione di costituzionalità.

In effetti, nella sua *opinion*, il giudice *Breyer*, preso atto, in linea di principio, della improponibilità di una "*exact formula*" utilizzabile al fine di risolvere casi, come quello all'esame della Corte, che si situino al limite della violazione della clausola separatista (si cita al riguardo il precedente *Schempp* – opinioni dei giudici *Goldberg* e *Harlan*) e spiegata l'esistenza di questi «*borderline cases*» con la complessità degli intenti seguiti dalle clausole religiose del primo emendamento, osserva, con più specifico riguardo al caso di specie, ed in considerazione del carattere polivalente dell'esposizione dei Dieci Comandamenti ovvero della possibilità che questi in concre-

honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments». Tanto, ci pare di capire, a prescindere da ogni indagine riguardante l'inerenza della pratica venuta di volta in volta in questione alle tradizioni ed alla storia del popolo statunitense.

to veicolino, a seconda del contesto, non solo un messaggio religioso ma altresì un messaggio morale o di tipo storico/culturale, come possa rivelarsi decisiva la considerazione del contesto in cui l'esposizione contestata si colloca⁸⁸.

Si tratta, almeno così ci pare, di una differenza non trascurabile, rispetto alla impostazione Rehnquist: quest'ultimo deduce la prevalenza/equivalenza di una caratterizzazione secolare rispetto al (comunque innegabile) significato religioso del messaggio veicolato attraverso l'esposizione pubblica dei Dieci Comandamenti dal dato, che potremmo definire in certo qual modo "estrinseco", della preesistenza di una pratica di una reiterazione continuata nel tempo di un uso pubblico dei Dieci Comandamenti nello svolgimento storico delle vicende del popolo e della Nazione statunitense ovvero dalla semplice corrispondenza della esposizione contestata a pratiche di antica e consolidata tradizione; l'altro preferisce piuttosto focalizzare la sua attenzione sulle caratteristiche attuali della rappresentazione oggetto di valutazione, sia per ciò che concerne il contenuto, sia, soprattutto, per quanto attiene il contesto in cui essa viene a collocarsi.

In effetti, nelle sue argomentazioni, il Breyer dà l'impressione di non voler indugiare oltremodo su valutazioni di ordine generale concernenti il ruolo tradizionale e storico giocato dal sentimento religioso nella vita della Nazione statunitense ma preferisce verificare con maggiore puntualità la compatibilità a Costituzione del messaggio veicolato attraverso l'esposizione pubblica dei Dieci Comandamenti, per come essa appare nell'attualità dei contenuti e della loro collocazione in quel determinato luogo pubblico⁸⁹.

Come si vede, in buona sostanza, rispetto alle argomentazioni del *Chief Justice*, la differenza, pur sottile, coinvolge la ragione ultima dell'indagine concernente il significato stesso del monolite e delle sua collocazione nello spazio pubblico: nella prima impostazione, si tratta invero di riconoscere l'apporto della religione per la costruzione della Nazione e conseguentemente di prestarvi il doveroso ossequio; nell'impostazione Breyer, invece, a venire in questione è la concreta utilizzazione a fini civili del messaggio ascrivibile ai Dieci Comandamenti, con la eventuale sottolineatura dell'esistenza di una relazione oggettiva tra diritto, morale e religione.

Il che ha l'effetto, per così dire, di ancorare in maniera ancor più decisa alle peculiarità del caso di specie la decisione relativa alla infondatezza delle censure di incostituzionalità per violazione delle clausole religiose del Primo Emendamento e, in particolare, della *Establishment Clause*⁹⁰, con cui viene in effetti definito il caso *Van Orden*.

⁸⁸ «Focusing on the text of the Commandments alone cannot conclusively resolve this case (...) 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».

⁸⁹ «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», si legge invero nella *opinion* dello stesso Breyer.

⁹⁰ Suggestive le considerazioni conclusive del Breyer, che ulteriormente richiama quanto i giudici Golberg ed Harlan evidenziarono a proposito del caso *Schempp*: «...where the *Establishment Clause* is at issue, we must "distinguish between real threat and mere shadow". Here we have only the shadow».

9. *Il contestuale riconoscimento della illegittimità dell'esposizione in Mc. Creary County et Al. v. American Civil Liberties Union of Kentucky et Al.: decisività della valutazione sul contesto*

Ora, pare fondatamente sostenibile che analoga centralità ai fini della decisione assunta dalla Corte in relazione al diverso caso *Mc. Creary* abbia giocato la particolarità del caso di specie ovvero, in prima approssimazione, la percezione delle specifiche circostanze di tempo e di luogo in cui viene a collocarsi l'esposizione pubblica dei Dieci Comandamenti disposta dalle autorità delle contee di *Mc. Creary* e *Pulasky* nel *Kentucky*.

Ne costituisce testimonianza significativa l'opinione espressa, per la maggioranza della Corte, dal giudice Souter, laddove, in particolare, viene richiamato quale precedente utilizzabile ai fini della decisione il già ricordato *Stone v. Graham*, in cui la Corte aveva appunto riscontrato la sussistenza di un chiaro profilo di incostituzionalità con riferimento alla esposizione del testo dei Dieci Comandamenti nelle aule scolastiche pubbliche⁹¹.

Più in particolare, ad avviso della maggioranza della Corte, il parallelo tra l'attuale caso ed il precedente *Stone* appare evidente per riguardo alla originaria versione della esposizione contestata, che non appare affiancata da alcuna rappresentazione di natura secolare⁹².

In realtà, in *Mc. Creary*, a guidare in maniera decisiva la maggioranza dei giudici della Corte nella valutazione dei fatti di causa più che le caratteristiche esteriori della rappresentazione contestata, è lo svolgersi degli avvenimenti che ne hanno determinato, per così dire, la definitiva messa a punto da parte delle autorità locali.

Merita preliminarmente ricordare al riguardo, come già si è avuto modo di anticipare, che le autorità locali di quelle contee, nel tentativo di sottrarre l'esposizione ai pericoli di una declaratoria di incostituzionalità, avevano a più riprese provveduto a modificare il quadro generale di riferimento ed il tenore stesso dell'iscrizione, al dichiarato fine di dimostrare come i Dieci Comandamenti rappresentino «*Kentucky's "precedent legal code"*».

In particolare, si era così addivenuti ad una più ampia rappresentazione dei Comandamenti supportata da ulteriori testi, oggetto peraltro di successive eliminazio-

⁹¹ «*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 governments' posting of the Commandments, given their prominence as "an instrument of religion"*».

⁹² «*The display rejected in Stone*», precisa invero lo stesso Souter, «*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*». Chiara e decisa è pertanto la valutazione negativa per ciò che concernente l'originaria esposizione, ad onta del possibile significato civile dei Dieci Comandamenti: «*This is not to deny that the Commandments have had an influence on civil or secular law; a major text of a majority religion is bound to be felt. The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religion sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable*».

ni, integrazioni ed aggiunte: in buona sostanza, in una sua prima versione rinnovata sulla base di una specifica risoluzione della autorità legislativa in cui si erano appunto delineate le finalità della rappresentazione nel senso appena ricordato, ai Dieci Comandamenti erano stati affiancati otto più piccoli documenti di rilevanza storica che tuttavia, già ad una prima valutazione, erano da subito apparsi chiaramente accomunati dal ricorrere di un univoco ed unitario riferimento di natura religiosa e quindi ritenuti insufficienti a salvare la rappresentazione dalle accuse di incostituzionalità⁹³.

Nella successiva terza versione – la «*Foundations of American Law and Government*» exhibit», com'era quindi stata definitivamente denominata – ridefinita senza il ricorso ad una nuova e diversa risoluzione del legislativo ma neppure senza rinnegare esplicitamente la precedente presa di posizione di questi, i comandamenti risultano infine esposti al pubblico in compagnia di altri documenti – nove frammenti di eguale taglia – ritenuti di particolare significato storico e, questa volta, nel complesso, almeno in apparenza, meno caratterizzati in senso religioso.

È a questo punto che l'attenzione della Corte, piuttosto che appuntarsi ulteriormente sulle caratteristiche esteriori della rappresentazione, viene a spostarsi sul piano del complessivo contegno adottato dalle autorità locali al fine comunque di evidenziare la finalità da queste effettivamente perseguita attraverso l'esposizione contestata.

In effetti, va comunque tenuto presente che ciò che consente alla Corte di riconoscere la sussistenza di un decisivo profilo di incostituzionalità nell'esposizione pubblica dei Dieci Comandamenti è il rilievo del perseguimento, attraverso di essa, di un chiaro scopo di ordine religioso da parte delle autorità locali: trattasi, pertanto, come la stessa Corte si premura di precisare, di uno dei casi – rari, invero – in cui il riscontro di una violazione della *Establishment Clause* consegue alla applicazione già solo del primo degli elementi previsti dal già ricordato *Lemon test*.

Buona parte delle argomentazioni del giudice Souter è quindi inevitabilmente destinata a neutralizzare le eccezioni della difesa concernenti la contestata utilizzabilità del succitato test, sia sotto il profilo generale che dal punto di vista della applicazione concretamente fattane nel caso di specie da parte delle corti di merito.

Gli oppositori avevano in effetti proprio contestato il ricorso al *Lemon test* – ovvero la reale percorribilità di un percorso interpretativo che indagasse la finalità dei provvedimenti contestati – o quantomeno, in subordine, l'applicazione fattane nel caso di specie da parte delle Corti di merito. Di conseguenza, essi avevano chiesto di abbandonare del tutto il riferimento all'indagine richiesta dal *Lemon test* o, comunque, ogni indagine sulle intenzioni perseguite.

Dal secondo punto di vista si era invece evidenziato che la ricostruzione fatta dalle Corti di merito avrebbe scorrettamente dedotto la sussistenza di un intento religioso da una ricostruzione complessiva della vicenda, indebitamente svalutando il senso delle modificazioni introdotte.

La maggioranza della Corte è tuttavia ferma nel difendere il *Lemon test* ed in

⁹³ Accuse sembrate particolarmente persuasive anche alle stesse autorità locali, dato che, come lo stesso Souter ricorda «*the Counties make no attempt to defend their undeniable objective, but instead hopelessly describe version two as "dead and buried"*». Il che non è peraltro privo di significato atteso quanto si rileva ulteriormente nella opinione della Corte: «*Their refusal to defend the second display is understandable, but the reasonable observer could not forget it*».

particolare il primo dei relativi criteri nonché l'applicazione fattane dalle Corti di merito.

In questa direzione, l'*opinion* resa dal giudice Souter si premura di avvertire che, per quanto ritenuto importante, l'elemento costituito dalla ricorrenza di uno scopo religioso solo raramente ha assunto rilievo decisivo. Come a dire che a venire sanzionate sarebbero, in ipotesi, solo pratiche in evidente violazione del principio previsto dalla clausola di separazione.

Si evidenzia quindi il largo uso di una indagine sullo scopo della legge fatto nei Tribunali e nelle Corti statunitensi, negandosene la strumentalità al fine di evidenziare (inesistenti) scopi religiosi come sottilmente rilevato dagli oppositori.

In effetti, sono particolarmente significative le precisazioni concernenti l'applicazione concreta del parametro contestato ovvero le modalità di svolgimento di una indagine intesa a verificare la sussistenza di uno scopo di natura secolare: detta indagine va invero condotta sulla base di indici oggettivi, con conseguente esclusione di ogni tipo soggettivistico o psicologico⁹⁴.

Puntuale e conseguente è quindi il superamento delle obiezioni relative all'avere, le Corti di merito, dedotto l'esistenza di uno scopo religioso dall'analisi del contegno complessivo seguito dagli organismi locali e non dalle caratteristiche dell'ultima rappresentazione frutto delle precedenti modifiche: le modifiche apportate, tardive, secondarie e quindi tali da non poter diluire la caratterizzazione religiosa dell'esposizione, non sono sufficienti a salvare quest'ultima dai rilievi di incostituzionalità proprio perché il perseguimento di uno scopo secolare deve essere effettivo e, soprattutto, inequivoco ed assorbente.

Non si tratta, evidentemente, considerata nel complesso, di una posizione priva di specifici referenti sotto il profilo della interpretazione dei contenuti del parametro di costituzionalità, costituito nella specie dalla clausola di separazione.

Merita anzi evidenziare che la ritenuta rilevanza della previa indagine sullo scopo perseguito è dedotta proprio dal riconoscimento di un obbligo di neutralità deviante dalla clausola separatista⁹⁵.

Il punto non è affatto marginale nella ricostruzione del giudice Souter, che assume su di sé il gravoso compito di sottolinearne la centralità e quindi chiarirne le conseguenze di ordine generale, soprattutto per ciò che attiene il rapporto tra le disposizioni dettate rispettivamente in tema di *establishment* e *free exercise of religion*.

Decisiva appare, al riguardo, la sottolineatura degli intenti originariamente perseguiti dai Padri Fondatori attraverso le due clausole religiose del Primo Emendamento ed il rilievo della loro piena attualità⁹⁶, secondo una opzione interpretativa

⁹⁴ Deve trattarsi, in particolare, di «*traditional external signs that show up in the "text, legislative history, and implementation of the statute", or comparable official acts*».

⁹⁵ «*First Amendment*» – si legge nella *opinion* considerata – *mandates governmental neutrality between religion and religion, and between religion and non religion*», di modo che, «*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*»: la necessità di una indagine sullo scopo della pratica legislativa contestata appare, quindi, come portato inevitabile del principio di neutralità.

⁹⁶ «*A sense of the past thus points the governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it*».

che comunque muove dal lucido rilievo della problematicità costitutiva del rapporto tra esigenze di separazione e tutela della libertà religiosa ivi formalizzato⁹⁷.

In effetti, è specialmente innanzi a casi in cui più evidente appare il contrasto tra siffatte esigenze, che, ad avviso del giudice Souter, il principio di neutralità mostra tutta la sua utilità, ponendosi come elemento interpretativo in grado di assicurare «*a good sense of direction*»: per esso, viene sostanzialmente ad essere impedita ogni pratica di favoreggiamento di un credo religioso a vantaggio di un altro o di opzioni religiose a vantaggio di atteggiamenti di ostilità od agnosticismo, e, quindi, ogni interferenza rispetto a scelte che non possono non rimanere di stretta pertinenza dei singoli individui⁹⁸.

In realtà, peraltro, non pare che nella ricostruzione del giudice Souter, sia l'esigenza di tutelare la libera formazione delle coscienze a porsi quale ragione ultima del principio di neutralità, emergendo piuttosto, dal tenore complessivo delle argomentazioni dello stesso Souter, preoccupazioni che possono forse apparire meno nobili ma che comunque danno conto della peculiarità del contesto statunitense e delle specificità storiche del relativo modello di separazione.

Trattasi, in particolare, di quelle che potremmo grossolanamente definire esigenze di tenuta complessiva del tessuto sociale ovvero di impedire divisioni sociali di matrice religiosa⁹⁹.

In effetti, pare proprio la particolare propensione del Souter per una ricostruzione del principio di neutralità in funzione coesiva del sostrato sociale dell'ordinamento a porsi quale motivo principale – se non unico – della *concurring opinion* a firma del giudice O' Connor, ben più decisa, diversamente, nell'affermare il legame tra dovere di separazione e tutela della libertà di coscienza dell'individuo¹⁰⁰.

⁹⁷ Quanto rilevato a quest'ultimo proposito è, invero, particolarmente significativo: «*the first amendment has not one but two clauses tied to "religion", the second forbidding any prohibition on the "free exercise thereof", and sometimes the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religion (...). At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices*».

⁹⁸ «*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*».

⁹⁹ Si tratterebbe di un obiettivo chiaramente perseguito dai Padri Fondatori che quindi non si sarebbero limitati ad agire «*to protect the integrity of individual conscience in religious matters*».

¹⁰⁰ «*Together with the other First Amendment guarantee – of free speech, a free press, and the rights to assemble and petition – the Religious Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought (...) 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*».

10. *L'ancoramento delle decisioni della Corte a profili di natura sostanziale (nella specie, esigenze di tutela della libertà di coscienza e di salvaguardia della pace religiosa) quale cifra del separatismo statunitense, ragione e limite della rivendicazione dei diritti dello Stato federale. Considerazioni di sintesi e prospettive di indagine*

Per quanto fondate sull'inevitabile potenziamento di profili legati alla specificità delle fattispecie oggetto di valutazione, le posizioni espresse dai giudici della Corte Suprema nei casi testé considerati sottendono quindi, in maniera più o meno esplicita e consapevole, visioni del contenuto ascrivibile alla *Establishment Clause* ed interpretazioni del rapporto tra questa e la *Free Exercise Clause* che paiono affatto complesse e diversificate.

Lo stesso *Chief Justice* Rehnquist che pure, come si è avuto modo di rilevare, non affronta in maniera esplicita ed approfondita il problema del contenuto della clausola separatista, nella *opinion* resa per il caso *Van Orden*, incidentalmente ribadita la necessità di conciliare il tenore della disposizione costituzionale con le specificità della storia nazionale, e facendo leva sul presunto carattere meramente passivo dell'esposizione contestata, pare propendere per letture del divieto di *establishment* che facciano salve deroghe imposte dall'inerenza delle pratiche di riconoscimento volta per volta oggetto di valutazione da parte della Corte alle tradizioni ed alla storia degli *States*.

In questo senso, come pure si è accennato, la posizione di Rehnquist, anche a prescindere dal risultato ultimo della decisione adottata, pare comunque collocarsi nell'alveo di posizioni interpretative che potremmo definire riduttive rispetto al contenuto della clausola separatista e quindi di particolare elasticità, perché fondate sul più o meno consistente riconoscimento della rilevanza ascrivibile al fenomeno religioso, come può dedursi dal confronto con le concorrenti opinioni dei giudici Scalia e Thomas.

In estrema sintesi e con una certa approssimazione potremmo infatti rilevare che, mentre per Scalia la clausola separatista non impedisce affatto riconoscimenti pubblici del ruolo del fenomeno religioso, limitandosi essa semplicemente a vietare atteggiamenti di favore nei confronti di una specifica confessione religiosa e quindi non della religiosità generalmente intesa, per Thomas siffatti riconoscimenti sono ammissibili ma solo a patto di non tradursi nella imposizione/divieto di specifici comportamenti; per Rehnquist, invece, come detto, pratiche di riconoscimento simbolico del ruolo del religioso possono essere salvate da una declaratoria di incostituzionale laddove ritenute conformi alla storia ed alle tradizioni della Nazione statunitense.

Peraltro, con ogni probabilità, le posizioni espresse dai giudici Scalia, Rehnquist e Thomas (nonché, implicitamente, da Kennedy) provano comunque troppo, nel senso che ad esiti di analogo tenore si potrebbe evidentemente giungere anche sulla base di impostazioni complessivamente più rispettose delle esigenze di non identificazione e rispetto per la libertà religiosa e di coscienza. Lo testimonia la posizione espressa in riferimento al caso *Van Orden* dal giudice Breyer che rappresenta, come già si è avuto modo di rilevare, il vero e proprio ago della bilancia nella valutazione dei casi giunti da ultimo al vaglio costituzionale, determinando il diverso risultato raggiunto dalla Corte nel caso *Mc Creary*.

Come si è avuto modo di vedere, invero, Breyer giunge, in *Van Orden*, a riconoscere la legittimità dell'esposizione in luogo pubblico dei Dieci Comandamenti rilevando l'insussistenza, alla luce del contesto dell'esposizione e delle caratteristiche della rappresentazione contestata, di una reale situazione di pericolo per le esigenze

che il Primo Emendamento, complessivamente considerato, è destinato a tutelare.

La notazione ci appare invero particolarmente significativa e suscettibile di sviluppi ulteriori, in buona sostanza dimostrando che, non è affatto pacifico che a ricostruire, in astratto, la clausola separatista come funzionale alla tutela della libertà religiosa, ovvero, più nello specifico, alla libertà di coscienza in materia religiosa si giungano a conclusioni univoche e tranquillizzanti per riguardo alla soluzione delle variegate situazioni di fatto che giungono alla valutazione dell'interprete: proprio Breyer perviene ad una evidente diversità di conclusioni, rispettivamente in *Van Orden* e *Mc. Creary*, pur esplicitamente rifacendosi alla posizione di principio assunta dalla O'Connor, ovvero alla sua propensione per una ricostruzione del contenuto della clausola separatista in funzione della libertà di coscienza¹⁰¹.

Comunque sia, rimane difficile non registrare come, nel complesso, la posizione espressa dalla Corte tenda a confermare il definitivo abbandono di interpretazioni favorevoli alla erezione di un vero e proprio «*wall of separation*», come negli auspici formulati dal *Chief Justice* Frankfurter e, prima ancora dal Jefferson, nella sua nota polemica con lo Story¹⁰².

Come si è già avuto modo di segnalare, trattasi di una linea di tendenza che, in maniera particolarmente significativa per la giurisprudenza costituzionale statunitense, ha cominciato a riguardare, in maniera vieppiù decisa, persino la valutazione di fattispecie riconducibili alla più generale tematica della presenza simbolica nello spazio pubblico (come nei casi *Marsh* e *Lynch* ed infine nello stesso *Van Orden*) così manifestando una certa disomogeneità rispetto alle risalenti ma mai dimenticate interpretazioni *Schempp* e *Vitale*.

Come pure si è già visto un atteggiamento di maggiore rigidità viene, in realtà, mantenuto allorché si tratti di presenza simbolica del fatto religioso nelle scuole pubbliche (casi *Lee* e *Doe*). Il che, da un punto di vista ricostruttivo-generale (e con il conforto del più recente *Mc. Creary*), potrebbe forse costituire spia significativa di una certa preferenza della giurisprudenza statunitense per letture della clausola separatista in funzione della garanzia della libera formazione della coscienza, piuttosto che per il potenziamento di profili di stretta¹⁰³ neutralità dei pubblici poteri

¹⁰¹ Ciò vale, almeno così ci pare, anche laddove si ricostruisca – cosa che più chiaramente avviene nel caso del giudice Souter – il divieto di *establishment* come espressivo dell'esigenza di evitare contrasti e divisioni su base religiosa, come si deduce, ancora una volta, dalle notazioni, incidentalmente rese dal Breyer a proposito della opportunità di evitare che i pubblici poteri finiscano col dimostrare ostilità nei confronti della religione: un'ostilità che evidentemente, allo stesso Breyer, appare costituzionalmente insostenibile almeno quanto atteggiamenti, per così dire, di eccessivo ossequio.

¹⁰² Come ricorda G. Recchia, *Nuovi orientamenti della Corte Suprema statunitense in tema di libertà di religione*, in *Dir. e soc.*, 3-4/1984, p.468, mentre per quest'ultimo «il governo federale deve limitarsi a non privilegiare alcuna fede religiosa», nell'impostazione del Presidente Jefferson il Primo Emendamento impone «che ci sia una netta separazione tra Stato e Chiesa». Lo stesso Recchia ricorda peraltro come la Corte Suprema tenga ben presente questa dicotomia nell'accingersi a motivare le proprie posizioni ed evidenzia come, dopo una prima fase in cui «la tesi espressa da Thomas Jefferson è apparsa nettamente prevalente rispetto all'altra enunciata da Joseph Story (...), la più recente giurisprudenza della Corte Suprema sembra, però, voler avviare un nuovo indirizzo, che si distacca dalle tesi tradizionalmente prevalenti».

¹⁰³ Diciamo stretta, intendendo non meramente funzionale alla tutela della libertà di coscienza.

o della distinzione fra ordine civile ed ordine religioso.

Pur senza considerare tale ultima circostanza, certo ancora da verificare nella sua effettiva consistenza, rimane peraltro da segnalare il tentativo, posto in essere da tutti i giudici della Suprema Corte in maniera più o meno decisa e consapevole ma comunque a prescindere dalla specifica decisione assunta nel merito della questione giunta al proprio esame, di ancorare ogni valutazione in ordine alla portata concreta della clausola separatista a ragioni di fondo di ordine, per così dire sostanziale e, più specificamente, teleologico, (nonché ricostruttivo generale e sistematico): pur nella diversità degli esiti del ragionamento seguito, i giudici Breyer, O' Connor, Souter, tanto per esemplificare, preferiscono sottolineare gli intenti perseguiti dai Padri Fondatori, in qualche caso preoccupandosi di attualizzarne il significato ma comunque ricollocando l'ideale separatista nel più ampio quadro di riferimento costituzionale e considerando solo in via secondaria risvolti di ordine meramente formale, legati alla necessaria riconduzione del fenomeno religioso nell'alveo del diritto comune.

Il punto non è di secondaria importanza, almeno per un duplice ordine di ragioni, rispettivamente specifiche e di ordine più generale.

In primo luogo, per quanto attiene allo specifico statunitense, si tratta di circostanza di un certo rilievo perché consente di ribadire le motivazioni sostanziali che sottendono all'apparente arretramento della giurisprudenza costituzionale federale nei confronti dell'interpretazione delle clausole religiose del primo emendamento ed in particolare della *establishment clause*.

Ed infatti, come si è già avuto modo di anticipare, un'operazione di ammorbidimento dei presupposti separatisti costituisce esito in certo qual modo connaturato alle origini stesse del modello statunitense, che non è certo concepito in funzione antagonista delle esigenze della religiosità, essendo piuttosto connotato da una indiscutibile "coloritura" di *favor religionis*.

L'eco di siffatta consapevolezza è ancora viva ed operante in quel contesto, se è vero che mentre, come si è ricordato più di recente, «da tempo parte della dottrina si interroga sulla correttezza nonché sull'attualità del concetto di separatismo per definire i rapporti Stato-Chiesa negli USA, ritenendo che il cosiddetto «*wall of separation*», inteso come «*religious blindness*», sia un tipo di relazione – o meglio di non relazione – difficile a realizzarsi»¹⁰⁴, l'esigenza di assicurare una più ampia tutela del principio costituzionale di libertà religiosa finisce spesso con l'imporre il riconoscimento di porpose eccezioni alla regola della irrilevanza del fatto religioso nel diritto dello Stato e quindi, per così dire, a pregiudicare la "purezza" del modello.

Il che finisce indirettamente col confermare la fondatezza del rilievo per cui quel medesimo modello, in sé considerato, può manifestare evidenti "difetti" sul piano della garanzia dei diritti dell'individuo¹⁰⁵ e, più in generale, vale a ridimensionare fortemente l'effettiva portata sostanziale delle scelte ordinamentali tra i possibili sistemi di relazione tra Stato e Chiese sul piano della tutela delle posizioni giuridiche soggettive, individuali e collettive, trattandosi in definitiva di assicurare, nel rispetto delle specificità dei contesti anche istituzionali di riferimento, la centralità del valore della dignità della persona umana e del diritto di questa alla propria libera autodeterminazione.

¹⁰⁴ A. Madera, *Spunti evolutivi nella giurisprudenza della Corte Suprema U.S.A. sul Primo Emendamento*, in *Quad. dir e pol. eccl.*, n. 3/2001, p. 797.

¹⁰⁵ M. Tedeschi, *Stato cit.*, p. 108.

Certo, dal punto di vista più propriamente applicativo, neppure vanno sottovalutate, nel contempo, alcune incongruenze dell'opera di riorientamento dell'opzione separatista a vantaggio delle posizioni di libertà, individuale e collettiva poste in essere dalla giurisprudenza statunitense: in questo senso risultano particolarmente significativi i rilievi della migliore dottrina che non esita ad evidenziare i limiti delle tesi di fondo che fungono da presupposto «alle decisioni con cui le Corti statunitensi, mentre non lesinano le garanzie della “free exercise clause” quando si tratta di valorizzare le parvenze transculturali e para-religiose dell’umanitarismo”, tendono poi ad esentarlo dai limiti derivanti dal “no establishment”, in forza della sua dimensione pretensivamente “secolare”. Le stesse Corti tengono, invece, oltremodo fermi i limiti del divieto di identificazione e, quindi di sostegno, nei riguardi delle chiese non disposte a traslarsi sul terreno della “secular motivation”, della motivazione falsificabile in termini puramente e semplicemente mondani»¹⁰⁶.

Ma, anche tenendo conto delle riserve appena segnalate – veniamo così al secondo dei motivi di interesse che ci pervengono dal peculiare *modus agendi* della Corte Suprema – rimane il fatto che l'attenzione da essa stessa manifestata per la reale ispirazione finalistica dell'opzione separatista sancita dal Primo Emendamento costituisce elemento di riferimento metodologico di particolare utilità al fine di ribadire l'essenzialità del ruolo unificante dei poteri dello Stato e le specificità dei singoli contesti ordinamentali, pur nell'ambito dell'attuale svolgersi delle già ricordate dinamiche erosive della sovranità statale.

Lungo questa dimensione prospettica, in particolare, l'indicazione che ci proviene dal sistema statunitense di regolamentazione del fenomeno religioso e da cui emerge la sostanziale imprescindibilità di una costante opera di riaggiustamento, da porre in essere per il rispetto e nel rispetto dei valori fondanti ed identificativi dell'ordinamento, ben può venire riguardata quale esigenza imposta da una ancora plausibile riaffermazione dei diritti dello Stato, fondata su una rinnovata esigenza di unità politica, e contribuisce a riportare al centro del dibattito scientifico tutte le problematichità derivanti dal riconoscimento della scorrettezza di operazioni interpretative che fondino sulla pressoché totale identificazione del diritto ecclesiastico con quello pattizio¹⁰⁷.

D'altra parte, su queste basi e con questa consapevolezza, anche quella sorta di autolimitazione di sovranità che caratterizza la “via italiana” alla regolamentazione giuridica del fattore religioso (artt. 7, comma 2, ed 8, comma 3) non può non trovare nelle più generali scelte di fondo che sostanziano il complessivo quadro di riferimento costituzionale, un baluardo (giuridicamente) insormontabile¹⁰⁸.

¹⁰⁶ S. Berlingò, *Alla riscoperta della laicità, in Europa*, in *Derecho y opinion*, n. 8/2000, p. 267, laddove si evidenzia ulteriormente che «ciò non ha impedito certo alle confessioni religiose, e in primo luogo alla Chiesa cattolica, di lucrare profitti da un separatismo “benevolo” o addirittura “amicale” avvalendosi delle ampie maglie offerte dalla “libertas anglica”. Di questi vantaggi si sono però giovate, prevalentemente, le estroversioni umanitarie del fenomeno religioso, spesso ponendo a rischio la loro propria identità ed il nucleo essenzialmente non profano della loro riserva di senso. Al contrario, proprio quel nucleo andrebbe fatto emergere nell'odierno crinale della civilizzazione, per impedire che il c.d. *pensiero unico* induca ad una banalizzazione ed omologazione culturale e morale, ad una – come è stato ben intuito – cultura del mondo del minimo comune denominatore».

¹⁰⁷ M. Tedeschi, *Stato cit.*, p. 106.

¹⁰⁸ Secondo una impostazione di fondo ribadita, com'è noto, dalla nostra Corte Costituzionale.